

# INDEX

## ADMINISTRATION OF ESTATES:

Judgment obtained against deceased testator during lifetime – *wife executrix and beneficiary – Monies received by her under deceased husband’s insurance policy – Whether liable for satisfaction of judgment – s. 11 (2) of the Married Persons (Property) Ordinance, Cap. 169.*

**G. CREDIT CORP. v. BRITTLEBANK – (H.C.)** .....405

Variation of statutory procedure by Proper Officer – *Executrices allowed to pay estate duty on their valuation without any assessment on figures presented by them – Whether permissible – s. 24 (2) of the Deceased Persons Estates’ Administration Ordinance, Cap. 46.*

**C. I. R. v. GOMES & WIGHT – (C.A.)** .....317

## AGENCY:

English confirming house to make payment in England for goods ordered in Guyana from American company – *Whether English company agents or vendors.*

**SCOTT & Co., LTD. v. MANDAL – (H.C.)** .....391

## APPEAL

Court of Appeal – *Civil appeal – Appeal dismissed for non-compliance with order for security for costs made by Justice of Appeal in Chambers – Whether Court of Appeal has jurisdiction to have appeal restored – O. 1 r. 8; o. 11 rr. 13, 14 & 15 of the Federal Supreme Court (Appeals from British Guiana) Rules, 1959.*

**ALLY v. HAND-IN-HAND FIRE INS. CO., LTD. – (C.A.)** .....310

Court of Appeal – *Civil appeal – Whether matter adjudicated upon ex parte by a High Court Judge under o. 11 r. 11 of the Rules of the Supreme Court, 1955, is a “judgment by default” from which no appeal lies to the Court of Appeal – Federal Supreme Court (Appeals) Ordinance, No. 19 of 1958, as adapted by the British Caribbean Court of Appeal Order in Council, 1962, and the Guyana Independence (Adaptation and Modification of Laws) (Judicature) Order, No. 37 of 1966.*

**BHAGWANDIN v. COLLINS – (C.A.)** .....478

Court of Appeal – *Civil appeal – Whether matter adjudicated upon ex parte by high Court Judge under o. 33 r. 2 of the Rules of the Supreme Court, 1955, is a “judgment by default” from which no appeal lies to the Court of Appeal – Federal Supreme Court (Appeals) Ordinance, No. 19 of 1958, as adapted by the British Caribbean Court of Appeal Order in Council, 1962, and the Guyana Independence (Adaptation and Modification of Laws) (Judicature) Order, No. 37 of 1966.*

**BENJAMIN ET AL v. AGARD – (C.A.)** .....425

<p>Court of Appeal – <i>Criminal appeal – Conviction and sentence in Magistrate’s Court affirmed on appeal in Full Court – Whether further right of appeal to Court of Appeal – Federal Supreme Court (Appeals) Ordinance, No. 19 of 1958, as adapted by the British Caribbean Court of Appeal Order in Council, 1962, and the Guyana Independence (Adaptation and Modification of Laws) (Judicature) Order, No. 37 of 1966.</i></p> <p><b>NORMAN v. D. C. HARDING – (C.A.)</b>.....</p>	520
<p>Court of Appeal – <i>Criminal appeal – Substantial miscarriage of justice – Application of Proviso to s. 16 (1) of the Federal Supreme Court (Appeals) Ordinance, No. 19 of 1958, as adapted by the British Caribbean Court of Appeal Order in Council, 1962, and the Guyana Independence (Adaptation and Modification of Laws) (Judicature) Order, No. 37 of 1966.</i></p> <p><b>R. v. MOHAN LALL ET AL – (C.A.)</b> .....</p>	413
<p>Privy Council – <i>Civil appeal – Conditional leave – Final leave – Whether procedural requirements properly carried out – Guyana (Procedure in Appeals to Privy Council) Order, 1966.</i></p> <p><b>DARSAN v. ENMORE ESTS. LTD. – (C.A.)</b>.....</p>	544
<b>CHARITY:</b>	
<p>Organisation established partly for charitable and partly for non-charitable purposes – <i>Test to be applied – s. 8 of the Civil Law Ordinance, Cap. 2.</i></p> <p><b>D’AGUIAR v. C. I. R. – (C.A.)</b>.....</p>	223
<b>CLAIM LICENCE:</b>	
<p>Juridical nature of – <i>s. 3 (d) of the Civil Law Ordinance, Cap. 2.</i></p> <p><b>J.A.K SYN. v. C. G. EXPL. CO., LTD. – (F.C.)</b>.....</p>	160
<b>CONSTITUTIONAL LAW:</b>	
<p>Deduction of teacher’s pay on grant of sick leave – <i>Whether breach of fundamental right of protection from deprivation of property – Article 8 (1) of the Constitution of Guyana, Cap. 1:01.</i></p> <p><b>HARRY v. THOM – (F.C.)</b> .....</p>	68
<p>Reduction of Crown servant’s pay – <i>Whether an unauthorised compulsory taking of property violative of Article 12 of the Constitution of British Guiana, 1961.</i></p> <p><b>NOBREGA v. A-GENERAL – (C.A.)</b>.....</p>	83
<b>CONSTRUCTION:</b>	
<p>Contract – <i>Building contract permitted assignment or sub-letting with consent – Whether such assignment included obligations or was restricted to rights and benefits of deceased contractor.</i></p> <p><b>LICORISH v. A-GENERAL – (C.A.)</b>.....</p>	436

Deed – <i>Transport – Reservation to mine for bauxite and other ore, minerals and clays – Meaning of word “mining” – Intention of parties and circumstances existing at time of reservation.</i>	
DE CLOU v. D. BAUXITE CO., LTD. – (C.A.) .....	250
Regulation – <i>Meaning of words “to continue in occupation” and “to remain in occupation” – regs. 29 &amp; 31 of the Mining Regulations, Cap. 196, (Subsidiary Legislation).</i>	
J. A. K. SYN. v. C. G. EXPL. CO., LTD. – (F.C.).....	160
Regulation – <i>Meaning of words “so long as” – reg. 23 of the Mining Regulations, Cap. 196 (Subsidiary Legislation).</i>	
J. A. K. SYN. v. C. G. EXPL. CO., LTD. – (F.C.).....	160
Rules of Court – <i>Meaning of words “cause or matter” and “proceeding had” – Order 32 Rule 9 (1) (a) of the Rules of the Supreme Court, 1955.</i>	
GILLETTE v. RAI & ANOR. – (H.C.) .....	374
Statute – <i>Meaning of words “satisfy”, “is not satisfied” and “is satisfied” – secs. 9 (6), 10 (1) &amp; (2) of the Matrimonial Causes Ordinance, Cap. 166.</i>	
AUSTIN v. AUSTIN – (H.C.).....	587
Statute – <i>Meaning of word “thereupon” in clause ‘shall thereupon pay into the Treasury the duty so assessed’ – Whether person making declaration and inventory must have knowledge, actual or implied, of what he is to pay before he could be expected to pay – s. 15 (2) of the Estate Duty Ordinance, Cap. 301.</i>	
C. I. R. v. GOMES & WIGHT – (C.A.).....	317
Statute – <i>Whether permissible to place a particular construction on statutes not “in pari materia” unless there is specific reference in one statute to the other – Income Tax Ordinance, Cap. 299; Estate Duty Ordinance, Cap. 301.</i>	
C. I. R. v. GOMES & WIGHT – (C.A.).....	317
Statute – <i>Whether regular hourly-paid worker entitled to double pay for job-work performed on Sundays – s. 29 of the Factories Ordinance, Cap. 115.</i>	
KHAN v. BOOKERS D. S. ESTS. LTD. – (C.A.).....	13
<b>CONTRACT:</b>	
Building contract – <i>Contractor died before completion of work – Another contractor recommended to finish work – Executrix prevented from finishing job – Whether contract of a personal or impersonal nature – Whether devolved on executrix.</i>	
LICORISH v. A-GENERAL – (C.A.) .....	436

Parties living in concubinage – <i>Written agreement expressly stipulating that they are the joint owners of the building occupied by them and declaring each entitled to one-half share thereto – Whether agreement invalid because of a past and/or immoral consideration.</i>	
<b>MAHADAI v. RAGBEER – (H.C.)</b> .....	535
Type of transaction – <i>English confirming house to make payments in England for goods ordered in Guyana from American company – Whether C.I.F. contract.</i>	
<b>SCOTT &amp; Co., LTD. v. MANDAL – (H.C.)</b> .....	391
Variation – <i>Immediate payment on delivery under verbal agreement – Subsequent collateral agreement purporting to vary method of payment – Whether “nudum pactum” – secs. 29 &amp; 30 of the Sale of Goods Ordinance, Cap. 333.</i>	
<b>PURI v. PERSAUD – (H.C.)</b> .....	32
<b>CORPORATION:</b>	
Action – <i>Libel – Whether maintainable by.</i>	
<b>B. G. R. M. BOARD v. P. TAYLOR &amp; CO., LTD. – (H.C.)</b> .....	206
<b>COSTS:</b>	
Payment into Court – <i>Amount lodged by defendant more than amount actually recovered and not uplifted by plaintiff – Effect of.</i>	
<b>RAJNARINE v. B. G. &amp; T/DAD M. F. INS. CO., LTD. – (H.C.)</b> .....	297
Payment into Court – <i>True basis upon which such payment rests – Judicial discretion – Order 20 Rule 6 of the Rules of the Supreme Court, 1955.</i>	
<b>RAJNARINE v. B. G. &amp; T/DAD M. F. INS. CO., LTD. – (H.C.)</b> .....	297
<b>CRIMINAL LAW:</b>	
Amendment – <i>“Possession” of distillery apparatus charged – Evidence disclosed “custody” of distillery apparatus – Whether Court has power to amend – s. 104 (3) of the Spirits Ordinance, Cap. 319.</i>	
<b>SEERATTAN v. NANDALALL – (F.C.)</b> .....	8
Assaulting peace officer – <i>Two separate assaults – Whether part and parcel of same transaction of using indecent language by third person.</i>	
<b>SEMPLE &amp; SEMPLE v. P. C. SINGH &amp; S. C. MARKS – (F.C.)</b> .....	24
Assaulting peace officer – <i>Two separate arrests without warrant – Whether constables acting in execution of duty – Whether arrests lawful – s. 28 (b) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14; secs. 17 (1) (a) &amp; 17 (2) of the Police Ordinance, No. 37 of 1957.</i>	
<b>SEMPLE &amp; SEMPLE v. P.C. SINGH &amp; S.C. MARKS – (F.C.)</b> .....	24

Attempt – <i>Break and enter and larceny – Actus reus – Mens rea – Requisite legal and factual issues to be determined.</i>	
YUSUF v. P.C. CUMBERBATCH – (F.C.) .....	54
Duplicity – <i>Two separate offences charged in one complaint – Whether bad for duplicity – s. 34 (1) of the Colonial Medical Service Ordinance, Cap. 134.</i>	
DOOBAY v. INSPECTOR ALEXANDER (No. 2) – (F.C.).....	293
Duplicity – <i>Two separate offences charged in one complaint – Whether bad for duplicity – s. 36 of the Colonial Medical Service Ordinance, Cap. 134.</i>	
DOOBAY v. INSPECTOR ALEXANDER (NO. 1).....	119
Evidence – <i>Alibi – Break and enter and larceny – Whether set pattern or stereotyped language to be used by trial Judge in summing-up.</i>	
R v. NARINE – (C.A.).....	139
Evidence – <i>Alibi – Robbery with violence – Whether special direction needed to be given by trial Judge – Burden of proof.</i>	
R v. ADAMS & LAWRENCE – (C.A.) .....	548
Evidence – <i>Bare denial by accused after being cautioned in presence of victim – Critical comments thereon by trial Judge in summing-up – Whether misdirection.</i>	
R v. CHAND – (C.A.) .....	182
Evidence – <i>Circumstantial – Larceny of 2 boxes of detonators – No evidence of contents – Reasonable inference – Whether hearsay – s. 188 (b) of the Criminal Law (Offences) Ordinance, Cap. 10.</i>	
R v. MOHAN LALL ET AL – (C.A.) .....	413
Evidence – <i>Corroboration – Rape – Jury directed that the unsworn evidence of child could corroborate sworn evidence of mother – Whether misdirection – Proviso to s. 71 of the Evidence Ordinance, Cap. 25 as amended by Ordinance No. 29 of 1961.</i>	
R. v. BOODRAM LALL – (C.A.) .....	554
Evidence – <i>Corroboration – Rape – No corroboration of sworn testimony of young girl – Trial Judge placed certain ‘bits’ and ‘pieces’ of evidence before jury which, in effect, they were invited to treat as corroboration – Whether misdirection.</i>	
R. v. DUBAR – (C.A.).....	154
Evidence – <i>Corroboration – Rape – Trial Judge properly warned jury that it was dangerous and unsafe to convict where there was no corroboration in sexual cases – No similar warning given concerning the age of the victim, a young girl “in her fourteenth year” – Whether misdirection.</i>	
R. v. DUBAR – (C.A.).....	154

Evidence – <i>Identification – Unsatisfactory nature of – Whether verdict of jury unreasonable.</i>	
<i>R. v. WILKIE – (C.A.)</i> .....	198
Indictment – <i>Motion to quash – Committal by Magistrate for murder – Indictment by Director of Public Prosecutions for murder – Whether Court can go beyond indictment to see if evidence in depositions support the charge.</i>	
<i>R. v. ALFRED – (H.C.)</i> .....	433
Sentence – <i>Appeal against – Principles involved – Whether question of law.</i>	
<i>NORMAN v. D. C. HARDING – (C.A.)</i> .....	520
Statutory Offences – <i>Several distinct offences created – Crown to stand or fall by its election.</i>	
<i>R. v. MOHAN LALL ET ALL – (C.A.)</i> .....	413
<b>CROWN LANDS:</b>	
Rice lands – <i>Landlord’s testator licensee of Crown lands – Permission of Commissioner of Lands and Mines for sub-letting not pleaded or argued – Effect of – Crown Lands Regulations, Cap. 175 (Subsidiary Legislation).</i>	
<i>ALEXANDER v. MUNIA – (F.C.)</i> .....	572
Rice lands – <i>Wife executrix and legatee of deceased husband tenant – Notice to landlord that wife would continue tenancy – Effect of – Rice Farmers (Security of Tenure) Ordinance, No. 31 of 1956.</i>	
<i>ALEXANDER v. MUNIA – (F.C.)</i> .....	572
<b>CROWN SERVANT:</b>	
Right of Crown to dismiss at pleasure – <i>Public policy – Whether Crown has right to unilaterally alter terms of contract.</i>	
<i>NOBREGA v. A-GENERAL – (C.A.)</i> .....	83
Unauthorised act by – <i>Whether liable personally.</i>	
<i>HARRY v. THOM – (C.A.)</i> .....	68
<b>DAMAGES:</b>	
Death of young child – <i>Loss of expectation of life – Economic conditions of country – Principle of moderation.</i>	
<i>BHAGWANDIN v. COLLINS – (C.A.)</i> .....	478
<b>DIVORCE:</b>	
Adultery of petitioner – <i>Frankness of disclosure – Exercise of Court’s discretion.</i>	
<i>AUSTIN v. AUSTIN – (H.C.)</i> .....	587
Corroboration – <i>Petitioner’s evidence – Whether rule of law or practice.</i>	
<i>AUSTIN v. AUSTIN – (H.C.)</i> .....	587

Cruelty – <i>Proper test – Mental cruelty.</i>	
AUSTIN v. AUSTIN – (H.C.).....	587
Desertion – <i>Whether kindred offence to cruelty – Whether subject to the same test – Constructive desertion.</i>	
AUSTIN v. AUSTIN – (H.C.).....	587
Domicile – <i>Husband and wife American citizens – Husband resident and working in Guyana on 5 year contract – Wife refuses to live in Guyana and is permanently resident in New York – Petition by husband on ground of malicious desertion – Whether husband has acquired a domicile of choice in Guyana – Jurisdiction of High Court of Guyana to grant decree – s. 2 of the Matrimonial Causes Ordinance, Cap. 166.</i>	
CITERA v. CITERA – (H.C.).....	170
Grounds – <i>Standard of proof – Whether beyond reasonable doubt.</i>	
AUSTIN v. AUSTIN .....	587
High Court – <i>Jurisdiction of – Procedural issue – Whether Court has power, ex mero motu, to raise jurisdictional point therein.</i>	
CITERA v. CITERA – (H.C.).....	170
<b>EQUITY:</b>	
Presumption of advancement – <i>Husband and wife – Wife made no contribution towards erection of matrimonial home – Husband instructed Village Overseer to change registration of building into name of wife – Whether gift – Whether equitable presumption of advancement applied.</i>	
CHANGLEE v. CHANGLEE – (H.C.).....	507
Rectification – <i>Excepted lots mistakenly included in transport with knowledge of purchaser – True intention of parties – Whether rectification of transport possible.</i>	
SAHOY v. SAHOY – (H.C.).....	240
Rectification – <i>Plan not in accordance with agreement of sale re land – True intention of parties – Whether rectification possible.</i>	
DEEN v. SINGH & SINGH – (H.C.).....	142
Rescission – <i>Illegal contract re transport of land entered into to defeat a creditor – Whether executory contract – Locus poenitentiae – Whether right to rescind exists.</i>	
LAVERICK v. JAIPATI – (H.C.).....	523
<i>Specific performance – Mutual agreement to exchange “properties” – Receipts issued speak only of “houses” – Whether “lands” included in exchange – True intention of parties – Whether specific performance possible.</i>	
PERSAUD v. WALKS & ANOR. – (H.C.) .....	190

Specific performance – <i>Variation of terms of agreement of sale of immovable property – Whether specific performance possible.</i>	
<b>DEEN v. SINGH &amp; SINGH – (H.C.)</b> .....	142
Trusts – <i>Resulting trust – Husband and wife – Lease of land in husband’s name – Wife made contribution towards lease but of an unknown amount – Whether resulting trust arose in favour of wife.</i>	
<b>CHANGLEE v. CHANGLEE – (H.C.)</b> .....	507
Trusts – <i>Resulting trust – Parties living together in concubinage – Equal contributions made by them towards repairs and renovation of house – Parties to be treated as strangers – Whether resulting trust arises in favour of the concubine.</i>	
<b>MAHADAI v. RAGBEER – (H.C.)</b> .....	535
Trusts – <i>Statutory trust created by policy of insurance taken out by deceased husband – Wife beneficiary under said policy – Whether wife as administratrix of husband’s estate entitled to receive policy monies absolutely – s. 11 (2) of the Married Persons (Property) Ordinance, Cap. 169.</i>	
<b>G. C. CORP. v. BRITTELBANK – (H.C.)</b> .....	405
Trusts – <i>Trustee – Shares owned by wife in her own name transferred to husband to improve his standing in company for purposes connected with anticipated litigation – No intention to make gift – Whether deceased husband held shares as trustee for his wife.</i>	
<b>C. I. R. v. GOMES &amp; WIGHT – (C.A.)</b> .....	317
<b>ESTATE DUTY:</b>	
Interest – <i>Date when payable from – secs. 13, 14 &amp; 15 of the Estate Duty Ordinance, Cap. 301.</i>	
<b>C. I. R. v. GOMES &amp; WIGHT – C.A.)</b> .....	317
Proper Officer – <i>Certificate by – Whether condition precedent to grant of administration ad colligenda bona – s. 15 (3) of the Estate Duty Ordinance, Cap. 301.</i>	
<b>C. I. R. v. GOMES &amp; WIGHT – (C.A.)</b> .....	317
Provisional declaration and inventory – <i>Executrices filed same on application for limited grant of administration ad colligenda bona – Commissioner of Inland Revenue not satisfied – Whether letter written by Commissioner amounted to an assessment and/or notice thereof – s. 14 (1) of the Estate Duty Ordinance, Cap. 301.</i>	
<b>C. I. R. v. GOMES &amp; WIGHT – (C.A.)</b> .....	317
Tax – <i>When due – s. 66 of the Tax Ordinance, Cap. 298.</i>	
<b>C. I. R. v. GOMES &amp; WIGHT – (C.A.)</b> .....	317

## ESTOPPEL:

Judgment – *Questions determined in previous litigation between parties – Whether estoppel arises.*

**HARPRASHAD v. KARAMAT & ANOR. – (H.C.)** ..... 36

Landlord and tenant – *Estoppel of tenant denying landlord’s title – Common law rule – Whether overridden by statutory provisions – s. 220 of the Local Government Ordinance, Cap. 150.*

**KUMARLALL v. CLONBROOK V. COUNCIL – (H.C.)** ..... 202

## EVIDENCE:

Transport – *Agreement of sale – Not evidenced in writing and not pleaded – Effect of – Proviso (d) to s. 3 (D) of the Civil Law Ordinance, Cap. 2; Order 17 Rule 15 of the Rules of the Supreme Court, 1955.*

**LAVERICK v. JAIPATI – (H.C.)** ..... 523

Written agreement – *Executed and attested in lawyer’s chambers – Plaintiffs copy stolen by defendant – Whether copy retained by counsel admissible in evidence.*

**MAHADAI v. RAGBEER – (H.C.)** ..... 535

Written agreement – *Variation by parol evidence – When admissible.*

**DEEN v. SINGH & SINGH – (H.C.)** ..... 142

## EXECUTION:

Levy – *Article seized subject-matter of hire purchase agreement – No breach of terms of agreement – Hirer not execution-debtor – Whether owner entitled to possession – Whether action maintainable.*

**C. GARAGE LTD. v. HASSAN – (H.C.)** ..... 18

## FACTORY:

Sugar factory – *Regular hourly-paid factory workers did additional job-work on Sundays in the factory cleaning boilers – Whether entitled to double pay – s. 29 of the Factories Ordinance, Cap. 115.*

**KHAN v. BOOKERS D. S. ESTS. LTD. – (C.A.)** ..... 13

## HUSBAND AND WIFE:

Division of property – *Dispute – Summary remedy – s. 15 of the Married Persons (Property) Ordinance, Cap. 169.*

**CHANGLEE v. CHANGLEE – (H.C.)** ..... 507

## IMMOVABLE PROPERTY:

Servitudes – *Transport – Reservation clause to mine for bauxite and other ore, minerals and clays – Nature of right created by reservation – Whether profit a prendre – s. 3D of the Civil Law Ordinance, Cap. 2.*

*De CLOU v. D. BAUXITE CO., LTD. – (C.A.)* .....250

Servitudes – *Transport – Reserves for ‘street and drains’ on relevant plan – Parties agree to fence land including reserves and to plant rice thereon – Way of necessity – Whether servitude existed and, if so, whether abandoned – s. 135 of the Public Health Ordinance, Cap. 145.*

*HARPRASHAD v. KARAMAT & ANOR. – (H.C.)* .....36

## INCOME TAX:

Income – *Interest-free loan granted to Managing-Director of company to purchase residence – Whether loan exigible to tax – s. 5 (b) of the Income Tax Ordinance, Cap. 299.*

*Mc DAVID v. C. I. R. – (C.A.)* .....1

Organisation established partly for charitable and partly for non-charitable purposes – *Contribution made under Deed of Covenant deducted from income tax return – Disallowed by Commissioner – Whether exigible to tax – s. 53 (3) of the Income Tax Ordinance, Cap. 299.*

*D’AGUIAR v. C. I. R. – (C.A.)* .....223

## INSURANCE:

English confirming house to make payment in England for goods ordered in Guyana from American company – *No insurance certificates accompanied relevant documents – Floating policy taken out by confirming house made payable in London – Effect of.*

*SCOTT & CO., LTD. v. MANDAL – (H.C.)* .....391

## JUSTICES PROTECTION:

Omission of Drainage Overseer – *Whether administrative or judicial act – Whether Board liable therefor – s. 2 of the Justices Protection Ordinance, Cap. 18.*

*PERSAUD ET AL v. D. & I. BOARD – (H.C.)* .....301

Not pleaded that act done ‘maliciously and without reasonable or probable cause’ – *Whether obligatory to do so – secs. 2 & 14 of the Justices Protection Ordinance, Cap. 18.*

*SINGH & JUNOR v. D. & I. BOARD – (C.A.)* .....561

LANDLORD AND TENANT:

Colony land rented by local authority – *Unilateral increase of rental – Whether ‘ultra vires’ – s. 220 of the Local Government Ordinance, Cap. 150.*

*KUMARLALL v. CLONBROOK V. COUNCIL – (H.C.)* .....202

Exclusive possession of land for considerable time – *No rent paid – No exceptional circumstances – Whether tenancy at will or mere licence.*

*ETWARIA v. BELLAMY – (H.C.)* .....385

LEGAL PRACTITIONER:

Land – *Contract of sale – Contentious business – Same solicitor appearing for both parties – Whether improper conduct.*

*SAHOY v. SAHOY – (H.C.)*.....240

LIMITATION:

Crops lost by flooding due to negligence of Board’s servants on January 20, 1965 – *Writ filed on July 6, 1965 – Proper notice of intended action given – Whether action filed within the requisite 6-month statutory period – s. 8 (1) of the Justices Protection Ordinance, Cap. 18.*

*SINGH & JUNOR v. D. & I. BOARD – (C.A.)* .....561

Crops lost by flooding due to negligence of Board’s servants during December, 1964 – *Second flooding took place during May, 1965 – Writ filed on July 3, 1965 – Proper notice of intended action given – Whether action filed within the requisite statutory period of 6 months in relation to both floodings – s. 8 (1) of the Justices Protection Ordinance, Cap. 18.*

*PERSAUD ET AL v. D. & I. BOARD – (H.C.)*.....301

LOCAL GOVERNMENT:

Colony lands rented by local authority – *Whether absolute prohibition against letting colony lands – Whether purported contract ‘ultra vires’ – s. 220 of the Local Government Ordinance, Cap. 150.*

*KUMARLALL v. CLONBROOK V. COUNCIL – (H.C.)* .....202

MAGISTRATE:

Reasons for decision – *Appeal – No reasons given for Magistrate’s statement of findings – Whether appeal from decision or from reasons for decision – Duty of Magistrate – Summary Jurisdiction (Appeals) Ordinance, Cap. 16.*

*FERREIRA v. CROMWELL – (F.C.)* .....47

MINING:

- Proceedings before Hearing Officer – *Right of challenge by holder of prospective licence – Upon whom onus lies – regs. 29 & 31 of the Mining Regulations, Cap. 196 (Subsidiary Legislation).*  
*J. A. K SYN. v. C. G. EXPL. CO., LTD. (F.C.)*.....160
- Revocation or forfeiture of claim licences – *When applicable – regs. 24, 29, 30 & 31 of the Mining Regulations, Cap. 196 (Subsidiary Legislation).*  
*J. A. K. SYNDICATE v. C. G. EXPL. CO., LTD. – (F.C.)*.....160

PRACTICE AND PROCEDURE:

- Originating summons – *Declaration sought – Whether consequential relief also obtainable – Order 42 Rule 2 of the Supreme Court Rules, 1955.*  
*HARRY v. THOM – (C.A.)*.....68
- Pleadings – *Colony land – No denial specifically or by necessary implication – Whether amounting to admission – Order 11 Rule 13 of the Supreme Court Rules, 1955.*  
*KUMARLALL v. CLONBROOK V. COUNCIL – (H.C.)* .....202
- Pleadings – *Libel – Allegations of “falsely and maliciously” – General denial – Whether pleadings embarrassing – Summons to strike out – Order 17 Rule 31 of the Supreme Court Rules, 1955.*  
*G. M. CORP. v. P. TAYLOR & CO., LTD., & ANOR – (F.C.)*.....61
- Pleadings – *Libel – Desertion – Abandonment – Whether two concepts to be construed together or separately – Order 32 Rules 8 & 9 of the Supreme Court Rules, 1955.*  
*GILLETTE v. RAI & ANOR. – (H.C.)* .....374
- Pleadings – *Libel – False innuendoes pleaded by plaintiffs – Fair comment pleaded by defendants – Matter of public interest – Expressions of opinion as opposed to expressions of fact – Criteria for such defence – Whether justification should have been pleaded instead of fair comment.*  
*B. G. R. M. BOARD v. P. TAYLOR & CO., LTD. – (H.C.)*.....206
- Writ of summons – *Default of appearance – Matter adjudicated upon ex parte – Whether a “judgment by default” – Order 11 Rule 11 of the Supreme Court Rules, 1955.*  
*BHAGWANDIN v. COLLINS – (C.A.)*.....478
- Writ of summons – *Pleadings in order – Matter listed for hearing and adjourned – Matter adjudicated upon ex parte – Whether a “judgment by default” – Order 33 Rule 2 of the Supreme Court Rules, 1955.*  
*BENJAMIN ET AL v. AGARD – (C.A.)* .....425

RENT RESTRICTION:

- Excess rent – *Premises previously assessed – Maximum rent fixed – Increased – Identity of premises – Whether changed – Whether increase justified – Rent Restriction Ordinance, Cap. 186.*  
*FERREIRA v. CROMWELL – (F.C.)* .....47
- Tenancy at will – *Whether protected – Rent Restriction Ordinance, Cap. 186.*  
*ETWARIA v. BELLAMY – (H.C.)* .....385

RICE LANDS:

- Wife executrix and legatee of deceased husband tenant – *Landlord’s testator licensee – Crown lands – Whether Rice Farmers (Security of Tenure) Ordinance, No. 31 of 1956 applicable to such lands – Effect of statute.*  
*ALEXANDER v. MUNIA – (F.C.)* .....572

SALE OF GOODS:

- Immediate payment on delivery of goods under verbal agreement – *Subsequent oral collateral agreement purporting to vary method of payment by instalments – Writ issued by plaintiff without any demand for payment of balance due – Whether such demand a legal requirement or a mere courtesy – secs. 29 & 30 of the Sale of Goods Ordinance, Cap. 333.*  
*PURI v. PERSAUD – (H.C.)* .....32

STATUTORY BODY:

- Drainage and Irrigation Board – *Negligence – Inadequacy of koker boxes – Several reports made to Drainage Overseers – No steps taken to avert flooding which destroyed farmers’ crops – Whether duty of care owed by Board – Action for damages.*  
*PERSAUD ET AL v. D. & I. BOARD – (H.C.)* .....301
- Drainage and Irrigation Board – *Negligence – Omission of Board to ensure adequate defences – Flooding caused by old buried box koker, the existence of which was known to the Board before flooding – Destruction of farmers’ crops by flooding – Whether consequence of harm reasonably foreseeable – Action for damages.*  
*SINGH & JUNOR v. D. & I. BOARD – (C.A.)* .....561
- Local Government Authority – *Village Council – Colony lands rented by Council – Whether absolute prohibition against such letting – Whether purported contract of tenancy ‘ultra vires’ – s. 220 of the Local Government Ordinance, Cap. 150.*  
*KUMARLALL v. CLONBROOK V. COUNCIL – (H.C.)* .....202

WORKMEN:

Regular hourly-paid worker employed at sugar factory – *Additional job-work done on Sundays cleaning boilers – Whether entitled to double-pay – s. 29 of the Factories Ordinance, Cap. 115.*

**KHAN v. B. D. S. ESTS. LTD. – (C.A.)** .....13

**THE LAW REPORTS OF  
GUYANA  
1967**

Edited by

Francis Vieira, Puisne Judge

Published by the Ministry of Justice

Georgetown.

Printed in Guyana by National Lithographic Co. Ltd.,  
Industrial Estate, Ruimveldt, Georgetown.

1981

# SUPREME COURT OF JUDICATURE OF GUYANA

1967

## COURT OF APPEAL

THE HON. SIR KENNETH SIEVRIGHT STOBY, KT. (PRESIDENT)	— Chancellor
THE HON. MR. JUSTICE EDWARD VICTOR LUCKHOO, Q.C.	— Justice of Appeal
THE HON. MR. JUSTICE GUYA LILADHAR BHOWANI PERSAUD	— Justice of Appeal
THE HON. MR. JUSTICE PERCIVAL ARTHUR CUMMINGS	— Justice of Appeal
THE HON. MR. JUSTICE VICTOR EMANUEL CRANE	— Acting Justice of Appeal (with ef- fect from 1.7.67).

## HIGH COURT:

THE HON. MR. JUSTICE HAROLD BRODIE SMITH BOLLERS	— Chief Justice
THE HON. MR. JUSTICE AKBAR KHAN	— Puisne Judge (acted Chief Jus- tice from 8.7.67- 9.10.67).
THE HON. MR. JUSTICE ARTHUR CHUNG	— Puisne Judge
THE HON. MR. JUSTICE VICTOR EMANUEL CRANE	— Puisne Judge (ap- pointed acting Justice of Appeal with effect from 1.7.67).
THE HON. MR. JUSTICE GEORGE AUBERT SYDNEY VAN SERTIMA	— Puisne Judge.
THE HON. MR. JUSTICE DHANESSAR JHAPPAN	— Puisne Judge
THE HON. MR. JUSTICE CHARLES JOHN ETHELWOOD FUNG-A-FATT	— Puisne Judge
THE HON. MR. JUSTICE HORACE LINCOLN MITCHELL	— Puisne Judge

THE HON. MR. JUSTICE  
FRANCIS VIEIRA

— Puisne Judge

THE HON. MR. JUSTICE  
KENNETH MONTAGUE GEORGE

— Acting Puisne  
Judge (appointed  
with effect from  
15.8.67).

**LAW OFFICERS OF THE CROWN:**

THE HON.

SHRIDATH SURENDRANATH RAMPHAL, Q.C.

— Attorney-General

THE HON. MOHAMMED SHAHABBUDEEN, Q.C.

— Solicitor-General

**METHOD OF CITATION:**

These Reports may be cited as (1967) G.L.R.

## LIST OF CASES REPORTED

### A

Adams & Anor, R. v.....	548 C.A.
Agard, Benjamin v .....	425 C.A.
Alexander v. Doobay.....	119 F.C.
Alexander v. Doobay.....	293 F.C.
Alexander v. Munia.....	572 F.C.
Alfred, R. v.....	433 H.C.
Ally v. Hand-in-Hand Fire Ins. Co. Ltd. ....	310 C.A.
A-General, Licorish v.....	436 C.A.
A-General, Nobrega v. ....	83 C.A.
Austin v. Austin.....	587 H.C.

### B

Bellamy, Etwaria v.....	385 H.C.
Benjamin v. Agard .....	425 C.A.
B.G. R. M. Board v. P. Taylor & Co. Ltd .....	206 H.C.
B.G. & T/Dad M. Fire Ins. Co. Ltd., Rajnarine v.....	297 H.C.
Bhagwandin v. Collins .....	478 C.A.
Bookers D. S. Ests Ltd., Khan v.....	13 C.A.
Brittlebank, G. C. Corp., v.....	405 H.C.

### C

Central Garage Ltd. v. Hassan.....	18 H.C.
C. G. Exp. Co. Ltd., J.A.K. Syn. v. ....	160 F.C.
Chand, R. v.....	182 C.A.
Changlee v. Changlee.....	507 H.C.
Citera v. Citera .....	170 H.C.
Clonbrook V. Council, Kumarlall v .....	202 H.C.
Collins, Bhagwandin v. ....	478 C.A.
C. I. Revenue, D'Aguiar v.....	223 C.A.
C. I. Revenue v. Gomes & Anor .....	317 C.A.
C. I. Revenue, Mc David v. ....	1 C.A.
Cromwell, Ferreira v. ....	47 F.C.
Cumberbatch, Yusuf v.....	54 F.C.

## D

D'Aguiar v. C. I. Revenue.....	223 C.A.
Darsan v. Enmore Ests Ltd.....	544 C.A.
De Clou v. D. Bauxite Co. Ltd.....	250 C.A.
Deen v. Singh & Anor.....	142 H.C.
Doobay, Alexander (No. 1) v. ....	119 F.C.
Doobay, Alexander (No. 2) v. ....	293 F.C.
D. & I. Board, Persaud et al v.....	301 H.C.
D. & I. Board, Singh & Anor. v. ....	561 C.A.
Dubar, R. v.....	154 C.A.

## E

Enmore Ests Ltd., Darsan v.....	544 C.A.
Etwaria v. Bellamy.....	385 H.C.

## F

Ferreira v. Cromwell.....	47 F.C.
---------------------------	---------

## G

Gillette v. Rai & Anor.....	374 H.C.
Gomes & Anor., C. I. Revenue v.....	317 C.A.
G. C. Corp. v. Brittlebank.....	405 H.C.
G. M. Corp. v. P. Taylor & Co. Ltd.....	61 F.C.

## H

Hand-in-Hand Fire Ins. Co. Ltd., Ally v. ....	310 C.A.
Harding, Norman v.....	520 C.A.
Harprashad v. Karamat et al.....	36 H.C.
Harry v. Thom.....	68 F.C.
Hassan, Central Garage Ltd. v.....	18 H.C.

## J

J.A.K. Syndicate v. C. G. Expl. Co. Ltd.....	160 F.C.
Jaipati, Laverick v. ....	523 H.C.

## K

Karamat et al, Harprashad v. ....	36 H.C.
Khan v. Bookers D. Sugar Ests Ltd.....	13 C.A.
Kumarlall v. Clonbrook V. Council.....	202 H.C.

## L

Lall (Boodram), R. v .....	554 C.A.
Lall (Mohan et al) R v. ....	413 C.A.
Laverick v. Jaipatti. ....	523 H.C.
Licorish v. A-General.....	436 C.A.

## M

Mahadai v. Ragbeer.....	535 H.C.
Mandal, Scott & Co. Ltd v .....	391 H.C.
Mc David v. C. I. Revenue.....	1 C.A.
Munia, Alexander v. ....	572 F.C.

## N

Nandalall, Seerattan v.....	8 F.C.
Narine, R. v. ....	139 C.A.
Nobrega v. Attorney-General .....	83 C.A.
Norman v. Harding.....	520 C.A.

## P

Persaud et al v. D. & I. Board.....	301 H.C.
Persaud v. Walks & Anor.....	190 H.C.
Puri v. Persaud.....	32 H.C.

## R

Ragbeer, Mahadai v.....	535 H.C.
Rai & Anor., Gillette v .....	374 H.C.
Rajnarine v. B.G. & T/Dad Fire Ins. Co. Ltd. ....	297 H.C.
R. v. Adams & Anor.....	548 C.A.
R. v. Alfred.....	433 H.C.
R. v. Chand.....	182 C.A.
R. v. Boodram Lall.....	554 C.A.
R. v. Mohan Lall et al.....	413 C.A.
R. v. Narine .....	139 C.A.
R. v. Wilkie .....	198 C.A.

## S

Sahoy v. Sahoy .....	240 H.C.
Scott & Co. Ltd. v. Mandall .....	391 H.C.
Seerattan v. Nandalall.....	8 F.C.

Semple & Semple v. Singh & Anor. ....	24 F.C.
Singh & Anor., Deen v.....	142 H.C.
Singh & Anor., v. D. & I. Board .....	561 C.A.

**T**

P. Taylor & Co. Ltd., B.G. R. M. Board v.....	206 H.C.
P. Taylor & Co. Ltd., G. M. Corp. v.....	61 F.C.
Thom, Harry v.....	68 F.C.

**W**

Walks & Anor., Persaud v.....	190 H.C.
Wilkie, R. v. ....	198 C.A.
Yusuf v. Cumberbatch.....	54 F.C.

# The Law Reports of Guyana

SIR FRANK MC DAVID v. THE COMMISSIONER OF INLAND  
REVENUE

[Court of Appeal (Stoby, C., Persaud and Cummings, JJ.A.)  
September 28, October 3, 1966; January 5, 1967.]

*Income Tax – Income – Interest-free loan granted to Managing-Director to purchase residence – Whether loan exigible to tax – Income Tax Ordinance, Cap. 299, s. 5(b) (now Income Tax Act, Cap. 81:01, s. 5(b)).*

The appellant was the Chairman of the Board of Directors of a life assurance society. In 1959 he decided to emigrate to England during 1960 and, with that end in view, sold his house in Kitty. The society, however, wished to retain his services and, in order to induce him to remain, executed two agreements the same day, one referred to as the “employment” agreement, under which he was engaged as Managing-Director with a fixed salary and fringe benefits as from January 1, 1960, and, the other, called the “loan” agreement, under which he was given an interest-free loan of \$45,000 to purchase a residence for himself. The respondent considered that the appellant had received a benefit from the interest-free loan and he assessed him on an additional sum of \$3,360, which was computed at the rate at which the society made loans to borrowers. The appellant objected to the additional assessment and the interest was reduced to \$2,956 on grounds not relevant to this appeal. This final assessment was confirmed by a Judge in Chambers.

**HELD** – Looking at the true nature of the transaction, the exemption from the payment of interest, even though only notional, was a gain or allowance made to the appellant in reference to services rendered by him by virtue of his office and was thus in the nature of a reward for his services and, as such, exigible to tax.

(Bridges v. Bearsley and Hewitt (2) (infra) distinguished)

*Appeal dismissed – Order of Court below affirmed.*

*Cases referred to:*

- (1) Seymour v. Reed (1927) A.C. 554; 11 Tax Cas. 625, H.L.
- (2) Bridges v. Bearsley and Hewitt (1957) 2 All E.R. 281, C.A.; 37 Tax Cas. 289, 306, C.A.
- (3) Moorhouse v. Dooland (1955) 1 All E.R. 93; 36 Tax Cas. 1, 12, C.A.
- (4) Wright v. Boyce (1958) 2 All E.R. 703, 102 S.J. 381.
- (5) Herbert v. McQuade (1902) 2 K.B. 631; 4 Tax Cas. 489, C.A.
- (6) Hochstrasser v. Mayers (1959) 3 All E.R. 817, H.L.
- (7) Henley v. Murray (1950) 1 All E.R. 908; 31 Tax Cas. 351, C.A.
- (8) White v. Franklyn (1965) 1 All E.R. 692; (1965) 1 W.L.R. 508; 42 Tax Cas. 291.
- (9) Jarrold v. Boustead (1964) 3 All E.R. 76; (1964) 1 W.L.R. 1357; 41 Tax Cas. 728.

*[Editorial Note:— This case is reported in (1967) 9 W.I.R. 5047*

*G. M. Farnum, Q.C.*, for appellant.

*M. Shahabuddeen, Q.C., Solicitor-General*, with *S. Rahaman*, for respondent.

PERSAUD, J.A.: On December 10, 1959, the appellant who was then the chairman of the board of directors of the Demerara Mutual Life Assurance Society, Limited – a company whose offices are in Georgetown – entered into two agreements with the company. One agreement can, for convenience, be termed the employment agreement. By this agreement, the appellant was engaged by the company as its Managing Director or Chief Executive Officer as from January 1, 1960, being responsible for the general management of the company subject to the control and approval of the Board of Directors. His salary was fixed together with other fringe benefits, his duties were laid down, and clause 10 of the agreement provides as follows –

“The Managing Director’s appointment as Managing Director shall determine if he shall cease to be elected a director of the Society but the Board shall take such steps as are within its powers to secure his re-election or appointment as a director. If at any time and whilst the Managing Director is not a director, he shall nevertheless continue to serve the Society (company) as its Chief Executive Officer.”

The other agreement which may be termed the loan agreement is so material to this appeal that I will set out hereunder the relevant paragraphs in full –

“WHEREAS – the Director is a director of the Society but intended in 1960 to leave British Guiana and to live in the United Kingdom and with a view thereto sold his house in Kitty:

## MC DAVID v. C.I.R.

AND WHEREAS the Directors of the Society are desirous of appointing the Director, Managing Director of the Society, and the Director is willing to accept such appointment if the Society will lend him the money to acquire a suitable residence (hereinafter referred to as “the residence”):

AND WHEREAS – in consideration of the Director accepting the said office, the Society has agreed as hereinafter provided:

NOW THIS AGREEMENT WITNESSETH as follows –

1. Subject as hereinafter provided the Society shall lend to the Director a sum not exceeding \$45,000: – and not exceeding the cost of acquiring and equipping the residence, to be secured by a First Mortgage on the residence, repayable on demand without interest on the termination of his employment as Managing Director of the Society.
2. On the termination of the employment of the Director, the Society will at the option of the Director either purchase the residence from him at cost (less depreciation) or at the current market price, whichever is the lower, or grant him a new mortgage thereon for such sum and on such terms as the Society may then be investing money on mortgage, and the Director shall forthwith advertise and pass such mortgage and repay to the Society on the passing of such mortgage the difference between the original loan and the amount of such mortgage.
3. This Agreement is conditional upon the Director accepting appointment and holding office as Managing Director and if the Director does not accept the said appointment or ceases to be Managing Director or Chief Executive Officer before purchasing the residence, this Agreement shall be void.”

In pursuance of these agreements, the appellant entered the employment of the company as its managing director as from January 1, 1960, the loan was granted to him, and he purchased a residence.

The appellant submitted a return of his income in respect of year ended December 31, 1960, and the respondent assessed the appellant on the additional amount of \$3,360 (which was not returned by the appellant), that amount being regarded as the value of the benefit he derived from the interest-free loan and computed on the basis of the market rate of interest on loans i.e. 7% of \$48,000. The appellant objected to the assessment and the interest was reduced to \$2,956 on grounds not relevant to this appeal. The final assessment was confirmed by a judge in Chambers, and this appeal is from that decision.

Broadly speaking, the case for the appellant is that the loan was not in consideration for the giving of service; it was not received by the appellant in his capacity as an employee; it was not a benefit arising from the appellant’s service as such; rather a true view of the facts is that the granting of the loan

was to enable the appellant to put himself in a position whereby he could enter the services of the company as its managing director upon terms and conditions to be subsequently agreed upon. In other words, urges counsel, the loan which the appellant received under the loan agreement was not a benefit accruing from the appellant's employment, and therefore it follows that the notional interest which he was not required to pay was not such either, and consequently not exigible to tax.

Perhaps it will be convenient at this stage to set out the relevant section of the Income Tax Ordinance (Cap. 299) under which it is sought to tax the appellant as it was at that time. S. 5(b) provides that income tax shall, subject to the provisions of the ordinance, be payable in respect of "gains or profits from any office or employment including the estimated value of any quarters or board or residence or of any other allowance granted in respect of employment whether in money or otherwise. . . ." The argument of the respondent is that the notional interest is a gain or profit accruing to the appellant from his employment, and as such is taxable.

The first point counsel for the appellant seeks to make is that the two agreements made no reference to each other, and even though they were executed on the same day, the appellant was not yet in the employ of the company as managing director when the loan agreement was signed. There is nothing to indicate the order in which the agreements were executed, but I will assume that the loan agreement was first in point of time, which is an assumption in favour of the appellant. That agreement recites the society's (company's) desire to appoint the appellant managing director, and his willingness to accept, and goes on to provide that in consideration of the appellant accepting the said office, the society has agreed *inter alia* to lend the appellant a sum of money for purposes of acquiring and equipping a residence, the loan to be secured by a first mortgage on the residence repayable on demand without interest on the termination of the employment. The employment agreement then appoints the appellant managing director, and prescribes his duties, etc. In the face of these facts I find counsel's proposition untenable. In my opinion, the agreements clearly relate to each other, and could, as was said during the course of the arguments, have been conveniently incorporated in one document. Indeed, the loan agreement provides that upon the termination of the appellant's employment the society will at the former's option either purchase the residence from him at cost (less depreciation) or at the current market price, whichever is lower, or grant him a new mortgage thereon for such sum and on such terms as the society may then be investing money on mortgage. It is incontestable that the agreements are inter-related; in fact it is my view that upon a proper reading, rights under the loan agreement do not accrue but for the existence of the employment agreement.

The point that calls for decision in this appeal has received judicial attention in several English cases; and it seems to me that while the test has been settled, the position is that everything depends on the circumstances of the particular case, recognising, among others, two important principles

## MC DAVID v. C.I.R.

– (1) that a sum may be assessable as a profit though it is received in the form not of cash, but of money's worth, such as shares, and (2) not every sum received from another person during the period of the recipient's service is assessable as income and a profit of his office, even though it comes from the recipient's employer.

The test as laid down by LORD CAVE, L.C., in *Reed v. Seymour* 11 Tax. at p. 646, was that the words "salaries, fees, wages, prerequisites or profits" from an office or employment of profit –

"include all payments made to the holder of an office or employment as such – that is to say, by way of remuneration for his services, even though such payments may be voluntary – but they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his service."

In *Bridges v. Bearsley and Hewitt* 37 T.C. 289, it was held that certain shares in a company which were transferred to the taxpayers in consideration of their continuing their engagements with the company were in the nature of testimonial for what they had done, including what they had done before holding their current office, and that the shares were not profits from these offices. SELLERS, L.J., seemed to have based his decision on the distinction between capital and income, for at p. 325 (*ibid*), he said –

"On the face of things it would seem unreasonable and against good sense that the shares in the hands of the Hornby brothers, which were part of large holdings which were not subject to Income Tax except in respect of the dividends paid thereon, should cease to be capital and become income of the recipients by the transfer to the two appellants."

If this test were to be applied in the instant case, it could hardly be said that the interest which the appellant would have had to pay, but for the fact that he was employed as managing director of the company, was either a testimonial or a capital gain. And in this respect I would differentiate *Bridges v. Bearsley and Hewitt* (*supra*) from the instant case.

I will now refer to the cases of *Moorhouse v. Dooland* (1955) 1 All E.R. 93, and *Wright v. Boyce* (1958) 2 All E.R. 703 (both of which were cited by counsel for the appellant) to remove the impression – if there were such – that a transaction which results in a benefit to the taxpayer must be looked at from the recipient's point of view in the sense that the transaction must be regarded as the recipient regards it. Perhaps such a thought was inspired by the dictum of SELLERS, L.J. in *Bridges v. Bearsley & Hewitt* (*ibid*) at p. 322 where he said –

"A profit may accrue by reason of an office when it comes to the holder of an office as such. Payments that come to the holder of an office as such are payments which from the recipient's point of view have the features of remuneration."

It is in my judgment clear that what is meant by the words “recipient’s point of view” is the nature of the payment having regard to the taxpayer’s entitlement under the terms of his contract of employment. As it was put by the Master of the Rolls in *Herbert v. McQuade* (1902) 2 K.B. 649 (and referred to by the Master of the Rolls in *Moorhouse v. Dooland* (*supra*)) –

“a payment may be liable to income tax although it is voluntary on the part of the person who made it, and . . . the test is whether, from the standpoint of the person who receives it, it accrues to him by virtue of his office . . .”

In *Moorhouse v. Dooland* (*supra*) the taxpayer, a professional cricketer was entitled, under his contract of employment, to have a collection made whenever he had a particularly meritorious performance in batting or bowling for his club. In the course of his judgment, the Master of the Rolls said (at p. 99 *ibid*) that such a sum may be earnings arising from the recipient’s employment even though it was a mere gift on the part of him who paid. The point I wish to stress is that the Master of the Rolls was relating the sum collected to the taxpayer’s employment, and there was no question as to how in the taxpayer’s view the payment appeared.

Again in *Wright v. Boyce* (*supra*) where it was held that voluntary payments made to a huntsman by followers of a hunt were taxable, JENKINS, L.J., dealt with this point in these words (at p. 708 *ibid*), he also relating the payment to the employment –

“. . . the first test will still hold good; what was the quality of the payment from the point of view of the recipient? In the case put, from the point of view of the recipient the payment would have nothing to do with his employment at all; . . . . .”

And at p. 709 (*ibid*), he said –

“It appears to me to be clear that the taxpayer’s hope or expectation of payments pursuant to the custom was at all times a hope or expectation attached to the office or employment.”

Employing the language used by LORD COHEN in *Hochstrasser v. Mayers* (1960) W.L.R. at p. 74, counsel for the appellant has submitted that unless the service agreement was the *causa causans* the loan agreement, the appellant may not be taxed upon his immunity from the payment of interest, as it is not sufficient for the service agreement to be merely the *causa sine qua non* the loan agreement. It has been said by EVERSLED, M.R., in *Henley v. Murray* (1950) 1 All E.R. 910 that –

“the duty of the court is to see what in substance, and in truth, the bargain was and not to be blinded by some formula which the parties have used. That proposition is not peculiar to tax cases, though there is perhaps a tendency for the subject to try to disguise the real nature of a transaction by forms of words if he thinks the result would be profitable.”

## MC DAVID v. C.I.R.

Looking at the true nature of the transaction, I would say that the exemption from the payment of interest was a gain or an allowance made to the appellant, in reference to services rendered by him by virtue of his office, and was in the nature of a reward for his services, and as such is exigible to tax. As LORD RADCLIFFE puts it in the *Hochstrasser case (supra)* at p. 71 –

“ . . . . . while it is not sufficient to render a payment assessable (by saying) an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him in return for acting as or being an employee.”

In the *Hochstrasser case*, the facts of which are familiar to this court, it was clear that the sum of money on which it was sought to levy income tax was not a payment made in reward for services; rather it was paid to the taxpayer by his employers to compensate him for loss he had suffered upon a sale of a house which he had purchased pursuant to an agreement with his employers as part of a housing scheme. Indeed, it is worthy of note that in that case the commissioners had given as their reason for holding that the sum of money was not liable to tax that the payment was to meet a capital loss accrued by the taxpayer in fulfilling the obligations of his employment. Although this was not the line taken on appeal, I would say that that reasoning would apply with equal force in the instant case, in that the interest was not in the nature of a capital gain; had it been such, it would have been exempted from tax.

In *White v. Franklin* (1965) 1 All E.R. 692, shares were settled upon the taxpayer as an inducement to him to remain an active director of a company, on trusts under which the income of the shares were to be paid to the taxpayer “so long as he shall be engaged in the management of the company”. It was held that the income derived from the shares was taxable. Referring to the payment of the income to the taxpayer, WILMER, L.J., said (at p. 698 *ibid*) –

“ . . . . . what is its character as a receipt in the hands of the recipient? That was the test which the judge sought to apply, and in my judgment, rightly sought to apply. Applying that test, he came to the conclusion that, on the facts recited in the Case stated, there was ample evidence to justify the conclusion of the commissioners that the character of the income received in this case was such as to constitute remuneration from the taxpayer’s office or employment with the company, so as to come within the definition of earned income. I for my part take the same view.”

In *Jarrold v. Boustead*, (1964) 3 All E.R. 76, the taxpayer was an amateur rugby player. He agreed to play for a rugby club at a specified sum per match, and the club agreed to pay him £3,000 on his signing professional forms. Once the player had relinquished amateur status, he could never regain it. It was held that the signing-on fee of £3,000 was a capital sum paid

to the taxpayer as consideration for his relinquishing his amateur status for the rest of his life, *viz.*, paid in compensation for the loss of a permanent asset, and was not taxable. Similarly, urges counsel for the appellant, in this case the appellant was changing or postponing his decision to live in more salubrious climate out of this country, and this was a thing of value which he was giving up, albeit temporarily, in exchange for, among other things, the grant to him of an interest free loan. The answer to this submission is twofold – the interest that would have been payable on the loan is not of a capital nature in that the right to the exemption ceased upon the termination of the appellant's employment, and the taxpayer had not, as in the case of the rugby player, surrendered anything whereby his status was affected adversely either temporarily or for the rest of his life.

Had the appellant paid the interest on the loan, there is no doubt but that such payments would have been paid out of his income. For my part I can see no difference between that situation, and the situation where, arising out of his employment, and during the tenure of his office, the interest is waived, whereby he gains to that extent. And if he receives a gain or a benefit by virtue of an allowance out of his employment then that gain or benefit is exigible to tax. For these reasons, I would dismiss this appeal, and affirm the judgment of the court below. The appellant should pay the respondent's costs of this appeal.

Stay of execution for two (2) months.

STOBY, C. I concur.

CUMMINGS, J.A. I concur.

*Appeal dismissed – order of Court below affirmed.*

Solicitors:

JOSEPH CHATEAU DOOBAY v. ISAAC ALEXANDER.  
DETECTIVE INSPECTOR – (NO. 1)

[In the Full Court of the High Court (Bollers, C.J., and Crane, J.) March 4, 1967; April 6, 1967]

*Criminal Law — Two separate offences charged in the same complaint — “Using the name and title of physician” — Whether bad for duplicity — S. 36 of the Colonial Medical Service Ordinance, Cap. 134 (omitted from the 1973 current Laws of Guyana).*

*Criminal Law — Meaning of words “wilfully and falsely” — Mens Rea.*

Between January 4th and 6th, 1966, exercises of a medical nature were carried out by the appellant on three police decoys at his home, outside of which there was a sign-board which stated, *inter alia*, “Dr. J.C. Doobay, M.D.I.H., F.S.A.U.I., Physician”. A search warrant was executed on the premises and the respondent took away the sign-board as well as three of the appellant’s letter-heads which repeated the information on the sign-board plus the following words “Practitioner of Medicine”. After being cautioned, the appellant stated that he was not a registered medical practitioner but a Doctor of Homeopathy and that his papers were at Parika. At the trial, the Assistant Secretary of the Medical Board gave evidence that the name “Joseph Chateau Doobay” did not appear in the register of medical practitioners or in the Official Gazette where the names in the said register were subsequently published. Dr. Sankar, a medical practitioner, who gave expert evidence for the prosecution, stated that the words on the sign-board were not used by medical practitioners and he did not know what they meant but they were not registrable medical degrees although he agreed that in some parts of the world there was a registered panel of homeopathic physicians. After the close of the case for the prosecution, the appellant made a statement from the dock in which he denied that he had “wilfully and falsely” used the name and title of physician and he went on to say that he was a Doctor of Homeopathy and had been awarded a diploma (which was tendered) in that field by a University of St. Andrews, Tottenham, London, and he pointed out that in many countries such as the United States and Europe, homeopathic physicians were registered.

It was submitted on behalf of the appellant that (a) the charge was bad for duplicity in that two separate offences were charged in the same complaint, viz., “using the name of physician” and “using the title of physician” and, consequently, the appellant could not properly be convicted of one offence as he would not know of which offence he had been convicted and had not been given an opportunity to answer the charge in relation to that specific offence, and, (b) that the Magistrate had misdirected himself on the law applicable to the offence charged as he had not addressed his mind to the question whether there had been clear proof by the prosecution that the appellant had “wilfully and falsely” used the name and title of physician which was an important ingredient in the offence.

**HELD:**— (i) on the question of “duplicity” (per Bollers, C.J., Crane, J., concurring) — that although the words “using the name and title of physician” created two separate and distinct offences, nevertheless, the charge was not bad for duplicity since the acts complained of, although spread over three consecutive days, constituted one single and continuous act, and, therefore, could properly be charged conjunctively;

(ii) on the question of “mens rea” (per Bollers, C.J.) — that it was the duty of the Magistrate when considering whether there was proof by the prosecution that the appellant had “wilfully and falsely” used the name and title of physician, to show in his memorandum of reasons that he had addressed his mind to the question whether the appellant had acted honestly under a genuine belief that he was entitled to describe himself as ‘a physician and whether he had reasonable grounds for that belief, and, the Magistrate, not having done so, then the appeal must succeed; (per Crane, J) — that although the Magistrate would have appeared to have directed his mind, albeit perfunctorily, to the importance of the word ‘falsely,’ it was evident that he omitted to so consider the word ‘wilfully’ and, as the two words, joined by the copulative “and,” had, of necessity, to be considered together, the Magistrate had convicted the appellant without indicating in his memorandum of reasons that he had made a finding of “wilfulness” and, accordingly, this being absolutely essential, the appeal must be allowed. Where epithets such as these are used in a statute, they must be specifically referred to by the Magistrate who must relate them in his reasons to the facts of the case in hand, indicating quite clearly therein whether “mens rea” has been established or not.

*Appeal allowed — Conviction and sentence set aside.*

[*Editorial Note:*— The respondent’s appeal to the Court of Appeal (Criminal Appeal No. 34 of 1967) was dismissed by that court (Stoby, C., Khan, C.J. (Ag.), and Cummings, J.A.) on 20th September 1967] [unreported].

*R.H. McKay* for appellant.

*W.G. Persaud*, Acting Senior Crown Counsel, for respondent.

*Cases referred to:*—

- (1) *Edwards v. Jones* (1947) 1 All E.R. 830.
- (2) *Atchim v. Stevens* (1960) 2 W.I.R. 359.
- (3) *Hargreaves v. Alderson* (1962) 3 All E.R. 1019.
- (4) *Budhu v. Allen* (1962) L.R.B.G. 162.
- (5) *Ware v. Fox* (1967) 1 All E.R.
- (6) *Ellis v. Kelly*, 25 J.P. 279.
- (7) *Andrews v. Styrap* (1872) 26 L.T. 704.
- (8) *Whitwell v. Shakesby* (1932) 147 L.T. 157.
- (9) *Younghusband v. Luftig* (1949) 2 All E.R. 72.
- (10) *R v. Naismith* (1961) 1 W.L.R. 952.
- (11) *Thompson v. Knight* (1947) 1 K.B. 330.
- (12) *Smith v. Perry* (1906) 1 K.B. 262.
- (13) *Newton v. Smith* (1962) 2 Q.B. 279.
- (14) *R v. Surrey JJ* (1932) 1 K.B. 452.
- (15) *R. v. Clow* (1963) 127 J.P. 371.
- (16) *R v. Jones, Ex. parte Thomas* (1921) 1 K.B.D. 632.
- (17) *R. v. Wells, etc. JJ, Ex parte Clifford* (1904) 68 J.P. 392.
- (18) *Simon v. Reid* (1966) 8 W.I.R. 166.
- (19) *Hunter v. Clare* (1899) 1 Q.B. 635.
- (20) *Pedgrift v. Chevallier* (1860) 25 J.P. 181.
- (21) *Ladd v. Gould* (1860) 1 L.T. 325.

## DOOBAY v. ALEXANDER (NO. 1)

- (22) Wilson v. Inyang (1951) 2 All E.R. 237.
- (23) R v. Skivington (1967) 1 All E.R. 483.
- (24) Davies v. Makuna (1885) 29 Ch.D. 596.
- (25) R v. Lewis (Stipendiary Magistrate) and Frickhart (1896) 60 J.P. 392.
- (26) Alexander v. Chalmers (1956) L.R.B.G. 146.
- (27) Long v. Bissoondial (1922) L.R.B.G. 151.
- (28) R v. Senior (1899) 1 Q.B.D. 283.

BOLLERS, C.J.: On the 4th January, 1966, as the result of a police trap a decoy was sent to the home of the appellant Joseph Chateau Doobay where on her arrival she saw a signboard which stated *inter alia* "Dr. J. C. Doobay, M.D.I.H., F.S.A.U.I., Physician." The decoy found the appellant at home and asked him if he was Dr. Doobay and he replied yes. Subsequently, exercises of a medical nature, which are not relevant to this appeal, were carried out by the appellant on the person of the decoy. On the following day, another decoy was sent to the residence of the appellant, where he observed the sign-board hanging in front of the appellant's home. More exercises of a medical nature took place on this decoy. On the same day, at a later stage, another decoy was sent by the police to the appellant's home who repeated the process as in the previous cases. As this interview was about to conclude Supt. Elcock, who was in charge of the operation, arrived on the scene, with a party of policemen, and informed the appellant that it was a police trap. Detective Inspector Alexander then executed a search warrant on the premises and, as a result, removed the sign-board and three sheets of paper bearing what was obviously the letter head of the appellant which repeated the information on the sign-board along with the words "Practitioner of Medicine". The appellant, after being cautioned, stated that he was not a registered medical practitioner but a Doctor of Homeopathy and stated that his papers were at Parika.

On these facts the appellant was convicted and fined in the Magistrate's Court for the offence of "improper use of medical title contrary to section 36 of the Colonial Medical Services Ordinance, Chapter 134", and it is from this conviction and sentence that he now appeals to this court.

At the trial the Assistant Secretary of the Medical Board in the Ministry of Health gave evidence that it was his duty to place on the register persons with the necessary qualification who had applied for such registration and that the name Joseph Chateau Doobay did not appear in the register of medical practitioners of the country or in the Official Gazette where the names in the register were subsequently published.

The medical practitioner who gave expert evidence for the prosecution stated that the words on the sign-board were not used by medical doctors and he did not know what they meant but they were not registrable medical degrees and in some parts of the world he would agree that there was a registered panel of homoeopathic physicians. A diploma in homoeopathy which purported to be conferred upon one Joseph C.R. Doobay by St. Andrews College, Tottenham, England, was then put in evidence by the

defence and at the close of the case for the prosecution the appellant made a statement from the dock, in which he denied that he had wilfully and falsely used the name and title of a physician implying that he was recognised by law as a registered medical practitioner and went on to say that he was a Doctor of Homoeopathy and had been awarded the diploma tendered in evidence in that subject by the University of St. Andrews in London, having covered the prescribed course. He pointed out that in many countries such as the U.S.A. and Europe homoeopathic physicians are registered.

The particulars of the charge read as follows:

“ Joseph Chateau Doobay between Tuesday 4th and Thursday 6th January, 1966 at Georgetown in the Georgetown Judicial District, did wilfully and falsely use the name and title of a physician implying that he is recognised by law as a physician.”

and counsel for the appellant has now submitted to this court two points for consideration which arise from the grounds of appeal. Firstly, that the complaint was bad for duplicity in as much as two separate offences were charged in the same complaint, which alleged that the appellant used “the name and title of a physician” implying that he is recognised by law as a physician and that if there were two offences charged in the complaint the appellant could not properly be convicted of one offence as the appellant would not know of which offence he had been convicted and had not been given an opportunity to answer the charge in relation to that specific offence. Secondly, that the learned magistrate had misdirected himself on the law applicable to the offence charged as he had not addressed his mind to the question whether there had been clear proof by the prosecution that the appellant had wilfully and falsely used the name or title of a physician which was an important ingredient of the offence. In support of his contention, on the first point, counsel cited *Edwards v. Jones* (1947) 1 A.E.R., p. 830, *Atchim v. Stevens* (1960) 2 W.I.R., p. 359 *Hargreaves v. Alderson* (1962) 3 A.E.R., p. 1019, *Budhu v. Allen* (1962) L.R.B.G., p. 162, and finally *Ware v. Fox* (1967) 1 A.E.R. With reference to the second point, Counsel cited *Ellis v. Kelly* 25 J.P. 279, *Andrews v. Styrap* (1872) 26 L.T. 704, *Whitwell v. Shakesby* (1932) 147 L.T. 157 and *Younghusband v. Luftig* (1949) 2 A.E.R., p. 72.

The reply of counsel for the respondent to this argument was the submission that the complaint was in respect of one offence only and if, indeed, it was in respect of two offences, then both offences could properly be charged conjunctively if it was a single, indivisible act of the appellant or one incident, and in respect of the second point he urged that there was ample evidence upon which the magistrate could have found that the appellant had wilfully and falsely used the title of a physician and that having stated that he found the appellant guilty the magistrate must be presumed to have considered this element of the charge.

In considering the first point, I ought to make it clear that if, indeed, there were two separate offences contained in the complaint, then the proper

## DOOBAY v. ALEXANDER (NO. 1)

procedure is as laid down by the Divisional court in England in *Edwards v Jones* (1947) 1 A.E.R., p. 830, that in that situation where an information or complaint preferred contains two separate offences and not one the magistrate should take steps to see that the complaint is amended and he should call on the prosecutor to elect on which offence he intends to proceed and the prosecutor having elected it should be the duty of the magistrate to amend accordingly by striking out the other offence charged so that the defendant is only called on to answer one offence. If the prosecutor declines to elect then the complaint is bad for duplicity and the magistrate should dismiss it – see the judgment of LORD GODDARD C.J., at page 831 of the report. This ruling of the learned Chief Justice was followed in the case of *Atchim v. Stevens* by the Full Court in Trinidad where the complaint alleged two separate offences where the magistrate attempted to cure the position by amendment at close of the case for the defence and the appellant was convicted without being allowed an opportunity to plead or make his defence to the new information. The learned Chief Justice of Trinidad pointed out that the moment the amendment was made the magistrate ought to have called on the defendant to plead to the new complaint. The appeal was therefore allowed and the conviction of the appellant quashed.

In the local case of *Budhu v. Allen* the procedure laid down in *Edwards v Jones* was followed and in the situation where two offences were charged in the complaint and the prosecutor elected to proceed on one offence and the other was struck out, and the evidence led disclosed an offence not under the charge substituted but an offence under the charge that was struck out, and the appellant was convicted, the Federal Supreme Court held that section 94 of the Summary Jurisdiction Procedure Ordinance, Chapter 15, under which the magistrate could give leave to the prosecutor to amend the complaint by substituting the offence proved and to call upon the appellant to answer the charge which the evidence disclosed, did not empower the magistrate to convict the appellant for the offence so substituted without giving him an opportunity to answer the new charge. The conviction was, therefore, quashed. It follows from these authorities that if, indeed, there were two separate offences disclosed in the complaint in the instant appeal the procedure laid down in *Edwards v Jones* was not carried out by the magistrate the effect of which would be that the complaint would be bad for duplicity. There remains, therefore, the question whether there were two separate offences disclosed in the complaint and whether the relevant words in section 36 of Chapter 134 “anyone who wilfully and falsely uses the name or title of a physician . . .” creates one offence or two offences. In *Edwards v Jones* where the appellant was charged with dangerous driving contrary to section 11(1) of the Road Traffic Act 1930 and in the same information with driving without due care and attention contrary to section 12(1) of the Act, it was held that there were two separate offences charged, one for dangerous driving and one for careless driving. In *Atchim v. Stevens*

the section 13(2) of the Shops' Ordinance under which the appellant had been charged stated:

“ If, outside the opening hours fixed by any Shop Order, any shop to which the Order applies is opened or kept opened . . . or if . . . any sale or transaction is effected or attempted to be effected in any such shop, etc. . . .”

The Court of Appeal held that there were two separate offences created (1) being the owner and did keep open a shop, and (2) being the owner did effect a transaction in such shop. In *Hargreaves v. Alderson* where the information preferred against the appellant charged him with driving a motor vehicle recklessly on a road or at a speed or in a manner which was dangerous to the public contrary to section 2 of the Road Traffic Act 1960, the Court of Criminal Appeal held that the information charged three offences and was clearly bad for duplicity. In *Budhu v. Allen*, section 141(c) of the Summary Jurisdiction Offences Ordinance, Chapter 14 under which the appellant was charged made it an offence to send or deliver any obscene writing and the Federal Supreme Court had no difficulty in holding that two separate offences were created by that section. These cases are, however, to be contrasted with the authorities cited by counsel for the respondent namely *R. v. Naismith* (1961) 1 W.L.R., p. 952, *Thompson v. Knight* (1947) 1 K.B. p. 330, *Smith v. Perry* (1906) 1 K.B. p. 262, *Newton v. Smith* (1962) 1 Q.B. p. 279.

In *R. v. Naismith*, where the appellant was charged before a Court Martial with committing a civil offence contrary to section 70 of the Army Act 1955, namely, causing grievous bodily harm to one H. with intent to maim, disfigure or disable him contrary to section 18 of the Offences to Persons Act 1861, it was held that the charge was not bad for duplicity because section 18 created one offence and the various intents mentioned in that section merely specified variations in the method by which the offence may be committed but did not create separate offences. ASHWORTH J. who delivered the judgment of the Courts Martial Appeal Court observed that the correct approach was to keep in mind the distinction between a section creating two or more offences and a section creating one offence but providing that that offence may be committed in more than one way. In *Smith v. Perry* where the appellant had been charged under section 72 of the Highway Act 1835 which made it an offence to lay any substance upon the highway “to the injury, interruption or personal danger of any person travelling thereon” it was held that a conviction for having laid matter on the highway “to the interruption and personal danger of any person travelling thereon” was not bad for duplicity under the Summary Jurisdiction Act, 1848, for that the act of laying the matter on the highway followed by any one or more of the consequences abovementioned, constituted but one offence. LORD ALVERSTONE, C.J., who delivered the judgment of the court observed that the injury, interruption, or personal

## DOOBAY v. ALEXANDER (NO. 1)

danger of the passengers were grouped together as one class and were, in his view, not intended to constitute different offences, and so far as any argument was to be derived from the grammatical form of the sentence the absence of the word “or” between injury and interruption pointed to that conclusion. The learned Chief Justice argued that if it has been intended to treat the act of placing substances on the highway to the interruption of the passengers as a distinct offence from a similar act done to the injury of the passengers, one would have expected to find the statement of those different offences separated by the word “or”. This authority, therefore, supports the submission of counsel for the respondent that where there are different modes of doing the single act committed then there is only one offence but LORD ALVERSTONE, C. J., was careful to point out that had the various modes been separated by the disjunctive “or” then there would be different offences created.

In *Newton v. Smith* where the appellants were charged with wilfully or negligently failing to comply with conditions attached to their licence in using a vehicle on a route not specified in the licence contrary to section 134 of the Road Traffic Act 1960, the Divisional court held that the words wilfully or negligently failing to comply with the conditions of the licence in the section constituted a single offence and the charge was not bad for duplicity and fell within the principle laid down in *Thompson v. Knights* and that the offence was the failure to comply with the conditions in the licence whether that failure was wilful or negligent. In other words, this decision seems to indicate that there was a single act committed by the appellants of failure to comply with the conditions of the licence and the mode of failure could be either wilful or negligent. In *Thompson v. Knights*, the question arose whether a conviction for being unlawfully in charge of a motor car whilst acting under the influence of a drink or drug was bad for duplicity and the Divisional court held that it was not bad for duplicity or uncertainty. LORD GODDARD, C.J., in his judgment, concluded that one offence was created by those words and that the words “under the influence of a drink or drug” were merely adjectival. The learned Chief Justice stated:

I do not think that Parliament meant to create one offence of being incapable by reason of a drug and another offence of being incapable by reason of drink. What it meant to provide was that a man driving, attempting to drive, or in charge of, a car in a state of self-induced incapacity, whether due to drink or to drugs, in each of those cases, committed the offence. In my opinion, it is not an alternative offence, nor can there be said to be two offences. The offence was driving the car when in this particular state of incapacity.”

Can it then be said that in the present appeal the section under which the appellant was charged, that is, section 36, gives rise to two offences of using the name or title of a physician? In other words is there a single act of using something in different modes as in *Smith v. Perry* where there was a single act of laying matter on the highway and in *Newton v. Smith* there was the single act of failure and in *Thompson v. Knights* the single act of driving or

being in charge of a motor car in a particular state of incapacity, or in *R. v. Naismith* the single act of causing grievous bodily harm. I think not. As AVERY, J. in *R. v. Surrey JJ.* (1932) 1 K.B. at 452, in offering a test suggested that if there are two items in a statutory prohibition joined with “or” there are separate offences “if a person may do one without doing the other”. In my view there were two offences created by the relevant words, namely, using the name of a physician and using the title of a physician. No single act committed in different modes can be inferred from those words. Support for this view would appear to be found in *Younghusband v. Luftig* (1949) 2 A.E.R., p. 72, where the appellant was charged under section 40 of the Medical Act, 1858 which is the English section almost identical with section 36 of Chapter 134 with two offences on two informations committed on the same day, that is, firstly, “that he did wilfully and falsely use the title of Dr. of Medicine contrary to the Medical Act 1858, Section 40” and secondly, on the same day “he did wilfully and falsely use the description M.D. contrary to section 40 of the Act” thus suggesting that two separate offences were recognised to have been created by those words of the section. It was never suggested in this case that the appellant had been charged on separate informations which could have been charged on one information, and indeed, LORD GODDARD, C.J., in his judgment at page 24 states that the two offences charged on each day were in fact alternative.

Finally, in the recent case of *Ware v. Fox* (1967) 1 A.E.R., at page 100, the Divisional court came to the conclusion that section 5(b) of the Dangerous Drugs Act 1965 created two offences, that is, being concerned in the management of premises used for the purposes of smoking cannabis or cannabis resin and being concerned in the management of premises used for the purpose of dealing in cannabis resin, that is, the two offences of using premises for the purpose of smoking and using the premises for the purpose of dealing, and where a complaint charged both of these offences it was bad for duplicity. I arrive at the conclusion, therefore, that the appropriate words in the particulars of offence “using the name and title of a physician” created two separate offences.

Having arrived at the conclusion that two separate offences were charged in the complaint, I turn now to consider the submission of Counsel for the respondent that the offences having been charged conjunctively in the complaint this could properly be done provided it was a single indivisible act of the appellant or one incident. In this he is supported by the authorities of *R. v. Clow* (1963) 127 J.P. at page 371 and *R. v. Jones Ex parte Thomas* (1921) 1 K.B.D. at page 632. In *R. v. Clow* the appellant was charged with causing death by dangerous driving contrary to section (1) of the Road Traffic Act 1960 and the Particulars of Offence alleged that the appellant caused death by the driving of a motor vehicle on a road at a speed and in a manner dangerous to the public having regard to all the circumstances of the case, and the Court of Criminal Appeal arrived at the conclusion that the charge was valid and not bad for duplicity. LORD PARKER, C.J., who

## DOOBAY v. ALEXANDER (NO. 1)

delivered the judgment of the court stated that there were a series of decisions to the effect that whether these were separate offences or not they could be charged conjunctively provided, of course, it was one indivisible act committed by the defendant or one single incident as it was in that case, being the driving of the appellant which caused the death of a person. The court depended upon the case of *R. v. Wells etc. JJ. Exp. Clifford* (1904) 68 J.P. 392 where LORD COLERIDGE stated:

“ Where the offences charged consist of one single act they may be made the subject of a single count. Here the defendant’s act was one and indivisible – the act of driving which might be both reckless and at a speed dangerous to the public.”

In Trinidad in the case of *Simon v. Reid* (1966) 8 W.I.R. 166 the Court of Appeal followed *R. v. Clow* where the respondents had been charged for assembling together and taking part in a public lottery contrary to section 5 of the Gambling and Betting Ordinance (Trinidad) held that two separate offences were implicit in the charge: (1) assembling for the purpose of gambling and (2) gambling, but nevertheless as both offences arose out of a single incident and the respondents had been charged conjunctively and not disjunctively as a result the information was good and free from objection.

In *Ware v. Fox* the Divisional court accepted the authority of *R. v. Clow* but held that the act of the appellant complained of did not constitute a single indivisible act or incident as there was evidence of the premises being used for the purpose of smoking and for the purpose of dealing in cannabis resin.

In the instant appeal I am inclined to the view that the act of the appellant in saying on the 4th of January, 1966, that he was Dr. Doobay and displaying a sign-board as already stated outside the door of his home both on that day and on the subsequent days when the other decoys were attended by him and when the police arrived at his home, was one single, continuous act on his part and therefore on the authority of *R. v. Clow* the two offences of using the name of a physician and using the title of a physician could properly be charged conjunctively. The offences having been charged conjunctively, the prosecution must necessarily be called upon to establish all the particulars of offence and this they have done as the name of a physician merely means the description physician (see the judgment of LAWRENCE J. in *Hunter v. Clare* (1899) 1 Q.B. 635) and title means that the appellant used the prefix ‘doctor’ before his name (see the judgment of BRAMWELL B. in *Ellis v. Kelly* (1860) 6 H. & W. 222).

For a proper appreciation of the second point raised in this appeal, it is necessary to refer to the memorandum of reasons for decision given by the magistrate wherein he states in relation to this offence:

“ As regards the charge of improper use of the name and title of physician, I was quite satisfied that the word ‘physician’ is solely restricted to a duly qualified medical practitioner and ought not to be

used by any other person. Physician is defined in the Concise Oxford Dictionary as 'one legally qualified in medicine as well as surgery'. In conclusion therefore I found the appellant guilty."

Thus it will be seen that the magistrate did not purport to consider specifically whether there was clear proof by the prosecution that the appellant had wilfully and falsely used the name and title of a physician but merely stated that he found the appellant guilty. The question as to whether there was proof of this important element of the offence was considered by the Divisional court in England in the case of *Younghusband v. Luftig* (1949) 2 A.E.R., at page 72, where after an exhaustive review of the authorities, some of which will be considered by me in this judgment, the court decided that a person did not commit an offence under section 40 of the Medical Act 1858 if he honestly believed on reasonable grounds that he was within his rights in describing himself as he did; to commit an offence under the section a person must be shown to have acted wilfully and falsely and it was a question of fact for the Justices to decide whether or not he had done so. In the particular case the Justices had found that the person charged had not so acted and had not implied that he was registered under the Act. There was evidence on which they could properly so find; and therefore the appeal by the prosecution must be dismissed. LORD GODDARD, C.J., who delivered the Judgment of the Court in the course of his judgment pointed out that what was prohibited by the section of the Act is the use of certain titles such as, physician, doctor of medicine, and so forth, which of themselves imply, or are taken to imply, that the person using it is registered, and he disposed of the submission that the title Doctor of Medicine could only be used by a person who was registered, by the obvious answer that if that were so, it would be an offence for a Professor of Medicine from a celebrated University who might not have taken steps to get himself registered to describe himself as a Doctor of Medicine which would, of course, be an absurd situation. The learned Chief Justice was at pains to point out that there may be bogus concerns masquerading as universities who sell bogus degrees and if the only title of a person who described himself as a Doctor of Medicine was a piece of paper as a diploma from one of these concerns the courts would know how to deal with such an imposture.

In *Pedgrift v. Chevallier* (1860) 25 J.P. 181 it was held that the mere fact that a person whose name did not appear in the medical register represented himself to be a surgeon, was not sufficient to warrant a conviction under section 40 of the Act. In this case the evidence was scanty and ERLE, C.J. stated that there was nothing in the case to show that the appellant was not a surgeon in practice before the Act was passed, and there was nothing to show that he did not possess a diploma conferred by one of the various learned bodies entitled to confer it and there was nothing to show that the appellant was not recognised by law as a surgeon, so far as a person might be entitled to practise the lawful trade of a surgeon. The only facts were that the appellant called himself a surgeon and was not registered. The learned

## DOOBAY v. ALEXANDER (NO. 1)

Chief Justice had no hesitation in saying that it could not be maintained that every person who called himself a surgeon without being registered was liable to be convicted.

In *Ladd v. Gould* (1860) 1 L.T. 325 the defendant called himself a surgeon and mechanical dentist and the court held that it was for the Justices to decide as a question of fact whether the use of the word surgeon coupled with the words mechanical dentist was an offence against the Statute and COCKBURN, C J. said:

“ I do not think there was any falsehood or any intention to deceive which was necessary in order to bring the case within the Act, that was also the opinion of the magistrates, though they might have come to a different conclusion.”

This case was followed by *Ellis v. Kelly* (1860) 25 J.P. 279, where the respondent was a member of the Royal College of Physicians and a Licentiate of the Society of Apothecaries and possessed of a German medical diploma. He called himself Dr. Kelly and it was urged that that was tantamount to using the title of Doctor of Medicine and therefore was an offence under the Act as he was not registered as such, but the court of Exchequer held that no offence had been committed by him because he believed that he was entitled to use the title of Doctor and the Justices were justified in finding that he had not done so wilfully and falsely. POLLOCK, C.B. pointed out that the Act was passed for the purpose of protecting the public against the impositions of persons pretending to possess qualifications which they do not, and the question is therefore whether the defendant did wilfully and falsely use the name of Doctor of Medicine. He had a diploma from a foreign university, he was qualified and registered as a member of the College of Surgeons and there was no ground for saying that he falsely assumed to be a Doctor of Medicine nor was there any evidence that he wilfully and falsely represented himself as a physician.

In *Hunter v. Clare* (1899) 1 Q.B. pg. 635, a licentiate of the Society of Apothecaries duly registered described himself as a physician and surgeon and was prosecuted for wilfully and falsely pretending to be and taking and using the name and title of physician contrary to section 40 of the Act of 1858. The court quashed the conviction and LAWRENCE, J. stated:

“ The appellant having a certificate entitling him to practise both medicine and surgery in effect said ‘I have a right to say that I am a doctor in the ordinary sense of the word, that is to say I am a physician and I can practise medicine’.”

The learned Judge then made it quite clear that the appellant was wrong in so thinking but that he was not doing that wilfully and falsely but was doing it in the assertion of a right for which there was no legal foundation. CHANNELL, J. expressed the view that although the appellant incorrectly described himself as a physician yet he did not do so wilfully and falsely by reason of the decision in *Ellis v. Kelly* which differed from the decision

in *Andrews v. Styrap* (1872) 26 L.T. 704 where the conviction of the appellant was upheld, in that in the former case the qualification which was put forward by the appellant was a genuine one but in the latter a bogus one. In *Whitwell v. Shakesby* (1932) 96 J.P. 307, an osteopath, not registered and not legally qualified to be registered, had a plate outside his house with his name and the words "Bonesetter, Osteopathic Physician and Surgeon" it was held he had committed an offence under this section of the Act, and LORD HEWART, C.J. observed that the words used on the plate appeared to convey that the respondent had qualifications which, in fact, he had not and which the Medical Act 1858 prevented him from assuming, without the lawful right so to do.

From these cases, LORD GODDARD, C J. stated in his judgment in *Younghusband v. Luftig* it would be seen that there was an unbroken line of authority from 1860 to 1899 that to commit an offence a defendant must have acted wilfully and falsely and that it is for the Justices to decide whether he has done so, and also that he does not commit an offence if he honestly believes that he was within his rights in describing himself as he did. He must, of course, have a reasonable ground for his belief. A person who has passed no examination and has received no qualification from a genuine teaching body cannot adopt one of the titles mentioned in section 40 of the Act 1858 and be heard to say that he believed he had such skill as would entitle him so to describe himself. The learned Chief Justice then continued to lay down perhaps the most important principle in cases of this kind when he stated:

“ We can sum up this part of the case by saying that there must be *mens rea* and the presence or absence of that state of mind must be tested on ordinary principles and in the light of common sense. *Actus non facit reum, nisi mens sit rea* is a cardinal doctrine of the criminal law.”

Two years later, LORD GODDARD was to refer to this dictum in *Wilson v. Inyang* (1951) 2 A.E.R. at 237 where the respondent, an African, who had lived in England for two years, published an advertisement describing himself as a Naturopath Physician, M.D., M.R.D.P., and gave his address. He was not a registered medical practitioner but had attended a course of instruction at a clinic of drugless therapy and had obtained a diploma and a certificate of membership of the British Guild of Drugless Practitioners. A charge that he wilfully and falsely used the title or description of physician contrary to section 40 of the Medical Act, 1858 was dismissed by the magistrate on the ground that he genuinely believed that he was entitled so to describe himself, although, in similar circumstances, no person brought up and educated in England could reasonably have held such a belief. On appeal by the prosecution, the Divisional court headed by LORD GODDARD, C.J. upheld the magistrate's decision but stated that they did not profess to understand the reasoning of the magistrate but as the magistrate saw the respondent and heard him cross-examined it would be

## DOOBAY v. ALEXANDER (NO. 1)

impossible for the court to say that there was no evidence on which he could come to that conclusion of fact. LORD GODDARD stressed that the important aspect of the matter whether the defendant in these cases acted wilfully and falsely is the question whether the defendant was acting in good faith in describing himself as he did because he had an honest belief that he was entitled to do so and in order to do this, he must, of course, have a reasonable ground for his belief. LORD GODDARD made two important observations on the function of the magistrate in considering this aspect of the case when he stated that the magistrate must apply ordinary principles and test the matter in the light of common sense, and that, generally speaking, applying ordinary principles and in the light of common sense, he would say that if a man had no reasonable ground for believing what he said he believed he was not acting honestly. Later on in his judgment, after referring to the passage quoted above from *Younghusband v. Luftig*, he stated that the question for the magistrate was whether the defendant acted honestly, by saying that he could not have acted honestly if he had no reasonable ground. The learned Chief Justice continued:

“What we were pointing out was that, in considering whether he had acted honestly, the magistrate ought to take into account the presence or absence of reasonable ground of belief. In the present case, it is obvious that the magistrate did take that into account and he has given us his reasons for coming to the conclusion that this man did act honestly. Whether we should have come to that conclusion is neither here nor there, because we cannot disturb it if there was evidence on which he could arrive at that conclusion. He saw the respondent and heard his evidence and formed an opinion as to his credibility and honesty. Having found that, I do not think the court can interfere because to do so would be ignoring the true ratio of the judgment in *Younghusband v. Luftig* which is that whether a person acted honestly is a question of fact for the magistrate and whether he acted reasonably or not is not the deciding feature in this case.”

It is clear from the judgment of LORD GODDARD, that the magistrate must address his mind to these principles involved in deciding as a question of fact whether the defendant wilfully and falsely did use the name and title of a physician, and in so doing he must consider whether the defendant acted honestly and whether he had reasonable ground for so acting. That he did so wilfully is obvious as he intended on purpose to do so (see the judgment of MARTIN B. in *Andrews v. Styrap*) but the question remains whether he did so falsely. In the instant appeal, the appellant having stated that he was a Doctor of Homoeopathy and having produced a diploma degree in Homoeopathy from St. Andrews College, London, and having stated from the dock that he did not use the name and title of a physician wilfully and falsely, it was the duty of the magistrate when considering whether there was proof by the prosecution of the important element of the charge that the appellant used the name and title of physician

wilfully and falsely, to show in the memorandum of reasons that he had addressed his mind to the question whether the appellant had acted honestly under a genuine belief that he was entitled to describe himself as a physician and whether he had reasonable grounds for that belief.

The magistrate not having done so this appeal must succeed. I would add that, under the modern concept of discharging the evidential burden, the appellant having introduced the evidence of holding a diploma degree in homoeopathy from a college, the final or persuasive burden lay on the prosecution to prove the *mens rea* or the intention to deceive in the appellant, which could have been done by showing that the diploma was a bogus one and if, indeed, the diploma was a genuine one by showing there was other evidence upon which the magistrate could have found the intention to deceive on the part of the appellant. I am of the view that there was evidence on the record upon which the magistrate could have found the *mens rea* or the intention to deceive established in the appellant, namely, the omission in the diploma of the word physician or doctor of medicine and the use of the letters M.D.I.H., F.S.A.U.I., on the sign-board all of which were calculated to deceive the public and which do not appear in the diploma. The magistrate, however, has not shown that he addressed his mind to this question.

Perhaps at this stage I should bring to the attention of the appellant the final Words of LORD GODDARD, C.J., in *Wilson v. Inyang* wherein he stated that the only satisfactory part of the case was that he hoped the appellant would understand now this matter has been before the Court and it has been explained to him what are the requirements of the law, that he will never be able to say that he honestly believes he is entitled to use the title of physician because he is holding what he is pleased to call the diploma of a body that is not recognised, if he does so he will be prosecuted.

In the result the appeal is allowed and the conviction and sentence set aside with costs to the appellant fixed at \$34.24.

CRANE, J:

The particulars of the charge read as follows:

“ Joseph Chateau Doobay, between Tuesday 4th and Thursday 6th January, 1966 at Georgetown, in the Georgetown Judicial District, did wilfully and falsely use the name and title of a physician implying that he was recognised by law as a physician.”

BOLLERS C.J. has dealt somewhat exhaustively with the first point taken on behalf of the defendant, viz., that the charge is bad for duplicity. I am in entire agreement with the view he expressed — that the charge is properly laid and for the reasons he has given — that though the use of the title with the required intents are two separate and distinct offences rolled up together in the information as one, it is quite permissible for the prosecution to take that course since the public display by the defendant of his signboard constituted one single continuous act on his part, albeit the

## DOOBAY v. ALEXANDER (NO. 1)

particulars of offence allege they were acts which continued over a period of three days. I have therefore no further contribution to make in that respect, but will confine myself to a consideration of *mens rea* which the authorities clearly indicate is an absolute requirement in cases of this nature.

The second ground of appeal is that the learned magistrate did not direct his mind to the mental element in the case. I believe that though he may be said to have failed to do so adequately he was not wholly delinquent in this respect. This being the only respect in which I differ from BOLLERS, C.J., it will be necessary for me to consider some relevant particulars of the charge which I think support my view.

The leading cases of *Younghusband v. Luftig* (1949) All E.R. 72, and *Wilson v. Inyang* (1951), 2 All E.R. 237, and many more, all show that a claim of right founded on an honest belief in the defendant that he had the right to describe himself as “M.D.I.H., F.S.A.U.I, PHYSICIAN”, furnishes as complete an answer to a charge under s. 40 of the Medical Act 1958 (U.K.) (which is in substance our s. 36), as the defence of a *bona fide* claim of right would on a charge of stealing, but it is necessary that before this defence is accepted the defendant also shows that he had an honest belief he was entitled to do as he did — see *R. v. Skivington* (1967) 1 A.E.R., 483, 485.

In both these offences therefore, the approach in determining the mental elements is identical — in larceny, was there a *bona fide* taking with an intent to defraud?; in false pretences, was the taking, using, or obtaining done *bona fide* with an intent to defraud or deceive? In both a defence of an honest belief founded on reasonable grounds will succeed. I have mentioned the offence of false pretences because it is pertinent in the charge under appeal since s. 36 Cap. 134 is based on s. 40 (U.K.) aforesaid, on an evolution on the analogy of false pretences. In this regard, see the excerpt from the judgment of PEARSON, J. in *Davies v. Makuna* (1885) 29 Ch.D. 596 at p. 601 quoted in *Luftig's* case at p. 78 below; and the reference to COLLINS, J. at p. 393 in *R. v. Lewis (Stipendiary Magistrate) & Frickhart* (1896) 60 J.P. 392 — “that there was no proof before the magistrate of a false pretence”.

The name physician is not defined in Cap. 134, but it is in the OXFORD CONCISE DICTIONARY as “one legally qualified in medicine as well as surgery”. It is significant that this very phraseology is employed in s. 24 of Cap. 134 which, it is submitted, shows that the legislature thereby intended that the dictionary meaning should be included within the phrase “medical practitioners” in sec. 25 of that ordinance. A physician therefore, is one of the species of the genus medical practitioners.

S. 24 aforesaid, empowers the Secretary of the Medical Board established under the ordinance, to keep a register in prescribed form “of all persons qualified to practise medicine or surgery in the Colony,” that is to say, to keep a register in which physicians are included.

Now the question who exactly are those persons recognised by law as physicians is pertinent. To my mind the answer to it is found clearly stated in s. 25 of the ordinance which reads:

“The following persons and no others shall be entitled to be registered as medical practitioners under this ordinance, that is to say —

- (a) everyone who at the commencement of this ordinance is duly registered as entitled to practise medicine and surgery in the Colony under the provisions of the Medical Ordinance, 1886; and
- (b) everyone who is registered or is entitled to be registered under the Medical Acts of the Imperial Parliament provided he fulfils the conditions hereinafter specified.”

Our law therefore recognises as physicians only such persons who have been registered as entitled to practise before the 5th July, 1924, the date when Cap. 134 came into operation, and such persons who have registered or are entitled to register under the Medical Acts of the Imperial Parliament.

It will be instructive here to note the interrelation between the above-mentioned sections and s. 36 of the ordinance, and the apportionment of the onus of proof in cases of this kind. By adducing evidence of the fact that the defendant has not registered, what the prosecution are in effect saying is: ‘We say you are not registered to practise as a physician in this country; we say that you are so holding yourself out, and that you are doing so wilfully and falsely because you have publicly displayed on your premises a signboard bearing the name and title of yourself as a physician; we say that it is a reasonable *prima facie* inference that why you have not registered is because you are not entitled in law so to register, and because the law does not recognise you as a physician.’

It is submitted that the *onus* of proof in the instant case clearly falls within the principle applied by this court in *Alexander v. Chalmers* (1956) L.R.B.G. 146, at p. 153, where it is stated:

“Where, however, the act is one which is lawful it is done in a particular manner without lawful authority or excuse, proof by the prosecution that the act was done in that manner is not sufficient *prima facie* evidence to sustain a conviction for doing the act in that manner without lawful authority or excuse. Some *prima facie* evidence must be given by the prosecution from which it might be inferred that the defendant did not have lawful authority or excuse for doing the act in the particular manner”.

The act of using the name and title of a physician is a perfectly lawful one unless it is advertised to the public without being registered or being entitled to be registered.

## DOOBAY v. ALEXANDER (NO. 1)

The prosecution have sought to prove by calling evidence from the Medical Board that the defendant is not recognised by law as a physician because his name is not entered on the register; but this can never be conclusive evidence that he is not so recognised, since the law also takes cognizance as physicians those qualified medical practitioners who are entitled to register under the Medical Acts of the United Kingdom Parliament, though they may not have registered thereunder or cared to register, in just the same way as it takes cognizance of the right of duly qualified medical practitioners to use the title “doctor of medicine,” though they may not have registered or cared to register. See per LORD GODDARD, C.J. in *Luftig’s* case above, at p. 76.

What the prosecution have in effect done is to adduce evidence showing that the defendant is holding out himself as a registered medical practitioner by publicly displaying his signboard with the name “physician” and title “doctor” when indeed he is not registered; this will be some *prima facie* evidence though slight, that he is not recognised by law as a physician, but no more than that, leaving the evidential burden of proving his qualification or entitlement to register to be discharged by the defendant on a balance of probabilities, since it is a matter peculiarly within his own knowledge — see s. 8 of the Summary Jurisdiction (Procedure) Ordinance Cap. 15, applied in *Long v. Bissondial* (1922) L.R.B.G. 151.

In seeking to discharge this evidential burden, the certificate produced by the defendant in the magistrate’s court shows that he is not a physician within the meaning of s. 25 above; it certainly does not entitle him to use that name nor to register himself as a medical practitioner of any species; it merely purports to confer upon him, by St. Andrews College, Tottenham, London, a diploma of the merit in homoeopathy. There is no mention of the names “physician” or “medical practitioner” in the certificate, or his entitlement to the title “Dr.” or to any one of the letters written on his signboard or letterheads. But it is submitted on his behalf that the paper confers on him the right to be called a homoeopathic physician, and there is the admission by Dr. Sankar who gave expert evidence for the prosecution that homoeopathic physicians are registered in some countries in the world. But while this may be so, and whatever that term may mean in countries abroad, we must be guided solely by our ordinance with respect to what is registrable and what is not registrable as a qualification to practise medicine in Guyana.

Having decided that this particular has been properly established, the next point for consideration is whether the use of the name and title which appeared on his signboard and publicly displayed on his premises thus:

“Dr. J.C. Doobay, M.D.I.H., F.S.A.U.I. Physician”.

*wilfully* and *falsely* implied that which the law does not recognise him to be, namely, a physician.

Speaking on this aspect of s. 40 of the Medical Act 1858 (U.K.), LORD GODDARD, C.J. said in *Luftig’s* case at p. 76, “What is prohibited

by s. 40 of the Act is the use of certain titles, such as physicians, doctor of medicine and so forth, which of themselves imply, or are to be taken to imply, that the person using it is registered, or the use of any name, title, addition, or description which would give rise to a similar implication.”

I have already shown that our law recognises as physicians only those already registered locally before 1924 and those who are registered or so entitled to be under Imperial Medical legislation. Thus, in keeping with the mischief envisaged by the learned Chief Justice, if a person publicly displays a sign-board to the effect that he is a physician and doctor of medicine by implication he holds himself out as a person who is registered under the ordinance because those persons whom the law recognises as physicians are entitled so to be registered.

However, the result of all the cases without a single exception since *Ellis v. Kelly* (1960) 3 L.T. 331 shows that it is a question of fact for the magistrate who heard and saw the witnesses, noted their demeanour and their disposition to speak the truth, to decide whether he is satisfied that the defendant acted in the honest belief that he was entitled to describe himself as he did. In his memorandum of reasons all the learned magistrate said on this charge was:

“As regards the charge of improper use of the name and title of physician, I was quite satisfied that the word ‘physician’ is solely restricted to a duly qualified medical practitioner and ought not to be used by any other person. ‘Physician’ is defined in the Concise Oxford Dictionary as ‘one legally qualified in medicine as well as surgery’. In conclusion, therefore, I find the appellant guilty.”

It is contended that it is clear from the above that the magistrate did not direct his mind to the importance of the word ‘falsely’ in the charge because he has in fact written nothing on it. I believe however, that he must have so directed his mind, although very perfunctorily. I feel sure he could not have convicted the defendant unless he so found. To my mind he must have done so, because he in effect has said, and quite rightly too, as I have shown, that no one but a person who is qualified to practise medicine or surgery can make use of the name ‘physician’. Therefore, both reason and commonsense would suggest that he must have considered at the same time that if anyone who made use of that name when not so qualified, (and indeed the defendant was not qualified), would be doing so falsely. The magistrate’s reasoning is clearly syllogistic, but the minor premise can readily be supplied.

But it is evident that where the magistrate went wrong was in his reasons for decision, by his omission to consider the word in juxtaposition to falsely – namely, ‘wilfully’. It is most important to observe that both these words are joined by the copulative “and,” and they must of necessity be considered together. ‘Wilfully’ imports *mens rea* in its graver form i.e., that the defendant *knew* of the falsity in his use of the name and title and

## DOOBAY v. ALEXANDER (NO. 1)

deliberately persisted in the use of it. In *R. v. Senior* (1899) 1 Q.B.D. 283 at p. 290, LORD RUSSELL OF KILLOWEN, C.J., analysed this state of mind when he defined it in terms of intentional wrong-doing thus:

“ ‘Wilfully’ means that the act is done deliberately and intentionally not by accident or inadvertence, but so that the mind of the person who does the act goes with it.”

On the other hand, the word ‘falsely’ likewise imports *mens rea*, but whereas, as is seen from Lord Russell’s analysis in the quotation above, ‘wilfully’ as a state of mind unequivocally excludes inadvertence, the same cannot be said with respect to ‘falsely’. A man may make a false statement either intentionally or unintentionally. When he does so intentionally, he is said to do so wilfully; when he does so unintentionally or inadvertently, he is said to do so carelessly or negligently. His *mens rea* assumes the less grave form of mere carelessness as opposed to wilful wrong-doing. In such a case his negligent mind is not the criminal mind and is not amenable to the criminal law. The law only holds him so amenable if he deliberately or intentionally makes a false statement with an intent either to defraud or deceive. This analysis is enough to show that the word ‘falsely’ is equivocal in content in that it is capable of conveying that the wrongdoer may be possessed of either one of two states of mind. It is this duplicity in content of the epithet ‘falsely,’ and the likelihood of equivocation in its use that the law recognises, when it stipulates that not only the use of the name and title of a physician must be proved to be false, but also that the defendant intentionally so used the name and title. This the law ensures by preceding falsely with the word ‘wilfully’ which, I have shown, admits of no ambiguity whatever in the criminal law.

Whilst I think it can be confidently implied from his reasons for decision that he must have taken the ‘falsely’ into consideration before he convicted the defendant, it cannot be implied from his finding of “guilty” that the magistrate had so taken the word ‘wilfully’ in reaching that conclusion. It is well to remark that magistrates should always bear in mind that whenever any epithets like knowingly, wilfully, falsely, or fraudulently, all of which import the mental element in crime, are stated in a section under consideration they must receive express attention; they must be specifically referred to by the magistrate who must relate them in his reasons to the facts of the case in hand, indicating quite clearly therein, whether *mens rea* has been established or not. Some offences of course, particularly those under statutory regulations, do not require *mens rea* as an ingredient of the charge; but that is another matter.

It is clear to me from the cases of *Makuna* and *Frickhart*, above, also *Ladd v. Gould* (1860) 1 L.T. 325, per COCKBURN, C.J., at p. 326, which have evolved on the analogy of false pretences, that the words ‘wilfully’ and ‘falsely’ in s. 36 posit an intention to deceive, that is to say, “to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false.” In the instant case the

suggestion of the prosecution is clear: it is, that by making use of the name "physician" and the title "Dr." on his publicly displayed signboard, the defendant thereby has falsely held himself out to the public that he is a person whom the law recognises as a physician; and that he intentionally did so to deceive members of the public.

But I cannot help thinking that the magistrate after subjecting the word 'falsely' to a mental analysis, and after satisfying himself that only a qualified medical man can properly use the name 'physician,' he then closed his eyes and convicted the defendant without considering whether the finding of a false use of the name and title which he made, and which I opine he properly made, was a *wilful* one. If indeed the magistrate made that finding of wilfulness, he has not recorded it; it is absolutely essential that he records such a finding.

What then is the result? – it is that the appeal must be allowed because all the cases, as BOLLERS, C.J., has shown, are in unison that it is for a magistrate to say whether he believes or does not believe a defendant is acting honestly in describing himself as he did, and whether he has reasonable grounds for the belief he entertains which caused him so to act. Wilful wrong-doing and motivation from honest belief are incompatible mental elements; therefore the magistrate must direct his mind specifically to them. The Full Court on Appeal cannot make that finding for the magistrate, I am afraid, principally because it is one on which he himself has to assess the credibility of witnesses having seen and heard them. It is only when he has made his finding can a Court of Appeal say whether there is material on which he is justified in the findings as he did.

It is a pity, in what seems to me to be a very clear case, that there has been a magisterial lapse in writing reasons for decision. Here is the case of a man who proffers in evidence a certificate purporting to come from some College in London conferring on him the degree of merit in homoeopathy. That certificate does not give him the right to use the letters "M.D."; yet those letters appear in the first set of letters on his signboard and letterheads; it does not give him the right to use the name "physician," yet this name appears on his signboard. He says he is a homoeopathic physician and is entitled to use the title of "Dr." in front of his name. To me he should consider himself lucky on this charge, and my advice to him is the sooner he erases the offending self descriptions from his sign the better for him.

For the above reasons, I agree that the appeal must be allowed, the conviction quashed and sentence set aside.

*Appeal allowed — Conviction and sentence set aside.*

MUSTAPHA KHAN v. BOOKERS DEMERARA SUGAR  
ESTATES LIMITED

[Court of Appeal (Stoby, C., Luckhoo and Persaud, JJ. A.)  
January 17, 18, 1967.]

*Statute – Interpretation – Sugar Factory – Whether payments received by regular hourly-paid worker doing additional job work on Sundays cleaning boilers should have been doubled – Factories Ordinance, Cap. 115, s. 29 (now Factories Act, Cap. 95:02, s. 24).*

The appellant was employed at Rose Hall Estate, Berbice, which was owned by the respondent company. In addition to a regular type of work in the factory for which he was paid hourly, he and others cleaned boilers on Sundays which was 'job' work, i.e., for a fixed price. In March, 1960, the company brought into operation an extra boiler which made it possible to clean one boiler during the week. Since payment for boiler cleaning had been fixed on the assumption that it could be done only on Sundays, the Factory Manager paid a little over 50% of the Sunday payment to those who performed that work on a week-day. The Trade Union, of which the appellant was a member, objected to the reduction in payment for cleaning on weekdays and the Factory Manager agreed to pay the same rate for both Sunday and week-day cleaning. Shortly after, however, the company decided not to have boilers cleaned during the week and reverted to cleaning on Sundays only. About two years afterwards, the appellant claimed \$1,287.50 for work done and services rendered including boilers on Sundays on the ground that s.29 of the Factories Ordinance, Cap. 115, provided that certain payments should have been doubled.

**HELD** – (i) the correct interpretation of s. 29(4) of the Ordinance is that the rate at which a workman would be paid but for the section is the agreed and settled rate of pay for normal working days in any week and do not include Sundays; (ii) the time when s. 29 came into force, i.e., June 1, 1953, did not have the effect of automatically doubling pay for Sunday work but to provide double pay for Sunday work as compared with week-day work; (iii) there was an agreed fixed rate between the appellant and the company for a special type of work to be done on a Sunday and such a contract of employment was not caught by the Ordinance since the rate of pay at which a person employed in a factory is paid as contemplated in Part VI of the Ordinance, of which s. 29 is part, must, of necessity, be related to the

normal rate at which an employee is paid for work he usually performs on days other than those mentioned in paras, (b) and (c) of s. 29 (1), i.e., on week-days only; (iv) a workman cannot double the amount in a special contractual arrangement for Sunday work by invoking the aid of the Ordinance and if that special contractual arrangement for a Sunday is agreed to be paid should similar work be done on a week-day, that Sunday rate does not thereby become the normal basic rate because it is not work regularly performed on a week-day.

*Appeal dismissed.*

*Cases referred to:*

- (1) *Parkinson & Co. Ltd. v. Scholsberg & Peters* (1961) 3 W.I.R. 413.

[*Editorial Note:*— This case is reported in (1967) 9 W.I.R. 496 sub nom. *Khan v. Bookers, Demerara Sugar Terminals Limited.*]

*S. Mohabir* for appellant.

*G. M. Farnum, Q.C.* for respondents.

STOBY, C. — From August 1944 until the present time the appellant has been employed at a sugar factory owned by the respondents at Rose Hall in the County of Berbice.

From 1954 the appellant did a type of work in the factory for which he was paid hourly; in addition to this regular work he and others cleaned the factory boilers on Sunday. This latter type of work was not paid for by the hour, but was for a fixed price, as it was performed on Sundays only.

During March 1960, the respondent company brought into operation an extra boiler and as a result the cleaning of one boiler became possible during the week. Since payment for boiler cleaning had been fixed on the assumption that it could only be done on a Sunday, the company's factory manager paid a little over 50% of the Sunday payment to those who performed that work on a week-day. Boiler cleaning has been described as "job work". It is usually done by five persons who would be paid a proportionate share of an amount fixed for the particular task without reference to the period of time taken in its performance. The trade Union of which the appellant was a member, objected to the reduction in payment if the boilers were cleaned on a week-day, and made representations to the management when on April 28, 1960, the Field Secretary of the Union, David Rayward Persaud, met the Factory Manager of the respondent company, Hugh Slandley Howard; Persaud pointed out to Howard that the question was under negotiation with the Sugar Producers' Association, and that it would be tantamount to unfair labour practice if the management then continued to reduce the rate which workers had been getting. Howard in those circumstances agreed that if a boiler was cleaned on a week-day, payment would be the same as if cleaned on a Sunday; but very shortly after this agreement, that is to say, on May 6,

## KHAN v. B.S.E. LTD.

1960, the company decided not to have boilers cleaned during the week, and reverted to cleaning on Sundays.

About two years afterwards the appellant claimed from the company \$1,287.70 for work done and services rendered in cleaning boilers on Sundays on the ground that under the law certain payments which he received should have been doubled.

The relevant law on which the appellant founded his case in the court below and on which he relies on appeal is s. 29 of the Factories Ordinance, Cap. 115. The parts of the section germane to this appeal are as follows:—

- “(1) The Governor-in-Council may make regulations prescribing the rate at which a person who is employed in a factory, or in any occupation in a factory, shall be paid –
- (a) in respect of work on any day in excess of eight hours or in respect of work in any week in excess of the normal hours of work prescribed under paragraph (a) of sub-section (1) of section 26 of this ordinance;
  - (b) in respect of work on any public holiday, other than as specified in paragraph (c) of this sub-section, within the meaning of the Public Holidays Ordinance;
  - (c) in respect of work on Sundays, Christmas Day, the day after Christmas Day, if Christmas falls on a Sunday, the day commonly known as Boxing Day, the first week-day of January, Good Friday, Easter Monday or Whit-Monday.
- (4) Where, in relation to any factory or to any occupation in a factory the appropriate rate under paragraphs (a), (b) or (c) of sub-section (1) of this section has not been fixed in regulations made under this section, such rate shall be, in the case of work on any day specified in paragraph (c) of sub-section (1) of this section twice the rate at which the person employed would but for this section be paid, and, in the case of any other work, one and a half times the rate at which the person employed would but for this section be paid.”

Counsel’s submission is two-fold. He contends (a) that the basic rate of pay for boiler cleaner was the rate paid on Sundays; and (b) that since the Factories Ordinance came into force in 1947 and s. 29 was not enacted until June 1, 1953, then whatever wage was paid from 1947 to that date for Sunday work was the basic wage and should be doubled after the first of June 1953.

It will be convenient to deal with the second submission first. S. 29 of the ordinance empowers the Governor-in-Council to make regulations prescribing the number of hours during which a person may normally be employed in a factory on any day or in any week. When that background is appreciated the section presents no difficulty of construction. Under it the

intention was to make certain regulations prescribing a rate of pay for factory workers. The rate would be for weekly, daily or hourly work; a rate could be prescribed for certain holidays and another rate could be fixed for Sundays and certain other holidays. Modern trade union practice almost serves to make regulations under this section unnecessary. Direct bargaining between employer and trade union is advantageous to a union in that employees are obligated to the union for benefits achieved whereas the fixing of wages by a government agency minimises the part played by the union. S. 29(4) of the ordinance recognised the possibility of wages rates not being fixed by regulation and provided for this eventuality by enacting that work done on a Sunday and certain holidays should be paid for at twice the rate at which the workman would be paid but for the section. Clearly the rate at which the workman would be paid but for the section is the agreed and settled rate of pay for week-days. If this is the correct interpretation of the section, as I think it is, then the time when the ordinance came into force cannot have the effect of automatically doubling Sunday pay. What the ordinance did was to provide double pay for Sunday work as compared with week-day work. If a workman was receiving X dollars for working on Sunday before 1947, it does not mean he must get 2X dollars for working on Sunday after 1947 unless X dollars was being paid and accepted by him as the ordinary normal rate of pay for the same work during the week.

The other submission recognises the fact that s. 29 is really concerned with payment of extra wages for working overtime, that is to say, for more than eight hours per day, or on holidays. Counsel for the appellant argues that it having been agreed by the parties that the appellant would be paid the Sunday wage for the same type of work when performed on week-days, that wage then assumes the quality of the normal rate of pay, and thereafter double that rate is payable in respect of work done on a Sunday. Counsel for the respondents stresses that the evidence is overwhelming that cleaning boilers is limited to Sundays and hence there is no basic or week-day wage to double.

The evidence requires examination. At the very outset of the evidence the appellant said: "In 1960 I did work of packing megasse and on Sundays I would clean boilers". He went on to explain that notices are posted up by the Factory Manager which indicate when workmen are required for cleaning boilers. A notice was tendered in evidence, the caption of which is List of Factory Employees required to work on Sunday 3.10.65. He also said that the same rate of pay was paid even if boiler cleaning took place on a day other than Sunday. This evidence was more fully explained by Persaud, the President of the Trades Union Council of Guyana and Howard. Persaud said that workers had reported that their pay had been reduced to a little over 50% of Sunday pay when cleaning boilers on week-days. He said he reported this to management on the ground that this was an unfair labour practice since the matter was under negotiation. After negotiation with Howard the latter agreed to pay the same rate for week-days as was paid for Sundays. Howard accepted that after negotiations he agreed to the terms related by

## KHAN v. B.S.E. LTD.

Persaud but thereafter boiler cleaning was limited to Sundays. An assessment of the evidence makes it indisputable that the wage structure at the respondents' factory was payment of a special sum for boiler cleaning which was to be performed on Sundays only; for a short time in 1960 – March and April – boiler cleaning was permitted on week-days at a little over 50% of the Sunday wage; as a result of protests the management agreed to pay the Sunday rates for boiler cleaning if done on week-days but almost immediately afterwards reverted to the system of limiting cleaning to Sundays.

On the evidence as a whole, I find that the respondent company and the appellant agreed on a fixed rate of pay for a special type of work to be done on a Sunday, and it does not support the argument contended for by the appellant. Such a contract of employment is not caught by the ordinance for, in my opinion, the rate of pay at which a person employed in a factory is paid as contemplated by the scheme of the ordinance – and in particular Part VI of which s. 29 is part – must of a necessity be related to the normal rate at which an employee is paid for work he normally performs on days other than those mentioned in paras, (b) and (c) of that section. The expression “on any day” in para, (a) of the same sub-section must be construed to mean any day other than those set out in paras, (b) and (c), and these can only be week-days, that is to say, the normal working days in any week, and do not include Sundays.

To put it in another way, s. 29(4) presupposes that there is a rate of pay in existence which is strictly applicable to work performed on days other than those mentioned in s. 29(1)(c); to fulfil this requirement the workman must have been engaged in work of that kind during the week to establish this rate of pay so that it becomes fixed, settled or agreed upon in a manner which could be ascertained; then, as such, it could be properly used as a yardstick for giving effect to the Legislature's intention of benefiting the workman in the way provided if subsequently he is called upon to do similar work on one of the special occasions mentioned in the sub-section.

A workman cannot double the amount in a special contractual arrangement for Sunday work by invoking the aid of the ordinance [*See Parkinson & Co. v. Scholsberg* (1961) 3 W.I.R. 413], and if that special contractual arrangement for a Sunday is agreed to be paid should similar work be done on a week-day that Sunday rate does not thereby become the normal basic rate because it is not work regularly performed on a week-day.

Therefore, there does not truly exist in this case any real basic weekday rate for the work in question; there was in effect merely a transitory adoption for no more than one week of what had previously prevailed on a Sunday which occurred under special circumstances.

There is a third ground on which the appellant's claim fails. It was faintly mentioned by counsel for the respondents but ignored by appellant's counsel. The appellant in order to succeed had to prove:—

- (a) the agreed week-day rate;

- (b) the Sundays on which he worked in relation to the agreed weekday rate.

No attempt was made to prove either requirement. Indeed, from 1958 to March 1960, no work of cleaning boilers was done on week-days; in March and April 1960 when cleaning was done on week-days the amount paid was less than on Sundays and after the agreement to increase the pay, no work was done on week-days. The specific Sundays worked were never proved and there was no evidence on which the judge could have found for the appellant. For these reasons the appeal is dismissed. The appellant must pay the costs here and in the court below.

LUCKHOO, J. A.      I agree.

PERSAUD, J. A.      I agree.

*Appeal dismissed.*

Solicitors:

*D. Dial* for the appellants

*Miss D. P. Bernard* for the respondents.

## THE QUEEN v. HAROLD NARINE

[Court of Appeal (Stoby, C., Luckhoo and Cummings, JJ.A)  
April 14, 1967.]

*Criminal Law — Evidence — Alibi — Whether set pattern or stereotyped language to be used by trial Judge in summing-up — Onus.*

The appellant was charged for breaking and entering the dwelling house of S. R. with intent to steal and for robbery under arms committed in the said house. He lived about six rods away and was known for some years to S. R. and his family. The defence was an “alibi”, to the effect that he was far away from the scene on the night in question and he called a witness to support that evidence. He was convicted and his sole ground of appeal was that the trial Judge did not properly put his defence to the jury in that he did not explain to the jury, as he should have done, the proper way in which an alibi is to be considered.

**HELD** — although the trial Judge did not tell the jury that not only is the onus of disproving an alibi always on the prosecution but also that even if they rejected or did not believe the alibi it was their duty to go back to the case for the prosecution to see whether all the ingredients of the charge had been established before they could convict, nevertheless, when all the relevant passages in the summing-up were looked at as a whole, it was clear that the trial Judge was telling the jury in no uncertain terms that, alibi or no alibi, whether they disbelieved the alibi or not, the onus was on the Crown to prove the case against the appellant.

Dictum of Gomes, C.J., in *R v. Maraj et al* (1962) 4 W.I.R. 227 at pp. 278-79 approved and recommended as a model for all trial Judges to follow when dealing with an alibi.

*Appeal dismissed — Conviction and sentence affirmed.*

*Cases referred to:*

(1) *R v. Maraj et al* (1962) 4 W.I.R. 277.

*R. Hanoman* for appellant.

*E. A. Romao, Director of Public Prosecutions*, for respondent.

STOBY, C. At the appellant’s trial for breaking and entering the dwelling-house of Sumair Ramnarine with intent to steal, and for robbery under arms on the 1st day of March, 1965, in connection with an offence which took place at Sumair Ramnarine’s dwelling-house, the prosecution led evidence to show that the appellant had broken and entered the dwelling house and stolen a quantity of articles from that house, and had assaulted severely several people in the house.

The appellant’s defence was that he was not the person concerned with the incidents. Most of the witnesses for the Crown were members of the dwelling-house – father, mother, daughter. Although independent evidence was led, that independent evidence was offered in order to establish that the

incident of breaking and entering the dwelling-house did take place, and a doctor was called to show that on the night in question violence was committed on the members of that dwelling-house.

The appellant's defence was an alibi. He gave evidence from the dock in which he said that he was far away from the scene on the night in question, and he called a witness to support that evidence. He was convicted and his sole ground of appeal is, that the trial judge did not properly put his defence to the jury in that he did not explain to the jury, as he should have done, the way in which an alibi is to be considered.

Mr. Hanoman, for the appellant, referred us to the case of *R. v. Maraj et al* where SIR STANLEY GOMES, President of the Federal Supreme Court, in delivering the judgement of the Court said this:

“Where the defence of an alibi is set up, the requirement for an adequate direction to be given by the judge to the jury is of such an elementary nature that it should not require constant repetition. The fundamental principle is that before a jury can return a verdict of guilty, they must feel sure that the prosecution has discharged the onus of establishing the guilt of the accused. Where an alibi is set up as a defence, not only does that onus remain on the prosecution, but the trial judge is required to go a step further and direct the jury that, even if they reject or do not believe the defence of alibi, they must, nevertheless, still consider whether the prosecution has proved all the ingredients of the charge that must be established before they can convict.

The main reason why that further direction or reminder is required to be given is that, where an accused person gives evidence or calls witnesses, or does both of those things in support of his alibi, the jury is confronted with two diametrically opposed versions which are created by the presentation of evidence, the truth or falsity of which can be tested and be determined by them. In such event, a jury, in the absence of the further direction, might think that if they reject the alibi, they must or can only accept the version put forward by the prosecution.”

We, of course, accept that as a correct statement of the law. It is the manner in which judges usually sum-up and we would commend it for judges to follow this method of summing-up when dealing with an alibi. But the fact remains that there is no set pattern, no stereotyped language which must be used by a judge in summing-up. What can be extracted from the passages which I have just read is, that a judge must make it clear to the jury that the onus is on the prosecution and never shifts, and it is important to do so in an alibi lest the jury get the impression that if the alibi is disbelieved they must automatically convict without considering whether the onus was on the prosecution to prove the case or not.

Let us look at the pattern of the summing-up in this case. What the judge did in this case was: He dealt with the case for the prosecution, ex-

## R. v. NARINE

plained the elements, pointed out that although nothing is admitted in a criminal case, the plea of “not guilty” puts everything in issue. Nevertheless, the way in which this case was conducted, the breaking and entering and the robbing were not being seriously challenged. In other words, there was really no issue at the trial on those points. The real issue in this case was whether the appellant was the person who committed the acts of breaking and entering and robbing.

The trial judge dealt with that issue in admirable language and pointed out over and over again that the onus was on the prosecution to prove the case against the appellant. He said this:

“In this case, in fact, the easiest method of proving an intent is by proof of an actual felony committed. So, therefore, if you believe that the accused did enter that house, broke down the door, entered the house, took money from under the mattress, snatched bangles from the mother and daughter, and a finger ring from the father, took up an agricultural fork, then, Members of the jury, you may well consider that this is a proper taking in law and that the intention would be satisfied.

“So please remember that as regards the first count of burglary. Are you satisfied that it was the accused? This is most important. You may well consider that there was a breaking, that there was an entry, that it was done in the night-time and that articles were in fact stolen from that house, but the important point you will have to ask yourselves is: Are we satisfied that it was the accused and nobody else?”

The judge was pinpointing the importance of the Crown’s proving not only the evidence which had to be proved in a case of this kind, but whether it was the appellant who had broken and entered and robbed. Then he went on to say in dealing with the alibi:

“It is never for an accused person to prove an alibi. It is for the Crown to disprove that alibi. If you are satisfied therefore that the Ramnarine family — mother, father, son and daughter — saw this man on that night in that house, that they knew this man for some years — at least knew the man who lives just six rods opposite them, then you may well be satisfied that he was there.”

What the judge was telling the jury was, that the inmates of the house knew the appellant, recognised him, he lived nearby, and if the jury were satisfied that they were speaking the truth, then it could only be that it was the appellant who was in the house.

In concluding his summing-up at page 55 of the record, he said:

“If, however, Members of the jury, let me finally tell you, if you accept the alibi, that it was not the accused, then your clear duty would be to acquit. Equally, if you do not accept it, but have a reasonable doubt, it may be true, it may not be true, then acquit. The law says give the benefit of the doubt to the accused.”

What counsel for the appellant has said is, that at that stage the judge should have interposed what the Federal Supreme Court said should always be done – to tell the jury to go back to the prosecution’s case – because if he did not do that the jury might well come to the conclusion that the moment they negative the alibi, disbelieve him, they would feel it their bounden duty to convict.

As I said before, the summing-up must be read having regard to the facts which were in issue and the facts which were proved.

Then the judge also said this:

“If you are satisfied that this man came into the house, did all that the family said he did – created havoc, that pandemonium reigned – remember a man’s home is his castle – then your clear duty, if you are so satisfied, will be to convict.”

When that passage is read in relation to all the other passages in the summing-up, it seems that although the judge did not use the language which is recommended that judges should use in a case of this kind, he was, nevertheless, telling the jury in no uncertain terms that, alibi or no alibi, whether you disbelieve the alibi or not, the onus is on the Crown to prove the case against the appellant.

We think that for these reasons the appeal ought to be dismissed. The appeal is dismissed and the conviction and sentence affirmed.

LUCKHOO, J.A.      I concur.

CUMMINGS, J.A.    I concur.

*Appeal dismissed – Conviction and sentence affirmed.*

FAMIDA DEEN v. RAMRATTI SINGH &  
AJODHA PERSAUD SINGH

[In the High Court (George, J (Ag) – January 16, 17; February 6, 7, 14;  
March 20; April 25, 26, 1967.]

*Equity — Land — Agreement of sale — Plan — Whether plan accords with description in agreement — True intention of parties — Rectification.*

*Equity — Land — Agreement of sale — Variation of terms of agreement — Specific performance.*

*Evidence — Written agreement — Variation by parol evidence — When admissible.*

## DEEN v. SINGH &amp; SINGH

The plaintiff and her husband, who is her business adviser, became interested in purchasing sub-lot "C" which is one of three sub-lots of lot 8 New Market Street, North Cummingsburg, Georgetown, which was owned by the defendants who are husband and wife, the former being the attorney of the latter. Sub-lot "C" is immediately west of sub-lots "A" & "B" which had been sold to Cho Po and Balkaran Singh, respectively. There are two buildings on sub-lot "C", a two-flat one to the front and a five-room range to the back. Negotiations for the sale of the said sub-lot "C" took place between the plaintiff, her husband and the second defendant and on November 16, 1961, an agreement of sale (Ex. "D") was executed by the parties. The plaintiff and her husband went into possession and effected substantial repairs to the front building in which they lived from 1963 and they carried on a business in the bottom flat which had been converted into a concrete structure. During the said 1963, the plaintiff and her husband commenced negotiations with the second defendant concerning a certain additional area of land between the eastern and southern boundaries of the sub-lot. A draft agreement was prepared by a lawyer and he took it to Mr. S.S.R. Insanally, Sworn Land Surveyor, accompanied by the plaintiff's husband, an ex-policeman, and the second defendant. Mr. Insanally, who was then preparing a plan for lot 8 New Market Street was asked whether he would change his plan to include the additional property which had been purchased by the plaintiff sometime before but this draft was never executed or even tendered. The parties eventually consulted a firm of Solicitors and the second defendant had with him a copy of a draft agreement which sought to amend the original agreement of lease (Ex. "D"). This draft (Ex. "M") was shown to the Managing-Clerk who was informed that it had been drawn by a Solicitor. In this draft the dimensions of the enlarged portion of land was spelt out. Following discussions with the parties and an examination of the said draft, the Managing-Clerk prepared a new agreement dated April 17, 1963 (Ex. "E"), the subject-matter of this action, in which was incorporated the additional area set out in the draft (Ex. "M") and the 'special condition' contained in the original agreement (Ex. "D"), viz., that no agent was concerned in the purchase of the property and that all negotiations had been done by the plaintiff, her husband and the second defendant. Insanally's plan dated June 24, 1964 (Ex. "B") set out the dimensions of the additional area purchased and under clause 3 of the second agreement (Ex. "E") it was agreed that the said additional area was to be surveyed and delineated and defined as sub-lot "C" of lot 8.

A dispute then arose as to the western boundary and that part of the eastern boundary in the area of Balkaran Singh's sub-lot, i.e., "B", the plaintiff claiming that Insanally's plan demarcating the boundaries did not represent the true consensus of the parties. She then brought an action seeking rectification of the description contained in the agreement (Ex. "E") as interpreted in Insanally's plan (Ex. "B") and specific performance of the said agreement as rectified. The defendants contended that Insanally's plan accorded with the description of the property contained in the agreement (Ex. "E") and that it represented the true intention of the parties and they counter-claimed for specific performance of the said agreement in accordance with Insanally's plan.

**HELD:**— that (i) the definition of the boundaries of sub-lot “C” as given in evidence by the second defendant truly represented what the parties had in fact agreed upon but that Insanally’s plan did not reflect that consensus; (ii) accordingly, the plaintiff was entitled to an order for specific performance with the variations given in evidence by the second defendant which would not be an unjust and inequitable course to adopt having regard to the particular circumstances; (iii) the exact dimensions and area to be ascertained would follow a resurvey of sub-lot “C” which was to be carried out in accordance with the agreed boundaries as the Court had found them, and (iv) as neither party had shown that frankness which they ought to have done in a matter of this nature, then each party would be ordered to bear their own costs.

*Judgment for plaintiff — Counter-claim dismissed.*

[*Editorial Note* — The defendant’s appeal to the Court of Appeal (Luckhoo, C., Persaud & Cummings, JJ A.) was withdrawn on May 23, 1969.]

*Cases referred to:—*

- (1) Craddock Brothers Ltd. v. Hunt 127 T.L.R. 228.
- (2) United States of America v. Motor Trucks (1924) 93 L.H. 46, (P.C.).
- (3) Ramsbottom v. Gosden 35 E.R. 65.
- (4) Preston v. Luck (1884) 27 Ch. D. 497.
- (5) Smith v. Wheatcroft (1878) Ch. D. 223.
- (6) London and Birmingham Rly. Co. v. Winter (1840) Cr. & Ph. 57; 13 Digest 392, 1176.

*J.A. King* for plaintiff.

*J.O.F. Haynes, Q.C., with C.V. Wight*, for defendants.

GEORGE, J. (Ag.): In this action the plaintiff claims a rectification of the description of certain property as contained in an agreement of sale dated the 17th April, 1963, Ex. “E” and as interpreted in a plan Ex. “B” dated the 24th June, 1964 which was required by the agreement to be prepared by S.S.R. Insanally Sworn Land Surveyor and specific performance of the agreement as rectified.

The description reads as follows: —

“all that piece or parcel of land being part of lot 8 New Market Street, North Cummingsburg District, in the city of Georgetown, Colony of British Guiana with the buildings and erections thereon, the said piece or parcel of land being bounded on the north by New Market Street, with a frontage of 36.5 feet on the south by the inter-lot drain dividing lots 8 and 9 North Cummingsburg, the measurements on the southern portion of the premises sold is 42.5 feet with a mean depth of approximately 86.4 feet, the said area containing approximately 33.66 square feet.”

## DEEN v. SINGH &amp; SINGH

In their defence the defendants contend that the plan by Insanally accords with the description of the property contained in the agreement and represents the true intention of the parties. In other words the defendants claim that there has been no mistake in the description of the property. The defendants further counterclaim for an order for specific performance of the agreement and in accordance with the plan prepared by the surveyor Insanally.

It would appear that the defendants who are married were at one time the owners of the whole of lot 8 New Market Street which stretches from Mundy Street on the east to Water Street on the west. This lot is situate on the southern side of New Market Street and has been divided into several sub-lots. Sub-lots A and B, which face New Market & Mundy Streets were sold some time back to Cho Po and Balkaran Singh, respectively. Sub-lot C, the subject matter of the present dispute is immediately west of sub-lots A & B and has a frontage in New Market Street. There are two buildings situate on it. The front building is a two flat one and the back building a five room range.

In their evidence both the plaintiff and her husband, who appears to be her business adviser, state that one Lalta Persaud Sukul, an insurance company representative caused them to become interested in the sub-lot. During the negotiations leading up to the purchase of sub-lot C and the buildings situate thereon but before an agreement was signed they state that the second Defendant, the attorney of the first Defendant took them to the property and pointed out to them the boundaries of the sub-lot as well as the buildings to be sold. The following are the boundaries shown to them.

The eastern boundary was demarcated by Cho Po's western palings and those of Balkaran Singh. These palings do not run in a straight line. After some distance south Cho Po's palings turn east. At a point about 6 feet from the south western corner of Cho Po's palings, Balkaran Singh's palings commence and run south to an inter-lot drain which forms the southern boundary of lots; the northern boundary commenced from Cho Po's palings westward and is demarcated by the southern edge of the southern pavement of New Market Street. Along this boundary at a point half way between the front two flat building on sub-lot C and the building west of it the western boundary commences. It extended southward between the two buildings to a point near to the door of the fifth room of the range counting from the east. This point was marked X in paint by the second defendant. The western boundary then cut through the fifth room at that point and continued to the inter-lot drain.

Their evidence in this regard is supported by the witness Sukul who states that he was the person who introduced the plaintiff and her husband to the second defendant as a prospective purchaser of sub-lot C. This witness further stated that he was induced by the second defendant to canvass a purchaser on the latter's promise to purchase an insurance policy from his

company for his children as well as to give him something. Despite his successful efforts, however the defendant did not take out a policy with his company nor has he obtained any remuneration for his efforts. He further admits that he has made no efforts to hold the defendants to their agreement.

According to the plaintiff the foregoing are the facts and circumstances which led to the signing of an agreement of sale in respect of sub-lot C dated the 16th November, 1961 Ex. "D". Although neither the plaintiff nor the witness Sukul was sure about this the plaintiff's husband was very positive that the agreement was not in fact executed until the 14th May 1962. Before considering the date of the execution of the agreement, attention must be drawn to two significant clauses in the agreement Ex. "D" viz. — the description of the property and the special condition relating to the sale.

The description of the property is as follows: —

*Firstly:*— "All that piece or parcel of land situate at lot 8 New Market Street North Cummingsburg, Georgetown (32) thirty-two feet in width by (66) sixty-six feet in depth now occupied by F. Isaacs and others on the upper flat as tenant and Sursatti and others on the lower flat. The boundaries to be surveyed by S.S.R. Insanally, Sworn Land Surveyor and called sub-lot C to hold and enjoy the possession of a term of 999 years (nine hundred and ninety-nine years) commencing from the date of the passing of the lease."

*Secondly:*— "The lessor for and in consideration of the sum of eleven thousand dollars (\$11,000) will agree to assign unto the lessee the *building* and erections on the aforesaid premises to hold the same unto the lessee absolutely."

The plaintiffs husband strikes me as a very intelligent person. He attended primary school up to the 7th standard the highest standard in the school and was successful at the Primary School Certificate Examination in 1939. After leaving school — whether immediately or not is not clear on the evidence — he joined the then B.G. Police Force and before he left the Force was a Detective Constable. Since leaving the Police Force he has been a grocery proprietor. His wife is also engaged in a similar occupation. He admits that before the signing of the agreement dated 16th November 1961 the second defendant left a copy of it with him and the plaintiff the night before. It is inconceivable that neither he nor his wife took this opportunity to read the proposed agreement thoroughly as they would have me believe. I accordingly do not accept their evidence when they state that they did not read, at least carefully, the agreement which they signed the next day, the former as a contracting party and the latter as a witness. I believe that the plaintiff and her husband did read and understand the contents of the agreement although they may be excused for believing that the measurements mentioned in the description represented the dimensions of the land shown to them as they did not measure the land. They must however have realised

## DEEN v. SINGH &amp; SINGH

that they were only purchasing one building. If as they say this was contrary to the oral agreement one would expect that they would have refused to sign it. This they did not do.

I now go on to consider the special condition which reads as follows: —

“The lessee declares that there was no agent who introduced the property to her, all negotiations done by herself, her husband and the lessor.”

This condition can only mean that the plaintiff and her husband have denied that anyone including Sukul was instrumental in causing the former to purchase the property. With regard to the date on which the agreement was executed the plaintiff's husband alleges that it was 14th May 1962 but explains away the 16th November, 1961 by saying that the second defendant said it was law to backdate the agreement. I find this explanation, coming from a former member of the police force and a businessman difficult to accept. He further states that although this agreement speaks of a payment of \$500: on its execution and an additional payment of \$4,000 (four thousand dollars) on the 14th May 1962 he paid the whole sum of \$4,500.00 (four thousand five hundred dollars) on this latter date. Despite this, the agreement incorporates a receipt clause for \$500 and on the 14th May 1962 – the receipt Ex. “J” reads 14th May 1961 – the second defendant issued a receipt to the plaintiff for \$4,000 comprising \$3,700 in cash and \$300 on a promissory note executed by the plaintiff in favour of the second defendant.

The second defendant on the other hand states that the agreement Ex. “D” is correct in every respect and accurately reflects what the parties originally agreed upon. He specifically denies that a larger area than what was that contained in this agreement was ever shown to the plaintiff or her husband or that any portion of the range was included. He, further states that it was agreed that the western boundary should run west of but very near to the external stairway on the western side of the front building. According to the uncontradicted evidence of the plaintiff and her husband when they took possession of the front house this stairway ran north to a platform and then to the ground. They later changed the run of the step so that it lead southward for its full length but did not widen it. Subsequently, this step stairway was removed and there is now an internal stairway. Besides, they have reconstructed but not extended certain portions of the front building including the bottom flat which is now out of concrete. According to the witness Spence, a land surveyor, there was a stairway on the western side of this building when he carried out a survey of lot 8 New Market Street and the area in dispute. He drew a plan, Ex. “C” in which he shows *inter alia* the sub-divisions of the lot as carried out by the witness Insanally and set out in a plan dated the 26th June, 1964 Ex. “B”. Spence's plan also shows the buildings situate in the disputed area i.e. the front building including the external stairway on the western side of the front building and the range. His demarcation of the western boundary up to a point 66

feet southward in my opinion accords with the evidence of the second defendant as to the direction which this boundary should take as agreed upon between he and the plaintiff and her husband before the execution of Ex. "D". With regard to Sukul, the second defendant states that he did know him in 1961. During that year Sukul told him that he had heard the plaintiff and her husband discussing the purchase of the third building on Lot 8 counting from Mundy Street. Sukul further told him that he knew that he was asking \$13,000 for the building and land and that they were offering \$12,000. He, Sukul, offered to try to persuade them to effect the purchase for \$13,000 if the second defendant took out a life insurance policy with his company. Sukul's efforts, however, appeared to have failed and the plaintiff eventually decided to purchase the front building situate on what is now sub-lot C. This version would in my opinion more satisfactorily explain Sukul's indifference after Ex. "D" was executed.

In the face of this violent conflict in the evidence of the plaintiff, her husband and Sukul on the one side and the second defendant on the other, I prefer to accept the evidence of the latter and I find as a fact that what was agreed upon by them prior to the execution of Ex. "D" is as the second defendant has stated.

In 1963 the plaintiff and her husband commenced negotiations with the second defendant to purchase certain additional areas of land between the eastern boundary of the 32 feet and 66 feet area and Cho Po's paling, and the southern boundary of this area to the inter-lot drain. A sum of \$1,000 (one thousand dollars) was agreed upon for these additional areas and the parties at the instance of the plaintiff and her husband consulted Mr. P. Persaud, then a practising barrister-at-law with a view to having an agreement prepared. A draft agreement was prepared and the plaintiff's husband, the second defendant and Mr. Persaud went to the home of Insanally the Surveyor, who was then preparing a plan of lot 8. Mr. Persaud took with him the draft agreement and Insanally was asked whether he could change his plan to include the additional portions of land bought by the plaintiff. Unfortunately, this draft agreement was not tendered in evidence. Despite his efforts the draft agreement was not executed. The parties eventually consulted Messrs. Cameron & Shepherd a firm of Solicitors at the instance of the plaintiff's husband. They spoke with a Mr. Callender the managing clerk attached to the firm. It would appear that the second defendant took with him a copy of a draft agreement headed "Amendment to agreement of lease dated 16th November, 1961" Ex. "M". Mr. Callender states that as far as he recollects the second defendant told him it was drawn by Mr. Carlos Gomes, Solicitor. In Ex. "M" the dimension of the enlarged portion of land as well as its area were mentioned. These were as follows: —

Northern boundary 36.5 feet;  
southern boundary 42.5 feet  
area 3366 square feet more or less.

## DEEN v. SINGH &amp; SINGH

According to Mr. P. Persaud these dimensions were obtained from Insanally. Following on discussions with the parties an examination of Ex. "M", Mr. Callender prepared a new agreement Ex. "E" the subject matter of this suit. He incorporated into it the dimensions and area contained in Ex. "M" and the special condition contained in Ex. "D". Indeed Insanally's plan Ex. "B", in so far as it relates to sub-lot C does set out the dimensions referred to above and having regard to clause 3 of Ex. "E" must be considered as being incorporated by reference in this agreement. Clause 3 reads as follows: —

"The Vendor and the Purchaser agree that the said area is to be surveyed by S.S.R. Insanally, Sworn Land Surveyor, and is to be delineated and defined as sub-lot C of the said lot 8, North Cummingsburg."

Despite the fact that the plaintiff and her husband say they had already purchased these additional areas their evidence concerning the negotiations leading up to the signing of Ex. "E" by the parties substantially accords with that of the 2nd defendant. The real dispute between them is as to the position of the boundaries of sub-lot C. The plaintiff claims that Insanally's plan demarcating the boundaries does not reflect their consensus. The parties have no quarrel about the northern boundary of the sub-lot or about its depth. Their difference is confined to the western boundary and that part of the eastern boundary in the area of Balkaran Singh's sub-lot.

As has been pointed out above the second defendant states, that, in respect of the western boundary of the 32 x 66 feet area, it was intended that it should run west of but very near to the stairway. He further states that he did not intend that this boundary should cut across the stairway. The plaintiff agrees with this. In addition, he states that it was agreed that, in so far as the extended western boundary is concerned, it should pass through the ranges about 4 feet east of the partition dividing the fourth and fifth rooms of the range. As I construe his evidence therefore, the western boundary should run near and parallel to the western stairway for a distance of 66 feet south and in order to cut through the fourth room at the point stated it would according to Spence's plan of the fourth room require that the boundary line swerve slightly south eastward. I accept his evidence as to the direction of the extended westward boundary and that the parties agreed to this. The result would therefore be that Insanally's plan of the whole of the western boundary is wrong. Indeed Insanally himself admits that after he received instructions about the additional areas of land he adjusted the western boundary of subplot C some six inches east of the proposed western boundary of the 32 feet x 66 feet. I do not however accept that it was merely adjusted six inches. I now propose to consider the eastern boundary of the enlarged area. The parties were agreed that Cho Po's western palings would form part of this boundary and this accords with Wong's plan. They however, differ as to that part of the boundary which adjoins Balkaran Singh's sub-lot. According to the plaintiff, the intention was that an existing paling from Cho Po's southern palings

to the inter-lot drain should be the boundary and this was agreed to by the parties. The defendant on the other hand states that he showed the plaintiff and her husband Wong's palings at a point on the inter-lot 3 feet east of this paling as their south eastern boundary and that their western boundary at this point would extend northwards to the point where the existing paling meets Cho Po's southern paling. This south eastern boundary would coincide with the south western boundary of Balkaran Singh's sub-lot as defined on a plan by R.H. Wong, a land surveyor. In accepting the defendants' contention I have been influenced by the evidence of Balkaran Singh himself a witness called by the plaintiff. He states that, before he purchased sub-lot B, by way of 999 years lease, together with the building situate thereon in 1959, he occupied the latter as a tenant for over 10 years. During this period the western palings were in the same position as the present one stands. He also states that prior to his purchase of sub-lot B the second defendant, who is his brother-in-law, told him that these palings would form his western boundary. He, however, agrees that according to the plan by which his specific area of land is defined his western boundary would run from the point where the existing western paling meets Cho Po's southern paling to a point on the inter-lot drain three feet east of these palings. He continues that during the latter part of 1962 or in 1963 the plaintiff's husband told him that the second defendant was selling him a piece of his (Balkaran - Singh's) land. This bit of evidence is in my view very significant, indeed the plaintiff's husband admits that he knew and did tell Balkaran Singh that the 2nd defendant had proposed to sell him this portion of land. The result in my view can only mean that at some time the parties did discuss and agree that the paling along Balkaran Singh's sub-lot was not in fact his boundary. I accordingly accept and believe the evidence of 2nd defendant that the agreement as to southern portion of the eastern boundary of sub-lot C is as he has stated. In demarcating the western boundary of sub-lot C Insanally followed Wong's plan. I, therefore, find that Insanally's plan as to the western boundary of sub-lot C accurately represents what the parties agreed upon.

With regard to the southern boundary they were *ad idem* that it ran parallel to and along the northern side of the inter-lot drain. Further they were agreed that Insanally's plan as regards the northern boundary represents what they agreed upon.

It is now well settled that parol evidence is admissible to rectify a written document. In this regard I can do no better than refer to the case *Craddock Brothers Ltd. v. Hunt* 127 T.L.R. 228 and in particular to a portion of the judgment of WARRINGTON L.J. at page 236 where he said and I quote:

“The jurisdiction of courts of equity in this respect is to bring the written document executed in pursuance of an antecedent agreement into conformity with that agreement. The conditions to its exercise are that there must be an antecedent contract and a common

## DEEN v. SINGH &amp; SINGH

intention of embodying or giving effect to the whole of that contract by the writings and there must be clear evidence that the document by common mistake failed to embody such contract and either contained provisions not agreed upon, or otherwise departed from its terms.

If these conditions are fulfilled, then it seems to me, on principle that the instrument so rectified should have the same force as if the mistake had not been made, in which case the Statute of Frauds would be no defence to an action founded on it."

This case was cited with approval by Judicial Committee of the Privy Council in the *United States of America v Motor Trucks* (1924) 93 L.J. 46.

In the present action I am satisfied that the definition of the boundaries of sub-lot C as given in evidence by the 2nd defendant represents what the parties in fact agreed upon. I also believe that the dimensions and area as set out in the agreement Ex. "E" were obtained from the surveyor Insanally and were based on a sketch which he made when the parties visited him. I also believe that this sketch differs in no material respect from the final plan of the sub-lot as is laid down in his plan Ex. "B". It follows that the area of the sub-lot as well as the length of the southern boundary as described in the plan would be different from that which the parties had in fact mutually agreed upon.

It would appear therefore that on the authority of cases referred to above an order for rectification of the agreement and the plan to reflect this consensus can be made.

There is, however, another issue which must be resolved viz. whether order for specific performance of the agreement and plan as rectified can properly be made. This issue is the more important in view of my finding it is the 2nd defendant's version rather than that of the plaintiff which represents the consensus. I must, therefore, now examine some of the authorities on this aspect of the matter.

In *Ramsbottom v Gosden* 35 E.R. 65 the evidence of an attorney was admitted for the defendant, in a suit for specific performance by the plaintiff, to prove the intention of both parties according to the oral instructions, that the plaintiff, purchaser, should pay the expenses for making out the defendant's title. It was ordered that the plaintiff, who denied any such condition, must submit to have the agreement performed in the way contended for by the defendant or the bill must be dismissed.

In *Preston v. Luck* (1884) 27 Ch. D. 497 the facts were as follows:—

Negotiations took place between the plaintiff and the defendant as to the sale of a British patent and certain foreign patents for the same inventions and ultimately an offer was made for sale at £500 and accepted by letter. It was not however, quite clear whether the offer and acceptance related to all the patents or the British patents. The plaintiff brought an action for specific performance treating the contract as including

all the patents and moved for an injunction to restrain the defendant from parting with them. At the hearing of the motion he asked leave to amend the writ and for an injunction as to the British patent only. It was held, on appeal against a refusal of the injunction, that it should be granted. The view was expressed that where a written agreement was signed, though it is in some cases a defence, to an action for specific performance according to its terms, that the defendant did not understand it according to what the court holds to be the true construction. The fact that the plaintiff has put an erroneous construction on it and insisted that it include what it did not include does not prevent there being a contract nor preclude the plaintiff from waving the question of construction and obtaining specific performance according to what the defendant admits to be the true construction.

COTTON, L.J., at page 506 had this to say:

“Now where parties enter in a written contract, what they agree to must depend on the construction of that contract. It is very true that in some cases if the party against whom specific performance is sought to be obtained satisfies the court by clear evidence that, what he, on the terms of the contract, appears to have contracted for, was not in his mind the thing in respect of which he was bargaining, the court will refuse specific performance, but that is only because in cases of specific performance the court does not grant that specific equitable relief if it finds for any reason that it would be what amounts to a hardship or unreasonable to compel the defendant to specifically perform the contract.”

Finally, I refer to the case of *Smith v. Wheatcroft* (1878) Ch. D. 223. In that case in defence to an action for specific performance of a document signed by the plaintiffs, the defendant pleaded that the document did not contain the true terms of the purchase, but he did not state what these true terms were. He afterwards produced a written agreement of purchase different from those in the document stated by the plaintiff and showing a reservation of mineral rights. The plaintiffs amended their statement of claim but continued to claim specific performance of the contract as stated by them.

It was held that, the plaintiffs asking at the trial to have specific performance with a variation according to the terms of the agreement produced by the defendant, the action would not be dismissed but judgment would be given for specific performance with the variation. It should be noted that no further amendment of the plaintiffs' statement of claim was sought.

In his judgment FRY, J. at page 227 referred to the judgment of LORD COTTENHAM in *London and Birmingham Railway Co. v. Winter Cr* and Ph. 62 in which he stated that it depends on the particular circumstances in each case whether the variation set up from the written contract “is to defeat the plaintiff's title to have specific performance or whether the court will perform the contract taking care that the subject matter of this proposed

## DEEN v. SINGH &amp; SINGH

agreement or understanding is also carried into effect, so that all the parties may have the benefit of what has been contracted for”.

Among the special circumstances which FRY, J. took into account in *Smith v. Wheatcroft* (supra) was the fact that although the defendant did plead that the statement of claim did not contain the true terms or all the terms of the agreement he did not state what this agreement was. At pages 227 and 228 he said:

“It appears to me that the mere fact that the plaintiffs so re-amended the statement of claim without adopting the terms of the agreement is not a ground upon which I can say that it is inequitable or unjust that, the plaintiff submitting to the variation between the receipt and the agreement should have specific performance of the agreement.”

From the foregoing decisions two important principles appear to be of paramount importance: —

- (a) It depends on the particular circumstance in each case whether a variation is to defeat the plaintiff’s title to have specific performance, whether the court will perform the contract; and in arriving at its decision whether or not to grant the order the court will enquire into the equity and justness of the situation as between the parties, and
- (b) If the defendant can show that the instrument does not represent the real agreement between the parties the plaintiff cannot have specific performance Unless he consents to the variation set up by the defendant and if he will not accept specific performance with the variation as set up and proved by the defendant his action will be dismissed.

These principles are complimentary and must both be taken into account in the present case. With regard to (a) I can find no injustice or inequity being done if an order for specific performance of the agreement is made in terms of the variations concerning which the defendants have admitted. The 2nd defendant has led no evidence to show that any inequity or unjustness would result if such a course were to be adopted. Besides this fact, I take into account the fact that the plaintiff has been in possession of the sub-lot since about the middle of 1962 and has effected substantial repairs to the front building situate thereon. They have also since 1963 been living in the front building and carrying on a business there. I also take into account the fact that the 2nd defendant in his pleadings maintained that the description of the land as set in Ex. “E” and the plan, Ex. “B”, made by Insanally fully reflected the agreement between the parties but was forced to admit in evidence that this contention could not be correct.

With regard to (b) the plaintiff, in paragraph (b) of her statement of claim, indicated her willingness to submit to any variation of the agreement which the court may deem proper and reiterated this willingness in her evidence.

In the result I find that Insanally's plan does not reflect the true agreement between the parties and am of the opinion that the plaintiff is entitled to specific performance of the agreement with the variations given in evidence by the 2nd defendant: the exact dimensions and area to be ascertained after the sub-lot has been resurveyed in accordance with the agreed boundaries as I find them viz:—

The northern and eastern boundary should be as defined by Insanally in his plan dated the 26th June 1964 (Ex. "B").

The western boundary should commence from the point along the northern boundary 36.5 feet west of Cho Po's north western palings and Wong's paal south and alongside the existing base of dismantled stairway for a distance of 66 feet thence to a point four feet east of the wall dividing the fourth and fifth rooms of the range counting from the east, thence south and parallel to this wall to the inter-lot drain.

The southern boundary should ran along the inter-lot drain and commence from the south western boundary of the sub-lot as defined by Insanally westward to where it meets the western boundary. I accordingly dismissed the counterclaim.

With regard to costs neither the plaintiff nor the defendants displayed the frankness which they ought to have shown in a matter such as this and I order that each party bear his own costs.

*Judgment for plaintiff – Counter-claim dismissed.*

Solicitors:

*Miss D. P. Bernard* (for the plaintiff);

*Mr. P. Poonai* (for the defendants).

LAW REPORTS OF GUYANA [1967]  
THE QUEEN v. SAMUEL DUBAR

[Court of Appeal (Luckhoo, Persaud and Cummings, JJ.A.)  
April 27, 28, 1967].

*Criminal Law — Evidence — Rape — Young Girl — Sworn testimony — No corroboration — Trial Judge placed certain 'bits' and 'pieces' of evidence before jury which, in effect, they were invited to treat as corroboration — Whether misdirection.*

*Criminal Law — Evidence — Rape — Trial Judge properly warned jury that it was dangerous and unsafe to convict where there was no*

## R. v. DUBAR

*corroboration in sexual cases — No similar warning given concerning the age of the girl — Whether misdirection.*

On May 21, 1966, a girl, who gave her age as being “now in 14 years” was dipping water from a trench when the appellant suddenly came up behind her, held her hand and threw her down on the ground. He then choked her, removed her panty and had sexual intercourse with her. There were no external signs of injury and the medical examination revealed rupture of the hymen in 2 or 3 places but the doctor gave evidence that they were consistent with sexual intercourse at least 2 weeks before or longer. The girl alleged that the appellant was the first man who ever had sexual intercourse with her and that it took place that very day. The appellant gave a written statement to the police on May 23, 1966, which he adopted from the dock at his trial, to the effect that they were friends and had had sexual intercourse some time before. He alleged that he had asked her for sex that day but she had declined saying that he was to be engaged to another girl in a few days time. He vehemently denied the allegation of rape. On appeal against his conviction and sentence —

**HELD** — (Luckhoo, J.A., delivering the judgment of the Court) that (i) although there was ‘opportunity’ and ‘desire’ on the part of the appellant to have sexual intercourse with the girl, those aspects could not be considered in isolation since they were wedded to other elements in the statement which sought to explain how the desire arose, why nothing came of the opportunity and a possible motive for the allegation. The trial Judge in referring to this ‘opportunity’ and ‘desire’ gave an unrealistic picture of the defence since they were only two circumstances in the context of other related and germane answers; (ii) further, when those ‘bits’ and ‘pieces’ of evidence were placed before the jury, they were, in effect, being invited to treat it as corroboration, after they had been clearly told that no corroboration existed; (iii) although the sworn evidence of a child need not be corroborated as a matter of law, the jury should be warned, not that they must find corroboration, but that there is a risk in acting on the uncorroborated evidence of young boys or girls, though they may do so if convinced that the witness is telling the truth; (iv) a girl ‘in her fourteenth year’ should fall within the category of a young girl, and (v) the requirement of warning the jury of the danger of acting on the uncorroborated evidence of a young child is no longer a matter of discretion for the trial Judge but a peremptory prerequisite.

(Dictum of Lord Goddard, L.C.J., in *R v. Campbell* (2) (*infra*) approved).

*Appeal allowed — Conviction and sentence quashed.*

*Cases referred to:*

- (1) *Director of Public Prosecutions v. Christie* (1914-15) All E.R. Rep. (1914) A.C. 545, H.L.
- (2) *R v. Campbell* (1956) 2 All E.R. 272, C.C.A.
- (3) *R v. Gammon* (1959) 43 Cr. App. R. 155.

*F. R. Wills* for appellant.

*J. Gonsalves-Sabola*, Assistant Director of Public Prosecutions, for respondent.

LUCKHOO, J.A. The appellant was convicted of having carnal knowledge of Albertha Payne, without her consent, on the 21st May, 1966, contrary to section 76 of the Criminal Law (Offences) Ordinance, Chapter 10, and was sentenced to be imprisoned for four years.

Albertha Payne was then under the care of her cousin Susan Gibbons, with whom she resided, and who gave her age at the trial in November 1966 as being "now in 14 years". This little girl was medically examined by Dr. Hardutt Singh, the Government Medical Officer of the district, on the very day – 21st May. He found the hymen had been ruptured in two or three places, but not recently; those ruptures, he said, were consistent with intercourse at least two weeks before or longer.

In her evidence Albertha Payne said:

"The accused was the first man with whom I ever had sexual intercourse and it was on that day".

The trial Judge directed the Jury that there was no corroboration to be found in the case; and that in view of the medical evidence they should find that she was not speaking the truth when she said the incident of the 21st May, 1966, was her first experience. He said:

"It seems the doctor's evidence gives the lie to that; but it does not mean that you have to reject all of her evidence".

It would be apparent, therefore, that because of the age of the girl, the absence of corroboration, and the probability that she had lied on the question of not having sexual experience before, the necessity for a very careful summing-up throughout was essential.

The girl's story was that when she was dipping water from a trench the appellant suddenly came up behind her, held her hand, and threw her down; she did not expect him to come up; she 'fought' up; he kept choking her for about ten minutes — pressing her throat hard during that time; he removed her pantie and had intercourse with her. There was no evidence of any external injuries. On the 23rd May the appellant in a written statement to the police told his story, which was consistent with his earlier denials of the allegation of rape and was as follows;

"Myself and Sahadat and a girl name Data was sitting at my bottom house the same Saturday (21.5.66) when I saw this girl (Albertha Payne) passing, myself and her was gaffing whilst going to the pond for water, and ah ask her foh leh we sex, she say no because ah got ah girl already and ah getting engage Sunday coming (29.5.66).

## R. v. DUBAR

“We only spend five minutes at the pond gaffing and in that five minutes ah dumb woman (Raj) saw us that is all wha happen the day deh. When she go home ah en’t know what she tell she grandmother, and she grandmother come to me house and ask foh me and she say me do this girl so and so (that ah hold down Maisie meaning Albertha Payne) and she grandmother say ah should not ah hold down Maisie ah should ah hold down me mother and she started to curse; I told her I never hold down Maisie; the same day, 21.5.66, ah went back there at Maisie home and she say that ah hold she hand but ah never choke she neck. I sex she before but not on that Saturday and me and she was close friends for past two years”.

At the trial, the appellant said from the dock:

“I rely on my statement which I gave to the police. That statement is true. Nothing more”.

The grounds of appeal which merited consideration put shortly were:

1. That the learned trial judge erred in law in his direction to the jury on the question of the probative value of the appellant’s statement to the police which
  - (a) tended to remove from them the issue of whether the accused could be found ‘not guilty’ on the indictment,
  - and (b) conveyed to them that Albertha Payne’s evidence was so strengthened by parts of that statement, that they would have no choice but to find him guilty, if they accepted those parts.

The argument on the first ground was mainly directed to the following passages in the summing-up:

- (a) “As I have told some juries before, where a statement by an accused person from the dock is a reiteration of a statement given to the police, it could have one of three effects: (1) It could sustain further the innocence of the accused, bearing in mind that he starts with that in his favour and does not have to prove it. (2) It could cast such doubt on the case for the prosecution that you are not satisfied at all with the case. In either of these two eventualities you give effect by returning a verdict of ‘not guilty’. (3) But it sometimes happens that when you consider a statement from the dock, or a re-stating from the dock of a statement given to the police, as in this case, you may find that it strengthens the case for the prosecution. You may find that certain bits of the evidence coincide with, and strengthen the case for the prosecution, if you are satisfied with it, in which case you give effect to that by returning a verdict of ‘guilty’ in accordance with the evidence and in accordance with the conclusions to which you have arrived”.

- (b) “But bear in mind that I told you before that there is no independent evidence coming from a source other than Albertha Payne which implicates the accused in this case, and which confirms in some material particular that this particular offence was committed and that he had committed it. You have to ask yourselves whether the other bits and pieces of evidence add up reasonably, conclusively, to the fact that Samuel Dubar, the accused, was the person who committed this alleged offence and no one else”.

It must be observed that the appellant actually said nothing in his statement which indicated that he was guilty; nor was it proved that he had told falsehoods from which the inference could be drawn in the particular circumstances that they were contrived to conceal guilt. It does, however, reveal that there was an opportunity, and also the desire, on the part of the appellant, to have sexual intercourse with the girl. But these two aspects cannot be considered in isolation; they were wedded to other elements in the statement which sought to explain how the desire arose, and why nothing came of the opportunity; and a possible motive for the allegation. The appellant, in effect, was saying: I was with her; I asked her to have sex with me; we had previously done so; she declined because I was to be engaged in another few days to another girl.

To disassociate ‘the opportunity’ and ‘desire’ from the previous relationship and reason for refusal would hardly do justice to the answer offered in the statement.

When the learned trial judge said in his summing-up in the passage referred to above:

“You may find that certain bits of the evidence (referring to the statement) coincide with and strengthen the case for the prosecution, in which case you give effect to it by returning a verdict of ‘guilty’,

he was no doubt referring to this ‘opportunity’ and ‘desire’ which he specifically mentions in the following passages respectively:

“Bear in mind the accused admits in his statement to the police, which he reaffirms from the dock, that he was by the pond, and you will have to ask yourselves, having regard to those circumstances, whether there was not the opportunity”.

And

“At that particular juncture there by the pond he is asking her for sex with the desire, the wish, in his mind, and she is saying ‘No’. There is a denial; there is no consent. Is there anything in the evidence which suggests to you that she changed or had reason to change her mind?”

To examine two circumstances of the appellant’s answer from the context of other answers, related and germane, must produce an unrealistic

## R. v. DUBAR

picture of the defence; further, when these 'bits' and 'pieces of evidence' were placed before the jury as being capable of strengthening the case for the prosecution, in reality they were being invited to treat it as corroboration, after they were clearly told that no corroboration existed. If they had been told that such evidence narrows the gap of dispute between the prosecution and defence and reduces the issues, the matter would stand on a different footing. Portions of the statement of the appellant which coincided with the prosecution's evidence were not only permitted to have corroborative force, if accepted by the jury, but to possess sufficient cogency for the jury to give effect to them by returning a verdict of 'guilty'.

We also consider that in view of what the appellant had said in his statement about the girl's grandmother accusing him that day of 'holding' her down etc. (which he denied), it may have been well if the jury were told that this was not a piece of evidence which could be used against the appellant, in view of his express denial. Reference to the pronouncement of LORD ATKINSON, in *Director of Public Prosecutions v. Christie*, (1914-15) A.E.R. Rep. at page 67 that —

“A statement made in the presence of an accused person even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement so as to make it in effect his own”.

might well have served a useful purpose.

On the second ground, the learned trial judge told the jury:

“The law says that when there is no corroboration in a case of this type — a sexual offence, that it is dangerous and unsafe to convict, and I must accordingly warn you, as I hereby do, that it is unsafe and dangerous to convict on the evidence of Albertha Payne, alone”.

They were not similarly warned anywhere in the summing-up that for another reason, viz., because of her age, there was a danger in coming to a conclusion adverse to the appellant on her uncorroborated evidence.

There may be different reasons for the exercise of caution in the different instances where corroboration is required. Children, it is said, are more susceptible to the influences of third persons and may allow their imagination to run away with them. In sexual cases the charge may be promoted by hysteria or spite; it is so easy to make and so difficult to disprove. In the case of an accomplice, there is the danger that the accomplice will minimise his role in the crime and exaggerate that of the accused in his efforts to exculpate himself and inculpate the other, and so on.

The sworn evidence of a child need not be corroborated as a matter of law, but a jury should be warned, not that they must find corroboration, but that there is a risk in acting on the uncorroborated evidence of young

boys or girls, though they may do so if convinced that the witness is telling the truth (Per LORD GODDARD in *R. v. Campbell*, (1956) 2 A.E.R., p. 272 at page 276). We are inclined to the view that the requirement of giving this warning to the jury of the danger of acting on the uncorroborated evidence of a young child is peremptory and not a matter for the discretion of a particular judge. We consider that a girl 'in her fourteenth year' should fall within the category of a young girl and so require a warning to be given that there is a risk in acting on her uncorroborated evidence because of her age.

If a caution is required for more than one reason, but it is thought fit to mention only one, that or those omitted may have appealed more to the jury than the one given or, in combined effect may have acquired sufficient penetration to be received and heeded. Each is independent of the other; each must be assessed and valued according to the circumstances of the case; the jury is entitled to be fully informed; they must select and adjudge for themselves, which they can only do if all that is open for their consideration is placed before them. The need for caution because of the girl's age should not have been omitted.

PROFESSOR CROSS, in his book on "EVIDENCE", 2nd Edition, page 177, has this to say on the question:

"There could be several reasons why the same evidence should be received with caution if it is not corroborated for, in addition to coming under the present head, the evidence might be that of an accomplice, or it might be given by a person of tender years. In such a case each ground for the warning should be mentioned".

(See *R v. Gammon*, 1959 43 C.A.R. 155).

In this case we find that certain directions invited the jury to give a probative value to portions of the appellant's statement beyond their capacity. That may have made all the difference to the jury's verdict, and so we were constrained to allow the appeal.

*Appeal allowed — conviction and sentence quashed.*

J. A. K. SYNDICATE

v.

CENTRAL GUIANA EXPLORATION CO., LTD

[In the Full Court of the High Court (Crane, Van Sertima and George, JJ).  
March 31; April 7, 27, 28 & 29, 1967]

*Mining — Construction of statute — Reg. 23 of the Mining Regulations, Cap. 196 (Subsidiary Legislation) (now reg. 23 of the Mining Regulations, Cap. 65:01 (Subsidiary) ).*

## J.A.K. SYNDICATE v. C.G. EXPLORATION CO.

*Mining — Claim Licences — Juridical nature of — S. 3(D) of the Civil Law Ordinance, Cap. 2 (now s. 3(D) of the Civil Law Act, Cap. 6:01).*

*Mining — Revocation or forfeiture of claim licences — Regs. 24, 29, 30 & 31 of the Mining Regulations, Cap. 196 (now regs. 24, 29, 30 & 31 of the Mining Regulations, Cap. 65:01).*

*Mining — Proceedings before Hearing Officer — Right to challenge by holder of prospecting licence — Upon whom onus lies — Regs. 29 & 31 of the Mining Regulations, Cap. 196 (now regs. 29 & 31 of the Mining Regulations, Cap. 65:01).*

*Mining — Locus standi of agent and/or solicitor at hearing — Want of authority — Effect of.*

The respondents were, since 1957, in possession of claim licences in respect of 23 locations along the lower Kurupung River in the Mazaruni Mining District. From the commencement of 1963 right through to September, 1964, when boards were put up on all 23 locations by the respondents' local agent, none of the claims were kept properly marked by location boards in each corner of a location, as required by regs. 8-10 of the Mining Regulations, Cap. 196. The appellants located the area of these claims sometime around June to August, 1964, and applied for a licence, notice whereof was advertised in the Official Gazette. The respondent opposed the grant of the licence on the ground that they held existing licences for the said area which were still in force. The Hearing Officer found in favour of the respondents and, on appeal to the Supreme Court, Chung, J., held that the Hearing Officer had not exceeded his jurisdiction since the respondents fell to be considered as being in occupation of the land by virtue of their claim licences and once such a licence is in existence then the holder is deemed to be in occupation and thus has a right to continue in occupation until his licence has either been revoked under reg. 24 or forfeited under regs. 29, 30 & 31 and, accordingly, the location by the appellants was invalid. On further appeal to the Full Court —

HELD:— (*per* Crane, J., delivering the judgment of the Court) that (i) the respondents had been in continuous possession of their 23 locations since 1957 and, although they were in breach of the Mining Regulations, Cap. 196, in that their boundary lines were not kept reasonably clear and their boundary marks not erected and marked in accordance with the said Regulations, nevertheless, they were in possession of valid claim licences in respect of their 23 holdings since the appellants did not have the right *ipso facto*, because of such breaches, to locate the respondents' claims as they had not pursued the only course open to them to determine the respondents' interests under the licences, viz., the right to 'challenge' the respondents remaining in occupation as provided for by reg. 29; (ii) the contention of the appellants that the 'onus of proof of a previous lawful location or occupation was cast upon the respondents was a 'red-herring' since no such question could properly arise where, as here, the appellants had not obeyed the Regulations since it is only when a 'challenge' has been made that the Commissioner or a Warden acting under reg. 30(2) can, if he upholds the challenge, deem the

respondents to have invalidated their holdings; (iii) the argument of the appellants that neither the respondents' local agent nor their firm of Solicitors had any '*locus standi*' before the Hearing Officer was without merit since, they had neither pleaded such 'want of authority' in their Answer to the respondents' Notice and Reasons for Opposition, nor had they raised it on a preliminary objection. The real question at issue was not the validity of the agent's appearance but the validity of the authority to solicitor to appear. On the authorities, this could not be questioned in the manner and form in which it had been done. The proper way to have taken objection on the issue of 'want of authority' was by way of an interlocutory motion or summons, and (iv) the respondents' opposition was therefore just, legal and well-founded and the learned Judge was correct in considering that the Hearing Officer had not exceeded his jurisdiction.

*Appeal dismissed.*

[*Editorial Note*:— Judgment of Chung, J. reported in (1966) L.R.B.G. 54, affirmed].

*C A. F. Hughes* for appellants.

*J. O. F. Haynes, Q.C.* for respondents.

*Cases referred to*:—

- (1) *Pellew v. Griffith* (1940) L.R.B.G. 114.
- (2) *Duke of Sutherland v. Heathcote* (1892) 1 Ch. 475.
- (3) *Souza v. Soares* (1916) L.R.B.G. 82.
- (4) *Daimler Co. v. Continental Tyre Co.* (1916) 2 A.C. 337.
- (5) *Russian etc. Bank v. Comptoir de Mulhouse* (1924) All E.R. Rep. 381; (1925) A.C. 112.
- (6) *Richmond v. Branson* (1914) 1 Ch. 968.
- (7) *Eze Ogueri v. Argosy Co. Ltd.* (1952) L.R.B.G. 90.
- (8) *United Engineering Union v. Devanayagam* (1967) 2 All E.R. 367.
- (9) *John Shaw & Sons v. Shaw* (1935) 2 K.B. 113, (C.A.).

CRANE, J: I agree. I desire to add a few observations of my own on this aspect of the matter to emphasise the juridical significance of a claim licence. This point was not taken in the arguments before us, but nonetheless I think it is important and not wholly academic as it has a direct bearing on the true construction of regulation 23 of the Mining Regulations, Cap. 196.

In evaluating the rights conferred on the holder of such a licence, the authorities, as my brother VAN SERTIMA, J. has stated, clearly relegate them to the category of profits *a prendre*, the right to which, as this court has shown in *Pellew v. Griffith* (1940) L.R.B.G. 114, may be vindicated with might and main.

## J.A.K. SYNDICATE v. C.G. EXPLORATION CO.

According to proviso (b) of sec. 3(D) of the Civil Law of British Guiana Ordinance, Cap. 2, the law which governs such rights is still Roman-Dutch, the former common law of Guyana. This system of jurisprudence, though abrogated by our legislature as far back as 1916, is as much alive here today as it ever was. This case furnishes a vivid illustration of the impact of its survival and the fact that it is destined to regulate personal and proprietary interests for many a year to come.

Etymologically speaking, the term profit *a prendre* appears to have been introduced into English Law at the time of the Norman Conquest. There are two different views put forward on the matter of its historical antecedents – see HOLDSWORTH, HISTORY OF ENGLISH LAW, Vol. iii, p. 144. Briefly, one is that the conception began with feudalism and originated in the grants that the lord of a manor usually made to the manorial tenants; while the other view is that the origin is to be found in the Anglo-Saxon method of land cultivation. Whichever view be accepted, it is clear that the conception is analogous to the usufruct of Roman-Dutch Law principally in the respect that it conferred the right on one person to use and enjoy another's property.

PROFESSOR LEE in his INTRODUCTION TO ROMAN-DUTCH LAW, 1915 Edition, p. 158 tells us:

“In Roman Law usufruct meant the right of use and enjoyment of another's property, usually for the life of the person entitled, sometimes for a fixed or ascertainable period terminable on death. A usufruct may be constituted over either immovable or movable property.”

Unlike the real servitude, personal servitudes of which the usufruct is one, were specifically excluded from sec. 3(D) of the Civil Law Ordinance, and its English counterpart the profit *a prendre* which is a much wider conception substituted in its stead.

A profit *a prendre*, as defined by LINDLAY L J., in *Duke of Sutherland v. Heathcote* (1892) 1 Ch. 475 at p. 484, is – “a right to take something off another's land”. From these definitions there is no doubt about the synonymy of the two expressions – the profit *a prendre* of English Law, and the usufruct of the Civil Law. They are both *jura in re aliena*; they both confer interest in or concerning land for which they are constituted. A profit *a prendre* however, is of wider import than the usufruct; it is an incorporeal hereditament, i.e., it is an interest which is capable of passing by way of descent to heirs, (unlike the usufruct which enured only for life or a shorter period – see *De Souza v. Soares* (1916) L.R.B.G. 82). It confers an interest in the land on which the profit is enjoyed – one which is not determinable on death as is the interest of a usufructuary. In this respect it is analogous to the grant of a licence under reg. 10 of the Crown Lands Regulations, Cap. 175, Part 1, Sub. Leg. Laws of Guyana, vol. 9. On this evaluation a claim holder's licence is alienable *inter vivos*; it will not cease

on death, but would devolve on his personal representatives for the remainder of the term of the grant.

By way of contrast it is of interest to note that Roman-Dutch Law made provision for the determination of a usufruct in five possible ways – (i) death; (ii) complete, but not partial, destruction or change of form of the subject matter of the usufruct; (iii) surrender; (iv) merger; (v) non-user for one-third of a century.

As I view it, the respondents, the Central Guiana Exploration Co. Ltd., being in the continuous possession of claim licences in respect of their 23 locations along the lower Kurupung river, since the year 1957, have ever since that time and up to now are still in lawful occupation of their holdings despite the construction which counsel for the appellant Syndicate urges should be given to regs. 6 and 23 of the Mining Regulations (referred to hereafter as the regulations), which, so far as is material, reads as follows:

23. “A licence, so long as the holder thereof complies with the Mining Ordinance and with these regulations, shall, subject to its terms, confer the right to the use and enjoyment of the surface included within the boundary lines of the claim, and to all veins, lodes, ledges, and deposits below such surface and of all the metals, minerals, or precious stones covered by such licence within the vertical planes in which the surface boundaries lie.”

In my opinion, the right to the use and enjoyment of the surface included within the boundary lines of the claims and the deposits below such surface and of ore, metals, minerals etc., does not cease *instanter*, on failure of the claim licence holder to keep the boundaries of his claim distinctly marked as provided by the regulations – (see regs. 8-10) even if a court were to accept that the boards were not kept up.

The title of right to prospect for and to locate claims springs from reg. 6. The words “so long as” in reg. 23, in my view, can in no way derogate from nor determine those rights or hold them in abeyance; they confer no automatic right on the holder of a prospecting licence to re-locate a claim which has previously been lawfully occupied or lawfully located for an alleged breach of the Mining Regulations.

The right conferred by reg. 23 is not in the nature of a determinable interest giving a holder of a prospecting licence the immediate right to enter upon and locate a claim for condition broken; but though it is of indefinite duration, a claim licence may be revoked for cause by the Governor-General in Council (reg. 24(1)); or cancelled by the warden on a certificate being issued to the effect that the area included in the licence is not being efficiently worked on a complaint made by any person who desires to obtain a licence for the same area, or any part thereof, (reg. 24(2)). It is really only in one instance, it seems, that a claim holder’s interest is an immediately determinable one, that is to say, an interest which may come to a premature end, i.e. before the completion of the maximum period intended by the grantor,

## J.A.K. SYNDICATE v. C.G. EXPLORATION CO.

and one which terminates the right of enjoyment during the continuance of that time. By reg. 25 it is a condition that “every licence shall continue in force so long as the rent payable in respect thereof is regularly paid”, and reg. 26(3) provides that all claims on which rent has not been paid up to and including the 31st March in any year shall be deemed to be abandoned for nonpayment of rent, and the lands upon which such claims were located shall be open to location from the very next day. Such abandonment, of course, is only a statutory fiction because a claim holder, even though he is in actual physical occupation working his claim, is deemed in contemplation of law to have vacated it.

In truth, only the same medium which confers the right can lawfully provide for its determination, and this is precisely what reg. 29 has done by conferring upon the holder of a prospecting licence the power to challenging the right of the holder of the claim to continue in occupation.

In my opinion the words in reg. 29 — “to continue in occupation”, in the same way as do the words in reg. 31 — “to remain in occupation”, show that the law recognises his right to be still in occupation thereof until it decrees otherwise, even though there has been a breach of the regulations in the respect that the claim-holder’s boundary lines are not kept reasonably clear and the boundary marks are not erected and marked in accordance with the regulations.

The fact of the matter is that so much is the interest conferred on the licensee respected and recognised that it is clear that not even the Crown may forfeit it except under due process of law. We see that this is so from reg. 31 under which the warden is obliged to avail himself of the identical right to challenge which is open to the holder of the prospecting licence, and for the same grounds as in reg. 29, before the Commissioner of Lands and Mines may lawfully, declare a forfeiture to have been incurred.

It seems to me therefore that before a claim which has been formerly located becomes once again open to location — and I would agree that a claim licence is *prima facie* evidence of the fact of a prior lawful location — any one of the following must have occurred:

- (i) rent must have remained unpaid up to and including 31st March in any year. If this happens the claim becomes open to location immediately after midnight on that day (reg. 26(3)).
- (ii) in the case of a claim holder’s voluntary abandonment of his claim at the expiration of one month from the date of the first of three successive notices in the Gazette to that effect by the Commissioner or Warden on receipt of notice from the licensee, (reg. 26(4)).
- (iii) the right of challenge aforesaid, must have been exercised either by the holder of a prospecting licence or the Warden, and a forfeiture declared either under reg. 30(3) or reg. 32.

For my part, I think it is beyond dispute that the appellant Syndicate have not availed themselves of the procedure provided by reg. 29, and it is submitted that a challenge is the only means whereby the profits *a prendre* conferred by the 23 claim licences may be lawfully determined. It therefore seems to me that once the respondents are in possession of valid claim licences in respect of their 23 holdings, the interests which are thereby conferred having been previously lawfully located constitute a barrier to further location and may be determined only by regs. 29 and 31 for the grounds on which the Syndicate claimed they have exercised their right to locate in this case. Failure to maintain boards or to work the claims, even if such had been established to the satisfaction of the Warden, cannot *ipso facto* give the appellants a right to locate the respondents' claims unless the procedure of challenge is first employed, for it is only such means that the law provides for the determination of the respondents' interests under their claim licences.

In my opinion, to suggest that the onus of proof, as has been alleged in the grounds of appeal, of a previous lawful location or occupation lies on the respondent company is a red-herring. No such question can properly arise, I believe, simply because the appellants have not obeyed the regulations; they have not pursued the only course which is offered them in the circumstances, that is to say the procedure in reg. 29 of challenging the right of the respondents to remain in occupation.

The onus of proof of a prior lawful location or occupation can only become relevant when the law has been complied with. The appellants cannot be heard to throw the onus of proof on the respondents when they have not obeyed the regulations; it is only when there has been such compliance by them that the Commissioner or Warden acting under reg. 30(2) can, if he upholds the challenge, deem the respondents to have invalidated their holdings.

I will now deal with grounds 11 and 13 of the Grounds of Appeal. These may be taken together since they have a common basis in the alleged want of authority in Robert Narain, the respondents' local representative in Guyana. Ground 13 appears to embody ground 11 and is couched in the alternative: "The learned judge erred in law when he held that the proceedings were properly instituted, alternatively when he held that an authority for the institution of the proceedings was properly or validly given."

It was contended that Robert Narain who testified on behalf of the company before the Hearing Officer to the effect that he was the company's local agent with authority to accept process on its behalf was in fact not duly authorised to do so. The argument is that if indeed Narain was not the duly constituted agent of the respondents, he was incapable of appointing the firm of solicitors, Messrs. Gomes & Gomes who appeared on behalf of the respondents.

Accordingly, want of authority is alleged both with respect to agent and solicitor. In reply, counsel for the company reasoned: that in the pro-

## J.A.K. SYNDICATE v. C.G. EXPLORATION CO.

ceedings in the Hearing Officer's court, no objection was taken in the Answer filed by the appellants that the opposers were not properly before it. He contends, as I understand him, that issue was joined only on the facts, and that there was no preliminary objection taken, as indeed there ought to have been on this legal point of the company's *locus standi* before the Hearing Officer on January 6, 1965. Counsel particularly directed attention to the fact that the representative capacity of Robert Narain was specifically stated in ground 1 of the Notice and Reasons of Opposition, with his address — I take it his address of service — stated there to be at lot 92 Middle Street, Georgetown. The point is that Narain's authority to represent the company was in fact, as the record shows, taken only during the cross-examination of Narain who was not even asked to produce it; this he stated to be in the form of a letter of authority derived through a certain Colonel Roberts and issued by the respondents.

Having considered the above objection raised to the *locus standi* of both Robert Narain and of Messrs. Gomes & Gomes, Solicitors, who briefed Queen's Counsel at the Hearing Officer's court, I am of the view that it cannot prevail either in its primary or alternative forms, for there is no substance in it.

The authorities are clearly to the effect that proof of want of authority by the plaintiff to its agents to prosecute an action cannot be furnished in the manner in which it is contended should be done. It is conceded of course, that if the court becomes aware in the course of the trial that a plaintiff is incapable of giving a retainer, it will strike out the action without any formal application — see *Daimler Co. v. Continental Tyre Co.* (1916) 2 A.C. 337. The principle is stated to be that if a defendant has reason to believe that a plaintiff has not really set the law in motion and a writ purporting to be issued in his name was issued without authority he should apply promptly to set it aside; he should not wait to deliver a defence — see *Russian etc., Bank v. Comptoir de Mulhouse* (1924) A.E.R., (reprint) 381 at p. 390 (A-D); (1925) A.C. 112; *Richmond v. Branson* (1914) 1 Ch. 968, and *Eze Ogueri v. Argosy Co. Ltd.*, (1952) L.R.B.G. 90.

It was contended that these authorities are instances before the superior courts, and could have no place before a Hearing Officer whose functions are merely ministerial as distinct from judicial; be that as it may, it is submitted the principle involved is the same. A defendant must allege before any court or tribunal as early as possible a want of authority to prosecute; he must endeavour at the earliest available opportunity to set aside the proceedings for want of it, whether in the High Court or in courts of inferior jurisdiction, though if the court becomes aware of the want it must *ex mero motu* strike out the proceedings. Want of authority is fundamental; it is a matter which goes to jurisdiction to entertain proceedings, and therefore may properly be taken before any kind of court or tribunal irrespective of whether it acts ministerially or judicially. The majority opinion of the Privy Council in the recent case of *United Engineering Union v. Devanayagam* (1967) 2 A.E.R. 367, is well illustrative of the difficulties involved in drawing the distinction

between executive and judicial power, and shows how baffling it is even to great minds to formulate the true basis on which it rests. In my opinion there was nothing to prevent this point being taken before the Hearing Officer *in limine*, either with respect to Robert Narain or the solicitors. This was not done however, but merely a question asked in cross-examination, and Narain not even being asked to produce his letter of authority.

In the case of *Richmond v. Branson* (above), WARRINGTON, J., observed when the authority of a solicitor for the plaintiff to bring an action was called in question:

“The application really raises an important question of practice or procedure, namely, whether it is competent to a defendant to insist on trying, as a relevant issue in the action itself and at the trial, the question whether or not the plaintiff’s solicitor has sufficient authority to institute the action . . . In other words, they dispute the authority of the solicitors instructed by the next friend, and that of the friend himself, to institute the action. Now is that an issue which it is competent to the defendants to raise at the trial? In my opinion it is not. The action, in whatever form it is brought, is the action of the plaintiff. If a solicitor is acting without authority in an action brought by a plaintiff who is not alleged to be of unsound mind, either the plaintiff or the defendant is entitled to have that action summarily stayed, and to an order that the solicitor should pay the costs of the action as between solicitor and client. There is really, in principle, no distinction between an action brought by a plaintiff of unsound mind, or alleged to be of unsound mind, by her next friend, and an action brought by an ordinary plaintiff. In both cases the real question, if there is any question at all, is that of the authority of the solicitor.

. . . But the real question is the authority of the solicitor. Is that a question which can be raised as a relevant issue in the action and at the trial? No authority has been cited in support of the affirmative of such a proposition, and, in my opinion, it is impossible, according to the ordinary practice and procedure of the court, to justify that proposition. The business of this court could not be carried on if one were not entitled to assume the authority of the solicitor unless and until that authority had been disputed and shewn not to exist in the proper form of proceeding, namely, a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority. . . . In my opinion the defendants, by alleging in their defence what is tantamount to a lack of authority on the part of the solicitors who instituted the action, have raised an issue which it is not competent to them to raise as an answer to the claim, though it is competent to them to raise it in other proceedings.”

These reasons of WARRINGTON, J., in *Richmond v. Branson*, above, were approved by the Court of Appeal in *John Shaw & Sons v. Shaw* (1935) 2 K.B. 113, C.A. which affirmed the principles that an objection to the right

## J.A.K. SYNDICATE v. C.G. EXPLORATION CO.

to sue ought not to be taken at the trial, nor should want of authority be pleaded in the statement of defence; but by way of an interlocutory motion or summons — see *per* ROCHE, L.J., at p. 147 of the report.

In the instant case the appellant Syndicate neither pleaded such want of authority in their Answer to the Company's Notice and Reasons of Opposition to their claim for the grant of claim licences nor took the preliminary point in relation thereto even, if they were entitled to do so before the Hearing Officer. They merely, and in a very perfunctory manner in cross-examination, asked of Robert Narain by what authority he appeared on behalf of the respondents. The point is that there was no duty on Narain's part to produce his letter of appointment as the company's locally resident agent unless he were specifically asked to do so at the hearing, because in the Notice and Reasons of Opposition it is clearly stated he is such agent with a fixed and determinate address. The appellant's Answer did not make an issue of it so as to throw the onus on Narain *ab initio* of proof of authority to appear and represent the foreign corporation. It is suggested that if Narain knew his authority was being challenged at the hearing he would have been armed with it and not be taken by surprise.

Even so, on the basis of the reasoning of WARRINGTON, J. above, it would appear that Narain's appearance is not indeed the real question at issue; it is the authority of solicitor to appear which is the real question at issue. This, it is submitted, I have shown to be concluded by authority and cannot be questioned in the manner and form in which it has been. There is likewise no substance in this ground of appeal, but I should perhaps mention for the sake of the record that had we considered such authority for the respondents to Narain at all necessary to be proved by him, we would have acceded to counsel's request and received evidence on the point.

For the above reasons, I must agree that the opposition by the Central Guiana Exploration Company Ltd., before the Hearing Officer to the appellant Syndicate's claims to licences in respect of the 23 locations on the lower Kurupung river, Mazaruni Mining Area, No. 3, were just, legal and well founded, since the company were in possession of 23 valid claim licences in respect of the same area which they had previously lawfully located and thus constituted a barrier to further location. It follows that the learned judge was right in concluding that the Hearing Officer had not exceeded his jurisdiction. The Syndicate's appeal is therefore dismissed with costs.

VAN SERTIMA, J.: I agree.

GEORGE, J (Ag.): I agree.

*Appeal dismissed.*

Solicitors:

*H. B. Fraser* (for the appellants);

*N. C. Janki* (for the respondents).

## CARMINE THOMAS CITERA v. RITA COSTA CITERA

[In the High Court (Vieira, J.) — April 3, 11; May 3, 6, 1967.]

*Divorce — American citizens married in New York — Wife permanently resident in New York — Husband resident in Guyana on 5 year contract — Wife refuses to come to live in Guyana — Petition for divorce filed by husband in Guyana — Malicious desertion — Whether husband has acquired domicile of choice — Jurisdiction of High Court to grant decree — S. 2 of the Matrimonial Causes Ordinance, Cap. 166 (now s. 2 of the Matrimonial Causes Act, Cap. 45:02).*

*Practice and procedure — Divorce — Service of petition in foreign country — Discretion of Court — Order 9 Rule 2 of the Supreme Court Rules, 1955 (now Order 9 Rule 2 of the Rules of the High Court, Cap. 3:02 (Subsidiary)).*

*High Court — Divorce — Jurisdiction — Procedural issue — Whether Court has power, ex mero motu, to raise jurisdictional point therein.*

The parties are American citizens and were married by licence in the Borough of the Bronx, State of New York, United States of America. On October 28th, 1966, the husband arrived in Guyana on a 5 year contract with the Government of Guyana as an Industrial Training Adviser under the aegis of the United States Agency for International Development, who were his real employers. The wife did not accompany her husband and steadfastly refuses to come to live in Guyana. On April 1, 1967, the husband filed a petition for divorce in the High Court of Guyana praying for a dissolution of his marriage on the ground of his wife's malicious desertion. He then made an application in Chambers by way of summons together with an affidavit in support seeking to dispense with personal service of the citation and petition and with liberty to effect such personal service out of the jurisdiction by registered postal packet addressed to the wife at her address in the Bronx, New York. The Court, not being satisfied on the vital question of the husband's domicile adjourned the matter into open Court for viva voce evidence to be taken from him.

The husband testified that it was his intention to reside permanently in Guyana and that he had no intention of going back to the United States to live. He asserted that he had brought all his personal belongings, assets and savings, as well as his left-hand drive American Mercury car to this country. Since his arrival, he has lived at two addresses, both in Georgetown, which were rented, but it was his intention to purchase his own property here. His wish was to give his expertise to the people of this country and he had been offered the post of Adviser to the Industrial Training School to be set up by the Government which was a project of the American Institute of Free Labour Development which, after the first two years, would be taken over and run by the Government. He had not heard from his wife since March 5, 1967, and her refusal to come and live with him in Guyana had placed a terrific stress and strain on him and he assured the Court that he was not in this country for the purpose of acquiring a domicile so as to obtain a divorce. Para. 5 of his petition read

## CITERA v. CITERA

— “5. The petitioner has taken up permanent residence in Guyana and both the petitioner and the respondent are domiciled in Guyana.”

**HELD:**— that (i) under s. 2(1) of the Matrimonial Causes Ordinance, Cap. 166, the jurisdiction of the High Court in this country in divorce and matrimonial causes is exercised, as far as possible, in the same manner and in accordance with the same principles and rules as jurisdiction in those matters is exercised by the Probate, Divorce and Admiralty Division of the High Court of Justice in England subject to any rules of court made under the Matrimonial Causes Ordinance, Cap. 166 or the Supreme Court Ordinance Cap. 7 or any other Ordinance; (ii) jurisdiction in England is based upon domicile and not upon residence as was formerly the case; (iii) the husband’s domicile of origin was that of the State of New York and a domicile of origin can never be destroyed but remains in abeyance until a domicile of choice has been acquired which is a question of fact to be determined in each particular case; (iv) a change of domicile is a serious step which can only be imputed where there is clear and unequivocal evidence, the onus of which is on the party claiming that such a change has taken place; (v) here, the only way the husband could get a decree is if he had satisfactorily established a domicile of choice but he had failed to do so since, in the opinion of the Court, there was no absolute certainty or even great probability that he would remain in this country for the full 5 years of his assignment or even longer and it must be remembered that at the time of the filing of the petition on April 1, 1967, he had only been living in this country for just five months. Further, his job here was a mere assignment subject to all kinds of unforeseen events and external influences and his employer was not the Government of Guyana but the U.S.A.I.D., a foreign external agency. He had no property here, a most important consideration, and the fact that he had brought all his assets and savings as well as his car did not, ipso facto, show that he had formed that ‘fixed, final and deliberate intention’ that is absolutely necessary before a person can abandon his domicile of origin; (vi) although the direct concern of the Court at this preliminary stage of the proceedings was a mere procedural issue, nevertheless, it was competent for the Court to take the jurisdictional point since if the application were granted and the point of jurisdiction taken successfully at a later stage then the order of the Court would be a nullity.

*Application refused — Leave to appeal, if necessary, granted.*

*Cases referred to:—*

- (1) Le Mesurier v. Le Mesurier (1895) A.C. 517.
- (2) Salvesen (or Van Lorang) v. Administrator of Austrian Property (1927) A.C. 641.
- (3) Lord Advocate v. Jaffrey (1921) A.C. 146.
- (4) Lord v. Coluin (1857) 4 Drew. 366.
- (5) Udney v. Udney (1869) L.R. 1 Sc. App. 441.
- (6) Wilson v. Wilson (1872) L.R. 2 P & D 435.
- (7) Bell v. Kennedy (1868) L.R. 1 Sc. App. 319.
- (8) Bowie (or Ramsey) v. Liverpool Royal Infirmary (1930) A.C. 588.

- (9) Carr v. Carr (1955) 1 W.L.R. 422.
- (10) Gulbenkion v. Gulbenkion (1937) 158 L.T. 46.
- (11) Bryce v. Bryce (1933) p. 83.
- (12) Moorhouse v. Lord (1863) 10 H.L.C. 272.
- (13) Platt v. Att-Gen. of New South Wales (1878) 3 App. Cas. 336.
- (14) Winans and Another v. Att-Gen. (1904) 90 L.T. 721, H.L. (1904) A.C. 287; 20 T.L.R. 510.
- (15) Att-Gen. v. Yule & Mercantile Bank of India (1931) 145 L.T. 9 C.A.
- (16) Gatty (F.A.) and Gatty (P.V.) v. Att-Gen. (1951) P.444; (1951) 2 T.L.R. 599.

*Eon Hanoman* for petitioner (applicant).

VIEIRA, J.: The parties to this petition are citizens of the United States of America, having been married by licence in the Borough of the Bronx, State of New York, United States of America, on 7th August, 1965.

On 28th October, 1966, the petitioner (applicant) arrived in this country on a 5-year contract with the Government of Guyana as an Industrial Training Adviser, under the aegis of the United States Agency for International Development (A.I.D.), who are his real employers.

The Respondent did not come with her husband and has refused and still refuses to do so despite repeated requests on behalf of the Petitioner.

On 1st April, 1967, the Petitioner (applicant) filed a petition for Divorce in this court together with an affidavit in support, praying for a dissolution of his marriage on the ground of the Respondent's malicious desertion.

The petitioner (applicant) now seeks leave of this court by way of Summons together with affidavit in support thereof to dispense with personal service of the Citation and Petition and with liberty to effect service out of the jurisdiction by registered postal packet addressed to the Respondent at her address at 2764, Latting Street, Bronx, New York, United States of America.

Order 9 Rule 2(e) of the Supreme Court Rules, 1955 provides as follows—

“2. Service out of the jurisdiction may also be allowed by the court or a judge of the following processes or of notice thereof, that is to say –

(e) where the person on whom an originating summons, petition, notice of motion or other originating proceeding or a summons, order or notice is to be served, is neither a British subject nor residing within British dominions, a copy of the originating summons, petition, notice of motion or other originating proceeding or summons order or notice shall be served, together with an intimation in writing that a process in the form of the copy has been issued or otherwise launched.”

## CITERA v. CITERA

Order 9 Rule 4 provides as follows –

“4. Every application for an order under rules 1 and 2 of this Order shall be supported by affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action or the applicant has good ground for the application, as the case may be, and showing in what place or country such defendant or respondent is, or probably may be found, and whether such defendant or respondent is a British subject or not, and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this Order.”

Not being satisfied as to the vital question of the applicant’s domicile I adjourned the matter into open court for evidence to be taken from him.

In his *viva voce* testimony the applicant stated that it is his intention to reside in Guyana permanently and has no intention of going back to the United States of America. He asserted that he has brought to this country all his personal belongings, assets and savings, as well as his Mercury car PX 309 which he alleges is the last left-hand drive car permitted to be brought into this country by the Ministry of Communications.

Since his arrival in Guyana he has lived at two addresses, firstly at 250 Forshaw and Oronoque Streets, Queenstown, Georgetown, and presently at 17, North Road, Bourda, Georgetown in a house which he rents from one Miss Elsie Cordner who is now resident in Barbados, West Indies. He intends subsequently to purchase his own property here.

He stated that he wishes to give his knowledge to the people of Guyana and has been offered the post of Adviser to the Industrial Training School to be erected in Georgetown within the next two years. This school is a project of the American Institute of Free Labour Development which, after the first two years, will be taken over by the Government of Guyana.

The last time he heard from his wife was when she wrote him a letter dated March 5, 1967, in which she sent him the marriage certificate (tendered Ex. “A”). He alleges that as a result of his wife’s refusal he is under terrific stress and strain and he assured the court that he was not in this country for the purpose of acquiring a domicile so as to obtain a divorce.

Although this application is really a procedural one, nevertheless, in my opinion, it raises a fundamental principle as regards the jurisdiction of the High Court in Divorce proceedings in Guyana.

Section 2(1) of the Matrimonial Causes Act, Chapter 166, provides as follows —

“2. (1). Subject to any ordinance, the Supreme Court (hereinafter in this ordinance called ‘the court’) shall exercise all jurisdiction in respect of divorces and other matrimonial causes and disputes, and

in respect of declarations as to the legitimacy of a child, and as to the validity of any marriage under this or any other ordinance or under the common law, in as full and complete a manner as it has hitherto exercised jurisdiction in divorce and matrimonial causes under the Roman-Dutch common law, and that jurisdiction shall as far as possible be exercised in the same manner and in accordance with the same principles and rules as jurisdiction in those matters is exercised by the Probate Divorce and Admiralty Division of the High Court of Justice in England subject to any rules of court made under this ordinance or the Supreme Court Ordinance, or any amending ordinance, hereinafter in this ordinance called 'the Rules'.

Rule 3(d) of the Rules of Court (Matrimonial Causes) provides as follows:—

“3. In all proceedings before the court exercising jurisdiction under the ordinance, a petition shall state —

(d) the domicile of the parties to the marriage, unless the petitioner is asserting a domicile for the wife different from that of the husband, when it will be sufficient if the domicile of the husband is stated.”

Paragraph 5 of the petition states —

“5. The Petitioner has taken up permanent residence in Guyana and both the Petitioner and the Respondent are domiciled in Guyana.”

In order to found the jurisdiction of the High Court in this country in suits for dissolution of marriage, the husband and therefore the wife (*vide infra*), must be domiciled in Guyana. There are only 2 exceptions to this rule, as far as I am aware, viz., sections 2(2) of Chapter 166 and 3 of Chapter 167.

Section 2(2) of Chapter 166, which came into force on 24th March, 1951, provides as follows —

“2(2). Anything in the provisions of subsection (1) of this section to the contrary notwithstanding, the court shall have jurisdiction to hear and determine any petition for divorce presented by a wife on the ground of malicious desertion where the petitioner was, immediately before the marriage, domiciled in the colony.”

Section 3 of Chapter 167 provides that in the case of a marriage celebrated on or after 3rd September, 1939, but before 1st June, 1950, where the husband was at the time of the marriage domiciled outside the colony and the wife was immediately before the marriage, domiciled in the colony, the court shall have jurisdiction in and in relation to proceedings for divorce or for nullity of marriage as if both parties were at all material times domiciled in the colony provided that the petition was commenced not later than 5 years after 1st June, 1950. This Act, of course, is now of almost spent application.

## CITERA v. CITERA

The statutes relating to matrimonial causes in the High Court in England are now consolidated in the Matrimonial Causes Act, 1950, and the Rules in force are the Matrimonial Causes Rules, 1957, as amended.

Today in England the High Court cannot entertain a suit for divorce, subject to 3 exceptions, unless the husband, whatever his nationality, is domiciled in England at the commencement of the proceedings. This was not always so, and, in fact, at one time residence remained the main test. It was not until 1895 that the Privy Council in *Le Mesurier v. Le Mesurier* (1895) A.C. 517, held that the only true test of jurisdiction to decree a divorce is the domicile for the time being of the married pair. This test was adopted as being the law of England in 1927 in *Salvesen (or Van Lorang) v. Administrator of Austrian Property* (1927) A.C. 641, where LORD PHILLIMORE said at p. 665 –

“ It is established that the law of England recognises the competence and the exclusive competence of the court of the domicile to decree dissolution of a marriage.”

The three exceptions in England are –

(1) under the Matrimonial Causes (War Marriages) Act 1944 (in almost identical terms with our Chapter 167);

(2) where a wife has been deserted by her husband or the husband is an alien who has been deported from the United Kingdom if immediately before such desertion or deportation the husband was domiciled in England, then, notwithstanding any subsequent change of domicile of the husband, the court has jurisdiction to entertain any proceedings by a wife (including a suit for divorce) other than proceedings for presumption of death and dissolution of marriage (section 18(1)(a) of the 1950 Act); and

(3) where a wife who has been resident in England for 3 years. If (a) the wife is resident in England and has been ordinarily resident there for a period of 3 years immediately preceding the commencement of the proceedings, and (b) the husband is not domiciled in any other part of the United Kingdom, the Channel Islands or the Isle of Man, then the court has jurisdiction to entertain proceedings by a wife for divorce or nullity (section 18(1)(b) of the 1950 Act.

The domicile of any person is, in general, the place or country which is, in fact, his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law – Rule I. DICEY CONFLICT OF LAWS (1949) 6th Ed. p. 77.

There are three main types of domicile —

(1) domicile of origin, which is one arising from a man's birth or connections although the mere accident of birth does not of itself affect the domicile;

(2) domicile by operation of law or domicile of dependence, which attaches to a person independently of his will, and without reference to

birth, residence or other facts. Thus the domicile of a legitimate child follows that of his father whereas an illegitimate child receives that of his mother. A woman, even if an infant, automatically acquires on marriage the domicile of her husband. So long as the marriage is subsisting the wife cannot have a different domicile from that of her husband, even if they are judicially separated and if the husband changes his domicile, the wife's domicile is also automatically changed — *Lord Advocate v. Jaffrey* (1921) A.C. 146: (3) domicile of choice, arises where a person having the power of changing his domicile, voluntarily abandons his existing domicile and in fact settles in another country with the intention of permanently residing there *animo manendi* — *Lord v. Coluin* (1857) 4 Drew. 366.

There can be no doubt whatsoever in this matter that the only way this application can be granted is if the applicant has in truth and in fact acquired a domicile of choice in this country at the time the petition was filed.

The applicant's domicile of origin is clearly that of the State of New York which is one of many divorce jurisdictions in the continental United States.

“Every person is deemed to have a domicile and no one can have more than one domicile at any one time” — *Udny v. Udny* (1869) L.R. 1 Sc. App. 441 *per* LORD HATHERLY at p. 448.

A domicile of origin can never be destroyed and remains in abeyance until a domicile of choice has been acquired but revives whenever the domicile of choice is abandoned and endures unless and until a further domicile of choice is acquired — *per* LORD WESTBURY in *Udny v. Udny (ubi supra)*.

The question whether or not a person has acquired a domicile of choice is a question of fact to be decided by the evidence in each particular case. In *Wilson v. Wilson* (1872) L.R. 2 P & D. 435, a Scotsman married a Scotswoman in Scotland, and cohabited with her in Scotland, until he discovered her adultery. Thereupon, in 1866, he broke up his home and removed to England. In 1871, he brought proceedings in England for the dissolution of his marriage on the ground of the adultery committed in Scotland previous to the separation. He swore that he had left Scotland with the intention of taking up residence permanently in England. The court, believing his evidence, held that he had abandoned his domicile of origin and acquired an English domicile.

In *Bell v. Kennedy* (1868) L.R. 1 Sc. App. at p. 319 LORD CHELMSFORD succinctly put the principle as regards the acquisition of a domicile of choice as follows —

“A new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but also this intention has been carried out by actual residence there. It may be conceded that if the intention of permanently residing in

## CITERA v. CITERA

a place exists, a residence in pursuance of that intention, however short, will establish a domicile.”

There are two essential elements to be satisfied before a domicile of choice can be acquired, viz: (1) an intention to set up a permanent home in a new country (*animus manendi*) and (2) residence in that country.

Where it is claimed that a domicile of origin has been changed to one of choice, as in this case, the onus of proof is on the party claiming that such a change has taken place — *Bowie or Ramsey v. Liverpool Royal Infirmary* (1930) A.C. 588.

A change of domicile is regarded as a serious step which is only to be imputed to a person upon clear and unequivocal evidence — *Carr v. Carr* (1955) 1 W.L.R. 422.

A particular act or a course of conduct may be evidence to prove the intention to acquire a new domicile e.g. application for naturalisation and a statutory declaration in connection therewith — *Gulbenkion v. Gulbenkion* (1937) 158 L.T. 46: letters or oral statements, properly proved, to relatives and friends — *Bryce v. Bryce* (1933) P.p 83: the ownership of land or of a grave — *Moorhouse v. Lord* (1863) 10 H.L.C. 272: the establishment of a man’s wife and children in a new country — *Platt v. Attorney General of New South Wales* (1878 3 App. Cas. 336. All these cases are examples of evidence to prove a person’s intention as to the acquisition of a domicile of choice.

In *Winans and Another v. Attorney General* (1904) 90 L.T. 721, H.L. W.L. Winans whose domicile of origin was in America left America in 1850 and resided in Russia, for business purposes for twenty years, visiting England in the winter to avoid the Russian climate. In 1870 he came to reside in England but up to 1883 visited Russia yearly for business purposes. From 1883 up to his death in 1897 he resided in England. He retained a large interest in property in America, and always described himself as an American citizen, and spoke frequently of his intention of returning to America to develop his property in that country. While in England he lived in various houses taken on short leases. His will was passed in England, and the Crown claimed legacy duty on his estate, which was very large. Held, that the Crown had failed to discharge the onus, which was upon them of proving that Winans had a fixed and settled purpose of renouncing his domicile of origin, and that the claim for legacy duty failed.

LORD MACNUGHTEN said at p. 724 –

“ If the authorities which I have cited are still law, the question which Your Lordships have to consider must, I think, be this — Has it been proved ‘with perfect clearness and satisfaction to yourselves’ that Mr. Winans had at the time of his death formed a ‘fixed and settled purpose’ — a ‘determination,’ ‘a final and deliberate intention’ — to abandon his American domicile and settle in England?”

The learned law Lord continued at p. 725 —

“ Then it was said that the length of time during which Mr. Winans resided in this country leads to the inference that he must have become content to make this country his home. Length of time, is, of course, a very important element in questions of domicile. An unconscious change may come over a man’s mind. If the man goes about and mixes in society that is not an improbable result. But in the case of a person like Mr. Winans, who kept himself to himself and had little or no intercourse with his fellow men, it seems to me that at the end of any space of time, however long, his mind would probably be in the state in which it was at the beginning. When he came to this country he was a sojourner and a stranger, and he was, I think, a sojourner and a stranger in it when he died. On the whole, I am unable to come to the conclusion that Mr. Winans ever formed a fixed and settled purpose of abandoning his American domicile and settling finally in England. I think that up to the very last he had an expectation or hope of returning to America and seeing his grand schemes inaugurated.”

In *Bowie or Ramsey v. Liverpool Royal Infirmary* (1930) A.C. H.L. Sc. 588, a testator who died in Liverpool in 1927, aged 82 and unmarried, left a holograph will, valid by the law of Scotland but invalid by the law of England. The testator’s domicile of origin was Scottish, and he lived the greater part of his life in Glasgow. Originally employed there as a commercial traveller he gave up that employment in 1882 and never worked again. He went to Liverpool in 1892 to be near a brother and sister, and lived there for the last 35 years of his life. He was supplied with the means of subsistence by his brother and sister, and on the death of his sister he succeeded to the whole of her estate. With the exception of family ties he had few, if any, ties in either England or Scotland. In an action by beneficiaries under the will against the testator’s next of kin for a declaration that the testator was domiciled in Scotland at the date of his death – Held, that in the absence of independent evidence of an intention on the part of the testator to change his domicile, the burden which lay on the next of kin of proving that he had abandoned his domicile of origin had not been discharged.

LORD BUCKMASTER said at p. 591–

“ To acquire a new domicile it is essential, in the words of Lord Wensleydale in *Ackman v. Ackman* (3), to show that the person who is said to have changed his domicile ‘has abandoned his former domicile *animo et facto*.’

To avoid misunderstanding it is, I think, well to point out that in some cases the *animus* can be established by the fact, and the proof of a change of domicile does not necessarily fail because it is only from the facts that the intention can be ascertained. I agree also with the view admirably expressed by counsel for the appellant that search for independent proof of intention becomes most essential where a residence is retained in the domicile of origin. In this case no such circumstance exists.”

## CITERA v. CITERA

At p. 593 the learned law Lord continued –

“The main facts as I have stated then are but little embellished by other evidence. It is proved that George Bowie refused to go to Scotland when his sister Isabella desired to remain there in 1915. He is also reported to have said he never wished to set foot in Glasgow again, and he arranged for his burial in Liverpool beside his brother and sisters. On the other hand he referred to himself as a Glasgow man both during his life and in his will. As evidence of definite intention upon the question of domicile this evidence is fragmentary and insufficient.

The actual facts must be considered to see if from them the intention can be formed.

I find them inadequate to the purpose. George Bowie did not leave Glasgow in order to change his domicile; there can, I think, be little doubt he would have followed his family had they returned.

At no time had he any real attachments to Liverpool other than the presence of his brother and sisters. The ties he ultimately established were those due to inaction. He never seems to have had or exercised any volition of his own except a disinclination to move. It is true that a long continued residence may, in certain circumstances, show that the domicile is changed, though such intention did not originally exist. In my opinion however in this case the continued residence of George, Bowie in Liverpool after his brother’s death appears more probably attributable to his own lack of initiative and the disinclination of a man sixty-nine years of age to change his mode of life than to an intention to change his domicile.”

In *Attorney General v. Yule and Mercantile Bank of India* (1931) 145 L.T. 9, C.A., Sir David Yule, who was born in Edinburgh in 1858, went out to Calcutta, India, in 1875 and worked in his uncle’s cotton mills, becoming a partner in his uncle’s firm in 1880. In 1883 he returned for a few months, but from 1883 to 1900 remained working in India, making his business his life. He seldom went into society, but was fond of Indians, and chiefly associated with them. In 1900 he returned to England and married his cousin, and took her out with him to Calcutta in 1901, but, the climate not suiting her, she returned in November 1901 to England. From January 1903 to 1910 he paid visits for a substantial time each year to be with his wife in England, where he had bought a house. In 1903 a child was born. From January 1912 to November 1915 he remained in England, being it was said, detained by litigation. In 1916 Lady Yule went out to Calcutta, and she and her daughter lived with her husband in his flat over his office. She returned with her daughter after 2 months. In 1917 Sir David followed his wife home and, until his death on 3rd July 1928, remained in England except for short visits to India in 1919, 1920, 1922, 1924 and 1925. In his will dated 28th June, 1922, he made a declaration

of Indian domicile. On his death, the Crown, on the ground that he was domiciled in the United Kingdom, claimed death duties on his estate, the value of which was many millions of pounds. On the question whether, as the executors of the will alleged, he had acquired a domicile of choice in India and lost his domicile of origin. Held — that the earlier period of Sir David's life up to the year 1900 could not be estimated in deciding whether he had acquired a domicile of choice in India in a compartment separate from his later years and on the facts there was no clear evidence, as was necessary, of any manifest and concluded intention of change of domicile to overcome the domicile of origin. Therefore the onus of proof of a domicile of choice was not discharged and Sir David Yule died domiciled in the United Kingdom.

LORD HANWORTH, M.R. said at p. 14 —

“ The fact of residence in Calcutta between 1883 and 1900 does not afford a discharge of the heavy burden which falls upon the appellants. There does not emerge from the period — ‘with perfect clearness and satisfaction’ — a manifest and concluded intention to overcome the domicile of origin. Still less does that period of residence fulfill such a purpose when it is analysed by the light of subsequent events. The marriage interrupted any such accruing intention and provided once more ties which bound Sir David to his domicile of origin. Hopeful as he might have been from time to time that Lady Yule would be able to come for longer visits to, or residence in India, that hope seems to have been gradually but certainly dispelled, and in the last year of his life he yielded to the stress of circumstances. His love for India and its people and its climate remained; but his loyalty to his wife and daughter compelled his wishes to be ineffective. In my judgment Rowlatt, J. came to a right conclusion and the appeal must be dismissed with costs.”

In *Gatty (F.A.) and Gatty (P.V.) v. Attorney General* (1915) P.p. 441 the domicile of origin of the petitioner's father was English. In 1885, the father married a Miss Margaret Baker in Quebec, Canada. That marriage was dissolved by the District Court of Fargo, North Dakota, United States of America, on December 17, 1897. The wife died in 1919. On December 20, 1897, the father married a Miss Frances Irwini (the petitioners' mother) in Winnipeg, Canada. Owing to the health of their first child, they went to England in 1900. In November 1921, the parties went through a second ceremony of marriage at a register office in London. The father died in 1927 and the mother in 1948. The petitioners were born in 1898 and 1901 respectively. The petitioners applied for a declaration of legitimacy. Held, the petitioners' father had never formed any intention to abandon his English domicile, still less had he acquired a domicile of choice in North Dakota. It followed, therefore, that in English law the decree of the North Dakota court could not be recognised and it further followed that the subsequent marriage in Winnipeg to the mother was invalid because at the time of the

## CITERA v. CITERA

celebration thereof, Mrs. Margaret Gatty was still the lawful wife of the petitioners' father. Petition dismissed.

KARMINSKI, J. said at p. 456 –

“On my view of the facts I am not satisfied on the test laid down in *Winars v. Attorney General* (30) that in the year 1897 F.A. Gatty (the father) had formed a ‘fixed and settled purpose,’ or a ‘determination’ or ‘a final and deliberate intention’ (31) to abandon his domicile of origin in England. I have no doubt at all that the possibility of such an abandonment was in his mind, having regard to the discussion with his second wife of social difficulties and inferences which would arise in England from his second marriage; but that he formed any intention to abandon his English domicile, either fixed or final or deliberate, I am not satisfied. If I answer that question in the negative, as I do, it must follow in my view that he had not formed the requisite intention of settling either in the State of North Dakota or in Massachusetts or in New York or any other State of the Union. But if it had become necessary for me to do so, I should have decided that he had formed no intention of settling in North Dakota or indeed in any other State of the Union . . .

Left as I am on the evidence in that state of complete indecision, I am bound to come to the conclusion that he never abandoned his domicile of origin in England, still less did he acquire a domicile of choice in the state of North Dakota.”

The cases cited above, to my mind, clearly show the almost herculean task that faces the applicant in this matter, indeed for anyone setting up the abandonment of his domicile of origin and the acquisition of a domicile of choice.

At the time of the filing of the petition on April 1, 1967, he had only been in this country for just 5 months. Although attached to the Government of Guyana he is really employed by the United States Agency for International Development. There is no absolute certainty or even great probability that he will remain in this country for the full five years of his assignment or even longer despite his fervent assertions to the contrary. His job here is a mere assignment subject to all kinds of unforeseen events and external influences. Climatic, social and other considerations are greatly different from those obtaining in his home state of New York.

He has no property here. There is no evidence to show whether the property his wife is living in at Latting Street in the Bronx is his own or not but, in the absence of any evidence to the contrary, it is not unreasonable to assume, that that address is his residence in his domicile of origin. The fact that he has brought all his assets and savings to this country as well as his car, does not *ipso facto*, show that he has abandoned his domicile of origin and acquired a domicile of choice in this country.

On the available evidence before me I am satisfied that the applicant has failed to discharge the heavy onus placed upon him to prove that he had formed a fixed, final and deliberate intention to abandon his New York domicile of origin; still less has he shown that he has acquired a domicile of choice in the State of Guyana.

In my opinion this has been a rash and precipitate action on the part of the applicant for which it may well be that he is not entirely to blame.

In my considered opinion it is competent for this court to take the point of jurisdiction at this preliminary stage of the proceedings. Were I to grant this application and the point of jurisdiction taken successfully at a later stage, then it would mean that my order would be a nullity.

The application for leave to dispense with personal service with liberty to effect service out of the jurisdiction is accordingly refused as it is my considered opinion that this court has no jurisdiction to entertain this application. Leave to appeal granted, if necessary.

*Application refused — Leave to appeal, if  
necessary, granted.*

*I.G. Zitman, Solicitor (for petitioner (applicant)).*

## CENTRAL GARAGE LIMITED v. S.M. HASSAN

[In the High Court (Van Sertima, J.) – October 5, 13, 25; December 8, 21, 1966; January 21, 1967]

*Execution – Levy – Article seized subject-matter of hire purchase agreement – No breach of terms of agreement – Hirer not execution-debtor – Whether owner entitled to possession – Whether action maintainable.*

On July 17, 1961, one Walter Hintzen, entered into a hire purchase agreement with the plaintiffs in respect of motor bus BL 731, and same was registered in the hirer's name on that said day under the provisions of the Motor Vehicles & Road Traffic Ordinance, Cap. 280 (now Cap. 51:02). On March 9, 1963, the defendant obtained judgment against Hintzen in Action 48 of 1963 (Berbice) and on June 30, 1965, he levied upon the said bus to re cover the sum of \$400.10, being the balance due on the said judgment and costs. However, on April 1, 1965, Veronica Hintzen, the wife of Walter Hintzen, had entered into another hire purchase agreement with the plaintiffs in respect of the very same bus BL 731 as well as another bus of the same make but no change in the registration had taken place from the husband's name to that of the wife's name. The plaintiffs then sought, *inter alia*, a declaration that they were the owners and persons entitled to bus BL 731 which they

## CENTRAL GARAGE v. HASSAN

alleged was wrongfully and unlawfully levied upon and taken into execution by the defendant in Action 48 of 1963 (Berbice).

HELD: – that the plaintiffs’ case was misconceived and not maintainable for the following reasons – (i) the hirer, Veronica Hintzen, was not the execution debtor and, therefore, it became necessary to examine the agreement with her to determine the question whether, under the terms of this agreement, the plaintiffs were entitled to possession of the bus, since an action of wrongful seizure is only maintainable by a person in possession or one entitled to the possession at the time of the seizure; (ii) there was no evidence that Veronica Hintzen was at the time of the levy in arrears of instalments nor was there anything that would indicate that she was in breach of clauses 3 or 7 of the agreement, which related to cases where possession immediately reverts to the owner and cases where anything was done or attempted to be done by the hirer that would cause the article hired to be taken into execution, respectively; (iii) it could not be said that by not causing the registration of the change of ownership under Cap. 280 that the wife had suffered something to be done whereby the chattel may be taken into execution since there was no clause in the agreement that specifically required her so to do. Indeed, it was the husband who was required to sign the necessary form requesting a change of name of the registered owner. Further, ownership for the purpose of registration under Cap. 280 is not necessarily the same as *de facto* or *de lege* ownership for the purposes of lawful execution whereby the real and legal owner retains his right to ‘interplead’ against the execution-creditor regardless of the factum of possession or the fulfilment of the provisions of Cap. 280 in relation to registration of ownership.

*Action dismissed*

*P. N. Singh* for plaintiffs.

*R. P. Rawana* for defendant.

*Cases referred to:—*

- (1) *Ward v. Macauley* (1791) 4 Term Report 489.
- (2) *Churchward v. Johnson* (1889) 54 J.P. 326.
- (3) *Masters v. Fraser* (1901) 85 L.T. 611.

[*Editorial Note* – The Court of Appeal (Stoby, C, Persaud & Cummings, JJ.A.) allowed the plaintiffs’ appeal on July 5, 1967, to the extent of varying the judge’s order by granting the declaratory order asked for.]

VAN SERTIMA, J: In this matter the plaintiffs’ claim against the defendant is, *inter alia*, for the following: –

(a) A declaration that the plaintiffs are the owners of and are entitled to the goods hereinafter described, that is to say: –

“One motor bus, registration number BL 731 along with spare wheel, some tools and one jack”

wrongfully and unlawfully levied upon and taken into execution on the 30th day of June, 1965, in action No. 48 of 1963 Berbice, at the instance of the defendant against Walter Hintzen;

- (b) An order of the court declaring the said levy bad and illegal;
- (c) Damages for wrongful levy.
- (d) An injunction restraining the defendant from attaching, levying or otherwise interfering with the said property.

Briefly, the evidence disclosed that the defendant obtained judgment against one Walter Hintzen on the 9th March, 1963, in the Supreme Court, of which there was a balance due and owing to the defendant in the sum of \$400.10 on the 30th June, 1965, towards the judgment and costs.

Up to that date the said Walter Hintzen operated the motor bus BL 731 between New Amsterdam and the Corentyne Coast for hire.

On the 17th July, 1961, the motor bus in question was registered in the name of Walter Hintzen, acknowledged on both sides as the defendant in the action No. 48 of 1963, Berbice. He had at that date entered into a hire-purchase agreement with the plaintiffs with respect to the said motor bus.

On the 1st April, 1965, the wife of the said Walter Hintzen, Veronica Hintzen, entered into another hire-purchase agreement with the plaintiffs with respect to the same motor bus and another motor bus of the same make, BH 687.

On the date of the levy the motor bus BL 731 was still registered under the provisions of the Motor Vehicles and Road Traffic Ordinance, Cap. 280, in the name of Walter Hintzen, no effort having been apparently made by Veronica Hintzen to alter the statutory registration of ownership.

It is self-evident, therefore, that at the date of the levy motor bus BL 731 was, having regard to the terms of the agreement between the plaintiffs and Veronica Hintzen, owned by the plaintiffs.

It was contended at the close of the case by learned counsel for the defence that the present action being one for wrongful seizure, the plaintiffs are not entitled to succeed, unless it can be established that they were entitled to possession of the motor bus at the time of the seizure, because the action is only maintainable by a person in possession or one entitled at the time of the seizure to possession. This the defence contended had not been established, nor could it have been established. Reference was made to the following passage at 189 of GOODE'S HIRE-PURCHASE LAW AND PRACTICE:

“(a) Liability to the owner – Wrongful seizure, being a tort against possession and not against ownership, does not of itself confer a right of action on an owner out of possession save in those cases where at the time of seizure the owner was entitled to possession. Under the provisions of the agreement the act of seizure may itself

## CENTRAL GARAGE v. HASSAN

cause a termination of the hire-purchase agreement so as to entitle the owner to immediate possession, and modern agreements normally provide that in the event of the goods being seized by way of distress or execution the owner shall have power to terminate the hiring or the agreement as a whole.

The right to possession must exist at the time of seizure. If it does not, the fact that the owner subsequently acquires such rights will not enable him to maintain an action in trespass, since the essence of trespass is direct physical interference, so that mere detention after the plaintiff has acquired the right to possession will not found an action. But this will normally be of academic interest only, since a refusal to deliver the goods to the owner after he has acquired such right will enable him to institute proceedings for detinue or conversion.”

The case of *Ward v. Macauley*, an early authority, (1791) 4 Term Report 489 is the authority relied upon by the author of this comprehensive work in support of the proposition.

The case quoted is not one of hire-purchase but of a general hiring. The following earlier passage from the same book sets out the position with respect to hire-purchase agreements, at page 185 –

“It frequently happens that when the sheriff’s officer or County Court bailiff attends at the debtor’s residence or place of business to effect seizure the goods to be seized are found to be held by the defendant as hirer under a hire-purchase agreement. Since the hirer does not acquire ownership of the goods until completion of the payments due from him the goods cannot be seized or sold to satisfy the judgment debt while payments are still outstanding under the hire-purchase agreement. However, unless otherwise provided in the agreement the hirer’s option to purchase is assignable and can be sold under the writ or warrant, the purchaser thus acquiring the right to obtain full ownership by paying the balance of the instalments due. But modern hire-purchase agreements almost invariably prohibit any assignment by the hirer, and such a prohibition effectively prevents a lawful sale by the sheriff or bailiff of the hirer’s interest in the goods. A similar result is obtained by a clause providing that on seizure of the goods by way of execution the agreement shall automatically determine. In such a case the execution creditor cannot touch the goods even if there is no prohibition against assignment, for as soon as the goods are seized the agreement comes to an end and thereupon the hirer ceases to have any interest capable of being sold.”

It is significant that the authorities of *Churchward v. Johnson* (1889) 54 J.P. 326, and *Masters v. Fraser* (1901) 85 L.T. 611, relied on by the author, both deal with the situation where the hirer was the execution debtor as well.

In the present case, however, this was not so. It becomes necessary, therefore to examine the Agreement, Ex. “A”, to determine the question

whether under the terms of the said agreement the plaintiffs were entitled to possession of the chattel.

Clause 3 of the agreement states as follows: –

“The Hirer also agrees that upon the failure of the Hirer to make any of the said payments at the times and in the manner hereinbefore agreed upon, or for violation of any other condition or covenant hereinafter contained, or should the Hirer commit any act of bankruptcy, or have a receiving order made against him, or be adjudicated bankrupt, or make a composition with his creditors, possession of the said Motor Buses shall immediately revert to the Owner who may terminate the said hiring and that upon such termination the Hirer further agrees to permit the Owner or his duly authorised agents and servants and others employed by him without any let, suit, trouble, hindrance or denial whatsoever and without being in any way liable to any action, suit, indictment or other proceedings whatsoever in relation thereto (and without prejudice to his right to recover arrears of rent and damages for breach of this agreement or the sum or sums mentioned in clause 10 (B) hereof) to retake possession of the said Motor Buses and leave and licence is hereby granted to the Owner and his agents and servants and others employed by him, to enter any premises for the purpose of taking possession of the said Motor Buses using such means as may be necessary in so doing the Hirer waiving any trespass or right of action for damages or other proceedings whatever in consequence thereof.”

Clause 7 of the same agreement states as follows: –

“That until the said payments shall have been made, as aforesaid, the Hirer shall not assign or part with the possession of, dispose of, mortgage, pledge, or otherwise deal with the said Motor Buses, or do or suffer anything whereby the same may be distrained or taken or attempted to be taken into execution, or whereby the title of the Owner thereto may in any way be prejudiced or affected; and the Hirer further agrees that the title to the said Motor Buses shall not pass until the whole of the said payment shall have been fully paid and satisfied, but shall remain until then in the Owner and that until then the Hirer shall remain and be considered a bailee thereof for all purposes, both civil and criminal.”

There was no evidence led to indicate that Veronica Hintzen was at the time of the levy in arrears of payment of her instalments. Nor was there anything that would indicate that she was in breach of either of the clauses quoted.

On behalf of the plaintiffs it was argued that she should have caused the registration of ownership under the Motor Vehicle and Road Traffic Ordinance, Cap. 280 to be changed to her name. Accordingly, she had suffered something to be done whereby the chattel may be taken into execution. The answer to this proposition is not difficult to find. In the first place there

## CENTRAL GARAGE v. HASSAN

is no clause in the agreement that specifically requires her to effect the change of registration. Secondly, the plaintiffs, being aware of the dealings with the chattel since 1961, cannot escape a certain amount of responsibility for the failure to ensure that the registration was effected at the time of the change, particularly where, as here, they must have known that the new purchaser was the wife of the former registered owner, whether or not they might have known of the judgment against the husband. Thirdly, ownership, for the purposes of registration under the provisions of the Motor Vehicle and Road Traffic Ordinance is not necessarily the same as *de facto* or *de lege* ownership for the purposes of lawful execution, whereby the real and legal owner retains his right to interplead against the execution-creditor, regardless of the factum of possession or the question of fulfilment of the provisions of that ordinance with respect to registration of ownership. Fourthly, it is the former registered owner who is required to sign the necessary form requesting a change of name of the registered owner.

Having regard to the foregoing, therefore, I am of the opinion that the present action is misconceived. It is possible that the plaintiffs have their remedy by way of interpleader, as legal owners of the chattel. Further, it is possible that Veronica Hintzen may have had a cause of action for wrongful levy, because she is the person, on the evidence before me, who was entitled to possession of the chattel at the time of the execution. It is not necessary for me to go into either of these propositions.

I find on the evidence before me that the plaintiffs have failed to establish a right to the possession of the chattel at the time of the levy and accordingly cannot maintain the present action. The plaintiffs may not be without remedy at law but not by way of the present action. By way of further comment, their rights may have been more strong, if Walter Hintzen had been the hirer at the time of the levy, because of the clauses (quoted above) of the agreement, whereby their right to repossess the chattel might have accrued upon the execution of the levy on the chattel. The agreement of hire-purchase is not before me and I cannot speculate as to its provisions.

For the above stated reasons the present action is dismissed with costs to the defendant taxed fit for counsel.

*Action dismissed.*

LAW REPORTS OF GUYANA  
THE QUEEN v. MINTRA CHAND

[1967]

[Court of Appeal (Luckhoo, Persaud and Cummings, JJ.A). May 8, 1967.]

*Criminal Law — Evidence — Summing-up — Critical comments by trial Judge about bare denial made by accused after being cautioned in presence of victim — Whether Misdirection.*

The appellant was cautioned by a policeman in the presence of B whom it was alleged himself and another man had robbed two days previously. After the appellant was cautioned he said "I don't know anything about that." In his statement to the police the appellant alleged that at the relevant date and time he was at a nearby cinema with another man and denied robbing B. In his statement from the dock at his trial in the High Court the appellant said that himself and B had a fight in front of the cinema which his friend had parted. The trial Judge failed to remind the jury that when a person is cautioned he is not obliged to say anything and he told the jury that one would have expected that the appellant would have told the police about the fight which the jury were hearing for the first time and that such an incident might have been a motive why B had made a false allegation against him.

**HELD** — (i) it is not always that "silence is golden"; a judge may properly, in certain circumstances, invite a jury to consider an accused person's

## R. v. CHAND

silence as a relevant factor in determining what weight should be given to any defence which he may subsequently raise, but it would amount to a misdirection were he to invite them to treat the accused's silence as evidence against him; (ii) to avoid the danger of depriving an accused person of the protection which he has a right to expect from the implication of the words 'that he is not obliged to say anything' contained in the caution, it may well be that where an accused person makes no answer at all or makes some observation which in itself is not in the nature of an explanation, then the trial Judge should make no observation on it; (iii) here, the trial Judge's directions clearly offended these principles and the result of his drastic and destructive comments made it difficult for the jury to resist coming to the conclusion that because the story of the fight was not told at the first opportunity it could not be true, was not in fact true, ought not to be believed and should be discarded. Such comments could not be described as fair and proper and did not take cognisance of the paramount importance of not allowing the usual police caution to become a trap to the unwary.

*Appeal allowed — Conviction and sentence quashed.*

*Cases referred to:*

- (1) *R. v. Mitchell* (1892) 17 Cox's C.C. 503.
- (2) *D.P.P. v. Christie* (1914-15) All E.R. Rep. 63.
- (3) *Child v. Grace* 2 C & P 193.
- (4) *R v. Naylor* (1932) All E.R. Rep. 152.
- (5) *R. v. Leckey* (1943) 2 All E.R. 665.
- (6) *R. v. Davis* (1959) 43 Cr. App. R. 215.
- (7) *R. v. Littleboy* (1934) All E.R. Rep. 434.
- (8) *R. v. Gerard* (1948) 32 Cr. App. R. 132.
- (9) *R v. Tune* (1944) 29 Cr. App. R. 162.
- (10) *R v. Hoare* (1966) 1 W.L.R. 762.

*K. Zaman Ali* for appellant.

*G. A. G. Pompey, Senior Crown Counsel*, for respondent.

LUCKHOO, J.A. We have already allowed this appeal, quashing the conviction and setting the sentence aside. We now give our reasons for so doing.

The appellant and another man, Mahadeo Sukdeo, were convicted on the 12th January, 1967, for the offence of robbery with violence, contrary to section 222(a) of the Criminal Law (Offences) Ordinance, Cap. 10, for which they were sentenced to two years and eighteen months, respectively, and from which they both appealed; but the latter, somewhat unfortunately (in view of the conclusion at which we have arrived) chose to abandon his appeal before hearing. No doubt his position will be reviewed by those charged with that responsibility to allow him to have, in justice, the benefit of what the appellant herein has derived from this decision.

The case for the prosecution rested almost entirely on the evidence of one Malcolm Burnett which disclosed that on the 12th day of June, 1966, he was robbed of \$5.00 by the appellant and the other man and at the same time subjected to personal violence by both. After a report was made at the Police Station, Detective-Constable Brynmore Jordan on the 14th of June, 1966, went to the appellant and told him, in the presence of Burnett, that it was reported by Burnett that on the 12th of June, 1966, around 7.15 p.m. he was walking north along Meten-Meer-Zorg sideline dam when the appellant and another man suddenly attacked him; and that while the other man locked him off from behind, the appellant cuffed him on his mouth, chopped him with the side of his hand at the back of his neck, and then robbed him of \$5.00 from his right-side trousers pocket.

After this was stated, Jordan quite properly cautioned the appellant and asked him if he wished to say anything, and told him that he was not obliged to say anything but that whatever he said would be taken down in writing and may be given in evidence, after which the appellant said: "I don't know anything about that." The appellant was then arrested and taken to the Leonora Police Station where he elected to make a statement and was again cautioned, after which his statement was taken down in writing and is as follows:

"Sir, around 7 o'clock Sunday night 12.6.66, I was at Tarla Cinema at Meten-Meer-Zorg seeing a picture called 'Rocket Tarzan'. I was sitting at the front bench and I was in company with Lall but he is no friend of mine. I have several people which saw me in the cinema. I didn't rob Malcolm Burnett called 'Machachur'."

The attention of the appellant must have been directed to a specific time, viz. 'around 7 p.m.' However, the evidence related to a somewhat later time, viz. 'around 7.30 p.m.', and in his defence from the dock the appellant said:

"Sir, on Sunday, 12th June, I was at the Tarla Cinema and around 7.30 I saw Malcolm come up and said to me, 'I hear boy you want to beat me'. I said, 'Boy I am not a fight man or a bad man but what you did you must not do it again'. Then he ask me, 'What me do you?' and I told him that he steal one of my sister's fowls and he said that if I feel annoyed about it we can fight it out right here. He pelted a cuff at me and knocked me in my belly and me and he grabbed on together and both of us fell down on the ground and his mouth butt my head and burst. Lall came and parted the two of us. When Lall lifted him up from the top of me he gave me two kicks on my belly. Nothing more, Sir".

The main arguments in this appeal centre around:

(1) Two comments made by the learned trial judge on the failure of the appellant to say no more than "I don't know anything

## R. v. CHAND

about that” after Constable Jordan had told him of Burnett’s report (and cautioned him). The learned trial Judge said:

(a) “Well, Members of the Jury, you will have to ask yourselves whether having been confronted by the police and having been confronted by Burnett who was accusing him of committing robbery on him, if his story were true would he not have said: Well look, P.C. it is not true — myself and this man had a fight in front of the cinema. You can ask the cinema Manager. Lall was there and he parted us. He mentioned nothing whatsoever about having a struggle with Malcolm Burnett in front of the cinema. That would have been a motive why Burnett would have gone and made this false accusation against him. One would have expected that he would have told the police that it was because of this struggle in which Burnett got his Up burst, that Burnett is making this false allegation against him”.

(b) “You will bear in mind that, as counsel for the Crown told you, this is for the first time being told from the mouth of the number one accused (appellant). You will ask yourselves if he had an opportunity to do so before, whether when Malcolm Burnett had accused him of this offence, whether he would not have put forward this story if this story is in fact true”.

And (2) The judge’s failure to remind the jury that a person cautioned was not obliged to say anything.

It is not always that ‘silence is golden’. It sometimes happens that the circumstances are such that a person against whom statements are made could reasonably be expected to reply, in which case his silence may be construed as evidence against him.

CAVE, J., in *R. v. Mitchell*, (1892) 17 Cox’s C.C. 503 at page 508, attempted to lay down a broad rule when he said:

“Undoubtedly when persons are speaking on even terms and a charge is made and the person charged says nothing and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true”.

Undoubtedly the effect of silence on such occasions would depend upon the facts of the particular case; the circumstances would direct what significance, if any, should be attached, and given.

LORD ATKINSON, in *Director of Public Prosecution v. Christie*, (1914-15) A.E.R. Rep. at page 67, was more specific in his authoritative pronouncement that –

“A statement made in the presence of an accused person even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement so as to make it in effect his own”.

And if the circumstances are such that a reply cannot properly be expected, the party's silence will afford no inference of assent (*see Child v. Grace*, 2 C. & P. 193).

In criminal cases, however, an accusation is not unusually accompanied by a caution containing a specific statement that the person against whom the charge is made need not say anything. This then poses the question: To what extent is a Judge entitled, after an accused is cautioned, to comment on his failure to repudiate the charge at the first opportunity, in the light of his disclosures at the trial? The authorities which have paid attention to this aspect are not wholly consistent. In *R. v. Naylor*, (1932) A.E.R. Rep. 152, the Court of Criminal Appeal examined the following direction given in the course of the Recorder's summing-up:

"Now you would imagine a purely innocent young man accused of house-breaking and having these words put to him, 'Do you wish to say anything?' Surely if he is an innocent man one would think he would give some explanation of where he was and what he was doing at that particular time, and would make his defence then and there, but he says nothing".

At page 154 LORD HEWART, C.J., in the judgment of the court said:

"When one looks at the words of the formula which must be deliberately framed, it is obvious that they were intended to convey and do convey to the prisoner the belief that he is not obliged to say anything unless he desires to do so. If those words are really to be construed in this sense, that having heard them an accused person remains silent at his peril and may find it a strong point against him at his trial that he did not say anything after being told he was not obliged to say anything, one could think that this form of words is most unfortunate and misleading. We think that these words mean what they say and that an accused person is quite entitled to say, 'I do not wish to say anything except that I am innocent'."

The conviction was accordingly quashed.

The use of similar words in the summing-up in *R. v. Leckey*, (1943) 2 A.E.R., p. 665 was considered to be wrong. The trial judge there said:

"It may well be that the coolest and most calculated man ordinarily would get into a panic if he thought he might be charged with murder, or thought he might be asked questions, but can you understand how it comes about if he be innocent of the charge made against him?"

And again —

"But is it not a little difficult to see why if a man is asked to account for his movements and told what the enquiries were being

## R. v. CHAND

made for he should not say, 'I didn't murder the girl. When I left her she was all right', if that be the fact?"

To quote LORD CALDECOTE in his judgment at page 669:

"The judge seems to put to the jury the consideration that they might infer or find his guilt by considering the fact of his silence after caution. We think that that amounted to a misdirection, and it is proper ground upon which this verdict, subject to one other question, should be quashed. If it were not so, it must be obvious that a caution may be indeed a trap instead of being a means for finding out the truth, in the interest as much of innocent persons as it is in the interest of justice against guilty persons. An innocent person might well, either from excessive caution or for some other reason, decline to say anything when charged and cautioned, and if it were possible to hold that out to a jury as ground upon which they might find a man guilty, it is obvious that innocent persons might be in great peril".

Here again the conviction was quashed.

Then in *R. v. Davis*, (1959) 43 C.A.R. p. 215, although the jury were specifically reminded that the accused was cautioned and was not obliged to say anything unless he wanted to, yet on a defence which sought to establish an innocent participation, the following comments were made:

"If Davis was in the position that he now would have you believe he was in having handled a lot of stolen property which he did, on the authority of Goss would he say to the police, 'I am saying nothing?'"

And,

"Can you imagine an innocent man who had behaved like that not saying something to the police about this in the course of the evening or the next day, or even a little time afterwards? He said nothing".

These were held to be misdirections, and the conviction was quashed.

These cases, however, do not mean that a Judge is absolutely prohibited from making comments. The extent to which a Judge may comment on the accused's failure to indicate the nature of his defence when charged by the police had previously been considered by the Court of Criminal Appeal in *R. v. Littleboy*, (1934) A.E.R. Rep. 434. There LORD HEWART, C.J., said:

"There is a great difference between making the comment that silence on the part of the prisoner is unfortunate and a matter to be regarded with reference to the weight of the defence when the defence of alibi is raised, and saying that the fact that the prisoner was silent may be treated as evidence against him or as corroborating the evidence of an accomplice".

But His Lordship was also at pains to point out that –

“No doubt observations upon the failure to disclose a defence on some date earlier than the trial have to be made with care and with fairness to the accused person in all the circumstances of the case”.

In the number of cases which fall on one side of the line or the other, where there is an invitation to the jury to treat the accused's silence as evidence against him, this would amount to a misdirection, but in some cases where the invitation is to consider his silence as a relevant factor in determining what weight should be given to any defence which he may subsequently raise, certain comments have been permitted.

HUMPHREYS J. in *R. v. Gerard*, (1948) 32 C.A.R. at page 134 (after stating the facts) said:

“It could be a misdirection only if it was an invitation to the jury to form an adverse opinion against the applicant because he did not then give an explanation”.

The expressions in this case — ‘If his story were true would he not have said (so and so)?’ and ‘Whether he would not have put forward this story if this story is in fact true’ are not mere comments on the fact that perhaps it was unfortunate he did not give an answer, but really amount to an invitation to the jury to say, ‘Can you possibly believe this man's defence when he failed to indicate what it would be when first accused?’ Even where the comment is intended to be restricted in its application as to merely suggest that in the circumstances silence may be a relevant factor in determining what weight should be given to any defence which may be subsequently raised, unless this comment is made carefully and fairly the jury may be left with an impression adverse to the accused and so imperil a fair consideration of his case, which would not be permitted because of its effect, and the caution administered.

In other words, when such comments are unduly severe and critical the accused is deprived of the protection which he has a right to expect from the implication of the words uttered to him — that he is not obliged to say anything. To avoid this danger ever arising, it may be well that where a person charged makes no answer at all or makes some observation which in itself is not in the nature of an explanation, that the judge at the trial should make no observation on it. Therein lies the wisdom of the opinion expressed in *R. v. Tune*, (1944) 29 C.A.R. 162 at page 165 by HUMPHREYS J. when he said:

“It is probably better where a person has been charged with a criminal offence after having been cautioned and has either made no answer at all, or has made some observation which in itself is not in the nature of an explanation of the charge, that the presiding judge should say nothing about it beyond telling the jury exactly what was said or not said on that occasion, because many observations of different sorts by learned judges have from time to time been made the

## R. v. CHAND

subject of appeal to this court. If nothing is said by way of comment by the presiding judge, no point could be raised”.

The case of *The Queen v. Hoare*, (1966) 1 W.L.R., p. 762, appears to be very apt to this appeal. There the defendant was charged, *inter alia*, with robbery with violence in respect of which he maintained his innocence from the outset and at his trial revealed for the first time that his defence was alibi. The jury were directed:

“The prosecution say that he must have known full well if he is telling the truth when he gave evidence before you that he had been nowhere near Liverpool on that day but had been at his parents’ home at Luton. They say it is inconceivable that an innocent man could forget that fact. Ask yourselves, Members of the jury, what would you have done if you were an innocent man and the police had been alleging that you on a certain day at a certain place had committed a serious offence like robbery with violence with others, and you knew that at the time you were nowhere near the scene of the crime? What would you think it best to do? To say nothing? Or to say, ‘This is a ghastly mistake. Come and talk with my mother and father. They will tell you where I was’. It is a matter entirely for you”.

It was held that since there had been a failure to remind the jury that a person cautioned was not obliged to say anything and the summing-up clearly commends to, the jury the inconceivability of an innocent man not giving the details of his alibi at once to the police if it were a true one, there was a misdirection, and the conviction would be quashed.

LORD PARKER at page 766 said:

“In the present case though, no doubt, the jury had the words of the caution in their mind, they were never expressly told that a man was entitled to stand on his rights and say nothing, that he was entitled to keep back for reasons which he might think good the nature and details of his defence. Nothing of that was explained to the jury and on top of that comes the passages to which I have referred, the last two of which would clearly commend to the jury the inconceivability of an innocent man not giving the details of his alibi at once to the police if it were a true one”.

In this case there was also the failure to remind the jury that a person cautioned was not obliged to say anything.

The directions of the learned trial judge, already adverted to, clearly offend the principles well laid down in the above cited cases, and must have seriously prejudiced the jury’s consideration of the defence. In effect they were told: If the story of the accused from the dock were true (that he had a fight with Burnett in front of the cinema) he would have told it to the police constable but this he did not do; further, you would have expected him to tell this story, because it provided a motive for Burnett’s false accusation; but this again he did not do; you are hearing that story for the first time now,

although there was an opportunity to tell it before when the accusation was made in Burnett's presence; if this story was in fact true, would he not have said it then?

The result of such drastic and destructive comments is, that a Jury would find it difficult to resist the conclusion to be derived from them — that because the story of the fight was not told at the first opportunity, it could not be true, was not in fact true, ought not to be believed, and should be discarded. The doubts here cast were not of a harmless or trifling nature; it inveighed against a vital aspect of the defence; in the wake of the suggested disbelief must arise a reaction, adverse to the accused and inconsistent with his innocence. The damage caused might have been well-nigh irreparable. In the circumstances of the case the trial judge's comments could not be described as fair or proper. It did not take cognisance of the paramount importance of not allowing the usual police caution to become a trap to the unwary.

We therefore find that because of the nature of the comments made, the Jury were misdirected.

We were invited by the Crown to apply the proviso in this case, but on the evidence led do not consider it would be safe to do so.

PERSAUD, J.A.        I concur

CUMMINGS, J.A.     I also concur

*Appeal allowed — Conviction and sentence quashed.*

## KHELOWTIE PERSAUD v. BEATRICE WALKS AND ANOTHER

[In the High Court (Crane, J.) – February 6, 7, 20; May 13, 1967.]

*Equity — Mutual agreement to exchange “properties” — Receipts issued speak only of “houses” — Whether “lands” included in exchange — True intention of the parties. Whether specific performance possible.*

*Land — Prescriptive title — Land surveyed and divided into sub-lots — Inadequacy of widths of sub-lots — Plan rejected by Central Board of Health — Whether purported transfer void for illegality — Whether declaration of prescriptive title possible — S. 135 of the Public Health Ordinance, Cap. 145 (omitted from the 1973 current Laws of Guyana).*

The plaintiff was the owner of two houses on sub-lot “C” of lot B4 Uitvlugt, valued \$6,000, whilst the defendant Walks was the owner of a house at lot 127 Zeeburg, valued \$4,000. During the civil disturbances of

## PERSAUD v. WALKS &amp; ANOR.

1964, when there were serious racial and political conflicts between the two major ethnic groups, i.e., those of East Indian and African descent, the plaintiff and Walks met at the plaintiff's house on April 22, 1964, where one Olie Mohamed, a retired Estate bookkeeper, made out three documents, viz., two notional receipts and a promissory note in favour of the plaintiff for \$1,998, which represented six years rental of the back house at Uitvlugt which was rented to tenants for \$333. per annum. No money passed. After the documents were made out, Walks left with her receipt but, shortly afterwards, Mohamed realised that the two receipts only spoke about "houses" and made no mention of the "lands" upon which they stood. He there and then amended the plaintiff's receipt in her presence by inserting the words "I agree to go to management to transfer the said lot 127", between the text and Walks' signature. A similar insertion was intended to be done by Mohamed in Walks' receipt but he forgot to do so and this was never in fact done. These words had important consequences since the first defendant, Walks, was in a position to have transport passed for lot 127 Zeeburg as the owners (the 'management'), the former Bookers Sugar Estates, had made a written offer of sale to Walks for the said lot. The plaintiff, however, was not in a position to pass title because, after lot B4 had been surveyed by Mr. J. Rutherford, Sworn Land Surveyor and a plan prepared by him dividing the said lot into three sub-lots, "A", "B" & "C", that plan had been rejected by the Central Board of Health for the reason that the widths of the sub-lots were inadequate. It was for this reason, therefore, that the plaintiff, in an action against Walks for specific performance of the agreement, sought a declaration of prescriptive title on the ground that she had been in occupation of sub-lot "C" for a period of over 12 years, *nec vi, nec clam, nec precario*, since 1950 when her father, Mangal Maraj, the second defendant, had given her the said sub-lot. The defendant Walks alleged that the agreement between herself and the plaintiff was only in relation to 'houses' and not to houses 'and' lands.

**HELD:**— that (i) although the receipts specifically referred to 'houses' only and made no mention about 'lands', nevertheless, from all the circumstances of the case and the tenor of the agreement itself, it was quite clear that the parties, placed in the unenviable position in which each found herself at the time, must have contemplated and stipulated for reciprocity of exchange of both houses and respective lots of land on which the houses stood as a term of their agreement, since they must have considered that each was leaving her respective locality for all time; (ii) despite this finding in favour of the plaintiff, the Court, however, was unable to grant her a declaration of prescriptive title to sub-lot "C" of lot B4 Uitvlugt and to direct registration thereof in the Deeds Registry, since to do so would be in the teeth of s. 135(1) of the Public Health Ordinance, Cap. 145, and, consequently, the contract or agreement to transfer title to the said sub-lot by the plaintiff to the defendant, Walks, was void for illegality; (iii) accordingly, there was never any enforceable contract or agreement between the parties since it was made in breach of s. 136(1) of Cap. 145 and all three documents were illegal, void and of no effect, and, regrettably, the parties must be ordered to revert immediately to their former situations.

(Dictum of Verity, C.J., in *Din & Boodhoo v. Tetry* (1) expressly approved).

*Action dismissed.*

[*Editorial Note* – On May 25, 1968, Persaud, J.A. ordered the plaintiff to lodge security for costs within 6 weeks. This was not complied with and the plaintiff later filed a notice of motion seeking an extension of time to comply with the said order and also to file the record of appeal. On November 8, 1968, the motion was refused by the Court of Appeal (Persaud, Cummings & Crane, J.J.A.)]

*Cases referred to:—*

- (1) *Din & Boodhoo v. Tetry* (1943) L.R.B.G. 145.
- (2) *Waugh v. Morris* (1873) L.R. 8 Q.B. 202.

*F.H. W. Ramsahoye* for plaintiff.

*H.D. Hoyte* for defendants.

CRANE, J.: The plaintiff *Khelowitz Persaud* is a woman of East Indian origin. The first-named defendant *Beatrice Walks* a woman of African descent. In April 1964, they found themselves in a sad plight. At that time racial and political conflict raged between their two ethnic groups. It was not convenient for them to live in their situations, so they met to discuss the matter. According to the plaintiff, the defendant *Walks* who then lived at *Zeeburg*, West Coast Demerara, expressed her willingness to exchange properties with her. The plaintiff who owned two houses at *Casbah*, *Uitvlugt*, but not title to the land on which they stood intimated her readiness to exchange. Both parties then valued their respective holdings with that end in view. The plaintiff valued hers at six thousand dollars (\$6,000.00) (the *Uitvlugt* property), and the defendant at four thousand dollars (\$4,000.00), (the *Zeeburg* property). There was thus a difference of two thousand dollars (\$2,000.00) in the plaintiffs favour, and this *Walks* agreed to pay off from rents which the back house of the *Uitvlugt* property would yield in 6 years' time at the rate of \$333 per annum.

Three documents were accordingly prepared on April 22, 1964, – two mutual notional receipts, one in favour of each party for four thousand dollars, (Exs. "D" & "E"), and a promissory note (Ex. "C") in the plaintiff's favour for the sum of one thousand nine hundred and ninety eight dollars, representing the difference in value of the *Uitvlugt* over the *Zeeburg* property. As stated, the difference is really two thousand dollars, but the evidence is that it was reduced to one thousand nine hundred and ninety-eight dollars (\$1,998.00), so that the amount could be exactly divisible by 6, the period for which *Walks* was obliging herself to pay the plaintiff out of the rents for the back house on the *Uitvlugt* property.

## PERSAUD v. WALKS &amp; ANOR.

The three documents were drawn by one Olie Mohamed, a retired Estate bookkeeper at the house of the plaintiff where Walks went. He testified to that effect and the circumstances surrounding that event on behalf of the plaintiff. Mohamed stated that after drawing the documents he read them over to the parties, after which, the first-named defendant departed with the receipt signed by the plaintiff (Ex. "E"). But no sooner had she gone, he discovered that the two receipts, Exs. "D" & "E", did not embody the true nature of the transaction between them. He then inserted the following words in the defendant's absence, in her receipt which the plaintiff kept. He did so in the space left between the defendant's signature and the text of it — "I agree to go to the management to transfer the said 127 lot," i.e., the Zeeburg property.

The insertion of these words in Ex. "D" has important consequences, not only in view of the plea of Beatrice Walks that there was no agreement between her and the plaintiff for the exchange of properties, that is to say, houses and land, but for the exchange of houses only, but also in view of the nature of the relief sought by the plaintiff, viz., that the defendant specifically performs her contract to transfer the Zeeburg property to her.

It is to be noted there is no corresponding undertaking by the plaintiff in Ex. "E" to transfer the Uitvlugt property to the defendant, though Mohamed admitted he ought to have recovered the plaintiff's receipt from Walks and inserted it at a later date, but forgot to do so. However, the plaintiff is asking the court to say from the insertion of the words above on the defendant's receipt that there was a mutual agreement to exchange properties. These receipts notionally acknowledge four thousand dollars (\$4,000.00) by each party. I say notionally because, in effect, no money passed before the insertion of the words mentioned in Ex. "D"; they specifically state those sums were paid in respect of houses, not properties, i.e., houses and land. Outside of these words which were inserted behind the back of the defendant Walks, neither speaks of any land whatever. I believe, however, that both parties must have contemplated, and stipulated for, placed in the situation in which each found herself at that time, reciprocity of exchange of both houses and the respective lots on which the houses stood as a term of their agreement. To be noted is the fact that mutual receipts were given in respect of an out and out sale of those houses. To my mind the parties must have therefore considered each would be leaving her respective locality for all time. Further, both parties must have considered they were in a position also to pass the land on which the houses stood. For certain, the defendant Walks was in a position to have transport passed for on April 22, 1964, the date of their agreement, she had previously been offered the sale of lot 127, Area V, Zeeburg, West Coast Demerara, by the owners — Bookers Sugar Estates — see Ex. "F". On the other hand, the plaintiff must have considered herself at the time of their agreement the owner of the houses and the land at Uitvlugt, because for over 12 years she was in possession of them, and so in a position to apply to the court

for the grant to her of a declaration of prescriptive title to the land, which is what she has in fact done in this suit.

Both in her pleadings and on oath, Walks has denied the agreement for an exchange of properties in 1964; but nonetheless admits making one in that respect in 1965, and also a visit in company with the plaintiff to Messrs. Cameron & Shepherd, Solicitors, then to transport their respective properties. On this occasion she actually paid transport fees and swore to the required affidavit. This was the evidence of Mr. Nick Persaud, transport clerk to the above-named firm. Persaud gave evidence on the defendant's behalf the significance of which is that — though he can only strictly speaking relate of his own knowledge of the matter from what was told him by the parties in 1965 at his firm — he stated in cross-examination that his understanding of the transaction was that what the parties were endeavouring to do before him was to put into effect the arrangements they had made during the (1964) disturbances. As I have indicated, Nick Persaud was a witness for the defendant Walks, but I have mentioned Mr. Persaud's impressions of the transaction only to show that they are against Walks' contention that there was no agreement for exchanging houses and land in 1964, and to show that they are in support of my view that the parties on April 22, 1964, were agreeing to the exchange of both houses and the lots on which they stood.

As I view it, the plaintiff is entitled to succeed on this issue. I believe the only reason why Walks denies the truth of the insertion in Ex. "D" is because she wants to evade what she considers the possible consequences of the pronote Ex. "C" which she gave, but denies giving for one thousand nine hundred and ninety-eight dollars (\$1,998.00), but Olie Mohamed appeared to me to be speaking the truth when he said that the parties agreed on the exchange of properties, but that he forgot to insert that fact on each receipt and that he did so only on the receipt Walks gave, but forgot to do so also on the plaintiffs at a later date. I believe Olie Mohamed because from the circumstances of the case and the whole tenor of their agreement the parties must have contemplated an exchange of properties.

The plaintiff asks for a declaration of title to subplot C of lot B4 Pln. Uitvlugt, West Coast Demerara, which I have hitherto described as the Uitvlugt property. She pleads and testifies that she has been in possession *nec vi, nec clam, nec precario*, for upwards of 12 years last past, that her father, the second-named defendant, Mangal Maraj, who was joined and served with process by order of court, gave her subplot C since 1950 and that she erected two buildings on it since that time. The building at the back is let out to tenants with a view to fulfilling her agreement with the defendant to exchange properties. At the instance of her husband, Rawatt Persaud, lot B4 aforesaid was subdivided into sublots A,B,C — hence subplot C — by Mr. J. Rutherford, a sworn land surveyor. Rutherford prepared and submitted a plan (Ex. "A") of lots B2 and B4 of the said plantation, and in accordance with section 135(1) of the Public Health Ordinance, Cap.

## PERSAUD v. WALKS &amp; ANOR

145, submitted it for the approval of the Central Board of Health, a statutory body, set up under that Ordinance. By letter dated 30th September, 1965, addressed to Rutherford (put in by consent as Ex. "B"), the secretary made known the verdict of the Board, viz., sublots A and B of lot B2 were approved under section 135(1)(3) aforesaid, but not sublots A,B,C of lot B4, for the reason that the width of these was inadequate.

The refusal of the Board to grant its approval was pleaded in paragraph 12 of the statement of claim, as not being lawful, "but in any event," it is there pleaded, "the requirement of approval by the Central Board of Health could not prevent the declaration of title of the first-named defendant or of the plaintiff to the said land"

In paragraph 13 of her statement of defence Walks simply pleads that the plaintiff was and is unable to obtain and pass transport to her of subplot C. It is submitted this puts the onus on the plaintiff to prove that she was and is now in a position to pass title. It is therefore for the plaintiff to show that the refusal of the Board was unlawful; but there was no proof of this very vital fact as I will show.

There is no doubt that this situation is governed by the Public Health Ordinance and that the relevant section to consider is 135 *ibid*:

135. (1) If the owner of any land desires to sell, lease, rent or grant the same in separate lots to any person or persons for any purpose whatever, or desires to lay it out for building purposes, he must cause a plan thereof to be prepared, which, if the Board in any particular case so directs, shall be prepared by a sworn land surveyor and laid before the Board, showing the mode in which it is proposed to subdivide the land, the streets, roads, and means of access to each lot, and the provision for the drainage thereof, and the Board may require any alteration to be made in the plan appearing to it expedient or necessary, and the Board shall issue a certificate signed by the secretary when the plan is fully approved.

(2) Where the owner desires to transport any land aforesaid he must deposit the plan as approved by the Board in the Deeds Registry, and every transport of the land, or portion or lot thereof sold, shall be passed in accordance with the plan and not otherwise.

(3) The Registrar shall not advertise the transport of any land aforesaid, nor shall it be transported, until the owner has deposited the plan as aforesaid and also a certificate signed by the secretary that the means of access to, and the drainage of, each lot have been provided on the plan to the satisfaction of the Board.

(4) No building operations on any land aforesaid shall be commenced by any person until such works as specified in the plan approved as aforesaid shall have been executed by the owner to the satisfaction of the Board by a certificate signed by the secretary.

(5) No lot of land situate within the limits aforesaid, as defined in the plan hereinbefore required to be approved, shall be subdivided into less portions than quarter lots, those quarter lots to be not less than twenty square roods.

(6) If the owner sells, leases, rents or grants any land as aforesaid for any purpose whatever, or by any means whatever, passes transport thereof, or attempts to do any of the acts aforesaid, or if any person builds or commences building operations on any such land, until the provisions of this section have been obeyed, or acts in any way contrary to those provisions he shall for every offence be liable on summary conviction to forfeit a penalty not exceeding five hundred dollars; and the magistrate may order any building or other erection placed on the land in contravention of this section to be removed forthwith and if the owner cannot be found or makes default in the execution of such order the Board may cause to be taken down such building, and may recover the expenses incurred in so doing from the owner thereof. (See Interpretation section 2 for the very wide meaning of the word *owner* in this Ordinance).

From her own mouth and that of her witness Olie Mohamed, as supported by the documentary evidence, it is evident that what the plaintiff in effect did was to sell the Uitvlugt property to the defendant Walks when she had not obeyed the provisions of the abovementioned section. I believe, however, for me to accede to the plaintiff's request by granting her a declaration of prescriptive title to subplot C of lot B4, and to direct registration thereof so as to enable her to fulfill her agreement to transport it to the defendant Walks, in circumstances such as these, would be to act in the teeth of section 135(1) of the abovementioned Ordinance as interpreted by the decision of VERITY, C.J., in *Din & Boodhoo v. Tetry* (1943) L.R.B.G. 145, with which I respectfully agree.

In *Din & Boodhoo's* case, sec. 27 of the former Local Government Board Ordinance 1907, which is now re-enacted as sec. 135 of the Public Health Ordinance, Cap. 145, came in for consideration. The interpretation of the learned Chief Justice with respect to sec. 27 of the 1907 Ordinance was clearly to the effect that no disposition should be made when the division of a single holding into lots is made until a plan of the proposed division showing streets, roads and means of access to each lot had been approved by the Board and deposited in the Registrar's office, and that after such approval and deposit, no disposition should be made save in accordance with the approved plan. His Lordship considered further, that if an owner were to proceed or attempted to proceed otherwise he is liable to a heavy penalty, and thought the matter is plainly one in which the imposition of a penalty amounts to a prohibition as would render void for illegality any contract or agreement made or attempted to be made in breach of statute. Accordingly, no agreement or attempted agreement prior to the date of the

## PERSAUD v. WALKS &amp; ANOR.

deposit in the office of the Registrar is of any effect, and no allegation of such prior agreement can avail the person relying thereon.

In the instant case, the stage of the deposit in the Deeds Registry had not yet been reached, the plan having been rejected by the Central Board of Health with respect to subplot C of lot B4, of Pln. Uitvlugt. Accordingly, any contract or agreement to transfer title in subplot C whether made on April 22, 1964, as alleged by the plaintiff, or subsequently in 1965, as the defendant Walks contends, is void for illegality. In the words of VERITY, C.J., at p. 149:

“It follows that no agreement or attempted agreement *prior* to the date of deposit (in the Deeds Registry — see sec. 135 (2) Cap. (145) is of any effect and no allegation of such prior agreement can avail the defendants. In the same way no transport can *prima facie* be deemed valid if its terms are in breach of the statute for it will have been void *ab initio* by reason of its illegality”.

It is not difficult to detect the wisdom of the learned Chief Justice in giving this interpretation to a highly penal prohibition which is in accord with both principle and authority. One can readily see what mischief he envisaged. Take the case of an unscrupulous landlord who makes agreements in fraud of his purchasers by receiving in advance exorbitant prices for strips of land drawn up on plans which are so obviously defective as not to have the remotest chance of being approved by the Central Board of Health. It is such an instance, it is submitted, the Chief Justice was concerned about quite apart from problems of public health. The holding of such agreements to be void *ab initio* is the obvious and only answer. Lest it be contended that the parties in their circumstances could not have been expected to know about this effect, it must be stated that it is well established that any agreement which is made in contravention of a statutory prohibition, through ignorance of the law by the parties, is from its very inception rendered void, and nothing can turn on it. As BLACKBURN, J., said in *Waugh v. Morris* (1873) L.R. 8, Q.B. 202 at p. 208: “Where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew it or not.”

I must accordingly hold there was never any enforceable agreement between the plaintiff and the defendant Walks because it was made in breach of sec. 135(1) of the Public Health Ordinance, Cap. 145. It must follow that all three documents which were prepared by the witness Olie Mohamed (Exs. “C”, “D” & “E”) are illegal, void and of no effect since they contravene sec. 135 of Cap. 145 which respects land laid out for building purposes, and I must order the parties to revert immediately to their former situations. My duty is clear; and much as I entertain some measure of sympathy for the plaintiff who has not been in receipt of the rents and profits of the back house of the Uitvlugt property for 3 years now, I am unable to give her any relief in this respect for there is no equity which relieves *ex turpi causa*. It must also follow that none of the orders sought to enable the

void agreements to be performed can be granted and that this suit must be dismissed, but without costs.

If I may be permitted to remark by way of postscript, it seems to me that this matter was, from the beginning obviously one for a settlement out of court. It will be recalled that both before and during the trial that I made this suggestion to both parties but to no avail; each was apparently bent on taking the court's verdict in the matter. I hope reason will still prevail; even now it is not too late. My order is that the parties must return, but both parties obviously do not wish to do so; both appear to be reasonably satisfied with their new localities being among peoples of their own ethnic origin, where no doubt, they have established new friends and relationships and where, it is hoped, they have relegated to the dim memory of the past, the bitterness of those fateful days of 1964. Surely a solution to the problem may lie in total or partial abatement of any difference between the respective values of the two properties owing to the fact that the plaintiff is unable to give transport for sub lot C, whereas the defendant is in a position to give such for her Zeeburg property.

Stay of execution, for 6 weeks granted.

*Action dismissed.*

Solicitors:

*M.A.A. Mc Doom* (for the plaintiff);

*M.E. Clarke* (for the defendants).

## THE QUEEN v. JAMES WILKIE

[Court of Appeal (Stoby, C., Luckhoo and Cummings, JJ.A).  
May 19, 1967.]

*Criminal Law — Evidence — Identification — Unsatisfactory nature of —  
Whether verdict of jury unreasonable.*

A woman was sleeping in a room with her four children whilst her husband was out at work. About 5 a.m., three masked men entered her home, covered her face and proceeded to rob and rape her. The next day, whilst the victim was sitting on her neighbour's steps, she saw a man who came up close to her and asked her to allow him to pass. She said she recognised his voice and she went to the gate, looked at him and recognised him by his high cheek bones. Later, as a result of a report, the appellant was arrested and taken to the station where the victim subsequently confirmed that he was one of her assailants. At the trial in the High Court she said that she

## R. v. WILKIE

recognised the appellant by his rising cheek bones, straight nose, large ears and a cut on his nose-bridge between his eyes, but she admitted in cross-examination that she had not given such a detailed description either to the Magistrate or to the police but had told the Magistrate that she had only seen the side of his face.

**HELD** — that the verdict of the jury was unreasonable because (i) it was clear that identification of the appellant was really by voice since she did not see his face as it was covered and she only saw the side of his face when the men were leaving; (ii) although there may be circumstances in which it may be proper to convict by the mere identification of a voice, this was not such a case, and (iii) it was the duty of the trial Judge to have stressed to the jury (which he had not done) that what was originally a “voice” identification became, at the trial, a “features” identification.

*Appeal allowed — Conviction and sentence quashed.*

*Cases referred to:*

- (1) R. v. Hancox (1913) 8 Cr. App. R. 193; 29 T.L.R. 331.
- (2) R. v. Wallace (1931) 23 Cr. App. R. 32; 75 S.J. 459.
- (3) R. v. Dent (1943) 29 Cr. App. R. 120; (1943) 2 A11 E.R. 596.

*C. A. Massiah* for appellant.

*G. A. G. Pompey, Senior Crown Counsel*, for respondent.

STOBY, C. On the 14th September, 1965, a woman was asleep in her room with her four children, her husband was at work. About 5 o'clock in the morning three men entered her room and committed a heinous crime: they robbed her and raped her. The appellant was convicted as being one of the three men concerned.

At his trial the main issue was identification. There was no doubt of the house being broken and entered, of the robbery and of the rape. The appellant was identified in this way: The day after the robbery the victim was sitting on the steps of the next-door house. A man came close to her and asked to be permitted to pass. She said she recognised his voice, went to the gate, had a look at him, and recognised him by his high cheek bone. A report was made to the police, the appellant was arrested, locked up, and the woman was sent for. On arrival at the station she confirmed he was one of the men.

The judge told the jury that the question of identification was most important. The jury, as I have said, convicted.

Several grounds of appeal have been argued, but in view of the decision to which this court has come, it is only necessary to deal with the main ground, and that is, that the verdict of the jury was unreasonable.

The principle on which the court proceeds in a matter of this kind where a ground of appeal is that the verdict is unreasonable is well-known and

has been set out in a number of cases. This is what the court said in *R. v. Hancock* at 8 C.A.R. p. 179:

“The court has said that it does not proceed on such lines as these — look at the evidence, see what conclusion the court would have come to and set aside the verdict if it does not correspond with such conclusion. There have been cases where the court has thought fit to set aside a verdict on a question of fact alone, but only where the verdict was obviously and palpably wrong. Such cases are rare”.

That view of the Court of Criminal Appeal in England was modified somewhat in *R. v. Wallace*, 23 C.A.R., which perhaps is the classic illustration of an appeal being allowed on the verdict of a jury being unreasonable. There the court said —

“The whole of the material evidence has been closely and critically examined before us during the past two days by learned and experienced counsel on both sides, and it does not appear to me to be necessary to discuss it again. Suffice it to say that we are not concerned here with suspicion, however grave, or with theories, however ingenious. Section 4 of the Criminal Appeal Act of 1907 provides that the Court of Criminal Appeal shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it cannot be supported having regard to the evidence.”

Then the court in that case proceeded to quash the conviction.

The question also came up in *R. v. Dent*, 29 C.A.R., p. 120. This case concerned the question of corroboration, and indeed most of the cases in which verdicts have been quashed on the ground of the unreasonableness of the jury's verdict relate to sexual cases, or relate to the question of corroboration. But this is a good case to illustrate, not only the principles upon which the court acts, but that the ground of appeal, “that the jury's verdict is unreasonable”, is not a meaningless ground of appeal; it must have some meaning.

“The Commissioner warned the jury of the desirability of look for corroboration of the girls' evidence. He told them that the girls could not corroborate one another and that this must be regarded as a case in which there was no corroboration. He told them that it was open to them to convict without corroboration but it would be dangerous to do it.”

In giving the decision of the court, MR. JUSTICE HALLETT, repeated the words I have just read — that the judge had properly warned the jury — and he stated quite plainly that that was the practice, and the Court of Appeal said that they had no criticism to make of the way in which the judge said it. Then he went on to say that section 4 of the Criminal Appeal Act, 1907, provides —

“The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury

## R. v. WILKIE

should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence.”

And then he said —

“It is upon that principle that the court proposes to act in the present case. The court which heard the application for leave to appeal said that this matter required very careful consideration. Having given that consideration to this case this court does think that, notwithstanding that proper warning or advice given to the jury, the verdict of the jury in the exceptional circumstances of this case was unreasonable, and was a verdict which cannot be supported having regard to the evidence.”

If one analyses very briefly the evidence of identification in this case, this is what took place; The man who entered the victim’s house had his face covered; the woman’s face was covered shortly after the three men entered. In the Magistrate’s Court she told the magistrate that she only saw the side of the face of the man who she alleged was the appellant. In the High Court when giving evidence she said that she recognised the appellant because of his rising cheek-bones, straight nose, large ears, and a cut on his nose bridge between his eyes. In cross-examination when it was pointed out to her that she had not said that in the Magistrate’s Court, and indeed had not given that description to the police, she repeated that she recognised him because of his high cheek-bones, the cut on his face, his large ears, and so on. She admitted she did not give that description to the police and she admitted that she did not give those details in the Magistrate’s Court.

Obviously then, there are certain disturbing circumstances about the identification. It is quite evident that the identification was really by voice that she came to the conclusion that the appellant was one of the three men who had raped her because of his voice. Since she did not see his face, since her face was covered, and since the only time she had an opportunity of seeing the side of his face was when the men were leaving, it is quite clear to us that what aroused her suspicion was the tone of his voice.

Counsel for the appellant has brought out what we considered to be a good point — in certain circumstances it may not be a good point, but it seems so in this case — and that is, that while A, who knows B’s voice, can at some times say she has heard B speaking, where A does not know B’s voice and for the first time hears it when an offence is being committed, it is not easy to say that that is necessarily the voice of the person who is arrested or who is alleged to have spoken in that way, for the simple reason that there is no evidence that the person speaking at the time of the offence had not disguised his voice.

Counsel has asked us to lay down as a principle of law, or as a rule of practice, the Judges should tell the jury not to convict if the only identification is the tone of the person’s voice. We are not prepared to do that because there may be circumstances in which it is proper to convict in such a case. But

certainly, on the facts of this case where the room was dark, faces were hidden, there was no opportunity of seeing the person, and the only identification was by voice, and in addition that when the case was presented in the High Court what was an identification by voice originally, became an identification by features, and the judge did not stress this point to the jury, we think this is a suitable case to act in accordance with the law — that the decision was unreasonable having regard to the evidence.

We so find, and the conviction will be quashed.

LUCKHOO, J.A., I agree.

CUMMINGS, J.A., I also agree.

*Appeal allowed — Conviction and sentence quashed.*

## KUMARLALL v. THE VILLAGE COUNCIL OF CLONBROOK

[In the High Court (Bollers, C.J.) – April 26; May 1967.]

*Local Government — Colony (now Government) Land — Rental of by Local Authority — Unilateral increase of rental — Whether ultra vires — S. 220 of the Local Government Ordinance, Cap. 150 (now s. 220 of the Local Government Act, Cap. 28:02).*

*Landlord and tenant — Landlord's title — Estoppel of tenant denying same — Common law rule — Whether overridden by statutory provisions — S. 220 of the Local Government Ordinance, Cap. 150 (now s. 220 of the Local Government Act, Cap. 28:02).*

*Practice and procedure — Pleadings — Colony (now Government) land — No denial specifically or by necessary implication — Whether amounting to admission — Order 17 Rule 13 of the Supreme Court Rules, 1955 (now Order 17 Rule 13 of the Rules of the High Court, Cap. 3:02).*

The plaintiff was a tenant for more than 12 years of a piece of land situate in Section B of the Clonbrook Village District which was under the jurisdiction of the defendant council, a Local Authority under the Local Government Ordinance, Cap. 150. The plaintiff's annual rental was arbitrarily and unilaterally increased by the defendants and the plaintiff brought an action seeking a declaration that the account and notice of the sum due as rents served upon him was illegal and void and for an order of the Court setting aside the said notice as well as a consequential injunction restraining the defendants as servants or agents from acting under the said notice and levying and selling his interest to the land occupied by him. In their defence, the defendants

## KUMARLALL v. CLONBROOK V.C.

alleged that it was a term of the tenancy that the rent could be unilaterally increased by them from time to time and they averred that the plaintiff had incurred a forfeiture entitling them to immediate possession as a result of his denial of their right or title to let him the land in question. Nowhere in their defence did the defendants deny that the piece of land was not Colony (now Government) lands. Counsel for the plaintiff took a preliminary objection that under the express provisions of s. 220 of the Local Government Ordinance, Cap. 150, the defendants were expressly forbidden from dealing or doing anything with Colony land unless it had the authority of Government to do so, and, consequently, the entire transaction was illegal and void *ab initio*. In reply, Counsel for the defendants, although conceding that the land in question was Colony land, nevertheless, argued, that the said land came within the ambit of s. 89 of the Ordinance and was, therefore, under the control and management of the defendant council. Further, and more importantly, the plaintiff was “estopped” from denying his landlord’s title and could not set up the defendants’ inability to let him the land since he had admitted in his pleadings that he was a tenant of the defendants.

**HELD:**— that (i) s. 220 of the Ordinance had to be construed on its own without any assistance from any other section and was very wide in its application and that the words “disturb or interfere” therein included “letting” and, consequently, there was an absolute prohibition against the defendants letting Colony (now Government) lands and that the purported contract of tenancy with the plaintiff was void as being ‘*ultra vires*’ the powers of the defendant council who were a statutory corporation under the Ordinance; (ii) the common law principle that a tenant is absolutely estopped from denying his landlord’s title cannot override a statutory provision expressly prohibiting any ‘interference’ with Colony (now Government) lands; (iii) as the defendants had not denied specifically or by necessary implication that the piece of land in question was the property of the Government of Guyana, then under Order 17 Rule 13 of the Supreme Court Rules, 1955, they must be taken to have admitted that fact.

*Preliminary objection upheld — Defence struck out.*

*Cases referred to:—*

- (1) Balls v. Westwood (1809) 2 Camp. 11.
- (2) Doe v. Mills (1834) 2 A & E 17.
- (3) Blackmore v. Cumberford (1680) 89 E.R. 395.

[*Editorial Note* – The defendant’s appeal to the Court of Appeal (Stoby, C, Persaud & Cummings, JJ.A.) was dismissed on October 17, 1968.]

*B. S. Rai* for plaintiff

*F. H. W. Ramsahoye* for defendants.

**BOLLERS, C.J:** In this action, the plaintiff claims against the defendants a declaration that the account and notice of sum due for rents served on him is illegal and void, an order of the court setting aside such notice and a consequential injunction restraining the defendants as servants and/or agents from

acting under the notice and from levying and selling the plaintiff's interest in and to a portion of land let to him by the defendants.

In his statement of claim the plaintiff alleges that he has been a tenant of the defendants — a Local Authority under the provisions of the Local Government Ordinance, Chapter 150 with jurisdiction over the Clonbrook Village District — for a period of more than 12 years in respect of a piece of land situate in Section B, within the boundaries of the said Village District, at an annual rental of \$9.00, such tenancy commencing on the 1st of January of each year and such rental being payable at the end of each and every year. It is his further allegation that the defendants served on him an account and notice of sums due for rents totalling \$57.76 being \$24.38 arrears rental for 1965 and \$33.38 rental for 1966, in respect of the said piece of land, and that in October 1965 he paid to the defendants the sum of \$9.00 being rental for the said land for the year 1965 and on the 10th May, 1966, posted to the defendants an Inland Money Order for \$9.00 by registered post with an accompanying letter explaining that the sum sent was for rental for the year 1965 in respect of the said piece of land. No receipt has been issued to him for this amount although several requests therefor have been made to the defendants. The plaintiff contends that he was never informed of any increase in his rental and as far as he is aware the Local Government Board has not given its approval to any increase in rental and in any event that neither the Local Authority nor the Local Government Board has any power to increase the rental. The plaintiff finally contends that the piece of land in question is the property of the Government of Guyana and cannot be used, rented or otherwise dealt with by the defendants.

In their defence, the defendants say that it was a term of the tenancy that the rent could be unilaterally increased by them from time to time; and it is their contention that in so far as the plaintiff has denied the right or title of the defendants to let to him the said piece of land the plaintiff has incurred a forfeiture and the defendants are entitled to immediate possession of the said land. Nowhere in the defence do the defendants deny that the piece of land which concerns this action is colony land or land which is the property of the Government of Guyana. Two main issues therefore arise in this case for determination. Firstly, can the Local Authority enter into a contract of letting or otherwise deal with any person in respect of land which was formerly known and designated colony land but which since 26th May, 1966, under section 5(1) of the Guyana Independence Order 1966 would now be designated "land, the property of the Government of Guyana"; and, secondly, if the Local Authority can so do, can they increase the rental?

As under Order 17, Rule 13 the defendants not having denied specifically or by necessary implication that the piece of land in question is land the property of the Government of Guyana, they must be taken to have admitted that fact and counsel for the plaintiff now takes the preliminary objection that the statement of defence does not disclose any defence in law in view of the express provisions of Section 220 of Chapter 150. His submission is that under the provisions of the Section the Local Authority is expressly

## KUMARLALL v. CLONBROOK V.C.

forbidden from dealing or doing anything with colony lands unless it has authority from the government to do so. When, therefore, the Local Authority purported to enter into a contract of tenancy with the plaintiff in respect of the said piece of land which they had no power to do, it was illegal and void *ab initio*.

Counsel for the defendant in his reply to this submission, while admitting that the defence did not deny that the said piece of land was colony land, urged that the land came within the ambit of S. 89 of Cap. 150 and was under the control and management of the Local Authority. His main point, however, was that the plaintiff was estopped from denying the title of his landlord and could not set up that the Local Authority had no power to let the land to him when on his pleadings he had admitted that he was a tenant of the Local Authority.

It must be clearly understood then that the preliminary objection proceeds on the basis that the piece of land, subject matter of the action, is land the property of the Government of Guyana. S. 220 of the Local Government Ordinance, Cap. 150 states:

“220. Subject to the provisions of Ss. 88 and 118, nothing in this ordinance shall be construed to authorise a local authority or the Board to disturb or interfere with any lands or other property vested in Her Majesty, or any of Her Majesty’s Principal Secretaries of State, or in the Colony.”

S. 88 speaks of ungranted Crown land or any empolder and as a result has no application to this matter. S. 118 deals with exemption of certain property from the payment of rates so for the purposes of this case that section can have no bearing on the matter. The language used in s. 220 in my view is very wide and states that nothing in this ordinance shall be construed to authorise a Local Authority to disturb or interfere with any lands or other property vested in the colony. I cannot therefore seek the assistance of any other section in the ordinance in construing the wording of this section. I hold, therefore, that the section provides an express prohibition against the Local Authority disturbing or interfering with any Colony lands, and it is clear to me that letting such land to another would be an interference. It is true that there is a rule of common law that a tenant is absolutely estopped from denying the title of the landlord by whom he was let into possession whether or not he had notice of any defect in title *Balls v. Westwood* (1809) 2 Camp. 11 and *Doe v. Mills* (1834) 2 A. & E. 17) and even if the tenant was not let into possession by the person claiming to be his landlord the tenant is estopped from denying the landlord’s title if he has paid rent unless he can show that the payment was due to misrepresentation or mistake and that a third person is in fact entitled. (See HALSBURY’S THIRD EDITION, Vol. 23 para. 988). It is clear therefore that if “A” without the authority of “C” lets land to “B” and puts him in possession, the title to the land being in “C”, “B” could never dispute “A’s” title except as indicated above but in that situation no express provision of a statute is being infringed.

As LORD

ELLENBOROUGH said in *Balls v. Westwood* “you may as well attempt to move a mountain, you cannot controvert the continuance of the title of the person under whose demise you continue to hold, the security of landlords would be infinitely endangered if such a proceeding were permitted.” In my view however this rule of common law cannot override the provisions of a statute laid down by an omnipotent legislature for it is clear that by s. 220 the Local Authority cannot on any showing interfere with colony land. There is no question here of the security of the landlord being affected as in this situation there is no basis for security. The purported contract of tenancy with the plaintiff was void as being *ultra vires* the defendants who are a statutory corporation. The Local Authority under the provisions of the Local Government Ordinance, Cap. 150 is a statutory corporation and is bound by restrictions imposed on its capacity by the Statute. In other words, the Local Authority can only exercise those powers given to it expressly and implicitly by the Statute and in this case the Statute expressly prohibits interference by the Local Authority with colony land.

In *Blackmore v. Cumberford* (1680) 89 E.R. 395, it was held that “when a parsonage is appropriated to a bishop, living the incumbent, a lease by the bishop before the incumbent’s death is void. *Semble*, a lease by indenture cannot operate by estoppel, where it appears by recital that the lessor has no estate.”

It follows therefore that the purported contract of tenancy with the plaintiff was both illegal, being expressly prohibited by the Local Government Ordinance, Chapter 150 and void, being *ultra vires* the Local Authority. The plaintiff therefore remains a trespasser in possession against whom the Government of Guyana can always move. I hold therefore the objection to be sound and the statement of defence must be struck out as disclosing no defence in law.

*Preliminary objection upheld —  
Statement of defence struck out.*

BRITISH GUIANA RICE MARKETING BOARD v.  
PETER TAYLOR AND COMPANY LIMITED

[In the High Court (Bollers, C.J.) – May 8, 10, 11; June 1, 1967.]

*Libel — Corporation — Whether action maintainable by.*

*Libel — Publication — Whether libellous — Reasonable man or average reader — Respective functions of Judge and Jury.*

## B.G.R.M. BOARD v. PETER TAYLOR &amp; CO.

*Practice and procedure — Libel — Pleadings — False innuendoes pleaded by plaintiffs — Fair comment pleaded by defendants — Matter of public interest — Expressions of opinion as opposed to expressions of fact — Criteria for such defence — Justification — Whether should have been pleaded instead of fair comment.*

The plaintiffs are a statutory corporation incorporated under the Rice Marketing Board Ordinance, Cap. 249 and carry on business in this country in accordance with the terms of that statute. The defendants are the printers and publishers of the 'Evening Post' newspaper of which one Peter Taylor is a Director. Sometime in 1963, two farmers, Hardat and Khemraj, complained to Mr. Taylor that they could not get payment for their rice which they had sold to the plaintiff corporation and they showed him two cheques, one in favour of Hardat on Barclays Bank dated May 10, 1963 for \$361.82, on the top left hand corner of which was written "present later," and the other in favour of Khemraj on Royal Bank of Canada dated May 17, 1963 for \$1,350.86, on the top left hand corner of which were the words "refer to drawer." Both indorsements were initialed. These two farmers were really distressed because the Banks had refused to cash their cheques and the amounts were outstanding for a long time. Later, about twenty other farmers approached Mr. Taylor and complained over non-payment by the plaintiffs for rice sold by them, and they were making their complaint to the newspaper so that their grievances could be known through its medium which would have the effect of speeding up payments to them by the Board. The Director believed what he was told, assumed that they were genuine rice farmers, and sought to verify the information received and, to this end, sent a reporter named Long to go to the Board and investigate the matter. Long confirmed the complaints made by the farmers and communicated his findings to Mr. Taylor. Nearly two years later, in the issue of the 'Evening Post' of March 1, 1965, the article, the subject-matter of this action, was published. The article, written by Long, was to the effect that the local Banks had served notice on the Board that they could no longer cash its cheques until its financial position improved and that many cheques issued to rice farmers had "bounced" and the Banks had rejected payment for the reason that the Board's deposits with the Banks were virtually exhausted and that the farmers felt that they were being pushed around and many of them had travelled many miles to the city only to return home empty-handed. Just two days after this article was published, the Managers of Barclays Bank and the Royal Bank of Canada, in a joint letter published in the very 'Evening Post,' protested that the information that they had served notice on the Board that they could no longer cash its cheques and that cheques had been dishonoured as alleged in the article was completely erroneous. Mr. Taylor himself had never in fact communicated with the Banks to see whether the allegations of the farmers were correct and Mr. Ali, the Board's General Manager, when contacted by Long, had stated that he did not desire to comment on the complaints made. Despite the prominence given to the letter of denial by the Managers of the two Banks, the defendants did not see fit to offer any apology to the Board.

The plaintiffs pleaded "false innuendoes," i.e., they relied on the ordinary and natural meaning of the words, that by the said words the defendants meant and were understood to mean, inter alia, that the plaintiffs

were bankrupt and/or unwilling or unable to meet their obligations to persons to whom they owed money in the conduct of their business and in the performance of their statutory functions and duties, and that they were a cause of embarrassment to the local Banks and the public dealing with them by the issue of cheques which had 'bounced' and that they were inefficient in their functions and duties in respect of the business of the corporation to the prejudice of rice farmers in the country. In their defence, the defendants admitted the printing and publication of the article but they denied that the words bore any of the defamatory meanings pleaded by the plaintiffs and they alleged that the words were fair and bona fide comment made without malice upon a matter of public interest, namely the conduct of the plaintiffs in the performance of their statutory functions and duties in the rice industry.

**HELD:**— that (i) a corporation can maintain an action for libel which reflects on the management of its trade or business and injuriously affecting the corporation as distinct from the individuals which compose it; (ii) it is well-settled that the question whether a particular publication can be construed as a libel is a question of law for the Judge. His function is to decide whether the publication complained of is capable of a defamatory or libellous meaning. If he then so rules then it is a question of fact for the jury to determine whether it has that meaning or not. The Judge, in considering whether the publication can be construed as a libel or not, has to consider what is the sense in which the ordinary reasonable man or average reader would understand the words to mean. Adopting that criteria to the law and facts of this matter, there could be no real doubt that not only were the words of the article in question capable of bearing a defamatory meaning but that they did in fact bear the meaning attributed to them in the innuendoes set out in the plaintiffs' statement of claim, since there could be no real doubt that the publication was one which reflected on the management of the plaintiff corporation, attacked its financial position and tended to lower it in the estimation of right-thinking members of society generally; (iii) in a defence of fair comment, the words complained of must be shown to be (a) comment, which is an expression of opinion on facts; (b) fair, in the sense of honest comment; (c) fair comment, on a matter of public interest. The defence of fair comment is concerned with expressions of opinions as distinguished from expressions of fact. It is not disputed in this matter that the article was concerning a matter of public interest which is a matter of law for the Judge to decide but it is a question of fact for the jury to determine whether the fact or facts upon which the comment is based have been sufficiently proved and, if there is any evidence of unfairness, whether the comment on the fact or facts have gone beyond the limits of fair comment. It was clear that the entire article in the circumstances of this matter consisted of a series of facts and not comment and, accordingly, the defence of fair comment could not arise. Where the allegations of fact in the publication are themselves of a defamatory and libellous nature, as was the case here, then the defence of fair comment is not available to a defendant and, in such circumstances, he must seek to establish the truth of the allegation under a plea of 'justification,' which had not been done in this matter, and (iv) with these principles in mind, the plaintiffs were entitled

## B.G.R.M. BOARD v. PETER TAYLOR &amp; CO.

to damages, which the Court would assess in the sum of \$1,000 with costs to be taxed certified fit for Counsel. Stay of execution for six weeks granted.

*Judgment for Plaintiffs.*

*Cases referred to:—*

- (1) South Hetton Coal Co. v. North Eastern News Association Ltd. and Others (1891-94) All E.R. Rep. 548.
- (2) Tolley v. Fry (1931) A.C. 333.
- (3) Sim v. Stretch 52 T.L.R. 669.
- (4) Homing Pigeon v. Racing Pigeon (1913) 29 T.L.R. 390.
- (5) Sutherland v. Stopes (1924) All E.R. Rep. 19; (1925) A.C. 47.
- (6) Hunt v. Star Newspaper Co. Ltd. (1908) All E.R. Rep. 513; (1908) 2 K.B. 309.
- (7) Kemsley v. Foot (1952) 1 All E.R. 501.
- (8) Grech v. Odhams Press Ltd. (1958) 2 All E.R. 462.
- (9) O'Brien v. Salisbury (1889) 54 J.P. 216.
- (10) Langlands v. Leng (1916) S.C. (H.L.) 110.
- (11) Merivale v. Carson (1886-90) All E.R. Rep. 261.
- (12) Campbell v. Spottiswoode (1863) 3 B.& S. 769.
- (13) Burton v. Board (1928) All E.R. Rep. 662.
- (14) Davis v. Shepstone (1886-90) All E.R. Rep. 406.
- (15) R. v. Carden (1879) 5 Q.B.D. 1.
- (16) Christie v. Robertson (1889) 10 N.S.W.L.R. 163.
- (17) Peter Walker & Son Ltd. v. Hodgson (1909) 1 K.B.D. 239; 99 L.T. 902.
- (18) Joynt v. Cycle Publishing Co. (1904) 2 K.B. 298.
- (19) Lewis v. Daily Telegraph (1963) 2 W.L.R. 1063; (1963) 2 All E.R. 151; (1964) A.C. 234.
- (20) Praed v. Graham (1889) 24 Q.B.D. 55.

*J.O.F. Haynes, Q.C.* for plaintiffs.

*A.S. Manraj* for defendants.

BOLLERS, C J.: Some time in 1963 two farmers, Hardat and Khemraj, complained to Peter Taylor, a Director of the defendant company, the publishers of the 'Evening Post' newspaper, that they could not get payment for their rice which had been sold to the plaintiff corporation and presented to him two cheques, both drawn by the corporation, one in favour of Hardat on Barclays Bank dated 10th May, 1963 and the other in favour of Khemraj on the Royal Bank of Canada dated 17th May, 1963, for the sums of \$361.82 and \$1,350.86 respectively. On the top left hand corner of the former cheque was marked "present later" with an initial and on the top left hand corner of the latter cheque were the words "refer to drawer" with an initial. These farmers were distressed by their failure to receive payment and the burden of their grievance was that the Banks had refused to cash their cheques and the amounts were outstanding for a long time.

It is the un rebutted evidence of the Director concerned that in addition to these two farmers there were other farmers whose names he did not know and could not remember who had reported to him that they had been informed by the plaintiff corporation, that is, the Rice Marketing Board, that the Banks had refused to cash the Board's cheques because their deposits at the Banks were virtually exhausted. These other farmers numbered about twenty and came from the West Coast and East Coast of Demerara, most of them being from the Windsor Forest area on the West Coast Demerara. The farmers informed the Director that they were again going to protest to the Rice Marketing Board over the non-payment for rice sold to the Board and that was why they were going to take steps to remedy the situation by making this complaint to the newspaper for they were of the opinion that if their grievances were made known to the public through the medium of the newspaper it would have the effect of speeding up payments to them by the Rice Marketing Board. The Director assumed that these persons were genuine rice farmers and believed what they had told him and attempted to verify the information received from them by communication with officials of the Rice Marketing Board. A reporter of the Newspaper named Long who is now on a scholarship in Germany was detailed to investigate the matter and check with the Board. The report of this reporter to the Director confirmed the complaint made by the farmers to him and the reporter with the knowledge and agreement of the Director, nearly two years later, wrote and published in the 'Evening Post' of the issue of 1st March, 1965, the article which is now the subject matter of this action for libel. The Director never communicated with the Banks to see whether the allegations of the farmers were correct and when the reporter sought the assistance of the General Manager of the Rice Marketing Board to confirm or deny these allegations of the farmers the General Manager stated that he did not desire to comment on the complaints made. Very shortly after the information was received from the farmers there appeared in an issue of the 'Daily Chronicle,' another newspaper, an article in which these two cheques were depicted by means of photostatic copies with the caption "Bank refuses R.M.B. cheques" in which it was stated, inter alia, that the two rice farmers concerned had gone to the Royal Bank of Canada to have their cheques cashed but on both occasions they received the advice "present later". It is, however, noticeable that on this occasion both cheques bore the Banks' "paid" stamp and in the case of the cheque drawn in favour of Khemraj the date of the stamp is 10th June, 1963. When the cheques were shown to the Director of the defendant company they did not bear this stamp.

On Monday, March 1, 1965, there then appeared the following article which was written by the reporter Long and published in the 'Evening Post' newspaper which is the subject matter of this action and which was inspired by the events previously related:

“ Deposits at banks 'virtually exhausted' so . . .

## B.G.R.M. BOARD v. PETER TAYLOR &amp; CO.

## R.M.B. CHEQUES BOUNCE

## Farmers plan mass protest tomorrow

“ The local banks have served notice on the B.G. Rice Marketing Board that they can no longer cash its cheques until its financial position improves, the ‘Evening Post’ was told this morning.

“ As a result many cheques from the Board have bounced, and farmers who have travelled many miles to the city have had to return home empty-handed.

“ The reason given for the banks’ refusal, the ‘Evening Post’ understands, is that “RMB deposits with the banks are virtually exhausted”.

“ While it was not stated when the banks began refusing the cheques, it is known that a large number of cheques issued to farmers by the Board in payment for their rice have been rejected by the banks over the past week.

## PROTEST

“ And this morning some disappointed farmers went to the Board to protest against what they called “an unsatisfactory state of affairs.”

“They blamed the management of the Board “for creating this uncertain position” and demanded that immediate steps be taken to remedy the situation.

“ Some of the farmers complain that they have been told for several weeks now that the cheques are being processed and that they would receive their money soon.

“ But as nothing is being done, the farmers feel that they are being pushed around and claim that other farmers have actually been told that the Board has no money and that they will have to wait for their payment when the situation improves.

## OVERDRAFT

“ This is not the first occasion on which the banks have had to refuse cashing cheques from the Board, eight months ago, it is understood, similar action had to be taken.

“ The current overdraft at the banks is said to be in the vicinity of \$6 million.

“ Mr. Jack Ali, General Manager of the Board, this morning refused to discuss the matter when he was asked about it by an “Evening Post” reporter.

“ Meanwhile a delegation of farmers drawn from all the rice producing areas in the country, is to protest at the Board about the continued failure to collect money.”

The plaintiffs, a corporate body which is a statutory corporation carrying on business in this country in terms of the Rice Marketing Board Ordinance, Chapter 249 and incorporated under the said ordinance, now seek to recover damages for the libel which it alleges emanates from the said publication and in consequence of which they have been seriously injured in their character, credit and reputation in the conduct and performance of their business and of their statutory functions and duties and have been brought into public scandal, odium and contempt. The plaintiffs plead false innuendoes, that is to say, they rely on the ordinary and natural meaning of the words, that by the said words the defendants meant and were understood to mean, *inter alia*, that the plaintiffs were bankrupt and/or unwilling or unable to meet their obligations to persons to whom they owed money in the conduct of their business and in the performance of their statutory functions and duties, and that they were the cause of embarrassment to the local Banks and the public dealing with them by the issue of cheques which bounced and that they were inefficient in their functions and duties in respect of the business of the corporation to the prejudice of rice farmers in the country.

The defendants, in their defence, admit the printing and publication of the article but they deny that the words bore any of the defamatory meanings pleaded by the plaintiffs and they say that the words are fair and *bona fide* comments made without malice upon a matter of public interest, namely the conduct of the plaintiffs, the Rice Marketing Board, in the performance of their statutory functions and duties in the rice industry.

I pause here to observe that two days after what might be termed the offending publication the 'Evening Post' newspaper published a joint letter by the Managers of Barclays Bank and the Royal Bank of Canada in which they stated that their attention had been drawn to the article and the information regarding the action by the Banks was completely erroneous, and they denied that they served notice on the Rice Marketing Board that they could no longer cash its cheques and that cheques had been dishonoured as stated in the article.

The first question in a matter of this kind is whether a corporation, as the plaintiffs are, can maintain an action for libel, and the authority for the proposition that a corporation can maintain an action for a libel reflecting on the management of its trade or business and injuriously affecting the corporation as distinct from the individuals which compose it, is *South Hetton Coal Company v. North Eastern News Association Ltd. and Others* (1891-4) A.E.R. (Rep.) 548. In that case, LOPES, L.J., in the course of his judgment at p. 552 stated:

“ I am of the opinion that, although a corporation cannot maintain an action for libel in respect of anything reflecting upon them personally, yet they can maintain an action for a libel reflecting on

## B.G.R.M. BOARD v. PETER TAYLOR &amp; CO.

the management of their trade or business, and this without alleging or proving special damage. The words complained of, in order to entitle a corporation to sue for libel, must injuriously affect the corporation as distinct from the individuals which compose it.”

and KAY, L. J., in the course of his judgment made the point that a corporation in relation to its business has a trading character which may be destroyed by libel. A corporation then can sue for such a libel as an individual might, and it is not difficult for me to say in terms of the present case that the article clearly reflects on the management and conduct of its trade and business and attacks its financial position.

It is well settled that the question whether a particular publication can be construed as libel is a question of law for the judge. The question, therefore, for the judge is whether the publication complained of is capable of a defamatory or libellous meaning. If the judge so rules it is then for the jury to say whether in fact it has that meaning. *Tolley v. Fry* (1931) A.C. 333. The authorities on the point all indicate that it is for the judge in considering this question to say what is the sense in which the ordinary reasonable man or average reader would understand the words to mean, and I have no hesitation in saying that when one reads this article that the ordinary reasonable man, who is a man of intelligence, would understand this article to mean that the author of it was saying that that newspaper had been informed that the local Banks had given notice to the plaintiff corporation that the Banks could no longer cash its cheques until its financial position had improved as they had no funds in the Banks to meet their cheques. As a result of this notice many cheques drawn by the corporation in favour of farmers had been dishonoured and that the Banks had refused to pay thereon and that the reason for the refusal to pay was that the deposits by the corporation in the Banks were virtually exhausted and at an end and in consequence it was known and accepted that a large number of farmers had received cheques from the Board which were later dishonoured and rejected by the Banks. The meaning of the following paragraphs of the article must be that the farmers were disappointed over this unsatisfactory state of affairs and attached blame for this to the management of the Board. That nothing was being done to alleviate this position of uncertainty but the farmers were merely being put off from time to time by the nebulous statement that their cheques were being processed whereas other farmers had been informed that the Board actually had no money and, as a result, a delegation of the fanners drawn from all the rice producing areas of the country was to protest to the Board about the failure of farmers, all over the country, to collect their money for rice which they had sold to the Board. I have no hesitation in holding therefore that the words of the article are capable of bearing a defamatory meaning and do in fact bear that meaning and the meaning attributed to the words in the innuendoes set out in the Plaintiffs' Statement of Claim. There is not the slightest doubt in my mind that this publication is one which reflects on the management of the plaintiff corporation, attacks its financial position and tends to lower

it in the estimation of right thinking members of society generally (see *Sim v. Stretch* 52 T.L.R. 669). The learned authors of GATLEY ON LIBEL AND SLANDER, 5th Edition at page 29 support this conclusion where they state:

“ It is libellous to write that a cheque has been dishonoured, for such a statement ‘imports insolvency, dishonesty or bad faith in the drawer of the cheque’.”

I turn now to consider whether the defendants have established their plea of fair comment on a matter of public interest and whether indeed this defence arises at all in the circumstances of the case. HALSBURY’S LAWS OF ENGLAND, Third Edition, Vol. 24, p. 70, para. 123, informs that the defence of fair comment requires that the material fact or facts on which comment or criticism is based should be a matter of public interest, and that the comment or criticism on the fact or facts should be fair within the wide limits which the law allows. It is for the trial judge to say whether the matter is one of public interest. It is for the jury to say whether the fact or facts on which the comment is based have been sufficiently proved and, if there is any evidence of unfairness, whether the comment on the fact or facts is fair or has gone beyond the limits of fair comment. In the defence of fair comment, therefore, the words complained of must be shown to be (i) Comment, which is an expression of opinion on facts; (ii) Fair in the sense of honest comment; (iii) Fair Comment on a matter of public interest. It is to be noted, therefore, that what is protected by the defence is the comment made on a matter of public interest which must be fair in the sense of being honest, and Halsbury stresses the point at page 72, para. 125, that the defence of fair comment is concerned with expressions of opinions as distinguished from expressions of fact. In the words of SCRUTTON, J. in *Homing Pigeon v. Racing Pigeon* (1913) 29 T.L.R. 390, fair comment is not wanted as a defence unless the statement is defamatory. As LORD SHAW put it in *Sutherland v. Stopes* (1924) A.E.R. 19 at p. 35:

“ The point as to fair comment with regard to opinion is only reached when there is separate matter in the words used — separate matter of expressed opinion which goes beyond the natural meaning attaching to the facts.”

It is the comment then that is protected and BUCKLEY, L.J., in the *Star* case emphasised that the defence assumes that the matter to which it relates would be defamatory if it were not protected by the defence of fair comment. It is not disputed, in the present case, that the article which is the subject matter of this action, is a matter of public interest which is a question of law which is exclusively within the province of the judge to decide but the further question arises whether the article consists of expressions of opinion, that is to say, comments made on facts stated or whether it consists purely of assertions of facts, and counsel for the plaintiffs has submitted with confidence that the publication consists wholly and purely of statements of fact on which no comment whatever

## B.G.R.M. BOARD v. PETER TAYLOR &amp; CO.

is made and, as a result, the defence of fair comment does not arise at all. Counsel for the defendants on the other hand, concedes that the first four paragraphs of the article under the caption "R.M.B. CHEQUES BOUNCE" and the third paragraph under the head "PROTEST" and the first, second and third paragraphs under the heading "OVERDRAFT" are all assertions or statements of fact but he submits that the first, second and fourth paragraphs under the heading "PROTEST" and the fourth paragraph under the heading "OVERDRAFT" are expressions of opinion by the writer and are indeed fair comment on the statement of facts made. Counsel presses upon me that when the article states "And this morning some disappointed farmers went to the Board to protest against what they called "an unsatisfactory state of affairs," the writer is there expressing his own opinion and is incorporating so to speak his opinion with that of the farmers. Similarly, in the following paragraph, where the writer states that they (the farmers) blame the management of the Board "for creating this uncertain position" and demanded that immediate steps be taken to remedy the situation, the writer is there expressing both his own opinion and that of the farmers. Counsel argues that the phrase in inverted commas indicate that it is the author's opinion as well as that of the farmers. I cannot agree with this contention as the words in inverted commas, as I understand it, indicate the direct speech of the person mentioned in the paragraph which must be the subject of the sentence. The paragraphs must therefore mean that the writer is stating what the farmers alone have said. In the fourth paragraph under the heading "PROTEST" the argument is advanced that where the words "the farmers feel that they are being pushed around and claim that other farmers have actually been told that the Board has no money" appear that the writer is expressing the comment or opinion that by reason of the circumstances that existed both he and the farmers felt that the farmers were being pushed around. In the last paragraph where the article states that "meanwhile a delegation of farmers drawn from all the rice-producing areas of the country is to protest at the Board about the continued failure to collect money," counsel urges that that sentence means that the farmers are to protest to the Board about the Board's failure to collect money and the writer is there merely expressing his opinion about the management or mismanagement of the Board in relation to their collection of money. This submission, in my view, is fallacious and does not accord with reality and I will have none of it. The article clearly states from the paragraphs that I have quoted that the farmers were protesting to the Board against what they and no other person called an unsatisfactory state of affairs. They alone blamed the management of the Board for what they considered to be an uncertain position and demanded that immediate steps be taken to remedy the situation. Nothing was being done and the farmers felt that they were being pushed around and claimed that other farmers had been told that the Board had no money. Finally, that a delegation of farmers was to protest at the Board about the Board's failure to collect money. These surely are all clear statements of fact.

In *Hunt v. Star Newspaper Co. Ltd.* (1908) A.E.R. (Rep.) p. 513, FLETCHER MOULTON, L.J., made this classic statement on the law of fair comment:

Comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment. The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice it might do will be to some extent negated by the reader seeing the grounds upon which the unfavourable comment is based. But if the fact and comment be intermingled so that it is not reasonably clear what portion purports to be reference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses. Any matter therefore which does not indicate with reasonable clearness that it purports to be comment and not statement of fact cannot be protected by the plea of fair comment."

Thus to enable alleged defamatory matter to be treated as comment and not as an allegation of fact the facts on which it is based must be stated or indicated with sufficient clarity to make it clear that it is comment on those facts. There must be a sufficient *substratum* of fact stated or indicated in the words which are the subject matter of the action. (*Kemsley v. Foot* (1952) 1 A.E.R., p. 501). It follows then that if the writer chooses to be ambiguous he runs the risk of having treated as statements of fact, statements which, had he been more specific, might well have ranked only as comment. And in *Grech v. Odhams Press Ltd.* (1958) 2 A.E.R. 462, it was held that if the court is left in any doubt as to whether the words are comment or fact the defence fails. It is clear, therefore, that the entire article in the circumstances of the present case consists of a series of statements of fact and not comment and the defence of fair comment cannot therefore arise. See the remarks contained in ODGERS ON LIBEL AND SLANDER, Sixth Edition, 1929 at p. 166, which was cited with approval by LORD PORTER in the House of Lords in *Kemsley v. Foot* (1952) 1 A.E.R. 501 at p. 505, where the author stresses that if the defendant states the bare inference without the facts on which it is based, such inference will be treated as an allegation of fact.

I think that the pronouncement by FIELD, J. in *O'Brien v. Salisbury* (1889) 54 J.P. at p. 216 is apt, in the circumstances of the present case, where he states that "if a statement in words of fact stands by itself naked, without reference, either expressed or understood, to other antecedent or surrounding circumstances notorious to the speaker and to those to whom

## B.G.R.M. BOARD v. PETER TAYLOR &amp; CO.

the words were addressed, there would be little, if any, room for the inference that it was understood otherwise than as a bare statement of fact, and then if untrue there would be no answer to the action.”

In the event of an appeal in which my conclusions on the previous points may be found to be erroneous I think I ought to consider the situation on the assumption that what counsel for the defendants urges is comment is in fact comment and that there is evidence of unfairness in an attempt to ascertain what the true legal position would be in those circumstances, and whether the defence of fair comment has been established by the defendant. In the defence of fair comment it is trite that a newspaper has the right, and no greater or higher right to make comment upon a public officer or person occupying a public position than an ordinary citizen would have, vide the judgment of LORD SHAW in *Langlands v. Leng* (1916) S.C. (H.L.) at p. 110, and HALSBURY'S LAWS OF ENGLAND Third Edition, Vol. 24, p. 10, para. 126 states that “the material fact or facts on which the comment or criticism is based should be truly stated and that a comment or criticism on the fact or facts should be fair.” At page 74 of para. 127 HALSBURY states that the defence of fair comment or criticism will fail if the comment and criticism is not fair and honest. The comment must not mistake facts because a comment cannot be fair which is built upon facts not truly stated and if a defendant cannot show that his criticism contains no, or no material mis-statements of fact he will fail in his defence of fair comment. A material mis-statement of any of the facts in which comment is made negatives the possibility of the comment being fair. Counsel for the defendant now submits that the defence of fair comment has been established in this case as the facts have been truly stated as the defendants have merely published what the farmers told them through their agents the Director Taylor and the reporter Long and both the Director and the reporter honestly and genuinely felt that what they were told was true and what was published were comments based on facts that were truly stated. Counsel for the plaintiffs in reply to this submission has urged that when it is said that the facts must be truly stated what is meant is that the facts must be proved to exist or be proved to be substantially true and this the defendants have failed to do and, as a result, the defence of fair comment has not been established. It is the further submission of counsel for the plaintiffs that in the particular circumstances the allegations of fact in the publication are of themselves of a defamatory and libellous nature and where this is so the defence of fair comment is not available to a defendant, and a defendant in those circumstances must seek to establish the truth of the allegation under a plea of justification. In *Merivale v. Carson* (1886-90) A.E.R. (Rep.) at p. 261 which was an action for libel based upon the criticism of a dramatic work by the public press, LORD ESHER M.R. in considering the question whether the criticism was an actionable libel felt that the answer to the question must be based on the principles laid down in *Campbell v. Spottiswoode* (1863) 3 B. & S. 769 where CROMPTON, J. in that case said:

“ Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, or the proceedings in courts of justice, or in Parliament, or the publication of a scheme, or a literary work. But it is always to be left to the jury to say whether the publication has gone beyond the limits of a fair comment in the subject matter discussed. A writer is not entitled to overstep those limits, and impute base and sordid motives which are not warranted by the facts, and I cannot for a moment think because he has a bona fide belief that he is publishing what is true, that is any answer to an action for libel.”

LORD ESHER went on to say that he was prepared to say that fair comment meant this:

“ Is it in the opinion of the jury, beyond what any fair man, however prejudiced or however strong his opinion may be, would say in criticising a work? Full latitude must be given to the strong opinions and even to the prejudices of a fair man but there must be nothing beyond opinion and judgment.”

This learned Judge was of the opinion that mere gross exaggeration would not necessarily make the criticism unfair however wrong, however prejudiced the criticism, all that may be within the limit. The question that must be left to the jury is “would any fair man have said it?” If it is more than a fair man would have said then it is a libel. If the jury are not satisfied that it is more than that, then it is within the limits of allowed criticism and is no libel. BOWEN, L.J. expressed the view that as soon as the writer passes out of the region of fair criticism he ceases to be protected by the law and the writing then becomes simply libellous and until those limits are passed there is no question of libel at all. In considering the standard that the jury ought to apply to ascertain whether the criticism in question is fair, the only limitation imposed is on the mode of expression; the opinion itself is in no way limited. It is the expression of the writer’s opinion that must be fair. The opinion may be anything that he likes. In other words, as I understand it, the question for the jury is not whether the opinion is a correct inference arising from the facts but whether it is fair in the sense of whether a fair man, however prejudiced he might be, or however strong he may feel, would have said so. The jury therefore have no right to substitute their own opinion of the work or statement of facts in question for that of the writer or to try the fairness of the criticism by any such standard.

In *Hunt v. Star Newspaper Co. Ltd.* (1908-10) A.E.R. (Rep.) p. 517, FLETCHER MOULTON L.J. stated:

“ In the next place, in order to give room for the plea of fair comment, the facts must be clearly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails. This has been so frequently laid down authoritatively that

## B.G.R.M. BOARD v. PETER TAYLOR &amp; CO.

I do not need to dwell further upon it: see, for instance, the direction given by Kennedy J. to the jury in *Joynt v. Cycle Trade Publishing Co.* (1904) 2 K.B. at p. 294, which has been frequently approved of by the courts. Finally, comment must not convey imputations of an evil sort except so far as the facts must be truly stated warrant the imputation.”

In *Sutherland v. Stopes* (1924) A.E.R. at p. 20, which is the classic authority on the defence of fair comment, it was decided that the defendant who puts forward this defence does not take on himself the burden of proving that the comments which he has made are true, what he must prove is that the facts on which the comment is based are true and the matter is of public interest, and in that connection he may even give particulars of the facts on which his comment is based which he must prove to be substantially true. Whereas, however, in the case where the facts relied on to justify the comment are fully set out in the alleged libel the truth of each fact must be proved by the defendant but where the facts relied on are contained only in the particulars it is not incumbent on the defendant to prove the truth of every fact so stated. He need only establish sufficient facts to support the comment to the satisfaction of the jury (see *Kemsley v. Foot* (1952) 1 A.E.R., at p. 501). It follows, therefore, that in the defence of fair comment the defendant in proving that the facts have been truly stated must establish that the facts are substantially true, as SANKEY, L.J. put it in *Burton v. Board* (1928) A.E.R. (Rep.) 662 “the defendant must show what the facts were upon which he commented and that they are true, as facts which are untrue are not facts.” The question, therefore, arises as to the distinction to be drawn between the defence of justification and that of fair comment. The authorities establish that in the defence of justification it is necessary to prove that the defamatory statements of fact in the words complained of are substantially true and that the expressions of opinion are correct. In order to make a good defence of fair comment it is necessary to prove that the statements of fact on which the comment is based are materially true and are a matter of public interest and that the comment on these facts is fair. Again, if a plea of justification is established the alternative plea of fair comment must fail and need not be investigated. HALSBURY’S LAWS OF ENGLAND, Third Edition, Vol. 24, para 136, p. 78). In other words, in the defence of justification the defendant must establish the truth of every injurious imputation which the jury think is contained in it but in fair comment, as VISCOUNT FINLAY, stated in *Sutherland v. Stopes* (1925) A.C. p.47:

“ The allegation of truth is confined to the fact averred, and the averment as to the comments is not that they are true but only that they were made in good faith and do not exceed the proper standard of comment upon such matters.”

In *Hunt v. Star Newspaper Co. Ltd.*, COZENS-HARDY M.R., stated that the defence of fair comment only arises in the event of the plea of justification failing but the plea of justification may fail by reason of the facts stated

not being substantially true. But there still remains whether if, and only if, the facts are substantially true the comment made by the defendants based upon those true facts were fair and such as might in the opinion of the jury, be reasonably made. In the language of BUCKLEY L.J. fair comment is a weapon which comes into action if and when justification has failed.

Finally, I turn to consider the submission of counsel for the plaintiffs and that is that where the statement of facts on which the comment is based are in themselves of a libellous nature the defendant cannot set up a plea of fair comment but must justify the allegations made in the statement of facts. On investigation into this matter I am satisfied that there is clear authority for this proposition and in *Davis v. Shepstone* (1886—90) A.E.R. (Rep.) at p. 406, where a newspaper had vouched for the truth of statements made to it by various correspondents concerning the alleged misconduct of a public officer, whereby he was charged with specific acts of misconduct, the paper had proceeded to comment on charges which turned out to be baseless, on the assumption that they were true, and it was held that there was no protection available to the newspaper in the defence of fair comment. LORD HERSHELL L.C. made it clear in the course of his judgment at p. 406 that there is no doubt that the public acts of a public man may lawfully be made the subject of fair comment and criticism by the press. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. "It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man and quite another to assert that he had been guilty of particular acts of misconduct." His Lordship went on to express the opinion of the court that there was no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege. Fair comment, in those days, was then considered a branch of the law of privilege and not a defence *sui juris* as it is in modern times. As long ago as 1879 COCKBURN C.J. in *R. v. Carden* (1879) 5 Q.B.D. at p. 8 laid it down that while it is true that a comment upon given facts, which would otherwise be libellous, may assume a privileged character because, though unjust and injurious yet being founded on facts not in themselves libellous, it is a comment which anyone is entitled to make upon a public man. On the other hand, to say that you may first libel a man and then comment upon him is obviously absurd. "If you state a number of libellous facts you cannot justify them on the ground that they are comments on a public man . . . the statement of facts must not be libellous or you must be prepared to prove the truth of it." And in a case in Australia, *Christie v. Robertson* (1889) 10 N.S.W.L.R. at p. 163, the learned Judge said:

" It is not comment . . . grossly to misrepresent the conduct of a public man, and then to hold him up to execration for his alleged wrongdoing."

It is a matter of common sense that this must be the law as he who repeats a libel is in no better position than the author of the libel. The position is

## B.G.R.M. BOARD v. PETER TAYLOR &amp; CO.

however otherwise where the facts on which the comment is based are innocent and the comment contains defamatory matter, then the defence of fair comment is available. In *Peter Walker & Son Ltd. v. Hodgson* (1909) 1 K.B.D. 239 at p. 256, KENNEDY L.J., stated:

“ But where the words which are alleged to be defamatory allege. or assume as true, facts concerning the plaintiff which the plaintiff denies, and which either involve a slanderous imputation in themselves. or upon which the comment bases imputations or inferences injurious to the plaintiff, it is, I think, settled law that the defence of fair comment fails, unless the comment is truthful in regard to its allegation or assumption of such facts.”

This principle is fully discussed and supported in ODGERS ON LIBEL AND SLANDER, Sixth Edition at page 161.

I now approach the various paragraphs of the publication itself bearing these principles of law in mind and applying them to the circumstances of the case, with the warning of KENNEDY J. in *Joynt v. Cycle Publishing Co.* (1904) 2 K.B. 298 uppermost in mind that comment must not mistake facts as such a comment cannot then be fair. As regards the first four paragraphs of the article, I must arrive at the conclusion, firstly, that the facts have not been truly stated and are not substantially true for it cannot be said that the defendants have proved that they were told that the local Banks had served notice on the B.G. Rice Marketing Board that they could no longer cash its' cheques until its financial position improved, as the evidence merely indicates that the two farmers, Hardat and Khemraj, showed the Director of the defendant company two cheque's and told him that they had been unable to cash them. There was no evidence that they had told the Director that the local Banks had served notice on the Board that they could no longer cash its cheques until its financial position had improved. In any event, that statement was in itself libellous and would have to be justified. In respect of the second paragraph that many cheques from the Board had bounced and farmers who had travelled to the city had to return home empty-handed is a statement of fact which has been mis-stated and which in itself is a libellous statement and must be justified. In respect to the third paragraph this is also a mis-statement of fact and must also be justified as it is of itself of a libellous nature. In respect to the fifth paragraph where it is said that it is known that a large number of cheques issued to farmers by the Board in payment for their rice had been rejected by the Banks over the past week, this is also a fact that has not been truly stated for the defendants have not attempted to show that such a fact was well known to members of the public and in any event this is a statement of itself of a libellous nature which must be justified. In respect to the third paragraph under the heading "PROTEST" it might possibly be that the facts there are truly stated that the farmers complained that they had been told for several weeks that their cheques were being processed and that they

would receive their money soon even though the evidence of the Director on this aspect of the matter was not corroborated by any of the farmers, but such a statement must be met by a plea of justification because of its libellous nature. In respect of the first and fourth paragraphs under the heading "OVER-DRAFT" the facts have not been truly stated because there was no evidence that eight months prior to the 1st March, 1965, the Banks had refused cashing cheques for the Board or that the newspaper had been told this by any person and, in any event, it is a statement of a defamatory and libellous nature which must be justified according to the principles already stated. In respect of the fourth paragraph this too is of a libellous nature and must be met by a plea of justification. The defence of fair comment must therefore fail. It is not necessary for me to consider whether the plaintiffs have shown malice on the part of the defendants as the defence of fair comment has already failed on other grounds pointed out and counsel for the plaintiffs has, in my view, in a spirit of generosity, conceded that while there may be recklessness, there is no evidence of improper motive. I say this because when it is considered that the information was made available to the newspaper shortly before the publication in the 'Daily Chronicle' in 1963, it was not until two years later that this information inspired the article of the 1st March, 1965, which spoke of the recent bouncing of cheques. I hold, therefore, that the defence of fair comment does not arise in the circumstances of this case and if it does it has not been established by the defendants on whom the burden of proof lies.

Having arrived at the conclusion that there is no answer to this action it follows that the plaintiffs are entitled to damages which are at large. Libel is a tort actionable *per se* without proof of special damage where there is a presumption of law in the plaintiff's favour that damage must result in the publication of the libel upon him. "The plaintiff may be entitled to very substantial damages though his income has not been affected by the libel," per LORD REID in *Lewis v. Daily Telegraph* (1963) 2 W.L.R. 1063. The plaintiffs, in this case, as already pointed out, are under no duty to prove special damage and, indeed, they have proved none. But in assessing the damages to be awarded it is a rule that the jury are entitled to look at the whole of the conduct of the defendant from the time that the libel was published down to the very moment of their verdict per ESHER M.R. in *Praed v. Graham* (1889) 24 Q.B.D. p. 55. In this case the defendants have not thought fit to offer an apology to the plaintiff corporation even though they gave prominence to the letter of denial by the managers of the Banks that they had not served notice on the plaintiff corporation that they were no longer prepared to cash their cheques nor had their cheques been dishonoured as stated in the offending article. It is true that the Minister of Trade and Industry had said at a Press Conference that the Board was having trouble with the local Banks but that was neither here nor there because the trouble could have been of any sort.

## B.G.R.M. BOARD v. PETER TAYLOR &amp; CO.

With these principles in mind I assess the damages at \$1,000.00 for which sum judgment is entered in favour of the plaintiffs with costs to be taxed certified fit for counsel. Stay of execution for six weeks granted.

*Judgment for Plaintiffs.*

Solicitors:

*S. Narain* (for plaintiffs);

*L.T. Persaud* (for defendants).

PETER STANISLAUS D'AGUIAR v. THE COMMISSIONER  
OF INLAND REVENUE

[Court of Appeal (Stoby, C., Luckhoo and Persaud, JJ.A.)  
January 30, February 1, June 6, 1967.]

*Income Tax — Organisation established partly for charitable and partly for non-charitable purposes — Contribution made under Deed of Covenant deducted from income tax return — Disallowed — Whether exigible to tax — Income Tax Ordinance, Cap. 299, s. 53(3) (now Income Tax Act, Cap. 81:01, s. 13(d) ). Charity — Test to be applied — Civil Law Ordinance, Cap. 2, s. 8 (now Civil Law Act, Cap. 6:01, s.8).*

The appellant submitted an income tax return for year of assessment 1962 in which he deducted the sum of \$4,200 being an amount paid by him during 1961 under a Deed of Covenant to an organisation called the Citizen's Advice and Aid Service, the objects of which were partly charitable and partly non-charitable. The respondent, in computing the appellant's chargeable income, did not allow the said sum of \$4,200 as a legitimate deduction on the ground that the organisation was not a charitable institution. This decision was upheld by a Judge in Chambers. On further appeal to the Court of Appeal —

**HELD** – (Luckhoo and Persaud, JJ.A) (Stoby, C., dissenting) that (i) the test as to whether an organisation is charitable or not is to ascertain whether its objects and aims are within the spirit and intendment of the preamble to 43 Eliz. 1c. 4 (U.K.) as preserved by s. 13(2) of the Mortmain and Charitable Uses Act, 1888 (U.K.), (both being expressly adopted by s. 8 of the Civil Law Ordinance, Cap. 2) i.e., the criterion is that it must be devoted exclusively to a charitable purpose or purposes; (ii) applying this test, the Citizen's Advice and Aid Service was not a charitable organisation and, accordingly, the contribution made by the appellant was personal income for income tax purposes and properly disallowed by the respondent.

*Appeal dismissed.*

*Cases referred to:*

- (1) Income Tax Special Commissioners v. Pemsel (1891) A.C. 531; 3 Tax Cas. 53.
- (2) Morice v. Bishop of Durham, 10 Ves. 522.
- (3) Att.-Gen. v. National Provincial Bank (1942) A.C. 265; 40 T.L.R. 191.
- (4) Williams' Trusts v. I.R.C. (1947) 1 All E.R. 513; 27 Tax Cas. 409, H.L.
- (5) National Anti-Vivisection Society v. I.R.C. (1947) 2 All E.R. 217; (1948) A.C. 31; 28 Tax Cas. 311, H.L.
- (6) Re Wedgwood, Allen v. Wedgwood (1915) 1 Ch. 113; (1914-15) All E.R. Rep. 322; 31 T.L.R. 43.
- (7) Baddeley and Others v. C.I.R. (1955) 1 All E.R. 525; 35 Tax Cas. 661. (8) Re Grove-Grady, Plowden v. Lawrence (1929) 1 Ch. 557; 140 L.T. 659; 45 T.L.R. 261.
- (9) Keren Kayemeth Le Jisroel Ltd. v. I.R.C. (1932) All E.R. Rep. 971; 17 Tax Cas. 27 H.L.
- (10) Oxford Group v. I.R.C. (1949) 2 All E.R. 537; 31 Tax Cas. 221, C.A.
- (11) Tennant Plays Ltd. v. I.R.C. (1948) 1 All E.R. 506; 30 Tax Cas. 107.
- (12) R v. Income Tax Special Commissioners 8 Tax Cas. 286, C.A.; 127 L.T. 651; 38 T.L.R. 603.

*[Editorial Note:—* This case is reported in (1967) 10 W.I.R. 209.  
The appellant's appeal to the Privy Council was dismissed on January 19, 1970 – see (1970) 15 W.I.R. 198.]

*G. M. Farnum, Q.C.*, for appellant.

*M. Shahabuddeen, Q.C., Solicitor-General, with S. Rahaman*, for respondent.

STOBY, C. The appellant submitted to the Commissioner of Inland Revenue a return of his income for the year of assessment 1962. In so doing he deducted the sum of \$4,200 being an amount paid during the year 1961 to an organisation known as the Citizen's Advice and Aid Service under a Deed of Covenant. The Commissioner of Inland Revenue in computing the taxpayer's chargeable income did not allow the sum of \$4,200 as a legitimate deduction on the ground that the Citizen's Advice and Aid Service was not a charitable institution.

This appeal is from a decision of a judge in Chambers upholding the decision of the Commissioner.

Two grounds of appeal were argued. First it was said that the learned judge misdirected himself in holding that under the relevant law of this country a gift to a charitable institution is not permissible deduction unless it is proved that the institution exists for charitable purposes only. It was submitted that in Guyana unlike the U.K. an organisation which is conducted partly for charitable purposes and partly for non-charitable purposes qualifies as a charitable institution under the Income Tax Ordinance, s. 53(3) Cap. 299.

## D'AGUIAR v. C.I.R.

In view of the argument the U.K. and Guyana provisions drawn to the attention of the court must be contrasted.

The Guyana s. 53(3) deals with the income of a donor and exempts that income from tax under certain conditions. The material portion of the subsection is:

“Notwithstanding anything to the contrary in this ordinance where any person has, directly or indirectly, . . . . . assigned or otherwise disposed of to any person otherwise than for valuable and sufficient consideration the right to income that would if the right thereto had not been so transferred. . . . . be included in ascertaining his chargeable income for the year . . . . . unless the income has been transferred, assigned, or otherwise disposed of for a period exceeding 2 years or for the remainder of his life to or for the benefit of any ecclesiastical, charitable or educational institution, organization or endowment of a public character within British Guiana . . .”

In the U.K. the Income Tax Act 1918 s. 37 provides for exemption to tax in respect of lands belonging to hospitals and other charities. S. 37 states:

“Exemption shall be granted —

(a) from tax under Schedule A in respect of the rents and profits of any lands, tenements, hereditaments, or heritages belonging to any hospital, public school or almshouse, Or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes only:

Provided that any assessment upon the respective properties shall not be vacated or altered, but shall be in force and levied, notwithstanding the allowance of any such exemption:

(b) from tax under Schedule C in respect of any interest, annuities, dividends, or shares of annuities, and from tax under Schedule D, in respect of any yearly interest or other annual payment forming part of the income of any body of persons or trust established for charitable purposes only, or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, are applicable to charitable purposes only, and so far as the same are applied to charitable purposes only”;

The Finance Act 1921 s. 30 deals with the exemption from income tax in respect of income of certain lands owned and occupied by charities and of profits of trades carried on by beneficiaries of charities. The Finance Act 1921 s. 20 provides:

“Exemption shall be granted —

(a) . . . . .

(b) . . . . .

(c) from income tax under Schedule D in respect of the profits of a trade carried on by any charity, if the profits are applied solely to the purposes of the charity and either —

- (i) the trade is exercised in the course of the actual carrying out of a primary purpose of the charity; or
- (ii) the work in connection with the trade is mainly carried on by beneficiaries of the charity”.

and s. 30(3) is:

“In this section the expression ‘charity’ means any body of persons or trust established for charitable purposes only”.

The Income Tax Act 1952 s. 448(3) repeats this definition of “charity”.

The repeated use of the words “charitable purposes only” in the U.K. legislation requires further investigation as it is unlikely they are an accident of inefficient draftsmanship; these words must have been selected and inserted for a specific reason. A study of some of the decided cases will be of assistance. In *Rex. v. Special Commissioners of Income Tax*, 8 Tax Cases 286, the Lord Chief Justice said:

“This rule raises an interesting question upon the right to exemption from Income Tax. Mr. Joseph Rank has by an Indenture of 7th March, 1917, settled or conveyed to trustees a very large sum of money and under that deed he reserved to himself by Clause 3 power to appoint to himself, or to anybody he liked. I will read the Clause:— ‘The Trustees shall stand possessed of the said Preference and Ordinary Shares and War Stock and of the moneys or investments for the time being representing the same (hereinafter referred to as ‘the Trust Funds’) and of the Income of the Trust Funds upon such trusts for the benefit of such persons Institutions or purposes as the said Joseph Rank shall by any writing under his hand or by Will appoint’. Clause 4 provides that ‘In default of and subject to any such appointment by the said Joseph Rank the Trustees shall stand possessed of the Trust Funds and the income thereof for such purposes connected with and for the benefit of the Wesleyan Methodist Church and to be applied in such manner as the Trustees or if they shall be more than two in number the majority of the Trustees shall in their absolute discretion determine’. Now it is said by the learned counsel appearing for Mr. Rank’s trustees that that deed creates a trust for charitable purposes only, and therefore it comes within the exemption conferred by Section 105 of the Act of 1842 and the Rules thereunder, “and now by Section 37 of the Act of 1918”.

AVORY J. based his judgment on a wider principle by referring to LORD ELDON’S judgment in *Morice v. The Bishop of Durham*, 10 Vesey 522 where it was held that a trust declared for charitable objects or for other purposes was not a trust for charitable purposes.

McCARDIE J. limited his judgment to the narrower ground; he said:

“. . . . . For the purpose of securing exemption under this sub-head of Section 37 the whole of the purposes must fall within the technical requirements of the words ‘charitable purposes’ as em-

## D'AGUIAR v. C.I.R.

ployed in the Income Tax Acts. If once that point be clear, and if the words of Lord Macnaghten in Pemsel's case at page 586 be remembered — they have already been read by the Attorney-General — then the point for decision is here brief.

Taking this deed of 1917 and reading the two material clauses, does it exhibit a trust for charitable purposes only? . . . . .”

The case of *Tenant Plays Ltd. v. Inland Revenue Commissioners* (1948) 1 All E.R. 506 illustrates the importance of the word “only” in the various Income Tax and Finance Acts (U.K.):

“The Finance Act, 1921, s. 30(1) (as substituted by the Finance Act, 1927, s. 24), provides: ‘Exemption shall be granted . . . . . (c) from income tax under sched. D in respect of the profits of a trade carried on by any charity, if the profits are applied solely to the purposes of the charity and . . . . . the trade is exercised in the course of the actual carrying out of a primary purpose of the charity . . . . .’ By s. 30(3): ‘In this section the expression ‘charity’ means any body of persons or trust established for charitable purposes only’.”

COHEN L. J. said:

“The question in this case is whether the appellant company, having regard to “its objects, is ‘established for charitable purposes only’.”

and again —

“. . . . . I feel some doubt whether a company can be said to be established ‘for charitable purposes only’ if it carried on a substantial non-charitable purpose, for instance, to take the case suggested by Somervell, L. J., during the argument, if it took power permanently to run a public house in order to produce funds for its charitable purpose. In this connection, I would refer to certain observations which were made both in this court and in the House of Lords in *Keren Kayemeth Le Jisroel, Ltd. v. Inland Revenue Commissioners*. Lawrence, L. J. said (17 Tax Cas. 40):

The instrument with which this case is concerned consists of the memorandum of association of the company and it is essential to bear in mind that in order to obtain exemption from income tax under the section it is not enough that the purposes described in the memorandum should include charitable purposes, the memorandum must be confined to those purposes so that any application by the company of its funds to non-charitable purposes would be ultra vires . . . . .”

The argument for the Commissioner of Inland Revenue is, Pemsel's case (1891) A.C. 531 decided that there is no difference between Income Tax Law and the law of Trusts regarding the principles of a charity and since a deed or a memorandum or a constitution of an organisation can only qualify as a charity if its main or dominant purpose is charitable within the meaning

of Pemsel's case as qualified and explained by later judicial decisions there is no need in s. 53(3) to legislate for a charitable organisation only because a charitable organisation is one established for charitable purposes only. What is often overlooked when Pemsel's case is referred to in this connection is that Pemsel's case gave a much wider definition to the word "charity" than was being contended for. The Inland Revenue wished to restrict charity to trusts for the relief of poverty, but the court gave to it the much wider and artificial meaning it has in the law of trusts.

The respondent's view, however, is supported by the case of *Williams' Trusts v. Inland Revenue Commissioners* (1947) 1 All E.R. 518 where the appellants conceded that the expression "for charitable purposes" means for charitable purposes only.

The moment it is conceded that the word "charity" must be given its technical meaning there is no necessity to speak of a charitable organisation only. A charitable organisation can only be charitable if it is charitable only. But this does not explain the U.K. use of the word "only". The reason is easily discernible. In Guyana it is the donor's portion of income which is exempt from tax; in the U.K. it is the income of the organisation for which provision for exemption is made and that income must be applied to charitable purposes only. Where a hospital, for example, owns immovable property the income from that property if applied to charitable purposes only is exempt from tax; or if the charitable organisation trades its income is tax free if applied to charity only. This is not the position in Guyana, where the income from the organisation is taxable if the income comes from a trade or business carried on by the institution. A charitable organisation has to apply its income from donors to the charitable objects stated in the memorandum or it ceases to be a charitable organisation.

A consideration of the cases leads me to the conclusion that in the Income Tax Acts (U.K.) the words "for charitable purposes only" were inserted in order to ensure that the income of a trust established for charitable purposes was applied to charitable purposes only.

It was also contended for the appellant that in any event the Citizens Advice and Aid Service was a charitable organisation.

I will refer to it hereafter as the organisation and set out now the principal features of its constitution for it is from the constitution that a court determines whether an institution is established for charitable purposes.

The constitution is as follows:

**"NAME AND ESTABLISHMENT OF THE CITIZENS' ADVICE AND AID SERVICE**

1. The name of the organisation hereby established is 'The Citizens' Advice and Aid Service', (hereinafter referred to as the Service).

## D'AGUIAR v. C.I.R.

## GENERAL AIMS, FUNCTIONS AND OBJECTS OF THE SERVICE

2. The aims, functions and objects of the Service are —

- (a) To provide advice, aid and services on or relating to medical dental, optical, health, legal, matrimonial domestic or other social matters;
- (b) To establish and operate a fund for the assistance of those in need on such terms and conditions as the Central Committee may determine;
- (c) To encourage thrift and provide savings facilities;
- (d) To make available to the individual in confidence accurate information and skilled advice on personal problems of daily life;
- (e) To establish, organise, sponsor or otherwise promote Adult Education and technical training of every kind including the explanation of legislation and government notices and publications;
- (f) To help the citizen to benefit from and to use wisely the services provided for him by the State;
- (g) In general to advise the citizen in the many complexities which may beset him; and
- (h) Generally to do anything to assist the citizen, whether financial or otherwise who makes enquiry of the Service and in any way as may be determined by the Central Committee”.

Before undertaking a detailed study of the organisation’s clauses as recorded above, I must advert to the recognised approach when construing a document of this nature. The first requirement is to interpret the document itself. There is no ambiguity in the language of COHEN, L. J. in *Tennant Plays Ltd. v. Inland Revenue Commissioners* (1948) 1 All E.R. 507 when he said:

“The question in this case is whether the appellant company, having regard to its objects, is ‘established for charitable purposes only’.”

To the same effect in the same case SOMERVELL, L. J. said:

“ . . . . . It seems to me that, in construing the clauses of a memorandum — and, indeed, in construing any document — the first thing is to see what they say without having any preconceived notion in one’s mind of what one is going to find. No doubt, it may often happen that one finds a dominant purpose stated at the outset to which the paragraphs which come later must be regarded as subordinate”.

There are occasions, of course, when evidence is required to enable a judge to decide whether a trust is for a purpose beneficial to the community. The necessity for evidence under certain circumstances was fully expounded in *Commissioners of Inland Revenue v. National Anti-Vivisection Society* 28 Tax Cases 311-378. In that case the National Anti-Vivisection Society was a voluntary society governed by rules. The object of the society was the total abolition of vivisection. The Special Commissioners allowed the Crown to lead evidence with the object of proving the great benefits which had accrued to the public by reason of the medical and scientific knowledge which had been obtained through experiments on living animals. On this evidence the Special Commissioners found that a large amount of present day medical and scientific knowledge is due to experiments on living animals. The House of Lords held the Society was not established for charitable purposes only. LORD SIMONDS in his speech referred to FITZ-GIBBON, L.J.'s words in *re Cranston* (1898) 1 I.R. 431: "What", he says, "is the tribunal which is to decide whether the object is a beneficent one? It cannot be the individual mind of a Judge, for he may disagree, *toto coelo*, from the testator as to what is or is not beneficial. On the other hand, it cannot be the *vox populi*, for charities have been upheld for the benefit of insignificant sects, and of peculiar people. It occurs to me that the answer must be — that the benefit must be one which the founder believes to be of public advantage, and his belief must be at least rational, and not contrary either to the general law of the land, or to the principles of morality".

Clearly the present case is not one in which evidence would be justified. The evidence which the court requires is the evidence of a written document. Neither the intention of the Directors of the organisation nor the way they propose to administer the society can help a judge in the construction of the document, and so I propose to confine myself to the avowed objects, bearing in mind that if the dominant purpose of the organisation is charitable ancillary non-charitable objects are not fatal.

Object (a) – To provide advice, aid and services on or relating to medical, dental, optical, health, legal, matrimonial, domestic or other social matters.

The learned Chief Justice held that the words "or other social matters" were wide enough to enable those administering the organisation to include social matters which are not objects of charity. This view is not original. A similar argument was addressed to the court in *Re Wedgwood, Allen v. Wedgwood* All E.R. 1914-1915 Reprint 322 where a testatrix left the capital and income of her residuary estate to Wedgwood absolutely subject to a secret trust that the money should be used at Wedgwood's absolute discretion for the protection and benefit of animals. KENNEDY, L.J., dealing with the argument that the bequest was too vague to qualify as a charitable gift said:

"It was intended in the argument addressed to us against the validity of this particular bequest as a "charitable gift that it fails on account of such vagueness and generality of expression as would

## D'AGUIAR v. C.I.R.

justify its application by the trustee to the protection and maintenance of noxious animals, and he instanced, if I remember rightly, lions and tigers. Now, it is quite true, as laid down by LINDLEY, L.J., in *Re Macduff; Macduff v. Macduff* (1896) 2 Ch. at pp. 463, 464), that when we are dealing with general words we must consider whether there is such an indication of purpose or of trust that the court, if called upon to execute it, can see what it has to do — can see the limits of its own powers”.

HOLMES, L.J. in *Re Cranston* also said:

“Gifts, the object of which is to prevent cruelty to animals and to ameliorate the position of the brute creation, are charitable. If it is beneficial to the community to promote virtue and to discourage vice, it must be beneficial to teach the duty of justice and fair treatment to the brute creation, and to repress one of the most revolting kinds of cruelty”.

I would like to stress the words “it is beneficial to the community to promote virtue and to discourage vice”. Surely a judge who has to interpret the law must take cognisance of the vices in his country. He cannot be expected to isolate his mind and exist in a dream world. Everyone knows that Guyana has passed through fire and brimstone and emerged from the bitterness of racial conflict with scars on the body and soul of its people. What greater act of charity can there be for an organisation to give advice, aid and services to its people in social matters within the context of the community in which we live. Reconciliation, forgiveness, both come within the ambit of social matters as contemplated in the clause. It is said that a dance or a concert may be organised and the Attorney-General will be unable to invoke the court’s powers to prevent the organisation exceeding its objects. I answer this in the words of KENNEDY, L.J. “. . . . .the court, if called upon to execute it, . . . . can see the limits of its own powers”.

One of the most revolting kinds of cruelty is to be unkind to the brute creation; in an emergent country where poverty abounds does kindness to a section of the human race count for nothing? Aid and services, not services alone, but aid relating to social matters. Aid to a people whose minds are disturbed, who are anxious about the future. I have no hesitation in holding that the object is a charitable one.

The Chief Justice found that object (d) was too wide. The object is:

“to make available to the individual in confidence accurate information and skilled advice on personal problems of daily life”.

In order to be valid this object must fall within LORD MACNAGHTEN’S fourth category in *Income Tax Special Commissioners v. Pemsel* (1891) A.C. 583, viz: “trusts for other purposes beneficial to the community”. LORD SIMONDS in *National Anti-Vivisection Society v. Inland Revenue Commissioners* (1948) Law Reports 64 pointing out that both before and after the Statute of 43 Elizabeth it became the duty of the

Court of Chancery to determine what objects were and what were not charitable, went on to say –

“The task of the court was in some degree simplified by the Statute of Elizabeth, which made it clear that at least the purposes enumerated in the preamble were charitable, but from the beginning it appears to have been assumed that the enumeration was not exhaustive and that those purposes also were charitable which could be fairly regarded as within its spirit and intendment. This view enabled the court to extend its protection to a vast number of objects which appeared both to the charitable donor and to it to be for the benefit of the community”.

In the earlier case of *Williams Trusts v. Inland Revenue Commissioners* (1947) 1 A 11 E.R. 518 LORD SIMONDS, has said:

“My Lords, there are, I think, two propositions which must ever be borne in mind in any case in which the question is whether a trust is charitable. The first is that it is still the general law that a trust is not charitable and entitled to the privileges which charity confers unless it is within the spirit and intendment of the preamble to 43 Eliz., c. 4, which is expressly preserved by s. 13(2) of the Mortmain and Charitable Uses Act, 1888”.

No one who reads the objects of the organisation with which we are concerned can question the fact that it exists for purposes beneficial to the community. But are the objects within the spirit and intendment of the preamble to 43 Elizabeth? The courts have never confined themselves to the objects therein mentioned but have treated those objects as a guide. In the 350 years which have elapsed since the list was formulated great social changes have taken place; the young tradesman may still need financial help as he did in 1601, but today accurate information and skilled advice may be more important than money. Polytechnics, county schools, training centres, all exist to overcome the barrier of financial stringency which in former times would make professional achievement impossible to those of slender means. This is not the real problem of this age; the excitement experienced from taking certain drugs; the lure of great wealth from armed robbery, to mention but two growing evils, are problems which confront the young in countries all over the world. I reject the idea that charity today in its legal sense must be the only virtue handicapped by the image of the seventeenth century. When we speak now of whether an object of intended charity is within the spirit and intendment of examples given 300 years ago we must recall the evils of the past generation and contrast them with the evils of this generation, for the whole basis was to give guidance to Commissions of Enquiry who had to determine whether gifts to certain existing institutions were charitable. An important test was clearly poverty but underlying it all was aid and advice. One of the objects was the maintenance of the sick, a truly charitable object when medical attention was expensive and difficult to obtain, but even then advice and good cheer were equally important. If then, why not now. It is said problems of daily life are varied and numerous; too

## D'AGUIAR v. C.I.R.

vague to qualify as a charity. Varied and numerous, yes, but too vague? Is any problem too vague to the individual concerned? To the man or woman depressed or anxious, no problem is unimportant. Advice is often needed and advice is what this organisation offers. I consider the clause a good charitable object.

The other clause which was held to be non-charitable was clause (g):

“in general to advise the citizen on the many complexities which may beset him;”

There is really very little difference between this clause and clause (d), and as I have held the giving advice to a citizen is a good charitable purpose, this clause does not infringe the law.

Although the judge held the other clauses of the organisation to be charitable counsel for the respondent contended that the judge was in error in so finding. The only concession he made was in respect of clause (f). In dealing with clauses (a) and (d) I set out my views generally and no useful purpose will be serviced by repeating them. On the whole I am persuaded that the organisation is a charitable one and I would allow the appeal with costs.

PERSAUD, J. A. The point in this appeal is whether the appellant (tax payer) is entitled in the computation of his taxable income to deduct the sum of \$4,200 which he contributed under a Deed of Covenant to an organisation described as the Citizens Aid and Advice Service and referred to in this judgment as the organisation. The Commissioner held the view that the sum contributed was not deductible, and the members of the Board of Review unfortunately were evenly divided in their opinions. A judge in chambers shared the Commissioner's view, and dismissed an appeal by the appellant.

Counsel for the appellant has advanced his arguments along two separate but complementary lines. The first assumes that, as in England, to be classified as charitable, an organisation must exist for charitable purposes only, in which case the submission is that the organisation here qualifies. The second argument examines s. 53(3) of the Income Tax Ordinance (Cap. 299) and propounds the theory that the true construction of the section leads to the conclusion that it is unnecessary for an organisation to be charitable only to entitle a tax-payer to deduct from his income donations to such an organisation. Counsel further submits that the organisation falls under categories (1) and (4) as set out in *Pemsel's Case*, 3 Tax Cas. 53, that is to say, “for the relief of poverty” and “for other purposes beneficial to the community, not falling under any of the preceding heads”. This latter object was also described in *Morice v. Bishop of Durham* 10 Ves. 522 as the advancement of objects of general public utility, and as being the most difficult category.

Before dealing with the submission, it might be of some use to make a few general observations. The overriding test in deciding whether an object is charitable is whether or not it is for the benefit of the public, but an object

which is for the public benefit is not necessarily charitable, just as a philanthropic object may not be charitable. [See *A. G. v. National Provincial Bank* (1924) A.C. 265]. A donor's opinion and his motive are both immaterial to the determination of this question, and so also are the opinions of officers of the organisation. The thing to be examined in this case in order to arrive at a conclusion is the constitution of the organisation in which are set out its objects and aims. But those objects and aims are still to be tested to ascertain whether they are within the spirit and intendment of 43 Eliz., 1, c.4, for s.8 of the Civil Law of Guyana (Cap. 2) provides that the law as to charities shall be the common law of England, provided that by "charities" shall be ordinarily understood charities within the meaning, purview, and interpretation of the preamble of 43 Eliz., 1, c. 4, as preserved by the Mortmain and Charitable Uses Act, 1888. Or as it has been put by LORD SIMONDS in *Williams' Trusts v. I.R.C.* (1947) 1 All E.R. at p. 518 —

"... there are, I think, two propositions which must ever be borne in mind in any case in which the question is whether a trust is charitable. The first is that it is still the general law that a trust is not charitable and entitled to the privileges which charity confers unless it is within the spirit and intendment of the preamble to 43 Eliz., c.4, which is expressly preserved by s. 13(2) of the Mortmain and Charitable Uses Act 1888".

The other proposition has already been referred to in this judgment, that is, that not all trusts that are beneficial to the community are charitable.

Of course, I hasten to add that even though the courts must not ignore the spirit and intendment of the Act, it is the case that the English Courts have from time to time extended by analogy the benefit of the law to various objects. As LORD ELDON said in *Morice v. Bishop of Durham* 10, Ves. 522, the court has taken strong liberties upon the subject of charities, but notwithstanding the strong liberties it has taken, there are certain principles which have always guided the court. It is inevitable that the courts would have extended the classification to include other objects if only because as time goes on the needs of mankind have become wider and more elaborate and an object which could not have been contemplated when the Act of Elizabeth and even the Mortmain and Charitable Uses Act were enacted, could very well in the present century fall within the spirit and intendment of the former. It is clear that the enumeration contained in the Statute of Elizabeth was not exhaustive. As LORD SIMONDS puts the matter in the *National Anti-Vivisection Society's Case* 28, Tax. Cas. at p. 369 —

"The task of the court was in some degree simplified by the Statute of Elizabeth, which made it clear that at least the purposes enumerated in the preamble were charitable, but from the beginning it appears to have been assumed that the enumeration was not exhaustive and that these purposes also were charitable which could be fairly regarded as within its spirit and intendment. This view enabled the court to extend its protection to a vast number of objects which appeared both to the

## D'AGUIAR v. C.I.R.

charitable donor and to it to be for the benefit of the community. Nowhere perhaps did the favour shown by the law to charities exhibit itself more clearly than in the development of the doctrine of general charitable intention, under which the court, finding in a bequest, (often, as I humbly think, on a flimsy pretext) a general charitable intention, disregarded the fact that the named object was against the policy of the law and applied the bequest to some other charitable purpose”.

Counsel for the appellant relies upon the dictum of FITZGIBBON, L.J., in *Re Cranston* (1898) 1 Ir. R. at p.446, particularly so as it was adopted by LORD COZENS-HARDY, M. R in *Re Wedgwood, Allen v. Wedgwood* (1915) 84 L.J.R. at p. 108. That dictum is to this effect –

“ . . . . any gift which proceeds from a philanthropic or benevolent motive, and which is intended to benefit an appreciably important class of our fellow-creatures (including, under decided cases, animals), and which will confer the supposed benefit without contravening law or morals, will be ‘charitable’.”

And LORD COZENS-HARDY continued his judgment with these words (ibid at p. 108) –

“It may be, and indeed I think it is true that there has been a tendency to enlarge the meaning of the word ‘charity’ and that gifts within the last fifty years have been supported as good charitable gifts which a hundred and fifty years ago would not have been supported”.

I have already attempted to give a reason for the latter dictum. There can be no exception to the statement of FITZGIBBON, L. J., as it stands if the purpose of the gift was not illegal, and not contrary to public policy. I would refer to the dictum of HOLMES, L.J., in the same case and also referred to by COZENS-HARDY, M. R. in *Wedgwood* to the effect that gifts, the object of which is to prevent cruelty to animals and to ameliorate the position of the brute creation, are charitable. LORD JUSTICE HOLMES said –

“If it is beneficial to the community to promote virtue and to discourage vice, it must be beneficial to teach the duty of justice and fair treatment to the brute creation, and to repress one of the most revolting kinds of cruelty”.

The *Wedgwood* case concerned a trust for the protection and benefit of animals, by the movement for the humane slaughtering of animals, and to provide municipal abattoirs.

I wish to observe in passing that *In Re Foveaux* (1895) 2 Ch. 501 which was also cited with approval in the *Wedgwood Case* has since been overruled in *C.I.R. v. National Anti-Vivisection Society* 28 Tax. Cas. 312.

In the last mentioned case — decided in 1947 — it was held that a society which existed “to awaken the conscience of mankind to the iniquity

of torturing animals for any purpose whatever” and to suppress the practice of vivisection was not established for charitable purposes only, this being contrary to the decision in *Re Wedgwood*.

So much for the cases dealing with the amelioration of the suffering of animals. I have had reason to refer to them because two of them were relied upon by the appellant, and to show that they are not completely acceptable. It is still the law – as was observed by LORD SIMONDS in the *National Anti-Vivisection Society's Case* (ibid at p. 375) that the court must still in every case determine by reference to its special circumstances whether or not a gift is charitable.

It now becomes necessary to set out in detail the objects of the society in the instant case, in order to deal with the first submission, that is, assuming that to qualify for relief the organisation must exist for charitable purposes only, then it so qualifies having regard to its objects.

The objects are as follows —

- (a) to provide advice, aid and services on or relating to medical, dental, optical, health, legal matrimonial, domestic or other social matters;
- (b) to establish and operate a fund for the assistance of those in need on such terms and conditions as the Central Committee may determine;
- (c) to encourage thrift and provide saving facilities;
- (d) to make available to the individual in confidence accurate information and skilled advice on personal problems of daily life;
- (e) to establish, organise, sponsor or otherwise promote Adult Education and technical training of every kind including the explanation of legislation and government notices and publications;
- (f) to help the citizen to benefit from and to use wisely the services provided for him by the State;
- (g) in general to advise the citizen on the many complexities which may beset him;
- (h) generally to do anything to assist the citizen, whether financial or otherwise who makes enquiry of the Service and in any way as may be determined by the Central Committee.

As I understand the appellant's submission, all the abovementioned objects merely set out the ambit of a scheme of social amelioration; while the respondent argues that even though some of the objects are charitable, others are not, and therefore the organisation does not exist for charitable purposes only, and it must fall into this category to qualify.

I will say at once that in my opinion, no one object can be singled out as the main object and the others ancillary; they may all be intended to

## D'AGUIAR v. C.I.R.

operate for the general amelioration of the people, but each has a separate aim, for example, to take two at random, (b) speaks of establishing and operating a fund for the assistance of those in need, while (f) contemplates helping the citizen to benefit from and to use wisely the services provided for him by the State — two totally unrelated objectives.

So far as the category of charitable objects is concerned, I would rule out the relief of poverty, as it does not appear to me that, with the possible exception of object (b), any of the other objects can be said to be devoted to the relief of poverty, and even (b) is subject to “such terms and conditions as the Central Committee may determine”. If then, the organisation is charitable, it can only be because it falls within the fourth class in Lord McNaghten’s classification, that is, it must be an organisation of general public utility and must be within the spirit and intentment of the preamble to the Statute 43 Eliz., c.4.

Now to revert to the first submission. As I have already indicated, the objects of the organisation as set out in its constitution are each a substantial object. And if it is found that some of those objects are not charitable, then it is not possible to save the rest.

I will refer to objects (a), (d), (g) and (h), which are already set out in this judgment. I can do no better to illustrate my point than to quote from the judgment of VISCOUNT SIMONDS in *Baddeley and others v. C.I.R.* 35 Tax. Cas. at p. 697 –

“My Lords, I do not think it would be possible to use language more comprehensive and more vague. I must dissent from the suggestion that a narrow meaning must be ascribed to the word ‘social’: on the contrary, I find in its use confirmation of the impression that the whole provision makes upon me, that its purpose is to establish what is well enough called a community centre in which social intercourse and discreet festivity may go hand in hand with religious observance and instruction. No one will gainsay that this is a worthy object of benevolence, but it is another question whether it is a legal charity, and it appears to me that authority which is binding on Your Lordships puts it beyond doubt that it is not. Here we are not concerned to consider whether a particular use to which the trust property may be put is a charitable use; that is a question upon which different minds might well come to different conclusions. On the contrary, we must ask whether the whole range of prescribed facilities or activities, call them what you will, is such as to permit uses which are not charitable: if it is, it is not such a trust as the court can execute, and it must fail”.

In *Williams’ Trusts v. I.R.C.* (1947) 1 All E.R. 513, a trust deed was executed whereby certain freehold property was held in trust to maintain an institute in London for the benefit of the Welsh people, resident in or near or visiting London, to promote moral, social, spiritual and educational welfare of the Welsh people. There were several other objects included in the

trust deed. It was held that the property was not vested in the trustees for charitable purposes only. In the course of his judgment, VISCOUNT SIMONDS, after quoting RUSSELL, L.J., as saying [in *Re Grove-Grady* (1929) 1 Ch. 582; (1929) All E.R. 158] that matters have been stretched in favour of charities almost to bursting point, continued (at p. 520):—

“That point would be reached if Your Lordships held that this trust deed has a purpose which falls within the spirit and intendment of the preamble; it clearly does not, and, if it does not, let the purpose be as beneficial as you like, here is no charity”.

If I may, I would with the greatest respect, use the language of VISCOUNT SIMONDS to describe the present situation, and say that here there is no charity.

Dealing with the powers which a company can exercise as being conducive to a main object (and I would imagine that this argument would be of greater force in the case of all main objects, as I have held to be the position in this appeal), LAWRENCE, L. J. in the *Keren Kayemeth Case* (17 Tax. Cas. at p. 41) said —

“The company can exercise any or all of these powers whenever in its opinion such an exercise would be conducive to the attainment of the so-called primary object which, from a practical point of view, means that it can exercise them whenever it is minded to do so, and whether such exercise is in fact conducive to the attainment of that object or not, as neither the court nor any one else can control the company’s opinion, or otherwise interfere with the manner in which it chooses to carry out its objects”.

Similarly, in the instant case, the establishment and operation of a fund for those in need must be on such terms and conditions as the Central Committee of the organisation may determine, and the objects as set out in this general and all-embracing clause are subject to the determination of the Central Committee. This, in my judgment, is much too wide. As it is put by LORD COHEN in *Oxford Group v. C.I.R.* 31 Tax Cas. at p. 254 —

“. . . . . the question which the court would have to decide, if any activity of the Association were being challenged as being ultra vires, would be not whether in the opinion of the court the activity was conducive to the main object but whether the Association in undertaking it had thought it conducive”.

In other words, the court is denied the power to decide whether an object is or is not charitable, but the organisation has that power. This cannot be the true legal position.

Clause (e) seeks to encourage thrift and to provide saving facilities. This, no doubt, is a laudable object, and a worthwhile pursuit, but it cannot be said to be charitable. It has been said that there may be a good charity for the relief of persons who are not in grinding need or utter destitution, but

## D'AGUIAR v. C.I.R.

relief connotes need of some sort, and it cannot be said that every person who participates in a thrift society is necessarily in need. The Income Tax Ordinance, Cap. 299 itself does not seem to accept a thrift society as a charitable organisation, for s. 10(p) makes provision for the exemption from income tax of the income of any institution established for the encouragement of thrift only if it is so declared.

I am of the view, therefore, that this organisation is not charitable within the meaning of 43 Eliz., 1, c. 4.

Now to the second proposition, namely, that under s. 53(3) of the ordinance, it is unnecessary for the organisation to be charitable only in order to enable a contributor to avoid tax on his donation. The section exempts from tax any contribution made “to or for the benefit of any ecclesiastical, charitable, or educational institution, organisation or endowment of a public character”. Unlike the English legislation the word “only” is not used in our ordinance. If the organisation is a charitable institution, well then the section applies; but it must be a charitable institution within the intendment of 43 Eliz., 1, c. 4, that is, that the criterion is that it must be devoted exclusively to a charitable purpose or purposes.

The United Kingdom legislation contains the phrases: “to charitable purposes only” (s. 37 of the Income Tax Act, 1918) and “applied solely to the purpose of the charity” (s. 30 of the Finance Act, 1921) S. 30(3) of the latter Act defines charity to mean: “any body of persons or trust established for charitable purposes only” and the Income Tax Act, 1952, repeats this definition. In my opinion, the reason for inserting the words “only” and “solely” is plain; it is to restrict the use to which the profits or rents of any body of persons or a trust can be put in order to qualify for exemption. The important distinction between the United Kingdom legislation and our legislation is that under the former it is the rents and profits of the organisation itself which are being scrutinised for purposes of taxation, while in the latter it is the nature of a contribution of an individual to an organisation which is being examined but for the same purpose; but, and this is of the utmost significance, no attempt has been made in the English legislation to detract from the meaning of the word “charity”. Even if such an attempt has been made, this would not have affected the meaning as it is understood in these courts, if only because the original meaning has been retained here by statute. It was necessary to place a limitation on organisation and trusts in the United Kingdom, for the reason that to otherwise would have resulted in their being able to utilize their funds for purposes other than charity, and yet able to avail themselves of the exemption. This is exemplified by COHEN, L.J., in *Tenant Plays, Ltd. v. I.R.C.* (1948) 1 All E.R. when he said at p. 510 –

“I think the principle that one must look only at the main or dominant purpose of the company must be taken with a little reserve. I feel some doubt whether a company can be said to be established ‘for charitable purposes only’ if it carried on a substantial non-chari-

table purpose, for instance . . . . . if it took power permanently to run a public house in order to produce funds for its charitable purpose”.

COHEN, L. J. referred to certain observations which were made by LAWRENCE, L. J. in the *Keren Kayemeth Case* (17 Tax Case at p. 40), and I would wish to repeat them in this judgment —

“The instrument with which this case is concerned consists of the memorandum of association of the company and it is essential to bear in mind that in order to obtain exemption from income tax under the section it is not enough that the purposes described in the memorandum should include charitable purposes, the memorandum must be confined to those purposes so that any application by the company of its funds to non-charitable purposes would be *ultra vires* . . . . .”

I am therefore inclined to the view that the second submission is also without merit.

I find myself in the position where I cannot accede to either submission made on behalf of the appellant, and so I would move for a dismissal of this appeal, with the usual consequences as to costs, for I feel that the decision of the judge in Chambers was right.

LUCKHOO, J.A.      I concur.

Solicitors:

*J. E. de Freitas* (for appellant).

*The Crown Solicitor* (for respondent).

*Appeal dismissed.*

RUDOLPH SEMPLE v. P.C. 6789 HARJEET SINGH  
 AND  
 CALVIN SEMPLE v. S.C. 795 MARKS

[In the Full Court of the High Court (Bollers, C.J., and Crane, J)  
 – January 27, 1967.]

*Criminal Law — Assaulting peace officer — Two separate assaults — Whether part and parcel of same transaction of using indecent language by third person.*

*Criminal Law — Assaulting peace officer — Two separate arrests without warrant — Whether constables acting in execution of duty — Whether arrests lawful — s. 28(b) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14 (now s. 28(b) of the Summary Jurisdiction (Offences) Act, Cap. 8:02) — secs. 17(1)(a) & 17(2) of the Police Ordinance, No. 39 of 1957 (now secs. 17(1)(a) & 17(2) of the Police Act, Cap. 16:01).*

One Brian Chan was arrested for using indecent language by S.C. Marks in a parlour and taken and placed in a police lorry parked outside. The first-named appellant unsuccessfully interceded to secure his release and later used indecent language in the said parlour and S.C. Marks went up to him and told him that he would arrest him for using indecent language. The first-named appellant denied using indecent language and told the constable that he was not going anywhere. S.C. Marks then held him but he pushed him off and the constable then held him again. The second-named appellant then entered the shop and began to use indecent language and he held on the S.C. Marks' hands telling him that he was not taking the first-named appellant anywhere and that he would have to carry him over his dead body. P.C. Singh then entered the parlour and went up to the second-named appellant telling him that he was obstructing a policeman from doing his duty. The second-named appellant continued holding on to S.C. Marks' hands repeating that he was not going anywhere, whereupon P.C. Singh promptly arrested him. The second-named appellant then pulled himself away and cuffed P.C. Singh in his face causing his nose to bleed. P.C. Singh again held on to the second-named appellant and eventually managed to get him out of the shop and placed him in the police vehicle. In the meanwhile, S.C. Marks had also forced the first-named appellant out of the shop and whilst they were on the road the first-named appellant proceeded to cuff S.C. Marks about his face and body in an endeavour to free himself. The second-named appellant then made a bid to escape and kicked P.C. Singh in his chest. The two appellants were eventually subdued and taken to the station where they were later separately charged for assaulting a peace officer in the execution of his duty. Both appellants denied using indecent language and assaulting the constables.

On appeal to the Full Court against their convictions, it was argued on their behalf that (a) the constables were not acting in the execution of their duty since the transaction had come to an end after Chan had been arrested and placed in the police lorry; (b) although the constables had the power to arrest without a warrant, nevertheless, they were under no duty

## SEMPLE &amp; SEMPLE v. SINGH &amp; MARKS

to do so at the time of the respective arrests of the appellants since the alleged breach of the peace had already terminated when Chan was arrested and placed in the vehicle, and (c) before the constables could have arrested the appellants it was incumbent upon them to show that the names and addresses of the appellants were unknown to them and could not be ascertained, and there was no evidence of this.

**HELD:**— that (i) — (Per Bollers, C.J.,) — the constables were acting in the execution of their duty since the respective arrests of the appellants formed part and parcel of the transaction of the arrest of Chan when they were under a duty to stop a breach of the peace or to take the necessary steps to prevent one that they might reasonably apprehend was likely to take place. (Per Crane, J.,) — that each succeeding incident from the first in which Brian Chan was arrested dovetailed, as it were, into each other; they were so interrelated in point of time, place and circumstance as to constitute one transaction. There was no break in the train of events which followed in immediate and rapid succession on the arrest of Brian Chan; (ii) under s. 17(1) (a) of the Police Ordinance, the constables had a right to arrest without a warrant since the summary *conviction offence of indecent language* had been committed by the appellants in their view, and (iii) s. 17(2) of the Police Ordinance did not affect the constables' powers of arrest without a warrant since the sub-section merely gives a police constable a discretion whether to arrest the offender on the spot or to proceed against him by way of summons and, where the offender's name and address can be ascertained, then the constable is thereby authorised to proceed against him by summons.

*Appeals dismissed.*

*Cases referred to:*

- (1) The Queen v. Roxburgh, 12 Cox's Crim. Cas. (1871-74) 8.
- (2) The Queen v. Marsden (1865-72) L.R. C.C.R. 131.
- (3) Regina v. Waterfield and Another (1963) 3 All E.R. 659, C.A.; (1964) 1 Q.B.D. 164.
- (4) Thomas v. Sawkins (1935) 2 K.B.D. 249.
- (5) Duncan v. Jones (1936) 1 K.B.D. 218.
- (6) Willey v. Peace (1950) 2 All E.R. 724, D.C.
- (7) Kenlin v. Gardiner (1966) 3 All E.R. 931, D.C.; (1967) 2 W.L.R. 129.

*B. De Santos* for appellants.

*W.G. Persaud, Acting Senior Crown Counsel*, for respondents.

BOLLERS, C.J.: In these appeals the appellants in the Magistrate's Court were each charged and convicted for the offence of assaulting a peace officer contrary to Section 28(b) of the Summary Jurisdiction (Offences) Ordinance, Chapter 14. The particulars of the offence in respect of the complaint against the appellant Rudolph Semple was that:

“the defendant on Sunday 26th June, 1966 at Sparendam in the East Demerara Judicial District assaulted Milton Marks Special Constable No. 795, a Peace Officer while acting in the execution of his duty;”

and in respect of the appellant Calvin Semple that:

“the defendant on Sunday 26th June, 1966 at Sparendam in the East Demerara Judicial District assaulted Harjeet Singh Police Constable No. 6789, a Peace Officer while acting in the execution of his duty.”

The main ground of appeal argued by counsel for the appellants in respect of both appeals, was, that there was no evidence on the record to show that the constable in respect of which each complaint was made, was at the time when he was assaulted by the respective appellant, acting in the execution of his duty, in that he was under no legal obligation to arrest the particular appellant at the relevant time.

The evidence led by the prosecution disclosed that around 11:40 p.m. on 26th June, 1966, Special Constable Marks and P.C. Harjeet Singh were on mobile patrol in Sparendam in a lorry driven by P.C. Benn when they stopped outside one Joseph's parlour in Victoria Street, Sparendam. P.C. Benn dismounted from the vehicle, entered the parlour and shortly after returned to the vehicle and made a report to the constables. As a result, S.C. Marks and P.C. Harjeet Singh entered the parlour where they found one Brian Chan using indecent language. S.C. Marks arrested Chan and brought him out of the parlour and placed him in the vehicle. As the party was about to move off the appellant Rudolph Semple used indecent language concerning the police after he and others had unsuccessfully interceded on behalf of Chan and immediately S.C. Marks dismounted from the vehicle and went up to the appellant Rudolph Semple and told him that he would arrest him for using indecent language, whereupon the appellant, Rudolph Semple, stated that he was not going anywhere and that he had not used indecent language. S.C. Marks held him and he pushed the constable away. The constable held on to him again. The appellant, Calvin Semple, then entered the shop where the appellant, Rudolph Semple and S.C. Marks were, held on to the hands of S.C. Marks and used indecent language and stated that the constable was not taking the appellant Rudolph Semple anywhere and he would have to carry him over his dead body. At this stage P.C. Singh entered the shop and informed the appellant Calvin Semple that he was obstructing a policeman from doing his duty. The appellant Calvin Semple continued to hold the hands of S.C. Marks repeating that he was not going anywhere, whereupon P.C. Singh arrested him and as P.C. Singh held him the appellant Calvin Semple pulled himself away and cuffed Singh in the nose and face causing Singh's nose to bleed. P.C. Singh again held him and forced him out of the shop and put him in the vehicle.

Meanwhile, S.C. Marks held the appellant Rudolph Semple and forced him out of the shop on to the road. It was at this point that the appellant

## SEMPLE &amp; SEMPLE v. SINGH &amp; MARKS

Rudolph Semple commenced to cuff S.C. Marks about his face and body in an endeavour to free himself. S.C. Marks then lifted him bodily and placed him in the truck. The appellant Calvin Semple then made a bid to escape from the truck and kicked P.C. Singh in the chest causing a chain which Singh was wearing at the time to break.

The defence of the appellants was a denial of the assault and a denial that any indecent language was used, and that the police handled them roughly on the night in question which caused them to receive injuries.

The learned Magistrate in his Memorandum of Reasons accepted the evidence for the prosecution, and at paragraph 5 of his memorandum states:

“5. I found that the policemen were on duty, that at the material time they were in execution of the duty to quell a breach of the peace, that they were in lawful execution of that duty, that the defendants separately assaulted the two arresting Police Constables.”

Counsel for the appellants in this court, while conceding that it was the duty of a police constable to take steps to prevent a breach of the peace and that in the circumstances of the present case the constables may have been acting in the execution of their duty when they entered the parlour in order to quell a disturbance or to prevent a breach of the peace, submitted that the transaction had come to an end when Chan had been arrested and taken out of the shop and placed in the vehicle, and S.C. Marks was not then acting in the execution of his duty when he returned to the shop in order to arrest the appellant Rudolph Semple for using indecent language. It would follow then that P.C. Singh was not acting in the execution of his duty when he sought to arrest the appellant Calvin Semple for using indecent language and obstructing S.C. Marks in the execution of his duty.

Counsel urged that while it was true that under Section 17(1)(a) of the Police Ordinance No. 39 of 1957, the Police constables may have had the power to arrest the appellant without a warrant, they were under no duty to do so at the time of the arrest, as the transaction of the alleged breach of the peace had already terminated when Brian Chan was placed in the truck. Furthermore, it was his submission that under sub-section (2) of the said Section 17, before the constables could have arrested the appellants it was incumbent upon them to show that the names and addresses of the appellants were unknown to them and could not be ascertained, and there was no evidence of this. In support of his contention counsel cited *The Queen v. Roxburgh* 12 Cox's Criminal Law Cases (1871-74) at page 8, *The Queen v. Marsden* (1865-72) L.R., C.C.R., at page 131 and *Regina v. Waterfield and Another* (1964) 1 Q.B.D., page 164.

In reply, Counsel for the respondents submitted that under Section 3(2) of Police Ordinance No. 39 of 1957, it was the duty of members of the Police Force to prevent and detect crime, to preserve law and order, to preserve the peace and to apprehend offenders, and that when S.C. Marks and P.C. Singh apprehended the appellants they were acting in the execution of their duty and an assault on the constables was an assault upon them in

the execution of their duty. Counsel submitted further that the whole incident represented one transaction when the Police were making enquiries to ascertain whether a breach of the peace had been committed and that the events which took place after the arrest of Chan were all part and parcel of the same transaction. In support of his contention counsel relied on the cases of *Thomas v. Sawkins* (1935) 2 K.B.D. 249 and *Duncan v. Jones* (1936) 1 K.B.D., 218.

In *Regina v. Roxburgh*, it was held that although a police constable may not be bound in the execution of his duty to assist the occupier of a house in putting out an intruder, yet he may lawfully do so and if he sustains violence in so doing the party inflicting such violence may not be indicted for assaulting a police constable in the execution of his duty.

In that case the prisoner had been drinking at a public house and was much the worse for liquor and the publican desired to get him out and called in a police constable who assisted the publican in ejecting the prisoner. In resisting the constable, the prisoner inflicted a serious injury on the constable. COBURN, C.J., pointed out that the constable was not strictly speaking acting in the execution of his duty as a police officer, as he was not actually obliged to assist in ejecting the prisoner, yet he was acting quite lawfully in doing so but, of course, the prisoner could not be convicted of assaulting a police officer in the execution of his duty. It is clear to me that in this case the police officer who went to the assistance of the publican did not do so by virtue of any power under a statute or under a common law duty, he merely went to the assistance of the publican as a private individual and could lawfully do so as the publican, in the position of landlord, had a right to eject the prisoner under the circumstances.

In *The Queen v. Marsden*, the prisoner had admittedly assaulted a police constable in the execution of his duty. The constable went for assistance and after an interval of an hour returned with three other constables, when he found that the prisoner had retired into the house, the door of which was closed and fastened. After the lapse of another 15 minutes the constables forced open the door, entered and arrested the prisoner who wounded one of them in resisting his apprehension, he was convicted of feloniously wounding a police constable with intent to resist his lawful apprehension. It was held by the Court of Crown Cases Reserved that there was no danger of any renewal of the original assault and as the facts of the case did not constitute a fresh pursuit the arrest was illegal. KELLY, C.B. addressed his mind to the question whether there was a lawful apprehension which depended on whether the attack on the constable in the house was merely a continuance of the struggle which took place on the occasion of the first assault, and found that it was impossible to say that what had occurred in the house was a continuation of the previous transaction. The original assault and the rights connected therewith were at an end and he was therefore of the opinion that the apprehension was unlawful.

## SEMPLE &amp; SEMPLE v. SINGH &amp; MARKS

In Marsden's case, therefore, the constable who was wounded was not acting in the execution of his duty when he attempted to arrest the prisoner without a warrant for an assault previously committed where there was not evidence of the continuation of the original affray or fresh pursuit. It is clear that Marsden's case differs from the instant case in that: they were two separate transactions, that is, (1)(a) the original assault and (b) breaking into the prisoner's house after the lapse of 1¼ hours; (2) the illegal act of arresting the prisoner without a warrant.

In the present case, it is my view that the events which took place after Chan was placed in the truck, that is to say, the respective assaults by the appellants on the constables, were all part and parcel of the same transaction as no time had elapsed between the arrest of Chan and the arrest of the appellants when the assaults on the constables took place.

*Thomas v. Sawkins* and *Duncan v. Jones* are authorities for the proposition that if a constable reasonably apprehends that a breach of the peace may be occasioned, it is his duty to prevent it. It is his duty to prevent anything which in his view may cause a breach of the peace.

In the instant case when S.C. Marks arrested Chan he was then acting in the execution of his duty to prevent a breach of the peace, which duty continued when the arrests of the appellants were effected.

In *Willey v. Peace* (1950) 2 A.E.R., at page 724, it was laid down that where a constable is empowered at common law or by statute to search a person on reasonable suspicion, he acts when so doing in the execution of his duty, and an assault on him is an assault in the execution of his duty and is not excused by the fact that the search does not confirm reasonable suspicion. In that case a police constable observed the appellant acting in a street within the metropolitan police district in a suspicious manner and enquired what he was doing. In reply, the appellant used obscene language and threatened to go to the police station and complain of the constable's conduct. They both went to the station where the officer repeated to the sergeant what had occurred. The respondent who was a detective constable, on hearing this account, and noticing that the appellant's pockets were bulging and that he was trying to conceal it, questioned him about it and the appellant refused to say or offer any explanation and the respondent then searched him. During the search the appellant resisted and assaulted the respondent. No stolen property was found but the appellant was charged for assaulting the respondent in the execution of his duty and convicted. The Divisional Court upheld the conviction.

LORD GODDARD, C.J. expressed the opinion that as soon as the appellant entered the Police station and the respondent formed a reasonable suspicion, the respondent had power to search him and there was no necessity for the respondent, having regard to the circumstances, to specifically inform the appellant that he reasonably suspected him of having stolen goods. It will therefore be seen that the learned Chief Justice in this case considered that as the respondent had power to do something, that is, to search the

appellant, when he exercised that power he acted in the execution of his duty. It is interesting to note that the learned Chief Justice stated that the power to search was given by Section 66 of the Metropolitan Police Act 1839 where a person is carrying something in the course of a journey and that when the appellant went to the police station to make a complaint about a police constable he did not break the transit, as he still had the property on him which he had while he was in the street. The respondent therefore had ample power, given by the statute, to search the appellant.

In the most recent case of *Kenlin v. Gardiner*, (1966) 3 All E.R. 931, D.C. (1967) 2 W.L.R. 129 where plain-clothes constables attempted to detain for questioning two schoolboys whose conduct aroused suspicion, the Divisional Court held that they were not acting in the execution of their duty when they were assaulted by the boys as they had no power to detain the boys for questioning.

In *Regina v. Waterfield and Another*, upon which counsel for the appellants strongly depended, the Court of Criminal Appeal, although assuming that constables were acting in obedience to the orders of their superior officer in attempting to detain a motor vehicle, held that they were not acting in the execution of their duty at common law. This case, when carefully read, shows that although the constables were acting in the execution of a duty to preserve for use in court evidence of a crime when they sought to detain a motor car in a public car park, the execution of that duty did not authorise them to prevent the removal of the car and when they sought to do so they were doing an unlawful act. Consequently when they detained the car they were not acting in due execution of their duty at common law. ASHWORTH, J. who delivered the judgment of the court, after citing the authorities on the point, pointed out that it would be difficult to reduce within specific limits the general terms in which the duties of police constables have been expressed. In most cases it would be more convenient to consider what the police constable was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. The learned judge stated that in considering this question it was relevant to consider whether (a) such conduct fell within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty. In the case that the Court of Criminal Appeal was then considering, the court came down on the side that in the circumstances of the case the execution of the duty that the constables were performing did not authorise them to prevent a removal of the car. The court then considered the position as it was under statute and dealt with the contention that the police officer was acting in the execution of a duty arising under Section 223 of the Road Traffic Act which provided that "a person driving a motor vehicle on the road . . . shall stop . . . on being so required by a police constable in uniform." The court considered that the argument involved considerable difficulties. In the first place the validity of the argument depended

## SEMPLE &amp; SEMPLE v. SINGH &amp; MARKS

upon the construction of the section which would involve the constable not merely to require a moving vehicle to stop but to require a stationary vehicle not to move. They went on to state that it was unnecessary to reach a conclusion on this aspect of the case because it was to be observed that the section was only giving a power as opposed to laying down a duty and they expressed the opinion that it would be an invalid exercise of the power given by the section if the object of its exercise was to do something, namely, to detain a vehicle which, as already stated, the constable had in the circumstances no right to do.

Therein lies the distinction to be drawn between the circumstances of that case and those of the present case. In the *Waterfield* case the police constable, while he was originally in the process of doing something which he had the power to do, went beyond that power and was then guilty of an invalid exercise of the power given him by the statute, whereas in the present case it cannot be said that the police constables when they arrested the appellants were invoking an invalid exercise of their power of arrest, for firstly, at common law, if the respective arrests of the appellants were part and parcel of the transaction of the arrest of Brian Chan when they were under a duty to stop a breach of the peace or to take the necessary steps to prevent one that they might reasonably apprehend was likely to take place, they were then acting in the execution of their duty; and secondly, under Section 17(1)(a) as the summary conviction offence of indecent language was committed by the appellants in their view they had the right to arrest without a warrant. It must be made clear that subsection (2) of Section 17 did not affect their powers of arrest. This subsection merely gives a police constable a discretion in the matter whether to arrest the offender on the spot or to proceed against him by way of summons and authorises him by law where the offender's name and address can be ascertained to proceed against him by way of summons.

Applying then the test laid down by the Court of Criminal Appeal in *Waterfield's* case, I hold that the constables were acting in the execution of their duty when they were assaulted, as their conduct fell within the scope of their duty both imposed by statute and recognised at common law, and it is impossible to say that such conduct involved an unjustifiable use of powers associated with the duty.

For these reasons the appeals must be dismissed with costs to the respondents fixed at \$25.00 plus the cost of the record in each appeal.

CRANE, J.: The defendant Rudolph Semple interceded unsuccessfully to secure the release of Brian Chan abusing the police and using indecent language when he could not affect this. It was this incident which caused S.C. Marks to leave the truck once again for the shop to arrest him. Rudolph Semple thereupon assaulted Marks; so that the nexus between the incident with Chan, the reason for the arrest of Rudolph Semple and the assault on Marks had not been broken; it was all one transaction having its origin in the incident with Chan. Again, the link was still there to connect yet

another incident — that which occurred when the defendant Calvin Semple intervened in the arrest of Rudolph Semple in the shop. It was then that P.C. Singh who intervened to warn Calvin Semple that he was obstructing a policeman in the execution of his duty was himself assaulted by Calvin Semple. In my opinion, P.C. Singh was also assaulted in the execution of his duty. Each succeeding incident from the first in which Brian Chan was arrested dovetailed, as it were, into each other; they were so interrelated in point of time, place and circumstance as to constitute one transaction. There was no break in the train of events which followed in immediate and rapid succession on the arrest of Brian Chan. This is against the contention of counsel for the appellants that the latter incident had terminated when Chan was put in the police van and so prevented the assaults on S.C. Marks and P.C. Singh from being committed when in the execution of their duty.

Further, as has been pointed out by BOLLERS, C.J., section 17(1)(a) of the Police Ordinance 1957, gives a clear power to any member of the Force to arrest without a warrant “any person who commits in his view an offence punishable either upon indictment or upon summary conviction”. It is conceded that Rudolph Semple used indecent language in the view of the constable. This was in fact what caused his arrest so when both defendants assaulted the constables in the manner described, those assaults were clearly committed in the execution of their duty.

For these reasons simply, I agree that there is no substance in these appeals which must be dismissed with costs.

*Appeals dismissed.*

## HARRY SAHOY v. RAMDEHOL SAHOY

[In the High Court (Crane, J.) – November 2, 28, 29; December 1, 1966;  
June 5, 6, 20, 1967.]

*Equity – Land – Transport – Excepted lots mistakenly included therein – Knowledge on part of purchaser – True intention of parties – Whether rectification of transport possible – Proviso to s. 23 of the Deeds Registry Ordinance, Cap. 32 (now Proviso to s. 23 of the Deeds Registry Act, Cap. 5:01) – s. 3B of the Civil Law Ordinance, Cap. 2 (now s. 3B of the Civil Law Act, Cap. 6:01).*

## SAHOY v. SAHOY

*Solicitor – Land – Contract of sale – Contentious business – Same solicitor appearing for both parties – Conflict of interests – Whether conduct improper.*

The plaintiff, an old and sickly man of 79 years, summoned a family council in 1962 with the object of distributing his lands among his children. The defendant, one of his sons, selected and purchased Plantation Aurora North, Essequibo Coast, the best developed of all the plaintiff's immovable property, which was well-worth \$45,000, for the nominal sum of \$5,000. The defendant was thus favoured because he was his father's confidant and man of business, having managed the said estate between 1956-1961 when he left to set up his own business with a ricemill at Aurora which he had taken on lease from his father for a term of five years. Before transport was passed to the defendant on January 6, 1964, however, the father had sold three lots, viz., 15, 16 and 22, during 1960 and 1961, to Caroline Reeton, Ramjass and Mahadeo, respectively. By error, these three lots were not excepted from the defendant's transport, No. 17 of 1964, and, when the error was later discovered, the defendant, a most ungrateful son, refused to have the transport rectified and, the poor old father, not being able to pass transport of the three lots, found himself in the unenviable and embarrassing position of being the defendant in a law-suit for damages for breach of contract brought by the three purchasers aforesaid.

On December 1, 1966, the parties informed the Court that they had arrived at a settlement and the matter was then adjourned for terms to be drawn up and submitted for the Court's approval, but, unfortunately, negotiations broke down, and the plaintiff was left with no alternative but to bring the present action seeking a declaration that the three lots were conveyed by mistake and an order for cancellation or rescission and/or rectification of the defendant's transport to have the said lots excepted therefrom. The defendant denied the sale of the three lots or that he had ever received any notice about same. There was some uncertainty as to whether the plaintiff was altogether to blame for the error since it would appear he had not given any firm instructions to his solicitor about excepting the three lots from the defendant's transport. He had, however, written to his solicitor on August 19, 1963, personally instructing him to have the transports passed to his three children, including the defendant, as soon as possible. As the transaction was between himself and his son and he had so much confidence in both his solicitor and his son, not even the customary preparatory written agreement of sale and purchase had in fact been drawn up and executed. The solicitor, however, did not seek further instructions, which he ought to have done especially in view of the absence of the customary agreement. But the most ugly aspect of the whole affair was when the action came up for hearing it was observed that the plaintiff's solicitor had in fact changed sides and was now the defendant's solicitor.

**HELD:**— that (i) having regard to the testimony of Caroline Reeton, Ramjass and Mahadeo, and to the fact that the defendant was his father's confidant and man of business who had in fact managed the estate during 1960 and 1961, the very year when the three lots had been sold, it could not be seriously disputed that the said lots had in fact been sold to those three persons by the plaintiff; (ii) as the defendant knew of the sale of the three

lots then it necessarily followed that he must have known when he acquired transport of Aurora North that lots 15, 16 and 22 thereof, had been excepted and, as he did absolutely nothing about it knowing full well that his father had not in fact passed those three lots to him, then the Court, sitting as a Court of Equity, would not permit him to take an unfair advantage of this unfortunate mistake; (iii) in accordance with the principle of Equity, in such cases, the defendant would be given the option either to (a) retain the transport in which case he is ordered to re-convey lots 15, 16 and 22 to the plaintiff within 6 weeks, or (b) to reject the transport, in which case he is directed to re-convey Aurora North to the plaintiff within 6 weeks. Failure to comply with either (a) or (b) then the Registrar of Deeds is directed to advertise and pass transport of the appropriate interest to the plaintiff; (iv) in order to accomplish (iii) the defendant is hereby directed to deliver the said Transport No. 17 of 1964, dated January 6, 1964, for rectification and it is declared that the conveyance of lots 15, 16 and 22 passed by the plaintiff to the defendant under the said transport was done by mistake.

(*Per Curiam*:— A conflict of interests had clearly arisen in this matter and it was Solicitor's duty to have determined his retainer from the defendant forthwith and as he had appeared against his former client at the hearing he had acted improperly.)

*Judgment for Plaintiff.*

*Cases referred to:—*

- (1) Goody v. Baring (1956) 2 All E.R. 11.
- (2) Moody v. Cox and Hatt (1917) 2 Ch. 71.
- (3) Garrard v. Frankel (1862) 30 Beav. 445; 54 E.R. 961.
- (4) Harris v. Pepperell (1867) L.R. 5 Exq. 1.
- (5) Paget v. Marshall (1885) 49 J.P. 85.
- (6) Resaul Maraj v. Bhuklal (1925) L.R.B.G. 82.

*S. M. B. Sahoy* for plaintiff.

*A. S. Manraj* for defendant.

CRANE, J.: In time to come whenever people speak of Pln. Aurora North, on the Essequibo Coast, they will relate this sad story of a son's ingratitude in return for the unbounded kindness of a thoughtful and considerate father.

In his 79th year Harry Sahoy, the plaintiff, is not enjoying good health; his sight is bad, and for the past 10 years he has been seeking medical attention. This was no doubt the reason why in 1962 he decided to summon a family council with the object of distributing his lands amongst his children. At that conference he gave away various portions of his landed estate to his children amongst whom was his son the defendant Ramdehol Sahoy who selected and purchased for the nominal sum of \$5,000 Aurora North, a

## SAHOY v. SAHOY

property well worth \$45,000. This item of the estate is the best developed of all the plaintiff's immovable property; it includes the three lots of land in dispute, and also 26 house-lots. Why the defendant was so favoured it is not difficult to see. He was his father's confidant and man of business having managed the estate from 1956-1961 after which he set up business on his own with a ricemill at Aurora which he took on lease from his father for a term of 5 years.

But the distribution of his lands to his children was not the plaintiff's only act in the liquidation of his estate. He had also sold three house-lots (15, 16 and 22) to three tenants in 1960 and 1961. (these persons were, Caroline Reedon, Ramjass and Mahadeo) for various sums of money before distributing the remainder amongst his children. These three house-lots formed part of Aurora North, and should have been excepted from the transport which he passed in favour of his son the defendant in 1964, but by error they had not been excepted therefrom. It was this mistake, the blame for which cannot be placed with certainty, which has led to this unfortunate case. When, however, the error was discovered and the defendant asked to have the transport rectified so as to embody the true intention of the plaintiff, he refused his consent maintaining the stand which he took on his pleadings and reiterated on oath — that he had got exactly what he bargained for with his father. The result is that the plaintiff, being unable to pass transport of the three lots owing to an unsympathetic son, is sued for damages for breach of contract by the three persons abovementioned in an action now pending in the High Court.

On December 1, 1966, the parties informed me that they had arrived at a settlement and the matter was adjourned for terms to be drawn up and submitted for my approval, but negotiations broke down somewhere. Having failed to effect a settlement with his son the plaintiff's last resort is this suit against him claiming a declaration in his amended statement of claim that those three lots were conveyed by mistake, and an order of cancellation or rescission and/or rectification of the transport which included them to his son.

On the pleadings the defendant puts in issue the sale of the three lots by the plaintiff to the persons mentioned, but I do not think it can be seriously disputed that these events did take place, particularly as the persons to whom they were sold testified on oath to this fact and the circumstances attendant thereon, producing receipts of purchase, and I must find as a fact the sales did occur. The defendant has also made it an issue as to whether he had notice of such sales to Reedon, Ramjass and Mahadeo. He has strongly denied such knowledge, But I think the weight of evidence is against him. Quite apart from the fact that I believe the witness Israel Reedon that it was the defendant who told him in 1960 that lot 16 was being sold by his father, I find it impossible to believe that a man in the defendant's position in relation to his father's business and affairs which he manages, would be entirely ignorant of the sale of lots 15, 16 and 22 in the years 1960 and 1961 at a time when he was his father's confidant, and when, on his own admission his father was dependent on him to carry on his business. Perforce, I must find against the

defendant that he did have full knowledge of the sales of the three lots at the times they were transacted.

As I have indicated, I am not sure whether the plaintiff is altogether blameworthy for the error that has occurred in the non-exception of the three lots from the transport of Aurora North to the son. The plaintiff said in evidence that he gave instructions to his solicitor's (Mr. A. G. King) clerk, the witness Azeem Khan, that the three lots were to be excepted from the transport. He could not say definitely whether or not he did speak to Mr. King specifically that the three lots were to be excepted — "because I had full confidence in Mr. King and my son, the defendant. I don't know who made the mistake". I interpret the words under quotation to mean that the plaintiff gave no firm instruction to Mr. King about excepting the lots from the transport of Aurora North which he authorised to his son. He was apparently so satisfied that everything would go well that he left the details to be filled up by solicitor's clerk and his son. So much was confidence reposed, most likely because it was a transaction between father and son, that in this particular instance there was not even the customary preparatory agreement which prudent and cautious conveyancing requires in all contracts for the sale of land. The transaction was for the most part effected by word of mouth save for a letter dated 19th August, 1963, which the plaintiff wrote personally to his solicitor, Mr. King instructing him to have the transports to three of his children including the defendant prepared and passed as early as possible (see Ex. "D"). Ex. "D" was only indeed a reminder to his solicitor and clearly a follow-up on the oral instructions given in 1962 at the solicitor's office which plaintiff spoke about, and which the defendant himself admitted. The point is that Ex. "D" was addressed to the solicitor himself and dated 19th August, 1963. Apparently there was no reply to this; but what strikes me is this: ought not solicitor in such circumstances as these to have replied with a view to protecting himself by insisting on the necessity for more specific instructions in writing, especially since there was an absence of the usual contract in writing between the parties for the sale of Aurora North, and the obvious inadequacy of Ex. "D"? I am not so sure solicitor ought not to have required more full and complete instructions in the circumstances.

There is another ugly feature in this case and that respects the same solicitor's appearance on behalf of the defendant in this matter as against the plaintiff. I want it to be fully understood that I am fully alive to the propriety of one solicitor appearing for both parties in the non-contentious business of obtaining transport on a contract for the sale of land. In England this is also the practice, — see *CORDERY ON SOLICITORS*, 5th Edn. p. 87. But clearly propriety in conducting the affairs of both parties as clients ought to cease when there are conflicting interests in prospect, and *a fortiori*, if there is actual litigation pending as we shall see there was in this case.

In *Goody v. Baring* (1956) 2 A.E.R., 11 at p. 12, MR. JUSTICE DANCKWERTS ventured to say:

## SAHOY v. SAHOY

“It seems to me practically impossible for a solicitor to do his duty to each client properly when he tries to act for both vendor and purchaser”.

Again in *Moody v. Cox and Hatt*, (1917) 2 Ch. 71, at p. 91, SCRUTTON L.J., said:

“It may be that a solicitor who tries to act for both parties puts himself in such a position that he must be liable to one or the other, whatever he does . . . It will be his fault for mixing himself up with transactions in which he has two entirely inconsistent interests, and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them”.

These dicta struck such an important and far reaching note in conveyancing practice that the Law Society thought it fit to issue the following statement *inter alia*. (See The Law Society’s Gazette, August 1956, at pp. 374-75):

“The dicta of Danckwerts, J., in *Goody v. Barring* and that of Scrutton, L.J., in *Moody v. Cox and Hatt* underline the principles which the council have always recognised that where a solicitor is instructed by both parties and a conflict of interest either arises or seems at all likely to arise, he should at once determine his retainer for one party if not for both. On the other hand there are a good many conveyancing transactions in which the possibility of a conflict of interest between vendor and purchaser is remote and is rarely experienced in practice.”

Accordingly, if there is no possibility of a conflict of interest a solicitor may properly act for both parties. The question will arise: could it have been said there was no such possibility in the case in hand? If it can be determined for certain that the plaintiff did intimate to Mr. King or his transport clerk, Mr. Azeem Khan, that lots 15, 16 and 22 were to be excepted, and they deliberately refrained from carrying out those instructions then, it cannot be said that future litigation between the parties could not be contemplated, because the probability of a suit by Reeton, Ramjass and Mahadeo against the plaintiff ought well to have been anticipated; and so could litigation between the plaintiff against the defendant, which is what actually occurred. On oath the plaintiff is uncertain whether he gave his oral instructions to Mr. King to except the lots or whether he gave them to his clerk, but he did give them, he insists. In these circumstances was it the proper thing for the solicitor to have appeared against the plaintiff on the side of the defendant in the present proceedings when he was aware that it was the plaintiff’s contention that he gave the solicitor or his clerk instructions which were not carried out? Ought he not to have been aware that litigation would likely arise? Interests between the parties are clearly now in conflict in this case; and the rule of practice is stated to be that where such are in conflict; and the solicitor so acts he does so at his peril. The burden of proof that the conflict-

ing interests did not hinder the performance of his duty to both clients must be discharged by the solicitor.

But even if it is conceded that the solicitor did not know or could not have known of a conflict of interest between his clients until the 24th January, 1966, when he received a letter (Ex. "F") from the plaintiff informing him that he had given him personal instructions to except the three lots and suggesting that these were not obeyed, I cannot think it is the proper thing to do to be fighting in the interests of one client with the prospect of aiding in the recovery of judgment against another client in what is really the same matter in which he gave advice and assistance at one time to both sides. Clearly a conflict of interest was not only in these circumstances likely to arise but did in fact arise between clients. But notwithstanding this, solicitor entered the fray on the side of one against the other in a matter in which he must have been fully aware from a letter the defendant wrote him *ante litem motam*, intimating that instructions were to him personally, and all but blaming him for not excepting the three lots from the transport of Auroro North – see Ex. "F"; this solicitor did not deny.

It seems to me in keeping with the statement of principle which I have extracted from the Law Society's Gazette above, the proper course was for solicitor to have determined his retainer for the defendant at once. Instead he signed the statement of defence in these proceedings and instructed counsel on behalf of the defendant.

I make no apology when I say such behaviour cannot be condoned, and that solicitor in so acting did a disservice to his former client when he appeared against him in this action. It is inescapable, I think, that I should mention all this, because the issues clearly arise on the pleadings — see paras. 7 & 8 of the statement of claim which are denied. It is an unpleasant duty of mine to do so, but one must feel free to speak out sometimes in exercise of the judicial function.

Now what is the legal position, can plaintiff be granted in these circumstances such as I have found such relief as is sought in his statement of claim? I am of the firm opinion that he can. The plaintiff claims rectification of transport No. 17 of the 6th January, 1964, as an alternative remedy to cancellation or rescission. But rectification of an instrument *stricto sensu*, presupposes that the parties at the time of its execution were in unison as to what they intended the instrument to declare but by accident or error it failed to record their common intention.

In the case of *Garrad v. Frankel* (1862) 30 Beav. 445; 54, E.R. 961, the plaintiff intending to let certain premises to the defendant at a rent of £230 signed a lease in which by mistake the rent was stated to be £130. The defendant knew that £130 was in the lease, and also knew of the plaintiff's real intention. The plaintiff sought rectification or in the alternative cancellation and in his bill offered to execute at his own expense a new lease. LORD ROMILLY, M.R., held that the plaintiff was not entitled to an unconditional

## SAHOY v. SAHOY

decree for rectification, but that the proper relief was to give the defendant the option of retaining the lease in a rectified form or else rejecting it. In *Harris v. Pepperell* (1867) L.R. 5 Eq. 1, a vendor sued for rectification of a conveyance which, he claimed, mistakenly comprised more land than he intended to convey. The case was essentially the same as *Garrard v. Frankel* and LORD ROMILLY, M.R. followed his previous decision.

The two cases were discussed before BACON, V.C., in *Paget v. Marshall* (1885) 49 J.P. 85, where a lessor claimed rectification of a lease which, he contended, by mistake extended to premises not intended by him to be demised. BACON V.C., followed the earlier decisions, stating at p. 86 the principles upon which he proceeded as follows:

“The other class of cases is one of what is called unilateral mistake, and there, if the court is satisfied that the true intention of one of the parties was to do one thing, and he by mistake has signed an agreement to do another, that agreement will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it has never been entered into. That I take to be the clear conclusion to be drawn from the authorities” . . . “. . . I think it would be right and just and perfectly consistent with other decisions that the defendant should have an opportunity of choosing whether he will submit, as the plaintiff asks that he should submit, to have the lease rectified . . . whether he will choose to take his lease with that rectification or whether he will choose to throw up the thing entirely, because the object of the court is, as far as it can, to put the parties into the position in which they would have been if the mistake had not happened. Therefore I give the defendant an opportunity of saying whether he will or will not submit to rectification. If he does not, then I shall declare that the agreement is annulled.”

In seeking a solution to this case, I propose to employ the *ratio decidendi* of the three equity cases I have extracted above, viz., that mutuality of error is not only required to enable a court to give relief; but unilateral error *in consensu* with knowledge of the error on the other side also suffices. As LORD ROMILLY M.R., said in *Garrard v. Frankel* at p. 451, – “The court will, I apprehend, interfere in cases of mistake, where one party to the transaction, being at the time cognisant of the fact of error seeks to take advantage of it.” I have already found as a fact that the defendant knew of the sales of the three house-lots by the plaintiff to his tenants ever since 1960 and 1961 when they took place. Therefore, it follows that he must have known when he acquired transport of Aurora North, that the three lots should have been excepted therefrom; however he stood by and said nothing about it knowing fully well that the plaintiff was not competent to pass them to him. It is precisely such behaviour that a Court of Equity censures and which it decrees he must not be allowed to take advantage of. The principle which applies is that set out in the judgment of VICE-CHANCELLOR BACON above, that is to say, it gives the defendant the option of retaining or rejecting the transport

If he elects the former course, the transport will be rectified by excepting lots 15, 16 and 22 of Pln. Aurora North from the description of the parcels conveyed, thus ensuring what the learned Vice-Chancellor referred to as the object to the court — “to put the parties into the position in which they would have been if the mistake had not happened.”

Counsel for the defendant contends that if the court finds the defendant knew of the sale of the lots prior to his acquiring transport then the plaintiff should have pleaded fraud, for only fraud, he contends, could render void a transport under the proviso to sec. 23 of the Deeds Registry Ordinance, Cap. 32, which otherwise confers an indefeasible title. In my view, this cannot be so; the defendant was guilty of no fraud. Fraud postulates the influence on one party of some action or word on the part of the other; so to plead would not have been a good plea because standing by and taking the benefit with full knowledge of another’s mistake in one’s contractual relations with that other is no fraud, either in its legal or equitable connotation.

I will observe that ROMILLY, M.R. was of a similar opinion in *Garrard v. Frankel* at p. 459 (above). But it is certainly unconscionable conduct of which Equity disapproves and would relieve against. The mediaeval doggerel of the Chancery bears eloquent testimony to this fact;

“These three give place in court of conscience. Fraud, accident and breach of confidence.”

Admittedly, mistake is not mentioned in the rhyme, but then DR. HANBURY reminds us in his MODERN EQUITY, 4th Edn. p. 635, that the conception was originally included in that of accident, which now has little vitality apart from mistake.

In reply to counsel, it is important to observe that section 3(B) in The Civil Law Ordinance is older than the Deeds Registry Ordinance itself and that the latter even though it confers on the holder of a transport “full and absolute title to the immovable property”, it contains no provision excluding the application of the equitable doctrine of rectification in relation to it. I think that the mere fact that fraud only has been mentioned in the proviso to section 23(1) *ibid*, is not derogatory of the application of any other equitable remedy. As I view it, the only reason why the Legislature specifically mentions fraud in the proviso is because of the limitation it is desirable to impose on its use as a means of declaring void a transport.

Ever since 1925, that is to say, five years after Cap. 32 was passed the cases show that our local courts have been granting relief on the equitable doctrine of rectification by virtue of sec. 3(B) of the Civil Law of British Guiana Ordinance, No. 15 of 1916, now Cap. 2 — in the same manner as in the High Court of Justice in England has since the Judicature Acts, 1873-1875 — *see Resaul Maraj v. Bhuklal* (1925) L.R.B.G. 82.

I will therefore make the following declaration and orders:

## SAHOY v. SAHOY

- (1) I hereby declare transport No. 17 dated 6th January, 1964, passed by the plaintiff to the defendant in respect of lots 15, 16 and 22 has been conveyed by mistake.
- (2) It is ordered that the defendant be and is hereby granted the option of electing whether he would retain or reject the transport; and (i) if he elects to reject, he is hereby ordered to reconvey Aurora North to the plaintiff within 6 weeks from the date hereof; (ii) if he elects to retain the transport, he is hereby ordered to reconvey the said lots No. 15, 16 and 22 to the plaintiff within 6 weeks from the date hereof. All Transport expenses to be borne by the defendant.
- (3) In the event of failure to comply by the defendant with either 2(i) or 2(h), the Registrar of Deeds is hereby directed to advertise and pass transport of the appropriate interest in the light thereof to the plaintiff.
- (4) The defendant is hereby ordered to deliver to the Registrar of Deeds, Transport No 17 dated 6th January, 1964, for rectification.

There remains one last question — costs, and the principle to be followed in *consimili casu* has been stated at p. 5 by ROMILLY, M.R., in *Harris v. Pepperell* (above) thus:

“With regard to costs in such cases, they must depend on the conduct of the parties. When the mistake is entirely owing to the conduct of the plaintiff, then he must pay all costs of the suit. When the defendant has been aware of the mistake from the beginning, and refused to rectify, it, then the costs must be given against him.”

In the instant case the mistake I find has not been entirely by the plaintiff's fault. I have found that the defendant was aware of the plaintiff's mistake from the beginning and refused to rectify it. He must therefore in accordance with the above principle, which has come to be accepted in such matters, bear the costs of suit, fit for counsel.

*Judgment for Plaintiff.*

Solicitors:

*Dabi Dial* (for the plaintiff);

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

ERNEST DeCLOU AND ANOTHER v. DEMERARA BAUXITE  
COMPANY LIMITED

[Court of Appeal (Stoby, C., Luckhoo and Persaud, JJ. A.)  
October 11, 12, 13, 14, 17, 1966; June 22, 1967.]

*Construction of Deeds — Transport — Reservation to mine for bauxite and other ore, minerals and clays — Meaning of word “Mining” — Intention of parties and circumstances existing at time of reservation. Land — Servitudes — Nature of right created by reservation — Profits a prendre — Civil Law Ordinance, Cap. 2, s. 3D (now Civil Law Act, Cap. 6:01, s. 3D) .*

*Mining — Surface owner — Common Law right of subjacent support — When displaced — Merger — Co-owner — Surface lands partly owned by appellants and partly by respondents in undivided shares — Whether merger of servitude with surface owners’ ownership thereby entitling them to profits to the extent of their undivided shares.*

The appellants were two of eleven members of the De Clou family who came to an agreement with one George Bain Mackenzie, and, as a result, three consecutive transports were passed at the same time and on the same day, viz, November 28, 1914. Under the first transport, all the eleven De Clou’s transported all their lands at Coomacka, Demerara River, consisting of lots 49, 50, 51 & 52, being approximately 3,173 acres, to Mackenzie for the then quite princely sum of \$2,221.10. Under the second transport, lots 51 & 52 (called the Upper Coomacka lands), being approximately 1,586½ acres, were re-conveyed by MacKenzie to four members of that family for the small sum of \$260.55, with a “reservation” written into the transport which gave him:

“the exclusive and unrestrictive right to mine on and take from the lands hereby transported, free from any charge or payment, all bauxite and other ores, minerals and clays and subject to all rights of way on, over and across the said lands at all times which the said George Bain MacKenzie may consider necessary for the purpose of mining and taking from the said lands the aforesaid substances and things”.

Under the third transport, MacKenzie re-conveyed lots 49 & 50 (referred to as the Lower Coomacka lands), being also approximately 1,586½ acres, for a similar sum of \$260.55 to the other seven members of the De Clou family (of whom the appellants were two), subject to a like “reservation” in identical language. In 1915, MacKenzie sold his specific mining reservations as a separate property to one Winthrop Neilson who, in turn, did likewise to the respondents in 1920. The respondents did not begin operations on lots 49 & 50 until 1948 and actual extraction of bauxite ore was begun in 1952. The respondents utilised the “opencast” system of mining, i.e., removing the ‘overburden’ or ‘top-soil’, which varied in depth, thus exposing the ore underneath. The result of this type of mining was to more or less destroy the surface of the land thereby rendering it useless for either building or cultivation. The appellants claimed damages, an injunction and an order that the respondents account for any or all profits made. On appeal to the Court of Appeal from the decision of the trial Judge dismissing their claim –

## DE CLOU v. DEMBA

**HELD** – (Luckhoo and Persaud, JJ.A) (Stoby, C, dissenting) that (i) the mining reservation was in the nature of a profit a prendre in gross, which had not been extinguished by non-user and the respondents could insist on the preservation of their rights under the said reservation, which was held independently of the ownership of the surface lands and could be separated from such ownership and made the subject matter of a separate title and this was the effect of the three transports executed in 1914; (ii) the principle of merger did not apply as only an undivided interest had been acquired by the respondents and, in any event, the doctrine of merger only arises in relation to praedial servitudes and, consequently, there was no obligation on the part of the respondents to account for any or all of the profits made; (iii) although at common law the surface owner has a natural right of support, this may be alienated by the instrument of severance either expressly or by implication and this was the clear result in this matter having regard to the express language of the reservation, and (iv) the term “mining” is not restricted to ‘underground’ mining but includes ‘opencast’ mining.

*Appeal dismissed — Order of Court below affirmed.*

*Cases referred to:*

- (1) Hext v. Gill and Others (1861-73) All E.R. Rep. 388; 41 L.J. Ch. 761; 27 L.T. 291.
- (2) Bell v. Wilson and Others (1866) 35 L. J. Ch. 337; 14 L.T. 115.
- (3) Harris v. Ryding (1839) 151 E.R. 27; 8 L.J. Ex. 181.
- (4) Glasgow Corpn. v. Farie (1888) 58 L.J.P.C. 33; (1886-90) All E.R. Rep. 115.
- (5) Warwickshire Coal Co. v. Coventry Corpn. (1934) Ch. 488; 103 L.J. Ch. 269.
- (6) Davies v. Treharne (1881) 6 App. Cas. 460; 50 L.J.Q.B. 665; 29 W.R. 869, H.L.
- (7) Beard v. Moira Colliery Co. Ltd. (1915) 1 Ch. 257; 112 L.T. 227; 84 L.J. Ch. 155.
- (8) Coronation Collieries v. Malan (1911) South African Law Reports (Transvaal Provincial Division), 577.
- (9) London & South African Exploration Co. v. Rouliot 8 S.C. 74 (South Africa).
- (10) McFarlane v. De Beers Mining Board 2 H.C. 398 (South Africa).
- (11) Caledonian Rly. Co. v. Sprot (1843-60) All E.R. Rep. 109.
- (12) Pountney v. Clayton (1883) 11 Q.B.D. 820; 49 L.T. 283; 52 L.J.Q.B. 566.
- (13) Rowbotham v. Wilson (1860) 8 H.L. Cas. 348; 30 L.J.Q.B. 49; 2 L.T. 642.
- (14) Proud v. Bates (1865) 34 L.J. Ch. 406; 12 L.T. 565; 13 L.T. 61.
- (15) Robinson v. Milne (1953) L.J. Ch. 1070.
- (16) Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op Co. (1906) A.C. 305.
- (17) Butterley Co. Ltd. v. New Hucknall Colliery Co. Ltd. (1909) 1 Ch. 37; (1910) A.C. 381.
- (18) Re The Moorcock (1889) 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654.
- (19) Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd. (1918) 1 K.B. 592; 87 L.J.K.B. 724.

- (20) *Shirlaw v. Southern Foundries (1926) Ltd.* (1939) 2 K.B. 206.
- (21) *K.C. Sethia (1944) Ltd. v. Partabmull Rameshwar* (1950) 1 All E.R. 51; 94 Sol. Jo. 112.
- (22) *Duke of Sutherland v. Heathcote* (1892) 1 Ch. 475; 66 L.T. 210; 8 T.L.R. 272.
- (23) *Ross and Another v. Royal Bank of Canada* (1940) L.R.B.G. 1.
- (24) *Pellew v. Griffith* (1940) L.R.B.G. 114.
- (25) *Thomson v. St. Catharine's College* (1919) 88 L.J. Ch. 163.
- (26) *Darvill v. Roper* (1855) 61 E.R. 915; 3 W.R. 467.
- (27) *O'Callaghan v. Elliot* (1965) 3 W.L.R. 746.
- (28) *South Staffs. Mines Drainage Commrs. v. Grosvenor Colliery Co. Ltd.* (1961) 125 J.P. 484; 105 Sol. Jo. 179, C.A.
- (29) *Wilkinson v. Haygarth* (1843-60) All E.R. Rep. 968; 16 L.J.Q.B. 103; 12 Q.B. 837.
- (30) *Jacobs v. Seward* (1872) L.R. 5 H.L. 464; 27 L.T. 185; 36 J.P. 771, H.L.

[*Editorial Note*:— This case is reported in (1967) 11 W.I.R. 127.]

*J. O. F. Haynes, Q.C., with Ashton Chase*, for appellants.

*C. Lloyd Luckhoo, Q.C., with J. A. King*, for respondents.

STOBY, C. The bauxite industry is of the utmost importance to the economy of this country, and for that one reason alone this case is of the gravest concern to all the inhabitants of Guyana.

When the Dutch capitulated to the British in 1803 Guyana was essentially an agricultural country. Sugar, coffee, tobacco and cotton were its main agricultural crops; its exports amounted to about 16,500 tons per annum. Today, apart from sugar and rice, agricultural exports have diminished in value and in their place bauxite, timber, gold and diamonds are established. Of these industries bauxite takes pride of place; its exports in 1966 amounted to \$78,597,000. The Demerara Bauxite Company Ltd., which is one of two companies engaged in mining bauxite, is probably, after sugar, the largest single employer of labour and contributes substantially to the country's revenue. The company has been engaged in mining since 1920.

These facts having been stated, the importance of this litigation cannot be overestimated, especially as the appellants seek to challenge a practice which has existed from 1945 and continued without demur until 1958 when this litigation commenced. Nevertheless, if the practice which obtains is legally wrong and if the lapse of time has not deprived the appellants of their rights, then the law being paramount, the consequences which might follow an adverse decision cannot be avoided.

The easiest way to understand this litigation is by summarising the statement of claim and the defence in order to focus attention on the issues the learned judge had to decide.

The appellants, after several amendments, claimed that they are the sole owners of two undivided seventh parts or shares of and in the lower

## DE CLOU v. DEMBA

Coomacka Lands, comprising an area of about 1,586½ acres, by transport passed to them by George Bain MacKenzie, on the 28th day of November, 1914, together with two forty-second undivided shares inherited from their mother Jane de Clou; in or about the year 1916 the respondents became the assignees of certain mining rights under the said transport in respect of bauxite and other ores, minerals and clays; and the respondents following their incorporation in September 1916, dug a few exploratory or test pits and took some samples of bauxite from the said lands; it was further alleged by the appellants that the respondents never carried out any further mining operations until in or around the month of May 1955, when without obtaining another servitude or any other rights of mining by grant or prescription or at all in respect of the said lands, they began about May 1955, to mine bauxite on the said lands. The respondents dug up and carried away several millions of tons of the soil of the said lands with the ore bauxite found therein, made vast excavations about seventy feet deep from the surface and cut down and destroyed the appellants' timber and flooded the said lands. As a result, the appellants' lands are now in danger of being rendered completely useless for building or cultivation purposes by the past and present mining operations of the respondents.

The respondents in their defence admitted that the appellants were the owners of two undivided seventh parts of the lower Coomacka lands by transport No. 839 of the 28th November, 1914. They referred to Transport No. 304 dated the 17th March, 1920, under which they were granted:

“the exclusive and unrestricted right to mine on and take from the Coomacka lands, being 3,173 (three thousand one hundred and seventy-three) acres, more or less, situate on the right bank of the Demerara River, in the county of Demerara and colony of British Guiana, and known as lots 49, 50, 51 and 52 on Bercheyck's Chart, dated 1759, free from any charge or payment, all bauxite and other ores minerals and clays with all rights of way on, over and across the said lands at all times which the said Demerara Bauxite Company, Limited or their assigns may consider necessary for the purpose of mining and taking from the said lands the aforesaid substances and things”.

and contended that the rights of the parties are matters of law depending upon the construction of the documents of title, to which reference at the trial would be made for the full terms and effect thereof. In addition, they said the appellants and other owners well knew that only opencast mining was employed and deep mining was never carried out. The respondents further alleged that the appellants stood by from the commencement of the opencast mining on the said lands in 1945 until the date of this action, the 30th October, 1958, and consequently could not now be heard to say that there was no right to mine by opencast methods.

Certain other matters were pleaded but there is no necessity to state them here, as I will set out hereunder the issues which arose as a consequence of the pleadings.

Three issues emerged from the pleadings —

- (a) whether the mining rights conveyed to the respondents in 1920 was a servitude, and if so, whether it was extinguished by non-user;
- (b) Since the respondents became owners with the appellants by purchasing undivided interests in the land in 1923 and 1949, then whether the servitude or mining reservation merged into their ownership and thereafter they were entitled to the profits of their mining operations only to the extent of their shares in the land and would have to account to all other owners;
- (c) Whether the mining reservation created in 1914 authorised underground mining, or opencast mining.

As to (a), the trial judge found as a matter of law that the reservation was a personal servitude — a *profit a prendre* — and, as a matter of fact, it had not been extinguished by non-user.

As to (b), that the principle of merger did not apply as only an undivided interest was acquired by the respondents and in any event the doctrine of merger arises only in relation to praedial servitudes.

As to (c), it was not intended by the language used in the reservation that bauxite should be extracted only by underground mining and the respondents were within their rights in making use of opencast mining.

The trial judge's decision that the reservation was a personal servitude which was not extinguished by non-user was not challenged on appeal.

The appeal was confined to the question of merger and the meaning to be attributed to the word 'mine'. I propose only to discuss the arguments concerning the interpretation which should be given to the words in the reservation. I agree with the trial judge's view that the principle of merger does not apply in this case.

The events which culminated in the reservation are fully set out in the judgment of PERSAUD, J. A. which I have had the opportunity of reading and I will only repeat those portions of the transaction which are necessary for the views I express, which I regret, differ from the conclusion he has reached on this phase of the appeal.

On the 28th November, 1914, George Bain MacKenzie transported to the appellant Joseph De Clou and others lots 49 and 50 Lower Coomacka for a consideration of \$260.55. The transport contained the following reservation —

“exclusive and unrestricted right to mine on and take from the lands hereby transported free from any charge or payment all bauxite and other ore, minerals and clays and subject to all rights of way on, over and across the said lands at all times which the said George Bain MacKenzie may consider necessary for the purpose of mining and taking from the said lands the aforesaid substances and things”.

## DE CLOU v. DEMBA

This reservation was subsequently transported by George Bain MacKenzie to W. C. Neilson and then by Neilson to the Demerara Bauxite Co. Ltd., the respondents, in 1920. The respondents in reliance of the reservation commenced opencast mining in 1955. Similar operations had been going on in the area since 1945 but the appellants had no interest in the lands on which the opencast mining was conducted. At the time of the issue of the writ about 100 acres of lots 49 and 50 Lower Coomacka had been mined by opencast methods and the expert evidence is that the total area which can be economically mined is 228 acres of the entire 1,586½ acres which is the extent of lots 49 and 50 Lower Coomacka.

There are two methods of mining — opencast and underground mining: the former method necessarily destroys the surface and renders the land useless for agricultural crops or for building; the latter method preserves the surface of the land.

Counsel for the appellants in support of his submission that the reservation permitted underground mining only relied on the following points —

- (1) No express powers of working are given as is usual in mining documents.
- (2) No provision for compensation for damage to surface, building or cultivation was made.
- (3) The reservation applies to minerals and ores other than bauxite so as to include coal, tin, lead, copper, silver, iron ore, slate, merumite, and gold, diamonds and precious stones.
- (4) No provision that the main object was mining bauxite, was made.
- (5) No provision affecting the right of the De Clous to build on the land, or to cultivate, was made.
- (6) A right of way over and across the land was also granted.
- (7) The word ‘mine’ is used and not the word ‘quarry’.

Counsel for the respondents submitted in reply that the meaning of mining in Guyana is not the same as in the United Kingdom and English cases may not be relevant. He put forward reasons why opencast mining was contemplated—

- (a) Because it was the type of mining almost exclusively used at the time.
- (b) If one is given the right to mine and it turns out that the only feasible method, for technical reasons, is the opencast method, then it must be presumed that right was intended to cover opencast mining.

He further submitted that the court is entitled to consider —

- (1) The wording of the reservation.

- (2) The prior recognised conception of the meaning of the words 'to mine'.
- (3) The existing physical conditions at the time.
- (4) The conduct of the parties for a considerable period of time of some 44 years until 1958 when the writ was filed to see whether by their conduct and whether by failure to make any protest over the many years that was not a circumstance that the defendants were acting within their rights.

In view of the respective contentions, a good starting point is to see what the English cases decided, to consider the approach of those courts and then determine whether the principles of construction adopted ought to be followed or discarded.

*Hext v. Gill* and others (1861-73) All E.R. Rep. 388 was a case where vendors conveyed land to purchasers excepting all mines and minerals within and under the said several and respective premises'. The question for decision was whether china clay was a mineral within the reservation, and if so, whether the vendors, having parted with the surface, could obtain china clay by opencast mining. In order to arrive at a decision the court discussed the rights of the owner of minerals. MELLISH, L. J. in the course of his judgment said —

“Where he (the lord of the manor) has parted with the surface of the land he cannot work the minerals beneath the land so as to destroy the surface unless express power to do so has been reserved to him. . . . The cases show that where the ownership of the minerals is separate from the ownership of the surface, prima facie the owner of the surface is entitled to have the surface supported by the minerals”.

JAMES, L. J., said —

“The long and uniform series of authorities appears to me to have established a very convenient and consistent system, giving the mineral owner every reasonable profit out of the mineral treasures, and at the same time saving the landowner's practical enjoyment of his houses, gardens, fields, and woods, without which the grant to him would have been illusory”.

It should be noted that this case concerns china clay, a mineral which could not be worked except by opencast mining. The fact that the reservation was useless, unless opencast mining was intended did not deter the court from finding that opencast mining was not reserved. The words of MELLISH, L. J., are instructive —

“When an owner of both mines and minerals sells the surface, reserves the minerals, and gives himself power to get minerals, he ought to frame his power in such language, if he intends to destroy the surface, that the court is able to say that that is clearly the intention of the parties. . . . . In the present case, I think the result is that the china

## DE CLOU v. DEMBA

clay has been reserved, but that this was not known to the parties at the time when the instrument was executed. Here, that was a mineral in the ground, unknown to the parties, apparently, at the time they executed the instrument, which cannot be got without destroying the surface. It appears to me that the fair result of that state of things is that the lord of the manor is practically in the same position as he would have been in if this had remained a copyhold tenement — viz., that the right is in him, but, inasmuch as he has not reserved the power to destroy the surface, and inasmuch as this clay cannot be got without destroying the surface, he cannot get the clay unless he can make some arrangement with the owner of the surface”.

In *Bell v. Wilson* and others (1865-6) 1 L.R. 306 the court had to consider whether firestone was a mineral and if so whether the defendants were entitled to work it from the surface by the mode of open quarrying which they had adopted. SIR G. J. TURNER, L.J. with whom KNIGHT BRUCE, L.J. agreed, said that the words ‘mines within and under the lands whether opened or unopened’ permitted underground working. The distinction was shown between quarrying which referred to work done upon or above and not under the ground and mining which implied working under the ground. The rights of the surface owner were again explained in *Harris v. Ryding* 151 E.R. 27 where the facts were that A., being seized in fee of certain lands, granted the land to P., his heirs and assigns, reserving to himself, his heirs and assigns, ‘all and all manner of coals, seams and veins of coal, iron ore, and all other mines, minerals, and metals which then were, or at any time, and from time to time thereafter, should be discovered in or upon the said premises, etc., with free liberty of ingress, egress, and regress, to come into and upon the premises, to dig, delve, search for, and get etc., the said mines and every part thereof, and to sell and dispose of, take, and convey away the same, at their free will and pleasure; and also to sink shafts, etc., for the raising up works, carrying away and disposing of the same or any part thereof, making a fair compensation to P., for the damage to be done to the surface of the premises, and the pasture and crops growing thereon”. It was held that, under this reservation, A., was not entitled to take all the minerals, but only so much as he could get leaving a reasonable support to the surface.

The case of the *Lord Provost and Magistrates of Glasgow v. Farie* (1889) 58 L.J. 33 arose because of a controversy between a statutory body of water commissioners and a landowner. The water commissioners had acquired from the landowner by compulsory powers certain lands but the conveyance reserved ‘the whole coal and other minerals in said lands in terms of the clauses relating to mines in the Water Works Clauses Act 1847’. Section 18 of that Act reserved to the landowner mines of coal, iron-stone, slates or other minerals. The landowner claimed to have the right to work a valuable seam of clay. The Lord Chancellor in discussing what was the true test to determine what are mines and minerals in a grant, referred with approval to LORD JAMES’ view in *Hext v. Gill* (supra). He said —

“I still think (to use his language) that a grant of ‘mines and minerals’ is a question of fact – ‘what these words meant in the vernacular of the mining world, the commercial world, and landowners at the time when they are used in the instrument!’.”

Then he used some words particularly pertinent to the facts of this appeal –

“I think no one can doubt that if a man had purchased a site for his house, with a reservation of mines and minerals, neither he nor anybody else would imagine that the vendor had reserved the stratum of clay upon which his house was built under the reservation of mines and minerals”.

In *Warwickshire Coal Co. v. Coventry Corporation* (1934) L.R. 1 Ch. D. 488 the principle that the right to work mines and minerals did not authorise the letting down of the surface was once again reiterated. LORD HANWORTH, M.R. referred to LORD BLACKBURN’s judgment in *Davis v. Treharne* 6 App. Cas. 460, when the latter said —

“a court of law has. . . .to look at the documents and see whether the parties have agreed upon something different from the common right”.

These cases are enough to establish that the principle of the common law is that the surface owner is entitled to have the surface of his land and to enjoy it unimpaired, unless he permits another person to destroy it. Indeed as I understand the respondents’ contention, they do not challenge the proposition that a surface owner *prima facie* has a right of support; what they say is that this right of support was specifically bargained away by the appellants. Whether this be so or not depends on the construction to be placed on the reservation. Again, there is no contest between the parties that a written document is construed by giving words in the document their normal English meaning but the respondents submit that in construing the reservation, two factors must be kept in mind; (a) the English cases which were referred to in argument may not be relevant in Guyana; and (b) this court will construe the document in such a way as a reasonable person would have understood the document at the time it was executed, bearing in mind the words of the document and the circumstances known to be existing at the time in the country. Counsel for the appellants insists that if the words are given the meaning attributed to them by the English Courts, that would be an end of the matter.

There is no dearth of authority regarding the manner in which words in a written instrument should be interpreted. SWINFEN EADY, L. J. said in *Beard v. Moira Colliery Co. Ltd.*, (1915) 1 Ch. D. 268 –

“There is no ground for extending any principle which may be found in these cases to the construction of deeds, contrary to the rules for the construction of deeds which have been observed for centuries, and contrary to the definite opinion of Lord Halsbury in the New

## DE CLOU v. DEMBA

Sharlston Case to which we have before referred. In the construction of deeds, ordinary words ought to be given their plain and ordinary meaning. Moreover, it has been laid down in cases too numerous to refer to that the common law right of support may be displaced by express provision, or by necessary or clear implication. There is necessary implication in the present case, and to say that such implication will not do, but that express language is necessary, would be to decide quite contrary to numerous cases of the highest authority”.

The cases also establish that the meaning of the word ‘mine’ varies according to the context in which it is used.

From a consideration of the cases referred to, and while it cannot be disputed that the principle of construction which emerges is that in England the primary meaning of the word ‘mine’ is underground mining, it is also established that before applying this natural meaning the document should be scrutinised in order to see whether another meaning was intended by the parties and finally the surrounding circumstances should be taken into account as an aid in ascertaining the intention of the parties. In other words, in the construction of a document of the kind under review, the court will consider the ordinary meaning. Then if it is found that the natural meaning itself expresses different shades of meaning, the intention of the parties is relevant so as to determine in which of the various senses the word was used. The trial judge’s view that the English cases were confined to coal and therefore inapplicable in Guyana is wrong. The principle of how a document containing a reservation to mine ought to be construed is a legal principle and does not vary from place to place. Assuming then that the correct principle in this case, because ‘to mine on’ might not have been used in its primary sense, is to endeavour to discover the intention of the parties, one must commence by examining the evidence.

The reservation is in the following terms —

“exclusive and unrestricted right to mine on and take from the lands hereby transported free from any charge or payment all bauxite and other ore, minerals and clays and subject to all rights of way on, over and across the said lands at all times which the said George Bain MacKenzie may consider necessary for the purpose of mining and taking from the said lands the aforesaid substances and things”.

It was agreed upon in 1914 and made between Henry De Clou, Joseph De Clou and others and George Bain MacKenzie. The appellants and the others who were parties to the conveyance are described as residing in Coomacka, Demerara River. Coomacka at that time was an insignificant settlement on the bank of the Demerara River about 72 miles from Georgetown, the capital. Most of the inhabitants of Guyana reside even now on the coast. The river dwellers would have had very little opportunity of meeting visitors from the outside world and discussing with them the developments which were taking place in that period. The mining of bauxite was unknown in Guyana in 1914. Gold and diamonds were being obtained in those areas of

land abutting the rivers Potaro, Puruni, Cuyuni and Mazaruni. The Demerara River is separated from these rivers by some 60 odd miles and the lands in the vicinity of the Demerara River have not been worked for gold or diamonds. In addition to all these facts of history is the nature of the transaction itself. George Bain Mackenzie purchased the whole of lots 49 and 50 Lower Coomacka and then having obtained transport he sold the lots to his erstwhile vendors and retained for himself the mining rights. If his mining rights entitled him to destroy the surface then what did he sell? It was given in evidence by Snijders, an expert witness, that the only way of mining bauxite was by letting down the surface and this state of affairs must have existed in 1914; Snijders' evidence was objected to as being inadmissible on the ground that his opinion was irrelevant as an aid to the interpretation of the document. The judge rightly overruled the objection. Snijders' evidence is certainly a factor to be taken into account in endeavouring to ascertain the intention of the parties, but his evidence has an inherent weakness in that there is no evidence that MacKenzie or the appellants and the other vendors shared Snijders' knowledge.

In endeavouring to arrive at the intention of the parties in 1914 it is pertinent to recall what knowledge existed about bauxite during that period; if scientific men throughout the world possessed certain knowledge about bauxite it might be safe to assume that a purchaser of bauxite lands had some knowledge of the method of obtaining the ore in other countries. Snijders' knowledge could not be helpful because bauxite had not been mined for in 1914, but worldwide knowledge or general knowledge is relevant as raising a strong probability of MacKenzie's knowledge. Since the appellants gave no evidence on the specific issue, if I am convinced that MacKenzie intended opencast mining, I would be prepared to find in favour of the respondents.

According to the CONSOLIDATED ENCYCLOPAEDIA published by the Consolidated World Research Society Ltd., in 1929, the production of Aluminium in the U.S.A. amounted to 112,500 short tons. The Overseas Geological Surveys Mineral Resources Division published in 1962 a handbook called BAUXITE ALUMINA AND ALUMINIUM. The writer was Smith Bracewell, B.Sc, W.I.C., A.R.C.S., M.I.M.M., F.G.S., sometime Director of Geological Surveys, Guyana. The publishers were Her Majesty's Stationery Office. An examination of this book discloses that in 1914 the known sources of bauxite were Australia, France, Greece, Hungary, Italy, Roumania, Russia, Yugoslavia, the United States of America and Sarawak; Jamaica and Surinam, presently among the leading producers of bauxite, were not then known to possess the ore. It was known, too, to scientists, that Bauxite could be obtained by opencast or open-pit mining and underground mining. In Sarawak, Alabama and Georgia, the method was opencast mining while in Yugoslavia, Arkansas and France, underground mining was the method used. There is no data available to me with respect to the method used in other countries. Although Sir John Harrison recorded in 1910 that bauxite in commercial grade was available in Guyana, mining did not commence until 1917. There is also an article entitled "BAUXITE AND LATERITES" by W. Francis,

## DE CLOU v. DEMBA

retired Government Analyst, published in 'TIMEHRI', a journal of the Royal Agricultural and Commercial Society, in which, among other things, it is said "In general, bauxite must be mined; although in certain of the American deposits and especially those at Akyma (in Guyana) it has been possible to quarry straight into a bauxite out-crop". This shows that even in 1934 when scientists knew the areas where opencast mining was taking place, a retired analyst was saying "In general bauxite must be mined".

The conclusion which can be drawn from the evidence available at the time and the conduct of the parties is that George Bain MacKenzie intended the mining of bauxite to be done by underground mining. The way I reason this is the state of the law was and still is that a surface owner has a right to support unless the language of the instrument regulating his rights or other evidence clearly shows to the contrary. Neither side knew the soil was of such a texture that bauxite could be obtained only by opencast mining; the scientific world knew that underground mining of bauxite was as prevalent as opencast mining; MacKenzie must have known this; in this setting the sale of the surface is strong, almost conclusive, indication of MacKenzie's intention to preserve the surface, especially having regard to the number of people involved in the transaction when the surface rights were sold by Mackenzie.

The argument that the words of the reservation mean that opencast mining was intended requires some further consideration. Attention has been attracted to the words 'mine on and take from', and the submission is that these words properly interpreted must mean opencast mining which is another way of mining ore. I am not persuaded by this argument. The words to 'mine on' a certain strip of land is restrictive of the area to be mined; the preposition 'on' does not change the meaning of the word 'mine'. If 'mine' has a specific meaning, that meaning is not changed by insisting that the mining must take place on certain property. If one authorises another to cut a tree on one's land, the cutting does not become digging.

On the whole of the evidence I am convinced that the appellants never gave the matter a thought. To them mining of bauxite would be synonymous with mining of gold, whereby even if the surface was disturbed it would remain habitable or could be replaced as though it were never disturbed. On the other hand, Mackenzie having purchased lands and then resold the surface rights must have known the difference between opencast mining and underground mining. By his conduct he demonstrated that the appellants' surface rights were to be left intact. Subsequent events and subsequent knowledge made this impossible. The appellants not having sold the surface rights are entitled to relief.

Before concluding this aspect of the appeal, a brief reference to Roman Dutch law is required. In 1914, English common law was not the law of Guyana, but the appellants, submission is that Roman Dutch law recognised the right of the surface owner to have his surface kept up at the level when the mining right was separated and it was unlawful to mine in such a way as to destroy the level of the surface or any structure resting on it. A person

who has mining rights over a particular piece of land cannot do anything upon it which will cause his neighbour's land to subside. In other words, the respondents could not do anything in mining on the lower Coomacka land that could cause land nearby to subside, much less the land on which they were mining.

Since Roman Dutch law ceased to be the common law of Guyana since 1917, there is a paucity of authority concerning the topic under discussion. What little authority there is supports the view that in Roman Dutch law the surface owner's rights were no less than a surface owner's under the common law of England.

In the second edition of HALL & KELLAWAY ON SERVITUDES, written by C. G. Hall, Q.C., LL.D., Judge of Appeal of the Supreme Court of South Africa, the law is stated as follows –

“The owner of land is likewise entitled to the support of the surface of the soil by the subjacent strata lying below it. Unless, therefore, he has waived that right, the owner of minerals below the surface of the soil must respect it and is compelled to mine his minerals in such a way as not to disturb the level of the surface of the soil or any structure resting on it”.

In THE OPINIONS OF GROTIUS, at p. 453, the view is expressed that –

“A sixth division of servitudes is into natural and conventional, or ex necessitate and by agreement. This division will be quite clear when compared with the division of hypothecs into legal or tacit and conventional.

Legal and natural servitudes or servitudines ex necessitate are those constituted not by grant or prescription, but by natural situation. Paulus says, ‘In the three main forms of servitudes the servient tenement serves the dominant tenement; these forms arise (a) by agreement (lex), (b) owing to its natural situation (natura loci), (c) by prescription (vetustas).

Very few text-writers on Roman-Dutch law mention the natural servitudes at all. Most writers have ignored them entirely, and the references of the few are meagre and of little import. Certain necessary servitudes were also recognised by Roman Law.

Chief among natural servitudes are (1) the right to allow drainage water to flow down on to adjoining ground lying at a lower level; (2) the right of necessary way; and (3) the right of lateral support. . . . .

*The Exploration Company v. Rouliot* is the most recent case on this interesting subject. The whole doctrine of the natural rights of owners of land to lateral support is there reviewed and discussed. The conclusions arrived at by the court were: (1) That according to Roman-Dutch law and the customs of the colony, the owner of land is entitled

## DE CLOU v. DEMBA

to lateral support from adjacent land (see also *McFarlane v. De Beers Mining Board*); (2) That, in the absence of regulations, stipulations, or special mining customs to the contrary, the owner who leases a portion of land for mining purposes is entitled to lateral support for the unleased as against the leased portion, unless it is clear from the terms of the lease that this right has been specially abandoned. The mere fact that the lessor has given the lessee the right to remove the soil from the claims or mine is not evidence of a waiver of the right of necessary support for adjacent ground.

Claim-holders inter se are not entitled to lateral support. It is, however, the duty of each claim-holder to work his claim with reasonable diligence, and a claim-holder will be liable in damages for negligence in working his claim where such negligence obstructs a neighbouring claim-holder in his work”.

This question was the subject of judicial decision in several cases. In *Coronation Collieries v. Malan* (1911) South African Law Reports Transvaal Province Division p. 586, MR. JUSTICE SMITH, said –

“It appears to be clear on the English authorities that the surface owner of land in its natural state has the right to have the surface supported, and that by the grant of the right to work the minerals he does not lose that right of support, unless there is something in the instrument containing the grant inconsistent with the continuance – see the decisions of the House of Lords in *Davis v. Treharne* (6 A.C. 460), and *New Charlston Collieries v. Earl of Westmoreland* (82 L.T. 725). As Lord Cranworth said in *The Caledonian Railway Co., v. Sprot* (2 Macq. 449), the principles governing the English decisions on the question of support ‘were not derived from any peculiarities of the laws of England, but rested on grounds common to the Scotch, and I believe to every other system of jurisprudence’. That the right to lateral support is recognised by the Roman-Dutch law was assumed apparently in *MacFarland v. de Beers Mining Board* (2 H.C.G. 398), and was expressly decided in *London and South African Exploration Co., v. Rouliot* (1. C.T.R. 4)”.

In *Macfarland v. de Beers Mining Board* (1884) Griqualand Reports Vol. II p. 411, BAUCHANAN, J.P. said –

“It was a matter of much discussion in the first cases which went from this court to the Appeal Court whether claim-holders *inter alia* were not bound to give each other lateral support, but that idea eventually vanished, and it was held that as the object of claim-holders going into a mine is to work down, and as they are bound so to do to avoid negligence, one claim-holder is not entitled to lateral support from another (*Van Beek v. Murtha, Buch C.A., 1,121*). But this, it was admitted, was an exception to the right of neighbouring proprietors to lateral support.”

Apart from the view of SMITH, J., in *Coronation Collieries v. Malan*, the weight of opinion of Roman Dutch writers seems to be that lateral support is an obligation of an adjacent owner. The books are silent regarding a surface owner's rights after he has parted with his mineral rights and retained the surface. But it seems to me that if there is an obligation on an adjacent owner to give lateral support to his neighbour, then a *fortiori* the owner of minerals is in a similar position with regard to the surface owner.

Counsel contends that the proper relief is to restrain the respondents by way of injunction and to order them to account for profits made. I do not consider this to be the proper course. The case relied on is *Bell v. Wilson* (supra), where accounts were ordered. In that case the defendant began to work the stone under the surface by open quarrying, but as the quarrying proved unprofitable, the working was abandoned. Seven years later he began to work in the same manner but correspondence followed and an action was brought. No reason is given in the judgment for ordering accounts. SIR G. J. TURNER, L.J., in the course of his judgment said —

“The case then is, in this singular position, that the Defendants were entitled to the stone, working it by underground mines, but were not entitled to work it from the surface; the consequence, as I think, must be, that the Plaintiffs are entitled to the account directed by the decree, of what has been got by the improper working”.

There was no challenge to the order for accounts. The case was conducted on the basis that if the plaintiff's interpretation of the reservation was the correct one, then an order for accounts must follow.

The present case has many special features. The transaction took place in 1914. Apart from the appellant Henry De Clou, no one connected with the matter is alive. I have no doubt that if Mackenzie or the respondents in later years realised that bauxite could only be won by opencast mining they would have offered to purchase the surface and the appellants would have sold. In any event, the financial resources required to carry on bauxite mining are not available to the appellants, and since the respondents are heavily involved in expenditure and acted in good faith, I apprehend the proper remedy to be damages.

I concede that the appellants did not suggest by evidence or in any way any basis from which an adequate sum might be arrived at, but the record contains some material on which I propose to act. In 1914 Mackenzie purchased from the De Clou family the whole of Coomacka, that is to say, lots 49, 50, 51, 52, being upper and lower Coomacka, and comprising 3,173 acres, for \$2,221. Appellants' counsel described that as a small fortune for those days. Allowing for extravagance of language, it can be agreed that the purchase price was a reasonable one in those days, not over generous but not undervalued. This means that the appellants and ten others were prepared to dispose of their total holdings at about 70 cents per acre. For some reason which no one has been able to explain, Mackenzie resold two lots at lower

## DE CLOU v. DEMBA

Coomacka, comprising 1,586½ acres, to the appellants and others for \$260.55 with the reservation already commented on. Now that it has been found that the surface has the real value, and having regard to present day land values, I consider 50 times \$260.55 or \$13,000 an adequate sum of damages. In the alternative, had I not been in the minority consideration would have been given to referring the case to a judge for further evidence on the question of damages.

I would allow the appeal.

LUCKHOOD, J. A. Having read the judgment of my brother PERSAUD, J. A., and agreed with his conclusions, I would only wish to examine certain features of what appears to me to be the major issue raised in this appeal, which may be very summarily stated thus: Could the respondents, in the exercise of their rights to mine bauxite on lands partly owned by the appellants, do so in the manner as was done without legal consequences?

The appellants, as part of the redress for such an alleged infringement, sought an injunction restraining the defendants, their servants, and agents from carrying on mining operations upon the said lands at all, or in the manner done, and from interfering with their peaceful enjoyment and committing any acts of waste thereon.

Four years after the announcement in the "Official Gazette" of the 16th July, 1910, that bauxite was discovered in the Upper Demerara River, lands perhaps considered of little value and for the most part abandoned, began to attract, not only the zeal of the pioneer, but the zest of the speculator. George Bain MacKenzie acquired the full ownership of several portions of land in this area, and also limited properties in the form of reservations with mining rights attached.

The Coomacka lands, a part of which concerns this appeal, were owned by the de Clou family. The appellants, Joseph and Henry de Clou, were two of eleven members of that family, who came to a certain arrangement with Mackenzie which resulted in three consecutive transactions taking place on the same day, viz., the 28th day of November, 1914, and at the same time. The first was that in which the eleven de Clous transported to him the entire Coomacka lands comprising 3,173 acres more or less, for a payment in the sum of \$2,221.10; the second was a re-conveyance of the upper half of these lands, viz., lots 51 and 52, to four members, of that family, involved in the first transaction, with a retention by Mackenzie of mining rights and interests in the form of a reservation, which will be set out later; the third was a re-conveyance to the seven other de Clous, of whom the appellants were two, of the lower half, viz., lots 49 and 50, also subject to a like reservation.

The ultimate result of these transactions meant that Mackenzie was able to carve on the titles to these lands his specific mining reservations, which, in the next year, he sold to Winthrop Cunningham Neilson, who in turn sold to the respondents along with other properties in that area, and

the stage was being prepared for major industrial development, today a boon to the economy of the country.

At the material times the de Clous had the benefit of two solicitors who acted as their duly constituted attorneys. Undoubtedly, what was sold to McKenzie eventually turned out to be a pearl of some price, but Professor Harrison's announcement in the "Official Gazette" of the 16th July, 1910, for the information of the public of the find of bauxite was not particularly alluring, as to its future, when he said: "At present these deposits are of too low commercial value to warrant their exploitation for export as sources for aluminium, but their exceptional purity renders it desirable for their occurrence to be placed on record". In any event, counsel for the appellants described the sum which the de Clous received as "a magnificent sum" for those days.

Although the de Clous received for all of the Coomacka lands \$2,221.10, when it was re-conveyed back to them, at the same time, with reservations, they were obliged to pay only \$521.10 for both portions (that is, \$260.55 for each). McKenzie was absolute owner of surface and minerals, prior to reconveyance; the reservations were acquired at a cost of \$1,700 altogether (the difference between \$2,221.10 and \$521.10), that is, \$850 for each portion, more than three times the value at which the re-conveyance was secured. If there was no bauxite or minerals available, or such as could not be mined economically, the loss would be that of the owner of the reservation. However, up to the time of hearing in 1962, 100 acres were mined, with the, prospect of mining another 100 acres economically out of the whole area of 1,586½ acres.

When the surface of land and the minerals below are both owned by the same person, no problem obviously arises if in the course of extracting the minerals subsidence and damage of any kind is caused to the surface. However, when there is a difference in ownership through a severance of these rights, the surface owner would naturally be concerned if damage is caused to his surface through the mining operations of the owner of, or person exercising the right to mine, the minerals.

On the one hand, *prima facie* the surface owner has the right to enjoy and have that surface preserved in its natural states. (See *Pountney v. Clayton* 11 Q.B.D. 838). On the other hand, the mineral owner looks to the maxim: "*Quando aliquid conceditur etiam et id sine quo res ipsa non esse potuit*" — When anything is granted all the means to attain it and all the fruits and effects of it are granted also. A grant of mines therefore carries with it *prima facie* the power to dig them (see *Rowbotham v. Wilson*, 8 H.L.C. 360), and everything necessary for working them (see *Proud v. Bates* [1865] 34 L.J. Ch. 406), and the right of removing such parts of the strata as have to be removed (see *Robinson v. Milne*, 1953, L.J. Ch. 1074).

Between these presumptions the law introduces the maxim: "*Sic utere tuo ut alienum non laedas*" — A man must not in the user of his property do an *injuria* to his neighbours. (See *Butterknowle Colliery Co. v.*

## DE CLOU v. DEMBA

*Bishop Auckland Industrial Co-operative Co.* 1906 A.C. 310 p.20). Hence a conflict may arise between the competing rights of surface owner and mineral owner; when it cannot be resolved, recourse is had to courts, as now.

The main complaint of the appellants is that the respondents have so indulged their mining operations for bauxite as to cause serious harm and injury to the surface by allowing it to sink in hollows, depressions and cavities, and to be defaced and injured, so as to render it unfit for use of any kind, and have otherwise caused loss to them, as a result of the employment of the opencast way of mining.

The respondents, in effect, answer this by saying that they were engaged in the legitimate mining of bauxite under the reservation granted by the appellants and other members of his family to McKenzie in 1914, and that they were entitled to mine by opencast method, the only feasible way of securing bauxite from those lands.

Damages and the right to damages were in issue. It may be convenient here to have a very brief look at the evidence.

At the Lower Coomacka lands where mining operations took place, there were no farms, no homes, no development of any kind, only trees and forest bush. There was no necessity to remove anyone. The appellants and other members of their family lived on lot 50, fairly close to Upper Coomacka by the riverside. The house farthest from the river was 500-600 feet. The nearest the excavations came to the river was about 14 mile. Areas to be mined would have to be cleaned of bush and trees and the overburden of earth and soil removed. Holes would then be drilled from about 12 feet to 28 feet deep (depending upon the depth of bauxite in the area), right into the bauxite for some depth, after which the bauxite is blasted and loosened up by explosives set in the drill holes, and then mined by diesel shovels. As a result of taking off the overburden, cavities are created, and by depositing the overburden in areas that are already mined or have no bauxite, pyramids are built up.

Bauxite was always mined in this and no other way, directly from surface to location. The appellant, Joseph de Clou, knew of and witnessed this method in the year 1916 on lots 49 and 50, Lower Coomacka, when the respondents dug holes and went down below to a depth of 50 to 70 feet, to get bauxite samples to take to the laboratory.

No mining of bauxite by underground is done in this country.

Peter Anton Snijders, a mining engineer, testified that from his experience it is impossible to mine bauxite from the soil in this country by underground methods because the soil is unconsolidated and loose. He further said:

“As an expert I say that the position is exactly the same as in 1914”.

There was no challenge whatever of this witness's testimony on this aspect; nor was any evidence led in rebuttal of his firm statement.

This witness only knew of opencast mining in this country. Even the witnesses for the appellants could speak of no other method of mining.

The appellant, Joseph de Clou, himself knew that the respondents were mining at Three Friends, three miles from lower Coomacka around the year 1917. He used to visit Three Friends twice a week and was aware since that year that the opencast method was in operation there. He said:

“Bauxite was exposed there on the surface. They did not have much overburden to remove. They did not have to mine underground”.

This evidence received confirmation from another witness for the appellant — David de Clou, a first cousin of the appellants — whose evidence contains some important features which will be examined later. When he gave evidence in 1962, he was 67 years old. In 1914 he would be no more than 19 years, a minor. He said in his evidence he was called “D. R. de Clou”. One of the four owners of Upper Coomacka in 1914, as appears on the Transport, Ex. “F3”, was the minor David Richardson de Clou”. In all probability David Richardson de Clou mentioned in the Transport is the person David de Clou who gave evidence, if one looks at his relationship to the appellants, the fact that he has the same first christian name, the same initials, and was of the same address. I have looked at the affidavit of Agnes de Clou which led to the Transport Ex. “F3” by the eleven de Clous to McKenzie. It could be seen from that that David Richardson de Clou, her son, a part-owner of the Coomacka lands, was 19 years in 1914, and a cousin to the appellants. I am satisfied that David de Clou, the witness, is the son of Agnes de Clou; that he was one of the persons who passed transport to McKenzie of all the Coomacka lands and received back, as part-owner, the Upper Coomacka lands on the same terms and conditions as the Lower Coomacka lands.

This David de Clou was a contractor for the respondents for clearing lands for mining by cutting bushes and trees and burning them. This he did at Lower Coomacka and Upper Coomacka. He saw mining at Three Friends around 1916. He saw when the earth was cleared away, test pits dug and bauxite taken. In his experience, “that is what is always known as mining bauxite”. He also told of mining going on at Upper Coomacka between 1939 and 1952. Apart from clearing lands at Upper Coomacka, he cleared 30 or 40 acres at Lower Coomacka. After he cleared the bush in 1952, mining was done there.

It would appear from the evidence that the mining from Upper Coomacka (lots 51 and 52) in 1939 advanced towards Lower Coomacka, moving towards Arrowcane Creek in Lower Coomacka which runs parallel to the boundary between these two places. By 1952 the boundary was crossed and mining actually took place there.

The learned trial Judge made these findings:

“On the evidence before me I am satisfied that the surface of the areas of the Lower Coomacka lands where opencast operations were carried out has been seriously damaged and rendered

## DE CLOU v. DEMBA

practically useless for agricultural purposes, at least for some considerable period of time. Lands in the vicinity of the areas so worked have also been affected by the 'hydraulicising' which accompanies opencast mining. But I am far from being persuaded that previous to the defendants' operations these lands were in fact being used or were suitable for ordinary agricultural purposes. It appears that there used to be a small quantity of timber on parts of the areas affected but that most of it was removed by the plaintiffs and their relatives before 1952, no account being given to the defendants; what remained was cut between 1952 and 1955 when the defendants were actively preparing for opencast operations. There is no evidence to show that the areas affected have ever been used for building purposes or are suitable for such purposes. In my view the plaintiffs' witnesses grossly exaggerated the extent of the damage caused by the defendants' operations. I accept Snijders' evidence that at the time of the issue of the Writ in October 1958 only about 100 acres of the Lower Coomacka lands had in fact been mined by opencast methods and that only about 228 acres of the entire 1,586½ acres comprising Lower Coomacka can be economically mined".

The necessity now arises to inspect and scrutinize the reservation written into the Transport of the property which McKenzie passed to the de Clous, and which is as follows:

"With reservation to the said George Bain McKenzie and his heirs, executors, administrators, representatives and assigns, of the exclusive and unrestricted right to mine on and take from the lands hereby transported free from any charge or payment of bauxite and other ore, minerals and clays, and subject to all rights of way on, over and across the said lands at all times which the said George Bain McKenzie may consider necessary for the purpose of mining and taking from the said lands the aforesaid substances and things".

The reservation virtually separated the ownership of the minerals which McKenzie had and kept, from the ownership of the surface which he had, but gave back. It was almost being used as an instrument of severance, which gave effect to the wishes of the parties, and was irrevocable and binding between them.

I will now proceed to construe the reservation, which, in a sense, could be described as the epitome of conciseness and simplicity. Within the short compass of its reading is contained the nature and extent of the powers reserved for McKenzie, with the assent of the de Clous.

The right to mine is described as 'exclusive and unrestricted'. It permits only McKenzie or his assigns, etc., to mine on the particular land, and no one else. Then it empowers him to determine for himself how or in what manner he would exercise that right by the use of the word 'unrestricted', which indicates that he should not be circumscribed or limited in the way of carrying out his project.

Counsel for the appellants sought to argue that 'unrestricted' here was intended to signify an entitlement to mine on any part of the land, that is, that it merely permitted McKenzie to go wherever he wanted on the land for mining purposes and did not mean more than that. This is not a justifiable interpretation. If the words 'and unrestricted' were removed, the reading would be, 'the exclusive right to mine on and take from the lands hereby transported', which completely covers and was intended to cover the requirement for allowing McKenzie to mine on any part of the lands transported. With this requirement clearly satisfied, the next question which one would expect to arise was the need to say how he should be allowed to mine, and whether any limit should be placed on his enterprises. The word chosen to answer this question is the word 'unrestricted'. It undoubtedly indicated that McKenzie was to be entitled to employ whatever method and manner of mining he wished to adopt, which could be justified in all the circumstances. This is the meaning I place on the words 'unrestricted right to mine'. If the intention was to provide for underground mining, the word 'unrestricted' could not, and, would never have been introduced. The right could not be 'unrestricted' if it is a right to mine underground only. The one is a negation of the other. Where one gives a measure of freedom in choice of operation, the other confines. The express language with its clear meaning must confound any nebulous attempt to eke out a contrary meaning. Any temptation to construe 'to mine' as having reference to underground mining only must conflict violently with the express description of the right. There would be no room to import a meaning when one exists from the clear language used.

The words which require interpretation after these are: 'free from any charge or payment'. Unfortunately, no argument took place on what meaning should be ascribed to them. I will desist from construing these words; but cannot resist the temptation merely to observe as follows: these words follow immediately after the words 'unrestricted right to mine and take from the lands hereby transported'. The de Clous have no right to bauxite or minerals; McKenzie had already paid for the rights to these, so no question of payment for them could arise. In the course of the exercise of the right to mine without restriction, injury may be caused in some way or other to land which was sizeable, but not being put to special use. Would the de Clous have the right to ask for payment for such injury? Is the phrase not sufficiently wide to cover this situation? Does it mean that whatever happens in the normal course of mining shall not give rise to liability for any charge or payment? Could not the word 'any' possibly enlarge the scope and application of the words 'free from charge or payment' and create an avoidance for liability in the legitimate process of mining? Nevertheless, I am not prepared to reach a conclusion on this point without the benefit of argument.

The reservation then goes on to state what was being reserved, namely, 'all bauxite and other ore, minerals and clays'. From this and the surrounding circumstances the principal concern must have been bauxite. It is the only

## DE CLOU v. DEMBA

substance which was identified. 'Other ore, minerals or clays' was of secondary importance.

When Professor Harrison announced the discovery of bauxite, it was the result of an examination of specimens of rock from the low hills at Christianburg and Akyma on the Demerara River and from a shoal in the bed of the Demerara River (see "Official Gazette" of 16th July, 1910). The ore was not only exposed in shallows in the bed of the river, but outcropped at certain parts of the land surface. The public could not have failed to be acquainted with the terms of this official announcement and must have known that this ore was of a kind which could occur at surface and at shallow depths. It must have been fairly evident, and the only reasonable inference to be drawn is that the parties were at that time focusing attention on the acquisition of mining rights for the purpose of the mining of bauxite. I am satisfied that it was the primary object for securing the reservation. To mine 'all bauxite' could never have given to the de Clous the impression that McKenzie was after tin or copper or such like minerals. I am sure that it could have occasioned no surprise to them when the Demerara Bauxite Company began to mine for bauxite under the reservation. The reservation, in conclusion, gives to McKenzie further to his 'unrestricted right to mine' all rights of way which he may consider necessary for his mining purposes.

On the facts and features of this case, I consider the decision in *Butterley Co. Lim., v. New Hucknall Colliery Co. Lim.*, (1909) 1 Ch. 37 to be particularly useful. The decision in the Court of Appeal was approved in the House of Lords (reported at 1910 A.C. 38. H.L.). In the Court of Appeal, MOULTON, L.J., in stating the basic principles said:

"The law with regard to the right of support in cases where the property in the minerals has been severed from the property in the surface appears to me to be well settled. The latest and most complete enunciation is to be found in the case of *Butterknowle Colliery Company Limited v. Bishop Auckland Industrial Co-operative, etc., Society Limited (ubi sup.)* in the House of Lords, and I shall take as an authoritative statement of that law the following passage from the judgment of the present Lord Chancellor in that case: 'Whenever the minerals belong to one person and the surface to another the law presumes that the surface owner has a right to support unless the language of the instrument regulating their rights, or other evidence, clearly shows the contrary. In order to exclude a right of support, the language used must unequivocally convey that intention either by express words or by necessary implication. For the same presumption in favour of a right of support which regulates the rights of parties in the absence of an instrument defining them will also apply in construing the instrument when it is produced. If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clause of the instrument, then it means that the surface cannot be let down'".

The Lord Justice went on to discuss how on the facts of the case a conclusion could be reached that it was the intention to let down the surface. At page 821 he said:

“Imagine a clause introduced in any one of these instruments to the effect that the lower seams must be worked so as not to let down the upper seam. That would amount to saying that they must not be worked at all, and this would plainly be inconsistent with the clauses that permit them to be worked. We must, therefore, read the clauses permitting the working of the lower seam with their necessary implication — namely that such working will cause the corresponding subsidence in the upper seam — and hold that when the parties agreed that the former should be permitted they also intended to permit the latter as being its inevitable consequence”.

When mining cannot be carried on without letting down the surface, COZENS-HARDY, M.R., recognises how it may influence the construction of the instrument. He said at page 920:

“In every case which has been brought to our notice by counsel it was either (1) proved, or (2) admitted, or (3) assumed, that the subjacent mines could be worked in such a way as not to produce subsidence of the surface, and in that state of facts it was held that the first presumption to which I have referred must prevail, and that provisions framed in very wide language ought to be so construed as to apply only to such mining operations as would not cause subsidence. In no case has the presumption been so applied as to render the lease or grant or reservation of the subjacent mines an idle form. The injunction granted has been to restrain the defendants from working the mines so as to let down the surface — a form which presupposes the possibility of working the mines without letting down the surface”.

And finally, I must advert to the clear-cut approach of FARWELL, L.J., on principles well supported by authority. At page 822 he said:

“It is now well settled that the owner of the surface, or of a higher seam, does not lose his common law right to support unless the document of severance takes it away either by express words or by necessary implication. And by necessary implication I understand that which the courts infer from relevant, admissible evidence for the purpose of giving to the transaction such efficacy as must have been intended by business men entering into such a transaction as explained in *Re The Moorcock* (60 L.T. Rep. 654; 14 P. Div. 64). It is also well settled that in construing a document (I quote Lord Blackburn in *River Wear Commissioners v. Adamson*, 37 L.T. Rep. 543; 2 App. Cas. 743, at p. 763): ‘In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the

## DE CLOU v. DEMBA

words were used, and what was the object, appearing from those circumstances, which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used”.

“And this is stated by Lord Wensleydale in *Rowbotham v. Wilson* (8 H.L. Cas. 348, at p. 360), in a passage quoted with approval by Lord Chelmsford in 1 App. Cas. at p. 703, and by Lord Blackburn in L. Rep. 7 Q.B., at p. 722. ‘The rights of the grantee to the minerals’, says Lord Wensleydale, ‘by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Prima facie*, it must be presumed that the minerals are to be enjoyed, and, therefore, that a power to get them must also be granted or reserved, as a necessary incident. It is one of the cases put by Shepherd’s Touchstone, cap. 5, p. 89, in illustration of the maxim, *Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*, that, by grant of mines, is granted the power to dig them. A similar presumption, *prima facie*, arises, that the owner of the mines is not to injure the owner of the soil above by getting them, if it can be avoided’. The learned Lord obviously means by the words ‘if it can be avoided’, that the surface may be let down if the mines cannot be worked at all without so letting it down. The courts refuse to suppose that men execute deeds or documents apparently for business purposes and good consideration with the intention that such deeds or documents shall have no effect”.

And at page 823 he concluded:

“The courts do not readily adopt a construction of a deed which will nullify all the rights given under it to one of the parties thereto; and it cannot read into these leases, which contain elaborate powers, and rights enabling the mineral owners to work, a proviso that such powers are not to be exercised at all, and yet that is what the respondents ask us to do. It is not a case of qualified working, it is a case of not working at all; and so to read the deeds would be to stultify the parties”.

The question now is, does the arrangement between the parties, as contained in the reservation, by necessary implication allow of injury to the surface as a consequence of this working of bauxite, as it must have been intended by both of the parties to be worked?

In construing an express contract, a term or terms may be implied into the agreement if it is clear from the nature of the transaction that, had the parties adverted to this situation, they would have intended to incorporate such a term into their agreement. It would be for this court to say whether, looking at the contract in a reasonable and businesslike way, it is a necessary implication that both parties must have contemplated and intended to import into the contract what is sought to be implied.

In every case, the question whether an implication ought or ought not to be made will depend on the particular facts and circumstances of the case. In *Moorcook* at page 70, BOWEN, L.J., said:

“The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit. . . .”

And again at page 64:

“The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side”.

The test to be applied by the court in deciding whether to make the implication has been stated by several judges in much the same language.

SCRUTTON, L.J., in *Reigate v. Union Manufacturing Co.*, (1918) 1 K.B. at page 605 said:

“A term can only be implied if it is necessary in the business sense to give efficacy to the contract, i.e. if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties: ‘What will happen in such a case?’ they would both have replied: ‘Of course so and so will happen; we did not trouble to say that; it is too clear’.”

And the test offered by MACKINNON, L.J., in *Shirlaw v. Southern Foundries, (1926) Ltd.*, (1939) 2 K.B. 206, at page 227 is:

“*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, ‘Oh, of course’.”

Within more recent times JENKINS, L.J., in the case of *Sethia (1944) Ltd. v. Partabmull Rameshwar*, (1950) 1 A.E.R. has summarised the test in these words:

“I do not think that the court will read a term into a contract unless, considering the matter from the point of view of business efficacy, it is clear beyond a peradventure that both parties intended a given term to operate, although they did not include it in so many words”.

I will now consider the reservation in the light of the evidence and concomitant circumstances, and conduct of the parties to determine whether it could be truly said that both parties must have realised and expected that

## DE CLOU v. DEMBA

there would be injury to the surface, but intended that any such injury to the surface should be of no consequence although they did not say so in so many words.

Apart from the knowledge of the occurrence of bauxite as indicated by Professor Harrison, one of the appellants had actually observed outcrops for himself not far from the Coomacka lands in 1916. It must be taken that the appellants knew that the ore bauxite could be found at or near the surface. They would also know the nature of soil about the land on which they lived – that it was loose and unconsolidated. In bestowing the right then ‘to mine and take all bauxite’, it would be with this knowledge, and would give rise to the inference that they were agreeable that the owner of this right could go directly to the substance and take it. The way of getting the substance at or close to the surface in soil that is unconsolidated, to the reasonable mind would surely not be by any underground method. The first thought would be to go directly through the loose soil to the bauxite. The very fact that the soil was loose and unconsolidated would at first indicate that it would not be able to give support to the surface if resort is had to an underground effort.

The appellant who testified gave no direct evidence on the question of his knowledge of mining; but this must be relevant to the soil, and the manifestation or occurrence of the substance, to be mined; and in this case the parties must be taken to have known what they had to contend with, because of that.

As it turned out, there was, and is, only one way of getting bauxite, that is, by opencast mining. There was no evidence in contradiction of this; indeed, it was unchallenged; it must therefore stand, in context of the case, an influential factor in determining the rights of the parties. Obviously open-faced working would occasion damage to the surface, particularly through the necessity of having to clear and excavate. If there was another way of working which would not cause such damage, then different considerations would arise. In construing the significance of only one method of mining, this must be related to the facts, which speak eloquently. On over 1500 acres of land, except by the riverside, there were no homes, buildings, cultivations, or farmlands; the land was of little consequence; for the most part it consisted of forest bush. Apart from the limited habitation by the riverside, there was really no apparent interest in much else, and little to wish to protect. The appellant himself in his evidence said: “Between 1916 and 1953 we did nothing on the Lower Coomacka lands except cutting a few timbers and fetching them out”. But, the consideration paid for the right to mine was evaluated at a sum equivalent to three times that placed on the land. Was there not an intention to create a right to do mischief of the kind caused to land, so little used, for which so much was paid at the time?

It is my view that if the appellants were specifically then asked whether they were authorising the interference or disturbance or injury to the surface by the reservation, they would have said: ‘For the good price paid we agree that he, McKenzie, may take away all the bauxite, in whatever manner he

wishes without having to pay us anything more than that paid for the reservation'. The property was such that the parties thought it a prudent and judicious thing to bargain in that way.

In the result of the reservation already construed, McKenzie was there saying to the de Clous: 'I am giving you back the land on terms, that is, that I, and I alone, shall have the right (which includes my assigns etc.) to mine all bauxite on those lands, and I may do so in whatever way is open to me'.

All of these matters must now be viewed in the perspective that there exists only one mode of extracting bauxite in the particular locality; it cannot be wrought by underground working but is only to be won by tearing up the surface and injuring it over the entire extent of the working. Is the reservation to be stultified and rendered futile through this, even after payment of valuable consideration? Is the wide language of the reservation itself, and the knowledge of the parties to count for nothing? In my opinion, no. I find it difficult to resist the conclusion, in all the circumstances, that the parties did intend that if there was only one way of mining bauxite, that *modus operandi* should prevail, even if it meant letting down or injuring the surface. If it were otherwise, then to avoid any injury to the surface 100% of bauxite for which payment was made would have to remain *in situ*. This notion would be entirely inconsistent with the terms of the reservation which authorised the unrestricted right to mine of which the disturbance was the inevitable consequence. It would derogate from the grant in such a way as to make the thing granted wholly valueless, and render the reservation nugatory.

I find there is no room for the presumption that the parties to the reservation could not have intended that the surface should be destroyed or damaged; the common law right to support was by necessary implication displaced; had it prevailed, the reservation would have been wholly frustrated.

There are no words in the reservation construed which appear to be ambiguous, or any collateral matter which breeds ambiguity; but in considering whether it establishes by necessary implication the right to get rid of the common law right of the surface owner to have his surface undisturbed, there would be no better source for aid than the acts of the parties, for there is no better way of seeing what they intended than to look at what they did and how they conducted themselves in relation to the instrument in dispute; the inferences to be drawn might provide some clue or guide in determining whether there is room for the implication of any necessary term in construing the reservation.

When the appellant, Joseph de Clous, saw the exploratory mining works being carried on by the respondents at Lower Coomacka in 1916, one would have thought that he would have raised an objection there and then that only underground mining must be employed and not opencast, on the ground that that was not contemplated, and involved the removal of trees,

## DE CLOU v. DEMBA

and overburden, and injured the surface. However, nothing of the kind occurred, nor was there any evidence that any time there was the slightest protest against the form of mining activities carried on by the respondents to show that the appellants were not prepared to tolerate, or, would take steps to prevent, the utilization of their land in the particular way. Had there been available any such evidence, undoubtedly it would have been led. Apart from witnessing the exploratory mining at Lower Coomacka in 1916, Joseph de Clou actually saw opencast mining operations at Three Friends in 1917. If he never intended the reservation to confer a right to mine in this way, would he not have said at the earliest convenient moment: 'It was never our bargain that you should exercise your right to mine in this way. You are causing damage to the surface; this is not permissible on my part-owned lands!' To say by way of excuse that the parties did not know of their legal rights, would be unavailing, because at least they would know what they intended and contemplated, and if the contrary was being done, it would be natural to expect some reaction between 1916 and 1959.

Moreover, what took place particularly between 1939 and 1955 does not suggest that there could have been any genuine grievance felt by the appellants. In 1939 mining operations started at Upper Coomacka; as the years rolled by it advanced from lot 52 to lot 51 there, and afterwards to lot 50 at Lower Coomacka. It took 15 years to reach lot 50 at Lower Coomacka. The whole process of opencast mining was there for all to see. The appellants lived at lot 50 fairly close to Upper Coomacka. With the advance of every year, it must have been evident to the appellants that soon their lands would be similarly involved; but nothing was said and nothing was done; but the evidence revealed the active participation of David R. de Clou the cousin of the appellants and part-owner of Upper Coomacka, in serving the respondents, as a contractor, to clear bush and trees and burn them prior to the removal of the overburden between 1939 and 1952 as the operations moved from Upper Coomacka to Lower Coomacka. Such conduct, although he was not a part-owner of Lower Coomacka, in my view would be most relevant. He was actually a party to the Transport by all the de Clous, including the appellants, to McKenzie of all the Coomacka lands (Ex. "F3"). When McKenzie at the same time retransported Upper Coomacka to four de Clous and Lower Coomacka to seven de Clous, it was in reality part of one and the same transaction, and subject to the same terms and conditions. Nothing that happened in relation to Upper Coomacka was different from Lower Coomacka, and the reservations were exactly the same. What must have been intended for the one would necessarily follow for the other. It was only a matter of arrangement for some de Clous to have lots 51 and 52 and others to have lots 49 and 50. This separation was inextricably bound up with the purchase of the whole and the purchase of the reservations.

When David de Clou for thirteen years took part in opencast mining operations at Upper Coomacka for the respondents, he was clearly demonstrating that it must have been a contemplated incident of the reservation that this form of mining should take place, otherwise he would hardly have

lent himself to unauthorised acts of destruction on his own land and then subsequently on that of his cousins. Whatever right of enjoyment David de Clou had of lands at Upper Coomacka, insofar as the mining reservation was concerned, would be no different from what Henry and Joseph de Clou enjoyed at Lower Coomacka. The interest of the one, in the protection of legitimate rights arising from the reservation, would be the same as that of the other, and each could, by his conduct, provide some evidence of what was contemplated, when the joint arrangement was concluded with McKenzie; that arrangement is indivisible and cannot be placed in watertight compartments. The conduct and behaviour, therefore, of each de Clou would be pertinent if it has a tendency to show that there must have been a clear understanding on a certain question to give efficacy to the transaction; and that the parties on each side intended that understanding to operate as a term although they did not include it in so many words.

Supposing the understanding was that only underground mining should be indulged, and David de Clou were then to contract with the respondents to strip the Upper and Lower Coomacka lands to permit of opencast mining, surely the appellants and others would condemn him for such treachery! But if the contrary were the case, and it was taken for granted that this was permissible, then nothing would be said or thought of it, as actually transpired.

To put it another way, David de Clou would never have allowed himself to be engaged as a contractor to strip land over the years from 1939 to 1955 in which he and other members of his family were interested, unless it was intended originally that McKenzie should have the right to mine that way although the surface should be damaged. Neither would Joseph de Clou have kept his silence without erupting over the many years, especially when David was responsible for clearing 40 acres of his partly-owned land at Lower Coomacka.

In the conduct of both Henry and David de Clou, I find ample support for the conclusion which I have reached, that what was done by the respondents was within the scope of the reservation, as was intended by the parties.

The learned trial Judge may not have been far wrong in observing that –

“when this action was launched the plaintiffs’ first complaint was in regard to the small rent being paid by the defendants for the strip of land over which their railway ran. It was alleged that the lease of the strip of land ‘was obtained by oppression on the part of the defendants and is a harsh and unconscionable bargain’. All in all the impression I have received is that now that the defendants have struck bauxite in a big way the plaintiffs feel that they made a poor bargain. Whatever justification there may be for such feelings, that can hardly be a ground for finding in their favour in this matter”.

I find, on the whole case, that the respondents have discharged the burden that the ownership of the surface was acquired on terms which gave

## DE CLOU v. DEMBA

the owner no right of support, and envisaged mining as was done with its ensuing consequences.

The appellants are not entitled to succeed on their claim.

Like PERSAUD, J.A., I would dismiss this appeal with such costs as the respondents may be entitled to recover against a person appealing *in forma pauperis*.

PERSAUD, J. A. This appeal discloses an open contest between the owners of the surface of land and their consequential rights on the one hand, and the owners of the minerals and similar produce and their consequential rights on the other hand. In short, the former (the appellants in this appeal) maintain that they have a right of enjoyment of the surface of the soil which right may not be disturbed by the latter (the respondents), while the latter claim that by reason of a reservation contained in the document of title, they have an exclusive and unrestricted right to mine for minerals, etc., and that they can do so even though the result of the mining operations may be to destroy the surface of the land rendering it utterly useless to the former.

This is by no means a unique problem in that it has arisen in other parts of the world, particularly in the English Courts, but the great point sought to be made here is that the methods of mining employed in the United Kingdom where minerals like coal and iron, and substances such as clay and slate are mined are vastly different from the methods employed in Guyana where substances such as bauxite and minerals such as gold are won from the earth. The main problem posed in this matter is the meaning to be given the word “mining” in the document of title, that is to say, whether it is to be given the same meaning attributed to it in some of the English cases, or whether the term has a meaning peculiar to Guyana, having regard to the state of the law in 1914 (the time when the document of title was executed) and to other circumstances, including the subsequent conduct of the parties. Of course, as is to be expected, there are other matters to which consideration must be given, and these will be dealt with as this judgment progresses.

Before dealing with the legal aspects, it would be necessary to set out the history of the title to the property in question.

On November 28, 1914, three transports were executed. By transport No. 838 the De Clou family (including the appellants) transported all the Coomacka lands referred to as lots 49, 50, 51 and 52 – approximately 3,173 acres – to George Bain MacKenzie, subject to the right of one John De Clou (not a party to the transport) to live on the upper portion of such lands during his life. The selling price was \$2,221.10. Lots 51 and 52 were known as the Upper Coomacka lands, while lots 49 and 50 were referred to as the Lower Coomacka Lands. By transport No. 840 MacKenzie transported lots 51 and 52 (which measured approximately 1,586½ acres) to four members of the De Clou family, subject to John De Clou’s right referred to above, and to a reservation in favour of MacKenzie, which reservation was repeated in

the third transport, and which is the subject matter of this dispute. That third transport is numbered 839 and relates to lots 49 and 50, or the Lower Coomacka lands, measuring approximately 1,586½ acres. For the payment of \$260.55 George Bain MacKenzie ceded title to the rest of the De Clou family, including the two appellants —

“With the reservation to the said George Bain MacKenzie and his heirs, executors and administrators representatives and assigns of the exclusive and unrestricted right to mine on and take from the lands hereby transported free from any charge or payment all bauxite and other ore, minerals and clays and subject to all rights of way on, over and across the said lands at all times which the said George Bain MacKenzie may consider necessary for the purpose of mining and taking from the said lands the aforesaid substances and things”.

On April 17, 1915, MacKenzie transported (Tpt. No. 366) several parcels of land to one Winthrop Cunningham Neilson, and as a separate item of property in that title deed appears the exclusive and unrestricted right to mine on and take from the Coomacka lands, i.e., lots 49, 50, 51 and 52 all bauxite and other ores, etc., that is to say, the same right that had been reserved to MacKenzie in the previous transports. This right was finally transported, again as a separate item of property, by Neilson to the respondents on March 17, 1920. There were two other transports — one by Neilson to the respondents, and by the respondents to Neilson — apparently executed to satisfy the requirements of s.23 of the Deeds Registry Ordinance (Cap. 32), but these are not relevant to this appeal as both in the court below, and in this court, the case was argued on the basis that the appellants, among others, hold the legal title to lots 49 and 50, save for two undivided sevenths which have been bought by the respondents, while the latter had a right to mine for bauxite, and other ores, etc., on the said lands.

An examination of the original transport papers disclose an interesting history of the transactions of November 28, 1914. It would appear that the original owner of the entire Coomacka lands (lots 49, 50, 51 and 52) was Charles De Clou, the husband of Agnes De Clou one of the parties to the transport No. 839. Charles De Clou had purchased these lands for \$450.00, but he held no legal title. Nevertheless he occupied the upper lands, while his brother John De Clou whose wife was Jane De Clou occupied the lower Coomacka lands with Charles' consent. After their deaths, their respective heirs continued to occupy each in accordance with his ancestor's occupation. At the time of the passing of the abovementioned transports, therefore, the heirs of the De Clou brothers had no title, but there was evidence before the court that they had been in occupation of the lands for over 40 years. Agnes De Clou agreed to sell to George Bain MacKenzie the exclusive right to mine and take from both upper and lower Coomacka lands all bauxite and other ores, minerals and clays, with the right of ingress, egress and regress at all times, while MacKenzie agreed to purchase that right, and in addition, to re-transport one-half of the lands to Agnes De Clou and others, and the other

## DE CLOU v. DEMBA

half to Jane De Clou and others. The appellants are descendants of Jane De Clou, and are in fact named as transportees in transport No. 839. It was to effect these objects that transports Nos. 838, 839 and 840 were executed on November 28, 1914.

The lands were then regarded by all parties as the property of the De Clous, subject to the right to mine in favour of MacKenzie. Subsequently, so far as lots 49 and 50 were concerned, the following transactions took place: One undivided seventh part was transported to John Edmondson, the husband of one of the heirs of John De Clou; a lease was executed in favour of the respondents of a strip of land 100 feet wide for a term of 50 years from January 1, 1923; an undivided seventh belonging to Elizabeth Ouckama, another heir of John De Clou was transported to the respondents on June 21, 1923, an undivided seventh, the share of Robert De Clou, another heir, was transported to the respondents on December 21, 1949, and on October 16, 1962, the appellants' undivided two-sevenths share were sold at execution and purchased by the respondents. The result of these transactions are not without some importance. The respondents now own an undivided four-sevenths of lots 49 and 50, and as from October 16, 1962, the appellants' interests in the land were extinguished. It is only right to point out that the writ in this action was filed on April 28, 1959, when the appellants' interests were surviving, and when the respondents owned an undivided two-sevenths only.

The respondents did not begin operations on lots 49 and 50 until 1948, and actual extraction of bauxite ore was begun in 1952, as a result of which the surface of the soil over an area of about 100 acres was so disturbed as to render it unfit both for building and for cultivation. The system of extraction used was described as open face or open cast mining. This was to remove what is called the 'over-burden', i.e., the top soil, which may vary in depths, thus exposing the ore which is desired; that ore is then dug by mechanical means and removed for processing into aluminium later on. The result of this operation is to leave a series of pits or saucer-like depressions on the land, and, claim the appellants, as a result, the land was of little value to them for it could neither be built on nor cultivated.

The arguments adduced on behalf of the appellants may be grouped under three broad heads. The first is that the respondents' right to enter upon the lands and to extract bauxite there from flows from the right which had been reserved in favour of George Bain MacKenzie in 1914, and is not affected by any of the subsequent transactions, and therefore the appellants' right could not be any greater than that enjoyed by MacKenzie, except there was an express agreement to that effect. The second head is that the right of MacKenzie — and that of the respondents — is a personal servitude in the nature of a *profit a prendre*, that a servitude must be strictly construed, and that in the exercise of such a personal servitude, the beneficiary must not destroy the surface of the land, for to do so, he would render himself liable in damages to the owner of the surface. The corollary to this is the all important question as to what is meant by the expression 'the exclusive and un-

restricted right to mine on and take from the lands . . . all bauxite etc' And the third is that by virtue of their acquiring an undivided share in the land, the respondents became co-owners with the appellants as from 1949 whereby the servitude was extinguished by operation of law to the extent of their interest, and they could then appropriate all the bauxite, etc., but in that event, they would have to account to the other co-owners for any profits made.

I would agree that in the absence of any agreement to the contrary, the right which has accrued to the respondents from Mackenzie through Neilson cannot be any wider in scope than that which was reserved in favour of MacKenzie in 1914. The more difficult question, however, is the nature of that right, and whether it was intended by the parties that mining for bauxite should be restricted to underground methods only.

Counsel submits that the right has all the characteristics of a personal servitude, except that it is assignable, and that the principles of Roman Dutch Law require such a right to be strictly construed. The nature of the right is important not only in relation to the intention of the parties, but also in regard to the appellants' third proposition.

A personal servitude has been defined to be that which 'vests in an individual as such only, and not in respect of his being the owner of a *praedium* . . . . It is therefore quite clear that in one aspect all servitudes are personal, for they must operate in favour of certain persons; whilst in another all are real, for they *are jura in rem*.' [OPINIONS OF GROTIUS, p. 420.]

In this INTRODUCTION TO ROMAN DUTCH LAW, LEE also distinguishes real from personal servitudes, and divides the latter into *usufruct* and *use*, the corresponding institutions in Dutch Law being *lijfucht* and *bruick*. And in the INSTITUTES OF CAPE LAW (B.K. II). BY MASSDORP, the following statements appear at pp. 144 and 147 respectively —

"A servitude may be defined as a detachment of some of the rights of ownership from the ownership of some particular property and the conferring of the same to the ownership of some other property.

"Personal servitude may be constituted over either movable or immovable property, and, according as they are so constituted respectively, they are themselves regarded as either movable or immovable property".

In NATHAN'S THE COMMON LAW OF SOUTH AFRICA, Vol. 1 at p. 420 *et seq.*, a servitude whether real or personal, is described as a real right, and a *usufruct* or personal servitude is defined as a right to consume what the property of another produces, without damage to substance of the property from which the produce is derived.

It will be seen, therefore, that the Roman Dutch Law accepted that a servitude could be real or personal depending in what capacity it is enjoyed,

## DE CLOU v. DEMBA

but in any event, because there must be a servient property in every servitude, it is a real right to be enjoyed within certain limitation, and can be dealt with by the owner as real property. This accords with the view expressed by DUKE in his LAW OF IMMOVABLE PROPERTY in Chap. XIII.

In his judgment, the learned judge in the court below agreed with the view expressed by HALL AND KELLAWAY ON SERVITUDES at p. 159 to the effect that it is more correct to describe [personal servitudes] as real rights *sui generis* and to recognise that they possess some of the characteristics of a personal servitude. The judge said: "Where there is, as in this case, no dominant tenement, they are, I think, analogous to what are known to the English law as profits *a prendre* in gross".

It would seem therefore that the right which was reserved to Mac Kenzie and his heirs, successors and assigns in 1914 amounts to a personal servitude, to wit, a profit *a prendre*. It is personal, not in the sense that it attaches to personality, but because it was intended to be enjoyed by the beneficiary in his personal right. It is held independently of the ownership of lands, and in this respect, is different from an easement; it is held in gross. A profit *a prendre* is, as all the text books agree, a right to take something which is capable of ownership from another's land [See *Duke of Sutherland v. Heathcote* (1892) 1 Ch. 484]: Such a right can be a right to prospect for and mine minerals, and can be separated from the ownership of the land and be made the subject matter of a separate title. This is the effect of the three transports which were executed in 1914. And the continued existence of profits *a prendre* in Guyana law is clearly recognised by proviso (b) to s. 3(D) of the Civil Law of Guyana (Chap. 2), which enacts that the law and practice relating *inter alia* to profits *a prendre* shall be the law and practice then (1917) administered by the Supreme Court. In passing, it is perhaps noteworthy to observe the nature of certain rights pronounced upon by the courts of this country. In *Ross & anor v. Royal Bank of Canada* (1940) L.R.B.G. 1, it was held that claim licences, which were in the form of grants to occupy land for the purpose of mining gold were in effect grants of profits of the land and were to be regarded as profits *a prendre*. In *Pellew v. Griffith* (*ibid* at p. 114), it was held that under the Mining Regulations, the holder of a prospecting licence must be regarded as possessed of a profit *a prendre* in the land located, that is to say, an interest in immovable property, pending the issue of a claim licence.

And now to the rights of the beneficiary of a profit *a prendre* to mine on and take from the lands all bauxite, etc.

Counsel for the appellant has urged that the reservation in favour of MacKenzie gave him a right to mine by underground methods only, and if there were any minerals or clays in the soil which could only be wrought by destroying the surface, then MacKenzie could not have exercised his mining rights to that extent. While he concedes that the word 'exclusive' in the grant means that only the donee could exercise the right, and 'unrestricted' means that he could exercise his right over any part of the land, he argues that the

owner of land enjoying surface rights has the right of support from the subjacent strata of his land; that the owner of mineral rights must mine in such a way that he does not disturb the upper strata and thus cause a subsidence.

The nature of the right apart, there seems to be no difference between Roman Dutch law and English law as regards the right of support. HALL AND KELLAWAY (opus cit.) at p. 161 states –

“An owner of land enjoying surface rights has the further right of support from the subjacent strata of his land. The owner of mineral rights must mine in such a way that he does not disturb the upper strata and thus cause a subsidence”.

Counsel for the appellant has referred us to a number of English decisions on this matter, all of which agree on the right of subjacent support by the owner of the surface. In *Caledonian Rail Co., v. Sprot* (1843-60) All E.R. Rep. 109, for instance, LORD CRANWORTH, L. C. said (at p. 114) –

“The subject of the right of the owners of the surface to adequate subjacent and adjacent support, has, on several recent occasions, been discussed in the English Courts. The principles which there govern the decisions were not derived from any peculiarities of the English Law, but rested on grounds common to the Scottish and, as I believe, to every other system of jurisprudence”.

And in *Davies v. Treharne* (1881) 6 App. Cas. 460, LORD BLACKBURN said (at p. 466) –

“I think it must be taken as perfectly settled ground that as of common right the surface land has a right to be supported by subjacent strata of minerals”.

And he continued (ibid) –

“Although this is a common right, it may be shown — the burden lying upon those who wish to shew it — that the person who has got the surface obtained it either upon terms which would give him no right to support, he having accepted it and taken it upon those terms, or that before he got it the person from whom he claims, the owner of the surface, had parted with the right of support from below, in which case of course the owner of the surface could be in no better position than the person who sold it to him”.

It is clear from the authorities that a common law right of subjacent support exists in favour of the surface owner, but such right may be displaced by the document severing the title, either expressly or by implication. This is the manner in which LORD MACNAGHTEN puts it in *Butterknowle Colliery v. Bishop Auckland Industrial Co-operative Society* (1904-07) All E.R. Rep. at p. 982 –

“. . . in all cases where there has been a severance in title and the upper and the lower strata are in different hands, the surface owner is entitled of common right to support for his property in its natural

## DE CLOU v. DEMBA

position and in its natural condition without interference or disturbance by or in consequence of mining operations, unless such interference or disturbance be severance either in express terms or by necessary implication”.

LORD MACNAGHTEN expressed similar views in *Butterly Co. Ltd., v. New Hucknall Colliery Co. Ltd.*, (1910) A.C. 381. In that case there were two seams of coal. The owner granted the appellants a lease of the overlying seam, but reserved to himself the right to grant a lease of the underlying seam, with full powers of working subject to a covenant by the owner to indemnify the lessees of the overlying seam against physical damage caused by the working of the underlying seam, the appellants to have the first offer of a lease of the underlying seam. This offer was refused, whereupon the lease was granted to the respondents. It was held that the respondents were entitled to work the underlying seam by the long wall system, leave to cause subsidence being clearly implied.

It is only right to advert attention to the fact that in the Butterknowle Colliery Case (supra) LORD MACNAGHTEN also dealt with the question of compensation, and this is one of the many points urged on behalf of the appellants in this case to show that provision not having been made in the reservation for the payment of compensation, it was never the intention of the surface owner to deny himself his common law right of subjacent support. LORD MACNAGHTEN said at p. 983 (supra) –

“Although provision for compensation is not of itself sufficient to show that the mine owner, working in the usual and proper manner, is at liberty to let down the surface, the absence of any provision for compensation is some indication that the ordinary rights of the surface owner were intended to be left untouched.”

There are two other cases worth mentioning if only to draw attention to the fact that dicta can be found to support the proposition that a surface owner may be deprived of his right of support by the instrument creating the reservation. *Hext v. Gill* (1861-73) All E.R. Rep. 388, a case heavily relied upon by counsel for the appellants, concerned a reservation of “mines and minerals” in a conveyance. The law as laid down in previous cases was repeated to the effect that where the ownership of the minerals is separate from the ownership of the surface, *prima facie* the owner of the surface is entitled to have the surface supported by the minerals. But it was clearly implied that the owner of the minerals can destroy the surface if he is authorised so to do by the reservation, for MELLISH, L.J. said [at p. 396 *ibid*].

“When an owner of both mines and minerals sells the surface, reserves the minerals, and gives himself power to get minerals, he ought to frame his power in such language, if he intends to destroy the surface, that the court is able to say that that is clearly the intention of the parties”.

Then in *Thomson v. St. Catherine College* (1919) 88 L.J.R. 163, the question arose as to the property in the minerals under allotments made by

virtue of an Inclosure Act. This case was relied upon by counsel for the appellants as laying down the principle that the fact that it is established that the owner of the minerals could not work the mines profitably without bringing down the surface does not entitle him to do so to the detriment of the surface owner. LORD FINLAY considered the effect of the Inclosure Act as a whole for in referring to the argument that the mines could not be worked profitably without bringing down the surface, he said (at p. 171 *ibid*) –

“ . . . . but the argument that this shows that the reservation of the minerals carried with it the right to bring down the surface appears to me not to have due regard to the effect of the Inclosure Act as a whole”.

LORD ATKINSON expressed his views thus (at p. 178 *ibid*) –

“ . . . where the mines and minerals in a parcel of land are vested in one person and the rest of the strata in another, the former cannot work his mines so as to let down the surface, unless he is expressly or impliedly empowered so to do by the provisions of the instrument of severance. He must find his authority to deprive the surface owner of his natural right to support in those provisions, and not in his anxiety to make a profit. If in the absence of such express or implied authority he should be obliged to leave his mines unworked, he must put up with the loss”.

It would appear, therefore, that the following principles can be gleaned from the authorities –

- (i) the surface owner has a natural right of support;
- (ii) that right may be alienated by the instrument of severance either expressly or by implication;
- (iii) such alienation must be proved by him who asserts it, that is, the owner of the mines and minerals.

This brings us to an examination of the extent of the right created by the reservation, – “the exclusive and unrestricted right to mine on and take from the lands. . . . all Bauxite and other ore, minerals, and clays. . . .” In other words, are the respondents entitled under the reservation to ‘mine’ bauxite so as to cause a subsidence of the surface soil? The trial judge found that the respondents engaged in open cast mining operations which had the effect of seriously damaging the surface, thereby rendering it practically useless for agricultural purposes, but he was not persuaded that, previous to the respondents’ operations, the lands were in fact being used or were suitable for ordinary agricultural purposes. These findings were not attacked on appeal.

However, counsel for the appellants has come down squarely on the side of the proposition that the reservation only permitted underground mining, and criticised the judge for seeming to reject the English authorities

## DE CLOU v. DEMBA

on the ground that those cases dealt with coal mining. Counsel submits that the principles set down in the English cases should apply with equal force to the mining of bauxite. It is correct to say that in most of those cases although the reservations spoke of coal, minerals and clay, the facts related to coal mines; it is also true to say that coal mining has never been attempted in Guyana, and there has been no incident of the mining of bauxite in the United Kingdom as far as is known. And it is also a fact that some of the cases referred to by counsel turned on what substances were to be included in the term 'minerals' as contained in certain statutes, rather than the meaning of the word 'mine' but they are undoubtedly helpful as guides to ascertaining the general principles.

In *Bell v. Wilson* (1866) 1 L.R. Ch. 303, a conveyance of land was subject to a reservation in favour of the grantor of all 'mines or seams of coal, and other mines, metals and minerals', under the land granted, with liberty to dig, bore, work, lead, and carry away the same, and to make pits, etc. Two points arose for decision, viz., whether the term 'minerals' included freestone, and whether the grantor was at liberty to get the freestone by underground mining and not by working in an open quarry. The first question was answered in the affirmative, and as regards the second, TURNER, L.J. said [ibid at p. 308] --

"I am satisfied that it was not intended by this deed that the freestone should be worked by the means which the Defendants have adopted, or otherwise than by underground mining. The language of the exception points, I think, to this conclusion; it is an exception of 'mines within and under the lands whether opened or unopened', words which are ordinarily used with reference to underground workings. And although perhaps, it cannot be said that there are not words in the clause which might be construed to extend to and authorise workings upon the surface of the closes, it cannot, I think be denied that the clause, taken as a whole, points much more strongly to underground workings".

I make two observations on the above dictum. Firstly, some importance must be attached to the words "words which are ordinarily used with reference to underground workings". In my opinion, if the words used to create the reservation were regarded to refer to underground workings, then the judgment could not have been otherwise. And secondly, that case is authority for saying that the reservation clause must be read as a whole, that is to say, words and phrases must not be isolated from the general context. Indeed, it is correct to say that this is the right method of construing all documents, whether they be statutes or documents of a private nature.

In *Darvill v. Roper* 61 E.R. 915, the reservation contained in an agreement for a partition of lands related to 'the mines of lead and coal and other mines and minerals, and the profits of the mines excepted to be taken between the parties according to their respective estates'. The question was whether lime-stone which was recovered by quarrying was among the ex-

cepted minerals. A distinction was drawn (and there is a distinction without doubt) between mines and quarries, and it was held that limestone was not among the excepted minerals. KINDERSLEY, V. C. had great difficulty in defining the term 'minerals', and refused to adopt the scientific meaning, turning instead for aid to the instruments themselves which created the reservations. He seemed also to have placed some importance on the subsequent conduct of the parties in ascertaining their intention. He defined 'mining' as 'when you begin only on the surface, and by sinking shafts or driving lateral drifts, you are working so that you make a pit or tunnel, leaving a roof overhead' and held that quarrying for limestone was not mining. But it is important to observe that the Vice-Chancellor accepted that the term 'mines' may be used in several different senses. After holding that a mine and a quarry could not be the same thing, he said, (at p. 917 *ibid*) –

“The meaning of the term does not depend on the nature of the fossil body obtained, it depends on the nature of the mode of working it. Some mines may be worked by means of mining, others by means of quarrying, and, upon the case here shown, the limestone was worked by quarrying. They were not limestone mines, but limestone quarries. That which is worked by mines is by a means of working in which the surface is not disturbed, and when limestone is worked, then it is a limestone mine”.

It is clear that what the Vice-Chancellor was saying is that even though limestone is won by quarrying, that operation may be referred to as mining.

And in *Glasgow Corp. v. Farie* (1886-90) All E.R. Rep. 115, LORD WATSON was of opinion that 'mines' and 'minerals' were not definite terms; that they were susceptible of limitation or expansion according to the intention with which they were used. That case concerned the interpretation of the reservation of 'mines of coal, ironstone, slate or other minerals' under land purchased by a water undertaking under statutory authority. It was held that ordinary subsoil clay, lying at a depth of two or three feet below the surface of the soil and being of varying thickness and normally wrought opencast, was not a 'mineral' within the meaning of the Act. It was argued that under the Poor Relief Act, 1601, it had been held that the word 'mine' referred exclusively to a subterranean excavation and that this was the meaning which should be given to the expression as used in the Waterworks Clauses Act, 1847, but LORD WATSON would have none of this. He said that [at p. 121 *ibid*] –

“Such may have been the original meaning of the word, but it appears to me to be beyond question that for a very long period that has ceased to be its exclusive meaning and the word has been used in ordinary language to signify either the mineral substances which are excavated or mined, or the excavations, whether subterranean or not, from which metallic ores and fossil substances are dug out. It does not occur to me that an open excavation of auriferous quartz would be

## DE CLOU v. DEMBA

generally described as a gold quarry. I think most people would naturally call it a gold mine.

The word 'quarry' is no doubt inapplicable to underground excavations; but the word 'mine' may without impropriety be used to denote some quarries".

LORD WATSON went on to hold that under Act, the word 'mines' must be taken to signify all excavations by which the excepted minerals may be legitimately worked and got.

In *Beard v. Moira Colliery Co., Ltd.* (1915) 1 Ch. 257, the reservation contained in a conveyance gave to the transferor full and free liberty to enter upon the lands, to sink pits and shafts, and to exercise all other powers for working and getting the minerals 'in as full and ample a way and manner as if these presents had not been made and executed'. There was also a covenant for the payment of compensation for damage or injury done in the exercise of the powers reserved. It was held that having regard to the terms of the reservation the surface owner's common law right to support was by necessary implication displaced, and the owner of the reservations had a right to let the surface down.

A more recent case is *O'Callaghan v. Elliot* (1965) 3 W.L.R. where the question to be determined was whether a lease of a sand and gravel pit was a mining lease within the meaning of the Landlord and Tenant Act, 1927 (U.K.). A mining lease was defined by the Act to mean "a lease for any mining purpose or purpose connected therewith", and 'mining purposes' to include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purpose of any manufacture, carrying away, and disposing of mines and minerals, In or under land'. It was held that sand and gravel and clay were to be included in the term 'mines and minerals'.

I trust that I have said enough to indicate that the terms 'mine' and 'minerals' are not to be restricted to underground operations. In his judgment in the court below, the learned judge used language which seemed to suggest that the English cases must of a necessity have referred to underground mining as they (or most of them) concerned coal mines which were underground operations, and that the principles enunciated therein ought not to be transported to mining operations in this country. Counsel for the appellants takes exception to this, and urges instead that the principles enunciated in the United Kingdom are equally applicable here. I am inclined to agree with counsel, with this proviso, that local conditions must not be ignored, and equally vital are the terms of the agreement which creates the reservation.

To complete this aspect of the matter, I would refer to *South Staffordshire Mines Drainage Commrs. v. Grosvenor Colliery Co. Ltd.*, (1961) 125 J.P. 484. In that case a private Act authorised the drainage commissioners to assess and levy upon the occupiers of mines a rate half-yearly in respect of all minerals gotten from mines in the drainage area. The commissioners

brought an action to recover the rate assessed on the occupiers of an opencast working from which coal and other minerals were extracted. It was held that the opencast working was a 'mine' within the meaning of the act, and the commissioners were entitled to judgment. Two things emerged from SELLERS, L.J.'s judgment. The first is the reiteration of the dictum that it cannot be said that the word 'mine' has one clear, natural, ordinary meaning; and the second is that in its infancy, the business of the extraction of coal in the United Kingdom was first done by opencast mining. [See p. 486 *ibid* where SELLERS, L.J. quotes from a report called the 'HISTORY OF THE MINING DEVELOPMENT OF THE COALFIELDS'.].

It would seem therefore that if counsel relies upon the interpretation given by the English courts — and so do I — then his contention that 'mining' must be restricted to underground operations must fail.

It is now time to go back to the reservation and to the surrounding circumstances which existed at the time the reservation was created. It bears repeating in part at this stage. It is —

“the exclusive and unrestricted right to mine on and take from the lands. . . . free from any charge or payment of all bauxite and other ore, minerals and clays, and subject to all rights of way on, over and across the said lands at all times. . . . .”

It is right to examine the circumstances as it now becomes important to ascertain the intention of the parties as can be gathered by the language used. The reservation was created in 1914, and counsel for the appellant, making use of the dictum of MAUGHAN, L.J. in *Warwickshire Coal Co. v. Coventry Corp.* (1934) 103 L.J.R. at p. 280, urges that only facts known at *the date when the severance took place* could properly *be* referred to for the purpose of construction. It is clear that in 1914, the mining of bauxite had not yet commenced in Guyana, so it cannot be said that either party to the reservation had any knowledge of the mode of mining for bauxite.

It would appear that in 1914, the only valuable substance to be won from the earth in Guyana were gold and silver. In 1880 there was enacted “The Gold Mining Ordinance, 1880” which authorised the grant of licences to mine for gold and silver, though the method of mining was not prescribed therein. Then in 1903 the Mining Ordinance, 1903, was enacted to make provision for mining for gold, silver and valuable minerals, and for precious stones. Counsel for the appellants seeks to make the point that the Mining Regulations, 1903, which are to be found in the schedule to the ordinance clearly contemplated only underground mining for gold, diamonds and precious stones. He has attracted our attention to Part X which is headed “Regulation of Mines”. There can be no doubt that that Part of the Regulations does have within its contemplation underground mines, but I am not persuaded that the provisions are restricted to underground mining, and an examination of certain sections of the ordinance and certain regulations would demonstrate this to be so. Section 13 empowers the Governor with

## DE CLOU v. DEMBA

the approval of the Secretary of State to grant a general concession to any person, entitling such person to the soil and to gold, silver, and valuable minerals, and precious stones found therein. Section 15 authorises the Governor in Council to grant, subject to the ordinance and any regulations made thereunder, concessions to mine for and take and appropriate gold, silver, valuable minerals, and precious stones, and section 28 provides for the issue of licences to mine. The argument of counsel is that the words 'to mine for and when found take and appropriate' used in these two sections must of a necessity refer to underground mining. Section 81 provides for the making of regulations in respect of several matters, including the mode of working claims, applications for and issue of dredging concessions, the sanitary regulations of claims and places adjacent to claims and the regulations of mines; and these regulations would relate to soil, gold, silver, valuable minerals and precious stones. In Part X of the regulations, one finds expressions such as 'the working of a mine underground' (reg. 139); 'No body under the age of sixteen years shall be employed below ground . . .' (reg. 140); 'The owner, manager, or person in charge of every mine where there are underground workings . . .' (reg. 145 (1)); 'All additions of any kind of the underground workings of such mine . . .' [reg. (4)]. It seems to me therefore to follow that while Part X of the Regulations makes provision for the safe working of underground mines, the scheme of the 1903 legislation contemplates the search and mining (not limited to underground mining) for gold, silver, valuable minerals and precious stones, and the removal of soil. This was the state of affairs in 1914 when the reservation was carved out of the title of the lands in question.

It is not without interest to note that in 1919 the Governor in Council, acting under the provisions of section 14(2) of the 1903 Ordinance ordered the granting of exclusive permissions to occupy and test the value of unoccupied Crown lands for the exploration of any mineral or metal other than gold, precious stones, bauxite or mineral oil. (Rules and Regulations, 1919, at p. 151). Presumably, the reservation of bauxite was as a result of the quickening of interest occasioned by researches carried out by Prof. J. B. Harrison in various areas, including regions on the upper banks of the Demerara River. [See Combined Court Sessional Paper No. 918 of 1917]. This reservation was perpetuated by the Mining Regulations 1924, and the Mining Regulations, 1931. Those regulations provided that they shall apply to gold, precious stones and minerals and metals, their ores and compounds other than bauxite, and mineral oil, asphalt, coal and other substances of a like nature. It would appear that the first set of regulations dealing specifically with bauxite was made in 1930 and these were entitled the Bauxite Mining Regs., 1930. Suffice it to say that these regulations provided that references to the mining of bauxite was to be construed to include every method by which it shall in fact be won; they spoke of the mining of bauxite (reg. 18) and of working, digging, getting, mining, raising, converting and carrying away bauxite (reg. 21).

It can, I would imagine, be argued with some degree of force that the draftsman of the 1930 Bauxite Mining Regulations made such a provision because the term 'mining' under the then mining laws may not have been regarded as having the wide meaning now being attributed to it by the respondents. This view is dispelled when one examines the state of the law prior to 1930 as I have endeavoured to do.

To revert to the state of affairs in 1914. *Warwickshire Coal Co. v. Coventry Corp.* (1934) 103 L.J.R. 269 is clear authority for the proposition that the governing consideration in cases of this nature is the knowledge of the parties at the time of the severance. Dealing with a reservation of the rights to work coal, ROMER, L J. said [ibid at p. 277].

“When the ownership in coal is severed from that of the overlying strata, it is, of course, always contemplated and intended that it shall be worked. Otherwise, there would be no object to severing it. But it is impossible to imply an intention that it may be so worked as to let down the surface, unless it be known at the date of the severance that it cannot be worked otherwise. In all these cases it is the intention of the parties that is being sought for, and intention pre-suppose knowledge”.

In the case before us, there is no evidence as to what knowledge either party to the conveyance had of the methods of winning bauxite. It follows in my judgment, therefore, that one must look at the circumstances existing at the time of the reservation in order to arrive at the intention of the parties. These circumstances are the state of the law at that time, the history of the title, and the wide terms of the reservation which included the mining of clay — a substance which is not necessarily found in subterranean workings only. In my view, the reservation of clay also points to surface operations and the destruction of the surface, as there appears no justification for limiting it only to clay to be found by underground mining. These are such as to lead to the conclusion that it was the intention of the appellants' forbears to part with their right of support.

The appellants' third submission, it will be recalled, is that having as from 1949 acquired an undivided two-thirds share in the land, the respondents as co-owners lost their right which was then in the nature of a personal servitude, and acquired instead the right as a co-owner to mine over the entire land, but that this latter right was subject to the appellants' right to an account of all profits made. Counsel has referred us to HALL & KELLAWAY (opus cit.) at pp .3, 121, and 131, BURGE'S COLONIAL LAWS, Vol. 4 p. 534, n.o., and NATHAN'S COMMON LAW OF SOUTH AFRICA, Vol. 1, p. 491 at para. 723. These works are all agreed that a servitude is indivisible and is extinguished by merger (confusio) but they speak of praedial servitudes where there are both dominant and servient tenements. This is not the case here. Indeed, the note referred to in Burge's Colonial Laws says that there was no extinction where the owner of the dominant land acquired only a part of the servient land.

## DE CLOU v. DEMBA

Although the owner of an undivided interest in land is entitled to enter upon and use the entire land, he is not entitled to damage or destroy the land. If he does any damage or destruction, he will be liable in trespass at the suit of his co-tenant [*Wilkinson v. Haygarth*, (1843-60) All E.R. Rep. 968]. So long as a tenant in common is only exercising lawfully the rights he has as a *tenant in common*, no action can lie against him by his co-tenant. [*Jacobs v. Seward*, (1872) 5 L.R. 464]. In the instant case, it can be said that the respondents are exercising rights of ownership, to the extent of their title, and as far as the remainder is concerned, they continue to exercise the right to mine as prescribed in the reservation. In other words, the servitude has not been extinguished, and the respondents can insist, as I appreciate their stand in this matter, on the preservation of their rights under the reservation. It seems to me that this right remains alive and is available to them until they become the full owners of the land in question when it becomes merged in the title, and may not be resuscitated except by a new instrument. In the meantime, I feel that the respondents are entitled to exercise their right to mine.

For the reasons which I have endeavoured to set down here, I would dismiss this appeal, I would affirm the judgment of the court below, and order the appellants to pay the respondents their costs of this appeal.

*Appeal dismissed — Order of Court below affirmed.*

Solicitors:

*J. Jorge* (for appellants.)

*J. E. De Freitas* (for respondents).

JOSEPH CHATEAU DOOBAY v. ISAAC ALEXANDER,  
DETECTIVE INSPECTOR – (NO. 2)

[In the Full Court of the High Court (Bollers, C.J., and Crane, J)  
March 4, 16; June 22, 1967]

*Criminal Law — Two separate offences charged in the same complaint — “Between the 4th and 6th January, 1966, in a medical district in which a duly registered medical practitioner resided, practised medicine for gain or reward.” — Whether bad for duplicity — S. 34(1) of the Colonial Medical Service Ordinance, Cap. 134 (omitted from the 1973 current Laws of Guyana).*

*Criminal Law — Medical District — Residence of duly registered medical practitioner — Proof of — Colonial Medical Service Regulations, Cap*

*134 (Subsidiary Legislation) (omitted from 1973 current Laws of Guyana).*

*Criminal Law — Registered medical practitioner — Evidential burden — Exemptive provision — S. 8 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15 (now s. 9 of the Summary Jurisdiction (Procedure) Act, Cap. 10:02),*

As the result of a police trap, three decoys went on three consecutive days, viz., 4th, 5th and 6th January, 1966, to the home of the appellant who examined them, administered injections and supplied tablets, for which services he was paid. He was later charged under s. 34(1) of the Colonial Medical Service Ordinance, Cap. 134, for “practising medicine between the 4th and 6th January, 1966, in a medical district in which a duly registered medical practitioner resided, for gain or reward, on three different persons by administering injections and supplying tablets after examining them.” The Magistrate held that the appellant had ‘practised medicine’ within the meaning of the section charged since the examinations, diagnoses and prescriptions done by him were acts in imitation of the professional practice of medicine and that they were against the law and fell within the ambit of the Full Court’s decision in *Mathews v. Hinds* (1941) L.R.B.G. 24., in which it was held that one instance alone was insufficient to constitute the practice of medicine. On appeal against his conviction and fine of \$100 it was argued that (1) the complaint was bad for duplicity in that it was alleged that (a) the appellant had practised medicine “between the 4th and 6th January, 1966” and (b) he had done so for “gain or reward”; (2) there had been no allegation by the prosecution that the appellant had practised medicine whilst not being duly registered, and (3) there was no evidence to show that a duly registered medical practitioner resided in the medical district alleged, i.e., Georgetown.

HELD: — (per Bollers, C.J., delivering the Court’s Reasons for Decision) that (i) the Magistrate was correct in his finding that the appellant had practised medicine within the meaning of s. 34(1) of Cap. 134 and that the charge was not bad for duplicity since the prosecution could properly prefer in one information or complaint several acts committed at different times of one day or dates between any two dates, each of which constitutes a separate offence, but only so long as they relate to an offence of a continuous nature or are demonstrative of a course of conduct manifesting one transaction. Here, the offence charged was the unauthorised practice of medicine for gain or reward on three consecutive days and the practice of medicine must necessarily be a continuous act, habit and repetition being of its essence: (ii) it is a misconception that it is incumbent upon the prosecution to allege that the appellant is not registered under the Ordinance. Since this is a fact peculiarly within the knowledge of the appellant, it is an exemptive provision under s. 8 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15 and no proof in relation to it is required from the prosecution. All they need allege is that the appellant ‘practised medicine’ for gain or reward in a medical district in which a registered medical practitioner resides and an evidential burden would then be cast upon the appellant, to be discharged on the mere balance of probabilities, that he was duly registered under the Ordinance, and (iii) the evidence of Dr. Sankar together

## DOOBAY v. ALEXANDER (NO. 2)

with the wording of the applicable subsidiary legislation was sufficient to prove this ingredient of the charge.

*Appeal dismissed — Conviction and sentence affirmed.*

[*Editorial Note:*— The appellant's appeal to the Court of Appeal (Criminal Appeal No. 56 of 1967) was dismissed by that court (Stoby, C., Khan, C.J. (Ag.), and Cummings, J.A.) on 20th September 1967] [unreported]

*R. H. McKay* for appellant.

*W. G. Persaud, Acting Crown Counsel*, for respondent.

*Cases referred to:* —

(1) *Matthews v. Hinds* (1941) L.R.B.G. 24 (F.C.).

BOLLERS, C.J.: We upheld the conviction and sentence and dismissed this appeal for the following reasons:

The charge which was laid contrary to s. 34(1) of the Colonial Medical Service Ordinance, Cap. 134 reads as follows: "No one shall for gain or reward at any time practise, or hold himself out, whether directly or by implication, as practising or entitled to practise, medicine or surgery in any medical district of the colony in which a duly registered medical practitioner resides unless he is registered under this ordinance."

The substance of the particulars are that on three consecutive days, namely, the 4th, 5th and 6th January, 1966, the appellant in a medical district in which a duly registered medical practitioner resided practised medicine for gain or reward on three different persons by administering injections and supplying tablets after examining them.

After hearing evidence in April and May 1966, the learned magistrate found the appellant guilty and convicted him and imposed a fine of \$100.00.

Three grounds of appeal — A, B and C — were argued before us. Firstly, ground A was that the complaint was bad for duplicity in that it alleged (i) that the appellant practised medicine "between the 4th and 6th of January, 1966," and also (ii) that he did so for "gain or reward". In substance, the complaint on this ground is that the prosecution ought not to have framed the particulars of the charge as they did so as to disclose the existence of what is admittedly three offences in one charge. It was quite permissible, it was contended, for the prosecution to charge each incident as a specific offence in three separate informations, and for the magistrate to have heard them all with the consent of the appellant at one and the same time. It was also quite permissible for the prosecution to charge the defendant with the offence of practising medicine in respect of any one day and to lead evidence in respect of any or both of the other two days, but not permissible to roll up all three offences in one charge as has been done. It was argued that the chief objection to the course adopted is the prejudicial effect on the accused who would be unable to

plead *autrefois acquit* to any particular offence. We have already dealt *in extenso* with the various aspects of this ground of appeal when we sat over the appellant's appeal in C.J. No. 303/66, wherein he was charged on an information tried by the magistrate jointly with C.J. No. 304/66, the appeal from which is now before us (see judgment of BOLLERS, C.J.). Accordingly, we think it is sufficient to say that the prosecution may properly prefer in one information or complaint several acts committed at different times of one day or dates between any two dates, each of which constitutes a separate offence, but only so long as they relate to an offence of a continuous nature, or are demonstrative of a course of conduct manifesting one transaction — see 35th Edition ARCHBOLD para. 122 "Duplicity". In this case the offence charged is the unauthorised practice of medicine for gain or reward on three consecutive days. The practice of medicine must necessarily be a continuous act, habit and repetition being of its essence — see *Mathews v. Hinds* (1941) L.R.B.G. 24 which is to the effect that one instance alone is insufficient to constitute practice.

We believe we are amply supported in our view by the form in which prosecutions on indictments are framed in offences which from their very nature are obviously continuous from both grammatical and logical standpoints. In this regard, see 35th Edition ARCHBOLD paras. 2965 and 3857, i.e., *Living on the Earnings of Prostitution and Keeping a brothel*. In both instances the indictments are framed as follows — "A, B, on the — day of— and on other days between that date and the — day of —." Admittedly, one certain day is named at first but then other days are named between *that* day and another. It seemed to us there is no distinction of substance to be drawn between the indictments and the information under appeal.

On limb (ii) of the first ground of appeal, we are in agreement with the learned magistrate that — "it is sufficient to constitute practice within the meaning of the section where a person on three separate occasions performed acts in imitation of the professional practice of medicine." The learned magistrate satisfied himself that the appellant examined each of the three decoys on each of the three dates mentioned in the particulars, diagnosed their complaints and then prescribed a remedy for each of them; he went on to state that in his opinion these several acts were in imitation of professional practice; they were against the law and fell within the ambit of *Mathews v. Hinds*, above, and we must say we are in agreement with him. This ground therefore fails.

For convenience we will deal with ground C, secondly. It is here alleged that there is no evidence to show that a duly registered medical practitioner resided in the medical district alleged i.e., in Georgetown. In the first place, there is the evidence of Dr. Sankar for the prosecution that Camp Street is a medical district in the Colony of British Guiana, and in the city of Georgetown, in the Georgetown Judicial District, and, in the second place, that Georgetown is a medical district, is clearly stated in Order-in-Council No. 17 — see subsidiary legislation Cap. 134 Vol. 8 Laws of Guyana, and Exs. KK, LL, the Official Gazette dated 25.4.64, showing

## DOOBAY v. ALEXANDER (NO. 2)

residences of medical practitioners in Georgetown. We held there was no substance also in this ground of appeal.

The third and final ground of appeal is to the effect that there is no allegation that the appellant practiced medicine not being duly registered to do so as required by law. In our opinion this ground is misconceived, for it is not incumbent on the prosecution to allege that the appellant is not registered under the ordinance. Indeed, that fact is peculiarly within his knowledge and even though the prosecution may be aware of it, it is an exemptive provision, and no proof in relation to it is required from them. (See sec. 8 of Cap. 15). The prosecution need not mention the fact that the defendant is not registered in the particulars of offence. Section 34(1) imposes an absolute prohibition against anyone who practices medicine for gain or reward in a medical district in which a medical practitioner resides, "unless he is registered under this ordinance." All the prosecution need allege is that he practiced medicine for gain or reward in a medical district as aforesaid and state as above, that this was done contrary to law. The appellant will then have to prove he is registered under the ordinance.

It was for the above reasons that we dismissed the appeal and affirmed the conviction and sentence of the learned magistrate.

*Appeal dismissed — Conviction and sentence affirmed.*

HAROLD RAJNARINE v. BRITISH GUIANA &  
TRINIDAD MUTUAL FIRE INSURANCE CO., LTD.

[In the High Court (Crane, J) – June 27, 1967]

*Costs — Payment into court — True basis upon which such payment rests — Judicial discretion — Order 20 Rule 6 of the Supreme Court Rules, 1955 (now Order 20 Rule 6 of the Rules of the High Court, Cap. 3:02 (Subsidiary)).*

*Costs — Prompt payment into court by defendant before statement of claim filed — Amount lodged more than amount actually recovered — Not uplifted by plaintiff — Effect of.*

The writ was filed on September 3, 1966 and served on September 9, 1966. The defendant entered appearance on September 14, 1966, and the very next day, filed notice of payment into Court of the sum of \$4,515.64, which was before the statement of claim was filed and delivered. The plaintiff elected not to uplift the sum lodged but contested the claim on the footing (which proved erroneous at the trial) that the amount paid in was not either the real value of the motor-car or the amount for which it was insured, and lost. On April 15, 1967, Crane, J., gave judgment in the sum

of \$4,089; and the question of costs was reserved for further argument. On April 27, 1967, Crane, J., gave a written ruling in which it was –

**HELD:**— that (i) where a defendant pays money into court which exceeds that awarded to a plaintiff then he is regarded as a successful party in the suit and is entitled to receive his costs as from the date of payment in; this is the modern practice; (ii) under O. 20 R. 6 of the Supreme Court Rules, 1955, the Court, in exercising its discretion thereunder, must have regard both to the fact that (a) money was paid into court and (b) the amount of such payment; (iii) here, in the exercise of its judicial discretion, the court had to take into account that payment into court had been very prompt indeed which showed how intent the defendants were to avoid litigation and the incurring of costs.

*Ordered that plaintiff to have his costs up to the time of payment in, and, thereafter, the defendants to have their costs.*

*R.H. McKay for plaintiff.*

*C.L. Luckhoo, Q.C., for defendants.*

*Cases referred to:—*

- (1) Findlay v. Railway Executive (1950) 2 All E.R. 969.
- (2) Wagman v. Vare Motors Ltd. (1959) 1 W.L.R. 853.
- (3) Brown v. New Empress Saloon's Ltd. (1937) 2 All E.R. 113.
- (4) Cullinane v. British "Rema" Manufacturing Co. Ltd. (1953) 2 All E.R. (C.A.).
- (5) Hultquist v. Universal Pattern & Precision Engineering Co. Ltd. (1960) 2 All E.R. 266.

CRANE, J.: At the conclusion of judgment on April 15, 1967, counsel for both parties asked that the question of costs be reserved for further argument. They did so in view of the fact that the defendants had paid into court a larger sum than that recovered, which they considered to be, and has turned out to be sufficient to satisfy the damages awarded in the action. This ruling is therefore merely complementary to my judgment of the abovementioned date.

The amount paid into court is \$4,515.64. This was before the statement of claim was filed; and the amount actually recovered is \$4,089.00. Lodgment in court therefore amply exceeds the court's award in the present case.

Before setting out the contention of counsel for the plaintiff, I think it is fitting if I state briefly the legal position as to costs when money is paid into court to abide the consequences of an action at law.

This is regulated by the joint operation of two Orders of Court viz., 0.20 and 0.49 of The Rules of The Supreme Court 1955. The latter is one of general application giving the court a wide discretion as to costs of and incidental to all proceedings before it; whereas rule 6 of the former Order is specific; it deals with payment into court and directs that — "the Judge

RAJNARINE v. B.G. & TRINIDAD INSURANCE CO.

shall in exercising his discretion as to costs, take into account both the fact, (i) money has been paid into court and, (ii) the amount of such payment". In both Orders then the court must exercise a discretion as to costs; but in the case of O.20 r. 6 specified matters must be taken into account in the exercise of judicial discretion. This however, is not a fetter of the court's discretion which still remains free, but must always be exercised in a judicial manner.

The authorities show that a defendant who pays money into court which exceeds that recovered by a plaintiff, is regarded as a successful party in the suit and is entitled to receive his costs as from the date of payment in. In *Findlay v. Railway Executive* (1950) 2 A.E.R., 969, 971, SOMERVELL, L.J., summed up the effect of payment in thus: "Once, therefore, the money has been paid in, the *lis* between the parties simply is: Is that sum sufficient to cover the damage which has been suffered? " The purport of the above authority is to the effect that only on the proper exercise of judicial discretion upon proper material arising out of the case or conduct of it, can a defendant be deprived of his costs – see too per MORRIS, L.J., in *Wagman v. Vare Motors Ltd.*, (1959) 1 W.L.R. 853, at p. 860.

Counsel for the plaintiff contends that I should not adhere to the above principles in this case in awarding costs in these matters; he has cited two cases – *Brown v. New Empress Saloon's, Ltd.* (1937) 2 A.E.R., 133, and *Cullinane v. Br. "Rema" Manufacturing Co. Ltd.*, (1953) 2 A.E.R., 1257, the former, of which shows that notwithstanding that a lesser sum is recovered than that paid into court I am not necessarily bound by the principles I have set out above; he has asked me to pay regard to the paucity of the award which is recovered by his client, the high rate of premiums charged by the defendants, and to consider whether it was not reasonable for the plaintiff to have continued the litigation after the payment in. Counsel urges that the rule as to payment into court is not designed to inflict hardship on the plaintiff by penalising him.

I regret however, that I can pay no regard whatever to any of the considerations which counsel has asked of me. So to do would, I believe, not be to act in due exercise of a judicial discretion. In the exercise of this discretion I must take into account that payment into court has been very prompt indeed, and made ostensibly with a view to avoiding litigation. I note this is so from the fact that the writ which is dated September 3, 1966, was served on September 9, while appearance to it was entered on September 14. Notice of payment into court of \$4,515.64 before defence was filed the very next day i.e., on September 15. This was before the statement of claim was filed and delivered. To my mind the swiftness of these acts show how intent were the defendants upon avoiding litigation and the incurring of costs. Surely they should be compensated for all this in costs?

The plaintiff on the other hand, elected not to uplift the sum lodged, but to contest the claim on the footing which proved erroneous at the trial

that the amount paid in was not either the real value of the motor-car or the amount for which it was insured, and lost.

For me to go now into the question as to whether the defendants have in fact charged too high a premium or whether the *quantum* of the award was right in the circumstances, would in my view, be to relitigate issues as to liability which have already been concluded by my judgment of April 15, 1967. This contention, it seems to me, misconceives the true basis on which a payment into court rests — “A payment into court,” said SELLERS’, L.J., in *Hultquist v. Universal Pattern & Precision Engineering Co. Ltd.*, (1960) 2 A.E.R., 266, at p. 272, “is an offer to dispose of the action and, if accepted, prevents all further costs. A plaintiff who continues an action after payment in takes a risk and cannot normally complain if he has to pay all the costs which his acceptance of the offer would have avoided.”

Referring to the two authorities above, cited by plaintiffs counsel in support of his argument that the court has an unfettered discretion as to costs, I can do no better than to quote again from SELLERS, L.J., in the *Hultquist* case above, at p. 272 on the point:

“Counsel for the plaintiff relied on a number of cases cited in the Annual Practice in the notes to this rule, and submitted that the plaintiff was entitled to the costs of the issue on which he had succeeded. Those cases must be treated as relying on their special facts. I do not think that they can be regarded at the present time as authorities which require a judge to grant such costs or which require this court to intervene if he fails to do so. The whole question must be dealt with in the discretion of the judge in accordance with the rule.”

I can find no valid ground for exercising my discretion in the direction sought by counsel, and I propose to follow strictly the modern practice in this matter which does not require a court to distinguish between issues of liability and damages or to make any special order on any issue of liability on which plaintiff succeeds. The modern practice is to regard the parties at the end of the day to see whether the amount paid in is more or less than the total of the plaintiff’s claim or claims. If the amount the court awards is less than the amount paid into court, the practice is to order that the plaintiff should have his costs up to the time of payment in and the defendant his costs after that time; and I so order in the case in hand.

*Ordered that plaintiff to have his costs up to the time of payment in, and, thereafter defendants to have their costs.*

Solicitors:

*H. D. Eleazer* (for the plaintiff),

*Dias & Dias* (for the defendants).

MOHAN PERSAUD AND OTHERS v. DRAINAGE AND  
IRRIGATION BOARD

[In the High Court (Bollers, C.J.) – February 20, 21, 22, 24;  
March 2; June 1967.]

*Drainage and Irrigation area — Inadequacy of koker boxes — Farmers' lands threatened by flooding — Several reports made to Drainage Overseer — No steps taken to avert disaster — Whether duty of care owed by Board — Action for damages for negligence.*

*Justices' Protection — Omission of Drainage Overseer — Whether administrative or judicial act — Whether Board liable therefor — S. 2 of the Justices' Protection Ordinance, Cap. 18 (now S. 2 of The Justices' Protection Act, Cap. 5:07).*

Plantations Blake and Kakaterie were included within the Vergenoegen-Boerasirie Drainage and Irrigation area by an Order-in-Council made in 1956 under the Drainage and Irrigation Ordinance, Cap. 192 (now the Drainage and Irrigation Act, Cap. 64:03). Inserted in the dams parallel to the facade drain were small koker boxes which were built on the advice of an Engineer-Economist to accommodate rainfall of 1½ inches, it being considered that, having regard to the average rainfall in this country, 1½ inches of rainfall falling on the land in 24 hours would run off during the 14 hour period that the sluices were open. In December 1964, the plaintiffs were all farming various portions of the land at Kakaterie, mainly with ground provisions, when the rains came and the farmlands were threatened with flooding. Around the middle of that month, the plaintiffs went to the Drainage Overseer, one Singh, who lived nearby, and told him that the koker box through which the water from the internal trench flowed was too small to discharge the water into the facade trench and, also, that only 2 of the 3 sluices were operating and they requested his permission to remove the koker box and cut the dam in order to allow the free flow of water through the dam into the facade trench. The Overseer bluntly refused and warned them that if they cut the dam they could get into trouble. However, he promised to insert larger koker boxes but this was never done and the plaintiffs' crops were destroyed. The rains held up in January and February 1965, during which time the plaintiffs were able to plough and re-plant their crops. However, in May 1965, when the crops were growing, the rains came again and a similar request to the Overseer to cut the dam was again refused. After writing several letters to the Board to which they received no reply, the plaintiffs' formed a delegation which went to Georgetown and they spoke to the Chief Engineer of the Board who told them that there would be an emergency meeting of the Board that afternoon when a decision would be taken. On the following day, the plaintiff, Young, received a telegram from the Chief Engineer giving the necessary permission to cut the southern embankment and requested that the koker box be handed over to the Overseer. On May 31, 1965, the Chairman of the Board addressed a letter to Young giving temporary permission for the cut in the southern embankment to remain open until funds were available to effect improvements to the available facilities. Unfortunately, by the time the plaintiffs were able to cut the dam and release the flood waters from their farmlands, their crops had already been completely destroyed.

The plaintiffs sued the Board for damages for negligence alleging that the defendants owed them a duty of care through their servants and/or agents in that they negligently caused or permitted their farmlands to be flooded thereby causing them loss and damage. In their particulars of negligence, the plaintiffs alleged that (a) the facade box was so carelessly and negligently kept that it resulted in the over-flooding which caused damage to their cultivated farms, and (b) that the facade box was so small that the defendants well knew that this would have caused such an over-flooding with its consequential detrimental effect.

**HELD:**— that (i) although the plaintiffs had not established either of the particulars of negligence given in their statement of claim, nevertheless, there was negligence in the Board through the Overseer, its servant or agent, when he took no steps to avert the flooding despite repeated warnings by the plaintiffs between December 1964, and May 1965; (ii) although no particulars were given in respect on the negligence which the Court found had existed, nevertheless, as the matter was fully ventilated and argued in Court, then the Court itself would amend the particulars of negligence to include its finding on this issue; (iii) as the Board is not a Crown servant and is therefore sueable in tort, then it is entitled to the protection afforded by the Justices' Protection Ordinance, Cap. 18, and the Overseer, as a servant or agent of the Board, is in the position of a Justice of the Peace by virtue of s. 14 of the Ordinance; (iv) in the present action, the omission of care found against the Overseer was an act of an administrative nature and although s. 2 of the Ordinance applies to both judicial acts and acts of an administrative nature in the erroneous exercise of judgment, here, the Board was not protected thereunder, since there was no question of an erroneous exercise of judgment either on the part of the Overseer or, indeed, on the part of any senior officer, such as the Chairman, Secretary or Chief Engineer, as they had not in fact exercised any judgment at all and, accordingly, the defendants were liable in damages for the common law action for negligence; (v) although the action was out of time of the statutory period of 6 months as laid down by s. 8 of the Ordinance in relation to the flooding of December 1964, not having been filed until July 3, 1965, nevertheless, it was within the time in relation to the second flooding of May 1965, and (vi) in view of (v) the amount claimed would be reduced and judgment would be given to each plaintiff for one-quarter of the sum claimed together with taxed costs.

(Dictum of Chung, J., in *Hansraj Singh v Drainage & Irrigation Board* (8) on the applicability of s. 2 of the Ordinance, expressly approved).

*Judgment for Plaintiffs.*

*Cases referred to:—*

- (1) *Blyth v. Birmingham Waterworks Co.* (1865) 11 Ex. 781.
- (2) *Donoghue v. Stevenson* (1932) A.C. 561.
- (3) *Sukhu & Others v. Drainage & Irrigation Board* (1962) L.R.B.G. 174.
- (4) *Din v. Drainage & Irrigation Board* (1962) L.R.B.G. 434.
- (5) *Wilson v. Mayor & Corporation of Halifax* (1868) 32J.P. 230.

## PERSAUD ET AL v. D. &amp; I. BOARD

- (6) Ferguson v. Kinnoull (1842) 9 Cl. & Fin. 251, H.L. (1842) 4 State Tr. N.S. 785 H.L.
- (7) Everest v. Griffiths & Another (1921) A.C. 631.
- (8) Hansraj Singh v. Drainage & Irrigation Board (1966) G.L.R. 227.

*R. H. Hanoman* for plaintiffs.

*Doodnauth Singh* for defendants.

BOLLERS, C.J.: In 1956 land in the Vergenoegen-Boerasirie area was declared a drainage and irrigation area by an Order-in-Council under the Drainage and Irrigation Ordinance, Chapter 192 and wells were constructed and completed in 1960. Plantations Blake and Kakaterie were included within the declared area. In this area the government built all the main wells for drainage and irrigation which included the main facade drain and sluices for drainage and irrigation. Canals with high sand banks were constructed with regulation for irrigation. The Drainage and Irrigation Board maintained all the works that were registered in the Board which included the facade drains, sluices, irrigation canals and the high level sand banks. In digging the facade drain, earth was thrown up parallel to the drain and dams were formed and into these dams, which were used for access purposes, were inserted koker boxes which were designed to take off the flow of water from the farm lands. The boxes were meant to be internal works in order to give the farmers drainage through the facade drain. There were, however, no internal works carried out by the Board and the scheme was only designed in respect of main works for drainage and irrigation purposes and whereas the dams, canals and facade trenches being included in the plan were vested in the Board, the box kokers did not vest in the Board and were not included in the plan of the scheme. The plan with the Order-in-Council was duly deposited in accordance with the ordinance. The Board remained responsible for the maintenance of the dams, canals, trenches, etc., but the proprietors of the estates were responsible for maintaining the koker boxes, notice of which was never given to them in writing. In this area the charge to proprietors for drainage rates for maintaining works of this nature which were carried out was \$2.52 to \$3.54 per acre but the proprietors of Blake-Kakaterie never in fact paid any drainage rates. This area of Blake-Kakaterie consisted of 215 acres, Blake being to the south of Kakaterie, each plantation consisting of roughly 100 acres, and through the centre of the estates is an internal drain which runs up to the dam in which the koker box is situate and the water from the internal drain flows through the dam, through the koker box, into the facade trench. From the main internal drain or trench there are trenches running east to west into the farms on either side of the internal drain and separated a distance of three roods away from each other and of course parallel to each other, and in that way the farms are drained and irrigated from these trenches into the main internal drain which connects up with the facade trench through the koker box on the dam to the north of the farmland.

When these koker boxes were constructed, regard was paid to the economics of the scheme and the funds that were available, and the external dimensions were 3 ft. by 3 ft. with the internal dimensions being 2 ft. 2ins. by 2ft. 6ins. high, having regard to the number of trenches and the total amount of water expected to come down from those trenches. The criterion which was used was that 1½ inches of rainfall would run off during the 14-hour period that the sluice was open and the overall rate of run off would therefore be 20½ cubic feet per second. On the assumption that each box would take a fair share of the run off, the amount of water going through each box would be 6.8 cubic feet per second and the speed of the water running through the box would be 1.27 feet per second, the difference in level between the upstream and the downstream end of the box being 3/8 inch. It was therefore considered that having regard to the average rainfall in this country that 1½ inches of rainfall falling on the land in 24 hours and having run off through the sluice in 14 hours was the normal designed criteria for this project. The boxes were therefore built on the advice of an Engineer-Economist to accommodate rainfall of 1½ inches

In December 1964, the plaintiffs who were all farming various portions of the land at Kakaterie had their farms well planted with various crops including plantains, bananas, yams, papaws, eddoes, etc., when the rains came and they were threatened with a flood. Around the middle of that month they went to the Drainage Overseer, Mr. Singh, who was stationed at Naamryck near to Kakaterie, and they informed him that their farms were threatened with a flood and that the koker box through which the water from the internal trench flowed was too small to discharge the water into the facade trench, and they asked him for permission to remove the box and cut the dam in order to allow a free flow of water through the dam into the facade trench. It was also the complaint of the farmers that only two of the three sluice gates were operating and the Drainage Overseer gave the plaintiff Young, who was the Manager of Kakaterie, notes to take to two sluice operators to open all three gates. The Drainage Overseer refused to give them the necessary permission, telling them that he could not give the permission and that if they cut the dam they would get into trouble. He promised to insert a larger box which promise was never kept, with the result that the crops were destroyed. 'The rains held up in January and February during which period the farmers were able to plough and replant their crops and in the month of May crops were again growing on the farms. The rains again arrived in May and again permission was sought by the plaintiffs of the Drainage Overseer to cut the dam and remove the koker box, and again permission was refused by the Drainage Overseer who kept promising to have inserted a larger box but failed to do so.

The Drainage Overseer took no steps whatever to alleviate the flood and I do not accept his evidence that he went to see the situation himself and found that the box was discharging the water properly and that the sluice was throwing off the water correctly. I do not believe that he ever went near the scene and I am convinced that he made no communication whatever to

## PERSAUD ET AL v. D. &amp; I. BOARD

the Board through the Secretary or the Chief Engineer as to what the true position was nor did he convey to those officers the request made to him by the farmers, even though the plaintiff Young considered it profitable to state incorrectly that the Chief Engineer told the delegation that Mr. Singh had requisitioned a larger box for \$900.00, funds for which were not available. The evidence, therefore, given by the Drainage Overseer and the Ranger as to their inspection and handling of the matter was rejected.

A delegation of the farmers, after writing letters to the Board to which they received no reply, eventually travelled to Georgetown and spoke to the Chief Engineer of the Board who informed them that the Board did not have funds available to supply a larger box but there would be an emergency meeting of the Board that afternoon when a decision would be taken. On the following day the plaintiff Young received a telegram from the Chief Engineer giving the necessary permission to cut the southern embankment of the Hubu-Blake facade drain and informing him that the box was to be handed over to the Drainage Overseer. On the 24th May, 1965, a letter was despatched by the Chief Engineer to the plaintiffs concerning the decision taken in the telegram. On the 31st May, 1965, the Chairman of the Drainage and Irrigation Board addressed a letter to the plaintiff Young giving temporary permission for the cut in the southern embankment of the facade drain to remain open until funds were available to effect improvement to the facilities available. By the time the farmers were able to cut the dam and release the water from the farmlands the flood had completely destroyed the crops.

From these circumstances the plaintiffs have sued the Board for damages for negligence and they claim that between the month of December, 1964 and the 24th May, 1965, the defendants in breach of their duty and care owed to them through their servants and/or agents, negligently caused or permitted the lands cultivated by them to be flooded thereby causing them loss and damage. In their Particulars of Negligence, the plaintiffs allege that the facade box was so carelessly and negligently kept that it resulted in the over-flooding of the cultivated farms causing damage to them and further that the facade box was so small that the defendants well knew that this would have caused an over-flooding of the plaintiffs' cultivated lands to the detriment of their crops.

I do not consider that the plaintiffs have established either of the particulars of negligence given in the Statement of Claim. There is no evidence to suggest that the koker or facade box was ever carelessly or negligently kept by the defendants and there is no evidence to indicate that this box which was erected in 1959—60 did not work well from that period up to 1964. In respect of the second head of Particulars of Negligence, it could not properly be said that the box was so small that the defendants knew or ought to have known that it would cause over-flooding, as the box was constructed on the advice of an Agricultural Economist, having regard to the economics of the scheme and based on the normal design criteria for the project. There was nevertheless negligence in the Board through its

agent or servant, the Drainage Overseer, when he was informed by the plaintiffs both in December and early in May that a flood was threatening and he took no steps whatever to avert it. In my view there was then a clear breach of a legal duty to take care by one of the servants or agents of the defendants, after repeated warnings over the period December 1964 to May 1965, which resulted in causing injury to the plaintiffs.

The defendant Board is a statutory corporation and can only act through its agents or servants and when the Drainage Overseer who was fully informed of the situation and who was in charge of the Board's operations at Kakaterie, both in December 1964 and May 1965, failed to convey the request of the plaintiffs to the Secretary or Chief Engineer of the Board who were in a position to grant the necessary permission, and when he failed to see that all the sluice gates were properly opened so that the water could run out, the Board then became liable for negligence. There was then in the words of ALDERSON, B. in *Blyth v. Birmingham Waterworks Co.* (1865) 11 Ex. 781 at p. 784, the omission to do something which reasonable men guided upon those considerations which ordinarily regulate the conduct of human affairs, would do. That the defendants owed the plaintiffs a duty must be accepted as the defendants were responsible for the maintenance of the main works on the scheme and must therefore conduct their operations in such a manner as not to cause injury to the plaintiffs.

In my view, the parties would come within the proximity test as laid down by LORD ATKIN in *Donoghue v. Stevenson* (1932) A.C. p. 561 which, as the learned authors of SALMOND ON TORTS 12th Edition at page 398 state, is merely a convenient description of the state of affairs which exist when the relationship between the parties is such that there is a real likelihood of harm to some legally protected interest against which precaution should be taken. There were no particulars given in respect of the negligence which I have found to exist but as the matter was fully ventilated and argued in court I can see no reason why I should not amend the particulars of negligence to include this situation and I accordingly do so.

It is conceded by both counsel that the Drainage Board is not a Crown servant and is sueable in tort and that the Board is entitled to the protection of the Justices Protection Ordinance, Chapter 18 (*Sukhu & Others v. Drainage & Irrigation Board* (1962) L.R.B.G. 174 and *Din v. Drainage Board* (1962) L.R.B.G. p. 434) and Counsel for the defendants submits that as the Board is entitled to the protection of the ordinance it would be entitled to the benefit of each and every section of the ordinance and certainly to the protection afforded by section 2. Counsel for the plaintiffs in reply submits that section 2 applies only in the case of a judicial decision taken by an officer of the Board and does not apply in the case of an administrative act by such officer.

Section 2 of the Justices Protection Ordinance, Chapter 18 reads as follows:

## PERSAUD ET AL v. D. &amp; I. BOARD

“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 nonsuited, or judgment shall be given for the defendant.”

HALSBURY’S STATUTES, Second Edition, Volume 14 at page 801 informs us that the Act was passed to protect justices in the execution of their duty, and unless there has been some irregularity, there can be no need for protection.

It is clear to my mind that in the circumstances of this case, section 14 would place the Drainage Overseer as a servant or agent of the defendants in the position of a justice of the peace. Section 14 reads as follows:

“14. This ordinance shall apply for the protection of all members of the police force, all constables, all district commissioners, and all other persons for anything done in the execution of their office under and by virtue of any ordinance; and in all other cases whatsoever, and whether protection is given or not to the members of the police force, constables and district commissioners, or any of them, or any other person, by any ordinance, they, in each and every action brought against them, or any of them, for anything done by them, or any of them, in the execution of their or his office, shall be entitled to the protection afforded by the provisions of this ordinance.”

and it has been held that even in a case of omission or non-feasance, as I have found in this case, that such omission would be something done by the person or officer in the execution of his office within the meaning of section 14. In *Wilson v. The Mayor and Corporation of Halifax* (1868) 32 J.P. 230, KELLY, C.B., laid it down:

“. . . it is now settled by authority that an omission to do something that ought to be done in order to complete the performance of a duty imposed upon a public body under an act of parliament, or continuing to have any duty unperformed, amounts to ‘an act done or intended to be done’ — within the meaning of those clauses requiring notice of action, for the protection of public bodies, under acts of parliament imposing public duties.”

and it is clear, therefore, as stated by PERSAUD, J. in *Din v. Drainage Board*, that from the authorities even if the plaintiff alleges acts of non-feasance, it would appear that the matter falls to be governed by section 14 of the Justices Protection Ordinance, Chapter 18.

The question remains, however, whether section 2 of the ordinance applies both to Judicial and Administrative acts or merely to Judicial acts, bearing in mind that in the present case the omission of care found against

the defendants' servant or agent — the Drainage Overseer — was an administrative act. In *Ferguson v. Kinnoull* (1842) 9 Cl. & Fin. 251; 4 State Tr. N.S. 785, H.L. LORD BROUGHAM laid it down that persons having judicial functions, but being also required to perform ministerial acts, may be sued for damages occasioned by their neglect or refusal to perform such ministerial acts. In such action no allegation of malice is necessary. This dictum was however made before the passing of the Justices Protection Act 1848, and my research leads me to think that it was thought, although not quite clear, that Judicial acts required no protection.

In *Everett v. Griffiths & another* (1921) A.C. 631 it was decided that a Justice of the Peace who had signed an order for the reception of a person as a lunatic was held not to be liable for false imprisonment even if he had acted negligently, for he had acted in good faith. The Chairman of a Board of Guardians was placed in the same position as a Justice of the Peace under the Justices Protection Act, and VISCOUNT HALDANE, in his judgment in analysing the judgment of ATKIN, L.J., in the Court of Appeal stated that that learned Judge had pointed out that a mere error in judgment would not bring about liability but a negligent enquiry might do so. The learned Lord Justice was of the view that reception orders in the case of paupers were in the nature of administrative acts rather than of judicial proceedings and he pointed out that the rule of public policy that a judge must be absolutely protected against all proceedings applied at most to justices of the peace acting judicially and not when they were acting administratively by making summary orders. Having arrived at this conclusion the learned Lord Justice held that the statute read as a whole implied that in the discharge of the administrative duties the Chairman of the Board of Guardians and the medical officer were bound to act in good faith and to exercise reasonable care. LORD HALDANE appeared to think that it was necessary to consider whether the Chairman was acting administratively or judicially when signing a reception order and after pointing out that under section 16 of the Act that when he signs such an order the effect was as if made by a Justice of the Peace held that provided the person entrusted by Parliament with the statutory duty of satisfying himself in the fashion prescribed by the Act and then to act, in fulfilment of the statutory duty which is that of a Justice of the Peace under section 16 of the Act, keeps within his jurisdiction, observing the prescribed conditions, and acting bona fide and honestly, he cannot be made liable. The reasoning of VISCOUNT FINLAY was along the same lines as LORD HALDANE and in the course of his judgment when speaking of Judicial acts said:

“ . . . 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 . . . ”

PROFESSOR DE SMITH in his JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, at page 202 makes the point that the common thread running

## PERSAUD ET AL v. D. &amp; I. BOARD

through these cases is the erroneous exercise of judgment on matters immediately affecting the legal rights of individuals and the functions discharged bore some resemblance to those entrusted to judges in court. He offers it as his opinion that it is 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. It follows then that where the acts complained of, whether judicial or administrative, are an erroneous exercise of judgment on matters immediately affecting the 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.

I agree therefore with the view expressed by CHUNG, J. in *Hansraj Singh v. The Drainage & Irrigation Board* (1966) G.L.R. 227 that section 2 of the Justices Protection Ordinance, Chapter 18 applies both to judicial acts and acts of an administrative nature in the erroneous exercise of judgment, but on the conclusions that I have reached in this case on the evidence there was no question of an erroneous exercise of judgment on the part of the Drainage Overseer, nor indeed on the part of the senior officers of the Board, that is, the Secretary and the Chief Engineer of the Board for they did not exercise any judgment at all. That being so, section 2 of the ordinance would have no application to the circumstances of this case. The Board then would be liable to the plaintiffs in damages in a common law action for negligence. See also section 25 of Chapter 192 which relates to the powers and duties of the Board in the case of a threatened flood.

Counsel for the plaintiffs has conceded that section 8 of the ordinance applies and that in respect of the flooding in December 1964 the action was out of time, having regard to sub-section (1), as the action was not filed until 3rd July, 1965, but in respect of the flooding in May 1965 both counsel have agreed that the action would be within the time limited.

I partly accept the evidence of the appraisers of the damage found on their inspection but as the plaintiffs have claimed damages for the crops destroyed in December 1964, to which they are not entitled, I consider that the amount claimed should be reduced by half and there should be a further reduction of at least half of the remaining amount allowing for the sympathetic appraisal by persons who were also farmers. I therefore enter judgment for each plaintiff in respect of one-quarter of the sum claimed by each of them. Each plaintiff will recover his costs against the defendants to be taxed certified fit for counsel.

*Judgment for Plaintiffs.*

MUSTAPHA ALLY v. HAND-IN-HAND FIRE INSURANCE  
COMPANY LIMITED.

[Court of Appeal (Stoby, C., Luckhoo and Cummings, JJ. A)  
March 21, July 5, 1967.]

*Appeal — Court of Appeal — Decision of High Court Judge challenged — Order for security for costs — Dismissal for non-compliance — Application to have appeal restored — No specific rule for restoration of a matter dismissed for non-compliance to provide security — Whether Court of Appeal has jurisdiction to grant relief claimed — Federal Supreme Court (Appeals from British Guiana) Rules, 1959, Order I Rule 8; Order II Rules 13, 14, 15, 16 (now Court of Appeal Rules, Cap. 3:01, Order I Rule 8, Order II Rules 13, 14, 15, 16.).*

On July 6, 1966, the appellant filed a notice and grounds of appeal challenging the decision of a High Court Judge made in favour of the respondents. On September 6, 1966 a Justice of Appeal in Chambers ordered that the appellants should provide security for costs in the sum of \$1,300 within 8 weeks, failing which, the appeal should stand dismissed. The appellant did not comply with the order as the result of a genuine and unfortunate mistake and the appeal stood dismissed. On 9th November, 1966, the appellant filed a notice of motion which was amended with leave at the hearing to request a discharge or variation of the order in accordance with Order II Rule 16(2) of the 1959 Rules.

**HELD** — (i) the Court of Appeal has an inherent jurisdiction to control its own procedure and, in a proper case, where no rules have been made, the Court will itself make rules necessary for dealing with matters within its jurisdiction; (ii) Order I Rule 8 of the 1959 Rules, authorising as it does a departure from the rules where the rules of practice so require was intended to confer on the Court of Appeal jurisdiction to grant or refuse relief upon an application such as the present one.

Decision of Federal Supreme Court in *Jonas v. Mahadeo* (4) (*infra*) not followed.

*Application granted — Appeal restored.*

[ *Editorial Note:*— This case is reported in (1967) 11 W.I.R. 202.]

*Cases referred to:*

- (1) *Burke v. Rooney* (1879) L.R.C.P.D. 226; 48 L.J.Q.B. 601.
- (2) *Carter v. Stubbs* (1880) L.R.C.P.D. 117; 6 Q.B.D. 116; 43 L.T. 746.
- (3) *R. v. Moore* (1957) 2 A11E.R. 703.
- (4) *Jonas v. Mahadeo* (1962) L.R.B.G. 51.

## ALLY v. HAND-IN-HAND INS. CO.

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

*J. A. King* for respondents.

CUMMINGS, J.A.: On the 6th day of July, 1966, the appellant filed a notice and grounds of appeal from a decision of a Judge of the High Court, then the Supreme Court.

The respondents applied for security for costs and on the 6th day of September, 1966, a Justice of Appeal in chambers made an Order —hereinafter referred to as the Order — that the appellant should provide security for costs in the sum of \$ 1,300: to be lodged within 8 weeks from the date of the Order, in default of which the appeal should stand dismissed.

The appellant did not comply with the Order within the time mentioned with the result that the appeal stands dismissed.

On the 9th day of November, 1966, he filed a notice of motion

- (a) to have the appeal restored;
- (b) to extend the time for lodging the security for costs;
- (c) to extend the time for lodging the record of appeal.

In his affidavit in support of the motion, the applicant stated that he was “labouring under a misapprehension that the time for lodging the said security for costs would expire on the 5th day of November, 1966, which is two months from the 6th day of September, 1966.” Accordingly, he sought to lodge the security for costs with the Registrar on 3rd November, 1966, but was informed that the time had expired.

At the hearing of the motion, the court granted an application to amend the motion so as to request a discharge, or variation of the Order in accordance with the provisions of Order II, rule 16(2).

Counsel for the appellant submitted that:

- (a) The court has an inherent jurisdiction to control its own proceedings and can in a proper case reinstate an appeal which stood dismissed.
- (b) In the case of the dismissal of an appeal on report by the Registrar of appellant’s default in filing record and documents in accordance with Order II rule 13 (1) the court has power under Order II rule 15 (3) to restore the appeal upon such terms as it thinks fit. That is an example of the exercise of statutory jurisdiction but there is nothing juristically inconsistent with the court’s exercising its inherent jurisdiction side by side with its statutory jurisdiction.
- (c) The court may in accordance with the provisions of Order II, rule 16(2):

- (i) discharge the Order of the appellate Justice in chambers for security for costs for non-compliance with which the appeal stood dismissed; or
  - (ii) vary the Order allowing the appellant to lodge the security at a time hereafter to be fixed by the court.
- (d) Order II, rule 14 provides that an appeal shall stand dismissed where the appellant has filed with the Registrar a notice of withdrawal. Although there is no rule providing for restoration of the appeal in those circumstances, the court will by analogy follow the English Court of Criminal Appeal and restore the appeal when the appellant later wishes to appeal.

The relevant rules for consideration are Order II:

- (a) Rule 13 (1) which deals with the filing of the record of appeal, notice to the respondent; service of the record and the time within which these acts should be done.
- (b) Rule 14(1) — If the appellant files with the Deputy Registrar a notice that he desires to withdraw his appeal together with three copies thereof the appeal shall stand dismissed with costs. The appellant at the same time shall serve copies of the notice of withdrawal on all or any of the parties with regard to whom the appellant wishes to withdraw his appeal, and any party so served shall be precluded from laying claim to any costs incurred by him after such service unless the court shall otherwise order.
- (c) Rule 15(3) — An appellant whose appeal has been dismissed under this rule may apply by notice of motion that his appeal be restored and the court may in its discretion for good and sufficient cause order that such appeal be restored upon such terms as it may think fit.
- (d) Rule 16(2) — Every order made by a single judge of the court in pursuance of this rule may be discharged or varied by any judges of that court having power to hear and determine the appeal.

In support of his submissions (a) — (c), Mr. Haynes referred to the English Order 27, Rule 1 dealing with the dismissal of an action for want of prosecution and Order 64, rule 7 dealing with the court's power to enlarge or abridge time, and relied upon the cases of *Burke v. Rooney* (1879) L.R.C.P.D. at p. 226, and *Carter v. Stubbs* (1880) L.R.C.P.D. at p. 117 in both of which it was held that a judge had jurisdiction to enlarge the time for appealing against an Order dismissing an action for want of prosecution even after the Order has taken effect and the action has therefore become dismissed, and he has also jurisdiction when he has so enlarged the time for appealing to vary or amend the Order dismissing the action, and in the exercise of such jurisdiction his discretion is not limited by any fixed or arbitrary rules.

## ALLY v. HAND-IN-HAND INS. CO.

He argued that although the rules under consideration do not provide for an appeal from an Order for security for costs and so directly correspond with the English Rules under reference, yet they provide for a discharge or variation; and that consequently the jurisdiction exercised by the English courts in granting an enlargement of time for appealing and in varying or amending the Order dismissing the action was analogous to the jurisdiction which this court would be exercising when considering the present application.

The position in England when those cases were decided is set out in the judgment of LORD COLERIDGE, C.J. in the former case *loc cit* at p. 220:

“How does it stand on the general law? Order LIV, rule 4 provides that ‘any person affected by any order or decision of a master may appeal therefrom to a judge at chambers;’ and that ‘such appeal shall be by summons, within four days after the decision complained of, or such further time as may be allowed by a judge or master.’ Here is an order by a master affecting the plaintiff — dismissing his action in the event of his non-compliance with a condition by a given day. Within what time was the plaintiff bound to appeal against that order? Within four days after the decision, or such further time as might be allowed by a judge or master. To make Order LIV, rule 4, conclusive against the plaintiff, some such words as these must be added — ‘except where the order is for dismissing the action and four days have elapsed since the order complained of.’ No such words are found in the rule. Then, by Order LVII, rule 6, it is provided that ‘a court or a judge shall have power to enlarge or abridge the time appointed by these rules or fixed by an order enlarging time for doing any act or taking any proceedings, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.’ The words of that rule are equally clear; the court or a judge may enlarge the time for appealing, upon such terms as the justice of the case may require, although the application is not made until after the expiration of the time allowed by the former rule.”

And in the judgment of LORD SELBORNE, L.C. in the latter case *loc cit* at p. 118 where he said:

“On the point of jurisdiction I have no doubt. I cannot find any foundation for the suggestion that Mr. Justice Hawkins had no jurisdiction to make the order of the 20th of July last. The cases of *Whistler v. Hancock* (6) and *Wallis v. Hepburn* (7) are very different from the present one. In those cases the order dismissing the action was in force and not appealed against, and also there was no application to enlarge the time for appealing, but some other orders were asked to be made for extending the time for doing something in the action, and it was there held *rebus existentibus* that there was no power to make such orders, as the action was no longer in existence. Those cases have no

application here, where the form of the order is for enlargement of the time for appealing against the order dismissing the action, and an order of this kind is within the meaning of Order LVII, rule 6, which expressly says that such enlargement may be ordered after the expiration of the time allowed for doing the act. The contention therefore that the learned judge had no jurisdiction to make the order is not supported by the cases which have been cited.”

It is clear, therefore, that in those cases the rules expressly conferred on the court the jurisdiction exercised.

In support of submission (d) counsel for the appellant cited the case of *R. v. Moore* (1957) 2 A.E.R. p. 703, but in our view even if this court were willing to act by analogy on the reasoning therein set out it would not help the appellant in this case. There LORD GODDARD, C.J. said at p. 703, letter G:

“An examination of the cases have shown that, except in one case at any rate, the court have only allowed notice of abandonment to be withdrawn if they are satisfied that there has been some mistake. No doubt if a case could be made out that a prisoner had in some way or another been fraudulently led or induced to abandon his appeal, the court in the exercise of their inherent jurisdiction would say that the notice was to be regarded a nullity; but where there has been a deliberate abandonment of an appeal, in the opinion of the court there is no power or right to allow the notice of abandonment to be withdrawn and the appeal reinstated because, the appeal having been dismissed, the court have exercised their powers over the matter and are *functus officio*. Accordingly, the court will not entertain applications for the withdrawal of notices of abandonment unless something amounting to mistake or fraud is alleged, which, if established, would enable the court to say that the notice of abandonment should be regarded as a nullity. Though I do not wish to encourage prisoners to petition the Home Office, it seems to the court that once the appeal has been dismissed, as it is dismissed when a notice of abandonment is received, the only thing that a prisoner can do to petition for the exercise of the prerogative or for the Home Secretary to take steps as he thinks right.”

An application to restore an appeal in circumstances similar to the present was considered by the Federal Supreme Court in *Jonas v. Mahadeo* (1962) B.G.L.R. p. 51. In the course of his judgment with which both LEWIS and MARNAN, JJ., concurred, GOMES, C.J., said at p. 52:

“It appears to me that the question that arises on this appeal is, ‘Has this court any power or authority to reinstate this appeal?’, because it would appear that at the moment there is nothing before the court except the application of the applicant.

In my view, sub-rule (3) of rule 20 is rather specific in its terms in that the rule states what is to be done where there is a failure to

## ALLY v. HAND-IN-HAND INS. CO.

lodge security. It does not provide that the judge shall do this or that, nor does it confer any discretion on a judge; but it states what should happen to the appeal if there is a failure to lodge necessary security.

In the course of argument the court directed the attention of counsel for the applicants to the provisions of rule 15(3) and rule 24 of Order II. The former, that is to say, sub-rule (3) of rule 15, in filing records and documents and it confers a discretion on the court where good and sufficient cause is shown to restore the appeal. Similarly, under rule 24, where an appeal may be struck out owing to nonappearance of the appellant, the court is empowered on application if it thinks fit, and on such terms as to costs as it deems just, to direct that the appeal be re-entered.

Reference may also be made to the preceding rule — rule 23 — which provides that where an appellant fails to appear when his appeal may be struck out or dismissed with or without costs. It is to be observed that the following rule, that is to say, rule 24, only deals with the case where the appeal is struck out and not where it is dismissed.

The view that I take of rule 15(3) and rule 24 is that they give definite indications that the rule-making authority gave full consideration to the cases dealt in those rules and there is no reason to believe that it was purely by lack of thought or accident that the rule making provision in a case where an appeal is directed to stand dismissed in the circumstances mentioned in rule 20. Indeed, I think that the observations I have made support the view which I expressed earlier that sub-rule (3) of rule 20 of Order II is specific in its terms and that in the absence of any authority in the rule to reinstate an appeal this court has no jurisdiction to do so. For those reasons I would dismiss the application with costs.”

We agree that this court has inherent jurisdiction to control its own procedure and in a proper case, where no rules have been made the court will itself make rules necessary for dealing with matters within its jurisdiction. But where rules are made they have the effect of a statute and the court must act in accordance with the rules.

Finally counsel for the appellant submitted that this was an application which should invoke the exercise of the power vested in the court by Order I rule 8 which provides as follows:

“8. Subject to the provisions of section 22(2) of the Ordinance (relating to the time within which an appeal may be brought in a capital case to the court), and to order II 3(3) of these Rules, the court may enlarge the time prescribed by these Rules for the doing of anything to which these Rules apply, or may direct a departure from these rules in any other way where this is required in the interests of justice.”

It does not appear, that the Federal Supreme courts’ attention was invited to this rule. Consequently it is necessary for this court to interpret this

rule without the aid of authority. There is no doubt that by virtue O.II. Rule 20(3) the appeal stands dismissed and equally it is evident that no rule specifically makes provision for restoring an appeal which has been dismissed because of non-compliance to provide security. This being so it might be helpful to consider the status of a litigant whose appeal has been dismissed for failure to provide the security ordered.

By virtue of the Guyana Independence Order 1966 Article 10 an Appeals lies under Article 92(2) of the constitution from decision of the Court of Appeal to Her Majesty in Council in certain cases. Article 92(4) provides as follows:

“Nothing in this article shall affect any right of Her Majesty to grant special leave to appeal from decisions of the court to Appeal to Her Majesty in Council in any civil or criminal matter.”

The established practice before and after the Guyana Independence Order 1966 has been for a discontented litigant who has been refused leave to appeal to Her Majesty in Council to apply to the Privy Council for special leave to appeal where the Court of Appeal does not possess the power to grant leave to appeal or where it has refused because it is still possible to obtain special leave. This practice admittedly is confined to cases where the Court of Appeal has heard and determined the appeal and the litigant wishes to approach the Privy Council. But if special leave can be obtained where an appeal has been heard and there is no jurisdiction in the Court of Appeal to extend the time for applying for leave it must follow that special leave may be obtained where a procedural rule deprives an appellant of being heard.

The procedure for obtaining special leave from the Privy Council is expensive and time-consuming and should not be resorted to where the relief sought is merely procedural unless the Court of Appeal has no jurisdiction to deal with it.

In our view, o. I., rule 8, authorising as it does a departure from the rules where the rules of practice so require was intended to confer on the Court of Appeal jurisdiction to grant or refuse relief upon an application such as the present one.

The automatic dismissal of the applicant's appeal was the result of a genuine and unfortunate mistake, and in the circumstances, having regard to the view which we have expressed herein about recourse to applications for special leave, the only way of avoiding the perpetuation of an injustice is to invoke the exercise of the discretion conferred by o. I., rule 8, depart from the rule imposing dismissal and direct that the appeal be restored to the list on terms. The jurisdiction conferred upon the court by this rule must obviously be sparingly exercised, but where circumstances demand its use the court must not hesitate to act. This, in our view, is such a case.

Accordingly, the court orders that:

- (a) The appeal be restored.

## ALLY v. HAND-IN-HAND INS. CO.

- (b) The Order be varied to extend the time for compliance therewith to 15th July, 1967.
- (c) The applicant pays the client the costs of this application.

STOBY, C. I Concur.

LUCKHOO, J. A., I concur.

*Application granted — Appeal restored.*

Solicitors:

*L. L. Doobay* for appellant

*Cameron & Shepherd* for respondents.

COMMISSIONER OF INLAND REVENUE v. ELAINE V.  
GOMES AND MURIEL G. WIGHT

[Court of Appeal (Persaud, Cummings & Crane, JJ.A.) July 12, 1967.]

*Estate Duty — Executries applied for limited grant of administration ad colligenda bona to perform contracts entered into by testator during lifetime — Provisional declaration and inventory filed — Commissioner of Inland Revenue not satisfied — Whether letter written by Commissioner amounted to an assessment and/or notice thereof — s. 14(1) of the Estate Duty Ordinance, Cap. 301 (now s. 14(1) of the Estate Duty Act, Cap. 81:23).*

*Estate Duty — Whether certificate by Proper Officer condition precedent to grant of administration ad colligenda bona — s. 15(3) of the Estate Duty Ordinance, Cap. 301 (now s. 15(3) of the Estate Duty Act, Cap. 81:23).*

*Estate Duty — Tax — When due — s. 66 of Tax Ordinance, Cap. 298 (now s. 71 of the Tax Act, Cap. 80:01).*

*Estate Duty — Interest — Date when payable from — secs. 13, 14 & 15 of the Estate Duty Ordinance, Cap. 301 (now secs. 13, 14 & 15 of the Estate Duty Act, 81:23).*

*Administration of Estates — Proper Officer varied statutory procedure by allowing executrices to pay estate duty on their valuation without any assessment on the figures presented by them — Whether permissible — s. 24(2) of the Deceased Persons Estates Administration Ordinance, Cap. 46 (now s. 24(2) of the Deceased Persons Estates Administration Act, Cap. 12:01).*

*Administration of Estates — Deceased testator left large estate finally declared at gross valuation of \$1,793,826.90 — Liabilities of \$324,721.23 — Nett estate of \$1,469,105.58 — Rate of duty assessed at 40% amounting to \$582,642 — Whether property improperly valued and/or assessed.*

*Trusts — 75 shares owned by wife in her own right — Transferred to husband to improve his standing in company for purposes connected with anticipated litigation — No intention to make gift — Whether deceased held shares as trustee for his wife — Whether shares should be included in dutiable estate of deceased.*

*Construction of Statutes — Conflict — Repeal by implication.*

*Construction of Statutes — Not in pari materia — Whether permissible to place a particular construction on a particular section unless there is specific reference in one statute to the other — Income Tax Ordinance, Cap. 299 (now Income Tax Act, Cap. 81:01) — Estate Duty Ordinance, Cap. 301 (now Estate Duty Act, Cap. 81:23).*

*Construction of Statutes — Meaning of word “thereupon” in clause ‘shall thereupon pay into the Treasury the duty so assessed’ — Whether person making declaration and inventory must have knowledge, actual or implied, of what he is to pay before he could be expected to pay — s. 15(2) of the Estate Duty Ordinance, Cap. 301 (now s. 15(2) of the Estate Duty Act, Cap. 81:23).*

The deceased testator was the owner of 526 of 750 shares in the Argosy Co. Ltd. On February 4, 1961, he entered into an agreement with the company whereby he agreed to transport 84,000 sq. feet of land at Bel Air Park, E.C.D., upon which the company, carrying on a printing and publishing business, had installed their machinery. The object of the agreement was to enable the company to avail itself of an offer to purchase the land and equipment made by another company, Peter Taylor & Co. Ltd; no consideration passed. On February 7, 1961, a second agreement was entered into whereby the Argosy Co., represented by the testator, the majority shareholder, agreed to sell to Peter Taylor & Co., who agreed to buy the printing and publishing business, as well as the 84,000 sq. feet of land and certain equipment and materials for \$500,000. The testator died before passing transport to the Argosy Co., so that the agreement with Peter Taylor & Co., could not be completed. As a result, on March 21, 1961, a third agreement was entered into between Peter Taylor & Co., as vendors, the Guyana Graphic Ltd., as purchasers, the executrices of the deceased testator (the respondents herein) (daughter and wife respectively of the deceased) and the Argosy Co., whereby it was agreed that the second agreement of February 7, 1961, should be modified in that the Guyana Graphic Ltd., were now purchasing from Peter Taylor & Co., with the concurrence of both the executrices and the Argosy Co., for the sum of \$290,400, apportioned between the immovable (\$105,000) and the movable (\$185,000) property.

For estate duty purposes, the land in question and a cottage valued \$12,000, which was also included in the sale to the Guyana Graphic Ltd., were all valued at \$138,702 and included as part of the deceased's estate

## C. I. R. v. GOMES &amp; WIGHT

under “Unpaid purchase money and immovable property”. The testator’s 526 shares were declared at the figure of \$350,667, which was arrived at by taking 526/750 of \$500,000, the agreed sale price under the second agreement, and was declared as “Unpaid purchase money” in the estate duty declarations. Also declared were 75 shares held by the wife in her own right in Gladys Hicken Ltd., which she testified she had loaned to her husband merely for the purpose of enabling him to be in a stronger position to contest the valuation which had been placed upon the shares by a valuer as the result of a dispute where her brother, who was a member of that particular company, had petitioned for its winding-up.

The executrices appealed to a Judge in Chambers against the Commissioner’s assessment of \$582,642 and the learned Judge found, *inter alia*, that (a) the sum of \$350,667 declared as ‘unpaid purchase money on immovable property’ representing the deceased’s shares in the Argosy Co., was incorrectly included in the dutiable estate of the deceased: (b) the 75 shares in Gladys Hicken Ltd., should not have been included in the dutiable estate of the deceased as he was holding them in trust for his wife, and (c) interest on the sum then owing was payable from August 10, 1962, the date of the issuing of the Proper Officer’s Certificate.

On appeal by the Commissioner to the Court of Appeal —

HELD — (Persaud and Cummings, JJ.A.), (Crane, J.A., dissenting) that (i) the Judge was right in saying that the sum of \$350,667 was incorrectly included in the estate of the testator as representing his shares in the Argosy Co., since the gift which the testator had purported to make to the Argosy Co., was not completed and therefore the property remained in him. However, the Judge’s method of calculating the value of those shares was wrong, since he had erroneously considered a further liability of the company, *i.e.*, the value of the 84,000 sq. ft of land, accepted at \$138,702, which sum he had added to the liabilities of \$388,693.80, a total of \$527,394.80, which was more than the agreed sale price of \$500,000 under the second agreement, and he had therefore considered that the Argosy Co., was bankrupt with the result that the testator’s shares were worth nothing. In the circumstances the Court would direct a valuation of the said shares either by the Commissioner or by someone appointed by him for that purpose having regard to the provisions of s. 14(1) of the Estate Duty Ordinance; (ii) estate duty does not become due within the meaning of s. 66 of the Tax Ordinance until the process prescribed in s. 15(1) & (2) of the Estate Duty Ordinance has been completed, *i.e.*, no legal steps can be taken against a person liable for the payment of estate duty for the recovery of that duty until it has been assessed; (iii) the Judge was therefore correct in finding that estate duty only began to accrue from August 10, 1962, the date when the Proper Officer issued his Certificate.

(Persaud, Cummings and Crane, JJ.A) — that (iv) there was sufficient evidence before the Judge, which he had accepted, that the 75 shares in Gladys Hicken Ltd., were held by the deceased in trust for his wife and, therefore, should not have been included in his dutiable estate.

(Per Curiam) — Income Tax and Estate Duty legislation, though both concerned with the collection of taxes and duties, are not in *pari materia* and the latter cannot be interpreted by analogy with the former.

*Appeal dismissed — Order of Court below varied — By consent valuation of deceased's shares in Argosy Co. Ltd., to be made either by Commissioner of Inland Revenue or by someone appointed by him and that an assessment be made thereon.*

*Cases referred to:*

- (1) *Gomes & Anor v. Commissioner of Inland Revenue* (1966) G.L.R. 269.
- (2) *Commissioner of Income Tax v. Barcellos* (1957) L.R.B.G. 105.
- (3) *Green v. Carill* (1877) 4 Ch. D. 882, M.G.
- (4) *In Re Curtis, Howes v. Curtis*, 52 L.T. 244.
- (5) *Wallace Bros. & Co. Ltd., v. Commissioner of Income Tax* (1948) I.T.R. 240.
- (6) *Guiana Industrial & Commercial Investments Ltd., v. Inland Revenue Commissioner* (1964). L.R.B.G. 217; (1964) 7 W.I.R. 23; (affd.) (1969) 13 W.I.R. 448, (C.A): (further affd.) (1969) 16 W.I.R. 131, (P.C).
- (7) *Ormond Investment Co. Ltd., v. Betts* (1928) All E.R. Rep. 709; 13 Tax Cas. 400.
- (8) *O'Flaherty v. McDowell* (1857) 6 H.L.C.
- (9) *The Danube II* (1920) P. 104.
- (10) *Milroy v. Lord* (1862) 4 De G.F. & J. 264.
- (11) *Re Fry, Chase National Executives and Trustees Corporation v. Fry* (1946) 2 All E.R. 106.
- (12) *King v. Powell & Powell* (1952) L.R.B.G. 20.
- (13) *Mangru v. Keela* (1931-37) L.R.B.G. 414.
- (14) *Surejpaul v. Ramdeya & Surju* (1942) L.R.B.G. 309.
- (15) *Re Germania T.B. De Freitas, decd.* (1949) L.R.B.G. 188.
- (16) *Whitney v. I.R.C.*, 10 Tax Cas. 88.
- (17) *Inland Revenue Commissioner v. Estate of Nicholson* (1962) L.R.B.G. 470.
- (18) *Attorney-General v. Till*, 5 Tax Cas. 440.
- (19) *Re Estate N'G-a-Kwang* – 3rd Feb. 1903, L.R.(B.G.).
- (20) *Inland Revenue Commissioner v. Forrest* (1890) 15 App. Cas. 334.
- (21) *Re Horrex* (1910) *The Times*, March 9, 1910.
- (22) *Lord Advocate v. Taylor (Miller's Trustees)* (1884) 11 Relt. 1046; 21 Scot. L.R. 709.
- (23) *Re King, Travers & Kelley* (1904) 1 Ch. 363.

*Doodnauth Singh* for appellant.

*S. L. Van B. Stafford, Q.C., with John Van B. Stafford*, for respondents.

PERSAUD, J.A. Percy Claude Wight (hereinafter referred to as “the testator”) died on March 1, 1961, leaving the respondents as his executrices to administer his estate. From some date soon after March 1 (that date is not ascertainable from the records) to April 6, 1962, five inventories were filed with the Commissioner of Inland Revenue for the computation of estate

## C. I. R. v. GOMES &amp; WIGHT

duty under the Estate Duty Ordinance (Chapter 301). I will refer only to those items of the inventories with which this appeal is concerned, that is to say, certain immovable property was the subject-matter of three agreements to which reference will be made later, the value of the testator's shares in the Argosy Company, Limited, and 75 shares in Gladys Hicken Limited, which the testator allegedly held in trust for his wife, the second respondent. Also raised before the trial judge and before this court was the question of the date of the commencement of the running of interest on unpaid estate duty.

In the first inventory, the testator's immovable property was declared at \$309,118.80. Presumably in this sum was included the value of the property, the subject-matter of the agreements. In the subsequent inventories, there appeared an item of property described in one instance as "Unpaid purchase money of Immovable and Leasehold Property contracted in lifetime of deceased to be sold". In every case the value was placed at \$350,667. It is clear that the value of the agreement property was meant to be included in this item. In fact on the 16th March, 1961, one Dudley Howard swore to the value of this property among others which he placed at \$103,702.

Now briefly to the history of the three agreements referred to above. During his lifetime the testator entered into an agreement with the Argosy Company Limited, a limited liability company in which he owned 526 of the 750 shares whereby he agreed to transport to the company or its nominees 84,000 square feet of land at Bel Air on which the company, carrying on a publishing business, had installed its machinery. No consideration passed. It is clear that the object of the exercise was to enable the company to avail itself of an offer to purchase the land and equipment made by Peter Taylor & Company Limited.

Three days after the first agreement, viz., on the 7th February, 1961, another agreement was entered into whereby the Argosy Company Limited, represented by the testator, agreed to sell to Peter Taylor & Company Limited who agreed to buy the printing and publishing business, the land referred to above, and certain equipment and materials for \$500,000. Certain other items were expressly excluded from the agreement; these items are set out in para. (v) of the agreement. Upon the signing of this agreement a previous payment of the sum of \$2,000: was acknowledged, and provision was made for the immediate payment of \$23,000. Further provision was made also for the payment of the balance of the purchase price.

The testator died before passing transport to the Argosy Company Limited so that the agreement with Peter Taylor & Company Limited could not be completed. Consequently, on the 21st March, a third agreement was entered into between Peter Taylor & Company limited, as the vendors, the Guyana Graphic Limited, as the purchasers, the executrices, of Percy Wight (who are the respondents in this appeal) and the Argosy Company Limited, whereby it was agreed that the agreement of the 7th February, 1961, should be modified in that the Guyana Graphic limited were now

purchasing from Peter Taylor & Company Limited, with the concurrence of both the executrices and the Argosy Company Limited, for the sum of \$290,400: apportioned between the immovable (\$105,000) and the movable (\$185,000) property.

As has already been stated, for estate duty purposes the land in question and a cottage valued at \$12,000, which was also included in the sale to the Guyana Graphic limited, were all valued at \$138,702, and included as part of the deceased's estate under "Unpaid purchase money and immovable property".

Among his several items of property, the testator owned 526 shares in the Argosy Company Limited, which had an issue of 750 shares. And it would appear — at least the trial judge so found — that the figure of \$350,667 declared as unpaid purchase money in the estate duty declarations was arrived at by taking 526/750 of \$500,000, the agreed sale price under the second agreement. The learned judge expressed the view that it was correct to include the value of the lands in question as part of the dutiable estate of the testator, as he would have been entitled to that value from the purchase price, which I understand to mean that the testator would have been entitled to retain for himself the value of the lands out of the purchase price of \$500,000. But the judge went on to hold that in view of the fact that the Argosy's liabilities amounted to \$388,692.30, which if added to \$138,702 would exceed the purchase price, the testator's shares would be valueless, and therefore the sum of \$350,667 declared as unpaid purchase money on immovable property as representing the deceased's shares in the Argosy Company Limited, was incorrectly included in the dutiable estate of the testator. The appellant also complains against the judge's finding that 75 shares were held by the testator in trust for his wife and so did not form part of his estate.

In a previous matter involving this estate — (*Gomes & anor v. Commissioner of Inland Revenue* — (1966) G.L.R. 269), this court had held that the notice of valuation or assessment had been given to the respondents on the 19th July, 1965, and not before. That decision was concerned with the computation of time within which a person made accountable by the Estate Duty Ordinance and who is dissatisfied with any valuation or assessment may appeal to the court. It did not concern itself with the date of assessment, and indeed no finding was made to that effect. However that may be, in this case the respondents have urged that as it was found that the notice was not given until the 19th July, 1965, interest on the unpaid estate duty should not run from any earlier date. On the other hand, the appellant contends that interest begins to accrue from the date of death, if not, then at least at the expiration of two months thereafter, having regard to section 13(1) of the Ordinance. It would appear that the learned judge examined the probate records left in the Deeds Registry and found that the estate duty was assessed on the 10th August, 1962. He then reasoned that estate duty was not payable until assessed, one is not liable to pay interest

## C. I. R. v. GOMES &amp; WIGHT

on estate duty until it becomes payable, and therefore the 10th August, 1962, was the date from which interest should run. I have myself examined the probate papers, and have found that on the 10th August, 1962, the proper officer issued a certificate in which is stated that the inventory and declaration of the estate has been delivered under section 13 of the Estate Duty Ordinance, and that security had been given for the due payment of the remainder of the estate duty in the sum of \$325,546.22.

I will now go back and examine the position as regards the property ultimately sold to Guyana Graphic Limited. It is important to bear in mind that the relevant time for our purposes is the date of the death of the testator. It is also of importance not to lose sight of the fact that the position as regards the property must not be confused with the situation of the Argosy Company Limited, and its shares, even though it might be felt in some quarters that the testator could have been regarded as the company and *vice versa*.

This matter can be stated in quite short compass. At the time of his death the property was still vested in the testator, even though he had executed first an agreement on behalf of the Argosy Company Limited, and then another agreement on behalf of the Argosy Company Limited, with Peter Taylor & Company Limited. The respondents contend that the value of the land should be included as part of the assets of the Argosy Company. I do not agree with this proposition. It was correct, in my judgment, for the value of this land to be included among the assets of the deceased, and not as unpaid purchase money under the agreements. It is more accurately described as part of the testator's immovable property, and the proper value to be placed on it is \$138,702. I agree with CRANE, J.A., when he says that the gift which the testator purported to make to the Argosy was not completed, and therefore the property remained in him. CRANE, J.A.'S opinion accords with that of the trial Judge, and there is no complaint against this ruling by the appellant. However, the Judge went on to calculate the value of the testator's shares in the Argosy on a different basis, and found that at the time of the agreement of sale by the Argosy Company to Peter Taylor & Company Limited, the Argosy was bankrupt, with the result that the testator's shares were worth nothing. In these circumstances says the judge, the sum of \$350,667 declared as unpaid purchase money on immovable property representing the deceased's shares in the Argosy Company Limited was incorrectly included in the dutiable estate of the testator. This finding is criticised by the appellant who argues that there was insufficient evidence before the judge to enable him to arrive at such a conclusion, and that he ought to have acted under the provisions of section 14(1) of the Estate Duty Ordinance, Chapter 301, that is, to return this question to the Commissioner so that he can either make an estimate himself or appoint someone to do so on his behalf.

If the land which the testator purported to give to the Argosy is part of his estate, then it cannot be regarded as part of the assets of the company also. On the date of the testator's death, the Argosy Company did not own

the land, but the testator did. If this is correct, how then can it be included as part of the assets of the company for any purpose? In my judgment, the appellant cannot have it both ways. If he accepts that the land is part of the testator's estate, then he is obliged to yield his ground that it ought to be taken into account in order to assess the value of the testator's shares in the company. The fact that the executrices returned the sum of \$350,667 as unpaid purchase money in the second inventory, and continued to do so subsequently is no answer if they did so incorrectly. It would appear that there were other assets of the Argosy Company which ought to have been taken into account in an attempt to assess the value of the shares.

The proper thing to do would be to return the sum of \$138,702 as the value of a portion of the testator's immovable property and assess the value of the share afresh as they stood at the date of the testator's death. The result on this first point should be, therefore, that the judge was right to say that the sum of \$350,667 was incorrectly included in the estate of the testator to represent his shares in the Argosy Company, but he was wrong in his method of computing the value of those shares. If we were to have regard to section 14(1) of the Ordinance, then the proper order on this aspect alone should be that the Commissioner should appoint a person to assess the true value of the shares on his behalf.

The judge found that the 75 shares in Gladys Hicken Limited were held by the deceased in trust for his wife. The evidence was that the wife had owned these shares in her own right, but that at her husband's request she had transferred them to him in order that he might improve his standing in that company for purposes connected with anticipated litigation. The judge accepted that evidence, and referred to *Green v. Carill* (1877) 4 Ch. D. 882 M.C., and *In Re Hawes v. Curtis* 52 L.T. 244 to show where a wife hands over to her husband property belonging to her without any intention of making a gift of it to him, it is presumed that he holds the property as trustee for her. I am of the view that there was before the judge enough evidence which, if accepted, could have enabled him to come to the conclusion to which he did come, and I am not prepared to say that he is wrong. Therefore that part of his judgment will stand.

I now turn to what I regard as the most difficult point raised in this appeal, the matter of the date from which interest on unpaid estate duty should commence to run. Counsel for the appellant contends for the proposition that under the Estate Duty Ordinance interest begins to run either from the date of death or at the expiration of two months after death, and has referred in support of his proposition to the fact that in the case of income tax, tax is due from the commencement of the year of assessment notwithstanding the fact that the tax has not been quantified. In other words, the liability arises even though the taxpayer has not yet been assessed. No doubt, counsel had in mind the dictum of STOBY, J. (as he then was) in *Commissioner of Income Tax v. Barcellos* (1957) L.R.B.G. 105 at page 111 that:

## C. I. R. v. GOMES &amp; WIGHT

“As soon as income is derived in the colony over and above a certain sum, the obligation to pay income tax arises. The taxpayer’s liability does not depend on the arithmetical calculations of a Government Official; it is the extent of his liability which is dependent on the ascertainment of his chargeable income. A clear distinction must be drawn between the liability to pay on the one hand and the amount required to be paid as a result of the liability on the other hand”.

And the dictum of the Privy Council in *Wallace Bros. & Company Limited v. Commissioner of Income Tax* (1948) I.T.R. 240 to the effect that —

“The rate of tax for the year of assessment may be fixed after the close of the previous year and the assessment will necessarily be made after the close of that year. But the liability to tax arises by virtue of the charging section alone, and it arises not later than the close of the previous year, though quantification of the amount payable is postponed”.

No one disputes this proposition of income tax law. [See also *Guiana Industrial & Commercial Investments, Ltd. v. Inland Revenue Commissioner* Vol. 7 W.I.R. 23; (1964) L.R.B.G. 217]. But while one may look at the whole of a statute in order to appreciate its scheme and so glean the interpretation to be placed on any particular section, it would be quite wrong to look at another statute which is not *in pari materia* to attempt to put a particular construction on a particular section unless there is specific reference in one statute to the other. My view is that the Income Tax Ordinance and the Estate Duty Ordinance are not *in pari materia* even though they are both concerned with the collection of revenue. They are concerned with the collection of different kinds of taxes, the types of allowances are different, and the rates of computation of the taxes payable are different. And as VISCOUNT SUMNER said in *Ormond Investment Co. Ltd., v. Betts* (1928) All E.R. Rep. 709 at page 717:

“. . . . . in any case the Crown does not tax by analogy but by statute. . . . .”

One must therefore look at the Estate Duty Ordinance alone to determine this question and if, perchance, that Ordinance is found to be inadequate, then the appropriate steps should be taken to remedy the defects.

Section 66 of the Tax Ordinance, Chapter 298, provides that in default of payment, when due, of any taxes or duties imposed, those taxes, duties, etc., together with interest at the rate of six per centum per annum from the date when they become due and payable shall, when not otherwise specially directed, be enforced and recovered by parate execution. The point of importance, therefore, is to ascertain the date on which estate duty became due and payable.

This takes us to the Estate Duty Ordinance, Chapter 301, section 13 provides that within two months after the death of a person who has died in the country, and six months in the case of a person dying out of the

country, certain persons shall appear before the proper officer and deliver a full and articulate inventory of all the property which the deceased possessed at the time of his death, together with a declaration verifying the inventory. Section 14(1) provides that if the Commissioner is satisfied with the inventory and estimate of value, or with any amendment made therein upon his requisition, he shall assess the duty on the basis of the inventory and estimate. But if he is dissatisfied with the inventory and estimate, he shall either make an inventory and estimate himself, or cause such to be made on his behalf by a person named by him, and on the basis of that inventory and estimate, he shall have the power to assess the duty payable. It would appear that the Commissioner acted here under the first part of the section, as he did not seek to make his own inventory and estimate, nor did he cause such to be made on his behalf. Indeed, the proper officer said in his evidence that he gave no estimate of value, but accepted the figures, and that the fifth and final inventory, Ex. "J", estimated the gross value of the estate at \$1,793,826.90, and the net value at \$1,469,105.58; that the duty was assessed at \$582,642: being 40% of the net value.

Section 15 of the Ordinance provides as follows:

"(1) On the duty payable being assessed as aforesaid the proper officer shall cause to be made on the declaration a memorandum of the amount of estate duty payable.

(2) The person making the declaration, or his agent, shall thereupon pay into the Treasury the duty so assessed, and the Financial Secretary shall give a receipt therefor.

(3) The proper officer shall then prepare a certificate under his hand, setting forth that the inventory and declaration have been duly delivered and that the estate duty, if that duty is payable, has been paid, and stating the value as shown by the inventory of the property on which it is payable.

(4) No will shall be received by any officer of the registry for deposit or for recording therein unless there is delivered therewith the certificate referred to in subsection (3) of this section".

It is clear that estate duty does not become payable until assessed. The various steps leading to the deposit of a will in the registry are carefully set out, and it is only when the duty has been assessed and a memorandum of the amount payable has been made on the declaration that the person making the declaration is required to make payment. In my view, therefore, estate duty does not become due within the meaning of section 66 of Chapter 298 until the process prescribed in section 15(1) and (2) has been completed. To put this another way: No legal steps can be taken against a person liable for the payment of estate duty for the recovery of that duty until it has been assessed.

## C. I. R. v. GOMES &amp; WIGHT

In *Guiana Industrial & Commercial Investments Limited v. Commissioner of Inland Revenue* (1965) 7 W.I.R. 23; (1964) L.R.B.G., 217, the appellant company was seeking to say that a sum of money which they claimed as their income tax liability for year 1962 in respect of income earned in 1961, should be regarded as a debt owed by them in 1961 in the computation of their "net property" for purposes of the Property Tax and Gift Tax Ordinance, 1962 (No. 19). LUCKHOO, C.J., rejected this argument, and having referred to the dictum of STOBY, J., in *Commissioner of Income Tax v. Barcellos* (quoted earlier in this judgment) held that although there was a legal obligation on the part of the appellants to pay income tax in 1961 in respect of the succeeding year, there was no legal right in the Commissioner of Inland Revenue to enforce payment in 1961, and therefore there was no debt due in respect of tax liability until the year of assessment had arrived. The point I seek to make here is, that even though liability for a debt may exist, it does not become a debt due and owing until the legal steps to make it so have been taken. And in the instant case, my opinion is that unless this duty has been assessed, it does not become a debt due, and until it becomes a debt due, interest does not begin to run.

Section 15 of the Ordinance seems to have been enacted to meet the situation which existed before the Commissioner of Inland Revenue performed the duties of the collector of estate duty. In those days the Registrar of the Supreme Court was charged with that duty and the person making the declaration presented his papers to the proper officer in the Supreme Court Registry, the estate duty was assessed, the memorandum made, and there and then the declarant was informed of the amount payable which he was required to pay in the same office. If he was unable to pay at that time, then, as I understand the provisions of the Ordinance, interest began to accrue, and this even though the declaration had been made within two months of the death of the deceased. In this way the word "thereupon" is to be construed. My view is that even now if the assessment is made within the two-month period, interest will begin to run from the date of assessment. Now that the system of assessing and collecting estate duty has been changed, it was not thought fit to amend the law to suit the new situation. As a result, there is no express provision in section 15 for notice to be sent to the declarant. But there is section 14(3) to be considered, and I will give attention to that later on in this judgment.

It is unreasonable, in my judgment, to say that interest should run from the date of death. I would say that there are three situations envisaged by the Ordinance. Section 13 creates the first situation where the inventory is filled within two months of the death of a person dying in the country. As soon as the duty is assessed, it becomes payable, and interest begins to accrue as from the date of assessment. If for any reason the assessment is not made within a reasonable time, then this should not be visited on the taxpayer, as this section presupposes that everything will be done with despatch. Where it is not so done, then section 17 applies to the second situation, that is, where there is default in delivering the inventory within

the period prescribed by law (and this could only refer to the times fixed by section 13). In such a case penalties are prescribed in the nature of a fine and double the amount of duty chargeable. The third situation arises under section 20 which provides as follows:

“20. (1) If at any time it is discovered that the property subject to estate duty on the death of the deceased was, at the time of the delivery of the certificate, of greater value than the value mentioned in the certificate, the heir or executor shall, within six months after the discovery, deliver a further declaration, with an account, to the proper officer.

(2) The person making the declaration, or his agent, shall thereupon pay to the officer whose duty it is to receive it the amount which, with the duty previously paid on a declaration of the estate and effects, is sufficient to cover the duty chargeable according to the true value thereof, and shall at the same time pay to the Registrar interest upon that amount at the rate of six per centum per annum from the date of the certificate or from such subsequent date as the Registrar thinks proper.

(3) The Registrar, on the receipt of that declaration and account, shall cause a fresh certificate to be written by the proper officer, setting forth the true value of the estate and effects as then ascertained, and that certificate shall be substituted for, and have the same force and effects as, the certificate hereinbefore mentioned”.

This section clearly contemplates that the duty has been assessed and paid, or at least security has been given for its payment, and the proper officer's certificate issued, and after all of this has been done, additional property has been discovered. It will be observed that sub-section (2) gives the proper officer a discretion to fix the date of interest, as there may be several reasons which contributed to the non-discovery of the additional assets, and it would be hard to penalise a tax-payer in respect of property of which he had no knowledge. It is also important to observe that subsection (3) requires the proper officer to issue a fresh certificate in which is set forth the true value of the estate.

On the 6th April, 1961, the Commissioner wrote the respondents' legal advisers a letter (Ex. "A") which made it appear that the executrices had declared the net value of the estate at \$620,000, but that the Commissioner was dissatisfied with this figure, and pointed out that there existed other assets which should be accounted for. However, he seemed to have been of the opinion that duty payable was \$350,000. And when the proper officer came to give his undated certificate (presumably after the date of the Commissioner's letter), it is there stated that the inventory and declaration of one part (the Argosy Company Limited with 84,000 sq. ft. of land) of the estate had been duly delivered in terms of section 13 of the Estate Duty Ordinance and referred to the sum of \$350,000 as being duty on the whole estate. It is clear from this situation, from the terms of the

## C. I. R. v. GOMES &amp; WIGHT

letter (Ex. "J") from further inventories made later on, from the form in which this and the later certificates were issued, and from the evidence of the proper officer that estate duty had not been assessed but only estimated so far by the 6th April, 1961, and this was done merely to facilitate the passing of the transport of the Bel Air lands to the Guyana Graphic Limited.

A point of some importance and worthy of note is that the certificates issued in this case do not take the form of a certificate usually issued where there has been an assessment. The proper officer's certificate purports to have been issued under section 24(2) of the Deceased Persons Estates' Administration Ordinance, Chapter 46, which says:

"Probate or Letters of Administration may be granted before payment of estate duty if security is given for the payment to the proper officer under the provisions of the Estate Duty Ordinance".

My view of this subsection is that security can hardly be required and given for the payment of duty that has not yet been ascertained. So that normally when the proper officer issues his certificate for the grant of probate or letters of administration, it is presumed that he has assessed the duty. But be that as it may, it may not be possible for the declarant to realise the amount required and he may have to realise some of the assets of the testator in order to do so, the proper officer satisfies himself that the proper security has been given, and he thereupon issues his certificate before the payment of estate duty.

In this instance, however, the proper officer seemed to have varied the procedure prescribed by the statute, for he has given evidence to the effect that the respondents were allowed to pay estate duty on their valuation without an assessment on the figures they presented in order to save interest at 6% per annum. He further went on to say that the respondents' legal adviser had a discussion with him and he indicated that he "could not pass the estate as it is in spite of the fact that it was so urgent that the sale of the Argosy Company was to be completed". He went on to say that the figures in relation to the Argosy Company Limited "were only put down tentatively in order to pass transport and all the other declarations that were furnished after, except the last one, showed no liability". In the face of this evidence, I find it difficult to accept that an assessment within the meaning of the Ordinance had been done, and as I have already held that duty does not become payable until assessed, I cannot agree with the proposition contended for by the appellant. Perhaps this situation has arisen because the appellant made certain concessions to the respondents in order to assist them in the winding up of the estate and the respondents now seek to take unfair advantage of these concessions, but we are not concerned with this. This is a taxing statute and there must be strict compliance.

Earlier in this judgment I had made reference to section 14(3) of the Ordinance. That subsection makes provision for an appeal to be brought by the declarant twenty-one days after receiving notice of valuation or assessment. As it was held in *Wight v. Commissioner of Inland Revenue*

(already referred to) it is imperative that notice be given, and it was suggested that such notice be in writing. Whether this suggestion has found acceptance or not, the position is, to my mind, clear that notice must be given. And if notice must be given to facilitate the launching of an appeal, it seems to me that it is implied that notice (whatever the form of notice may be) is contemplated by section 15.

The appellant has argued that the judge was wrong to find that duty was payable only upon assessment. In my view he was right in so holding. The judge went on to find the 10th August, 1962, as the date of assessment. Had the appellant succeeded in his submission on this aspect of the matter, then it became unnecessary to find a date of assessment. Both here and in the court below, counsel for the respondents contended that interest should begin to accrue from the date of assessment, but I do not believe he disputed the 10th August, 1962, as being that date. No doubt the judge selected that date because that was the date of the proper officer's certificate in which he stated that the remainder of the duty payable was \$325,546.22. In the previous proceedings (already alluded to) this court held that the certificate of the proper officer was not notice of assessment, and that the respondents did not have 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. On the last declaration and inventory, the one dated 6th April, 1962, the final duty was assessed, and a memorandum was made, but there is nothing to indicate when this was done. Had a date been affixed, and had the document been signed, then there would have been a compliance with section 15(1) of the Ordinance, in which case, interest would have begun to run from the date so indorsed.

In these circumstances I am compelled to hold, though with some regret, that interest could not accrue prior to the 19th July, 1965.

In conclusion, I would reject the appellant's contention and hold —

- (1) that the sum of \$350,667 was incorrectly included as part of the testator's assets; that instead the sum of \$130,702 should be included as part of the immovable property of the estate, and that so far as the Argosy Company shares are concerned, the Commissioner should take steps to have them assessed;
- (2) that the judge was right in his finding that the Gladys Hicken shares were not the property of the estate; and
- (3) that estate duty began to accrue from the 19th July, 1965.

The result is that all the appellant's submissions having been rejected, the appeal must be dismissed. But he has succeeded in obtaining one order for which he had been contending, that is, that the Argosy shares be sent back for valuation. In the circumstances, I would order him to pay the respondents three-quarters of their taxed costs fit for counsel.

## C. I. R. v. GOMES &amp; WIGHT

## ADDENDUM:

Since signing the judgment in *Commissioner of Inland Revenue v. Gomes & Wight*, I have had an opportunity to give further thought to the question as to the date from which interest should accrue, and it may well be that the trial judge was right in finding that the 10th August, 1962, was that date. The respondents filed the necessary documents for probate and among these documents was the proper officer's certificate in which the balance of estate duty was stated. This certificate was received in the registry in accordance with section 15(4) of the Estate Duty Ordinance, and was utilized for that purpose by the respondents. If this is so, then estate duty must have been assessed, and the respondents cannot now complain for lack of notice. In these circumstances, it seems right to agree with the date found by the judge.

I would therefore amend my judgment accordingly. But I would not alter the order for costs which I have proposed.

CUMMINGS, J. A. Percy Claude Wight, hereinafter referred to in this judgment as "the deceased", late Company Director and Chairman, licensed auctioneer, valuer and stockbroker, died on the 1st day of March, 1961 — according to local standards a very wealthy man. His estate was finally declared at a gross valuation of \$1,793,826.90. He left a will dated 30th September, 1959, in which he named as executrices his wife, Muriel Geraldine Wight, and his daughter Elaine Vera Gomes. They are the respondents in this appeal which stems from an assessment by the Commissioner of Inland Revenue of the duty payable on the property comprising deceased's estate.

The Commissioner assessed the duty at \$582,642. The respondents, in accordance with section 14(3) of the Estate Duty Ordinance, Chapter 301, hereinafter referred to as "The Ordinance", appealed to a judge in Chambers on the following grounds:

1. The assessment or re-assessment of duty payable in respect of the property of the above-named deceased was improperly made and signed by an officer other than the Commissioner of Inland Revenue.
2. The following property was improperly valued and/or assessed:
  - (a) 526 shares of the deceased in the Argosy Company Limited, in which the total share issue was 750 shares, was improperly calculated at 526/750 of the sum of \$500,000 at which the Argosy was sold as a going concern without taking into account the debts owing by the said company which had to be paid out of the said sale price;
  - (b) and further a debt of \$176,000: owing by the Argosy Company Limited to the deceased and which should have been brought to account as one of the deductions from

the total sale price to arrive at the nett value of the company's assets, was assessed as an asset of the deceased.

3. 75 shares in Gladys Hicken Limited, which were loaned to the deceased and held by him in trust for his wife in his lifetime and were still in his name at the date of his death were included as an asset and at an exaggerated and incorrect value, even though the par value of the said shares were disallowed as a liability of the deceased.
4. Certain advances made by the late R. M. Wight to the deceased in the lifetime of both of them, *inter alia* \$3,000.00, \$5,250,000.00, \$3,000.00, \$2,658.23, amounting to \$18,908.23, liabilities of the deceased were disallowed.
5. Certain moneys paid by the executrices on account of the Estate Duty from time to time have been wrongly appropriated towards interest on Estate Duty.
6. From time to time assets and values of assets of the said estate have been wrongly inserted by an officer of the Estate Duty Department and other liabilities of the said estate wrongly disallowed by the said officer.

At the hearing of that appeal counsel for the respondents abandoned grounds (1) and (4).

The learned trial judge found:

- (1) The deceased's shares in the Argosy Company Limited. The \$350,667 declared as unpaid purchase money on immovable property representing the deceased's shares in the Argosy Company Limited was incorrectly included in the dutiable estate of the deceased.
- (2) Immovable Property. That the lands and cottage sold by the deceased and the Argosy Company Limited to Peter Taylor and valued \$138,702 were correctly included in the dutiable estate of the deceased.
- (3) 75 shares in Gladys Hicken Limited. That these shares should not be included in the dutiable estate of the deceased as the deceased holding them in trust for his wife.
- (4) Interest is payable from the date of assessment — 10th August, 1962 — on the sum then owing.

From that judgment the Commissioner of Inland Revenue now appeals before this court on the following grounds:

- (1) The learned trial Judge erred in law and on the facts when he found that the \$350,667 declared as unpaid purchase money on immovable property representing the deceased's shares in the Argosy Company Limited was incorrectly included in the dutiable estate of the deceased.

## C. I. R. v. GOMES &amp; WIGHT

- (2) The learned trial judge erred in law and on the facts when he found that 75 shares in Gladys Hicken Limited were being held by the deceased in trust for his wife and therefore should not be included in dutiable estate of the deceased.
- (3) The learned trial judge erred in law when he held that estate duty was not payable until it is assessed and that a person cannot be liable to pay interest until estate duty becomes payable.

The deceased was for many years prior to his death a director and the majority shareholder in the Argosy Company Limited hereinafter in this judgment referred to as "The Company". He owned 526 of the 750 shares issued by that company.

On 4th February, 1961, he entered into an agreement with the company (hereinafter referred to in this judgment as "The Agreement"), the effect of which is most relevant to a determination of the dutiable assets of his estate. Accordingly, I set it out hereunder for ease of reference:

"AGREEMENT made and entered into this fourth day of February, 1961, by and between PERCY CLAUDE WIGHT, O.B.E., of Lot 10, Young Street, in the County and Colony aforesaid, hereinafter called "the Owner" which term whenever the context so permits or allows shall be deemed to include his heirs, executors, representatives or assigns, party of the first part, and THE ARGOSY COMPANY LIMITED, a company incorporated in and carrying on business in the Colony of British Guiana, whose registered office is situate at Lot in the City of Georgetown aforesaid, hereinafter called "the company" which term whenever the context so permits or allows shall be deemed to include its successors in title or assigns, party of the second part.

WHEREAS the Owner is the proprietor of the piece of land containing 84,000 square feet more or less situate on Bel Air Park immediately East of Vlissengen Road, on the East Coast, in the county of Demerara aforesaid;

AND WHEREAS the company has erected its Plant, machinery and buildings on the said piece of land with the knowledge and consent and permission of the Owner and has for several years carried on its business thereon;

AND WHEREAS the company has received an offer for the sale of its assets, buildings, erections and undertakings as described and enumerated in the Agreement of Sale between the company and Peter Taylor and Company Limited including the sale of the said 84,000 square feet of land owned by the Owner;

AND WHEREAS the Owner is the largest shareholder in the company and is willing to include the land consisting of 84,000 square feet on which the company has erected its Plant, machinery and buildings and that the purchase price for such land will be included

in and form part of the purchase price of the assets of the company as provided for in the Agreement of Sale aforementioned;

WHEREAS the Owner undertakes to pass Transport of the said 84,000 square feet of land either to the company of its nominee or nominees;

NOW THESE PRESENTS WITNESS and it is hereby agreed between the parties hereto as follows:

1. The Owner hereby sells to the company the said 84,000 square feet of land owned by him and situate at Bel Air Park immediately East of Vlissengen Road on which the Plant, machinery and buildings of the company are erected and will transport to the company or its nominee or nominees the said land free of cost the value of the said land, such value being reflected in the purchase price for which the company is selling the Plant, machinery and buildings erected on the said land.
2. There is no consideration passing between the Owner and the Company in respect of such sale of the said land in question.
3. The Owner hereby agrees that this Agreement shall bind his heirs, executors, administrators, representatives and assigns, and he hereby instructs his heirs, executors, administrators, representatives and assigns to carry out and fulfil the terms of this Agreement by transporting the said area of land to the company free of any payment in respect therefor the value of which is reflected in the sale price of the Plant, machinery, buildings and assets of the company including the sale of the area of land abovementioned".

On the 7th February, 1961, the company, the deceased acting on behalf of all the shareholders, members of his family concerned, and himself agreed to sell to Peter Taylor & Company Limited, the company as a going concern together with the 84,000 square feet of land which he had given to the company for the sum of \$500,000. It is significant to observe that in this agreement the following term appears:

“PURCHASE PRICE

(e) The balance of the purchase price to be paid on the passing of the Transport which is to be advertised and passed not later than the 30th April, 1961 and time shall be deemed to be of the essence. The Transport for the immovable property is hereby guaranteed by the Vendor to the Purchasers not later than 30th April, 1961, on the payment of the balance of the purchase price then due and payable.

In the event that the Purchasers fail to accept Transport on or before 30th April, 1916, it is hereby understood and agreed between the Parties that the sum of \$7,500: (Seven Thousand

## C. I. R. v. GOMES &amp; WIGHT

Five Hundred Dollars) shall be retained by the Vendor as agreed damages from the sum of \$25,000: paid on account for the non-fulfilment of this Agreement and for the non-acceptance of the passing of the Transport by the Purchasers. The balance of the sum of \$25,000: paid on account of the purchase price shall be repayable by the Vendor to the Purchasers, and this Agreement shall for all purposes be deemed rescinded and of no effect provided Purchasers have taken possession and paid the additional sum of \$75,000: (Seventy-five Thousand Dollars) and do not accept Transport on or before 30th April, 1961, then it is hereby agreed upon between the Parties hereto that the total sum of \$100,000: (One Hundred Thousand Dollars) so paid as herein before provided for shall be retained and become the absolute property of the Vendor as agreed liquidated damages”.

Since, therefore, time was of the essence of the contract, the agreed liquidated damages for breach thereof so substantial, and it was evident that an absolute grant of probate could not have been made within the time stipulated for performance of the agreement, it behoved the respondents to seek a grant of administration of the deceased’s estate *ad colligenda bona* so as to be vested with the necessary capacity to perform the agreement within the time specified therein. This they did. A statutory condition precedent, however, to such a grant is the issue of a certificate from the proper office that sufficient estate duty had been paid regarding the property to be dealt with or that good and sufficient security had been given by the respondents for the payment thereof.

Accordingly, on the 21st March, 1961, they filed the necessary declaration and inventory with the Commissioner of Inland Revenue or assessment.

Section 14(1) of the ordinance, provides as follows:

“14. (1) The Commissioner shall, if he is satisfied with the inventory and estimate of value given in the declaration as originally delivered, or with any amendment that is made therein upon his requisition, assess the duty on the basis of the inventory and estimate; but if he is dissatisfied with the inventory and estimate, he shall either make an inventory and estimate himself or cause an inventory and estimate to be made on his behalf by a person named by him, and on the basis of the inventory and estimate so made, he shall have power to assess the duty payable, subject to appeal as hereinafter provided”.

He however, was not satisfied with it and wrote to the respondents’ solicitors in the following terms:

Inland Revenue Department,  
Estate Duty Division,  
P.O. Box 24,  
Georgetown 9.

Gentlemen,

Estate: Percy C. Wight, deceased

I have for acknowledgement your letter dated 29th March, 1961.

2. In accordance with the Estate Duty Ordinance, Chapter 301, duty must be paid in full on the whole of the deceased's personality. The net value submitted in the declaration, prepared and filed by you appears to be approximately \$620,000.00 and with the proposed increased valuation and the inclusion of his shares in the Guiana Industrial and Commercial Co. Ltd., it is clear that duty at the rate of 35% payable provisionally on a net value of \$1,000,000.00 is \$350,000.00.

3. I must mention that the Argosy was also indebted to the deceased in the sum of \$176,000: and after deducting all liabilities – \$388,692.30 from sale price – \$500,000.00 the sum of \$111,307.70 remains. It follows that the value of one share is \$148.41 and the value of the deceased's 526 shares is \$78,063.66.

4. Therefore, for estate duty purposes you are required to hand over —

- (a) \$176,000.00 owing;
- (b) \$78,063.66, his shares; and
- (c) the sum of \$40,872.53 income tax disputed.

on account of Estate Duty. As the Commissioner of Inland Revenue is responsible for both accounts, adjustment can be made subsequently.

5. Mr. Dennison noted at an interview on Tuesday, 28th March, 1961, that the Manager of Barclays Bank stated that he had in hand the sum of \$290,000.00.

6. There is also a gift *inter vivos* (waived claim of interest – \$40,000.00) to be accounted for, as far as estate duty is concerned, and all the shareholders including the deceased must contribute to pay the duty on this gift.

7. I attach a list of the immediate liabilities of the Argosy Co. Ltd.

I have etc.  
W. G. STOLL  
Commissioner of Inland Revenue.

## C. I. R. v. GOMES &amp; WIGHT

Messrs. Luckhoo & Luckhoo,  
Chambers,  
"Whitehall",  
2, Croal Street,  
GEORGETOWN.

The list referred to was as follows:

Immediate Liabilities of Argosy Co., Ltd.		
1.	Trader Creditors and accrued expenses as at 30.6.60	\$ 52,099.62
2.	Income Tax (disputed)	40,872.53
3.	Sundry Creditors (General ledger) as at December, 1959	79,920.15
4.	Leave pay, severance pay and other allowances due and payable under agreement of sale dated 7.2.61 (estimated)	35,000.00
5.	Pension (estimated)	4,800.00
6.	Percy C. Wight, deceased	175,000.00
		\$388,692.30
	Sale price Argosy	\$500,000.00
	Less Liabilities	\$388,692.30
	750 shares value	\$111,307.70
	1 share value	148.41
	526 shares value	\$ 78,063.66
	Sums payable as per para. 4 of letter dated 6.4.61	
	Income tax disputed	\$ 40,872.53
	Amount owing by Argosy Co. Ltd.	176,000.00
	Deceased's shares	78,063.66
	Money in hand after passing of Transport	\$294,936.19

In order to assess the estate duty the Commissioner must first, in accordance with section 14(1) be satisfied with the declaration and inventory. Here he is saying in effect that far from being so, he is dissatisfied.

It is quite clear that the letter was not and did not purport to be an assessment and/or notice thereof.

In an agreement dated the 21st of March, 1961, Peter Taylor & Company limited agreed to sell to the Guyana Graphic with the concurrence of the company and the "Personal Representatives" (respondents) for \$290,400 the property which it had bought by virtue of "The Agreement".

This new agreement, although modifying certain of the terms of the first agreement, is only referred to chronologically in this judgment as it was one of the series of transactions concerning the administration of the deceased's estate; but it does not in any way effect the conclusions which must be reached for the determination of this appeal

In order then to facilitate the respondents in obtaining grants of administration *ad colligenda bona* so that they could perform the agreements within the stipulated time, the proper officer, Mr. Dennison, made computations on declarations and inventories filed from time to time and issued certificates in connection therewith evidencing the payment and/or security thereof of the ascertained duty in compliance with section 24(2) of the Deceased Persons Estates Administration Ordinance, Chapter 46. As he put it in his evidence which the learned trial judge accepted:

"I am the Proper Officer under section 2, Chapter 201, Estate Duty Ordinance. As Proper Officer the necessary declaration and inventory and estimates of valuation are brought in to me with vouchers. The executors would swear to the declaration and would leave them for examination. They are allowed to pay in estate duty on their valuation without an assessment on the figures they presented to us in order to save interest at 6% per annum. The assessment is done by the Commissioner and the figures are entered up by clerks and I signed most of them as Proper Officer at the bottom. I would give a certificate after the payment under section 15. In some cases security for payment would be given and a certificate would be issued. In the present estate there were a number of Inventory and Estimates submitted in the first list. Mr. Lloyd Luckhoo and Mr. Sharma, his clerk, and Mrs. Wight came to me. I went to the Commissioner and discussed it. I came out and told them that I could not pass the estate as it is, in spite of the fact that it was so urgent that the sale by the Argosy Company was to be completed.

Mr. Luckhoo told me he could not leave the Agreement with me because it was an important agreement. He decided to let me keep the Agreement for the night. I asked him what about the properties Mr. Wight expected to get. He said he could not give the figures right now, but all that was left unpaid he would bring in and he would let Mrs. Wight and Mr. R. M. Wight swear to the money unpaid and the money that is owing to him by the company. The figures in relation to the Argosy Company Lim-

## C. I. R. v. GOMES &amp; WIGHT

ited were only put down tentatively in order to pass transport and all the other declarations that were furnished after, except the last one showed no liability. The final Inventory and Estimate estimated the value of the estate to be \$1,793,826.90, it included a number of items. No item whatsoever I inserted. No estimate of value was made by me. I made no estimate of value nor did I insert an item in any of the Returns. On the final return had all the liabilities as \$324,721.32. This amount was added. The net estimate was \$1,469,105.58. The rate of duty was 40% – duty as assessed was \$582,642.00”.

It should here be observed that the provisions of section 20 of the Ordinance did not apply in this case and were never in fact invoked.

Accordingly a Grant of Administration *ad colligenda bona* was made by the Supreme Court to be respondents on the 18th April, 1961, and on the 21st December, 1961, administration was granted to Muriel Geraldine Wight to sell and dispose of and realise and generally administer such assets of the deceased’s estate as had been so far declared and accepted by the Commissioner of Inland Revenue; and they duly performed the agreements.

The final grant of probate was made on the 27th day of August, 1962. Along with the application dated 4th August, 1962, for this final grant, the following documents were lodged with the Registrar by the respondents’ solicitor:

1. Will.
2. Probate Copy of Will.
3. Affidavits of Attesting Witnesses.
4. Oath of Executrices to lead Grant.
5. Certificate of Proper Officer.
6. Statement of Assets and Liabilities.

The said “certificate of the proper officer” referred to above is in the following terms:

“CERTIFICATE OF Proper Officer under Estate Duty Ordinance Chapter 301, upon Security for payment to the Proper Officer as provided by section 24(2) of the Deceased Persons Estate Administration Ordinance, Chapter 46.

I, the Proper Officer under the Estate Duty Ordinance, Chapter 301, hereby certify that the inventory and Declaration of the estate of Percy Claude Wight, deceased, who died on the 1st March, 1961, at St. Joseph’s Mercy Hospital, Georgetown, testate, have been duly delivered to me in terms of section 13 of the Estate Duty Ordinance, Chapter 301, and that in accordance with section 24(2) of the Deceased Persons’ Administration Ordinance, Chapter 46, security has been given by the executors

for payment of the remainder of estate duty, the sum of \$325,546.22 (three hundred and twenty-five thousand, five hundred and forty-six dollars and twenty-one cents) with interest at the rate of six per cent from the 1st day of May, 1961, to the Commissioner of Inland Revenue under the provision of the Estate Duty Ordinance, Chapter 301, on property to the value of \$1,469,105.58.

Without Prejudice

H. R. DENNISON

for Commissioner of Inland Revenue,  
Proper Officer under section 2 of the  
Estate Duty Ordinance, Cap. 301.

Dated this 10th day of August, 1962”.

When a comparison is made with the other certificates previously issued for the purpose of the limited grants, it is clear that this was issued after an assessment had been made and was, subject to a declaration and inventory of property if any subsequently discovered, intended to be absolute and final. In each of those three other certificates, it is stated that the grant to follow was to be limited to the property declared, the duty upon which had either been paid or satisfactory security given therefor: “the executrices cannot touch anything belonging to the said estate without a further grant of probate”.

When the Estate Duty Ordinance, enacted as it was originally in 1898, is read together with the Deceased Persons Estates Ordinance, Chapter 46, which was originally enacted in 1920, it would be observed that there are conflicting provisions in the form of absolute contradictions. The maxim applicable is: “*Leges posteriores priores contrarias abrogant. Ubi duai contraries leges sunt, semper antiquam abrogat nova*”. (Vide also LORD ST. LEONARD in *O’Flaherty v. Mc Dowell* (1857) 6 H.L.C. and *The Danube II* (1920) p. 104. Consequently sections 5 and 6 of Chapter 46, which provides for the deposit in the Registry and dealings by the Registrar with wills up to a certain point impliedly repeal section 15(4) of Chapter 301; but when regard is had to the schemes of both Ordinances, the intention adumbrated in that subsection still remains – and that is, that probate or letters of administration will not be granted unless the proper officer appointed under Chapter 301 has certified in accordance with either section 15(3) of Chapter 301 that, *inter alia*, duty has been paid, or section 24(2) of Chapter 46, security has been given to him for the payment.

Sections 16 to 18 of Chapter 46 provide for various types of limited grants of administration including a grant limited, *inter alia*, to part only of the estate or property of the deceased person.

The language of section 24(2) –

## C. I. R. v. GOMES &amp; WIGHT

“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 (Chapter 301)”

is, in my view, wide enough to embrace not only the making of absolute grants, providing an assessment as contemplated by Chapter 301 has been made and duty so assessed paid or secured to the satisfaction of the proper officer; but also limited grants where the ascertained duty payable on the property to be administered in accordance with the grant, as computed on the valuation submitted by the declarant without an assessment, has either been paid or secured.

It is obvious that in order for the proper officer to issue a certificate for the purpose of an absolute grant, the Commissioner of Inland Revenue must have assessed the duty, as contemplated by Chapter 301, but such an assessment for the purposes of a limited grant is not only not within the contemplation of Chapter 301 and therefore unnecessary, but is also impracticable.

In my view, therefore, the Commissioner and Mr. Dennison acted not only well within the ambit of the relevant provisions of the law, but also in accordance with common-sense and a commendable sense of appreciation of their duty to facilitate the respondents in the administration of this large and somewhat complicated estate, while at the same time ensuring that there was adequate security for the collection of the public revenue as is manifestly intended by the scheme of both Ordinances in general and section 24(2) of Chapter 46 in particular.

The learned trial Judge, upon a close examination of the facts and application of the relevant law thereto, found that estate duty was assessed on the 10th day of August, 1962, and that a certificate of the proper officer was issued on that date. In my view the evidence justified the finding. Consequently, I see no reason for disturbing it; and I accept it.

As this finding is inextricably bound up with the determination of the date from which interest became payable it is convenient to deal with that question at this point. Counsel for the Commissioner urged that regardless of the date of assessment, estate duty was payable as from the date of death, or in the alternative two months after the date of death of the deceased.

For his first application he relied on a number of English cases and drew an analogy with the position in income tax cases. In my view neither of these has any bearing on the payment of estate duty and/or interest thereon in Guyana. The English cases are based upon specific statutory provisions which are quite different to those set out in the relevant local Ordinances; and therefore this proposition fails.

For his second proposition he relies on the provisions of section 13(1) of the Estate Duty Ordinance, Chapter 301, which provides as follows:

“13. (1) Within two months after the death of any person who has died in the colony, and within six months after the death of any person who has died out of the colony, the person or persons set forth in sections 10, 12 and 33 of the Deceased Persons Estates Administration Ordinance, shall appear before the proper officer, and —

(a) deliver a full and articulate inventory of all the property which the deceased person possessed at the time of his death, together with a statement of the deductions which are to be made therefrom, exhibiting at the same time the will (if any) of the deceased; and

(b) make a declaration verifying the inventory and statement and stating that the property is of the value of a certain sum therein specified, to the best of the deponent’s knowledge, information and belief.

He submitted that as the executrices were thereby obliged to deliver an inventory within that time, it follows that duty was payable therefrom.

Counsel for the respondents, on the other hand, urged that in accordance with the provisions of section 66 of the Tax Ordinance, Chapter 298, interest could only be charged from the date the duty becomes due and payable and that it only became due and payable when in accordance with sections 14 and 15 of the Estate Duty Ordinance, Chapter 301, there had been an assessment and that that assessment was only made in the legal sense after it shall have been communicated to the persons making the declaration.

The question, therefore, is really one of interpretation of the relevant sections.

Firstly, therefore, section 66 of the Tax Ordinance, Chapter 298:

“In default of payment, when due, of any of the taxes or duties imposed or other monies payable by this Ordinance or by any Ordinance mentioned in this Ordinance, those taxes, duties, or other monies with interest at the rate of 6 per centum per annum from the day when they became due and payable shall when not otherwise specially directed be enforced and recovered by the Financial Secretary by parate execution”.

Section 10 of that Ordinance makes provision for the payment of estate duty and prescribes the rates; so that duties are imposed and payable by virtue of that Ordinance.

Secondly, the Estate Duty Ordinance, Chapter 301, sections:

“15. (1) On the duty payable being assessed as aforesaid the proper officer shall cause to be made on the declaration a memorandum of the amount of estate duty payable.

## C. I. R. v. GOMES &amp; WIGHT

(2) The person making the declaration, or his agent, shall thereupon pay into the Treasury the duty so assessed, and the Financial Secretary shall give a receipt therefor.

(3) The proper officer shall then prepare a certificate under his hand, setting forth that the inventory and declaration have been duly delivered and that the estate duty, if that duty is payable, has been paid, and stating the value as shown by the inventory of the property on which it is payable.

(4) No will shall be received by any officer of the Registry for deposit or for recording therein unless there is delivered therewith the certificate referred to in subsection (3) of this section”.

It is clear, therefore, that certain specific acts are to be performed by the Commissioner and the proper officer and “thereupon” duty becomes payable. Consequently, the second proposition of counsel for the appellant also fails.

In Stroud’s Judicial Dictionary under the heading “Thereupon” appears the following definition:

“(1) It is as nearly accurate as possible to say that in its primary scope ‘thereupon’ is equivalent to ‘immediately’.”

Under the heading “Immediately” appears:

“So where a statute requires anything to be done ‘immediately’ that is the same thing as ‘forthwith’; and implies speedy and prompt action and an omission of all delay; in other words that the thing to be done should be done as quickly as reasonably possible”. (Per Cockburn, C. J. — *R. v. Berkshire Justices* 4 Q.B.D. 469. See also *R. v. Aston* 19 L.J.M.C. 236).

Is it reasonably possible to pay a sum of money before one knows what sum of money is to be paid? Obviously not.

To construe “thereupon” as meaning that the Commissioner could make an assessment in his mind, convey it to the proper officer who records a note or memorandum on the declaration and inventory – an official record in the custody of the proper officer – and without any communication thereof to the person making the declaration, demand interest from the date of his assessment, it to impute an absurdity to the legislature. The legislature must have intended that the person making the declaration should have knowledge of what he is to pay before he could be expected to pay.

While it is true that in construing all written instruments the practical and ordinary sense is to be adhered to, yet if that would lead to some absurdity, inconvenience or injustice presumably not intended, the court is justified in adopting a construction which modifies the meaning of the words, and even the structure of the sentence.

MAXWELL ON THE INTERPRETATION OF STATUTES 11th Edition, at page 220, puts it this way:

“Section 1 – MODIFICATION OF THE LANGUAGE TO MEET THE INTENTION’

Where the language of a statute, in its ordinary meaning and grammatical construction, leads to manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, or by rejecting them altogether, under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman’s unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Nevertheless, the courts are very reluctant to substitute words in a statute, or to add words to it, and it has been said that they will only do so where there is a repugnancy to good sense”.

Knowledge may result either from express notice or by implication, having regard to the surrounding circumstances.

In my view, therefore, in construing “thereupon” in this context, in order to avoid absurdity, inconvenience and harshness, obviously not intended, the words “upon notification thereof either expressly or by implication” should be inserted between the words “shall” in the first line and “pay” in the second line of section 15(2). In other words, the section should be read as follows:

“The person making the declaration, or his agent, shall upon notification either expressly or by implication thereof pay into the Treasury the duty so assessed, and the Financial Secretary shall give a receipt therefor”.

It is quite obvious, since the solicitors, upon the application for final grant of probate, lodged that certificate with the Registrar, they knew or ought to have known that the duty had been assessed; and the sum in which it had been assessed; and consequently their knowledge must be imputed to the respondents. Moreover, the respondents, upon application to the Chief Justice, obtained an order for the execution of a bond as good and sufficient security for the payment of the balance of the duty due in accordance with the said certificate. They must have appreciated at that time that the amount stated therein was the result of an assessment.

## C. I. R. v. GOMES &amp; WIGHT

In the circumstances interest became payable as from 10th August, 1962.

I ought not to pass from this judgment without a reference to the conclusion reached by this court in (1966) G.L.R. 269 when upon consideration of an *in limine* objection upheld by the learned trial judge, it allowed the appeal on the ground that no notice for the purpose of setting in motion procedure on appeal had been received by the respondents (appellants in those proceedings) until the 19th of July, 1965. And it is apposite to deal with that now. It is clear that the notice required by section 14(3) is an express notice for the specific purpose of the computation of time within which to appeal. That is to be an act of the Commissioner setting in motion the procedure for the exercise of a right of appeal and consequently the usual strict compliance is necessary; here no implication from surrounding circumstances will suffice. Moreover, in my own view "notice" in the context in which it is used there means "notice in writing".

The knowledge required in the persons making the declaration for the purpose of "thereupon" paying to the Treasury need not necessarily be the result of a specific notice even though that might be desirable; and is consequently distinguishable from the express notice required by section 14(3).

I turn now to the first ground of appeal.

There appears on all the declarations and inventories beginning with one filed on the 21st March, 1961, the following item:

"Unpaid purchase money of immovable and leasehold property contracted in the lifetime of the deceased to be sold (as per agreement)	\$350,667.00
---	--------------

and on the Final Declaration intituled "Final Grant to Probate":

"Value of shares held by deceased in Investment & Loan Association (B.G.) Ltd., in The Daily Chronicle Ltd. and in Gladys Hicken Ltd. (as per list "A" attached)	\$304,808.56
--	--------------

And list "A" shows:

"(4) Shares held by the deceased in Gladys Hicken Limited – 80 shares at \$952.22 each . . (Without prejudice to the Executrices to appeal to the courts to have a valuation fixed in relation to these shares, and without prejudice to have a court determine whether 75 shares are the property of the deceased or that of Mrs. Muriel Wight personally	\$ 76,177.60."
--	----------------

Counsel for the respondents urged that although the figure of \$350,667 was included and described as it was by the respondents, it was a mis-description and ought not to have appear where it did, and further that it was calculated in the wrong manner.

Mrs. Wight testified that this represented the deceased's portion of the unpaid purchase money of immovable and leasehold property owing to the deceased's estate by The Company. The learned trial judge found that this figure was reached by the following calculation: 526/750 of \$500,000 – the sale price of The Company without a deduction of the liabilities of The Company, which were mentioned by the Commissioner of Inland Revenue in his letter to the respondents' solicitor to which reference has been made earlier in this judgment at \$338,629.30, but that if this were done and the shares valued on the same basis, then the valuation would have been \$78,063.16 as set out in the Commissioner's letter. The learned trial judge then went on to revalue the shares by introducing what he considered to be a further liability of the company, i.e., the value of the 84,000 sq. ft. of land given by the deceased to the company – valued according to the evidence he accepted – at \$138,702 which brought the total liabilities to:

	\$388,693.80
plus	<u>\$138,702.00</u>
	<u>\$527,395.80</u>

He then related this figure to the sale price of The Company, concluded that the shares were worth nothing, and consequently made the findings set out earlier in this judgment. I agree with those ultimate findings but, with great respect, not with the reasons therefor.

Although an appeal is not from the learned trial judge's reasons for his judgment but from the judgment itself, yet in this case he has in his reasoning found that the shares had no value by treating the value of the gift of land to the company as one of its liabilities.

In my view for the purposes of the assessment of estate duty the gift to the Argosy Company Limited attracts the provisions of section 9(1)(b) of the Estate Duty Ordinance, Chapter 301, which are as follows:

“9. (1) Estate duty shall, subject to the deductions hereinafter mentioned, be payable in respect of —

(b) property taken as a *donatio mortis causa* made by the deceased or taken under a disposition made by him purporting to Operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, or otherwise, which has not been *bona fide* made three years before the death of the deceased, or taken under any gift whenever made, if *bona fide* possession and enjoyment of that property have not been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor, or any benefit to him by contract or otherwise;”

And also section 11(1) —

“11. (1) The estate duty payable in respect of any property of a deceased person shall, unless or until it is paid as hereinafter provided, be

## C. I. R. v. GOMES &amp; WIGHT

a preferent claim on all the property and effects of the deceased of every kind and of every part thereof, ranking immediately after debts (if any) due from the deceased to the Crown or Colony, and the whole or any part of the duty, if unpaid, may be recovered by parate execution out of any part of the property or effects in the possession of any person whomsoever, or by action against any person to whom any of the property or effects have been transferred or delivered to the extent of the value of the property or effects so transferred or delivered:

Provided that no person to whom any of the property or effects has been transferred or delivered *bona fide* and for valuable consideration, after the certificate hereinafter mentioned of the proper officer is placed in the Registry, shall be under any liability for the payment of the estate duty, nor shall the property or effects in his possession be subject to any claim in respect thereof."

"Equity will not perfect an imperfect gift." In *Milroy v. Lord* (1862) 4 De G.F. & J. 264, TURNER, L.J., laid it down 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 . . . 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."

This was followed in *Re Fry, Chase National Executors and Trustees Corporation v. Fry* (1946) 2 A.E.R. 106. See also *King v. Powell & Powell* (1952) B.G.L.R. p. 20 per BOLAND, J. at page 21:

"Under Roman Dutch law, the right to oppose would seem never to have been denied to one who had in fact some right to the '*dominium in res*' over and above the holder of the transport, no matter that he did not hold the transport. The protection afforded such a person, though not the legal owner, was analogous to the restraint imposed on the legal owner by court of equity in England so as to ensure that he will act fairly and with a good conscience towards persons having equitable interests in the land.

In the absence of judicial authority on the point as to the priorities between the donee *inter vivos* and the devisee, it may be helpful to consider the relative rights and obligations of each such person under English equity jurisprudence in similar circumstances seeing that the governing principles of English equity and Roman Dutch law in re-

gard to the protection of the non-legal owner of land are more or less the same.

It is a well known rule in equity that equity will not assist an imperfect gift. For such a donee to obtain recognition and for him to be enabled to invoke a remedy in equity, the intending donor must have done all that it was possible for him to do to effectuate the gift to the donee."

Consequently, as soon as duty is assessed, the Commissioner of Inland Revenue would have a claim to duty on this property as part of the deceased's estate in preference to the donee's rights to the property, once there had been no transfer of the legal title to the donee during the lifetime of the deceased.

As can be seen from the declaration of the 6th day of April, 1962, intituled "Final Grant to Probate", the deceased's immovable property is declared at \$309,124.80 as per affidavit of valuation of Howard. The evidence accepted established that the properties mentioned at items 10, 11, 12 and 13 in Howard's affidavit comprise the gift. As the learned trial Judge found, this is correctly included therein, and consequently no more need be said about it.

Counsel for the appellant urged that the learned trial judge was in no position to determine the valuation of the deceased's shares in the company because —

- (1) The company was in liquidation and that was not complete.
- (2) Para, (v) of "The Agreement" provided:
  - (v) The following is expressly excluded from this sale viz:
    - (a) The land owned jointly with the Demerara Tobacco Company Limited.
    - (b) The Artesian Well and Reservoir and Filter.
    - (c) Investments.
    - (d) Stock on hand (except as hereinafter stated).
    - (e) Sundry debtors.
    - (f) Cash in hand.
    - (g) Claim for refund of Income Tax.

#### STOCK IN HAND

The Purchasers hereby undertake and agree to purchase all of the newsprint on hand, on order or in-transit and at least 80 (eighty) per cent of the balance of the general stock, including all stocks, goods, parts and spares concerning machinery and equipment, on order or in-transit at landed cost. The Purchaser undertakes immediately upon the signing and/or initialling of the agreement reached herein to cancel and future shipment or shipments of newsprint on order."

## C. I. R. v. GOMES &amp; WIGHT

that it was only the liquidator who could determine the value of those items. He cited in support of his submission *Ellesmere v. The Inland Revenue Commissioners* (1918) 2 K.B. at page 735.

- (3) The trial judge ought to have acted in accordance with section 14(4) of the Estate Duty Ordinance, Chapter 301, which provides that –
- (4) The court shall have jurisdiction to hear and determine in a summary way the matter in appeal and the costs thereof, with power to direct for the purposes of the appeal, an inquiry, valuation, or report to be made by an officer of the court or other person, as the court thinks fit.”

Mr. Stafford conceded that there was merit in this submission; and I agree with it. I would accordingly direct a valuation of the shares by the Commissioner of Income Tax or someone appointed by him for that purpose. He may be well advised to seek the assistance of the liquidator in this connection – but that is a matter for his discretion.

Finally, the appellant urged that 75 of the shares in the name of the deceased on the register of Gladys Hicken Limited should form part of his estate. Mrs. Wight had executed a blank transfer of these shares to her husband during his lifetime.

*Quo animo* did Mrs. Wight transfer her shares to her husband? This is purely a question of fact. She says no consideration passed; the transfer was a loan so that her late husband’s voting strength could have been increased at a time when they considered it necessary to do so. She denied that it was a gift. She was supported by several credible witnesses. The learned trial judge accepted their testimony and consequently had ample evidence upon which to make his finding that the transaction was a loan, the effect of which was a resulting trust in the deceased’s estate for her benefit — vide *Green v. Carill* (1877) 4 Ch. D. 822 M.C. and *In Re Hawes v. Curtis* 52 L.T. 244. I can see no reason for disturbing that finding.

The result then is that I would dismiss this appeal, all three grounds having failed. I would, however, vary the trial judge’s order and direct a valuation by consent of the deceased’s shares in the Argosy Company Limited.

Although there was no cross-notice on the question of the learned trial judge’s directing a valuation, Mr. Doodnauth Singh did argue this point in the court below, and Mr. Stafford did not reply thereto then. He has, however, conceded its merits in this court and consequently I consider the appellant entitled to his costs in this connection. Accordingly, I would order that the respondents should have three-fourths of their costs certified fit for two counsel in this court and in the court below.

The majority judgment of the court then is, that this appeal be dismissed but that the Order of the learned trial judge be varied by consent to declare that a valuation of the deceased’s shares in the Argosy Company be

made by the Commissioner of Inland Revenue or someone appointed by him for that purpose; and that an assessment be made thereon; and that the respondents do have three fourths of their costs in this court and in the court below certified fit for counsel.

CRANE, J.A. (Ag.): Percy Claude Wight, Esquire, died domiciled in Guyana on March 1, 1961. He left a large estate the gross value of which is \$1,793,826.90; total liabilities amount to \$324,721.32; the net estate of which a 40% duty of \$582,642.00 becomes payable is therefore \$1,469,105.58.

In accordance with the Estate Duty Ordinance, Chapter 301 (hereafter called the Ordinance), the respondents, the executrices named in the last Will and testament of the deceased who were the petitioners before the judge from whose decision this appeal is now brought, delivered their original declaration, for estate duty purposes on March 21, 1961. To this document (Ex. "F"), are exhibited the usual inventory of property — form "A", and statement of account of debts due and owing from the deceased — form "B". The declaration, however, was obviously intended as provisional for the executrices made application of even date to the Supreme Court for a limited grant of administration *ad colligenda bona* to enable them to perform contracts made by the deceased in his lifetime, in one of which it is stipulated that time is of its essence, viz: that for the Argosy Company Limited, a printing company, (called hereafter the Argosy), in which the deceased held the majority of the shares, to transport certain land containing about 84,000 sq. ft. situate at Bel Air Park, east of Vlissengen Road, East Coast, Demerara (hereafter called Bel Air Park). This land at Bel Air Park is one of the matters in dispute in this appeal, and in this affidavit in support of the application the executrices averred they were not in a position to finalise the estate of the deceased, but that an application for probate proper would be made just as soon as they were in a position to get up an inventory of the deceased's estate.

In passing it may be observed that this grant required by the executrices being "limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the same", no declaration need have been filed unless ordered — see Tristram & Coote's Probate Practice 20th Edn. p. 509. The respondents, however apparently thought it was obligatory on them to do so; and that is why I believe they filed their original declaration on the same day as their application. It will be shown that by so doing they have attracted procedures in relation to the assessment of estate duty and interest under the Ordinance much earlier than they had anticipated, and there can be no ground for complaint if the appellant has set them into motion. They cannot approbate and reprobate.

Accordingly, a further limited declaration was filed later in the same year (Ex. "G"), in which the declaration gross estate was increased to \$947,253.00; later, there was another declaration corrective to Exs. "F" and "G" (Ex. "H") dated February 2, 1962, this time increasing the gross estate to \$1,265,048.30; and finally the declaration (Ex. "J") which led

## C. I. R. v. GOMES &amp; WIGHT

to probate declaring the gross estate leading to a grant of probate on 27th day of August, 1962.

From an inspection of the various heads and sub-heads in the four inventories and estimates of property of the deceased accompanying the aforesaid declarations, and the attendant statements breaking down and explaining their composition, it will be seen that the deceased owned a considerable number of stocks, shares and debentures in both local and foreign companies. In the Argosy, he was the principal shareholder since he owned 526/750 of its shares and so possessed the controlling interest in that concern. On February 4, 1961, shortly before his death, he concluded the agreement referred to with the Argosy. This was expressed to include his heirs or executors, and undertook that he, as owner of Bel Air Park, would pass transport of the same to the Argosy or its nominee or nominees. The recitals reveal that the Argosy had erected its plant, machinery and buildings, etc., on Bel Air Park with the knowledge and consent of the deceased and had so carried on business for several years; they also reveal that the Argosy had received an offer for the sale of its assets, buildings, erections and undertakings and that these were enumerated in an agreement of sale dated February 7, 1961 between the Argosy and Peter Taylor and Company Limited (hereafter called Peter Taylor) which included the land at Bel Air Park for \$500,000. The agreement between the deceased and the Argosy went on to provide that as the deceased was the largest shareholder therein, he was willing to include Bel Air Park on which the Argosy stood and carried on its business in the offer for sale from Peter Taylor. It was also stipulated that the purchase price for such land would be included in and form part of the purchase price of the assets of that company. The Agreement made by the deceased also provided that there would be no consideration for it, and that transport to the Argosy would be "free of any payment in respect therefor the value of which is reflected in the sale price of the plant, machinery, buildings and assets of the company including the sale of the area of land abovementioned."

Percy Claude Wight however, died before either agreement of the 4th or 7th February, 1961, was carried to fruition, and that is why it fell to the lot of his personal representatives to apply for a grant to enable them to execute the transport of the machinery, buildings and land on which the Argosy stood to Peter Taylor.

It has been considered fitting to refer to those two agreements with the Argosy in some detail because the subject matter of the first ground of appeal concerns the disputed figure of \$350,667.00 which appears in each of the four mentioned inventories submitted on behalf of the deceased, as property under the heading "Unpaid purchase money of immovable and leasehold property contracted in the lifetime of the deceased to be sold."

To be precise, the first ground raised by the Commissioner of Inland Revenue, the appellant, is that –

"The learned trial judge erred in law and on the facts when he found that the \$350,667.00 declared as unpaid purchase money on immovable

property representing the deceased's shares in the Argosy Company Limited, was incorrectly included in the dutiable estate of the deceased."

It must however be pointed out that when the matter engaged the attention of the trial judge the petitioners, who are now the respondents, had appealed against the Commissioner's assessment of the deceased shareholding in the Argosy, viz: the basing of his calculation of it as 526/750 of \$500,000. i.e. on the sale price of the Argosy, inclusive of land at Bel Air Park, buildings, machinery and plant.

The executrices contended before the judge, that the Argosy was sold as a going concern without taking into account the debts owing by it which had to be paid out of the \$500,000, but it must be pointed out that the error in the calculation of the deceased's shares in the Argosy for which they contended before the judge was their own, for it appeared in the very first inventory and estimate they submitted to the estate duty authorities (Ex. "F"). It was in fact this declaration and inventory to which the Commissioner referred when he addressed what was apparently his first bit of correspondence to the petitioners' solicitors (see Ex. "A"). In this letter the Commissioner, after deducting \$388,692.30 representing the liabilities of the Argosy, calculated the value of the 526 shares held by the deceased at \$78,063.66 and, among other demands requested that duty be paid on that figure. The letter is dated April 6, 1961, so from this time onwards, it ought reasonably to have been clear to the executrices that the figure of \$350,667.00 which they were responsible for including as an asset in the inventory as being subject to estate duty has been erroneously calculated by them; but as it happened, in each subsequent corrective declaration that identical figure reappeared,

Another asset which appeared in each succeeding inventory and estimate was the sum of \$309,124.80 representing the valuation of the immovable property of the deceased in Guyana. This included the four lots of land at Bel Air Park of a total value of \$138,702.00 which were transported by the Argosy to Peter Taylor under the agreement referred to above.

Before the judge who heard the petition, it was contended both in the evidence of Mrs. Muriel Geraldine Wight and by counsel on her behalf, that the estate had been charged duty twice in respect of the above figure \$138,702.00 – once in relation to the deceased's shares, and again in relation to his immovable property, and that this figure should be deducted only from \$309,124.80, the total valuation on immovable property. As a matter of fact, Mrs. Wight stated, apparently for the first time, that she was disposed to accept the findings of the Commissioner on the matter of the shares in the Argosy referred to in his letter of April 6, 1961 (Ex. "A").

I am afraid, however, this will not be possible, particularly in view of the fact that the Commissioner's was only a rough and inaccurate calculation based on material available to him at the time; it was in fact only intended as provisional.

## C. I. R. v. GOMES &amp; WIGHT

Very simply, after deducting the liabilities from the selling price of \$500,000: to Peter Taylor, without more, he found the value of the 526 shares owned by the deceased. But what of the assets of the Argosy? Surely these should have been included in computing the value of its shares. Evidently the Commissioner made no enquiry into the composition of what the Argosy was selling to Peter Taylor for the sum of \$500,000. Had he done so he would have found that the Argosy at the time of sale owned land jointly with another company, the Demerara Tobacco Company, Limited, that Argosy had made certain investments, possessed stock on hand and cash in hand, that it had various debts to be collected on its behalf, and that there was a claim by the Argosy for a refund of Income Tax. The Commissioner obviously was not aware that the Argosy had excepted these assets from the property owned by it in its agreement dated 7th February, 1961 to transport its property to Peter Taylor — see clause (v) Ex. “N”.

The judge in considering the value of the deceased’s shares in the Argosy approached it, by first considering the question of ownership in the value of Bel Air Park, and concluded, that its value was correctly included in the dutiable estate of the deceased since Bel Air Park was owned by him, for the reason that as he sold it to Peter Taylor, he would be entitled to its value from the purchase price.

It is evident that this conclusion is sustainable, though not for the reason given for it. No reason is assigned why the deceased still owned Bel Air Park though he had by the agreements of the 4th and 7th February, 1961, contracted to transport it to the Argosy. The judge evidently assumed there were valid contracts from which the deceased’s estate would be entitled to the purchase price. I think however, that the proper approach lies in an analysis of the combined legal effect of those agreements. The legal significance of the provision in the agreement for Bel Air Park to be transported to the Argosy without any consideration moving from that company went unconsidered; and so was the provision for its value to be reflected in the purchase price paid by Peter Taylor and for it to form part of the assets of the Argosy. A consideration of these agreements is important in view of the question whether the value of Bel Air is properly assessable in respect of estate duty on his immovable property or is to be considered unpaid purchase money on a contract made by the deceased in his lifetime, which is a matter in issue in this appeal. The respondents contend the value of Bel Air has been assessed under both heads, but should be allocated under immovable property.

The agreement between the deceased and the Argosy of the 4th February 1961, was plainly *nudum pactum* at the time of death and unenforceable in law being made without consideration, and it must follow that of February 7th in so far as Bel Air Park was concerned. The Argosy clearly could not sue the deceased on it, and for that matter neither could his executrices nor assigns who were also included in it, be sued for the same reason. It amounted to no more than a naked promise by the deceased to convey Bel Air Park to the Argosy; therefore when he died some three weeks later his personal rep-

representatives, though they applied to the court for a grant to enable them to transport Bel Air Park, were under no legal obligation to do so. But whether or not they were aware of this is immaterial because on March 21, 1961, exactly three weeks after the death of the deceased, they joined as personal representatives and concurring third parties in another agreement of sale and assignment; on this occasion between Peter Taylor and the Guyana Graphic Limited (called the Graphic) as vendor and purchaser respectively, with the Argosy as a fourth party, to transport Bel Air Park *inter alia* to the Graphic. When however Bel Air Park was thus transported, the executrices by concurring in the sale were really carrying on where the deceased left off by completing his imperfect gift of it to the Argosy; they did so with the ostensible object of effecting the agreements of the 4th and 7th February, 1961, both of which were expressed to include them.

While on the one hand, at the date of death as far as Bel Air Park was concerned, nothing affecting it could legally turn on the agreement of February 4, 1961, between the deceased and the Argosy, on the other hand it must not be overlooked that on 21st March, 1961, Bel Air Park by the agreement of sale and assignment legally became the property of the Graphic. Nevertheless, at all material times prior thereto, it was the *de jure* ownership of the deceased, and so on his death became subject to estate duty simply because the agreement between the deceased and the Argosy having been made without any consideration to support the undertaking he gave that he would make over Bel Air Park free of payment to the Argosy, remained property which he was competent to dispose of at his death. The proceeds of sale therefore did not form part of the assets of that company at the time of death.

The legal effects of the agreement of February 4, 1961, then, was the making of a contract for the voluntary transfer of immovable property without consideration i.e. – of an incomplete gift of immovable property with respect to Bel Air Park. The authorities are however to the effect that no transfer of immovable property can take effect unless perfected by transport – see *Mangru v. Bella* (1931-37) L.R.B.G. 414, 418, also, *Surejpaul v. Ramdeya & Sarju* (1941) L.R.B.G. 309, a case which bears remarkably similar features to the present of a man who makes a voluntary gift of immovable property *inter vivos*, but dies without perfecting it by transport.

Briefly, the facts are as follows: On March 14, 1940, one Gojadhar made a wedding gift by written agreement of W½ Lot 111, Barr Street, Kitty, to his son-in-law the plaintiff Surejpaul, promising to pass transport of it to him whenever he was ready to receive it if he married his daughter in Hindu fashion. Gojadhar then died on May 16, 1940 having made a Last Will and Testament in 1938 in which he appointed Ramdeya his executor and left lot 111, Barr Street Kitty, with all buildings and erections thereon to his son the defendant Sarju. The written agreement was held to be *nudum pactum*. In an action by the plaintiff against the executor and the devisee to enforce the gift, DUKE, J., held:—

## C. I. R. v. GOMES &amp; WIGHT

“Gojadhar never transported the west half of lot 111, Alexanderville, to plaintiff. It is part of the law of this colony that no transfer of immovable property can take effect unless perfected by transport; see *Mangru v. Kella* (1931-37) L.R.B.G. 414, 418. Consequently, the gift to the plaintiff of W½ lot 111, Alexanderville was not completed at the time of the death of Gojadhar on the 16th May, 1940.”

In like manner the undertaking by the deceased as expressed in the agreement of February 4 to transport Bel Air Park to the Argosy and for the proceeds of sale to form part of the assets of that company, unsupported as it was by valuable consideration failed for just the same reason as Gojadhar’s promise in writing to his son-in-law Surejpaul.

So that notwithstanding the purported sale by the agreement of sale between the Argosy and Peter Taylor on February 7, 1961 (Ex. “N”), Bel Air Park still remained the property of the deceased until his executrices *qua* executrices by the agreement of sale and assignment of the 21st March, 1961 (Ex. “O”) joined in as third parties as aforesaid, and agreed to the transport of the properties mentioned therein including Bel Air Park to the Graphic. It was then, and only then, that is to say, on March 21, 1961, that Bel Air Park legally passed out of the belongings of the deceased; but before that time estate duty by reason of the death had already been attached to it as property of which the deceased was at the time of his death competent to dispose.

No doubt had death not ensued the agreements of the 4th and 7th February, 1961, would have gone through in the normal course and without a hitch. The voluntary gift would have been perfected by transport subsequently but death made all the difference to the success of the plan of the deceased with regard to this item of property.

It is only for these reasons, I opine, that the judge’s conclusion that Bel Air Park was the property of the deceased and was included in his dutiable estate can be supported.

But having reached the above conclusion, it is submitted it was not correct to deduce that as a consequence the valuation placed by the Commissioner on the deceased’s shares in the Argosy was wrong; though it is for the reasons mentioned above. The judgment under review then proceeded to alter the basis of the Commissioner’s calculation of those shares by adding to the Argosy’s liabilities of \$388,692.30, the figure of \$138,702: viz: part of the selling price of Bel Air Park representing the value of three parcels of land and a fourth with a building on it. By so doing, I think, the judge erred when he altered the Commissioner’s calculation contained in his letter to the respondents’ solicitors of April 6, 1961, wherein was fixed the provisional valuation of the deceased shares in the Argosy at \$78,063.66 for estate duty purposes. The alteration though apparently consistent with the antecedent proposition of the learned judge that “the value of the lands is correctly included in the dutiable estate of the deceased”, is erroneous.

The unreality of considering the purchase price of Bel Air Park to be in the nature of liability is immediately apparent when one calls to mind the intention of the deceased as evidence in the undertaking he gave in the agreement – that the money should form part of the assets of the Argosy “free of payment in respect therefor.” I have said that I think the conclusion correct that the deceased remained the owner of Bel Air Park when he died; but we are really concerned with the value of the deceased’s shares in the Argosy at the death, but at that time Bel Air was still his property, not the Argosy’s as it was thought. From whichever angle one regards it, no debt of the value of Bel Air was due to the deceased from the Argosy as the judge evidently thought. It is thus evident that the significance of this aspect of the matter held no appeal to him. I think it was a mistake to consider that immediately after the death had taken place Bel Air Park became the property of the Argosy.

This oversight is clearly discernible from his valuation of the deceased’s shares in the Argosy, and it is clear it is what caused him to consider the figure of \$138,702: 00 i.e. the value of Bel Air Park, was in the nature of a debt due from the Argosy to the deceased which had to be taken into account in computing the value of the deceased’s shares in that company. It is thought this must have been the reason why he deducted it from the sale price of \$500,000. Whereas, in truth, Bel Air Park only from the time it was sold really became an asset of the Argosy. The result was to swell unjustifiably the liabilities and to create a wholly unreal state of affairs in which the Argosy was found bankrupt by a rough and inaccurate calculation from which the deceased’s shares were deemed worthless. It was so found despite the fact that the evidence revealed the existence of assets of unknown value belonging to the Argosy which was excluded from sale to Peter Taylor and therefore not included in the purchase price of \$500,000. Consequently, it is difficult to see how the true valuation of the shares of the deceased in the Argosy company could have been arrived at in this way. Perhaps if it had been drawn to the court’s attention that estate duty on Bel Air Park had been already properly charged against the head “immovable property”, then it would have been realised there was no need to try to incorporate the value of the same property in an attempt to assess the deceased’s shares in the Argosy for estate duty purposes. In so attempting, it is submitted, is where error was made, and it is obviously on the basis of the reason that the shares had no value that the figures were considered to be incorrectly included in the dutiable estate of the deceased.

However the question arises: Are not these 526 shares liable for estate duty? The answer is unquestionably in the affirmative, since they were at the time of his death the property of the deceased, but it is submitted the item has been mis-allocated; it has been posted under the wrong head for assessment; it ought to have been included against the very first item of movable property in the inventory “proprietary shares or Debentures of Public Companies (A)”. It is important to note that this mistake was made from the beginning by the respondent executrices in the very first declaration and in-

## C. I. R. v. GOMES &amp; WIGHT

ventory submitted by them (Ex. "F"); but unfortunately was never corrected. It was persisted in throughout, notwithstanding the fact that the Commissioner's assessment ought to have given the clue to it by his letter of April 6, 1961 (Ex. "A") when he called for duty to be paid on \$78,063.66 as representing the deceased's 526 shares in the Argosy. From that time on then, the true position ought to have been clear to the respondents. From that time onwards subsequent inventories of property should have re-allocated the \$78,063.66 to its appropriate category to be assessed and duty to be paid on it.

In her evidence Mrs. Wight intimated to the judge she was prepared to accept the Commissioner's estimate in the first declaration with regard to the Argosy. The fact of the matter however, remains that the figure of \$350,667.00 which the respondents return as unpaid purchase money of immovable property contracted to be sold in the life-time of the deceased is unreal.

The figure was furnished by them in an attempt to arrive at the share value of the deceased in the Argosy; it was a rough and inaccurate calculation –  $526/750 \times \$500,000 = \$350,667.00$ . Actually, it does not concern unpaid purchase money. Only \$138,702 of it can be said to have any connection whatever with unpaid purchase money, and keeping the value of the lands in Bel Air apart; it is really concerned with the shares of the deceased in the Argosy.

At the most \$350,667: was an erroneous estimate of the deceased's shares in that company without taking into account its liabilities, but certainly not unpaid purchase money of immovable property on a contract made by the deceased in his life-time. It appears to me that the liability to estate duty on Bel Air Park has been properly charged and accounted for in the total value of the deceased's immovable property of \$309,129.80 in the inventory of property and as set out in the affidavit of valuation of Mr. Dudley Howard.

But the deceased's 526 shares in the Argosy must of course be valued and made accountable for estate duty, bearing in mind, in order to avoid payment of double duty, that estate duty has already been charged on the value of Bel Air Park in respect of the deceased's immovable property.

Counsel for the respondents has urged before us, just as he did before the trial judge, that the position could be rectified by the value of Bel Air Park, viz: \$138,702.00 being taken away from the value of the immovable property owned by him viz: \$309,129.80, suggesting that if a deduction be made from this head, the figure of \$305,667: can remain undisturbed, but for reasons clearly given estate duty on Bel Air Park is properly chargeable against the head immovable property; and it must so remain.

It was submitted by counsel for the appellant that on the facts before him the learned judge had not sufficient material and was in no position to determine the valuation of the deceased's share-holding in the Argosy, and that he ought to have directed a valuation of them under sec. 14(4) of the

Ordinance, particularly, as is shown above, the purchase price of \$500,000: did not include certain items of property, which were clearly in the nature of assets from the sale by the Argosy to Peter Taylor. Without doubt, the inclusion of this omitted property is imperatively necessary if a true valuation of the deceased's shares in the Argosy is to be arrived at (see clause (v) of Ex. "N"). Certainly the Commissioner was not aware of the excluded property when he made a provisional valuation of the shares: nor was the judge either, when he altered the basis of the Commissioner's valuation of them.

The result is that the Commissioner's contention must prevail on this ground, since it is found contrary to the judge's ruling, that to the figure of \$78,063.66, demanded by the Commissioner, an increased valuation must later be made; and also instead of the value of Bel Air being added by the judge to the Argosy's liabilities, he ought to have subtracted it from the selling price of \$500,000 when computing the value of the deceased's shares for estate duty purposes, since Bel Air did not form part of the Argosy at the date of the death. Had this been done there could have been no complaint of double duty being charged on Bel Air. The judge's conclusion that the figure of \$350,667 is wrongly included in the dutiable estate of the deceased is tantamount to his saying that nothing whatever is payable as duty on the Argosy shares, but this cannot stand being the result of the erroneous finding of bankruptcy of the Argosy.

I would set aside the ruling and agree that the proper order to make, in the circumstances, is for the Commissioner to appoint a competent person to value the deceased's shares in the Argosy at the time of his death in the light of the foregoing, and thereafter to assess the amount of estate duty due thereon in accordance with law.

The next ground of appeal is that —

"The learned trial judge erred in law and on the fact when he found that 75 shares in Gladys Hicken Limited were being held by the deceased in trust for his wife and therefore should not be included in dutiable estate of the deceased."

In statement "B" exhibited to the declaration of the personal representatives already referred to, there appears against item 6 the sum of \$5,700: being "amount due towards the acquisition of 75 Gladys Hicken shares (par value)." This amount is there stated to be due from the deceased to Mrs. M.G. Wight who is his wife and one of the executrices named in his will.

According to the evidence led by and in support of Mrs. Wight on this ground which the court had to consider, the deceased was owner of a mere 5 shares in Gladys Hicken Limited in 1959 at a time when her brother who was a member of that company petitioned for its winding-up, there being a dispute concerning it. It was then at her husband's request that she loaned him 75 of her total of 208 shares which she possessed on August 23, 1957. The request for the transfer of the 75 shares from her allocation to his was to enable him to be in a stronger position to contest the valuation which one

## C. I. R. v. GOMES &amp; WIGHT

John Milliken had placed on the shares in Gladys Hicken Limited. Mrs. Wight insists that she transferred those 75 shares to the deceased; that they were on a loan to him and were intended to be returned to her; that he held them in trust for her; and that they still belong to her. With this contention the judge agreed. He found that the 75 shares in question were indeed loaned by her to the deceased. He held she was supported in her testimony on the point by her sister Mrs. Humphrey, and in some measure by another witness Alfred Gordyk. The court also considered documentary evidence in the form of a diary belonging to the deceased in which there were written two entries in handwriting said to be his. These entries were dated 1st February, 1960: "5 Hickers Ltd. \$500"; 31st May, 1960: "5 Hickers Ltd."

It is obvious that in concluding that the 75 shares were a loan, the learned judge must have accepted the entries as having been made by the deceased and that they showed the shareholding he personally had in the company as distinct from the 75 shares reputedly loaned to him by his wife in 1959, and construed the probative value as indeed it was urged upon him to do.

Speaking for myself on this aspect of the matter, I should have thought that the best evidence of shareholding would have been forthcoming from a production of the share register of the company or a certified true copy of an extract therefrom which would have shown the movement of shares from one spouse to the other at any particular time. This however was not insisted on by anyone at the trial; perhaps to do so would have been pointless in view of Gordyk's evidence that there was no entry dealing with the report of the 75 shares — "The transfer was dealt with as a personal entry from Mrs. Wight", Gordyk said. No payment was made for it, and after stating that the personal entry was made at p. 99 in the journal book with no entry in the cash book, contradicted himself by saying that no entry concerning the 75 shares was mentioned in the journal book, ledger or cash book. The evidence is however, that the deceased died being the registered owner of 80 shares in Gladys Hicken Limited.

There was also tendered and considered a copy of the minutes of a meeting of the directors of Gladys Hicken Limited held at the home of the deceased on 25th May, 1959 (Ex. "B"). This meeting was convened, according to the minutes, to approve an application by Mrs. M.G. Wight for the transfer of 75 shares to the deceased, and it was recorded thereon that permission for the transfer was granted after the motion was proposed, seconded and carried.

As I see it, it is clear that the court below did not have before it the best evidence of a transfer of the 75 shares from the wife's to the husband's name, though there was some evidence on which it could have found there was a loan of them. The learned judge must have been satisfied with the copy of the minutes of the meeting of the directors of Gladys Hicken Limited which were signed by the chairman; though this by itself could not constitute evidence of a transfer — only at the most evidence of permission to transfer. He must have also been satisfied about its being in the nature of a declaration of interest from the deceased's diary in which he recorded his

shareholding on the two different dates mentioned, that the only shares he owned in Gladys Hicken Limited, were five in number. There is also the matter of the blank transfer form (Ex. "P") which the deceased signed and left in the possession of his wife. Without question there is evidence that this concerned the transfer. Following the sequence of its introduction in evidence from the record, it may be clearly seen that it was produced in evidence by Mrs. Wight in response to a question which one would naturally be prone to ask of her viz: whether she had any document evidencing the loan for which she contended. The point is that the judge having assessed her evidence must have noted her demeanour and disposition to speak the truth, and after weighing the oral with the documentary evidence come down squarely in favour of a transfer of the 75 shares from the wife to the husband, and, though as I have remarked he did not have the best evidence before him of a transfer, he did have evidence on which he could have so found. I cannot say he was wrong in so finding, although I have been worried about it.

In concluding there was a transfer of the 75 shares from wife to husband, the learned judge quite rightly held, following *Green v. Carlill* (1877) 4 Ch. D. 882 M.G. and in *re Curtis, Howes v. Curtis* 52 L.J. 244, that the mere fact that the shares were transferred in the deceased's name was not *per se* evidence of a gift to him once the intention of making a gift of them was not shown, and that the burden lay upon those who assert the affirmative to do so; and this he found had not been done.

I should mention that in the course of the hearing counsel for the appellant conceded the fact of transfer of the shares to the deceased intimating he was no longer contesting that issue as he had done in the court below.

Therefore for the above reasons I am prepared to uphold the judge's finding that the 75 shares were held in trust by the deceased for his wife. Consequently they were not liable for estate duty, being within section 9(4) of the Estate Duty Ordinance, Chapter 301.

The third and final ground of appeal is as follows:

"The learned trial judge erred in law when he held that estate duty was not payable until it is assessed and that a person cannot be liable to pay interest until estate duty becomes payable."

This ground of appeal undoubtedly has its origin in ground 5 of the respondents' ground of appeal when they appeared *qua* petitioners in the court below and contested the appeal from the assessment of the Commissioner of Inland Revenue. It was their complaint there that certain sums of money paid by them on account of estate duty from time to time had been wrongly appropriated towards the payment of interest thereon, and that the Commissioner had no right to do so.

Testifying in support of the practice prevailing in estate duty matters of charging interest on estate duty, evidence was led at the trial by the proper officer, Mr. Harold Dennison, to the effect that an executor who swears to

## C. I. R. v. GOMES &amp; WIGHT

the required declaration *cum* inventory and estimate, is allowed to pay in estate duty on his valuation notwithstanding the fact that an assessment has not yet been made on the figures submitted by him. This is done he stated in order to save the executor payment of interest at 6% per annum. But although Mr. Dennison did not specifically say so, I understand him to mean that even though estate duty may not immediately be assessed by the Commissioner on the figures submitted, nevertheless interest becomes payable on them; but from what time he did not say; this is the *crux* of the matter, really. According to him, there was an assessment though he did not say when.

However, on this point counsel for the appellant is more specific, and from his grounds of appeal he deduces two propositions: (1) he contends interest on duty is either payable from death as in England; or (2) from the expiration of two months after death. It will however, be shown that the evidence supports the fact that interest first became due on April 6, 1961, which is on a date between the two situations contended for by the appellant. *In re Germania T.B. De Freitas, deceased* (1949) L.R.B.G. 188 was cited to show that it has been the practice of the Deeds Registry, which was in the year 1949, and before concerned with administration under the Estate Duty Ordinance, Chapter 301 (hereafter called the Ordinance) to assess the duty from two months after death. This was evidently done on the Registrar's understanding of s. 13 of that ordinance which requires certain persons, including personal representatives, to appear before the proper officer within two months or six months after death, as the case may be and deliver a full and articulate inventory of all the deceased's property possessed at the time of his death; but though this has been the practice, yet counsel contends interest is payable as from death as a matter of law. In support of this argument he cites by way of analogy the procedure adopted in the assessment of Income Tax whereby liability is determined retrospectively from the very first day of the year of assessment, even though tax on the previous year's earnings has not been assessed or quantified. Liability to Income Tax, it is said, does not depend on assessment even though quantification be postponed. All taxing statutes, counsel urged must be considered as forming one general and related scheme of taxation for the earning of revenue and so must be construed together, and he concludes by stressing the importance of this principle and insisting that it is one well recognised in all revenue cases and finds expression in the Tax Ordinance, Cap. 298, s. 66. This section reads as follows:

“66. In default of payment, when due, of any of the taxes or duties imposed or other moneys payable by this Ordinance or by any Ordinance mentioned in this Ordinance, those taxes, duties, or other moneys with interest at the rate of six per centum per annum from the day when they become due and payable, shall, not otherwise specially directed, be enforced and recovered by the Financial Secretary by private execution.”

Various authorities were cited by counsel, chief among which were Income cases – *Whitney v. C.I.R. 10 Tax Case. 88*; *I.R.C. v. Est. Nicholson* (1962) L.R.B.G. 470; *A.G. v. Till* 5 Tax Cas. 440; Re: *Est. N'G-a-Kwang* 3rd

February (1903) L.J. per Bovell C.J., though counsel concedes Nicholson's case would appear to be against him for it was there held, that estate duty does not become payable until it is assessed.

On the other hand counsel for the respondents reasons in this way: it is not necessary for the court to go outside the four walls of the Estate Duty Ordinance to resolve the question when it is amply dealt with there. Interest is payable neither from death nor from two or six months thereafter; in fact, it is not payable until a notice of assessment has been given the executrices to the effect that there has been issued a certificate pursuant to s. 15(3) of the Ordinance, for s. 20, the only section dealing with payment of interest in the Ordinance, specifically authorises payment of 6% interest "from the date of the certificate". Accordingly, counsel for the respondents submits there must be a certificate before interest becomes payable, and there can be no payment of interest until default is made in the payment of assessed duty, when interest should run from the date of the certificate. S. 12, he says, speaks of the executor's liability to pay estate duty "as if that duty has been a debt incurred by the deceased person"; but the accepted meaning of a debt being a specific sum which has accrued for payment there can be no enforcement until assessment; there must be a quantification crystallising the debt into specific figures. Counsel reinforces this point by reference to s. 66 of the Tax Ordinance, Cap. 298 (above) which provides that all taxes, duties and other imposts on becoming due and payable must be enforced and recovered by the well-known summary method of parate execution; but this, he stresses, requires an account in a specific sum to be rendered the debtor of what he owes before execution can legally proceed in default of payment. All this, it is urged by counsel, goes to show that there must be a specific sum claimed by the Commissioner by due notice of assessment. It was this line of argument that the judge accepted; hence this ground of appeal

It will be shown, however, that the viewpoints of both counsel are only partly true. In the one case, simply for the reason that liability for payment of the duty imposed by s. 12 though it exists from the death, cannot arise until the Commissioner has assessed duty under s. 14(1).

In the other case, interest under section 20 arises independently of the assessment of duty. All s. 12 does is to create in the heir or executor the status obligation of debtor, i.e., the debtor/creditor relationship between him and the Crown and to give him power to pay or raise the debt in order to pay off the liability. Tersely put, whilst liability for payment of duty exists from the date of death, the actual payment of it is deferred until quantum has been ascertained by assessment.

But whilst I can agree with counsel for the respondents that it is impelling that the person making the declaration under s. 14(1) be notified of the date of assessment before he can be called upon to pay it, I am not in entire agreement with him that there must first be issued a certificate under s. 15(3) before interest becomes payable. So to say is only partly true, for his proposition can only hold good in the case where interest is being

## C. I. R. v. GOMES &amp; WIGHT

charged on delivery of a further declaration with an account (section 20); but certainly not in the case where interest becomes payable when default is made in payment of duty assessed on an original declaration (section 14(1)). It is only in the case where interest is being charged as the result of the delivery of a further declaration, that there must needs be a certificate under section 15(3) not where interest is to be charged on an original declaration. The logic of counsel's argument suggests that interest is only properly chargeable when a further declaration with an account has been delivered, and there being no section other than 20 dealing with the charging of interest, we cannot go outside of it and apply the Tax Ordinance. I am however of the view that the fact that duty must be paid on the original declaration before a certificate issued under section 15(3), amply falsifies the view propounded by counsel which, if it were to prevail would mean that any assessment of which the declarant has been duly notified and so becomes due for payment, and which he neglects to pay for however long a time or only partially nonpayment could not become relevant until default is made in payment of duty. Accordingly, the judge considered section 15(1) (2) & (3) Chapter 301 which provided:

- “15 (1) On the duty payable being assessed 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 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;”

and then concluded, quite wrongly as I will show, that the “estate duty is not payable until it is assessed, and one cannot be liable to pay interest until estate duty becomes payable.” Therefore when he found the date of assessment by the proper officer to be August 10, 1962, the judge from the approach he took must have found thereby that only then could duty have become payable as a debt, and by invoking section 66, Chapter 298, as aforesaid, arrived at the conclusion that interest at 6% per annum became payable as from that date also, since the debt “became due and payable.”

Having considered both the views preferred on this point on behalf of the contestants in this appeal and the judgment under review, I am inclined to the view that on the true construction of sections, 2, 9, 11, 12, 13, 14(1), (3), 15(1), (2) & (3) of the Ordinance and of section 66 of the Tax Ordinance, Chapter 298, the correct conclusion is that estate duty becomes due and payable from the date when the Commissioner gives notification of the fact that he has assessed it on the basis of the declaration inventory and estimate as originally delivered to him by the person making it or his agent. I can see no

positive directive in the Ordinance as to how such notification is to be accomplished – whether it should be verbally or in writing – though it is thought that the proper officer’s memorandum on the declaration of the amount of estate duty payable could well achieve this end, for endorsed memorandum on documents as a means of giving notice is not known to statute law – see section 137(4) of the Law of Property Act 1925; also the Deeds Registry Ordinance, Chapter 32, second schedule, rule 29. In view however of the positive statement of PERSAUD, J.A. in *Elaine Vera Gomes et al v. C.I.R.* (above) that there must be proof that notice of the valuation or assessment must be given on a particular date in order that there should be established a definite point of time from which the period of 21 days for giving notice of appeal against it should begin to run, I think it would be desirable if such notice should always be communicated in writing to the declarant. Such would serve the dual purpose of an adequate notice of assessment that payment is due and also evidence of the date of a receipt of that notice by the person accountable under the Ordinance who is dissatisfied with the valuation or assessment and is desirous of appealing to the High Court against the decision under section 14(3).

As I see it, on the true construction of section 12, 13, 14 and 15, though there is a legal liability to pay from death payment of estate duty in fact becomes due and payable on the date of assessment by the Commissioner under section 14(1) at which time the amount of duty payable should be endorsed by the proper officer on the declaration as originally delivered; but the accountable party must have received notice in writing of the valuation or assessment. There is however no endorsement in this case of the required statutory memorandum of the amount of duty paid as required by section 15(1). But does this make any difference seeing that the main purpose of it, as I have suggested is evidentiary merely – the providing of notice to the respondents of the assessment – when what I conceive to be the Commissioner’s letter of assessment of 6th April, 1961 (Ex. “A”) which he addressed to the latter’s solicitors was produced by them in evidence and in fact acted on by them? What clearer evidence then can there be that the respondents received notice of assessment? Moreover, they accepted it as such by acting on that letter when Messrs. Barclays Bank, D.C.O. on their behalf furnished security for the payment of the identical sum of \$350,000: referred to in the Commissioner’s letter as 35% duty on the net value of \$620,000: (approximately) in the inventory and estate which they submitted – see the first certificate undated issued by the proper officer which was to enable them to obtain a limited grant of administration for the purpose aforesaid.

In my view, the Commissioner’s letter of April 6, 1961, was an adequate notice to the respondents which they themselves recognised by compliance therewith; and the fact that there has been no memorandum on the declaration can make no difference in this case.

Section 14 reads as follows:

## C. I. R. v. GOMES &amp; WIGHT

- “(1) The Commissioner shall, if he is satisfied with the inventory and estimate of value given in the declaration as originally delivered, or with any amendment that is made therein upon his requisition, assess the duty on the basis of the inventory and estimate; but if he is dissatisfied with the inventory and estimate himself or cause an inventory and estimate to be made on his behalf by a person named by him, and on the basis of the inventory and estimate so made, he shall have power to assess the duty payable, subject to appeal as hereinafter provided.”

The Commissioner must of course make his assessment within a reasonable time of his becoming satisfied with the inventory and estimate. Indeed, it appears he ought to do so with the least possible delay in view of the fact that the law imposes payment of estate duty as a liability in the form of a debt both on the deceased and on his executrices (though as we know, not an absolute one in respect of the latter, but a liability limited to the assets which they have received as such, or ought, but for their own neglect or default have received) on the property and effect of the deceased as from death. Viewed in this light, the clear intention is, I think, that the legislature has made it the duty of the Commissioner to quantify the statutory debt so that he may collect it at the first available opportunity. Indeed, he may very well assess the duty so that it becomes payable immediately i.e. at the very time of the delivery of the original declaration. Evidence of this is the “speedy and drastic remedy” of parate execution he is allowed to recover it, which shows that the delay in the realisation of it is not contemplated. This will exclude the exercise of any discretion on the part of the Commissioner as to whether he would comply at once or not with s. 14. He ought to make his assessment and the proper officer should endorse the statutory memorandum on the same day on which the inventory and estimate are delivered if practicable; if not, as soon as possible thereafter.

It follows from s. 66 of the Tax Ordinance, Cap. 298 (above) that interest is chargeable at 6% per annum from the time estate duty becomes due and payable and remains unpaid. This was the finding of the judge the fault with whose decision on this ground of appeal is the fixing of the date of assessment as August 10, 1962, which he does not specify as being either the date of the original assessment or which one of the dates of assessment on the further declarations which have been delivered.

Counsel for the appellant in keeping with the practice prevailing in England has urged that interest should be payable as from the date of death. Whilst this is true, it is the result of legislation in England; and it is evident that if counsel is to succeed on this point it would be necessary for him to prove that it is so assessable locally. This however seems impossible for him to do in view of the clear and unambiguous wording of s. 66 of the Tax Ordinance (above) which links estate duty to interest by making the imposition of the latter the consequence of non-payment of the former. It has however been shown that the date of payment of duty is the date when notice of assessment has been received by the party accountable for it.

For myself, I am afraid there is no room for granting the request in a taxation case, which requires strict interpretation to resort to interpretation by analogy to Income Tax legislation as has been suggested by counsel for the appellant for the purpose of guiding ourselves in this matter. To my mind the correct approach to adopt is to look solely at your own legislation to see if a solution is provided and only in the event that there is none need we look elsewhere for assistance.

In *Ormond Investment Co., Ltd. v. Betts* (1928) All E.R. 709., the House of Lords had to consider the question whether the acquisition by an English Company of shares in American Company was to be regarded as the setting up and commencement of trade so that a dividend of £601,717 on its foreign shareholding represented a total of two year's trading profits on which income tax become due under the Income Tax Act 1918. VISCOUNT SUMNER in rejecting the contention that dividends on foreign shares are analogous to trading profits and so liable to taxation spoke as follows at p. 717 of the report:—

“In its express term this rule applies to trading profits. The contention is that by analogy it can be applied to foreign shares, which are not in themselves stock-in-trade and the dividends of which are not trading profits. I cannot accept this. The analogy between the date of starting a trade which is an aggregate of many operations and the date when an investor buys a stock to hold, is too remote to be applicable and in any case the Crown does not tax by analogy but by statute, and there is nothing in the Act which says what is here contended for.”

Besides, Income Tax and Estate Duty legislation, though both concerned with the collection of taxes and duties are not in *pari materia*, as are the Finance Act 1894 and our Estate Duty Ordinance, Chapter 301, which I have just considered above. The word “par” means not “similar” or “like” but “identical” or the “same”. There is no justification therefore in resorting to Income Tax law to decide the matter under appeal, and I must perforce reject the contention just as LORD MACNAGHTEN did in *I.R.C. v. Forrest* (1890) 15 App. Cas. 334, 353 when it was urged that two revenue Act of 1843 and 1885 should be read together to elucidate a matter which the House had to consider. The noble and learned Lord of Appeal in Ordinary said:—

“The two Acts differ widely in their scope; and even if they happen to deal with the same subject their wording is not the same. It was argued, indeed, that the language was ‘practically identical’; but that expression, to my mind involves an admission that the language is different.”

It seems to me therefore, there are two mutually exclusive and clearly defined situations (referred to as cases – one and two) under Chapter 301 which determine the payment of interest on estate duty.

In case one, interest is chargeable by virtue of section 66 of the Tax Ordinance, Cap. 298 from the date of assessment under s. 14(1), i.e.

## C. I. R. v. GOMES &amp; WIGHT

the date when duty becomes payable and remains unpaid on the original declaration, i.e. before the issue of the proper officer's certificate under section 15(3) – payment of duty assessed and payment of interest in default being alternative impositions. I have already shown that there must be evidence that the declarant has received notice of an assessment before payment legally becomes due.

Case two arises under s. 20 of the Ordinance when the heir of executor delivers a further declaration with an account to the proper officer having discovered dutiable property of greater value than that mentioned in the certificate which that officer has got to prepare under section 15(3). However, it is clear that on the delivery of a further declaration with an account (s. 20(1)(2)), estate duty becomes immediately payable on the true value; but whereas in case one, liability for payment of interest can only arise in default of payment of duty, in case two, liability therefor already exists and is chargeable from the date of the proper officer's certificate under section 15(3), since the discovery of the additional property arises after its issue. The only question here is whether it is to be paid from the date of the certificate or from any subsequent date which the Commissioner thinks proper to fix. The fact of the matter is that it is only in case two that liability for interest arises from the date of each succeeding fresh certificate issued under s. 20(3) or such subsequent date as fixed by the Commissioner and must be calculated in each case from such dates.

As regards payment of estate duty the provisions of section 20 are clear enough; they need no particular elucidation; they simply direct that in the case of a further declaration the amount of duty must be ascertained by calculation with reference to the "true value" of the deceased's estate, i.e., not on the figures of the further declaration and account *per se*, but inclusive of those on the inventory and estimate as originally delivered, less duty already paid. The purpose of this is clear as estate duty is computed from graduated rates on the net value of property – see Section 10(1) Tax. Ord. Chapter 298. Therefore when the figures on the original as contained in the certificate and the further declarations are taken into account the rate per cent of duty would thus be charged according to the true values.

In case one, payment of 6% interest flows as an immediate consequence of non-payment of assessed duty from the joint operation of section 14(1), s. 15(1)(2) of the Estate Duty Ordinance, and s. 66 of the Tax Ordinance. Here, there is no discretion allowed the Commissioner to grant relief for the non-payment therefor in whole or in part as in section 20(2).

In case two, it is only reasonable to expect that liability for interest under s. 20 should exist since there is a statutory duty imposed on the executors to deliver within 2 months of the death a "full and articulate inventory" of all property possessed by the deceased at the time of his death which had not been performed — s. 13(2). The delivery of a further declaration and account is merely the mode of setting right that which the

law says ought to have been done in the first place within the statutory period. "Executors must use diligence in order to ascertain the value of the property. They must ascertain it within a reasonable time", said BRAY J., in *Re Horrex* (1910) Times, 9th March. In Guyana, the legislature considers periods of two and six months reasonable for executors to do so, accordingly as the deceased died domiciled in or out of the territory, failing which, interest will be charged according to the true value on the amount declared in the further declaration with account from the date of the certificate or from such subsequent date as the Commissioner thinks fit. Clearly the Commissioner has to exercise his discretion administratively, and in fixing such subsequent date he ought to take into account any genuine and diligent efforts as have been made by the executors to deliver the original declaration and inventory and to ascertain the value of all the deceased property within the required period.

This being the law, the practice in estate duty matters of allowing executors and administrators to pay in duty on their valuation without an immediate assessment being made on the figures submitted, about which Mr. Dennison testified in the lower court becomes easily understandable. This practice he said is intended to save them payment of interest of 6% per annum if they are held to pay it at a later date. Far from being wrong, I think it has much to commend it; it is certainly in accord with the status obligation the law imposes viz: the debtor/creditor relationship between the deceased through his personal representatives vis-a-vis the Crown through the Commissioner of Inland Revenue.

In neither case is there a directive on the Commissioner to serve notice of estate duty assessment in writing on the heir or executor for the payment of duty (although it is advisable that he gives such notice in that manner in a case one assessment so as to provide evidence that the time of 21 days allowed for giving notice of appeal against the valuation or assessment in section 14(3) of the Ordinance has begun to run – see *Gomes & Wight v. C.I.R.* (1966) G.L.R. 269 – he must do so if interest is to begin to accrue from assessment in default of payment — see section 66 Chapter 298 above.

Unlike in the case of an assessment of duty under section 14(1), notice of assessment in writing is not necessary under section 20; quite positively, it does not arise as payment thereof must be made contemporaneously with interest on delivery of the further declaration with an account on the amount of greater value revealed therein – section 20(1) (2). Under section 14, estate duty becomes payable only after assessment on due notification; but, under s. 20 duty and interest become payable immediately on delivery of the further declaration with account. It is suggested that it is principally with this distinction in mind that the legislature in section 14(3) refrained from requiring notice of assessment to be given in writing. But what I have observed earlier respects only an assessment on the original declaration where notice of assessment must be given and ought to be in writing to show that the party accountable has received such notice. But even were it necessary, Mrs. M.G. Wight signed at the foot of the proper officer's certifi-

## C. I. R. v. GOMES &amp; WIGHT

cate dated 18th November, 1961 as follows: "I undertake to pay the balance of duty as soon as possible", thus indicating she did indeed have such notice.

It is not therefore difficult to see the wisdom of the practice of the declarant or his agent making an advance payment to the Commissioner before assessment, the date of which must be uncertain to him. Besides, there is the additional advantage in making an advance payment to be obtained from the exercise of the Commissioner's discretion under section 20(2) in a proper case if he thinks fit to fix the date from which interest is to run should be subsequent to the certificate of the proper officer.

It seems to me that any other interpretation than that is obligatory on the declarant to declare within the statutory period all dutiable property belonging to the deceased at the date of his death which the declarant knows or is deemed to know, would be outside the spirit and intendment of the Ordinance. Otherwise the deceased's estate would be enabled thereby to escape the payment of duty and interest for as long as the declarant wishes to withhold such property until he makes a further declaration, when interest on duty which becomes payable thereby can only run under section 20(2) — from the date of the proper officer's certificate or subsequently. The State would lose, at the disposition of an executor the benefit of duty or interest under case one above. This can never be the intention of the Ordinance. Indeed, the highly penal nature of section 17 of the Ordinance (under which, on summary conviction, a penalty of double duty is imposed on a personal representative for neglect to comply within the period) reinforces this view. Moreover, at the very bottom of the back of every inventory the declarant is required, if necessary, to sign an undertaking to the effect that if he believes the deceased to be possessed of other estate and effects than those declared, but of which he is not in a position to give precise details at the moment, he would deliver a corrective declaration duly stamped as soon as the particulars and value thereof have been ascertained. This was done by both executrices in this matter; though I would agree with WORLEY, C.J., in *re G.T.B. de Freitas* at p. 193 *ibid.*, that such an undertaking is superfluous and "appears to have no legal effect for section 20 imposes on him (the executor), a duty to declare any further property which he discovers was subject to duty".

It cannot seriously be contemplated that if the person making the declaration or his agent were to deliver it or further declarations to the proper officer outside of the statutory period of two or six months after the death, as has been done in this case, any subsequent date of assessment thereafter could legally be the date when duty becomes due and payable thereon. The declarant by so doing would be profiting by his own wrong of non-compliance with the law unless on a motion brought by him in the High Court and for good cause shown and before the expiration of that period, it be extended — see *in Re: Ng-a-Kwang, C.J.* 3.2.03.

In my opinion, though the judgment under review has asserted that which is true in one respect which may be gathered from a cursory interpretation of the *litem legis* when it was found simply that "interest is payable

from the date of assessment – 10th August, 1962, on the sum then owing”, that conclusion was not correct in the present circumstances. I find that though the relevant sections dealing with the problem were considered, an adequate construction of them was lacking. There was no proper approach in determining the date when interest became due and it is in this respect that I think there was error. It was not appreciated, I say with respect, that when dealing with assessment of interest under section 20, interest is considered by law to be due from the date of the proper officer’s certificate. There is no question of the application of the Tax Ordinance as it was apparently thought I have above reflected on this aspect of the matter. Interest was already due because all the deceased property should have been declared within 2 or 6 months of his death (section 13). The question of interest under section 20 is quite distinct from one of the assessment of duty. It does not arise as the consequence of the non-payment of duty as it does under section 14, but from the fact that the greater value which is revealed by the further declaration ought to have been declared before it actually was, and, this being the case, the law says interest was owing on that amount as from the date of the certificate. When this fact is borne in mind, the second limb of this ground of appeal becomes easily understandable and the error easily perceived in the judge’s finding that a person cannot be liable to pay interest until duty becomes payable.

The appellants have not directly claimed that an assessment on the declaration as originally delivered took place on a defined date, but enquiry being directed to both the questions of when interest and duty become due and payable, I am attracted to the view that the evidence discloses that such an assessment occurred on the 6th April, 1961 when the Commissioner in his letter to the respondents of that date appears to have assessed them “provisionally” in the sum of \$350,000: on the basis of the net value declared by them in accordance with s. 14 of the Ordinance – see Ex. “A”.

Shortly after their original declaration had been delivered the Commissioner wrote the respondents. He referred to their original declaration, the fact that it disclosed a net value of approximately \$620,000: and also the fact that with a proposed increase in valuation of the assets and the inclusion of the deceased’s shares in a certain commercial concern, a provisional rate of duty of 35% on a net value of \$1,000,000: amounting to \$350,000: will become due. He then called upon the respondents to “hand over”, which I interpret to mean in the context, to “declare” on account of estate duty approximately \$295,000: in respect of a debt owed to the deceased, his shares in the Argosy, and an Income Tax Claim. This is clear, I think, because the individual sums which went to make up the \$295,000: did not appear in their original declaration. I believe the Commissioner was thereby calling the respondent’s attention to the fact that these sums must be included in a further declaration which was in fact subsequently done. It seems certain he was satisfied with the original declaration and accepted it as the basis for estimating from his knowledge gained from correspondence referred to of the state of the estate and gleaned from proposed increases

## C. I. R. v. GOMES &amp; WIGHT

in valuation and share value to be later included, that the net value would be swollen to \$1,000,000: . It appears to me that he concluded from his estimation of what he saw that a 35% duty of \$350,000: would become payable provisionally. Surely, though not a precise one, here was an assessment on the basis of the \$620,000: in the declaration as originally delivered and *intra vires* his powers under section 14(1). As the Commissioner pointed out, payment was only provisional. In the event of any overpayment of duty there could always be recoupment — section 18.

It is for this reason I think the evidence discloses there was indeed an assessment on the original declaration, although the precise net value was yet unknown for there was a basis on which it could be made. There was in fact compliance with that assessment evidenced by the certificate of the proper officer, and the respondents cannot approbate and reprobate.

In my opinion it follows that all three declarations subsequent to the original were in the category of further declarations under section 20 of the Ordinance. In thus concluding, I think it is important to observe that the second declaration No. 538/1961 of November 18, 1961, and the third declaration No. 40/1962 of February 2, 1962 are self-described thus: “Further Limited Declaration Corrective to No. 158/61 and 538/61.”

In the circumstances it seems to me from an examination of them, all three declarations subsequent to the first clearly fall within s. 20.

The second, No. 538/1961 (Ex. “G”) was sworn on the 18th November 1961, and a fresh certificate duly issued on the same date — section 20(3); but the proper officer’s certificate which was issued on the original declaration is apparently defective chiefly in the respect that it bears no date.

The third, No. 40/1962 was sworn on February 2, 1962. This disclosed property of greater value than the two previous ones and describes itself as corrective to them. Another fresh certificate duty issued thereupon in keeping with section 20(3) on March 8, 1962.

The fourth and final declaration which led to probate on 27th August, 1962 was later sworn declaring a gross estate of \$1,793,826.90. Unhappily, like so many important exhibits in this case it is undated, but in this particular instance that fact is not important. Very likely it was in search of the proper officer’s fresh certificate which issued on this final declaration that motivated the judge’s search amongst the probate records of the Deeds Registry from which he discovered and fixed the date from which interest is to run for payment of the remainder of duty. I myself have not examined that certificate, but with respect, I think it was clearly wrong for him to have done so, simply because under section 20(2) interest on the amount of estate which a further declaration with account discloses must be paid “at the same time” as the duty on the true value following delivery of the further declaration and account not from a subsequent date — August 10, 1962, as found.

Interest at 6% per annum must be paid “from the date of the certificate” of the proper officer or from such subsequent date as the Commissioner thinks proper — section 20(2). The position seems very clear to me that on the receipt of every further declaration with account a fresh certificate must be prepared by the proper officer setting out the true value of the estate and effects as then ascertained. This fresh certificate then supercedes that issued under section 15(3), is substituted for it and has the same force and effect of it, viz: that which issued on the original declaration, and so each succeeding fresh certificate must be substituted for a previous as long as further declarations continue to be filed.

But since the payment of interest on declaration No. 538/61 depends on a date being inserted on the certificate, it is arguable there is no point of time indicated from which payment thereof can be assessed; and that perhaps the Commissioner instructed his proper officer not to date the certificate for the reason that he knew, as can be seen from Ex. “A”, there was a further declaration to be filed at a later date, and was desirous of exercising his discretion by fixing some subsequent date from which interest was to run, as he is entitled to do — section 20(2). It seems more likely however, that it was a clerical omission in not inserting a date on the certificate, and I shall proceed on that assumption. Defects in the certificate are not fatal however, because of the well-known rule that “it is the privilege of the Crown not to be bound by the omissions, neglect and blunders of their officers”. The Lord Ordinary in *Lord Advocate v. Taylor (Miller’s Trustees)* (1884) 11 Rett. 1046; 21 S.L.R. 709. If I am right, the missing date can easily be supplied since it must be the date on which security for the payment of the duty of \$350,000: had been given by Barclays Bank, D.C.O. This conclusion follows from my construction of the sequence of the three acts to be performed in section 15(1) — (3) viz.; assessment, payment and preparation of the certificate. This date, which should not be difficult to procure will be the date from which interest on the true value disclosed by the increased value in the second declaration No. 538/61 must run. The net value according to the Commissioner’s assessment, Ex. “A”, on which the \$350,000: was founded was \$1,000,000: and should have been included in the certificate.

The proper officer has, however, issued a valid certificate on the 18th November, 1961, the same day on which declaration No. 538/61 was sworn. This was his fresh certificate in terms of section 20(3), which was efficient in both the respects in which his former certificate had been deficient, viz., as to value and date. Payment of estate duty is a necessary incident to the obtaining of grant. SWINFEN EADY, J., referred to it in *re King, Travers, & Kelley* (1904) 1 Ch. 363, as a “payment which must be made before probate can be obtained as it must be paid on delivery of the Inland Revenue Affidavit.” In Guyana, as we have seen, the position is different; payment of duty depends on assessment. There must be an assessment before payment, but notwithstanding this difference the position is the same here as in England with regard to the obtaining of probate for section 15(4) prohibits

## C. I. R. v. GOMES &amp; WIGHT

the depositing or recording of a will in the Registry unless it is accompanied by the certificate of the proper officer. This can only mean payment of duty must be made before probate issues since a certificate under 15(3) issues only after payment is made, or, which is tantamount to the same thing, security is given in lieu of payment under sec. 24(2) of the Deceased Persons Estates Administration Ordinance, Cap. 46 which provides:

“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.”

When the joint effect of s. 15(3) of Cap. 301 and s. 24(2) Cap. 46 is considered, it is clear that estate duty must normally be paid before a grant of probate or letters of administration issues; yet this need not be the case if security is given instead to the proper officer therefor. When this is the case the certificate issued by the proper officer is nevertheless a certificate under the Estate Duty Ordinance Cap. 301, not under the Deceased Persons Estates Administration Ordinance, Cap. 46, and will furnish evidence of:

- (a) an assessment in the sum specified and
- (b) that either payment or security has been given therefor and to the value stated.

It therefore appears to me that in the light of the proper interpretation of s. 20, interest on the true value disclosed by the increased value in the third declaration No. 40/1962, must run from the 18th November, 1961; and interest on the true value disclosed by the increased value in the fourth and final declaration No. 379/62 must run from the 8th March, 1962, the date of the fresh certificate which issued on the third declaration No. 40/1962.

For the foregoing reasons I would set aside the judge’s ruling on this ground also, and make an order for the Commissioner to calculate and charge interest with periodic rests as hereunder:

- (i) Simple interest at the rate of 6% per annum from the 6th April, 1961 to the date security was furnished for payment of the sum of \$350,000: being estate duty revealed in the proper officer’s certificate — *re* declaration No. 158/1961.
- (ii) Simple interest at the rate of 6% per annum from date of the certificate to the date of payment of the amount of duty chargeable on the true value of the estate taking into computation duty previously paid — *re* declaration No. 538/1961.
- (iii) Simple interest at the rate of 6% per annum from 18th November, 1961 to date of payment on the amount of duty chargeable on the true value of the estate taking into computation duty previously paid — *re* declaration No. 40/1962.

- (iv) Simple interest at the rate of 6% per annum from 8th March, 1962 to date of payment on the amount of duty chargeable on the true value of the estate taking into computation duty previously paid — *re* declaration No. 379/1962.

The Commissioner having succeeded on two of the three grounds the respondents will pay 2/3 taxed costs fit for counsel.

*Appeal dismissed — Order of Court below varied — By consent valuation of deceased's shares in Argosy Co., Ltd. to be made either by the Commissioner of Inland Revenue or by someone appointed by him and that an assessment be made thereon.*

## SWARM KUMAR PURI v. HARRYCHAND PERSAUD

[In the High Court (Crane, J.) — December 14, 21, 1966; January 28, 1967.]

*Contract — Variation — Immediate payment on delivery under verbal agreement — Subsequent oral collateral agreement purporting to vary method of payment — Whether nudum pactum — Sec. 29 & 30 of the Sale of Goods Ordinance, Cap. 333 (now secs. 28 & 29 of the Sale of Goods Act, Cap 90:10).*

The defendant purchased paint from the plaintiff on May 3, 1965, valued \$253.10 and again on May 5, 1965, valued \$29.25, leaving a balance of \$107.35. Both in para. 3 of the defence and in his evidence, the defendant alleged that during September, 1965, there was a verbal agreement between himself and the plaintiff that the balance due would be reduced by monthly payments of \$25. The plaintiff denied making any such collateral agreement

## PURI v. PERSAUD

and insisted that payment should have been made concurrently with delivery. After the defendant had paid the first instalment of \$25 the plaintiff issued a writ without making any demand for payment of the balance then due.

**HELD:**— that (i) as para. 3 of the defence impliedly admitted that there was no agreement to pay by instalments under the agreement of May, 1965, then payment of the price of the paints became due immediately on delivery and this was the clear purport of secs. 29 & 30 of the Sale of Goods Ordinance, Cap. 333, and accordingly, a request or demand for payment was a mere courtesy and had no legal significance; (ii) the September agreement, assuming that it was made between the parties, although not admitted by the plaintiff, did not affect the defendant's legal obligation to pay for the paint on its delivery and this was so even if the plaintiff had accepted the first instalment, since it is a familiar rule in the law of contract that a promise to do something which the promisor was at the date of the promise legally bound to the promisee to do provides no consideration for the promise; (iii) in like manner, the payment of the first instalment of \$25 by the defendant before the writ was issued provided neither the consideration nor accord and satisfaction for the agreement to pay off his debt on an instalment basis for which he alone contended; (iv) accordingly, the September agreement, if it ever did exist, was void as being '*nudum pactum*' out of which no right could arise.

*Judgment for Plaintiff.*

*Cases referred to:—*

- (1) *Stilk v. Myrick* (1809) 2 Campbell 317.
- (2) *Vanbergen v. St. Edmunds Properties Ltd.* (1939) 2 K.B. 223; 149 L.T. 182.
- (3) *Foakes v. Beer* (1884) 9 App. Cas. 605.

*D. C. Jagan* for plaintiff.

*E. W. Adams* for defendant.

CRANE, J.: The short but yet interesting point in this case, is whether the amount in the verbal agreement under which the plaintiff sold paint to the defendant should have been paid immediately, or been discharged by monthly instalments of \$25.00 (twenty-five dollars). This being the case, it seems to me that the point involved only affects costs consequent on whether the plaintiff had the right or not to sue out his writ at the time he did.

There is no dispute that the defendant purchased from the plaintiff paint valued \$253.10 (two hundred and fifty-three dollars and ten cents) on May 3, 1965, nor paint valued \$29.25 (twenty-nine dollars and twenty-five cents) on May 5, 1965, nor that the sum of \$107.35 (one hundred and seven dollars and thirty-five cents) now remains as balance due after a total of \$175.00 (one hundred and seventy-five dollars) has been paid.

Both in his affidavit of defence (paragraph 3), and in his evidence on oath, the defendant avers that "during the month of September 1965, it was

verbally agreed between myself and the plaintiff that the amount of my indebtedness in his favour should be reduced by monthly payments of \$25.00 (twenty-five dollars)". This statement is of importance because it reveals a second agreement — this time concerning payment for the paint; it discloses a subsequent and collateral promise made in September 1965, purporting to deal with the mode of payment of the earlier agreement of May 1965. From this, I think, it may be rightly inferred that what the defendant is setting up is that though the May agreement carried with it a right in the plaintiff to receive immediate payment for his paint on delivery, the subsequent collateral agreement of September varied the May agreement with respect to payment. The defendant himself has referred to "the amount of my indebtedness," which, in the context means, it is submitted, that he knew the whole amount was immediately due. But the plaintiff denies making any such collateral agreement, and insists that payment should have been made concurrently with delivery.

The defendant has complained that the plaintiff issued his writ some two weeks only after he had paid the first instalment of \$25.00 (twenty-five dollars) "as agreed", and without even making any demand for payment; this he contends the plaintiff cannot properly do. But the truth is that if there is indeed no agreement to pay by instalments in the agreement in May 1965, which seems to be impliedly admitted by paragraph 3 of the defence, to which I have already alluded, then payment for the price of the paints became due immediately on delivery of them. In such event a request or demand for payment would only be a mere courtesy and have no legal significance. This is the clear purport of the Sale of Goods Ordinance Chapter 333, Sections 29 and 30 of which reads as follows:

29. "It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale."

30. "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay in exchange for possession of the goods."

As I view it, the authorities clearly establish that the September agreement (for which the defendant contends, but which the plaintiff denies), is *nudum pactum*.

There is a familiar rule in the law of contract that a promise to do something which the promisor was at the date of the promise already legally bound to the promisee to do provides no consideration for the promise — see *Stilk v. Myrick* (1809) 2 Campbell 317. The law is that one person cannot by any promise of performance which does not go beyond the limits of his pre-existing legal duty to another, provide a good consideration for a promise by that other person in his favour; it says that there is no detriment to the defendant merely to perform and no promise of a detriment merely to promise to perform what is

## PURI v. PERSAUD

already his legal duty to the plaintiff to perform; and, notwithstanding the recommendations of the Law Revision Committee on this point in its report on the Statute of Frauds and Considerations (Cmd. 5449), this is still the law in Guyana today. So that if the defendant is under a legal obligation to pay for the paint on its delivery, a subsequent undertaking by him to pay monthly instalments of \$25.00 (twenty-five dollars) is of no legal effect, and this, even if the plaintiff has accepted the first instalment.

*In Vanbergen v. St. Edmunds Properties Ltd.* (1933) 2 K.B. 233; 149 L.T. 182 cited by Mr. Jagan, V presently owed a sum of money to E. An agreement was made between V and E, acting by his solicitors, that if V would pay the amount of the debt into a bank in the country for the credit of the solicitors in London, that would satisfy V's debt to E, and a bankruptcy notice which E had issued for part of the debt would not be served. V carried out his part of the agreement, but the solicitors nevertheless served the bankruptcy notice upon him. He therefore sued for damages for breach of contract. The question was whether there was any consideration to support the alleged contract. LORD HANWORTH, M.R., (at page 234), pointed out that there was no express request by E that V should pay in this way; and then said: "But they reaped no advantage; there was nothing moving towards them which could be deemed to be a consideration . . .". LAWRENCE AND ROMER, L.JJ., described the effect of the agreement (at pp. 236-37, 239), as being to confer on V two purely voluntary indulgences or concessions. There being, therefore, neither express request by E for payment at the bank in the country nor any advantage to E which could lead the court to infer that E had requested or bargained for this method of payment, it was held that the agreement was void as a contract for lack of consideration.

To the same effect is the case of *Foakes v. Beer* (1884) 9 Appeal Cases, 605., in which it was held that an agreement between judgment debtor and creditor, that in consideration of the debtor paying down part of the judgment debt and costs, and on condition of his paying to the creditor or his nominee the residue by instalments, the creditor will not take any proceedings on the judgment, is *nudum pactum*, being without consideration, and does not prevent the creditor after payment of the whole debt and costs from proceeding to enforce payment of the interest upon the judgment.

On the matter of instalmental payment the EARL OF SELBOURNE, L.C., observed at page 611 as follows:

"But the question remains, whether the agreement is capable of being legally enforced. Not being under seal, it cannot be legally enforced against the respondent unless she received consideration for it from the appellant, or unless, though without consideration, it operates by way of accord and satisfaction, so as to extinguish the claim for interest. . . . As to accord and satisfaction, in point of fact there could be no complete satisfaction, so long as any future instalment remained payable; and I do not see how any mere payments on account could operate in law as a satisfaction *ad interim*, conditionally upon other payments

being afterwards duly made, unless there was a consideration sufficient to support the agreement while still unexecuted.”

In like manner the payment of the first instalment of \$25: (twenty-five dollars) by the defendant before writ issued provided neither the consideration nor accord and satisfaction for the agreement to pay off his debt on an instalmental basis for which he alone contends. Under cross-examination however, the plaintiff has admitted advertising that he sells paint on an instalment basis, but is insistent that this was not the kind of arrangement under which he did so. Whenever he so sells paint, it is only where the monthly instalment is fixed as in the case of a hire-purchase agreement.

I am of the firm opinion that the plaintiff's contention is sound, and that he is entitled to succeed on the point of law he has taken — that, even assuming he did make the verbal agreement attributed to him by the defendant in the alleged September agreement, which he denies, that the agreement is void as *nudum pactum* out of which no right can arise.

There will be judgment for the plaintiff with costs.

*Judgment for Plaintiff.*

Solicitors:

*Mr. D. C. Jagan (acting as solicitor) (for the plaintiff);*

*Mr. L. L. Doobay (for the defendant).*

## HARPRASHAD v. KARAMAT &amp; ANOR.

[In the High Court (Chung, J.) — January 16, 17; February 9, 1967.]

*Land — Servitude — Transport — Parties purchased nearby house lots — Reserves for 'street and drains' on relevant plan — Parties agree to fence land including reserves and to plant rice thereon — Way of necessity — Whether servitude existed and, if so, whether abandoned — S. 135 of the Public Health Ordinance, Cap. 145 (now omitted from the 1973 current Laws of Guyana).*

*Judgment — Estoppel — Questions determined in previous litigation between parties — Whether estoppel arises.*

*Agreement — Whether tortious — Whether contrary to Public Health Ordinance, Cap. 145.*

Abdool Hack was the owner of a certain parcel of land at Waller's Delight, West Coast, Demerara, and he decided to divide up the land and sell the divisions as house lots. To achieve this object, he caused a survey to be carried out in accordance with the provisions of s. 135 of the Public Health

## HARPRASHAD v. KARAMAT &amp; ANOR.

Ordinance, Cap. 145, and a plan was prepared by S.S.M. Insanally, Sworn Land Surveyor, dated September 26, 1950 which was duly deposited in the Deeds Registry on June 16, 1953. The said plan showed the house lots as well as three reserves marked "reserved for street and drains," two of which ran east-to-west connecting the middle walk dam to the east and the side line dam to the west and these two reserves intersected the third reserve, which ran north-to-south, and which connected the public road, thus making a net-work of ingress and egress from the public road to the various lots. Hack sold the lots in three blocks to the plaintiff and the two defendants during 1957. The first-named defendant's land was west of the plaintiff's land and separated from it by the north-to-south reserve; the second-named defendant's land was east of the plaintiff's land and adjoining it. After the three transports were passed each party agreed to use his portion of land for the purpose of planting rice and this was carried into effect. The first-named defendant ran a barbed wire fence along the western side of the north-to-south reserve thus separating his land from the plaintiff's land but including as part of his land the east-to-west reserve. The second-named defendant also ran a barbed wire fence dividing his land from the plaintiff's land and including as part of his land the east-to-west reserve also. The north-to-south reserve was not interfered with.

Hack settled an action he had brought against the plaintiff and the first-named defendant in the sum of \$250 with the plaintiff on January 4, 1961, and for \$200 with the first-named defendant on January 19, 1961, both in relation to the east-to-west reserves fenced in as part of their respective lands. Later, the plaintiff began to plough the north-to-south reserve and the first-named defendant brought an action against Hack, who joined the plaintiff as defendant. In that action (No. 1846/1961 (Demerara)) the Court held that Hack had sold the north-to-south and the east-to-west reserves within the first-named defendant's land to the first-named defendant but only the east-to-west reserve within the plaintiff's land had been sold to him and \$400 damages were awarded against the plaintiff.

In March, 1964, in Action 232/1964 (Demerara) before King, J (Ag.), the plaintiff sued Hack and the first-named defendant seeking, inter alia, (a) a declaration that he was entitled to use for drainage and for ingress and egress from the house lots purchased by him all three reserves shown on Insanally's plan; (b) an order compelling Hack to rectify the transport by him to the plaintiff on June 24, 1957 and numbered 1214 by the addition to the description of the property shown thereon of the following words "together with a right of way and of drainage over, along and through the said strips of land shown on the said plan and marked 'reserved for street and drains'," failing which, the Registrar of Deeds to be ordered to rectify the said transport and to make the said annotation accordingly, and that Hack be ordered to pay the full costs and charges of and incidental to the rectification to the said transport. King, J. (Ag.) dismissed the plaintiff's action and in his judgment (reported in (1965) L.R.B.G. 47) (1) he held that there was no "servitude" or right to a servitude nor any right in the plaintiff to the present use of the reserved for the purpose of access and drainage and, even if he had not found that a servitude had not been created, he would still have refused relief because, in his opinion, the plaintiff had misconceived his remedy since this was not the case of an error in the name of a person or in the description of property as envisaged by s. 24 of the

Deeds Registry Ordinance, Cap. 32, but of a separate piece of property being omitted from the transport, the proper remedy for which was an action for specific performance. On March 19, 1965, the plaintiff, apparently in terms of the judgment of King, J. (Ag.), gave the defendants' notice of his intention to use his land as house lots and calling upon them to remove all portions of their barbed wire fences which obstructed the reserves.

It was argued on behalf of the plaintiff that he had a right to use all three reserves and he alleged that if there were any agreement then it was void as being tortious and contrary to the provisions of s. 135 of the Public Health Ordinance, Cap. 145. The defendants contended, however, that all relative questions concerning the plaintiff's rights had been concluded against him in the previous actions and he was accordingly "estopped" from raising those same issues at this hearing both by the judgment of King, J. (Ag.) and by his own conduct.

**HELD:** — that (i) under s. 2 of Ordinance No. 36 of 1954 which amended s. 135(3) of the Public Health Ordinance, Cap. 145, the words "in accordance with the plan" were substituted for the words "on the plan" and this amendment imposed a duty on the owner not only to exclude from the lots to be transported so much land as is necessary to provide means of ingress and egress to and from each lot but also a duty to see that the plan corresponds with the physical features of the land. In effect, the amendment creates a condition from which the vendor and purchaser can bargain as to 'servitudes;' (ii) having regard to the particular facts of this case, including the previous litigation, all that can be said is that the plaintiff and Hack, at the time of the sale, impliedly agreed that the plaintiff would be entitled to pass and repass on the reserves within his area to get from the lots on the northern side to the lots on the southern side, but it could not be implied from those facts that at the time of the sale the plaintiff was entitled to use all three reserves as the parties had bought the land in three separate blocks; (iii) even assuming that the plaintiff had a right to use the reserves as ingress and egress to the public road, he had 'abandoned' such a right when the parties had agreed to use the said reserves for rice cultivation and later on had fenced, ploughed and built up their respective areas. Once a servitude had been abandoned it cannot be revived except by consent of the parties, by transport or by prescription, none of which were applicable here; (iv) a 'way of necessity' could not be implied here since when the plaintiff bought the land he already had access to the public road by the front lands, and (v) it could not be said that if there was any agreement then same would be void as being tortious and contrary to the Public Health Ordinance, Cap. 145, since all three parties themselves had agreed to abandon the servitude and had in fact expended money in so doing which, in point of fact, meant that they had changed their positions.

*Action dismissed.*

[*Editorial Note:*— In a written decision delivered on April 2, 1968, the Court of Appeal (Luckhoo, Persaud and Cummings, JJ.A) dismissed the plaintiff's appeal and affirmed the decision of Chung, J.]

## HARPRASHAD v. KARAMAT &amp; ANOR.

*Cases referred to:—*

- (1) Harprashad v. Abdool Hack and Another (1965) L.R.B.G. 47.
- (2) Mohamed Din v. Boodhoo and Tetri (1941) L.R.B.G. 116.
- (3) Steele v. Thompson (1860) L.R.B.G. (Old Series) Vol. 2 (1859-1865); (affd.) (1860) Moore's Privy Council Reports (1859-1861) Vol. 31.
- (4) Rose v. Hanoman (1951) L.R.B.G. 135.
- (5) Ohlssons Cape Breweries Ltd. v. Whitehead (1894) Vol. IX Jutta's Reports of the Supreme Court of the Cape of Good Hope, 84.
- (6) Hiddingh v. Topps (1863) Vol. IV Searle's Reports of the Supreme Court of the Cape of Good Hope, 107.
- (7) Jaigopaul v. Clement (1960) 2 W.I.R. 203; (1960) L.R.B.G. 109.

*S.L. Van B. Stafford, Q.C.*, with *John B. Stafford*, for plaintiff.

*F. Ramprashad, Q.C.*, for first-named defendant.

*Dr. F.H. W. Ramsahoye* for second-named defendant.

CHUNG, J.: The facts in this matter are not in dispute, save and except that both defendants led evidence to show that there was an agreement among themselves and the plaintiff to use their lands to plant rice, and by doing so expended certain sums of money.

In 1957 the plaintiff purchased from Abdool Hack a portion of land consisting of house lots numbers 13, 14, 15, 16, 17, 36, 37, 38, 39, 40, 59, 60, 61, 62, 63, 82, 83, 84, 85, 86, 105, 106, 107, 108 and 109 in section A, part of plantation Waller's Delight situate on the west sea coast of the county of Demerara and colony of British Guiana, together with the right of drainage through plantation Vreed-en-Hoop, the said lots being laid down and defined on a plan by S.S.M. Insanally, Sworn Land Surveyor, dated the 26th day of September, 1950, and deposited in the Registrar's Office at Georgetown on the 16th day of June, 1953. Transport was passed on the 24th day of June, 1957.

Before the sale and in accordance with section 135 of Chapter 145 of the Public Health Ordinance, Abdool Hack had a survey carried out and a plan prepared showing the land as divided up and also showing certain portions, two of which ran from east-to-west and one from north-to-south marked "reserved for street and drains."

The first and second-named defendants during and around the said time purchased lands from the said Abdool Hack in accordance with the said plan of Insanally dated 26th September, 1950. The first-named defendant's land is west of the plaintiff's land and a north-to-south reserve divides them. The second-named defendant's land is east and adjoins the plaintiff's land. On the plan the north-to-south reserve is marked "reserved for street and drains" and connects the public road. There are two other

reserves marked "reserved for street and drains" running east-to-west and running through all the parties' lands. They connect the middle walk dam which is east, and the side line dam which is west and they intersect the north-to-south reserve, thus making a net work of ingress and egress from the public road to the various lots.

After the transports were passed each party agreed to use his portion of land for the purpose of planting rice. This they carried into effect.

The first-named defendant ran a fence along the western side of the north-to-south reserve, thus separating his land from that of the plaintiff's, and including as his land the east-to-west reserves which fall within his area.

The second-named defendant ran a fence dividing his land from the plaintiff's land and included in his area the east-to-west reserves which run within his land. The plaintiff also took within his area the east-to-west reserves which fall within his land. The north-to-south reserve was not interfered with. The parties planted rice on the reserves so included in their lands.

In 1958 Abdool Hack brought an action against the plaintiff and the first-named defendant. On the 4th January, 1961, the matter was settled with the plaintiff who gave \$250 (two hundred and fifty dollars) for the reserves within his land. On the 19th January, 1961, Hack settled with the first-named defendant for \$200 (two hundred dollars) for the reserves within his land. Later, the plaintiff started to plough the north-to-south reserves and the first-named defendant took action against Hack who joined the plaintiff as defendant. The court held in Action 1846/61 Demerara, that Hack had sold the north-to-south and the east-to-west reserves within the first-named defendant's (Karamat's) land to the first-named defendant and only the east-to-west reserves which are within the plaintiff's land were sold to the plaintiff. \$400.00 (four hundred dollars) damages was awarded against the plaintiff (defendant in that action).

In March 1964, in Action 232/1964 Demerara, the plaintiff took action against the first-named defendant and Abdool Hack in which the former asked for —

- (a) A declaration that the said sale to him and to Karamat of the full and absolute title in and to the said strips of land situate at Plantation Waller's Delight, West Coast Demerara reserved for street and drains as shown on a plan of the said plantation by S.S.M. Insanally, Sworn Land Surveyor, dated 26th September, 1950, and deposited in the Registrar's Office, at Georgetown on the 16th of June, 1953, were and are illegal, null and void.
- (b) Payment to the plaintiff of the sum of \$250.00 as money had and received, alternately, as money paid for a consideration which has wholly failed.
- (c) A declaration that the plaintiff is entitled to use for drainage and for the purpose of ingress to and egress from house lots numbered

## HARPRASHAD v. KARAMAT &amp; ANOR.

13, 14, 15, 16, 17, 36, 37, 38, 39, 40, 59, 60, 61, 62, 63, 82, 84, 86, 105, 106, 107, 108 and 109 in section A, part of Plantation Waller's Delight, situate on the west sea coast of the county of Demerara and colony of British Guiana, the three strips of land one running north to south and the other two running east to west across the said Plantation and shown as: 'reserved for street and drains' respectively on a plan of the said house lots by S.S.M. Insanally, Sworn Land Surveyor, dated the 26th day of September, 1950.

(d) An injunction restraining the defendant Karamat, his servants and agents from fencing in the said strip of land running north to south or otherwise excluding the plaintiff from the use and enjoyment thereof as aforesaid.

(e) The sum of 35,000.00 damages for trespass and for wrongfully and illegally preventing the plaintiff from using the said strips of land by the wrongful and illegal erection of a barbed wire fence thereon.

(f) An order compelling the defendant Karamat, to dismantle and remove the said fence.

(g) An order compelling Abdool Hack to rectify the transport passed by him to the plaintiff on the 24th day of June, 1957, and numbered 1214 by the addition to the description of the property shown thereon of the following words: "together with a right of way and of drainage over, along and through the said strips of land shown on the said plan and marked 'reserved for street and drains' " to the proprietor of the said house lots, his tenants, and agents, invitees and licencees, or such appropriate words to the satisfaction of the Registrar of Deeds and to cause the said right of way and of drainage to be endorsed or annotated on the original transport or root of title of the said house lots numbered 13, 14, 15, 16, 17, 36, 37, 38, 39, 40, 59, 60, 61, 62, 63, 82, 84, 85, 86, 105, 106, 107, 108 and 109 section A aforesaid held by Abdool Hack.

(h) An order directing the Registrar of Deeds to rectify the said transport and make the said annotation accordingly, in the event of the failure of Abdool Hack so to do.

(i) An order compelling Abdool Hack to pay the full costs and charges of and incidental to the rectification by the Registrar of Deeds of the said transport and failing which the plaintiff be at liberty to pay all such costs and charges and recover the same from Abdool Hack forthwith.

(j) Such further and other relief as may be just.

(k) Costs.

The matter came up before MR. JUSTICE KING (Acting), who delivered judgment on the 12th June, 1965, dismissing the action with costs.

In his judgment he stated (1965) L.R.B.G. 47, at p. 51: —

“. . . This is not therefore, in my opinion, a proper case to make the declaration asked for by the plaintiff at paragraph (c) of his prayer in the Statement of Claim. As I have found that no servitude or right to a servitude exists, nor is there any right in the plaintiff to the present use of the reserves for the purposes of access and drainage, the relief asked for in paragraphs (d), (e) and (f) of the prayer cannot be given.

As regards paragraphs (g), (h) and (i) of the prayer, even had I not found that no servitude was created I would still have refused this relief because the plaintiff has misconceived his remedy. This is not a case of an error in the name of a person or in the description of property as envisaged by section 24 of the Deeds Registry Ordinance Chapter 32, but of a separate piece of property being omitted from the transport. The plaintiff should therefore have sued for specific performance if he was entitled to the servitude. As the plaintiffs counsel specifically abandoned his claims in paragraphs (a) and (b) of the prayer, I find that he is not entitled to any of the relief claimed. The action is therefore dismissed with costs to the defendants to be taxed fit for counsel.”

On the 19th March, 1965, the plaintiff gave to the defendants notice of his intention to use his said land as house lots and calling on them to remove all portions of their barbed wire fences erected by them which obstruct the use of the said reserves.

It seems that this was done because the learned judge in the above case, at page 50, stated “that though there may be an inchoate right in each purchaser to the use of the reserves for streets and drains this right could not become operative until one or other purchaser decided actually to lay out his portion in separate lots according to the plan, thus necessitating the use of the reserves for streets and drains. In such case he would no doubt have to give the other purchasers adequate notice of his intention so to do in order to enable them to alter their use of their own lands. . . . As I suggested above it may be that if the plaintiff desired to use his land in separate lots he could, by a period of notice to the other purchasers, recover his right to the use of the reserves as streets and drains.”

The plaintiff is saying that he has a right to use all the reserves on the plan marked “reserved for street and drains.”

The defendants are contending that all relative questions concerning the plaintiff’s rights have been concluded against him in the previous actions and he is estopped from raising the issue here by the judgment, and by his conduct. The plaintiff is alleging that if there were an agreement, that agreement was void as it was tortious and against section 135 of Chapter 145.

Before deciding whether the agreement is void the court must first look and see what the plaintiff is basing his claim on; in other words, what is his legal right to the reserves. Section 135 of Chapter 145 states —

## HARPRASHAD v. KARAMAT &amp; ANOR.

(1) If the owner of any land desires to sell, lease, rent or grant the same in separate lots to any person or persons for any purpose whatever, or desires to lay it out for building purposes, he must cause a plan thereof to be prepared, which, if the Board in any particular case so directs, shall be prepared by a sworn land surveyor and laid before the Board, showing the mode in which it is proposed to subdivide the land, the streets, roads, and means of access to each lot, and the provision for the drainage thereof, and the Board may require any alteration to be made in the plan appearing to it expedient or necessary, and the Board shall issue a certificate signed by the secretary when the plan is finally approved.

(2) Where the owner desires to transport any land aforesaid he must deposit the plan as approved by the Board in the Deeds Registry, and every transport of the land, or portion or lot thereof sold, shall be passed in accordance with the plan and not otherwise.

(3) The Registrar shall not advertise the transport of any land aforesaid, nor shall it be transported, until the owner has deposited the plan as aforesaid and also a certificate signed by the secretary that the means of access to, and the drainage of, each lot have been provided in accordance with the plan to the satisfaction of the Board.

Section (6) makes it an offence to sell, lease, rent or grant any land or transport made or passed in contravention to the section.

In *Mohamed Din v. Boodhoo and Tetri* (1941) B.G.L.R., p. 116, the head-note reads —

“The statutory requirement that an owner of land must provide means of access to a lot about to be transported does not create a servitude. It merely imposes a duty on the owner to exclude from the lots about to be transported so much land as is necessary to provide means of ingress to and from each lot.”

Since that case was decided, section 135(3) was amended by ordinance 36 of 1954, section 2, to read “in accordance with the plan” instead of “on the plan.” The question therefore is: What is the effect of the amendment? I am of the opinion that besides imposing a duty on the owner to exclude from the lots about to be transported so much land as is necessary to provide means of ingress to and from each lot, it also imposes on him a duty to see that the plan corresponds with the physical features of the land. It creates a condition from which the parties — the seller and the purchaser — could bargain as to servitudes.

In *Steele v. Thompson*, (1860) Moore’s Privy Council Reports 1859—61 Vol. 31, it was held that a servitude being immovable property cannot be conveyed otherwise than by transport. In *Rose v. Hanoman* (1951) L.R.B.G. 135, at page 147, BOLAND C.J. (Ag.), said: “The case of *Steele v.*

*Thompson* came before the court as a matter in dispute not between persons who originally had entered into an agreement for servitude but between their respective assignees of the lands . . . if the decision is to be construed as holding that parties to a contract for servitude between themselves would not be bound by the contract because the servitude was not effectuated by transport, the decision would seem to be inconsistent with the opinion of the textbook writers on Roman-Dutch Law who have declared that in Roman-Dutch Law, there can be such an enforceable binding agreement between owners of contiguous lands." In the present case the action is not against the seller.

In the *Ohlssons Cape Breweries Ltd. v. Whitehead* (1894) Report of Cases in the Supreme Court of the Cape of Good Hope by Henry Jutta, Vol. IX, p. 84, it was held where land has been sub-divided into lots and such lots have been sold and transferred according to a general plan of sub-division in which the roads for the different lots are laid down, the owner of each lot may use all such roads as are reasonably necessary for convenient access to and egress from the public road of the district. See also *Hiddingh v. Topps* (1863) Cases decided in the Supreme Court of the Cape of Good Hope by H.W. Searle, Vol. IV, p. 107. It seems therefore that the intention of the parties at the time of sale is therefore most material.

In *Jaigopaul v. Clement* (1960) W.I.R., Vol. 2. p. 203 at p. 204 LUCK-HOO, C.J., held that: "a way of necessity although a real servitude arises by implication of law and is not required to be inserted in or annotated on the transport of the dominant tenement or the transport of the servient, tenement for his enjoyment." On page 206, the learned Chief Justice stated: "The distinction between a right of way other than a way of necessity and a way of necessity is important for if the plaintiff were to acquire and occupy property whereby he could without the use of the present way of necessity gain ingress or egress from or to the public road . . . a way of necessity would no longer exist. A way of necessity arises by implication of law, not so a right of way (other than a way of necessity). A way of necessity as it arises by implication of law does not require annotation or insertion in any transport."

In *Steele v. Thompson* (1860) B.G.L.R. Old Series Vol. 2, 1859-65, the plaintiffs brought an action in 1858 for right of servitude in a fresh water canal. They were unsuccessful on the ground that the servitude was not included in the transport. The decision was upheld by the Privy Council. They now claimed to use a part of the canal as a necessary way from their land, on the south side of the canal to their buildings. ARRINDELL, C.J., BEETE AND ALEXANDER, JJ. held that the right of way *ex necessitate* was certainly not put forward or touched upon in the former action, but this is materially unimportant. The foundation of the claim for such a right is servitude and it was finally and conclusively determined by the former action that no servitude either for shipping or navigation existed in favour of the plaintiffs in regard to the canal in question. This case was not cited in *Jaigopaul v. Clement* above.

## HARPRASHAD v. KARAMAT &amp; ANOR.

If *Steele v. Thompson* (both actions) are to be followed then the plaintiff has no servitude whatever to the reserves and therefore cannot bring an action against the defendant. If *Ohlssons Cape Breweries Ltd. v. Whitehead*, and *Hiddingsh v. Topps* are to be followed, then the court has to find out what was the intention of the parties at the time.

The land was sub-divided into lots. Land was reserved for streets and drainage but the plaintiff bought his lots in one block. Each defendant also bought his lots in separate blocks. Later, under an agreement between the buyers, each party encircled his block with wire fencing save and except the north-to-south reserve. Each party ploughed and planted the reserves within his area. Abdool Hack brought an action against the plaintiff and the first-named defendant. This action was settled — the plaintiff paying \$250 for the reserves within his area, the first-named defendant paying \$200 for the reserves within his area. Later, the plaintiff ploughed the north-to-south reserve. Action was brought by the first-named defendant against the plaintiff and Hack. It was held by the court that the north-to-south reserve and the reserves within the first-named defendant's area were sold to the first-named defendant by Hack, and the reserves within the plaintiffs area were sold to the plaintiff.

On these facts the most that can be said is that the seller Hack and the purchaser Harprashad, the plaintiff at the time of sale, impliedly agreed that the plaintiff would be entitled to pass and repass on the reserves within his area to get from the lots on the northern side to the lots on the southern side. It cannot be implied from those facts that at the time of sale it was agreed that the plaintiff was entitled to use all the reserves — the parties bought the land in three separate blocks. It might have been a different matter if each lot had been sold to different purchasers, then it might be implied that each owner was entitled to use the reserves.

Even if it can be implied that the plaintiff had a right to use the reserves as ingress and egress to the public road, the plaintiff had abandoned such rights when the parties agreed to use the area for rice cultivation — each party fenced, ploughed and built up his area. Once a servitude has been abandoned it cannot be revived unless by consent of the parties, by transport or prescription.

Even if *Jaigopaul v. Clement* is to be followed, a way of necessity cannot be implied in the present case as when the plaintiff bought he had access to the public road by the front lands and as stated by LUCKHOO, C.J., in *Jaigopaul v. Clement* at p. 206 “if the plaintiff were to acquire and occupy property whereby he could have the use of the present way of necessity to gain ingress or egress from or to the public road . . . a way of necessity would no longer exist.”

It was contended by the plaintiff that if there were any agreement, the agreement was void as it was tortuous and against the Public Health Ordinance. I do not agree with this submission. JUSTICE KING (Acting), stated (1965) L.R.B.G. 47 at p. 50 —

But what happens where from the time the land is bought no attempt is made to use it for any of these purposes but by agreement between the purchasers it is used *en bloc* for rice cultivation? Inter-lot access and drainage here become irrelevant and the Public Health Authority would not be concerned.”

The agreement to plough the reserves may be tortuous but the parties can agree to abandon the right of servitude. BOLAND, C.J., (Ag.) in *Rose v. Hanoman* above, page 162 stated —

The authorities are clear that while mere non user of a servitude will not extinguish the right to servitude, any acts of the owner of the servient tenement which are inconsistent with the existence of the servitude over his lands would, if not disallowed by the owner of the dominant tenement, serve to extinguish the servitude, and there would thereby be extinguishment of the servitude nonetheless though the owner of the dominant tenement with no intention to abandon his right to servitude give his consent to the condition making the exercise of the right of servitude impossible.

In the present case there is no doubt that the three purchasers agreed to abandon the servitude and expended money in so doing. In fact, they had by agreement changed their position. It is to be noted also that in Action No. 232/1964 Demerara, the plaintiff had asked the court to declare that the sale to him and to the defendants of the reserves were illegal, null and void. This was later abandoned during the action.

In the circumstances I find that the plaintiff has no legal right to the reserves (other than the reserves within his area of land) to bring a case against the defendants. The plaintiff's action is therefore dismissed. Costs to the defendants fit for counsel.

*Action dismissed.*

Solicitors:

*Jayme Jorge* (for plaintiff).

*P. Poonai* (for the defendants).

GORDON S. GILLETTE v. BALRAM SINGH RAI  
& PETER TAYLOR & CO. LTD.

[In the High Court (Mitchell, J.) — July 20, 21, 1967.]

*Practice and procedure — Pleadings — Libel — Desertion — Abandonment — Whether two concepts to be construed together or separately — Order 32 Rules 8 & 9 of the Supreme Court Rules, 1955 (now Order 32 Rules 8 & 9 of the Rules of the High Court, Cap. 3:02 (Subsidiary)).*

*Construction of statute — Supreme Court Rules, 1955 — Meaning of words “cause or matter” — “proceeding had” — Order 32 Rule 9(1) (a) of the Supreme Court Rules, 1955, (now Order 32 Rule 9(1)(a) of the Rules of the High Court, Cap. 3:02 (Subsidiary)).*

The plaintiff, a barrister-at-law and the Director of Public Prosecutions, brought a libel action against the first-named defendant, also a barrister-at-law and a former Minister of Home Affairs and the second-named defendant, the owners, publishers and printers of the “Evening Post” newspaper and he filed and served his writ of summons on February 3, 1964, to which the two defendants caused appearances to be entered on February 11 and March 3, 1964, respectively. On March 6, 1964, the plaintiff filed and served his statement of claim and on April 13, 1964, notices of default of defence were filed in relation to both defendants. On April 23, 1964, the second-named defendant filed a summons seeking an order to have paras 4 to 19 of the statement of claim struck out and on April 24, 1964, the first-named defendant filed a similar summons to have paras. 4 to 13 of the statement of claim struck out. Thereafter, there were a series of adjournments and postponements of the hearing of the two summonses, which were eventually part-heard on several occasions over a period of months and, on October 22,

## GILLETTE v. RAI &amp; ANOR.

1965, Chung, J., dismissed the applications and granted the plaintiff costs in any event. The learned Judge also granted leave to the defendants to file and deliver their statements of defence within 28 days from that date and also granted leave to the plaintiff to file and deliver a reply, if necessary, within 28 days thereafter. The defendants' appeals to the Full Court were dismissed on July 22, 1966, and the order of Chung, J., was affirmed.

On September 6, 1966, a consent was filed to enable the first-named defendant to file and deliver his defence which he did that said day and a similar consent was given to the second-named defendants on October 15, 1965, and they also filed and delivered their defence that same day. On March 30, 1967, a request for hearing was filed by the plaintiff and the substantive action was fixed for hearing on July 19, 1967, and subsequent days. When the matter came up for hearing on July 20, 1967, the first-named defendant indicated to the Court that he was taking a preliminary objection of which notice had been given to counsel for the plaintiff. He submitted that the action was not maintainable at that time or stage since by virtue of Order 32 Rule 9 of the Supreme Court Rules, 1955, the action was to be deemed altogether abandoned and incapable of being revived since April 24, 1965, being one year from the date when interlocutory proceedings were taken out on a summons filed by himself on April 24, 1964, that being the date of the last proceeding had or the filing of the last document. He argued that even though interlocutory proceedings were still pending at April 24, 1965, this fact did not prevent time from running so as to cause the action to be deemed abandoned. In reply, counsel for the plaintiff contended that 'last proceedings had' in the context of Order 32 Rule 9(1)(a) meant 'last proceedings held' and that every order made by the Court, even an adjournment or the hearing of arguments was a 'proceeding had' within the ambit of that rule. Further, 'interlocutory' proceedings did prevent the matter from becoming 'ripe for hearing' within the context of Order 32 Rule 3(2) and, therefore, there could not properly have been any 'request for hearing' filed until after October 22, 1965, the date when Chung, J., gave his decision. He argued that although "abandonment" and "desertion" are dealt with by separate rules of Order 32, viz., Rules 9(1)(a) and 8 respectively, nevertheless, they should be construed together and, in fact, 'abandonment' can only take place after 'desertion'.

**HELD:**— that (i) when regard is paid to the definition of the words "cause" and "matter" in s. 2 of the Supreme Court Ordinance, Cap. 7, and the same is read in conjunction with Order 32 Rule 9(1)(a) then the word "proceeding" could be defined as 'any act done against any other person through the Court by way of action, petition, motion, summons or otherwise' and would not apply to adjournments or even a hearing, if the hearing is postponed from day to day; (ii) the word "had" following the word "proceeding" in Order 32 Rule 9(1)(a) means "taken"; (iii) a cause or matter may be deemed 'abandoned' and incapable of being revived even though 'interlocutory' proceedings are or were pending at the expiration of the period of one year from the last proceeding taken or the last document filed in the cause or matter, i.e., if there is a failure to comply with Order 32 Rule 9(1)(a) of the Rules; (iv) the words "unless the Court or a Judge otherwise orders" in Order 32 Rule 3(2) is a provision which could and should be used to avoid or prevent the consequences of delay or inaction on the part of either party for a period of one year which may give rise to

a cause or matter being deemed 'abandoned'; (v) an examination of Order 32 discloses that there is no relationship in the stages of progress whereby a matter becomes 'deserted' and those whereby a matter becomes 'abandoned' and, accordingly, the state of 'desertion' is not a pre-requisite of the state of 'abandonment'.

*Action deemed abandoned and incapable of revivor  
No order as to costs.*

[*Editorial Note*:—The plaintiff's appeal to the Court of Appeal was allowed on June 12, 1968, and that court (Stoby, C., Persaud and Cummings, JJ.A) directed that the action be remitted back to the High Court for hearing on its merits.]

*Cases referred to*:—

- (1) Peter Taylor & Co. Ltd. and Another v G.S. Gillette (1966) G.L.R. 208.
- (2) Cunningham v Lee (1960) L.R.B.G. 69.
- (3) Webster v. Myer (1884) 14 Q.B.D. 231.

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

First-named defendant in person.

*A.S. Manraj* for second-named defendant.

MITCHELL, J.: The Plaintiff, a Barrister-at-Law of the Honourable Society of Gray's Inn was at the time of filing the Writ of Summons in this matter the Director of Public Prosecutions of Guyana, then British Guiana.

The first-named defendant is a Barrister-at-Law of several years standing at the Bar of Guyana and a former Minister of Home Affairs. The second-named defendant is the proprietor, publisher and printer of the "Evening Post" a newspaper with a circulation in Guyana.

The Plaintiff claimed against the defendant jointly and severally damages in excess of \$500.00 (five hundred dollars) for libel unlawfully and maliciously printed and published by the defendants jointly and severally in Guyana of and concerning him on page 3 of the "Evening Post" newspaper of Tuesday, January 21st, 1964 under the caption "More questions for the Public Prosecutor," which was widely circulated and/or distributed and/or published throughout Guyana and elsewhere.

The Plaintiff, also, claimed an injunction restraining the defendants jointly and severally and/or their servants and/or agents from printing and/or publishing and/or circulating and/or distributing the said libel in this country and elsewhere. The Plaintiff, also, claimed costs.

The Writ of Summons initiating the action was filed on 3rd February, 1964 and service was effected on the defendants on the same date. On 11th February, 1964 there was filed an Entry of Appearance on behalf of the first-named defendant, and on 3rd March 1964 there was filed an Entry

## GILLETTE v. RAI &amp; ANOR.

of Appearance on behalf of the second-named defendant. On 6th March, 1964 an application for an enlargement of time to enable the Plaintiff to file and deliver his statement of Claim was filed and on the same date 6th March, 1964, the plaintiff filed his Statement of Claim. On 13th April, 1964 notices of default of defence were filed in relation to the first-named and second-named defendants. Then on 23rd April, 1964, a summons was filed on the part of the second-named defendant for an order that paras, four (4) to nineteen (19) of the Plaintiffs Statement of Claim be struck out, and on 24th April, 1964 a summons was also filed on the part of the first-named defendant for an order that paragraphs four (4) to thirteen (13) of the Plaintiffs Statement of Claim be struck out. Thereafter, there were a series of adjournments of and postponements on the hearing of the two summonses. They were part-heard on 20th February, 1965 and adjourned. They were further part-heard on 26th July, 1965. On 11th September, 1965 they were part heard by a judge other than the judge who heard them on 20th February, 1965. They were heard again on 18th and 25th September 1965, and on 22nd October 1965 a written decision was given by the judge who heard the applications, dismissing the applications of the two defendants, granting the plaintiffs costs in any event, the defendants leave to file then defence within twenty-eight (28) days of that date and also the plaintiff leave to file a reply to the defence within twenty-eight (28) days of their filing the defence, if that were considered necessary.

The defendants appealed against the decision of the learned judge in Chambers, and the appeal was heard before the Full Court comprising BOLLERS, C.J. PERSAUD AND KHAN, JJ. The Full Court dismissed the appeal and affirmed the order made by the trial judge CHUNG, J. [see (1966) G.L.R. 208.]

A consent was filed on 6th September, 1966 to enable the first-named defendant to file and deliver his defence in the action. This the first-named defendant did on the said 6th September, 1966. A similar consent was given the second-named defendant on 15th October, 1966 and the defence of the second-named defendant was filed on the same date.

The request for the hearing of the matter was filed on 30th March, 1967 and it was fixed for hearing on 19th July, 1967 and subsequent dates.

When the matter came up for hearing on 20th July, 1967 the first-named defendant who appeared in person made a preliminary submission, notice of which, he said, had been given to counsel for the plaintiff.

He submitted that the action was not maintainable at that time or stage, and that by virtue of o. 32, r. 9 of the Rules of the Supreme Court 1955 it was to be deemed altogether abandoned and incapable of being revived since 24th April 1965, one year from the date when interlocutory proceedings were taken on summons filed by the first-named defendant. He contended that either party failed to take any proceedings or file any document in the matter for one year after 24th April, 1964, the date of the

last proceeding had, or the filing of the last document thereon. He also contended that even though interlocutory proceedings were still pending at the time when the period of one year after 24th April, 1964 had expired, that fact did not prevent time from running, so as to cause the action to be deemed abandoned. He also said that the existence of that order did not preclude the filing of other documents, that the rule was strict and of a mandatory nature. Mr. Rai referred to the decision of the learned Chief Justice in *Cunningham v. Lee* (1960) L.R.B.G. p. 69-72 to support his contention.

Counsel for the plaintiff in reply contended that the submission should not be considered correct in the circumstances of this case having regard to the wording of o. 32, r. 9(1)(a) and especially the word "had" which follows the word "proceeding" in that rule. He contended that "last proceeding had" in the context of o. 32, r. 9(1)(a) means "last proceeding held." He said that every time the matter was called up before the court and the court made an "order" adjourning it, it was a proceeding — even an adjournment. He said that when arguments were heard it was a "proceeding had" within the meaning of o. 32, r. 9(1)(a). He also said that o. 32, r. 9(1)(a) could not apply where interlocutory proceedings challenged the validity and sought to strike out the Statement of Claim.

Counsel for the plaintiff further contended that as a result of the interlocutory proceedings o. 32, r. 3(2) came into operation and prevented the matter from becoming ripe for hearing until the determination of such proceedings and thus there could have been no request for hearing filed until after 22nd October, 1965.

He further said that although "abandonment" is dealt with in a rule separate from that of "desertion" the rule on abandonment r. 9(1)(a) and the rule of "desertion" r. 8 of o. 32 should be construed together, so that "abandonment" can only take place after "desertion" has taken place.

O. 32, r. 9 of the Rules of the Supreme Court, 1955, provide as follows:—

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

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

("therein" to my mind refers to the cause or matter).

- (b) no application for or consent to revivor has been filed within six months after the cause or matter has been deemed deserted; or

## GILLETTE v. RAI &amp; ANOR.

- (c) if the cause or matter has not, on the request of any party been entered on the Hearing List within six months from the date of any order of revivor.
- (2) The instituting of a cause or matter which has been deemed altogether abandoned shall be of no effect in interrupting any period of limitation.”

It is, perhaps, appropriate at this stage to consider what is a cause or matter within the meaning of o. 32, r. 9(1). The Rules of the Supreme Court 1955 of which Order 32 is one were made under the powers conferred on the rule-making authority by the Supreme Court Ordinance, Cap. 7 of the Laws of Guyana The Rules of the Supreme Court 1955, thus emanate from the Supreme Court Ordinance, Chapter 7, and take their effectiveness and force from that ordinance, and, cannot be considered apart from that ordinance constituting as it does the Supreme Court which includes a judge when exercising any of the jurisdictions conferred on him by that ordinance, by any other ordinance, or the rules.

According to the Supreme Court Ordinance, cap. 7, s. 2 (Interpretation) “cause” includes any action or other original proceeding between a plaintiff and a defendant, and any criminal proceeding at the suit of the Crown. “Matter” includes every proceeding in the court not in a cause. A cause or matter, (apart from a criminal proceeding) it follows, must have a plaintiff and defendant. A “plaintiff includes every person asking any relief (otherwise than by way of counterclaim as a defendant) against any other person by any form of proceeding whether the proceeding is taken by action, petition, motion, summons, or otherwise. It follows therefore that the proceeding in any cause or matter is taken by action, petition, motion, summons, or otherwise.

If one were to apply that reasoning to o. 32, r. 9(1)(a) it will be appreciated that if “any party (and that includes both plaintiff and defendant) has failed to invoke or attract the attention of the court by way of any action, petition, motion, summons, or otherwise, that party will have failed to take a proceeding. A proceeding may thus be defined as any act done against any other person through the court by way of action (a civil proceeding commenced by filing a claim and includes a suit), petition, motion, summons, or otherwise. From that definition it would be gleaned that a “proceeding” would not apply to and include adjournments in a matter engaging the attention of the court or the mere hearing of that matter even if the hearing were postponed from day to day for several days. Accordingly, the contention of counsel for the plaintiff that whenever the matter came before the court and the court made an “order”, even by pronouncing an adjournment, it was a “proceeding” is untenable.

It therefore follows that if any party has failed to do any action through the court against any other person by way of action, petition, motion, summons or otherwise, either in the original proceeding, or in any proceeding in the court not in the original proceeding, (interlocutory), or,

file any document either in the original proceeding, or, in any proceeding in the Court not in the original proceeding (interlocutory) for one year from the date of the last proceeding had. i.e. the last act done by way of action, petition, motion, summons or otherwise or the filing of the last document, the original civil proceeding commenced by filing a claim as between plaintiff and defendant or any proceeding in the Court not in the original civil proceeding (interlocutory) shall be deemed abandoned.

To my mind having regard to Section 2 (Interpretation) of the Supreme Court Ordinance, Cap. 7, and the context in which the word is used in o. 32, r. 9(1)(a), the word "had" following the word "proceeding" means "taken". This was also the view held by LUCKHOO, C.J., in *Cunningham v. Lee* 1960 L.R.B.G. pgs. 71 and 72, when he used the words "since the date of the last proceeding taken or documents filed."

I am further fortified in my view by a reference to the wording of o. 32, r. 9(1)(a) and the wording of o. 64, r. 13 of the ANNUAL PRACTICE (WHITE BOOK) 1883 to 31st December, 1963, which are almost identical in their operative parts in relation to the delay after one year.

In o. 32, r. 9(1) of our Rules the relevant words are "any party has failed to take any proceeding or file any document therein for one year from the date of the last proceeding had" and in o. 64, r. 13 of the ANNUAL PRACTICE 1883 to 1963 the relevant words are "In any cause or matter in which there has been no proceeding for one year from the last proceeding had".

This o. 64, r. 13 of the ANNUAL PRACTICE (1883 to 1963) was worded in the same manner in 1955 when the Rules of the Supreme Court of Guyana were formulated and came into operation and was only revoked by the English Rules of the Supreme Court (Revision) 1962 which came into operation on 1st January 1964, and was replaced by the English Order 3 rule 6 of which the relevant words "where a year or more has elapsed since the last proceeding in a cause or matter." It is significant that the English Order 3 rule 6 has omitted the word "had" after the words "last proceeding" without detracting from the sense or effectiveness or force of the order. Thus the word "had" in that context may be considered as mere surplusage and unnecessary and may be dispensed with.

I am disposed to the view that the rule making authority of the Guyana Rules of the Supreme Court 1955, must have had the ANNUAL PRACTICE (WHITE BOOK), 1954 and the Rules of the Supreme Court of England as reflected in the Book and the English Rules of the Supreme Court from 1883 to 31st December, 1963 under active consideration for application in the Supreme Court of Guyana when those 1955 rules were made, in so far as it is specifically stated in o. 1, r. 3 of our Rules to the effect that:

"Where touching any matter of practice or procedure these rules are silent, the Rules of the Supreme Court for the time being in force, made in England under and by virtue of the Supreme Court

## GILLETTE v. RAI &amp; ANOR

of Judicature (Consolidation) Act 1925, or any statute amending the same shall apply *mutatis, mutandis*.”

Accordingly, the use of the word “had” in the English Rule Order 64 r. 13 (1883 to 31st December 1963) and its being dispensed with in the English Rule Order 3 r. 6 (Revision) 1962 which came into force on 1st January, 1964, should help us to understand the meaning in which the said word “had” was used in the context of our Rule Order 32 r. 9(1)(a) 1955.

In the case of *Webster v. Myer* (1884) 14 Q.B.D. page 231 Order 64 r. 13 of the English Rules whose operative words include the words “the last proceeding had” received judicial consideration and interpretation. In that case the action was brought in September 1881 to recover the amount of a Solicitor’s bill. The writ was served in December 1881, but the defendant did not appear and no step was taken by the plaintiff until September 1884, when the Affidavit of Service was sworn and in the month of November following application was made to the Proper Officer of the court to enter judgment for Default of Appearance. This was refused on the ground that no proceeding had been taken in the action for more than a year after service of the writ.

BRETT, M.R. in the course of delivering his judgment said “Now Order LXIV (64) r. 13 provides that where no proceeding has been taken for a year . . . and LINDLEY, J. said “The fact of more than a year having elapsed” (the new word in Order 3, r. 6 of the English 1962 rules) “Since the last proceeding” (also in Order 3 r. 6 of 1962) “seems to show that the plaintiff had intended to abandon the prosecution of the action . . . .” Thus I hold the view that “had” in the context of Order 32 r. 9(1)(a) means “taken” or could be dispensed with altogether.

Again in so far as Order 64 r. 13 of the Rules of the English Supreme Court, 1883 to 1963 may be said to have given birth to and to be the *fons et origo* of our Order 32 r. 9(1)(a) it is significant to note that having regard to the arguments of counsel for the plaintiff concerning what is a proceeding, that in the original English Rule Order 64 R. 13 it is specifically stated I quote “A summons on which no Order has been made shall not . . . be deemed a proceeding”. And in so far as our Supreme Court Rules 1955 are silent on this particular aspect of practice or procedure, and having regard to our Rules Order 1 R. 3 which states that the Rules of the Supreme Court for the time being in force . . . shall apply *muttis mutandis*, it can thus be accepted that the undetermined summons on which there was no order cannot by themselves be considered each as a proceeding.

If it is argued as a corollary that the orders made by CHUNG, J. on those interlocutory proceedings amount to proceedings, those were not actually made until 22nd October 1966, and that would be still more than one year after 24th April 1964, the date of which the last summons was filed.

Counsel for the Plaintiff had also contended that Order 32 r. 9(1)(a) was not intended to apply and did not apply to the circumstances of this case whether interlocutory proceedings related to the Statement of Claim were pending. He also said that even though "abandonment" is dealt with in a rule separate from that rule dealing with "desertion" Rules 8 and 9 of Order 32 of our Rules of Supreme Court 1955 should be construed together so that a cause or matter may be deemed altogether abandoned and incapable of being revived only after it has been deemed deserted.

It is perhaps worthy of mention that there is no comparable rule in the English Rules of Supreme Court with Rule 8 of Order 32 of our Rules of Supreme Court 1955 and with the aspect of a cause or matter being deemed altogether abandoned in Rule 9 of Order 32.

There is no Rule in our Order 32 which says that a matter must be deemed deserted before it can be deemed altogether abandoned and incapable of being revived.

Order 32 r. 3(2) is as follows: –

"If there are any interlocutory proceedings pending, a cause or matter shall not become ripe for hearing until the determination of such proceedings, unless the court or a judge otherwise directs".

Order 32 r. 1(1) is as follows: –

"When a cause or matter has become ripe for hearing it shall be the duty of the plaintiff or other party in the position of plaintiff to file a request for hearing within six weeks thereafter"

Order 32 r. 8(1) is as follows: –

"A cause or matter shall be deemed deserted if no request for hearing shall be filed within six months after the expiration of the period fixed for the filing of such request."

On an examination and interpretation of Order 32 of our Rules of Supreme Court, 1955, one finds that there is no relationship in the steps of progression whereby a matter becomes "deserted" and those whereby a matter becomes "abandoned".

In so far as a cause or matter may become "deserted" it is recognised that the state of desertion may be perpetuated into a little state whereby the cause or matter may be deemed, "abandoned" and that is recognised in Order 32 r. 9(1)(b) which states that a cause or matter shall be deemed altogether abandoned and incapable of being revived if prior to the filing of a request for hearing or consent to judgment or the obtaining of judgment

"(b) no application for or consent to revivor has been filed within six months after the cause or matter has been deemed deserted"

Order 32 r. 9(1)(b) above stated also recognises the computation of time of one year from the time after which a request for hearing may be filed i.e. one year from the date from which it was incumbent on the plaintiff or

## GILLETTE v. RAI &amp; ANOR.

other party to file a document and infers that the filing of a document albeit an application for or consent to revivor after the matter has been “deserted” would prevent the cause or matter from becoming abandoned if that document were filed “within six months after the cause or matter had been deemed deserted”.

To my mind this does not make the state of “desertion” a pre-requisite for the deeming of a state of “abandonment”. Rather it indicates that if there is a period of inaction (no filing of a request for hearing) for one year from the date when that request for hearing should have been filed, the cause or matter shall be deemed altogether abandoned and incapable of being revived. This to my mind, is the spirit, purport and intent of the other sub-rules 9(1)(a) and 9(1)(c) of Order 32.

Accordingly, I held the view also, that that contention of learned counsel for the Plaintiff was untenable and that a cause or matter may be deemed altogether abandoned and incapable of being revived even though interlocutory proceedings are or were pending, at the expiration of the period of one year from the last proceeding taken or the last document filed in the cause or matter, that is, if there is a failure to comply with the provisions of Order 32 rule 9(1)(a) of our Rules of Supreme Court, 1955.

In this regard, I would refer to the decision of LUCKHOO, C J. in *Cunningham v. Lee* (1960) L.R.B.G. p. 69 at p. 71. I quote:

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

Continuing in *Cunningham v. Lee* the learned Chief Justice said,

“Read literally Order 32 r. 9(1)(a) would appear to have the effect of the cause or matter being deemed abandoned and incapable of being revived for the failure referred to therein is by “any party” not by the defendant. To avoid the consequences of that provision it would be necessary in such circumstances for a plaintiff to apply under the provisions of Order 32 r. 3(2) for an Order of the court or judge that the matter shall become ripe for hearing. If such an order is attained then there can be no further difficulty. If the court or judge on such an application declines to make the order then in my view the provisions of Order 32 r. 9(1)(a) must be held in so far as it relates to the party not in default to be inoperative until the determination of interlocutory proceedings or until a court or judge makes an order that the matter has become ripe for hearing.”

I concur with the views stated by LUCKHOO, C.J. in the extract from *Cunningham v. Lee*. Moreover, the power conferred on the court in the

provisions of Order 32 r. 3(2) and particularly the words “unless the court or judge otherwise orders” to give directions as to whether a cause or matter shall or shall not become ripe for hearing until the determination of any interlocutory proceedings is a useful shield or weapon to protect or correct any possible abuse on the part of either party. It is, thus, a provision recourse to which could and should be had to avoid or prevent the consequences of delay and inaction on the part of either party for a period of a year which may give rise to a cause or matter being deemed abandoned.

Could a court or a judge in so far as interlocutory proceedings were pending in the instant case have otherwise ordered that the cause or matter should become ripe for hearing within the scope of Order 32 r. 3(2)? Having regard to the possible pre-requisites for doing so as indicated in Order 32 r. 3(1)(a) it would seem that that could have been done. Because a Statement of Claim was filed by the plaintiff and Notices of Default of Defences filed against both defendants as required by Order 25 r. 15. In addition, an application by the plaintiff under Order 32 r. 3(2) apart from possibly having that effect would have provided the plaintiff with the fact of having taken a proceeding or filed a document in the cause or matter, and would have thus prevented the period of one year from elapsing since the then last proceeding taken or the last document filed, i.e. the applications by way of summons filed by both defendants, the last on 24th April 1964.

Accordingly, and for the reasons given, I held the view that the action of the plaintiff filed herein shall be deemed altogether abandoned and incapable of being revived as a result of the failure on the part of the plaintiff or defendants to take any proceedings or file any document in the cause or in any matter herein for one year after 24th April 1963 and I so deemed it.

Having regard to the various adjournments made at the request of each party resulting in the delay in the hearing of the interlocutory proceedings initiated by the defendants, and, also, having regard to the conduct of the parties prior to the hearing and during the hearing, and in the exercise of the judicial discretion of the court, on the basis of reason and justice there shall be no Order for Costs in this particular original and substantive action between the parties.

*Action deemed altogether abandoned and incapable of  
revivor – No order for costs.*

Solicitors:

*H. D. Eleazar*, (for plaintiff);

*Laurie T. Persaud*, (for defendants.)

## ETWARIA v. CLINTON BELLAMY

[In the High Court (George, J. (Ag.) — February 15, April 29, July 22, 1967]

*Land — Possession — Exclusive — No rent paid — Length of time in occupation — No exceptional circumstances — Whether tenancy at will or mere licence.*

*Land — Tenancy at will — Whether protected — Rent Restriction Ordinance, Cap. 186 (now Rent Restriction Act, Cap 36:23).*

*Land — Possession — Jurisdiction of High Court — Whether competent to grant order for possession.*

During the civil disturbances of 1964, the plaintiff was forced to leave her property at Bachelor's Adventure and went to live at Enmore. During June of that year she orally agreed to sell to the defendant her house situate on the land at Bachelor's Adventure for \$1,200: and he paid her \$425: for which a receipt was issued and he promised to pay the balance within a year. Immediately thereafter, the plaintiff accompanied the defendant to the said house and handed over possession of it to him. At her request he agreed to keep some furniture and a Delco plant for her until the disturbances were over and in August 1964 she sold him the palings which enclosed the land. It was agreed that the defendant would live on the land until he paid off for the house which she alleged was to be done within a year. The defendant paid no rent and it was not until April 1966 that the plaintiff first took steps to get the defendant off the land when she caused a notice to be sent to him. In August, 1965, she instituted proceedings against him for the balance of \$325: then owing on the purchase price of the house. However, it was not until the present action that she actually sought to obtain an order for possession and have the house removed therefrom. Since he went into possession, the defendant has been occupying the land exclusively and growing crops thereon.

It was submitted on behalf of the defendant that he was occupying the land as an implied tenant at will and, as such, was protected by the Rent Restriction Ordinance, Cap. 186, and, accordingly, the High Court had no jurisdiction to grant the relief sought.

**HELD:**— that (i) since the defendant was in exclusive possession of the land and the evidence had disclosed no 'exceptional circumstances' to negative the creation of a tenancy, he was a tenant at will of the land in question and not a mere licensee since the plaintiff had never returned to the land since delivering possession of the house to the defendant in April 1964, neither had she or any agent on her behalf paid periodic visits of inspection or given notice to quit before April 1966, which were all factors to be considered in negating any proper inference that the defendant was a mere licensee; (ii) the word "rent" in the definition "standard rent" could only mean 'rent' in the ordinary acceptance of the term, i.e., consideration paid by the tenant and if he pays nothing then there is no rent and, accordingly, there can be no 'standard rent'; (iii) the whole scheme of the Rent Restriction legislation makes it abundantly clear that the legislature contemplated that it was dealing solely with rent yielding tenancies and not at all with rent free tenancies of any kind, and (iv) the defendant, therefore, was not protected by the Rent

Restriction Act, Cap. 186 and, accordingly, the High Court had jurisdiction to try the plaintiff's action for possession, and, as the plaintiff must succeed on her claim, the defendant would be ordered to give up possession of the land on or before October 1, 1967.

*Defendant ordered to give up possession of the land on or before October 1, 1967 — Counterclaim dismissed.*

*B. S. Rai* for plaintiff.

*M. G. Fitzpatrick* for defendant.

*Cases referred to:—*

- (1) Addiscombe Garden Estates, Ltd. v. Crabbe (1957) 3 All E.R. 563 (C.A.).
- (2) Facchini v. Bryson (1952) 1 T.L.R. 1386.
- (3) Marcroft Wagons Ltd. v. Smith (1951) 2 All E.R. 271.
- (4) Coombes v. Sampson (1965) 7 W.I.R. 463.
- (5) Wharton & Wharton v. Rent Assessor (1950) L.R.B.G. 183.
- (6) Bovell v. Kaladeen (1955) L.R.B.G. 58.

GEORGE, J.(Ag.): In this action, the plaintiff, Etwaria, who is the owner of parcel 273, block XXXIII, Bachelor's Adventure Zone, East Coast Demerara, seeks an order for possession against the defendant in respect of the land and the latter has counterclaimed for an order for specific performance of an oral agreement whereby he states the plaintiff promised to grant him a five-year lease of the land with a right to renewal.

The facts as I found them, are as follows: Until June, 1964, the plaintiff besides owning the land, also owned and lived in the house situate thereon. She was forced to remove and live at Enmore because of civil disturbances in the Bachelor's Adventure area during 1964. In June of that year she agreed with the defendant to sell to him the house situate on the land for \$ 1,200.00 and he paid to her the sum of \$425.00 and a receipt was issued to him. He also promised to pay the balance within one year.

Immediately thereafter, the plaintiff accompanied the defendant to the house and handed over possession of it to him. At her request he agreed to keep for her some furniture and a Delco plant, which belonged to her, until the disturbances were over. Although the defendant did request the plaintiff to grant him a lease of the parcel of land on which the house is situate, I do not believe that she at any time agreed to this request. Even at the time of the signing of the receipt a similar request was made of the plaintiff but she did not react favourably to it. Indeed, I am of the opinion that the plaintiff was desirous of selling the land also — a desire which, in the context of the civil disturbances, was not unreasonable — and I accept her evidence when she states that during the negotiations leading up to the sale of the house she offered to sell to him the land also. Probably it was with the hope of eventually selling the land to him that she allowed the house to remain on it and in August 1964, sold to him the palings which enclosed the land.

## ETWARIA v. BELLAMY

Besides, the fact that the plaintiff took the defendant to the house, gave him possession, and requested him to keep her furniture is consistent with an understanding between them that the sale of the house was not with a view to its removal; or at least its immediate removal. The defendant says that it was his intention to live in the house on the parcel of land and the plaintiff confirms in her evidence that she also intended that he should live in it as situate on the land when she states that she told him that she would allow him to live on the land for the year until he paid off for the house. He paid no rent. I, however, do not believe her statement that the permission was granted for only one year. Support is lent for the view which I take in that she took no action to get the defendant off the land until April 1966, nearly two years after the sale of the house, when she caused a notice to be sent to him. And it was not that she had no opportunity before then to take action to obtain possession and have the house removed. Indeed, in August 1965 she instituted proceedings against him for the balance of \$325.00 then owing on the purchase price of the house.

The plaintiff also states in her evidence that she has not returned to the land since selling the house to the defendant. The latter, on the other hand, has been occupying the land exclusively and growing crops thereon from the time of his entry into possession of the house.

Counsel for the defendant has submitted that the defendant is occupying the land as an implied tenant at will and as such is protected by the Rent Restriction Ordinance. Accordingly, he submits, this court has no jurisdiction to grant to the plaintiff the relief she seeks.

With regard to the submission, the first question to be determined is whether the defendant ought to be considered a tenant or whether he is only a licensee. In support of his contention that the defendant is a tenant at will, counsel for the defendant has made references to HALSBURY'S LAWS, 3rd Edn. Vol. 23, pages 505 to 508, and in particular to para. 1151. According to this paragraph, "a tenancy at will is implied when a person is in possession by the consent of the owner, and his possession is not as a servant or agent or as a licensee holding under an irrevocable licence and is not holding in virtue of any freehold estate or of a tenancy for a certain term." Dealing with what in law would amount to a tenancy at will, JENKINS, L.J., in *Addiscombe Garden Estates Ltd. v. Crabbe* (1957) 3 A.E.R., 563, at p. 571, had this to say:

"save in exceptional cases the law is that exclusive possession, if not decisive against the view that there is a mere licence as distinct from a tenancy, is at all events a consideration of first importance."

With regard to "exceptional circumstances" DENNING, L.J. in *Facchini v. Bryson* (1952) 1 T.L.R. 1386 at p. 1389 has pointed out that in all the cases where an occupier has been held to be a licensee there has been a something in the circumstances, such as a family arrangement, an act of friendship or generosity, or such like to negate any intention to create a tenancy.

I am of the opinion that the defendant in this case was in exclusive possession of the land and that the evidence discloses no exceptional circumstances to negative the creation of a tenancy. In coming to the conclusion that a relationship of landlord and tenant exists I have also taken into account the fact that since the delivery of possession of the house to the defendant in April 1964, the plaintiff has never returned to the land. Initially, her failure to do so can be explained by the civil disturbances but these virtually came to an end about three or four months after the sale of the house. Her failure to return to the land cannot, therefore, be said to have been motivated by fear due to the civil disturbances. It appears more than passing strange, that if the defendant were a licensee, the plaintiff or some agent on her behalf would not have paid periodic visits of inspection to the land or give him notice to quit long before April 1966. In this latter regard *SIR RAYMOND EVERSHED, M.R.*, had this to say in *Marcroft Wagons Ltd. v. Smith* 2 A.E.R. (1951) 271 at p. 275:—

“If three, four, five or six weeks had elapsed and then the plaintiffs had said, “Well now, we have given you reasonable time, we are afraid we must ask you to go”, it seems to me that the defendant’s case would be almost unarguable. But as I have already said the plaintiff allowed the occupation to continue for six months, and that length of time, in view of the evidence given, would, I think, have been an important matter to the judge considering what, at the end of that period, was the proper inference to be drawn.”

and *ROXBURGH, J.*, at p. 278 had this to say:

“But if on the other hand the plaintiffs intended to let the defendant remain in occupation until they actually required the premises for their own employee, then I would have thought a tenancy would result.”

I accordingly hold the view that the defendant, who has been paying no rent, is a tenant at will of the plaintiff in respect of the land in question.

The next question to be considered, therefore, is, whether as such, he is protected by the Rent Restriction Ordinance, Chapter 186. According to the long title, the object of the legislation is “to restrict . . . the increase of rent of certain classes of dwelling-houses and the right to recover possession thereof and for purposes connected with the matters aforesaid”. This ordinance is similar in its scope and purpose to, and in many of its provisions identical with, the Rent Restriction Ordinance of Trinidad and Tobago, Cap. 27, Vol., III, No. 18 of the Laws of Trinidad & Tobago, 1950.

In construing the Trinidad and Tobago Ordinance, the Court of Appeal in *Coombes v. Sampson* (1965) 7 W.I.R., 463, came to the conclusion that a rent free tenant at will was not protected by the ordinance.

In that case the court was called upon to consider whether a tenant who had exclusive possession of premises for the purpose of running a club but who paid no rent was a protected tenant. In coming to the conclusion

## ETWARIA v. BELLAMY

that such a tenant was not so protected, the court drew heavily on the definition of the words “let furnished” and “let unfurnished”. The definitions of these expressions are the same as those in the Guyana Ordinance and read as follows: —

“Let unfurnished” means let at a rent which includes payment for the use of furniture and “let unfurnished” shall be construed accordingly.”

The court came to the conclusion that, as letting of building can only be furnished or unfurnished, and a ‘let unfurnished’ can only be construed to mean let at a rent which does not include any payment for the use of furniture, a tenant at will of a building who pays no rent is not protected under the ordinance. Counsel for the defendant has urged upon me that the decision of *Coombes v. Sampson* ought to be limited to buildings and should not be extended to building land. He drew attention to the differences in the wording of the long title of the Trinidad and Tobago Statute and the Guyana Statute. The former reads as follows: —

“An ordinance to restrict the rent of certain premises and the right to recover possession of same.”

He further urged that even if decision in *Coombes v. Sampson* can properly be extended to include land, this may be justified by the difference in wording of the long title of the two statutes. And, more specifically, he urged that the word “premises” includes both buildings and land but pointed to the fact that the long title of the Guyana legislation only speaks of “dwelling-houses.”

It is trite law that, although the long title of a statute can be used as an aid to determining the scope and purpose of legislation it cannot repeal or abrogate any specific and unambiguous provisions contained therein which point to the conclusion that its scope is wider than the long title suggests. From the coming into force of the Guyana Rent Restriction legislation in 1941, the then section 3(2) clearly made the Ordinance applicable to land. It reads as follows: —

“This ordinance shall apply to every parcel of land let for the purpose of erecting a dwelling thereon or on which a tenant has erected a dwelling.”

Section 3 was repealed and re-enacted by section 3 of the Rent Restriction (Amendment) Ordinance, 1947, No. 13, but its application to building land has been preserved. (See s. 3(1)(c) of the Rent Restriction Ordinance, Cap. 186).

Although the case of *Coombes v. Sampson* *ibid* was decided primarily on a construction of the words ‘let furnished’ and ‘let unfurnished’, I am of the opinion that the whole scheme of the Rent Restriction Legislation, both of Guyana and Trinidad and Tobago, makes it abundantly clear “that the legislature contemplated that it was dealing solely with rent yielding tenancies and not at all with rent free tenancies of any kind”. I adopt the reasoning in *Coombes v. Sampson* *ibid*, at p. 465, that:

“If rent free tenancies were within the enactment it would follow—

- (a) that the . . . standard rent applicable thereto would be nil if it so happened that a rent free tenancy had existed (at the relevant date).”
- (b) it would be the duty of a person proposing to grant a rent free tenancy of premises which had never previously been let to apply to the Rent Assessment Board (in Guyana the Rent Assessor) to fix the standard rent thereof before the commencement of the tenancy.”

In this latter regard, s. 8 of the Trinidad legislation was referred to. The comparable Guyana provision is contained in section 7. However, unlike section 8 of the Trinidad Statute, which provides for the fixing of a provisional standard rent, there is no such provision in the Guyana legislation, and in *Wharton & Wharton v. Rent Assessor* (1950) L.R.B.G. 183, and *Bovell v. Kaladeen* (1955) L.R.B.G. 58, this court decided that the Rent Assessor does not have the power to ascertain a standard rent unless the premises are let. In my opinion, the expression “standard rent” cannot mean no rent. The word “rent” in the definition of “standard rent” can only mean rent in the ordinary acceptance of the term i.e. consideration paid by the tenant. If he pays nothing then there is no rent and accordingly there cannot be a “standard rent.” *A fortiori* these cannot be a fixing of a “maximum rent.”

I accordingly hold that this court has jurisdiction to try the plaintiff’s action for possession and she must succeed on her claim. The defendant is therefore ordered to give up possession of the parcel of land, the subject matter of this suit, on or before the 1st October, 1967.

With regard to the counterclaim, I have already found that the plaintiff did not agree to grant a lease to the defendant. However, even if she did, the contract is incomplete in that the rental of the land was still to be agreed on by them and there can be no order for specific performance in such circumstances. The counterclaim is therefore dismissed. There shall be costs to the plaintiff to be taxed certified fit for counsel both on the claim and counterclaim.

*Defendant ordered to give up possession on or before October 1, 1967 — Counterclaim dismissed.*

Solicitors:

*L. L. Doobay* (for plaintiff);

*H. A. Bruton* (for defendant).

## D.J. SCOTT &amp; COMPANY LIMITED v. URSULA MANDAL.

[In the High Court (Khan, C.J. (Ag.) – October 26, 31; November 30; December 6, 1966; August 8, 1967.]

*Agency — Goods ordered from American company — English confirming house to make payment — Whether C.I.F. contract.*

*Insurance — No insurance certificates accompanied relevant documents — Floating policy taken out by confirming house made payable in London — Effect of.*

In 1962 the defendant ordered a consignment of shoes from Silman Shoe Co. Inc. of New York through a representative then in the country who demanded payment in advance to which the defendant did not agree. In January 1963, the defendant's husband, who was her attorney, approached Foster & Co., the plaintiffs' agents in this country, to have the order in relation to the said consignment confirmed by their principals, who were a confirming house in London. It was agreed between Foster & Co., and the defendant's attorney that (a) the order could be supplied in parts and not necessarily as a whole; (b) payments were to be made by sight draft on any part shipment, and (c) the plaintiffs be requested to insure the goods. In March 1963, the first shipment of shoes arrived and this was promptly paid for as was also the second shipment soon after although a carton was broached and goods to the value of \$29: missing. The defendant got a survey and made a claim on the shipping company which was rejected but she made no claim on the insurance company although this was advised. In April 1963, the defendant requested the balance of goods on order be cancelled because of competition and Foster & Co. wrote to the plaintiffs to this effect but the third and final shipment was already on its way and eventually arrived and the relevant documents sent to Barclays Bank as in the case of the two previous shipments. However, in all three shipments, no insurance policies accompanied the other documents. The defendants discovered three cartons missing and refused to pay the sight draft. In the Collection Schedule which the attorney signed there was printed in large capital letters "INSURANCE HAS BEEN EFFECTED UNDER DRAWERS FLOATING POLICY WITH LLOYDS UNDERWRITERS".

It was argued on behalf of the defendant that the contract between the parties was in the nature of a C.I.F., contract under which the plaintiff company assumed the position of a seller and as they had not fulfilled all the terms of the contract and as the insurance policy was not in favour of the defendant but in favour of the company, then the defendant was entitled to reject the goods. In reply to this, the plaintiffs argued that there was no relationship of buyer and seller existing between the parties since the defendant's order (Exhibit "A") made the plaintiffs the defendant's agents for the purpose of confirming and paying for the goods and affecting insurance on the goods and paying freight, and, consequently, this was not a C.I.F., contract. Further, a floating policy was a recognised commercial policy and as there was no specific directions as to the type of policy to be executed, the defendant's request being a mere general one, then such a policy complied with the defendant's request to insure the goods.

**HELD:**— that (i) where a confirming house confirms a contract, the seller is entitled to look to the confirming house personally to see that the contract is carried out and the true contract between the parties, according to the defendant's order (Exhibit "A"), was that the plaintiffs were agents and guarantors of the defendant for payment to Silman and not sellers of the goods and, accordingly, the transaction was not a C.I.F., contract; (ii) in the absence of particular directions from the defendant, the plaintiffs acted *bona fide* and to the best of their judgment and in accordance with customary commercial practice and such a policy, unlike one in a C.I.F., contract, does not have to be tendered with the draft and other documents in a transaction of its kind with a confirming house.

*Judgment for plaintiffs.*

*Cases referred to:—*

- (1) Moore v. Mourgue (1776) Cooper Reports Vol. 2, 479.
- (2) Comber v. Anderson (1808) 170 E.R. 1044.
- (3) Manfire Sacharine Co. Ltd. v. Corn Products, Ltd. (1918-19) All E.R. Rep. 980.
- (4) Sobell Industries Ltd. v. Cory Brothers & Co. Ltd. (1955) Lloyds Reports, Vol. 2, 82.
- (5) Rusholme & Bolton Roberts & Hadfield Ltd. v. S. G. Read & Co. Ltd. (1955) 1 W.L.R. 146.

[*Editorial Note* — The defendant's appeal was dismissed by the Court of Appeal (Stoby, C., Luckhoo & Persaud, JJ.A.) on May 24, 1968.]

*H. D. Hoyte* for plaintiffs.

*S. L. Van B. Stafford, Q.C.*, associated with *John Stafford*, for defendant.

KHAN, C.J. (Ag.): The plaintiffs are a confirming house of London, England. Their local agents are Foster & Company Ltd. of Georgetown. The defendant is a business woman carrying on a dry goods business in the Stabroek Market, Georgetown. Her husband, Altafar Rahim Mandal, is her duly constituted attorney and manager of her business.

In 1962 the defendant ordered a consignment of shoes from Silman Shoe Company Inc. of New York through a representative then in this Country. The representative required payment in advance. The defendant did not agree to this. In January 1963 the defendant's attorney — hereinafter referred to as Mandal — approached the plaintiffs' local agents Foster & Company Ltd., and requested the managing director Anthony Francis Foster — hereinafter referred to as Foster — to have an order confirmed for the defendant through D. J. Scott & Co., Ltd. — the plaintiffs. The order referred to was in connection with a consignment of shoes from Silman Shoe Company Inc. of New York — hereinafter referred to as Silman. Mandal placed the order with Silman through their local agents Onyx Agencies of Georgetown. The plaintiffs agreed to confirm Mandal's order to Silman and to pay Silman for a com-

## SCOTT &amp; CO. v. MANDAL

mission of 5%. Mandal then handed the order Ex. "A" dated 8th January, 1963, in duplicate to Foster.

It was agreed between Foster and Mandal that (1) the order may be supplied in parts, and not necessarily as a whole; (2) payments to be made by sight draft on any part shipment and (3) plaintiffs be requested to insure the goods.

In March 1963 the first part-shipment arrived and this was promptly paid for. No insurance certificate came with the documents. The second shipment came soon after and this was also paid for although a carton was broached and goods to the value of \$29.00 were missing. No certificate of insurance came with the documents. Mandal got a survey and made a claim to the Shipping Company but this was rejected. Mandal made no claim to the Insurance Company although this was advised. In April 1963 Mandal requested that the balance of the goods on order Ex. "A" be cancelled because of competition. Foster wrote the plaintiffs to this effect but the third and final shipment was already on its way. This third shipment arrived and the relevant documents sent to Barclays Bank as in the case of the two previous shipments. Mandal was duly informed by letter dated 12th July, 1963 (see Ex. "K1"). As in the previous two shipments no insurance policy came with the documents. Mandal uplifted the invoice and other documents and discovered that three cartons were missing. He refused to pay the sight draft. He signed the collection schedule dated 8th July, 1963 (Ex. "G") when he uplifted the documents. On this schedule Ex. "G" is printed in large capital letters as follows:

"INSURANCE HAS BEEN EFFECTED UNDER DRAWERS  
FLOATING POLICY WITH LLOYDS UNDERWRITERS.

Mandal requested Mr. Foster to obtain the Insurance certificate as the goods were broached. This Foster did and the insurance certificate arrived around October 1963 and was handed to Mandal. The plaintiffs insisted that the sight draft should be paid and Mandal make his claim for the broached goods. On the 18th September, 1963, when the sight draft was again presented to Mandal he wrote on the back of the draft as follows: —

"18/9/63

I hereby reject this draft for non delivery of the insurance policy which I asked D. J. Scott since April 28/4/63. It again is fraud.

A. R. Mandal  
for U. Mandal"

On 7th November, 1963, Mr. J. O. F. Haynes, Q.C., wrote the following letter to the plaintiffs on behalf of Mandal: —

“7th November, 63

Messrs. D. J. Scott & Co., Ltd.,  
Winchester House,  
Old Broad Street,  
London, E.C.2.

re: Mrs. Ursula Mandal of 118  
Fourth Street, Alberttown  
Georgetown

Dear Sirs,

1. I have been instructed by my client Mrs. Ursula Mandal to write to you in connection with the above matter.

2. My client informs me that sometime during 1961, Mr. A. R. Mandal went to Messrs. Foster & Co., Commission Agents in British Guiana, where he saw and spoke to Mr. Michael Foster. As a result of the said conversation a Transport was lodged as security with the said Messrs. Foster & Co. for goods to be supplied by you for Mrs. Ursula Mandal. That between 1961-63 goods were shipped as arranged with all documents in order. My client informs me that the said goods were paid for through Barclays Bank, D.C.O. Water Street, Georgetown.

3. During 1963 goods were imported from the United States of America through Messrs. Foster & Co. for my client. These were divided up into three shipments, the first shipment arriving safely. Delivery of same was taken by my client. The second shipment, before or on arrival in the colony was broached and no certificate of Insurance arrived with same. On reporting same to Messrs. Foster & Co., they said that it might arrive later. Delivery of the said goods were taken by my client and the money paid to the Bank as arranged. An Insurance Survey was obtained by my client from the Insurance Company and a claim forwarded to the Shipping Company. This claim was rejected.

4. The third shipment arrived minus three (3) cartons and without the insurance certificate, but insurance fees were stated on the Invoice for these goods. My client returned to Messrs. Foster & Co., with whom he discussed the matter and also with Barclays Bank, stating that if he did not get the Insurance Certificate the goods would be rejected and the draft would not be paid. My client later rejected the goods. Later an Insurance Certificate arrived from England with all the claims payable in England. This arrangement was rejected by my client as he had contracted to pay all moneys through Barclays Bank, D.C.O. in Georgetown.

5. It would appear from a letter written to my client that Barclays Bank wrote to you setting out Mr. Mandal's statement, as later Mr. Mandal received a letter from the said Bank stating that you

## SCOTT &amp; CO. v. MANDAL

were prepared to accept part payment for these goods, providing a Survey Certificate and Shipping Claim were sent to you. My client informs me that the Survey Certificate is easily obtainable but in order for him to get a Shipping Claim the draft at the Bank would have to be met.

6. My client further informs me that the third shipment of goods have been lying in the Bond for about six months now and that if he is allowed to pay the draft on the goods minus the sum of \$29.26c. (twenty-nine dollars and twenty-six cents), being the amount to be deducted on the broached goods and his transport is returned to him, the third shipment of goods now lying in the bond will be paid for and uplifted by him immediately.

7. In the circumstances he is asking also that the Bond charges incurred should be met by you and that no interest be charged for delay in meeting the draft since that is no fault of his.

8. Will you instruct the Bank to accept payment accordingly?

Yours faithfully,  
(Sgd.) J.O.F.Haynes"

In reply to Mr. Haynes' letter the plaintiffs wrote the following:

"D. J. SCOTT & CO. LTD  
12/13 Winchester House, Old Broad St.,  
London, E.C.2.

FH/JC

22nd November, 1963.

J.O.F. Haynes, Esq., Q.C.,  
217 South Street,  
Lacytown,  
Georgetown,  
Demerara, British Guiana.

Dear Sir,

Thank you for your letter of 7th inst., relative to our shipments to Mrs. Ursula Mandal and we fail to understand why our Draft No. 3240 for £225. 8s. 2d. issued in April has not been paid.

As all previous drafts have been paid we are only concerned with the above, in connection with which we have submitted an Insurance Certificate and agreed to accept payment of our draft less the value of the missing goods, provided a Survey Certificate is furnished with the Insurance Certificate as well as the rejection of the Claim for shortage by the Steamship Company. Our local Agents, Foster & Co. Ltd. have been dealing with the matter and we have left it to them

to determine the amount of Interest to be paid although the unfortunate delay is through no fault of ours and we have been out of our money since April when the Draft was drawn.

The correct procedure is of course for the Draft to be paid in full and an Insurance claim submitted to us with proper documents for collection on behalf of the Drawees, but having agreed to settlement less the value of the missing goods we must insist the matter be dealt with in this manner immediately and we hope you will see our wishes are carried out.

We cannot be responsible for Bond charges which have been incurred solely through the actions of Drawee and his contention that a claim on the Steamship Company cannot be made without the draft being paid is incorrect as in such cases the Bank are always disposed to facilitate matters when requested particularly as our local representative who are the "Case of Need" are in agreement.

Yours faithfully,"

The defendant did not pay the draft as requested. On the 24th February, 1964, the defendant through her solicitor wrote Foster as follows: —

"LAURIE T. PERSAUD  
SOLICITOR

5, Croal Street,  
Georgetown,  
British Guiana,

Telephone 4734

WITHOUT PREJUDICE

24th February, 1964.

The Managing Director,  
Foster & Co. Ltd.,  
P.O. Box 271,  
GEORGETOWN.

Dear Sir,

Mrs. Ursula Mandal of 118, Fourth Street, Alberttown, Georgetown, has consulted Mr. S.L. Van B. Stafford, Q.C, and myself in connection with a certain shipment of ladies' shoes shipped in Brooklyn by your principal, D.J. Scott & Co. Ltd., on board the S.S. Volumnia.

I am instructed that this consignment is the last of three shipments in respect of a larger order and that the two previous consignments have been settled for. This consignment arrived minus three cartons and without any insurance certificate and certain discussions between you and my client have taken place in connection with the loss. My client informs me that she had deposited a transport with you as further security in respect of this transaction. The position at the moment is that these goods have not been taken up because of

## SCOTT &amp; CO. v. MANDAL

disagreement between you and my client over the non-arrival of the insurance certificate.

With prejudice to my client's rights, we have advised settlement of this matter on the following terms —

- (1) my client will pay for all goods which can be delivered to her, the duty on such goods delivered, their bank charges and a proportionate part of port charges on carriage of such goods from Curacao to Georgetown.
- (2) in return you are being asked to allow a deduction of \$29.26 the certified shortage value on a previous shipment of January, 1963 in respect of 180 pairs of shoes and to re-deliver her transport to her.

I shall be pleased to hear from you at your early convenience.

Yours faithfully,  
(Sgd.) Laurie T. Persaud

Copy to Barclays Bank, D.C.O.  
Water Street, G'town.

On the 6th March, 1964, Foster wrote the defendant as follows: —

“FOSTER & COMPANY LIMITED.  
Manufacturers' Representatives and  
Commission Agents  
Importers and Exporters  
P.O. Box 271, Georgetown Demerara,  
British Guiana.  
Friday, March 6th, 1964.

Mr. Laurie T. Persaud,  
Solicitor,  
5, Croal Street,  
Georgetown,  
Demerara,  
British Guiana.

Dear Mr. Persaud,

We have for acknowledgement your letter of February 24th, and would refer you to the letter written to Mr. J.O.F. Haynes by our Principals, Messrs: D.J. Scott & Company Limited. We would also like to inform you that we have received instructions from our Principals that if this matter is not settled by Mrs. Mandal as per the terms of their letter of November 22nd, 1963, we will be instructed to pursue other means of getting this matter settled.

With regard to the reduction of \$29.26, we are quite prepared to take on the responsibility of allowing this deduction, provided that

the necessary documents are handed over so that this amount can be collected from the Insurance Company.

We would like to point out that in your letter no mention of interest on the draft has been made, and we assume that Mrs. Mandal is now prepared to pay this in full.

As soon as we hear from our Principals, we will advise you further.

Yours faithfully,  
FOSTER & COMPANY LIMITED

(Sgd.) A.F. Foster  
Managing Director

AFF/mcas

Encl. copy of letter written to Mr. J.O.F. Haynes."

Foster again wrote the defendant on the 20th March, 1964, as follows: —

“ FOSTER & COMPANY LIMITED.  
Manufacturers' Representatives and  
Commission Agents  
Importers and Exporters

P.O. Box 271, Georgetown Demerara, British Guiana.

Friday, March 20th, 1964

Laurie T. Persaud,  
Solicitor,  
5, Croal Street,  
Georgetown,  
Demerara,  
BRITISH GUIANA.

Dear Mr. Persaud,

We have to advise you that we have received a letter from our Principals, Messrs. D.J. Scott & Company Limited, who notified us that the draft drawn on Mrs. Mandal must be settled immediately, in accordance with the terms stated in their letter to Mr. Haynes of November 22, 1963.

We now look forward to hearing from you.

Yours faithfully,  
FOSTER & COMPANY LIMITED

AFF/mcas

c.c. Barclay's Bank D.C.O.  
Water Street Branch,  
Georgetown.

(Sgd.) A.F. Foster  
A.F. Foster  
Managing Director

## SCOTT &amp; CO. v. MANDAL

In his evidence before me, Mandal stated that since he had offered to pay for the six cartons, two of the six were also broached leaving only four cartons. Mandal however rejected the shipment.

It is in the above circumstances that the plaintiffs claim from the defendant the sum of \$1,146.88 being special damages for breach in April 1963, of an agreement made by the defendant with the plaintiffs to accept a Bill of Exchange dated April 1963, payable at sight for value received, drawn by the plaintiffs on the defendant.

Alternatively: —

The plaintiffs claim is for the sum of \$1,146.88 being monies paid in the month of April 1963 for and on behalf of the defendant at her request and for work done and services rendered at her request as per the particulars stated in the claim.

By paras. 5 and 6 of the defendant's defence Mandal stated inter alia: —

Of the third consignment invoiced as 9 cartons ladies shoes and the subject matter of this action only 6 (six) cartons arrived. No Insurance certificate of this consignment arrived though a fee for insurance was charged on the invoice. Because of the lack of an Insurance certificate and having in mind the loss referred to in paragraph 4 the defendant rejected the goods and the draft and other documents.

"6. About 3 months later an Insurance Certificate arrived but this was rejected because besides being out of time all claims for loss were made payable in England."

Under cross-examination by counsel for the plaintiffs Mandal stated inter alia:—

I see this collection schedule marked Ex. 'G'. I can't remember if I saw this before. I see written on it "Invoice received 5/7/63" and a signature appearing to be mine. I believe it is mine. It is customary when one receives invoices that person has to sign the schedule. I did receive the invoice . . .

The date on Ex. 'G' of my receipt is 8/7/63. The bank must have informed me before the 8th July, 1963 . . .

I agree that the sight draft Ex. 'B1' was presented to me for payment. I did not pay it. I was to pay by sight draft according to the agreement. I wrote at the back of the sight draft that I rejected because of the want of Insurance policy. That is dated 18/9/63 when I wrote it. I rejected the draft since April 1963 but the rejection written on the draft is dated 18/9/63. This is the invoice of the third shipment tendered Ex. 'B3 & 4'. It is true that a certificate of Insurance did arrive but this was after I rejected the draft.

The first shipment was not broached. No policy of insurance came with the papers of the first shipment, and none with the second shipment. In the third shipment none came and I requested it. It came

late and after I had rejected it. This is the only time when a certificate came. This was the first order I placed with the plaintiffs with reference to Silman and Company.”

I believe and accept the evidence of Mr. Anthony Foster in preference to Mandal’s evidence wherever there is conflict and/or variation.

In his careful and ingenious argument counsel for the defendant contends as follows: —

- (1) That nothing in the evidence shows payment by the plaintiffs to Silman and Company.
- (2) (a) That the contract between plaintiffs and Mandal was similar to a C.I.F., contract. Scott was either to pay or guarantee Silman payment and so Scott had assumed the position of a seller and therefore the plaintiffs were under a duty by the terms of the contract to — (i) pay or guarantee payment to Silman (ii) arrange for carriage, pay freight from New York to Georgetown; and (iii) insure goods in favour of Mandal. Only after those three things were done the plaintiffs were entitled to draw a bill of exchange in their own favour for the commission they earned, plus the cost, insurance and freight and any interest accrued to them. The terms proved are exactly those as a C.I.F., contract. A breach of any entitled Mandal to repudiate the transaction or contract.

Cites in support: —

“BENJAMIN ON SALE” 8th Edition  
at page 748.

- (b) Plaintiffs bought the goods from Silman and in turn sold to Mandal at a commission. It was therefore a C.I.F., transaction and all the consequences of a C.I.F., contract would follow.
- (3) The insurance policy is not in favour of Mandal but in favour of the plaintiffs. The policy should cover only the goods sold. The plaintiffs did not fulfil all the terms of the contract and therefore Mandal was entitled to reject the goods.

On the other hand, Mr. Hoyte for the plaintiffs submitted:

- (1) Defendant was not disputing the amounts stated in Ex. “B3”.
- (2) Ex. “A” is Mandal’s document and it specifically relates the terms as to how Silman was to be paid. Ex. “A” states inter alia: —  
“Terms: — confirmation and payment through D J. Scott & Co. Ltd., Winchester House, Old Broad Street, London, E.C.2, England.”
- (3) The plaintiffs were Mandal’s agents for performing certain services, viz: “confirming and paying for the goods and to effect Insurance on the goods and paying freight.

## SCOTT &amp; CO. v. MANDAL

- (4) Mandal's sole point was he did not get the insurance certificate and this he wrote on the back of Ex. "B1".
- (5) Mandal made a general request to insure. The plaintiffs insured under a Floating Policy and this is compliance in the absence of specific directions as to any particular kind of policy.

Cites in support: –

*Moore v. Mourgue* (1776) (Cooper Report Vol. 2) p. 479.

and

*Comber v. Anderson* (1808) 170 Eng. Reports, p. 1044.

### Submits

A floating policy is a recognised commercial policy. Mandal never protested about the type of policy in the first shipment or second shipment. This was the first time plaintiffs were confirming for defendant in respect to Silman.

This is not a C.I.F., contract. The relationship of buyer and seller does not exist between defendant and plaintiffs.

The short issue in this case is whether the defendant was entitled in all the circumstances to refuse payment of the draft (Ex. "B") and/or reject the goods because of:

- (a) The failure of delivery of the insurance certificate at the time of the presentation of the draft and other relevant documents to the defendant, and/or because of
- (b) the failure of the plaintiffs to effect an insurance policy in the name of the defendant and payable in British Guiana.

The law as to C.I.F., contracts is clearly set out in *Manfire Sacharine Company Ltd. v. Corn Products Ltd.* (1918—19) A.E.R. (reprint) at page 980. It is agreed on all sides that the contention of Mr. Stafford is good law with reference to a C.I.F., contract but is the contract between the plaintiffs and the defendant a C.I.F. contract? Ex. "A" is the order which was handed to Foster. The terms set out in Ex. "A" clearly states "confirmation and payment through D.J. Scott & Company Ltd., Winchester House, London, E.C.2, England." This order Ex. "A" is signed by the defendant. It is admitted by Mandal that the plaintiffs are a confirming house. Under cross-examination he stated inter alia:—

In this case I did not buy the goods from Scott (plaintiffs), I bought from Silman and Company and the plaintiffs Scott confirmed for me and paid Silman on my behalf – and I paid Scott a commission and interest for the amount they expended for me in the last two shipments. This is the bill of lading for the third shipment."

The three shipments concern the order Ex. "A". From Mandal's own evidence it is clear that the plaintiffs were not sellers but the defendant's agents.

The position of a confirming house is stated in BOWSTEAD ON AGENCY, 12th Edition at p. 260 thus:—

A confirming house may, upon the true construction of the transaction, contract as agent only, and if so is not personally liable. But the normal purpose of the intervention of a confirming house in the transaction between seller and foreign buyer is that the seller shall be guaranteed the performance of the contract by someone in this country. The transaction will normally, therefore, be intended to result in contractual privity between seller and confirming house. It follows that clear terms will be needed to exclude personal liability on the part of the confirming house".

In *Sobell Industries Ltd. v. Cory Brothers & Co. Ltd.* (1955) Lloyds Report, Vol. 2, p. 82, MR. JUSTICE MCNAIR stated thus: —

" this case raises, or may raise on a certain view of the documents, an interesting question as to the functions and obligations of confirming houses or confirming agents as part of the mechanism of the export trade."

After stating the facts the learned judge continued inter alia: —

" The critical question is: what is the meaning of 'confirming house' . . . it seems to me using the word in its ordinary sense 'to confirm' means that the party confirming guarantees that the order will be carried out by the purchaser. In that sense he adds confirmation or assurance to the bargain which has been made by the primary contractor, just as a bank which confirms that a credit has been opened by the buyer in favour of the seller guarantees that payment will be made against that credit if the proper documents are tendered. The whole purpose of the arrangement is that the seller shall have a responsible paymaster in this country to protect him against the very contingency which has occurred and the very damages which he claims.

" The contingency which had occurred was the failure of the buyer to pay against the documents . . . In the case of a confirmation given by a confirming house, it is the contract as a whole that is confirmed, and it seems to me that the whole purpose of the arrangement, adapting Mr. Justice Rowlatt's language, is that the seller shall have a responsible person in this country to perform the contract as a whole."

In *Rusholme & Bolton Roberts and Hadfield Ltd. v. S.G. Read & Co. Ltd.* (1955) 1 W.L.R., p. 146, an order similar to the defendant's order Ex. "A" contained the following words:

"Terms: — confirmation and payment by S.G. Read & Co."

## SCOTT &amp; CO. v. MANDAL

Construing the above words MR. JUSTICE PEARCE said:

“ Confirmation and payment by (the confirming house) meant that a confirmation such as the order now sued on was to be issued by the confirming house and that financial liability was to be assumed by the confirming house.”

Defendant’s order Ex. “A” contains the following words:

“Terms:— confirmation and payment through D.J. Scott & Co. Ltd.  
 . . . London . . . England.”

I am satisfied from the evidence of Mandal and the statements in para. 3 of the defence that Silman would not have accepted the defendant’s order Ex. “A” without the interposition of a confirming house such as the plaintiffs. Silman relied solely on the plaintiffs for payment.

Where a confirming house confirms a contract, the seller is entitled to look to the confirming house personally to see that the contract is carried out. Ex. “A” (defendant’s order) in my view reflects the true contract between the parties viz: — plaintiffs, Silman and the defendant. I find therefore that the plaintiffs were agents and guarantors of the defendant for payment to Silman and not the seller of the goods as contended by counsel for the defendant. By the contract the plaintiffs incurred personal liability for the payment of the goods in question. The contention that the plaintiffs were the sellers of the goods and the transaction was similar to a C.I.F. contract is therefore untenable.

On the issue of Insurance: The defendant had requested the plaintiffs’ agent Foster to insure the goods. It was therefore the duty of the plaintiffs to insure the goods in question. This was done in a Floating Policy. The question arises: Is this compliance of the request by Mandal to insure the goods? Mr. Hoyte contends that the request was a general one. A Floating Policy is a type of policy which is well known in commercial practice. It is submitted that in the absence of special directions, insurance in a Floating Policy is compliance notwithstanding that it was made payable in London and to the plaintiffs who were the defendant’s agents. In support of this argument Mr. Hoyte relies on the cases cited (*supra*). In *Moore v. Mourgue* (*supra*) the plaintiff, a merchant, brought an action against the defendant – his agent in London – for breach in not insuring plaintiff’s goods agreeable to his directions. . . . It did not appear that the plaintiff had given the defendant any particular directions how and with whom to insure, but only generally to insure the cargo. The defendant insured with the London Insurance Office who in policies upon fruit always put in an exception, free from particular average. This policy had this exception. The loss was not entirely a total loss, for though the goods were at first under water some were sound. But those that were damaged would not pay the salvage on them.

The jury found a verdict for the defendant because they thought defendant had acted *bona fide* to the best of his judgment. In his statement to the jury, LORD MANSFIELD said this: –

The plaintiff, if he pleased, might have given orders to the defendant not to insure at the London Insurance Office but at some other office where this exception would not have been insisted on. But he gives no directions at all. Therefore he left it to the discretion of his agent, who, if he meant no fraud, was at liberty to elect between the underwriters . . . as no particular orders were given, there has certainly been no breach of orders where the defendant appears to have acted bona fide . . . . There seems to be no ground for the court to interpose against the defendant.” (The three other judges concurred).

In *Comber v. Anderson (supra)* a merchant gave general instructions to an insurance broker to effect a policy of insurance for him without any other details and the broker effected insurance as he thought fit. In his judgment LORD ELLENBOROUGH stated inter alia:—

No negligence could be imputed to the defendants. The plaintiff’s letter of the 2nd left it to the defendants’ discretion to act as they should think most expedient, and if he was dissatisfied with their conduct, he ought immediately to have said so . . . . He had referred them to their own judgment and it seemed as if he himself at the time had thought that they acted judiciously.”

In the present case, Mandal made a general request of Foster to insure the goods. The plaintiffs insured in the usual and customary way with a Floating Policy in their favour payable in London. A Floating Policy is a recognised commercial policy usually used by confirming houses and large commercial concerns. In the absence of particular directions from Mandal the plaintiffs acted bona fide and to the best of their judgment and in accordance with customary commercial practice. Mandal admitted that this was the first order he had placed with the plaintiffs with reference to Silman and Company. Ex. “A” is the order which was supplied in three shipments. The documents in the first shipment did not contain a certificate of insurance, and this was promptly paid for by Mandal. The second shipment was also without an insurance certificate and although a carton was broached Mandal paid the draft and did not object to the type of insurance effected. No certificate of insurance was delivered to Mandal in the second shipment. The third shipment which is the subject matter of the present action was insured similarly as the two previous shipments. No certificate of insurance was delivered with the draft and invoice. Mandal requested the certificate and this was later delivered to him. It appears that Mandal refused to pay the draft because he did not want to “tie up cash,” so to speak, for goods he did not receive. He was unwilling to wait to be reimbursed later for the missing cartons by the insurance company. This is borne out by the fact that he offered to pay only for the goods he would actually receive. He was unwilling to honour his contract and to adhere to commercial practice by paying the draft and then submit a claim afterwards for the missing goods. I find that his objections to the insurance effected were really an after thought. These were not raised earlier. The endorsement of his objection was stated on the back of Ex. “B” on 18.9.63

## SCOTT &amp; CO. v. MANDAL

and that was with reference only to the non-delivery of the certificate. There is no obligation on the plaintiffs to tender the certificate of insurance with the draft and other documents in a transaction of this kind with a confirming house, unless the transaction is that of a C.I.F., contract. I have ruled earlier that this is not a case of a C.I.F., contract where it is necessary for the seller to tender to the buyer the certificate of insurance with the other relevant documents. The plaintiffs were not selling to the defendant. The plaintiffs were the defendant's agent.

In the circumstances, I must reject the defence put forward by the defendant. On either claim the plaintiffs are entitled to judgment for the sum of \$1,081.96 with interest at the rate of 6% from the 18th September, 1963, to the time of payment. The plaintiffs are also entitled to their costs to be taxed certified fit for counsel. And I so order. A stay of execution is granted for three months.

*Judgment for Plaintiffs.*

GUYANA CREDIT CORPORATION v. WAVENEY  
BRITTLEBANK

[In the High Court (Vieira, J.) — May 23; September 6, 1967.]

*Administration of estates — Wife administratrix of deceased husband's estate — Judgment against deceased — Satisfaction of judgment — Whether monies received under insurance policy payable to wife as beneficiary forms part of deceased estate — Married Persons (Property) Ordinance, Cap. 169, s. 11(2) — (now Married Persons (Property) Act, Cap. 45:04, s. 11(2)).*

*Trusts — Statutory trust created by policy of insurance — Objects of trust — Whether un-performed — Whether administratrix entitled to receive policy monies absolutely — Married Persons (Property) Ordinance, Cap. 169, s. 11(2) — (now Married Persons (Property) Act, Cap. 45:04, s. 11(2)).*

On December 30, 1963, the plaintiffs obtained judgment against the husband who died on July 6, 1964. The defendant obtained letter of administration of her husband's estate, which was declared for estate duty purposes in the sum of \$7,290.16, on November 20, 1964. The estate consisted mainly of two insurance policies, only one of which is relevant here, viz., a retirement income and life assurance plan for \$6,000 with the Sun Life Assurance Company of Canada, covering employees of the Demerara Bauxite Company with whom the deceased was working at the time of his death, and which was payable to the wife as beneficiary. It was contended on behalf of the defendant that the sum of \$6,567.24 actually received by her was hers absolutely by virtue of s. 11(2) of Cap. 169 and did not form part of her

husband's estate and thus not liable for the payment of debts including the satisfaction of the judgment of \$2,706.35 plus interest.

**HELD:**— (i) under s. 11(2) of Cap. 169 the monies payable under an insurance policy do not form part of the insured's estate or be subject to the payment of debts until the trusts have come to an end; (ii) here, as soon as the defendant received the policy monies from the insurance company, then the trust had been fully performed and, consequently, such monies did form part of the deceased's estate and were thus liable and available for the payment of debts including the satisfaction of the judgment obtained by the plaintiffs against the husband during his lifetime, and, therefore, the defendant was not entitled to such monies absolutely.

(Per Curiam) — All policies of insurance creating statutory trusts under s. 11(2) of Cap. 169 are subject to estate duty under s. 9(1)(e) of the Estate Duty Ordinance, Cap. 301 (now Estate Duty Act, Cap. 81:23, s. 9(1)(e)), whether the objects of the trusts have been performed or not and must be declared accordingly.

*Judgment for plaintiffs.*

*Cases referred to:—*

- (1) Re Burgess Policy (1915) 85 L.J.Ch. 273.
- (2) Robb v. Watson (1910) 1 I.R. 243.
- (3) Cleaver and Others v. Mutual Reserve Fund Life Association (1892) 1 Q.B.D. 147, C.A.
- (4) Cousins v. Sun Life Assurance Society (1933) 1 Ch. 126, C.A.

*H.D. Hoyte* for plaintiffs.

*C. Lloyd Luckhoo, Q.C.* for defendant.

VIEIRA, J.: This case is undoubtedly one of great importance and is based solely upon the proper construction of section 11(2) of the Married Persons (Property) Act, Cap. 169:

The admitted facts show that the defendant obtained letters of administration of her husband's Estate on 20th November, 1964, he having died on 6th July, 1964.

On 30th December, 1963, the plaintiffs obtained judgment against the husband, Joseph Bernard Brittlebank, in the sum of \$2,706.35 together with interest on the capital sum of \$2,229.89 at the rate of 6½% per annum from 12th September, 1963, until payment.

The nett Estate of the deceased was declared for Estate Duty purposes in the sum of \$7,290.16 as shown in the Declaration and Inventory Form (Ex. "A").

The Estate consists mainly of two Insurance Policies, viz: — (1) a 20 year endowment policy taken out on 2nd December, 1952, in the sum of

## GUYANA CREDIT CORP. v. BRITTLEBANK

\$1,000.00 with the Demerara Mutual Life Assurance Society Limited (Ex. "B") and maturing on death or on 2nd December, 1972, and payable to the assured or to his executors, administrators or assigns, and (2) a retirement income and life assurance plan effective from 23rd January, 1962, in the sum of \$6,000.00 with the Sun Life Assurance Company of Canada (Ex. "C"), covering employees of the Demerara Bauxite Company Limited and payable to the wife as beneficiary.

It is admitted that the defendant has received the amounts payable under the two policies, namely \$1,273.00 under the Demerara Life Policy (hereinafter called the First Policy) and \$6,567.24 under the Sun Life Policy (hereinafter called the Second Policy).

We are only concerned here with the Second Policy as it is conceded by the defence that the First Policy does form part of the deceased's Estate and therefore liable for the payment of debts including the satisfaction of the judgment obtained by the plaintiffs against the deceased during his lifetime.

It is submitted, however, that the sum of \$6,567.24 actually received by the wife under the Second Policy is hers absolutely by virtue of s. 11(2) of Cap. 169, and, accordingly, does not form part of the deceased's Estate and thus not liable for the payment of debts.

On the other hand, it is contended by counsel for the Plaintiffs, that so long as the statutory trust created by s. 11(2) of Cap. 169 in relation to the policy-moneys under the Second Policy remains unperformed, then the money cannot be touched, but, that when the trust has been performed, as in this case, then the money reverts to the Estate. The moment the wife received the money from the Insurance Company, as is admitted, then it became available to the deceased's Estate to pay off the debts including the judgment.

S. II of the local Act is in similar terms to s. II of the Married Women's Property Act, 1882, of England, except that the English section is one long continuous one whereas the local section is split up into 6 subsections.

S. 11(2) of Cap. 169 provides as follows —

“ 11(2) — A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under the policy, shall not, so long as any object of the trust remains unperformed, form part of the estate of the assured, or be subject to his or her debts:

Provided that, if it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the assured,

they shall be entitled to receive out of the moneys payable under the policy, a sum equal to the premiums so paid.”

The marginal note to section 11 states — “Moneys payable under policy of assurance not to form part of the estate of the assured.”

S. 11(3) of Cap. 169 states —

“ 11(3) — The assured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof and for the investment of the moneys payable thereunder.”

By section 11(4) it is provided —

“ 11(4) — In default of the appointment of a trustee, the policy, immediately on its being effected, shall vest in the assured and his or her legal representatives in trust for the purposes aforesaid.”

Section 11(5) states —

“ 11(5) — If, at the time of the death of the assured, or at any time afterwards, there is no trustee, or it is expedient to appoint a new trustee or new trustees, a trustee or trustees, or a new trustee or new trustees, may be appointed by the Supreme Court or a judge thereof on application by any party interested.”

In England, a married woman could not before 1883 effect a policy on her own life for the benefit of her husband and children so as to create a trust for his or their benefit — *Re Burgess Policy* (1915) 85 L.J. Ch. 273. For the first time she was allowed to do so by virtue of section 11 of the Married Women’s Property Act 1882 in relation to policies effected after 31st December, 1882. A husband, however, did have such a power under s. 10 of the Married Women’s Property Act, 1870.

In *Robb v. Watson* (1910) 1 I.R. 243, the word “object” as used in the expression “so long as any object of the trust remains” in s. 10 of the 1870 Act was construed by ROSS, J. as meaning “beneficiary”. This was doubted by LAWRENCE, L.J. in *Cousins v. Sun Life Assurance Society* (1933) 1 Ch. 126, C.A., where the learned Lord Justice referring to the words “any object” in the expression “so long as any object of the trust remains unperformed” in section 11 of the 1882 Act, said at p. 408 —

“Although the wording of the two sections are different I am inclined to think that they are in substance the same, so far as the point we have to decide is concerned. I think the preferable construction of both sections is to read the word “object” whenever it is used as equivalent to “purpose” . . . .”

LORD HANWORTH, M.R. referred to the difference in terminology between the words “and shall not so long as any object of the trust remains”

## GUYANA CREDIT CORP. v. BRITTLEBANK

and the words “shall not, so long as any object of the trust remains unperformed” used in section 10 of the 1870 Act and section 11 of the 1882 Act respectively. The learned Master of the Rolls said at p. 406 —

“ The difference it will be noticed, at once, is in the case of the word “unperformed”. It seems difficult to apply that word unless it relates to impersonal objects — that is, not to beneficiaries, but to other purposes of the trust.”

The legal effect of section 11 of the English Act was considered by the Court of Appeal in England in the cases of *Cleaver and others v. Mutual Reserve Fund Life Association* (1892) 1 Q.B.D. 147 C.A. and *Cousins v. Sun Life Assurance Society* (*ubi supra*).

In *Cleaver's case*, James Maybrick effected an insurance on his life with the defendants for £200 in favour of his wife, Florence Elizabeth Maybrick. He died on May 11, 1889, and by his will appointed Thomas Maybrick and Michael Maybrick as his executors. The deceased died as the result of poison alleged to have been administered by his wife and she was indicted for murder and convicted at Liverpool Assizes on July 25, 1889. The sentence of death passed upon her was afterwards commuted to penal servitude for life.

On August 1st, 1889, the wife assigned the policy and all her interest thereunder to the plaintiff Cleaver and notice of same was duly given to the defendants before the action. On August 30, 1889, Cleaver was duly appointed administrator of the property and effects of the wife under 33 and 34 Vict. C. 23 s. 9 (an Act to Abolish Forfeitures for Treason and Felony) (since repealed).

The question of law to be decided was whether, if it were proved that James Maybrick died from poison intentionally administered to him by his wife, that would afford a defence to the action (a) as against the plaintiff Cleaver as assignee of the policy: (b) as against the plaintiff Cleaver as administrator under the Statute and (c) as against the executors, Thomas Maybrick and Michael Maybrick. The Divisional Court gave judgment for the defendants. The appeal was allowed by the Court of Appeal.

LORD ESHER, M.R. considered the legal effect of such a policy with reference to section 11 of the 1882 Act and said at pp; 153 — 154 —

“S. 11 of that Act provides that a policy of insurance effected by any man on his own life, and expressed to be for the benefit of his wife or of his children, or of his wife and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his debts. Therefore, it is not provided that such moneys shall never form part of the insured's estate, but only that they shall not form part of his estate so long as any object of the trust remains unperformed. That gives rise to the necessary implication, that, when no object of the trust remains unperformed, the money is to form part of his estate.”

FRY, L.J. said at pp. 157—158—

“The 11th sections of the Married Women’s Property Act, 1882, deals with policies like the present effected for the express benefit of a wife, and, amongst, other things contains these alternative provisions. It enables the insured to appoint a trustee or trustees of the moneys payable under the policy; in default of such appointment, it provides that the policy shall vest in the assured and his legal personal representatives. It is impossible to consider the insertion of the name Florence Maybrick in the policy as the nomination of her as trustee for herself; there is no nomination of any other trustee, consequently the statute applied, and, in spite of her nomination as payee, vested the policy in James Maybrick and his legal personal representatives — namely, the plaintiffs. The section goes further, and declares the trusts on which such a policy is to be held. According to its language, the effecting of this policy created a trust in favour of the object named — that is, Florence Maybrick — and the section enacted that the moneys payable under it should not, so long as any object of the trust remained unperformed, form part of the estate of the insured . . .

Whenever, there is property produced by the payments of A which is held in trust for B., and the trust fails or is satisfied, a resulting trust arises for A or his estate. This resulting trust is recognised by the section of the Act in question, because it takes the property out of the estate of the insured so long as any object of the trust remains unperformed: language which implies, if it does not assert, that where no object of the trust remains to be performed the policy — moneys form part of the estate of the insured.”

In *Cousins’ case*, policies of insurance on his own life taken out by a husband each contained a declaration that the policy was issued “for the benefit of Lilian Cousins, the wife of the life assured, under the provisions of the Married Women’s Property Act, 1882.” The wife died in 1931, in the lifetime of her husband.

Held, the wife’s executors were entitled to the beneficial interest in the policies because (1) the trust declared by each policy in favour of the named wife gave her an absolute beneficial interest in the policy and the moneys thereby assured from the time when the policy was effected, and so this trust was not ended by her death and (2) the moneys were still to be paid under the policy, so an object of the trust remained unperformed, and section 11, therefore, prevented any interest from passing to the husband.

LORD HANWORTH, M.R. said at p. 406 —

“ But it will be observed that each of those sections (i.e. s. 10 of the 1870 Act and s. 11 of the 1882 Act) creates a trust in respect of the policy — moneys where it has been expressed in the policy that it is for the benefit of the wife, or the husband, or the

## GUYANA CREDIT CORP. v. BRITTLEBANK

children, as the case may be. The result is that when the policy states the purpose for which the policy has been entered into, the Act creates and declares a trust . . .”

At p. 407 the learned Master of the Rolls said —

“ I do not desire to say anymore, except that in the present case, where there is a persona designata, the wife indicated by name, there was an absolute interest taken by her by virtue of the statute, that a trust was created in her favour, that that trust still remains incomplete and unperformed until the date shall arrive when she, or, as it is now, her personal representatives, receive the money, and while that state of affairs continues the Act negatives any interest passing to the husband.”

ROMER, L.J. said at pp: 409 — 410 —

“I make two observations on that section (i.e. section 11 of the 1882 Act). The first is that you are referred to the policy itself to ascertain the objects of the trust which the Act says is created by the policy, and you must also look at the policy for the purpose of finding the interests which those objects take in the policy-money. The other observation that I make is that the words “so long as any object of the trust remains unperformed” clearly mean so long as any object of the trust remains to be performed; in other words, that the policy -moneys shall not form part of the estate of the insured or be subject to his or her debts until the trusts have come to an end.”

I wish to expressly adopt the interpretation placed upon section 11 of the English Act by the Court of Appeal in the above two cases as being the proper interpretation to be placed upon s. 11 of the Local Act.

The whole crux of this matter, as I see it, is whether the object i.e., the purpose, of the trust created by the Act in relation to the Second Policy has been performed or not i.e. whether the said trust has come to an end or not.

In this matter no trustee was appointed by the assured under section 11(3) neither was any application made by any interested party to the High Court or any judge thereof for the appointment of a trustee under section 11(5). This being so, it seems clear to me, that the position here is accordingly governed by s. 11(4) which has already been stated above.

Under the clause — Payment of Death Claims – in the Second Policy itself it is provided that —

“ any amount payable after the death of the employee shall be payable as it becomes due to the last beneficiary, if any, legally designated by the employee in writing . . . .”

In this case the defendant is not only the beneficiary but the administratrix as well. The mere fact that she is the named beneficiary under the Second Policy does not and cannot make her trustee for herself.

It is my considered opinion that in this matter the Second Policy vests in the defendant as legal representative of her husband's Estate under s. 11(4) of Cap. 169 for the purpose of the statutory trust created by the said policy but as this trust was fully performed, in the sense that it came to an end the moment she received the sum of \$6,567.24 thereunder from the Insurance Company, as is admitted, then it forms part of her deceased husband's Estate and liable and available for the payment of debts including the satisfaction of the judgment obtained by the plaintiffs against her husband during his lifetime and, accordingly, she is not entitled to keep this amount for herself as was submitted on her behalf.

Under s. 9(1)(e) of the Estate Duty Ordinance, Cap. 301 it is provided that—

“ 9(1) — Estate duty shall, subject to the deductions hereinafter mentioned, be payable in respect of—

(e) — money received under a policy of insurance effected by the deceased on his life where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of the money in proportion to the premiums paid by him, where the policy is partially kept up by the deceased for that benefit.”

In this matter both policies were declared in the Statement of Assets and Liabilities in Ex. “A”.

Although this is not necessary for my decision, it may be well to point out that, as I see it, all policies of Insurance creating statutory trusts under s. 11(2) of Cap. 169 are subject to Estate Duty under s.9(1)(e) of Cap. 301, whether the objects of the trusts have been performed or not and must be declared accordingly.

In conclusion, for the reasons stated above, there will be judgment for the plaintiffs against the defendant personally and in her capacity as administratrix of the Estate of Joseph Bernard Brittlebank deceased, in the sum of \$2,706.35 with interest on the capital sum of \$2,229.89 at the rate of 6½% per annum from 12th September, 1963, until payment.

There will be costs to the plaintiffs certified fit for counsel. A stay of execution for six (6) weeks is hereby granted.

*Judgment for plaintiffs.*

Solicitors:

*M.E. Clarke* (for plaintiffs);

*Miss Ena Luckhoo* (for defendant).

## THE QUEEN v. MOHAN LALL ET AL

[Court of Appeal (Luckhoo, Persaud and Cummings, JJ.A)  
May 22, 23, 24, 25, 29; June 12, 13; September 28, 1967.]

*Criminal law — Evidence — Larceny of 2 boxes containing detonators — No evidence of contents — Circumstantial evidence — Reasonable inference — Whether hearsay — Criminal Law (Offences) Ordinance, Cap. 10. s. 188(b) — (now Criminal Law (Offences) Act, Cap. 8:01, s. 188(b).*

*Criminal law — Evidence — Identification — Discrepancy — Sufficiency of evidence.*

*Criminal law — Statutory offence — Being in possession of detonators without lawful authority — Whether explosives — Whether absolute liability — Knowledge — Mens rea — Onus — Reg. 49(1) of the Emergency Powers Regulation 1964.*

*Criminal law — Statutory offence — Several distinct offences created — Election by Crown.*

*Criminal law — Appeal — Whether substantial miscarriage of justice — Proviso to s. 46(1) of the Federal Supreme Court (Appeals) Ordinance, No. 19 of 1958, as adapted by the British Caribbean Court of Appeal Order in Council, 1962, and the Guyana Independence (Adaptation and Modification of Laws) (Judicature) Order, 1966 — (now Proviso to s. 13(1) of the Court of Appeal Act, Cap. 3:01).*

Nos 1 & 2 appellants were convicted and sentenced for the larceny of 2 boxes and 4,000 detonators, the property of Toolsie Persaud Ltd., from the vessel 'Windmill' whilst it was moored in the Essequibo River, contrary to s. 188(b) of Cap. 10, whilst Nos. 3 & 4 appellants were convicted and sentenced for having in their possession without lawful authority 1,700 detonators, contrary to reg. 49(1) of the Emergency Powers Regulations, 1964. There was no direct evidence as to the contents of the 2 boxes and it was conceded at the appeal that the description on the boxes of the contents was hearsay.

On behalf of Nos. 1 & 2 appellants it was contended that (a) there was not sufficient proof that the boxes which were removed from the vessel contained detonators; (b) the evidence of identification was wholly unsatisfactory. On behalf of Nos. 3 & 4 appellants it was argued that (a) assuming that the articles found on the appellants were explosives, this issue was taken away from the jury; (b) the Crown must prove that the appellants had knowledge that they were carrying explosives, and (c) if anything, the evidence established a case of 'carrying' and not of 'being in possession', but, in any event, it was incumbent upon the Crown to prove '*mens rea*'.

**HELD** — (Luckhoo and Persaud, JJ.A) (Cummings, J.A., dissenting) that (i) although there was no direct evidence of the contents of the 2 boxes, nevertheless, having regard to the totality of the evidence, there was sufficient and satisfactory evidence from which the only reasonable inference the jury

could draw was that the 2 boxes taken from the deck of the vessels contained detonators. (*Per Cummings, J.A.*) — dissent only goes to the issue as to whether the contents of the boxes were satisfactorily established but does not affect the conviction, since it has been clearly established that Nos. 1 & 2 appellants stole from the vessel, even though perhaps only boxes. There were no circumstances to justify a reduction of sentence.

(Luckhoo, Persaud and Cummings, JJ.A) — that (ii) although the Judge quite inadvertently withdrew from the jury the question whether or not the things found were detonators, but instead, left them to find whether they were explosives, nevertheless, there was no substantial miscarriage of justice and the Court would invoke the proviso to s. 16(1) of the Federal Supreme Court (Appeals) Ordinance, as adapted, since the evidence as to the nature of the articles was overwhelming and unchallenged; (iii) there was no necessity for the Crown to prove '*mens rea*' since under reg. 49A(4)(b) of the Emergency Powers Regulations, 1964, a person is "deemed" to be in possession of explosives if he is proved to have had in his possession or under his control anything containing any explosives and, accordingly, the offence is an 'absolute' one and the word 'knowingly' is not to be read into reg. 49A(1) under which Nos. 3 & 4 appellants were charged. Here, the two appellants gave no explanation as regards the contents of the bag and, in the absence of an explanation, and, they having denied ever being in possession of the bag, the jury were entitled to impute knowledge, and (iv) reg. 49A(1) creates several distinct offences including 'carrying' and 'having in possession'. It is for the prosecution to elect which offence it will charge and it must then stand or fall by its election. Here, the Crown elected to charge 'having in their possession' and this was proved to the satisfaction of the jury.

*Appeal dismissed — Convictions and sentences affirmed.*

*Cases referred to:*

- (1) *Lim Chin Aik v. The Queen* (1963) 1 All E.R. 223.
- (2) *Brend v. Wood*, 175 L.T. 307.
- (3) *Wong Pooh Yin v. Public Prosecutor* (1954) 3 All E.R. 31.
- (4) *R. v. Cugullere* (1961) 2 All E.R. 343.
- (5) *R. v. Hallam* (1957) 1 All E.R. 665.
- (6) *Lochyer v. Gibb* (1966) 2 All E.R. 653.
- (7) *Yeandel v Fisher* (1965) 3 All E.R. 158.
- (8) *Patel v. Comptroller of Customs* (1965) 2 All E.R. 593.
- (9) *Comptroller of Customs v. Western Electric Co., Ltd.* (1965) 3 All E.R. 599.
- (10) *Myers v. D.P.P.* (1964) 2 All E.R. 881.

## R. v. LALL ET AL

*J. O. F. Haynes, Q.C.*, with *F. R. Wills* and *K. Bhagwandin*, for appellants.

*G. A. G. Pompey, Senior Crown Counsel*, for the Crown.

PERSAUD, J.A.: The appellants Mohan Lall and Basdeo Persaud, were convicted of larceny of two boxes and four thousand detonators, the property of Toolsie Persaud, Ltd., from a vessel, the "M.V. Windmill", while it was moored in the Essequibo River, contrary to s. 188(b) of the Criminal Law (Offences) Ordinance, Cap. 10, and sentenced to seven years' imprisonment each. The appellants Ronald Ragubir and Zaiafa Edun were convicted of having in their possession without lawful authority one thousand, seven hundred detonators, contrary to reg. 49A(1) of the Emergency Powers Regulations, 1964, and each was sentenced to five years' imprisonment.

Toolsie Persaud, Limited, owned and carried on a stone quarry at a place called St. Mary's on the left bank of the Essequibo River, and used explosives for purposes of blasting. In 1965 the government took control of all explosives, and established a magazine at a place called Makouria, which is also on the Essequibo River but near the mouth. There they stored all explosives, and these were only issued to Toolsie Persaud, Limited, and others upon a written permit issued by the police in Georgetown. When explosives are issued, they are required to be taken under armed guard to the site of operations.

On the 2nd July, 1965, an employee of Toolsie Persaud, Limited, presented a permit to the sergeant in charge at Makouria and received four boxes purporting to contain explosives which he placed on the vessel, the "M.V. Windmill", and proceeded up-river to St. Mary's. No armed guard was provided on this occasion, the reason given being that none was available at the time. The "M.V. Windmill" was moored alongside a wharf at St. Mary's, with the four boxes lying on the deck of the ship and covered with tarpaulin.

The case for the Crown, so far as the first count was concerned, was that while the four boxes of explosives were lying on the deck of the "M.V. Windmill," the two appellants approached the boat and engaged one Churchill Benjamin, a sailor, in conversation; he lent them a spanner with which to repair their engine, and then went below as the rain began to fall; that the first appellant boarded the "Windmill" and removed two boxes of explosives and either handed them to someone in the speed-boat or threw them into the speed-boat, and that he and one of the others who was also on the "Windmill", then jumped into the speed-boat and the boat containing the three accused and the two boxes of explosives continued downriver and made its escape.

The narrative continues: Later the same day, the speed-boat was seen travelling in the Bonasika Creek, and during the course of the night one Edward Latchmansingh assisted in pulling the speed-boat across the waterway at Land of Canaan. From this point it was a fairly simple matter to get to

Mahaica where the second appellant's boat was found. The allegation was that the speed-boat used for this enterprise belonged to the second appellant, and that soon after the mission was completed, the boat was re-painted.

These are the facts in a very short compass, but as I deal with the submissions, I shall dilate on them as is necessary.

The first submission (and this concerns the first count) is that there was not sufficient proof that the boxes which were removed from the deck of the "Windmill" contained detonators." There is no direct evidence, it is true, as to the contents of the two boxes, and the "Crown was asking the jury to infer this from other evidence, having conceded before us the description on the boxes of the contents therein is hearsay. The evidence discloses that the boxes were kept in a locked magazine where only explosives and similar substances were kept; that Toolsie Persaud limited and others stored only explosives in the magazine; that four boxes were delivered, all of which carried the same weight and inscription, and were similar in size and shape; and that the contents of the two that were not taken were in fact detonators, as they were subsequently used as such on the quarry; that the boxes were received at the magazine sealed, and were delivered to the Captain of the "Windmill" in the same condition. In my view, the only reasonable inference is that the two boxes taken from the deck of the "Windmill" contained detonators.

Counsel complains, and justifiably so, that the trial judge failed to warn the jury that they could not come to the conclusion that the boxes contained detonators from the inscription on the boxes. The judge did not so warn the jury; indeed, a careful perusal of the summing-up would indicate that it was taken for granted that the contents of the boxes were proved to be detonators. But, I am of the view that this omission was not fatal, and I have already indicated the evidence upon which I feel the jury could have made no other finding.

So far as the first appellant is concerned, counsel argues his submission, firstly, on the basis that the jury may have convicted him because they accepted the evidence that it was he who removed the two boxes from the "Windmill" and, secondly, that they may have convicted because they rejected that evidence but found that he was a principal in the second degree. In short, he argues that the evidence as to the identification of this appellant was wholly unsatisfactory, and he sought to deal with each witness's testimony separately. He makes the same submission with respect to the second appellant.

I will attempt to deal very shortly with the relevant evidence of those witnesses who testified to recognising the appellant Mohan Lall, and the probative value of their testimony.

Arnold Sandy said that he recognised the first appellant who was at that time wearing a crash helmet. He was not required to attend an identification parade. The judge told the jury that if the case turned solely on this

## R. v. LALL ET AL

evidence, he would have directed them to acquit. So it is clear that he was directing them not to consider Sandy's evidence.

Churchill Benjamin was the witness who said he saw the first appellant bare-headed; he had never seen the men before but saw them for about 10 to 15 minutes alongside the "Windmill." He was not invited to attend an identification parade, and the next time he saw the appellants was on their way to the Magistrate's Court under police escort. A witness placed in this position could hardly fail to attempt to identify the accused persons in the course of his evidence. This is clearly wrong, and I am at a loss to know why this witness was not invited to identify the persons whom he saw. No doubt the jury shared my view, and acquitted the fourth appellant on the first count. It would appear, therefore, that although the judge put the evidence of this witness to the jury, they did not act on it.

The first appellant was recognised by Fitzgerald Gordon who said that and who removed the two boxes from the "Windmill". The witness Edward Patterson said that it was the second appellant who was wearing the crash helmet, and who removed the boxes. I will deal with this discrepancy later on, as counsel sought to ground a submission on this. Gordon identified the first appellant on a parade, and he did the same with the second appellant on another parade. Besides, if his evidence was accepted, he had known the second appellant for some time previous, and this appellant actually spoke to him at the quarry enquiring for one Sankar, and he saw him speaking to Sankar. Patterson also picked out the second appellant on a parade. Joseph Garraway recognised the second appellant as the person who had gone ashore earlier, who was one of the speed-boat party, and who left in that boat going towards Bartica. He identified this appellant at a subsequent parade, but during a previous abortive trial, he said that he had recognised the first and fourth appellants, and counsel submits that the judge ought to have warned the jury to be careful in accepting this witness's testimony. In my opinion the learned trial judge did just this when he told the jury:

"You must also remember that in the parade he had only identified number two. Well, those are circumstances to take into account and you will decide whether or not to believe the witness. If you find he is deceiving you, then pay no attention to his evidence."

I feel that there was enough evidence, if accepted, from which a reasonable jury could have concluded that both the first and the second appellants were in the speed-boat as it lay alongside the "Windmill," and that they both took part in the removal of two boxes of explosives.

However, counsel submits the judge ought to have drawn to the jury's attention the contradiction between Gordon and Patterson as to which of these appellants removed the explosives. That there is this contradiction is apparent, but I cannot agree that there was not enough evidence from which a jury could have come to the conclusion that the men in the speed-boat

were acting in concert in stealing explosives. In this regard the judge told the jury:

“Before you find that they were acting in concert you will have to find that they went there with a common intention; that all three of them went there with a common intention and that that intention was to commit the very offence with which they are charged, that is, larceny of these detonators from the vessel, and that they were present assisting each other to commit the very offence with which they are charged.”

These directions were, in my judgment, quite adequate in the circumstances, and the circumstances, as related by the several witnesses, in my opinion, certainly pointed to such a conclusion. In any event, the learned judge, in dealing with Gordon’s evidence, did invite the jury to have regard to discrepancies between this witness’s testimony and that of Patterson, for he said:

“He is saying it was number one who picked up the boxes. Later on you will see that Patterson is saying that the man with the helmet on was the person who had the boxes. Well, as I said, you will take the discrepancies and see whether they are such as would make you disbelieve the witness entirely.”

This disposes of the first and second appellants’ appeals, which I find to be without merit. And I will now turn to the appeals of the other two appellants, who, it will be recalled, were found guilty of being in possession of explosives, that is to say, one thousand seven hundred detonators, without lawful authority. The regulation prescribing the offence reads as follows:

“49A. (1) Any person who without lawful authority, the burden of proof of which shall lie upon him, imports, purchases, sells, exchanges, transfers, acquires, receives, makes, manufactures, carries or has in his possession or under his control any firearm, ammunition or explosive shall be guilty of an offence. . .”

And it will be useful to bear in mind para. (4)(b) of the same regulation as this is very pertinent to the question of burden of proof:

“(4) (b) Every person who is proved to have had in his possession or under his control anything whatsoever containing any firearm, dangerous weapon, ammunition or explosive shall, until the contrary is proved, be deemed to have been in possession of such firearm, dangerous weapon, ammunition or explosive.”

The submissions are three-fold, viz.:

- (1) The issue as to whether the articles found on the appellants (assuming they were so found) were explosives was taken away from the jury.

## R. v. LALL ET AL

- (2) It was necessary for the prosecution to prove that the accused knew that they were carrying explosives; and
- (3) If anything, the evidence established a case of carrying, and not of being in possession, and in any event, if there was a case of carrying it is still incumbent on the Crown to prove *mens rea*.

“Explosive” is defined by s. 2 of the Explosives Ordinance, Cap. 346, to mean —

“gunpowder, nitro-glycerine, dynamite, gun cotton, blasting powder, fulminate of mercury or of other metal and every other substance whether similar to those abovementioned or not, used or manufactured with a view to producing a practical effect by explosion, or a pyrotechnic effect; and includes fuses, detonators and any adaptation or preparation of an explosive as herein defined but does not include safety cartridges.”

After the articles alleged to be explosives were seized by the police, they were examined by Sergeant Gangadeen, who was called to give expert evidence. Gangadeen said that he was trained in the study and examination of explosives, and that he has dealt with both military and commercial explosives; that the objects he examined were 170 bundles of No. 6 electric detonators, some with 96” twin yellow leads, and others with 48” twin yellow leads; he tested one of each set, and both fired instantly. He expressed the view that this meant that they were quite new and in good condition, and that the others were also in good condition, and would fire. He also said those detonators are the common type imported into this country for purposes of quarry blasting, and that they are dangerous.

Having regard to the definition of “explosive” all the prosecution would have proved is that the articles were detonators. And it was for the jury to find this as a question of fact based on Gangadeen’s evidence. In my opinion the evidence was overwhelming, and it is idle to contend that the highest point to which the evidence goes is to the effect that there were two detonators only. The question really is, whether the judge left the issue to the jury. In his entire summing-up he referred to this aspect of the case only once, as far as I have been able to ascertain, and that was when he said:

“. . . you will have no doubt that what was found in that bag — these detonators — are explosives. Sergeant Gangadeen has given that evidence.”

It would seem, therefore, that the judge — quite inadvertently in my view — withdrew from the jury the question whether or not the things found were detonators. What he did was to leave to them to find that they were explosives, but, as has already been pointed out, this was quite unnecessary. But I have already made the point that the evidence as to the nature of the articles was overwhelming and unchallenged. In these circumstances, I feel

that the proviso to s. 16(1) of the ordinance from which this court obtains its powers should be invoked.

It has always been a principle of the common law that *mens rea* is an essential element in the commission of any criminal offence against the common law. In the case of statutory offences, as in the instant appeal, it all depends on the effect of the statute. As LORD EVERSLED puts it in *Lim Chin Aik* (1963) All E.R. at p. 227:

That proof of the existence of a guilty intent is an essential ingredient of a crime at common law is not at all in doubt. The problem is of the extent to which the same rule is applicable in the cases of offences created and defined by statute or statutory instrument."

No doubt, counsel wishes us to bear in mind the dictum of GODDARD, L.C.J., in *Brend v. Wood* (175 L.T. 307) in support of his submission that the word "knowingly" must be read into reg. 49A(1). LORD GODDARD said:

"It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication, rubs out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."

Learned counsel before us submits that the learned trial judge failed to invite the jury to consider the question of whether the appellants had knowledge of the contents of the bag for, argues counsel, the prosecution must prove that the appellants knew that they were carrying explosives, that is, that they knew that they were doing wrong. It is a fact that the judge did not put the matter as counsel submits it ought to be put. The question is, whether the judge was right to do so, having regard to the provision as contained in the regulations. The judge said, referring to the evidence relating to the apprehension of the third and fourth appellants:

". . . if you accept this evidence, then of course, it is open to you to convict the number three and number four accused on the second count, because if you take Duncan's evidence that they were in possession of this bag and this bag had these detonators, the law deems them to have possession unless the contrary is proved. They have led no evidence to prove the contrary in the sense that they did not know what was in the bag and the law throws the onus on them to prove they had lawful authority. There is no evidence that they had lawful authority, so if you accept the evidence of this witness that they were in possession of this bag with the detonators then it is open to you to convict them."

The defence was a complete denial of ever being in possession of the bag containing the detonators, so that if the jury found that the two appellants had possession of the bag, then the appellants ran the risk of being convicted.

## R. v. LALL ET AL

Several authorities can be found on both sides of the line on this particular point. Counsel has referred us to cases such as *Wong Poooh Yin v. Public Prosecutor* (1954) 3 All E.R. 31; *Lim Chin Aik v. Reg.* (1963) All E.R. 223; *R. v. Cugullere* (1961) 2 All E.R. 343; and *R. V. Hallam* (1957) 1 All E.R. 665. The last mentioned case causes no difficulty and really it carries the matter no further as the statute the contravention of which was alleged did carry the word “knowingly,” and it would appear that this served to make the difference. The *Wong Poooh Yin* case turned on the question whether the appellant could be said to have had a lawful excuse for carrying a weapon which he admitted carrying for purposes of surrendering it to the authorities. The question of knowledge did not arise.

In the *Lim Chin Aik* case, an order was made under the Immigration Ordinance prohibiting the appellant from entering Singapore. He was convicted under an ordinance which enacted that it should not be lawful for a person prohibited by order from entering Singapore and rendered such entry into, or remaining in Singapore, an offence. The appellant had no knowledge of the prohibition order, and it was held that *mens rea* was an essential ingredient of the offence, notwithstanding the absence of the word “knowingly” in the ordinance. The part of LORD EVERSLED’S judgment to which counsel attaches great importance can be found at page 298 of the report, and is this:

“ . . . it is not enough in their Lordship’s opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to enquire whether putting the defendant under strict liability will assist in the enforcement of the regulations.”

And again at p. 229:

Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended.”

The paramount point to be remembered in all these cases is the statute itself, its object, and the remedy it is intended to bring in a given situation. And LORD EVERSLED gave consideration to these matters (at p. 229) — and this in my opinion is the *ratio decidendi* — where he said:

“ Clearly one of the objects of the ordinance is the expulsion of prohibited persons from Singapore, but there is nothing that a man can do about it if, before the commission of the offence, there is no practical or sensible way in which he can ascertain whether he is a prohibited person or not . . .  
 . . . . .  
 It seems to their Lordships that, where a man is said to have contravened an order or an order of prohibition, the commonsense of the language presumes that he was aware of the order before he can be

said to have contravened it . . . . .  
 None the less it is their Lordships' view that, applying the test of ordinary sense to the language used, the notion of contravention here alleged is more consistent with the assumption that the person charged had knowledge of the order than the converse. But such a conclusion is in their Lordships' view much reinforced by the use of the word 'remain' in its context."

It seems clear that LORD EVERSLED was endeavouring to construe the provisions of the ordinance as applicable to the circumstances before him. I would wish to add, with respect, that the prohibition order applied to the appellant only, and there is all the reason in the world for his attention being drawn to its provisions before he could be said to contravene it. In the instant case, the regulations are intended to be observed by every citizen of Guyana, and not by one person only, or one category of persons.

The strongest case in favour of the appellants is, in my view, *R. v. Cugullere* (1961) 2 All E.R. 343. There the appellant was charged with having with him without lawful authority or excuse in a public place offensive weapons, i.e. three pickaxe handles. The implements in question were in the back of a stolen van which the appellant was driving at the time. It was held that the Crown must prove that the appellant knew that the pickaxe handles were in the van, as the court was of the view that the words "has with him in any public place" must mean "knowingly has with him in any public place." Were that case to be used as an analogy to the case before us, the Crown had to prove that the appellants knew that there were explosives in the bag. But the appellants gave no explanation as regards the contents of the bag, and in the absence of an explanation and they having denied ever being in possession of the bag, the jury were entitled to impute knowledge. But that apart, when Reg. 49A(4) (b) is examined, the position is the same as it was in *Lochyer v. Gibb* (1966) 2 All E.R. 653 where the Court was called upon to interpret similar provisions. There was a "deeming" provision, and it was held that there was every reason for treating the provision as one imposing absolute liability. Similarly Reg. 49 A (5) (b) of the Emergency Powers Regulations, 1964, deems a person who is in possession of anything containing any explosives to be in possession of such explosive. This, in my opinion, puts it beyond dispute that it is not intended that the word "knowingly" should be read into Reg. 49 A (1); to put it another way, in a prosecution under the regulation, there is no necessity for the Crown to prove *mens rea*. And I would like to adopt the language of LORD PARKER, in *Yeandel v. Fisher* (1965) 3 All E.R. at p. 161:

" It is a regulation for the public welfare. I mention that because regulation of activities for the public welfare has always been treated as a category of cases in which provisions are more readily held to be absolute offences."

The last submission made on behalf of these two appellants relates to the question what, if any, offence was disclosed, assuming that it was

## R. v. LALL ET AL

established that the appellants were found with the explosives in the circumstances narrated by the policemen. Counsel contends that if the evidence supports a charge of carrying and not one of having possession, that the prosecution must establish a possession that is not ambulant. This is to reject the possibility of the situation that a person who possesses is ambulant, but the possession remains in him as he ambulates. There is the possibility that a person may carry an article without being in possession of that article, but this does not mean that if he possesses, and he carries it, that he ceases to be in possession.

The regulation creates several distinct offences including carrying and having in possession, and it may well be that a person can carry and as well be in possession at the same time. The prosecution then elects what offence it will charge and must stand or fall by its election. In my judgment, the prosecution elected possession in this case, and proved it to the satisfaction of the jury.

For the reasons which I have attempted to give in this judgment, I would move for a dismissal of this appeal. I would affirm the convictions and sentences.

LUCKHOO, J.A.:

I wish to record my concurrence in this judgment.

CUMMINGS, J.A.:

I have had the opportunity of reading the judgment of PERSAUD, J.A. and agree that these appeals should be dismissed.

However, with regard to the cases against the Nos. 1 and 2 accused, I do not agree that the contents of the boxes were satisfactorily established. All of the witnesses who testified on this issue said the boxes contained detonators because that was what was written on them. That is hearsay evidence and should not be regarded as satisfactory; indeed, it is inadmissible to prove the truth of the writing.

In *Paten v. Comptroller of Customs* 1965 3 A.E.R., p. 593 in dealing with a somewhat similar situation LORD HODSON in the course of delivering the opinion of the Judicial Committee of the Privy Council said at p. 597:

“The next question was whether there was any evidence on which the appellant could be convicted of making a false declaration as charged. The only entry as to which the allegation of falsity is made is the word ‘India’ in the column headed ‘country of origin’ which is part of the import entry form signed by the appellant. The only evidence purporting to show that this entry was false is the legend ‘produce of Morocco’ written on the bags. Their lordships are asked by the respondent to say that the inference can be drawn that the goods contained in the bags

were produced in Morocco. This they are unable to do. From an evidentiary point of view the words are hearsay and cannot assist the prosecution. This matter need not be elaborated in view of the decision of the House of Lords in *Myers v Director of Public Prosecutions* (16) given after the Fiji Courts had considered the case. The decision of the House however makes clear beyond doubt that the list of exceptions to the hearsay rule cannot be extended judicially (17) to include such things as labels or markings. Nothing is to be gained by comparing the legend in this case with the records considered in Myers' case (16). Nothing here is known of when and by whom the markings on the bags were affixed and no evidence was called to prove any fact which tended to show that the goods in question in fact came from Morocco."

This was followed in *Comptroller of Customs v Western Electric* (1965) 3 A.E.R., p. 593 when LORD HODSON in concluding the opinion of the Judicial Committee of the Privy Council said at p. 601:

"The admission made by the respondents' agent was an admission made on reading the marks and labels on those goods and was of no more evidential value than those marks and labels themselves.

... Their Lordships do not regard the admission here made as of evidential value so as to support the conviction of the respondents."

I consider myself bound by these decisions. My observations, however, do not affect the conviction as recorded because it had been clearly established that the Nos. 1 and 2 accused stole from a vessel – even though perhaps only boxes.

Counsel for the accused urged that if his submission with which I have just expressed agreement were upheld then the sentences of the Nos. 1 and 2 accused should be reduced. In my view, this does not follow.

It is clear from the surrounding circumstances that whether or not the boxes did in fact contain detonators, the intention of the accused was to steal detonators. I cannot, therefore, find any circumstances to justify a reduction of the sentence imposed by the court.

Consequently I am also of the view that the convictions and sentences should be affirmed.

*Appeal dismissed — Convictions and sentences affirmed.*

## SAMUEL BENJAMIN ET AL v. JOHN MONTGOMERY AGARD

[Court of Appeal (Stoby, C., Cummings and Crane, JJ.A).  
October 3, 1967.]

*Practice and Procedure — Rules of the Supreme Court, 1955 (now Rules of the High Court, Cap. 3:02) — Writ of Summons — Pleadings in order — Matter listed for hearing and adjourned — Matter adjudicated upon ex parte under Order 33 Rule 2 — Whether adjudication a “judgment by default” from which no appeal lies to the Court of Appeal — Federal Supreme Court (Appeals) Ordinance, No. 19 of 1958, as adapted by the British Caribbean Court of Appeal Order in Council, 1962, and the Guyana (Adaptation and Modification of Laws) (Judicature) Order, No. 37 of 1966 (now Court of Appeal Act, Cap. 3:01).*

The respondent issued a writ on March 10, 1966, to which the appellants entered appearance on March 31. On the same day the writ was issued, the respondent applied *ex parte* for an interlocutory injunction which was granted on March 12 to expire on March 26. A summons for the continuation of the injunction was filed but this was dismissed on June 20. On June 29, the respondent was granted leave to file a statement of claim within 7 days and, on August 3, a defence was filed. The matter was then listed for hearing on 6th September, 1966, when counsel for the appellants was present and it was then adjourned to 8th September for hearing, to which date there was no objection. Neither counsel for the appellants nor the appellants or any of them were present at the adjourned hearing and the trial Judge took evidence from the respondent and his witnesses and gave judgment in terms of the statement of claim.

In the Court of Appeal, the respondent took a preliminary objection on the ground that as the respondent had obtained judgment against the appellants “by default”, then, the appellants were precluded from lodging an appeal under s. 9(5) of the Federal Supreme Court (Appeals) Ordinance, as adapted,

**HELD** — (i) the ‘default’ envisaged by s. 9(5) of the Ordinance was restricted to (a) default in entering appearance under Order 11 Rule 11; (b) default in filing an affidavit of defence in a specially indorsed writ under Order 12 Rule 15, and (c) default in filing a pleading under Order 25 Rule 13; (ii) there is a distinction between a judgment by default and a judgment after a hearing in the absence of the defendant under Order 33 Rule 2. Under the former, an affidavit verifying claim suffices to prove the case whilst, under the latter, the action may not succeed if the evidence does not support the allegations contained in the statement of claim; (iii) the normal procedure to be adopted by a defendant against whom judgment has been given in his absence is to apply under Order 35 Rule 13 to set aside the judgment and, although the appeal was heard in this particular case, it must not be assumed that in every case the Court of Appeal will entertain an appeal if the procedure set out in Order 35 Rule 13 has not been followed.

*Preliminary objection over-ruled.*

[*Editorial Note*:— (Although Cummings, J. A., agreed with the result reached by the Chancellor, he adhered, however, to the reasons he gave in *Hemchand Bhagwandin v. Collins* reported elsewhere in this volume at p. 478) (*Hemchand Bhagwandin v. Collins* is also reported in (1967) 11 W.I.R. 335).]

*Cases referred to:*

- (1) *Spira v. Spira* (1939) 3 All E.R. 924, C.A.
- (2) *Dsane v. Hagan & Anor* (1961) 3 All E.R. 380.
- (3) *Vint v. Hudspith* (1885) 29 L.R.Ch. 322.
- (4) *Hemchand Bhagwandin v. Ernest Collins* (1967) G.L.R., p. 478; (1967) 11 W.I.R. 335.

*H. D. Hoyte* with *M. R. Persaud* for appellants.

*Dwarka Dyal* for respondent.

STOBY, C.: On this appeal coming on for hearing, counsel for the respondent objected to the hearing of the appeal on the ground that the plaintiff (respondent) had obtained judgment against the appellants by default and in such circumstances the Federal Supreme Court (Appeals) Ordinance 1958, as adapted by the British Caribbean Court of Appeal Order in Council 1962 and the Guyana Independence (Adaptation and Modification of Laws) (Judicature) Order No. 37 of 1966, precludes the lodging of an appeal. S. 9(5)(d) of the 1958 ordinance states that no appeal shall lie to the Court of Appeal from an order obtained by default and consequently the point for determination is whether the plaintiff's judgment was obtained by default.

There is no dispute about what took place in the court below. On the 10th March, 1966, the plaintiff issued a writ against the defendants (appellants) seeking a declaration of ownership in respect of a certain area of land; there was also a claim for an injunction and damages. The defendants entered appearance on the 31st March, 1966. On the same day as the writ was issued the plaintiff applied *ex parte* for an interlocutory injunction which was granted on the 12th March, 1966, to expire on the 26th March, 1966. A summons for the continuation of the injunction was filed. It was dismissed on the 20th June, 1966.

On the 29th June, 1966, the plaintiff applied for leave to file a statement of claim within 7 days. This was granted and a statement of claim filed. On the 3rd August, 1966, a defence was filed.

The case was listed for hearing in New Amsterdam on the 6th September and adjourned to the 8th September. The judge's note is as follows:—

“Mr. Hardyal was present on 6th September, 1966 when the matter was fixed for hearing and did not object to the dates.

## BENJAMIN ET AL v. AGARD

Counsel for defendants and defendants absent. Mr. Hardyal telephoned but does not appear.”

The judge proceeded to hear the evidence of the plaintiff and his witnesses and gave judgment for the plaintiff in terms of the statement of claim.

This is a judgment characterised by counsel as a judgment by default within the meaning of the Federal Supreme Court (Appeals) Ordinance 1958 s. 9. Reference was made to the Rules of the Supreme Court 1955 (G) o. 35 rr. 12 and 13. Rule 12 states:—

“Subject to particular rules any judgment by default, unless the court otherwise directs, shall have the effect of a judgment upon the merits for the plaintiff”,

and r. 13 is:—

“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 application made within fourteen days after the trial.”

It will be noted that rule 13 does not equate the non-appearance of a defendant with a judgment by default although the marginal note does describe the rule as dealing with a judgment by default. It is necessary, therefore, before construing the words “judgment by default” in s. 9 of the 1958 Ordinance to discuss the various forms of default which may take place from the time a writ of summons is issued. The rules of the Supreme Court 1965 (U.K.) are much more detailed than the rules of the Supreme Court 1955 (G.) and an examination of the 1965 rules (U.K.) draws attention to the fact that there may be default of entry of appearance, default of pleading, default in discovery and inspection of documents, default in issuing a summons for directions; default in answering the interrogatories and default of appearance at trial.

The case relied on by the appellants for the submission that failure to appear at the trial resulting in a judgment in the absence of the defendants is not a default is *Spira v. Spira* (1939) 3 All E.R. 924 where it was held that a judgment obtained under o. 14 r. 1 (U.K.) (as it was then worded) was not a judgment obtained by default. I think the decision in *Spira v. Spira* depended on the fact that the judgment was obtained under o. 14 r. 1 (U.K.), and it might be dangerous to import into this case the reasoning of that case. o. 14, r. 1(A) (U.K.) was in 1939 when *Spira v. Spira* was decided as follows:—

“1. (a) Where the defendant appears to a writ of summons specifically indorsed with or accompanied by a statement of claim under O. III., R. 6, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to

the amount of damages claimed if any, apply to a judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The judge thereupon, unless the defendant shall satisfy him that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed.”

And the rule under which a judgment could be set aside was o. 27 r. 15, which was:—

“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 costs or otherwise as such court or judge may think fit, and where an action has been set down on motion for judgment under R. 11 of this Order, such setting down may be dealt with by the court or a judge in the same way as if judgment by default had been signed when the case was set down.”

As BUCKLEY, J. pointed out in *Dsane v. Hogan* (1961) 3 All E.R. 383 that since o. 14 (U.K.) merely gives a defendant an opportunity to show cause why he should be permitted to defend the action, his failure to avail himself of the opportunity could not be aptly described as a default.

On the other hand where there is a failure to enter appearance or a failure to file pleadings and judgment is obtained by a plaintiff, that is a judgment by default because the defendant did not have to obtain the court's permission to defend, but was entitled to defend as of right, and it was his default in not exercising a right which caused judgment to go against him without his being heard; this being the principle, what then did the Federal Supreme Court Ordinance mean when it precluded an appeal where the judgment was by default? The answer to this question must lie in the Supreme Court Rules 1955 (G.). o. 11, which deals with default of appearance, stipulates in r. 2 that:—

“Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the following rules of this Order, or under o. 13, r. 1 he shall, where the writ of summons or notice in lieu thereof has been served out of the jurisdiction, file an affidavit of service.”

Subsequent rules of this Order permit a plaintiff, upon filing an affidavit verifying claim, to request final judgment. When this is done and judgment is given on the affidavit, then that is a default judgment and there is no right of appeal. When, however, the judge requires evidence in order to assess damages, a judgment so obtained is probably appealable on the question of damages. The failure to enter appearance presumes an admission of the allegations in the writ but the moment the necessity arises to take evidence in

## BENJAMIN ET AL v. AGARD

order to assess damages then the defendant having had no notice of this cannot be presumed to have admitted it.

The same considerations apply to o. 12, the specially indorsed writ, where unlike the procedure under the equivalent rule in the U.K., failure to file an affidavit of defence is specifically treated as a default by r. 15 which says:—

“Any judgment given or order made in default of appearance of plaintiff or defendant under the provisions of this Order may be set aside or varied by the court or a judge on the application of the party against whom the judgment or order was given or made on such terms as to the payment of costs or otherwise as may be just.”

I interpose here to mention that the decision in *Spira v. Spira* was nullified by o. 14 r. 11 (1962) which enacts that —

“Any judgment given against a party who does not appear at the hearing of an application under Rule 1 or Rule 5 may be set aside or varied by the court on such terms as it thinks just.”,

and the note to that rule explains:—

“It reverses *Spira v. Spira*, (1939) 3 All E.R. 924, C.A., and removes the anomaly that, unlike every other judgment in default or even a judgment at trial in the absence of a defendant, a judgment under o. 14 in the absence of a defendant could not be set aside, though it could be appealed. Now a judgment under o. 14 given against an absent party whether on claim or counterclaim may be set aside or varied by the court.”

The remaining Order which deals with default is o. 25 r. 13. Here again the rule makes provision for a plaintiff to apply for final judgment if no defence has been filed.

In my view when the Federal Supreme Court Ordinance legislated to prevent a litigant who was in default for appealing, the default envisaged must have been the default referred to in the rules I have mentioned, that is to say, default in entering appearance, default in filing an affidavit of defence and default in filing a pleading.

In the case of non-appearance of a defendant at the trial, other factors must be considered. Under o. 32 r. (1)(b) when the pleadings have been closed the case is ready for hearing. At this stage a request for hearing can be made and when that is done the case is set down for hearing. O 33 r. 2 states:—

“If, when a trial is called on, the plaintiff appears, and the defendant does not appear, the plaintiff may prove his claim, so far as the burden of proof lies upon him.”

It follows that if the evidence does not support the allegations in the statement of claim the case will be dismissed. Therein lies the distinction be-

tween a judgment by default and a judgment after a hearing in the absence of the defendant. In the former, an affidavit verifying the statement of claim suffices to prove the case; the action is bound to succeed. In the latter, the action may not succeed for lack of proof. Consequently, I hold that the appellants were entitled to appeal. I must observe, however, that since o. 35 r. 13 allows an absent defendant to apply to set aside the judgment this is the procedure which should normally be adopted, and although in this case the court will proceed to hear the appeal it must not be assumed that in every case the court will entertain an appeal if the procedure set out in o. 35 r. 13 has not been followed.

The preliminary objection to the hearing of the appeal is overruled.

CRANE, J. A. (ag.)      I concur.

CUMMINGS, J.A.: I agree with the result reached by My Lord Chancellor in this case. I adhere, however, to the reasons I gave in the recent judgment in this court — differently constituted, in the case of *Bhagwandin v. Collins* (1967) G.L.R., p. 478; (1967) 11 W.I.R. 335. For ease of reference I quote hereunder the relevant portions of that judgment:

“S. 9(2) of the Federal Supreme Court Ordinance, No. 19 of 1958 confers a right of appeal to that court (now this Court): ‘In any case or matter from any order of the Full Court or a judge of the Supreme Court in certain circumstances set out therein.’

S. 9(5) provides that:

‘No appeal shall lie under this section . . . (d) from an order obtained by default or made as an *ex parte* application.’

It is clear that the order obtained by default or on the *ex parte* application refers to an Order of the Full Court or a judge of the Supreme Court (now the High Court of Justice); and that ‘Order obtained by default’ in the ordinance is in effect the same thing as ‘Judgment by default’ in the rules.

As a close examination of the relevant rules is necessary I set out *seriatim* hereunder together with my comments on the effect of each rule.”

After having done this the judgment continued:

“It clearly emerges from the analysis that the term ‘Judgment by default’ as issued in the rules embraces three situations:

- (i) A judgment obtained by one party in the absence of the other at a hearing of the matter, *i.e.* an adjudication upon the *vive voce* evidence led by one party.
- (ii) A judgment obtained by one party upon judicial consideration of affidavit evidence filed by one or both parties.

## BENJAMIN ET AL v. AGARD

- (iii) A judgment obtained automatically, upon application by one party as a result of the failure of the other to perform some procedural act as provided by the rules.

It may be observed that all three types may be set aside upon application, but it does not follow *ipso facto* that they do not attract the right of appeal.

Although Mr. Hughes' submissions were of great assistance to the court in discerning the different situations to which the term is applied by the rules; nevertheless, although the matter is not free from difficulty I am convinced that the fundamental question to be determined is this: To which one or more of these situations did the legislature intend the phrase used in the Ordinance to apply? The answer is to be found in the application of well established canons of construction to section 9 of the Ordinance.

This is a section conferring a right of appeal on an aggrieved person in certain circumstances. Did the legislature intend, while doing this, to exclude by s. 9(d) the attraction of that right to a type of judgment based upon an adjudication on the merits of the case? It is true that in this type of case the evidence for consideration is adduced by one party only either *viva voce* or upon affidavit; but it must nevertheless be judicially processed by the trial judge, that is to say, it must be perceived and evaluated, and the relevant law applied thereunto. The judicial process thereby occasioned – although comparatively limited in scope – is fundamentally the same as if both parties had adduced evidence and fully contested the case before the learned trial judge — and in the instant case this is evident from the judgment of the learned trial judge cited earlier in this judgment. Why then should a party aggrieved by this type of judgment not also have a right of appeal so that the adjudication might be reviewed by a higher tribunal consisting of at least three judges? To construe the phrase as avoiding such a right would in my view impute to the legislature an intention which would result in inconsistency, unreasonableness, harshness, inconvenience and injustice.

The term is, however, open to a construction which limits its application to a type of default judgment where there has been no adjudication on the merits. Such a situation arose in the Court of Appeal in England in the case of *Vint v. Hudspith* (1885) 29 L.R. Ch. p. 322. In that case the action was dismissed with costs due to the plaintiff's non-appearance.

In the course of his judgment, COTTON, L.J., said at p. 323:

'We are of opinion that the plaintiff's proper course was to apply to the judge to restore the cause on the ground that the plaintiff was absent *per incuriam*. I am far from saying

that this court cannot entertain an appeal from a judgment made by default, but in a case like the present it is important to prevent the court of Appeal from being flooded by having to hear cases in the first instance. It is therefore right that the plaintiff should first apply to the judge who gave the judgment to restore the action. It cannot be said that the plaintiff did not know that the action was going on against him. He has only himself to thank for all the difficulty that has occurred. The appeal must stand over for a fortnight, to give time for the plaintiff to make such application to the judge as he may be advised.'

And BOWEN, L.J., at p. 324:

'I agree with the rule as expressed by the Lord Justice, and also with the qualification which he has stated. I should be sorry to decide that the court has not jurisdiction to entertain an appeal from a judgment given by default; but it is equally clear that it is a bad practice to encourage parties to come here without having the cause in the first instance tried by the court below.'

The plaintiff accordingly applied for a rehearing before the learned first instance judge who heard and dismissed the motion on its merits.

It is clear that the court's view in that case was that where there was no adjudication on the merits it was impracticable and inconvenient for the Court of Appeal to have considered the matter.

It may be that the local legislature while intending to avoid this inconvenience by the enactment of s. 9(5)(d) did not intend to create hardship, injustice, inconsistency or inconvenience by excluding from the attraction of the right of appeal an adjudication on its merits.

I accept and adopt as correct, statements of the law applicable to the canons of construction as they appear in the 11th Edition of MAXWELL ON THE INTERPRETATION OF STATUES AND DOCUMENTS:

'CONSTRUCTION MOST AGREEABLE TO JUSTICE  
AND REASON

SECTION 1 – 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 no less, but rather more, force is due to

## BENJAMIN ET AL v. AGARD

any drawn from an absurdity or injustice. The question of inconvenience or absurdity must be looked at in the light of the state of affairs at the date of the passing of the statute, not in the light of subsequent events. Moreover, a court of law has nothing to do with the reasonableness or unreasonableness of a statutory provision except so far as it may help it in interpreting what the legislature has said.'

'SECTION 2 — 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.'

Applying these presumptions to the construction of the provision under consideration I hold that the judgment in this case, resulting as it did from an adjudication on the merits was not an 'Order obtained by default' as contemplated by the Ordinance, and consequently, the objection in limine should be overruled."

Accordingly, I consider it should also be overruled in this case, and agree with the order proposed by My Lord Chancellor.

*Preliminary objection over-ruled.*

## THE QUEEN v. COMPTON ALFRED

[In the High Court (Chung, J.) — October 3, 10, 1967.]

*Criminal Law — Committal by Magistrate for murder — Indictment by Director of Public Prosecutions for murder — Motion to quash indictment — Whether Court can go beyond indictment to see if the evidence in the depositions support the charge.*

The accused was committed by a Magistrate to stand trial for murder and was indicted by the Director of Public Prosecutions for murder. At the trial, counsel for the accused moved the Court to quash the indictment on the ground that the D.P.P., had no authority to prefer an indictment because, on the evidence as shown in the depositions, the offence of murder was not disclosed as there was no evidence of the cause of death and, further, the only

evidence upon which the committal was based was the unsworn and uncorroborated evidence of a child, and, under s. 71 of the Criminal Law (Procedure) Ordinance, Cap. 11 (now s. 71 of the Criminal Law (Procedure) Act, Cap. 10:01), the accused could only have been properly convicted of murder if the evidence established a case for murder.

**HELD:** – that the D.P.P., was acting within his jurisdiction when he indicted the accused for the same offence for which the Magistrate had committed and it was not competent for a Court to go beyond the indictment and look at the evidence in the depositions to see whether in fact the evidence had established a case of murder.

(Dictum of Date, J., in *R. v. Manning* (3) approved.)

*Motion to quash indictment dismissed.*

*Cases referred to:—*

- (1) *R. v. Chairman of London County Sessions, ex parte Downes* (1953) 37 Cr. App. Rep. 148.
- (2) *R. v. McDonnell* (1965) 3 W.L.R. 1138.
- (3) *R. v. Manning* (1959) L.R.B.G. 272.

*G. A. G. Pompey, Senior Crown Counsel, for the Crown.*

*C. A. Massiah for the accused.*

CHUNG, J.: In the present case the accused has been committed by the magistrate to stand trial for the offence of murder, and has been indicted by the Director of Public Prosecutions for the offence of murder.

Counsel for the accused now moves the court to quash the indictment on the ground that the Director of Public Prosecutions has no authority to prefer an indictment against the accused for murder, as under section 71, Chapter 11, the accused could only have been properly committed for murder if the evidence establishes a case of murder.

He is alleging that the evidence as shown in the deposition does not disclose the offence of murder as there is no evidence of the cause of death. Therefore, the committal was improper.

He also contends that the only evidence upon which the committal was based was the evidence of an unsworn witness — Grace Alfred, and that under Cap 25 as amended by ordinance 29 of 1961 s. 5(b), no person can be convicted upon the uncorroborated and unsworn evidence of a child.

He argues that if there was no evidence to commit for murder, then the Director of Public Prosecutions has no jurisdiction to prefer an indictment, as Cap. 11, s. 113(1) reads—

“On receipt of the documents relating to the preliminary inquiry, the Director of Public Prosecutions, if he sees fit to do so, shall at any

## R. v. ALFRED

time institute those criminal proceedings in the court against the accused person which to him seem legal and proper.”

He submits that the words “if he sees fit to do so” and “which to him seem legal and proper” means that the Director of Public Prosecutions must exercise a judicial mind.

Counsel for the Crown in answer to the motion says that the court cannot go beyond the indictment and look at the evidence in the deposition to see if the evidence in the deposition supports the charge where a person has been indicted for the same offence for which he has been committed. He admits that where the person has been indicted for another offence other than that for which he has been committed the court can look at the deposition to see whether the evidence establishes the offence for which he has not been committed.

The question as to whether or not the court can look at the deposition to see whether the evidence establishes the charge has long been settled.

In the case of *R. v. The Chairman of London County Sessions ex parte Downes* (1953) 37 C.A.R., it was held that –

“A court is not entitled to quash an indictment on the ground that the evidence as disclosed in the depositions does not appear to it sufficient to justify a conviction on any count.”

At p. 152 the Lord Chief Justice stated —

“I know of no power in the court to quash because it is anticipated that the evidence will not support the charge. The only ground on which the court can examine the depositions before arrangement is to see where, if a count is included for which there has been no committal, the depositions or examination taken before a justice in the presence of the accused disclose that offence.”

This was followed in the case of *R. v. Mc Donnell* 3 W.L.R. (1965) p. 1138.

Counsel for the accused says that the procedure as to the indictment in England differs from that in this country and that the powers of the Director of Public Prosecutions to indict is derived from s. 113, Cap. 11. He argues that the words “which to him seem legal and proper” appearing in s. 113 of Cap. 11, must mean what is legal and proper.

In *R. v. Manning* (1959) L.R.B.G. 272, JUSTICE DATE said –

“Counsel’s main argument in this court was that the words “which to him seem legal and proper” appearing in s. 113 of Cap. 11 do not entitle the Attorney General to indict for anything he may think legal and proper, but only for what is legal and proper, which is a matter to be determined by the court; and that what is legal and proper has to be discovered from the other, provisions of the ordinance, due regard being paid to the provisions of the 1846 ordinance when those words first appeared in our laws.”

In answer to that question, JUSTICE DATE stated at page 279 –

“I have no fault to find with the general principles of law put forward by counsel for the accused but I am, after full and careful consideration of all the provisions of Cap. 11, and of their history, unable to agree with the narrow interpretation suggested by him for s. 113. Such an interpretation would be entirely out of character with the rest of the Ordinance, the general scheme of which clearly demonstrates an intention to confer upon the Attorney General of this colony wider powers than are enjoyed by the Attorney General of England in the bringing of persons to trial for indictable offences.”

Section 16, Chapter 11 states —

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

The arguments put forward by counsel for the accused seem impressive but in view of the above I have no doubt that once a magistrate has exercised his discretion in committing a person to stand trial for an offence and the Director of Public Prosecutions has indicted a person for the same offence of which he has been committed, the Director of Public Prosecution is acting within his jurisdiction and the court cannot go beyond the indictment and look at the evidence in the deposition to see if an offence has been established.

The motion is therefore dismissed.

*Motion to quash indictment dismissed.*

SYLVIA AGATHA LICORISH v. HER MAJESTY'S  
ATTORNEY-GENERAL OF GUYANA

[Court of Appeal (Bollers, C.J., Cummings and Crane, JJ.A).  
October 16, 1967.]

*Contract — Building contract — Tender by Housing Department — Contractor died before completion of work — Executrix prevented from finishing job — Action for damages.*

*Contract — Another contractor recommended to finish work — Letter from Housing Department repudiating contract — Whether new agreement or arrangement.*

## LICORISH v. ATTORNEY-GENERAL

*Contract — Whether personal or impersonal — Whether devolved on executrix.*

*Contract — Interpretation — Article 13A permitted assignment or subletting with consent — Whether such assignment included obligations or restricted to rights and benefits of deceased contractor.*

On December 10, 1966, one Harris, a building contractor, entered into a contract with the Commissioner of Housing to construct 50 houses in accordance with certain approved drawings and specifications. Unfortunately, Harris died, leaving the greater part of the work unfinished. The appellant, Harris' widow and executrix, later introduced another contractor, one Hopkinson, to the housing authorities as a capable successor to her late husband. According to her, Hopkinson was accepted for the job by the quantity surveyor but, before he could actually commence the work, she received a letter signed by the quantity surveyor on behalf of the Commissioner of Housing which, in effect, repudiated the contract. Some 5 years and 10 months later, she sued the Attorney-General as representative of the Government for damages for breach of contract, after obtaining the Governor's fiat as required by law.

Nowhere in the pleadings did the appellant specifically allege a new agreement or arrangement but, in their defence, the respondents denied that there was ever any new arrangement or agreement or that Hopkinson was ever approved by the quantity surveyor. The main contention of the respondents in their defence was that obligations in a building contract as substantial as this one were of a personal nature and therefore not assignable. The trial Judge agreed with this contention and made it quite clear that even if he were wrong and that the 'contract was non-personal then the evidence showed that the executrix and her agents were incapable of completing the contract both financially or otherwise and to have allowed her to carry on the contract would have been an irresponsible and hazardous exercise.

**HELD** — (Bollers, C.J., and Crane, J.A. (Ag.)), (Cummings, J.A. dissenting) that (i) the contract was a personal one since, from its terms and specifications, it was clear that Harris was selected because of his skill, integrity, qualifications, experience and financial responsibility, and not merely because he was a qualified building contractor who had submitted the lowest bid as was alleged by the executrix; (ii) the contract, being of a personal nature, terminated with the death of Harris, and, accordingly, was not capable of assignment; (iii) although Article 13A of the contract permitted assignment of sub-letting with consent (not to be unreasonable withheld), the word "assignment" only applied to Harris' rights and benefits since, in the strict and narrow sense of that word, there was an absolute prohibition against the assignment of his 'obligations' under the contract; (iv) the evidence did not indicate, as was submitted on behalf of the executrix, that there was a new arrangement between the parties whereby the appellant was to be permitted to complete the contract with the assistance of Hopkinson, but rather that there were merely preliminary negotiations as to whether a new contract would be entered into between the parties and there was, therefore, no new contract, and, indeed, no arrangement between the parties; (v) the learned trial Judge's finding that the appellant was incapable of completing the contract both financially and otherwise was correct.

Dictum of Cockburn, C.J., in *British Waggon Co. v. Lea* (6) (*infra*) embodying the principle upon which a personal contract is determined, approved and applied.

(*Per Crane, J.A. (Ag.)*) — although not ventilated either in the court below or in the Court of Appeal, it is a well-established principle that there is an implied condition in all contracts of personal service that during the lifetime of the party contracting, that he shall be alive to perform them and should he die then not only is his executor not liable to an action occasioned by his death but also that the executor cannot bring one to enforce the contract.

Dictum of Pollock, C.B., in *Hall v. Wright* (14) (*infra*) approved.

*Appeal dismissed – Order of Court below affirmed.*

*Cases referred to:*

- (1) Quick & Harris v. Ludborrow (1615) 3 Bulst. 29.
- (2) Tolhurst v. Associated Portland Cement Manufacturers (1903) A.C. 414; (1903) 2 K.B. 660.
- (3) Dr. Jaeger's Sanitary Woolen System Co. Ltd. v. Walker & Sons (1897) 77 L.T. 180.
- (4) Robson v. Drummond (1831) 2 B & Ad. 303.
- (5) Knight v. Burgess (1864) 33 L.J.Ch. 727.
- (6) British Waggon Company v. Lea (1880) 5 Q.B.D. 149.
- (7) Humble v. Hunter (1848) 2 Q.B. 310.
- (8) Arkansas Smelting Company v. Belden Company, 127 U.S., 379.
- (9) Nokes v. Doncaster Amalgamated Collieries Ltd, (1940) A.C. 1014.
- (10) Davies v. Collins (1945) 1 All E.R. 247.
- (11) R. v. Smith (1885) S.C.R. (Canada) 1.
- (12) Farrow v. Wilson, L.R. 4 C.P. 744.
- (13) Tamplin v. Anglo-Mexican Products Co. (1916) 2 A.C. 397.
- (14) Hall v. Wright (1858) E.B.& E. 746.

*J. T. Clarke, Q.C.*, for the appellant.

*M. S. H. Rahaman, Senior Crown Counsel*, for respondents.

BOLLERS, C.J.: This appeal arises out of the dismissal of an action for damages for breach of contract brought by the appellant in her capacity as Executrix of the estate of her husband, Felix Augustus Harris, deceased, against the Attorney General as representative of the Government of British Guiana (as it then was) whereby the appellant claimed that she had lost the profit of \$9,422 which the estate would have earned had she been permitted to complete the work under a Contract which had been awarded to the deceased in his lifetime.

On the evidence, the deceased who carried on the business of a Building Contractor under the name, style and firm of "FELIX A. HARRIS, CONSTRUCTION ESTABLISHMENT" submitted to the Commissioner of

## LICORISH v. ATTORNEY-GENERAL

Housing, of the Housing Department, a Tender for the construction of 50 houses, that is to say, 20 houses of Type 106 and 30 houses of Type 109, at Cane Grove, East Coast Demerara, in which he declared a statement, verified by affidavit, in regard to his ability to carry out the Contract, which included his available labour force and equipment, and the equipment which he proposed to order for the purpose of carrying out the work, his qualifications and experience as a Building Contractor and the details of buildings already completed by him on contract for the government and other persons. On the 10th December, 1956, the deceased was awarded the Contract with reference to the above Tender for the erection of the aforesaid 50 houses for a consideration of \$103,103.60 and on that date he signed a Contract in writing entitled "Articles of Agreement" made between the Commissioner of Housing of British Guiana, the employer, of the one part, and himself, the Contractor, of the other part, which contained several conditions. In pursuance of the said Contract, the deceased commenced construction of the houses in February 1957 and in the month of June of that year, when he became ill and was ordered to hospital, he nominated his father, Mr. J.B. Harris, a qualified Building Contractor, to carry on the work under the said Contract (which was then much behind schedule), authorising him to make all decisions and sign on his behalf all documents in relation to the Contract. No objection was made to this nomination and the nominee of the deceased carried on the work under the Contract in the absence of the deceased. In September 1957, however, the deceased died leaving the greater part of the work to be done under the contract unfinished. The work done and materials at the site at the time of his death were valued by the Housing and Planning Department at \$32,000 and the deceased had drawn up to the time of his death, in cash and materials supplied, over the sum of \$34,000. He then owed the Department the sum of \$3,245 which the appellant in her capacity as Executrix stated that she had no money to pay. Under the terms of the Contract the deceased was called upon to provide two guarantors and they were in fact a Dr. Denbow and a Mrs. Forde. In October 1957, there was a meeting of all the persons concerned under the Contract at the Crown Solicitor's office where the problem of the completion of the Contract was discussed. A contest arose between the appellant and the father of the deceased, a Mr. J. B. Harris, as to which of them should be permitted to complete the Contract and Dr. Denbow made it known that he would refuse to be a guarantor under the Contract if the Contract was to be completed by the appellant, who was then most anxious to complete the Contract so that she could pay off the other guarantor to whom the estate was indebted in the sum of \$5,500, which this guarantor had advanced to the deceased in his lifetime for the purpose of carrying out the work under the Contract. No decision was taken at this conference and it is the appellant's evidence that she obtained a Contractor who was prepared to complete the work and who produced his credentials to the Quantity Surveyor, Mr. Greenwood, who approved of him and told him that he would make some money on the job. It is the appellant's case that before the Contractor Hopkinson could commence work on the uncompleted work

under the Contract, she received a letter from the Quantity Surveyor, dated 1st November, 1957, in which he stated that he had been informed that the Contract had ended with the death of her husband and no rights or liabilities existed thereafter with respect to the Contract. The further point was made in the letter that the Department was not empowered to enter into contracts except by certain methods and in an undertaking of this size a contract must be approved by the Governor-in-Council after recommendations by the Tender Board. The Contract could not therefore, according to the letter, be awarded to the appellant except as the result of new tenders in competition. In that letter, the Quantity Surveyor informed the appellant that a check would be made and a final account submitted to the appellant when arrangements for the paying of the cash balance to the estate of the deceased would be made. It transpired, however, that when the final account was prepared it was found that the deceased was overpaid in the sum of \$786.29. On the 9th November, 1957, the appellant's Solicitor wrote the Commissioner of Housing stating that the letter of the first instant had been handed to him by his client for reply and informing the Commissioner that his client had instructed him that the Department had made a new agreement with her in her capacity as Executrix of the estate of the deceased on the 2nd October, 1957, whereby she was to complete the work remaining undone under the Contract. The allegation was then made that the letter of 1st November, 1957, signed by Mr. Greenwood, amounted to a breach of this new agreement which his client was demanding that she be allowed to perform failing which she would take such action as she might be advised. After this letter no action was taken by the appellant until the lapse of five years and ten months when the present proceedings were filed.

In the Statement of Claim it is important to observe that the appellant alleged that in the month of October 1957, in her capacity as Executrix of the estate of the Contractor, she had made every effort to complete the work under the Contract by employing another qualified Contractor, that is, a Mr. Harold Hopkinson, to do the work and that the government had approved of Hopkinson but before she could commence to complete the work under the Contract the Government had repudiated and determined the Contract and refused to allow her to complete the work. Nowhere in the pleadings did the plaintiff specifically allege a new agreement. Nevertheless, in the defence, the defendant denied that there was ever any new agreement with the appellant or that Hopkinson was ever approved of by the employer to carry out the contract. The main contention of the defendant in the defence was that the Contractor's obligations in a building contract as substantial as this were personal and could not be assigned. It was in these circumstances that the learned judge, after paying due regard to the nature of the Tender and the requirements and qualifications set out by the Bidder Contractor in the Tender form and particularly to clause 13A of the Contract, and to the evidence of the witnesses (who were government officials and who gave evidence on behalf of the defendant particularly on the general factors to be considered by a Tender Board in awarding such

## LICORISH v. ATTORNEY-GENERAL

Contracts) reached the conclusion that the Contract was a personal one and, as a result, it did not devolve to the personal representative but came to an end with the death of the Contractor. The learned judge stated in his judgment:

“Having considered all the factors leading up to the award of the contract and having considered the authorities cited by counsel, I formed the firm opinion that the contract in question was a personal one and did not devolve on the personal representative.”

The learned judge then went on to make it clear that even if he were wrong in this finding and the Contract was a non-personal one and it did pass to the personal representative, the evidence of the plaintiff showed that she and/or her agents were incapable of completing the Contract both financially or otherwise and to have allowed the plaintiff to carry on the contract would have been an irresponsible and hazardous exercise. He therefore found that the action failed on both limbs in law and in fact and proceeded to dismiss the action with costs to the defendant.

In this court, the learned counsel for the appellant argued two grounds of appeal — (a) and (b):

- (a) the learned trial judge erred in law in holding that the contract made between Felix Harris and the Government of British Guiana was one of a personal nature; and
- (b) the learned trial judge erred in fact and in law in holding that the contents, nature and requirements of the tender for the said contract showed it was of a personal nature.

In his arguments on these two grounds counsel urged that there was nothing in the Tender form or, indeed, in the Contract in writing signed by the deceased, which showed that the deceased was possessed of any special or outstanding skill as a result of which the employer, that is, the Housing and Planning Department, could have insisted that the deceased and the deceased alone perform the Contract, and that if the appellant could have produced another Contractor of equal ability and integrity to that of the deceased, acceptable to the employer, no injustice would be done, and under condition 13A of the Contract this Contract was assignable and, therefore, not one of a personal character. His submission was that a personal contract is one which would mean that no one else but the particular Contractor, in this case the deceased Harris, could have performed the Contract. In support of this contention, counsel cited *Quick and Harris v. Ludborough* (1615) 3 Bulst. 29 at p. 30 and *Tolhurst v. Associated Portland Cement Manufacturers* (1903) A.C. 414 and (1903) 2 K.B. 660; *Dr. Jaeger's Sanitary Woollen System Co. Ltd. v. Walker & Sons* (1897) 77 L.T. 180. His further submission was that assuming but not admitting that the Contract was of a non-personal nature and did not devolve on the personal representative of the deceased on the death of the deceased, the evidence disclosed that a new arrangement had been entered into between

the appellant in her capacity as Executrix whereby it was agreed between the parties that she, with the assistance of the Contractor, should complete the work under the Contract.

Counsel for the respondent, on the other hand, submitted that this Contract was essentially one of a personal nature in that reliance by the employer was placed on the skill, integrity, experience, competency and financial responsibility of the Contractor at the time the Contract was entered into and for the purpose of discovering whether this was done the court should consider not only the Contract in writing but all of the circumstances leading up to the execution of the said Contract. He stressed that under the terms and conditions of the Contract it was necessary to have an Architect and a Quantity Surveyor which, along with the sum involved, that is, over \$100,000, showed that this was a Contract of some magnitude, the result of which must be that the employer must of necessity have placed some reliance on the skill, integrity and financial responsibility of the particular Contractor in awarding him the Contract. It must follow, then, that such a contract would be a personal contract. In reply to the second point counsel urged that all the evidence showed was that the parties contemplated the execution of a new contract which never materialised.

In considering the question of whether this Contract was personal or non-personal, one of the earliest authorities in which this question fell to be decided was *Robson v. Drummond* (1831) 2 B. & Ad. 303, in which R., a coachmaker, contracted to let D. a carriage for five years and keep it in repair and to paint it once during that term. At the time S. was an undisclosed partner with R. but D. only knew of and contracted with R. Three years afterwards D. was informed that R. had retired from business and that S., his successor, would do the repairs in future. D. refused to deal with anyone but R. and returned the carriage. It was held that he was entitled to do so. In this case, LORD TENTERDEN held that the defendant could not be sued on the contract on the ground that the defendant might have been induced to enter into the contract by reason of the personal confidence which he reposed in S. and therefore might have agreed to pay money in advance, for which reason the defendant had a right to object to its being performed by any other person. The other two judges who sat in the appeal added the ground that the defendant had a right to the personal services of Sharp and to the benefit of his judgment and taste to the end of the contract. It might very well have been thought that it might not have mattered to the defendant who repaired and painted the carriage, yet the court concluded that it was a personal contract because the defendant was entitled to receive the personal taste of S. in painting the vehicle. Thirty-three years later *Knight v. Burgess* (1864) 33 L.J. Ch. 727 was decided where a builder contracted to build a chapel and before completion became financially embarrassed and discharged his workman, and two days after notice had been given under the termination clause assigned all his assets to trustees for the benefit of his creditors. The trustees corresponded with his employers who

## LICORISH v. ATTORNEY-GENERAL

eventually insisted on the forfeiture. The trustees asked for a declaration that they were entitled to the benefit of the contract and to complete the work themselves. It was held that the contract was personal to the Contractor and the trustees could not be substituted for him by any assignment, voluntary or otherwise. STUART, V.C. examined the contract and stated that what was to be considered was the right of those who were called the contractors and who had disappeared from the scene to appoint any other person to set out the work and perform all those personal obligations which they had undertaken. He referred to certain stipulations which could only be performed by the contractors themselves, for example, that the contractors were to set out the works and to be responsible for any errors in the same and he commented that it seemed to him that no other persons could set out the works.

In *British Waggon Company v. Lea* (1880) 5 Q.B.D. 149 where the contract was held not to be a personal one, the Waggon Company let to the defendant a number of railway waggons for a term of years and agreed to keep them in repairs. The company was dissolved and the contract assigned to another waggon company who were ready and willing to repair the waggons. It was held that the repair of the waggons by the company to whom the contract was assigned was a sufficient performance by the plaintiffs of their agreement to repair. COCKBURN, C.J. stated that "the repairs were a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute and the defendant, in entering into the contract, could not be supposed to have attached any importance as to whether the works were done by the company or by anyone with whom the company might enter into a subcontract to do the work." In this case, COCKBURN, C.J. made it clear that the Court entirely concurred in the principle on which the decision in *Robson v. Drummond* rested, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualifications, the inability or unwillingness of the parties so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract or the performance of it by the other party and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which consequently, cannot in its absence be enforced against an unwilling party. This learned judge, however, considered that the principle appeared to the court to be inapplicable to the circumstances of the case that was then being considered, as it could not be supposed that the defendants attached any importance as to whether the repairs were done by the company or by anyone else with whom the company had entered into a subsidiary contract to do the work.

This dictum of COCKBURN, C.J. embodying the principle on which a personal contract is determined remains good law up to the present day and I must now examine the circumstances leading up to the contract and the contract in writing itself in order to determine whether the contract in this case was one of a personal nature or not. In paragraph 5 of the Instructions to Bidders it is stated that each bid must be accompanied by a statement of the bidder's financial position and equipment available for the work contemplated and that the department reserves the right to take such steps as it deems necessary to determine the ability of the bidder to perform the work and the bidder must provide such information as may be required for this purpose. The right to the department is then reserved to reject any bid where an investigation of the available evidence does not satisfy the department that the bidder is qualified to carry out the work contemplated. This clause, then, clearly demonstrates that the bidder's financial position and his possession of the necessary equipment is an important consideration in determining whether his bid will be accepted by the Tender Board or not, and must mean that reliance will be placed by the Board upon the bidder's ability, financial and otherwise, to carry out the work contemplated by the Contract.

Clause 9 states that the Contract will be awarded to the responsible bidder submitting the lowest bid providing his bid is reasonable. I interpret the words "responsible bidder" in that context to mean a person who by reason of his professional skill, ability, qualifications and financial competence is able to carry out the work under the contract. Indeed, under Clause 9 the right is reserved to the department to consider as unqualified a bidder who is unable to satisfy the department as to his ability to carry out the work contemplated.

In Clause 10 the co-operation of the successful bidder with the department is sought in a break-down of his bid prices in order to show the division of costs, which must mean that the Tender Board must have some confidence in the person who is selected as contractor to co-operate with them for this purpose.

Under Clause 11 the successful bidder is called upon to furnish a performance bond or security to the value of 10% of the contract figure or a maximum of \$10,000 as security for satisfactory performance of the contract and for the payment of all persons, firms, etc., to whom he may become indebted for materials, tools, equipment used by him in the performance of the work. In this regard he is required to find two guarantors who would be prepared to bind themselves with the bidder to execute faithful performance of the work under the contract or to lodge sufficient security in favour of the Housing and Planning Department against faithful performance of the contract. It is therefore perfectly clear to me that under this Clause of the instructions the Tender Board must have considered the financial position of the successful bidder in awarding him the Contract and must have considered the integrity of the particular person as to whether

## LICORISH v. ATTORNEY-GENERAL

or not he would be willing to pay off persons and firms for materials and equipment purchased by him in the performance of the work under the Contract.

To my mind Clause 13 deals with the professional knowledge of building of the successful bidder who is to be awarded the Contract when it states that the bidder is advised to visit the site prior to the bidding as no claim will be entertained on the grounds of ignorance of the conditions under which the work is to be executed.

Finally, in Clause 14, the bidder is reminded that time is of the essence of the contract and will be considered in making awards. This must mean that reliance on the professional ability of the successful bidder to complete the work in the time to be stipulated under the Contract must be considered by the Tender Board in making the award.

Under the heading "Preliminaries" the instructions state under Clauses 12 to 21 that the Contractor is to maintain and protect public property and that of the drainage, electricity, highway, water and similar undertakings and to make good or pay for the reinstatement of all damages thereto. He is to keep all persons employed by him under his control and within the boundaries of the site and will be responsible for the care of the works generally until completion. He is to provide sufficient watchmen both night and day from the time the work is commenced until final completion and acceptance. He is to protect the works from damage during inclement weather. He is to provide a sufficient number of men for the complete execution of the works within the contract period. In the event of the Architect becoming dissatisfied because of incompetence or insubordination of any of his employees he is to discharge them and substitute others instead and he is to provide hoists, ladders, scaffolding, staging, tools and other plant, and he is to provide transport for labour and materials.

These Clauses in the preliminaries to the Contract must, of necessity, indicate that the Tender Board would rely on the personal character and responsibility of the Contractor to carry out these directions.

When the Contract in writing which was signed by the deceased Contractor is examined, it will be seen at Article 3(a) that the Contractor is called upon to pay and indemnify the employer against any fees or charges demandable under any ordinance, Regulation or By-law in respect of the works, provided that the said fees and charges, if not expressly provided for in the specification, shall be added to the contract sum.

Under Article 11, the Contractor is to be responsible for loss or damage to unfixed materials and goods which are intended for, and placed on or adjacent to the works, which shall be the property of the employer.

Under Article 13B (a) (i) the Contractor is to pay rates of wages and observe hours and conditions of labour not less favourable than those

established for the trade or industry in the district where the work is carried out by machinery of negotiation or arbitration.

Under Article 2, the Contractor, in the absence of any rates of wages, hours or conditions of labour so established, is to pay rates of wages and observe hours and conditions of labour which are not less favourable than the general level of those observed by other employers whose general circumstances in the trade or industry in which the Contractor is engaged are similar.

Under Article 14(a) the Contractor is made solely liable for and shall indemnify the employer in respect of any liability, loss, claim, etc., arising under any Statute or at common law in respect of personal injury to, or the death of any person arising out of or in the course of, or caused by the execution of the works, unless due to any act or neglect of the employer.

Under Article 14(b) the Contractor is made liable for and called upon to indemnify the employer against any loss or liability, claim, etc., in respect of injury or damage to property, in so far as such injury or damage arises out of or in the course of the execution of the works provided always that the same is due to any negligence, omission or default of the Contractor, his servants or agents or of any sub-contractor.

Under Article 15(b) the Contractor is called upon in the joint names of the employer and himself to insure against loss and damage by fire for the full value thereof of all work executed and all unfixed material and goods upon the site.

These conditions of the Contract make it clear to me that the financial position and ability of the Contractor would have to be strongly considered by the Housing Department when the award is made, for in the event of loss arising under the various clauses of the Contract which I have cited, the Contractor may very well be made liable in respect of large sums of money. If the Contractor is to pay general level wages and observe hours and conditions of labour established in the trade or industry, this must, of necessity, call for integrity on the part of the particular individual who is to be awarded the Contract.

Under Article 1 of the Contract, if the Contractor finds any discrepancy in or divergence between the contract drawings and/or specifications he is to refer the same in writing to the Architect and to apply in writing for any necessary instructions from the Architect in relation thereto. In my view, for the Contractor to find such a discrepancy or divergence he must be possessed of the necessary skill in the building trade.

Under Article 3(b) the Contractor is permitted to make variations from the contract drawings or specifications providing he gives notice in writing to the Architect.

## LICORISH v. ATTORNEY-GENERAL

Under Article 6 the Contractor is to constantly keep on the works a competent general foreman and any instructions given to the foreman by the Architect shall be deemed to be given to the Contractor.

Under Article 17 if the Contractor fails to complete the works by the date stated in the conditions of the Contract and the Architect certifies that the work ought reasonably to have been completed then the Contractor is to pay to the employer a sum calculated at the rate stated in the appendix as Liquidated or Ascertained Damages. All of this indicates that the Contractor must be possessed of the particular skill in order to complete the work under the Contract within the time stated and reliance must have been placed upon this skill when the deceased was awarded the Contract.

There are many Clauses in the Contract which demonstrate that the skill and integrity, qualification and ability, financial and otherwise, of the deceased must have been considered and great reliance placed upon these considerations when the Contract was awarded to him, and I must reject the submission by counsel for the appellant that under the Contract the Contractor was a mere dummy under the constant supervision of the Architect.

Under Article 27 it is stipulated that where any dispute or difference arises between the employer or the Architect and the Contractor, either during the progress or after the completion or abandonment of the works, as to the construction of the Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by the Contract to the discretion of the Architect), then either party could refer the matter to arbitration and final decision by the Attorney General of Guyana.

Under Article 3(b) I have already pointed out the Contractor was free to make variations on the contract drawings or specifications and these Clauses indicate therefore that the Contractor enjoyed freedom and independence in the construction of the works save and except that under Clause 1 he was subjected to the general supervision and direction of the Architect.

When I consider, therefore, the instructions to the bidder and the Contract in writing and the magnitude of the operation, I must arrive at the irresistible conclusion that this Contract was one which involved personal service and was one of a personal nature.

In respect of Article 13(a) which states that the Contractor shall not without the written consent of the Architect assign this Contract or sublet any portion of the works provided that such consent shall not be unreasonably withheld to the prejudice of the Contractor, it is submitted by counsel for the appellant that the Contractor could have assigned the Contract providing he obtained the consent of the Architect which shall not be unreasonably withheld. If, therefore, the Contractor, produced an individual possessed of all the necessary qualifications the Architect would

have to consent otherwise the court would order him to consent and in that situation the Contract would cease to be a personal one.

I do not construe this condition in that way. What the condition says is that the Contractor shall not assign without the written consent of the Architect which consent shall not be unreasonably withheld. This then is an express prohibition against assigning without consent which the learned author of HUDSON'S BUILDING AND ENGINEERING CONTRACTS, 9th Edition at p. 558, states "appears to be aimed at preventing vicarious performance rather than true assignment." This condition is taken from the standard form of RIBA contract and in BUTTERWORTH'S ENCYCLOPAEDIA OF FORMS AND PRECEDENTS, 4th Edition, Vol. 3 at p. 268, it is stated that it is submitted that in the absence of consent the Clause prevents absolutely assignment of the contractor's burden but not necessarily of the contractor's benefit under the contract. Assignment in its strict sense means the transfer of contractual rights to a stranger of the original contract, whether by operation of law or by an act of the person originally entitled to those rights, so as to enable the transferee to sue upon the contract himself. In other words, the assignor or transferor of the contractual rights drops out of the transaction and the third party takes over his contractual rights for which he can sue in his own name. While, however, an original party to a building contract can assign his contractual rights or benefit under the contract to another, he cannot assign or transfer his liabilities or burden under the contract. As the learned author of HUDSON'S at p. 555 states:

"English law does not recognise or permit the assignment of contractual liabilities so as to extinguish the liability of the assignor without the consent of the other party to the contract. In other words there must be a novation if the burden of a contract is sought to be shifted on to another person."

Thus in *Tolhurst v. Associated Portland Cement Manufacturers* (1903) 2 K.B. 600, COLLINS, M.R. said:

"It is, I think, quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to somebody else, this can only be brought about by the consent of all three, and involves the release of the original debtor, see *Liversidge v. Broadbent* (1859) 4 H. & N. 603."

The learned judge then went on to explain that the rights or the benefit under a contract could be assigned in its strict sense when he stated:

"On the other hand, it is equally clear that the benefit of a contract can be assigned and wherever the consideration has been executed and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to

## LICORISH v. ATTORNEY-GENERAL

enforce it can be assigned and can be put in suit by the assignee in his own name after notice. . . . . and the rule of the common law that the action must be brought in the name of the assignor shows that it did not regard such a transaction as equivalent to a novation. The right seems rather to be based on the equitable principle that it will be against conscience on the part of the person on whom the obligation lay to discharge it to the original contractee after he had notice that the latter had assigned the benefit to another person.”

The learned judge then explained that the basis for this special right of ignoring altogether the consent of the person upon whom the obligation lies to the substitution of one person for another as the recipient for the benefit would seem in principle in common justice to be confined to those cases where it can make a difference to the person on whom the obligation lies to which of two persons he is to discharge it, and it followed that the right of dropping the original contractee out of the discussion must be limited to those cases only in which the contract, that is, the benefit of all that remains to be done under it, has been assigned to it in this sense only that contracts can be said in strictness to be assigned. The law is clear, therefore, that whereas there can be a strict assignment of a benefit under a contract there can be no such assignment or transfer of liabilities known as the burden under a contract. And even though the benefit of a contract is assignable it must be limited to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it. The M.R. pointed out that there was another class of contracts where there were mutual obligations still to be enforced and it would be impossible to say that the whole consideration has been executed, and contracts of this class could not be assigned at all in the sense of discharging the original contractee and creating privity or *quasi* privity with a substituted person. The original contractee must be a party to suits on these contracts and he cannot enforce the contract without showing ability on his part to perform the conditions performable by him under the contract and that is the reason why contracts involving special qualifications in the contractor are said somewhat loosely not to be assignable.

The essential fact to appreciate, therefore, in the case of delegated performance of obligations under a contract, is that the debtor, who has assigned his liability to another, is not relieved from his obligation to ensure due performance of his contract with the contractee. The debtor still remains liable to the contractee and the third party cannot be sued by the contractee for non-performance or for defective performance. In other words the so-called assignment of an obligation is not an assignment in the true sense of the term since it does not result in the substitution of one debtor for another – see CHESHIRE & FIFOOT, LAW OF CONTRACT, 5th Edition at p. 435.

As COLLINS, M.R. in the Tolhurst case, after giving the reason why contracts involving special personal qualifications in the contractor are perhaps said, somewhat loosely, not to be assignable, stated:

“What is meant is, not that contracts involving obligations not special and personal can be assigned in the full sense of shifting the burden of the obligation on to a substituted contractor any more than where it is special and personal, but that in the first case the assignor may rely upon the act of another as performance by himself, whereas in the second case he cannot.”

It must follow, therefore, that in the instant case the Contract being a personal one, being one for personal services, that the burden of completing the work could not be assigned in its strict sense to another although the law would permit the transfer of obligations under a contract to another provided that the contract was not one of a personal nature. DR. MARSHALL sums it up in his book on the ASSIGNMENT OF CHOSSES IN ACTION at page 40 where he states “the too personal objection is no longer a reason for invalidating every assignment, though it is still a good reason for invalidating assignments which do in fact transgress the sanctity of a personal relation.” In the instant case there is the other aspect as pointed out by the learned M.R. that there were still mutual obligations to be enforced under the contract as it remained for the contractor to complete the work under the supervision of the Architect and the employer had to advance money from time to time after portions of the work were completed in which case such a contract could not be assigned. As was laid down by LORD DENMAN, C.J., many years ago in *Humble v. Hunter* (1848) 2 Q.B. 310 and cited by GRAY J. in the case of *Arkansas Smelting Company v. Belden Company*, 127 U.S. 379, in a judgment of the Supreme Court of the United States: “You have a right to the benefit you contemplate from the character, credit and substance of the party with whom you contract.”

I therefore construe the words of Article 13A to mean an absolute prohibition against assignment of contractual rights or benefit under the Contract without the consent of the employer which consent shall not be unreasonably withheld, the word “assignment” there being used in its strict sense and having nothing to do with the permission of the vicarious performance of the work to be completed under the contract by another which, of course, is dealt with by the prohibition against subletting. The contract then remains both a personal contract and one in which there remained mutual obligations to be enforced by both parties where the consideration for which had not been fully executed. To adopt the language of COLLINS, M.R., in Tolhurst’s case, the appellant in this case could not vouch the capacity of the Contractor Hopkinson to perform that which the other party to the Contract might however unreasonably insist was what alone he undertook to pay for, namely, work to be executed by the party himself. In the Tolhurst case, T. contracted to sell to I. Company 750 tons of chalk per week for 50 years at a certain price and so much more (if any) as the company should require for the whole of the manufacture of cement upon their land near the quarries. I. Company afterwards assigned the contract and sold the undertaking, land, etc. to A. Company. T. claimed to be free from the contract. When the case reached the House of Lords the learned

## LICORISH v. ATTORNEY-GENERAL

Law Lords held that the contract was not essentially personal in its nature and the reason was that the contract between T. and I. Company must be read as though it contained the words "and their assigns." As LORD MACNAUGHTON, pointed out, it was merely a question of interpretation which being solved gave rise to no difficult legal question. The basis for the decision then was that there was nothing essentially personal in a contract to supply chalk for the purpose of making cement. The circumstances of the Tolhurst case were quite different to those of the instant case which, I have endeavoured to point out, depended upon the skill, ability, financial or otherwise, integrity and qualification and indeed the whole personality of the Contractor and fell squarely within the celebrated principle as pronounced by COCKBURN, C J. in *British Waggon Company v. Lea*.

The case of *Jagger's Sanitary Woollen System Co. Ltd. v. Walker & Sons* (1897) 77 L.T. 180 does not assist counsel for the appellant in any way but is an authority for the argument against him as the dictum of COCKBURN, C.J., in *British Waggon Company v. Lea* was relied upon and cited when the Court held that the particular contract was a personal one. The facts of the case were that an agreement dated April 1, 1891, was entered into between a company and T.W. & R. trading as R.W. & Sons, Manufacturers, which provided, among other things, that the company should purchase from the manufacturers and from no other person or firm all the goods therein specified which the company might require over and above orders to the amount of a certain sum per annum reserved for another firm; that the company's orders should be placed with the manufacturers, and that so long as the orders should amount to a specified number of articles per annum the manufacturers should not sell the goods made upon the company's standard qualities to any person or firm other than the company nor manufacture goods resembling the company's standard qualities and that the manufacturers should not use the Company's Trade Mark for any goods other than those destined for the company.

It was held by KEKIWICH, J. and affirmed by the Court of Appeal that this was an agreement which required on the part of the manufacturers a certain amount of skill, knowledge and supervision in its performance, hence it was of a personal nature and therefore non-assignable and was determined on the option of the company on the retirement of R. KEKIWICH J. arrived at the conclusion that the contract was of a personal nature on the ground that after an examination of the contract that the terms of it appeared to import confidence between the two parties and there were covenants by the manufacturers which necessarily implied that there was a trust reposed by the company in them that they would produce the goods in a certain way and would not do certain things which would be to the detriment of the company. It seemed, therefore, to him, impossible to say that the company entering into such a contract and insisting upon these provisions must be understood to have agreed with the parties to the contract that so long as the provisions were performed they cared not by whom

they were performed nor with whom they made these stipulations, nor whether the benefit of them might be assigned to any third person without the company having a chance of saying if the assignment was or was not satisfactory to them. Confidence therefore seemed to the learned judge to be apparent on the face of the agreement, hence it was a personal agreement.

LINDLEY, L.J., agreed that it was a personal contract on the ground that it required for its performance personal superintendence on the part of the manufacturers and personal responsibility as regards the financial operations. The head-note of the report is really taken from the judgment of LOPES, L.J., wherein he stated that he thought it was an agreement which required on the part of the manufacturers a certain amount of skill, knowledge and supervision which could not be performed by everyone and therefore could not be assigned. When this learned judge spoke of an agreement which could not be performed by everyone what he was saying there was that the agreement could not be performed by anyone who did not have the necessary skill on which the other party to the contract had placed reliance or, as KEKIWICH J. called it, confidence, when entering into the contract. It is worthy of note that LINDLEY, L.J. spoke of personal superintendence and in the instant case under the preliminaries and various Articles of the Contract it is to be implied that the Contractor was called upon to exercise superintendence over the execution of the works.

It is submitted that when these learned judges spoke of the non-assignability of such a contract they were using the word assignment not in its strict sense but rather in its loose sense, meaning the transfer of obligations under the contract to another where English law permits the vicarious performance of the burden of a contract providing it is not of a personal nature.

The mere fact that under Article 13B (f) of the Contract there is a condition that the Contractor should be responsible for the observance of Clause 13B by subcontractors employed in the execution of the Contract does not detract from the Contract being one of a personal nature. Article 21 also gives the right to the employer to select and nominate contractors. Article 13A imposes an absolute prohibition against subletting any portion of the works without consent (which shall not be unreasonably withheld) so there may then be a sub-contracting where consent has been obtained. The presence of this condition would appear, therefore, to authorise the subcontracting by the contractor for certain portions of the work, and HUDSON'S BUILDING AND ENGINEERING CONTRACTS, 9th Edition, p. 557, states that in the normal building work certain parts of the work, such as plumbing and plastering are nearly always carried out by sub-contractors and it is suggested that vicarious performance of these parts of the work would not be objectionable. Thus in *British Waggon Company v. Lea* the court said:

“Much work is contracted for which it is known can only be executed by means of sub-contracts, much is contracted for as to which

## LICORISH v. ATTORNEY-GENERAL

it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by someone on his behalf. In all these cases the maxim *qui facit per alium facit per se* applies.”

While therefore a considerable degree of subcontracting is permissible, there may be obligations particularly in larger contracts which a builder cannot transfer, depending on the circumstances surrounding the selection of the builder and the particular contract in question. I have endeavoured to show throughout this judgment that the circumstances surrounding the selection of the contractor and the Contract itself all indicated that the award of the Contract was dependent upon the particular qualification and ability of the individual. VISCOUNT SIMON, L.C. in *Nokes v. Doncaster Amalgamated Collieries Ltd.* (1940) A.C. 1014, pointed out that the real point of the decision in *British Waggon Company v. Lea* was that the contract which the Parkgate company had made with Lea for the repair of certain waggons did not call for the repairs being necessarily effected by the Parkgate company itself but could be adequately performed by the Parkgate company arranging with British Waggon Company that the latter should execute the repairs. Such a result did not depend on assignment of contract at all but on the view that the contract of repair was duly discharged by Parkgate company by getting the repairs satisfactorily effected by a third party. In other words, the contract bound the Parkgate company to produce a result not necessarily by its own effort, but if it preferred by vicarious performance through a subcontractor or otherwise. In the instant case from the terms of the Contract the deceased Contractor was not employed to produce a result not necessarily by his own efforts but was employed because of his personal qualifications to carry out the work under the Contract, under the supervision of the Architect, though for obvious reasons he could not do all the work himself so was authorised under the Contract to engage subcontractors in respect of portions of the work with the consent of the employer. The “too personal” objection prevented the vicarious performance of the work by another. In the words of LORD GREENE in *Davies v. Collins* (1945) 1 A.E.R. 247. 250:

“Whether or not in any given contract performance can properly be carried out by the employment of a sub-contractor, must depend on the proper inference to be drawn from the contract itself, the subject-matter of it and other material surrounding circumstances.”

The Contract then being one of a personal nature terminated with the death of the Contractor, as is stated by HALSBURY 3rd Edition, Vol. 16 at para. 935, p. 467, on the death of a building contractor before he has completed his contract his personal representatives are bound to perform the contract unless the contractor was employed owing to some special qualification and are entitled to recover payment — *Quick & Harris v. Ludborrow* (1615) 3 Bulst. 29 at p. 30. In para. 3 of the Statement of Claim the appellant pleaded that the Contractor was awarded the Contract because he was a qualified Building Contractor who had submitted the lowest

bid and he was not selected by reason of any particular or individual skill, competency or other personal qualification peculiar to or possessed by him alone. The defendant, on the other hand, in his defence at para. 3, pleaded categorically that the Contractor was awarded the Contract after the employer was satisfied that the Contractor possessed the necessary ability to carry out a contract of this magnitude. On the state of the pleadings, therefore, the onus lay on the appellant (plaintiff) to show that this was not a contract of a personal nature and this the appellant failed to do.

I turn now to consider the second point raised by counsel for the appellant and that was that the evidence clearly indicated that there had not been a new Contract between the appellant in her capacity as Executrix and the Housing and Planning Department but a new arrangement between the parties whereby they had agreed that the appellant would be permitted to complete the work under the Contract through the qualified Contractor Hopkinson who would take the place of the deceased in carrying out the work remaining to be done under the Contract. Counsel submitted that when one considered the unrebutted evidence of the appellant and her witnesses Forde, the guarantor, and Hopkinson, the Contractor, and the letter of the 10th October, 1957, written by the Quantity Surveyor for the Acting Commissioner of Housing to the appellant, there was a clear indication that the parties had entered into an arrangement whereby the appellant would complete the work through the Contractor Hopkinson who had been approved of by the officials of the Housing Department — a department of the government. In her evidence the appellant stated that after the conference in the Crown Solicitor's office late in October 1957, she got a Contractor, a Mr. Hopkinson, and took him to Mr. Barrow who asked him for his credentials. Mr. Hopkinson then spoke to Mr. Greenwood, the Quantity Surveyor, and Mr. Greenwood approved of the contract and contractor and told Hopkinson that he would make some money on the job. She then received the letter (Ex. "B") from Mr. Greenwood in which he enclosed a statement of the financial position of the contract at 18th September, 1957, and then said "you will note that when the work is recommenced under the new Contract the retention will not be covered by the balance in hand and work to the value of \$350-59 will have to be done before you can begin to earn any monies and before any payment of any kind can be made."

Mrs. Forde in her evidence spoke of Mr. Barrow, the Commissioner of Housing, informing the appellant and herself that they were to get a Contractor if the appellant were to carry on with the Contract. She then obtained the services of Mr. Hopkinson, the Contractor, and took him to Mr. Barrow who referred them to Mr. Greenwood. This witness makes no mention of the appellant being present at this interview, but states that Mr. Greenwood quizzed Mr. Hopkinson and was then satisfied that Mr. Hopkinson was all right. According to her, Mr. Greenwood told Mr. Hopkinson that Hopkinson would hear from him. The witness, Hopkinson, however, stated in evidence that he was taken to Mr. Barrow

## LICORISH v. ATTORNEY-GENERAL

by the appellant and Mrs. Forde, and he was then referred to Mr. Greenwood who quizzed him about his ability. He does not make it clear that either the appellant or Mrs. Forde were present at this interview in which case their evidence as to what took place at this interview might well have been hearsay. Hopkinson went on to say that he showed Mr. Greenwood two Contracts which he had completed for Government and Mr. Greenwood was satisfied and told him that he would make some money on the job and he would hear from him later. I interpret this portion of his evidence to mean that Mr. Greenwood was satisfied with his former experience.

On this nebulous evidence this court is asked to say that there was a new arrangement between the parties whereby the appellant was to be permitted to complete the work under the Contract through the assistance of a Contractor, Hopkinson. I have no hesitation in rejecting the submission as all the evidence indicates is that both parties contemplated that there would be a new Contract between the appellant and the Housing Department whereby she would complete the work if the Contractor Hopkinson were approved of by the government, having passed through the formalities of the Tender Board. Indeed, Mr. Greenwood's letter of the 10th October clearly indicates that there would be a new Contract, and it may well be that he was prepared to approve of and recommend Hopkinson to the Tender Board as a suitably qualified person to carry out the work as he had told Hopkinson that he would make some money on the job and would hear from him later on. I am of the view that the evidence merely indicates that there were preliminary negotiations as to whether or not a new Contract would be entered into between the parties. There was therefore no new Contract between the parties and, indeed, no arrangement between them. The learned judge was correct therefore in finding that there was no new Contract and no satisfactory evidence that Hopkinson was ever approved of by the Department to carry on the work on behalf of the appellant. Furthermore, the learned judge was correct in finding that the appellant was incapable of completing the Contract both financially and otherwise, in the circumstances, when she admitted that she was totally ignorant of the state of the work which remained to be done and, indeed, of all contracting work, and that she had no finance at all and owed \$5,500 to the guarantor and could not pay off the government the sum in which the estate of her deceased husband was indebted, and was under the misconception that the function of a guarantor was to finance the operation; and I agree with his observation that she failed to show that she was in a position ready, willing and able to complete the work under the Contract, and to have allowed her to carry on the Contract would have been an irresponsible and hazardous exercise.

I have reached the conclusion, therefore, that the Contract under consideration was one of a personal nature and did not devolve onto the personal representative of the deceased Contractor and while criticism of the failure of the judge to set out in his judgment the principle to which he addressed his mind in making this finding may be justifiable, he did say that

he considered the factors leading up to the award of the Contract and the authorities cited in arriving at the conclusion that the Contract was a personal one, and it must be assumed, therefore, that he considered the principle enunciated by COCKBURN, C.J. in his dictum in *British Waggon Company v. Lea*. I would therefore dismiss the appeal and affirm the order of the judge with costs to the respondent both in this court and in the court below to be taxed certified fit for counsel.

CUMMINGS, J.A.: The appellant is the widow and executrix of Felix Augustus Harris (deceased) – hereinafter in this judgment referred to as “the deceased” – who died on 12th September, 1957. Probate of his will was granted by the Supreme Court on the 6th day of May, 1958. Prior to his death the deceased, a building contractor, entered into a contract with the Commissioner of Housing of Guyana (then British Guiana) on the 10th day of December, 1956 to construct 50 houses at Cane Grove, East Coast, Demerara, in accordance with certain drawings and a specification prepared by or under the supervision of an architect. He commenced the work but died before completing it.

The appellant made arrangements for the carrying on of the work, but before she could commence she received a letter from the Commissioner of Housing in the following terms:

“HOUSING & PLANNING DEPARTMENT,  
Georgetown, Demerara,  
British Guiana.

Ref. No. 35/26/35.

1st November, 1957.

Dear Madam,

Contract 34 of the late Felix Harris.

I have been informed that the above contract ended with the death of your husband and no rights or liabilities existed thereafter in respect of the contract.

2. The Central Housing and Planning Authority is not empowered to enter into contracts except by certain methods. In an undertaking of this size, a contract must be approved by the Governor in Council after recommendations by the Tender Board. The contract could not therefore be awarded to you except as the result of new tenders in competition.

3. I am accordingly asking you to remove the plant, being the property of your late husband, from the site within seven days from receipt of this letter. Mr. Fung, the Clerk of Works, will check these items which you remove. Under no circumstances may construction materials be removed from the site.

## LICORISH v. ATTORNEY-GENERAL

4. A complete final account will be sent you in the course of a few days when arrangement for the paying of the cash balance to the estate of your husband may be paid.

Yours faithfully,  
K. A. GREENWOOD, A.R.I.C.S.,  
Quantity Surveyor,  
for Acting Commissioner of Housing.

Mrs. Felix Harris,  
31 Alexander Street,  
Kitty.”

She then brought an action in the High Court claiming damages in the sum of \$9,422 for breach of the said contract.

Two questions arose for the consideration of the learned trial judge:

1. Was the contract a personal one which came to an end with the death of the deceased, or was it not personal and consequently devolved on the executrix?
2. Did the Commissioner for Housing make a new arrangement with the appellants for the carrying on of the contract?

The learned trial judge in his judgment said:

“I had regard too to Clause 13A of the contract (Ex. “A1”). I considered the evidence of the witnesses Bernard Oppenshaw, Oscar Garnett and H. McGregor Reid, particularly on the general factors to be considered by a Tender Board in awarding such contracts. A bidder (or contractor) had to be a responsible person. Having considered all the factors leading up to the award of the contract and having considered the authorities cited by counsel, I formed the firm opinion that the contract in question was a personal one and did not devolve on the personal representative.

“Assuming I was wrong in so finding — I found also on the second limb on the facts of the case itself that even if the contract was non-personal and it did pass to the personal representative — the evidence of the plaintiff herself showed that she and/or her agents were incapable of completing the contract both financially and otherwise. To have allowed the plaintiff to carry on the contract would have been an irresponsible and hazardous exercise.

“The plaintiff was induced to bring this action by Mrs. Forde who in her own words stated *inter alia*:

‘After the meeting the plaintiff and I decided to take legal proceedings . . . . The proceeds were to satisfy my money due to me and so I am hoping that at the end of this action I would be paid. I have financed this action with the hope of getting my money back.’

“I found that the action failed on both limbs – in law and in fact. I accordingly dismissed the action with costs to the defendant. There was a stay of execution for six weeks.”

The learned trial judge does not say on what law or on what facts the action failed. This court must therefore examine for itself both fact and law.

Oppenshaw and Garnett testified as to the general factors usually considered by a tender board of the Ministry when awarding contracts of this nature. Neither of them was in the department of housing when the deceased’s contract was awarded, or knew anything about it other than what appeared in the departmental files. The effect of Reid’s evidence was that the deceased had made “meagre” progress with the work and was substantially behind schedule at the time of his death.

In my view the evidence of those witnesses was of little, if any, value in the determination of the questions before the court.

The learned trial judge does not seem to have paid any attention to the following uncontradicted evidence of the appellant (plaintiff) and her witnesses. She said:

“After my husband’s death I was summoned to a meeting at the Crown Solicitor’s office. I saw Mr. Barrow, Housing Administrator, Greenwood, Surveyor, Mr. Harris (deceased’s father), Dr. Denbow, Mrs. Forde and myself. The Clerk of Works was also there (Mr. Kilkenny). Mr. John Carter was at the conference also. Mr. Burch-Smith (Crown Solicitor) was also there. The meeting was to find out who was going to complete the contract. The Housing and Planning wanted Mr. Harris (snr.) to carry on the contract.

“Mr. John Carter asked that deceased’s father complete the contract; we were told to sit as relatives and decide what we were going to do. My father-in-law and I discussed the matter on 2nd October, 1957. I went back late in October at the Housing Department and saw Mr. Barrow and told him that he would not bother (he, Harris (snr.) I got a contractor — one Mr. Hopkinson — and took him to Mr. Barrow, who asked him for his credentials. He spoke to Mr. Greenwood. Mr. Greenwood approved of the contract and contractor and told Hopkinson that he would make some money on the job.

“After I spoke to Mr. Greenwood I received this letter (tendered, admitted and marked Ex. “B”). I was willing to carry on the work”.

The letter is in the following terms:

## LICORISH v. ATTORNEY-GENERAL

“HOUSING & PLANNING DEPARTMENT,  
Georgetown, Demerara.  
10th October, 1957.

Dear Madam,

50 Houses at Cane Grove, Contract 34

I enclose a statement of the financial position of the contract at 18th September, 1957.

“You will note that when the work is recommended under the new contract the retention will not be covered by the balance in hand and work to the value of \$350.59 will have to be done before you can begin to earn any monies and before any payments of any kind can be made.

Yours faithfully,  
K. A. GREENWOOD,  
Quantity Surveyor, A.R.I.C.S.,  
for Acting Commissioner of Housing.

Mrs. Harris,  
31 Alexander Street,  
Kitty.

c.c. Mr. Carter, Solicitor,  
1, Croal Street,  
Georgetown.”

Mazilla Forde, one of the deceased’s guarantors for his due performance of the contract, said that she was present at the meeting at the Crown Solicitor’s office. She said:

“It was decided that plaintiff and her father-in-law should discuss the matter between themselves and return and report — because J. B. Harris wanted to carry out the contract also. Dr. Denbow stated at the meeting that he was not going to be guarantor for any one except J.B. Harris (plaintiff’s father-in-law). I was prepared to continue as guarantor if plaintiff got the contract to complete.

“After the meeting plaintiff went to the Housing and Planning Department. I accompanied her. She spoke to Mr. Barrow, the Commissioner of Housing, and told him that her father-in-law agreed for her to carry on with the contract. Mr. Barrow told her that she had to get a contractor. I got Mr. Hopkinson for her and took him to Mr. Barrow who sent us across to Mr. Greenwood who quizzed Mr. Hopkinson and was satisfied that Mr. Hopkinson was all right. Mr. Greenwood then told Mr. Hopkinson that he (Hopkinson) would hear from him.

“I knew Mr. Calder and I asked him to be a guarantor in place of Dr. Denbow and he agreed. Calder is a property owner. I had business relations with Calder before.

“I was in a position to assist plaintiff to carry on the contract financially.”

Harold Hopkinson said:

“I am a contractor of 20 years’ experience. In the course of my experience I executed many building contracts with government. I am now supervising the erection of offices for the Ministry of Works and Hydraulics — P.W.D., are doing the building.

“I know the plaintiff. In 1957 I was taken to the Housing and Planning Department to Mr. Barrow by plaintiff and Mrs. Forde. I was referred to Mr. Greenwood. I was taken there to arrange for the completion of the contract of plaintiff’s husband who was building 50 houses at Cane Grove Scheme when he died. Plaintiff asked me to complete the buildings for her and I was taken to Mr. Greenwood who quizzed me about my ability. I showed him two contracts which I had completed for government. He was satisfied and told me that I would make some money on the job and that I would hear from him later. I had visited the site on three occasions and studied the plans and specifications of the contract. The variations were extensive and to the extent of \$27,000. The original contract provided for the houses to be built flat on the ground. The variations provided for the houses to be built on blocks, because the land was too low or that the persons wanted it that way. I don’t know. The work called for extra excavations and concrete blocks for the columns. The rates issued by the Housing and Planning Department for building provide a basis on which contractors can make their general estimate with a good profit at about 10 to 20 per cent. The average profit on building contracts is about 15 per cent. I calculated the profit on this contract at the minimum of about \$ 10,310.36 on the whole contract.

“The contract called for two types of houses. The 106 type yielded a profit of \$176.17 on each of the 106 type. There were 20 of these buildings to yield \$3,523.40. The second type 109 yielded \$226.23 on each building as profit. There were 30 such buildings to be built at a total profit of \$6,768.96 on the 30 such houses.

“The overall profit was to be \$ 10,310.36.

“In performing the contract government pays fortnightly or monthly as the work progresses on the quantity surveyor’s certificate of the work. A 10 per cent retention by government is customary, that is, 10 per cent of the payment for work done is usually retained by Government — until completion of the whole job.

## LICORISH v. ATTORNEY-GENERAL

“I was quite willing to carry on the work for the plaintiff.”

The effect of this uncontradicted evidence is that Greenwood was satisfied with the appellant’s arrangements for carrying on the contract, told the contractor he could make money on the job and promised that the latter would hear from him later.

This evidence does not in my view support the finding that:

“To have allowed the plaintiff to carry on the contract would have been an irresponsible and hazardous exercise.”

The evidence in my view tends to support the appellant’s contention that the Commissioner of Housing, through his architect, was satisfied with the proposals for the carrying on of the work; but it falls short of establishing that the Commissioner either personally or through the architect had positively and definitely accepted the proposal.

This finding disposes of the second question with which this court was confronted.

And now to the first.

It is a question of the intention of the parties as to whether a contract is personal or not. In this connection regard must be had to the general nature of the contract, to its terms and, if necessary, to the surrounding circumstances.

Now what is the nature of a building contract?

In *R. v. Smith*, (1885) S.C.R. (Canada) p. 1, where the contract under consideration by the Supreme Court of Canada was one with Her Majesty for the excavation etc. of the Georgia Bay branch of the Canadian Pacific Railway, it was necessary to determine whether the contract was personal or not. One of the clauses of that contract was in the following terms:

“17. The contractors shall not make any assignment of this contract, or any sub-contract for the execution of any of the works hereby contracted for; and in any event no such assignment or sub-contract, even though consented to, shall exonerate the contractors for liability, under this contract, for the due performance of all the works hereby contracted for. In the event of any such assignment or sub-contract being made, then the contractors shall not have or make any claim or demand upon her Majesty for any future payments under this contract for any further or greater sum or sums than the sum or sums respectively at which the work or works so assigned or sub-contracted for shall have been undertaken to be executed by the assignee or subcontractor; and in the event of any such assignment or sub-contract being made without such consent, Her Majesty may take the work out of the contractors’ hands, and employ such means as she may see fit to complete the same; and in such case the contractors shall have no claim for any further payment in respect of the works performed, but shall nevertheless remain liable for all loss and damage which may be

suffered by Her Majesty by reason of the non-completion by the contractors of the works; and all materials and things whatsoever, and all horses, machinery, and other plant provided by them for the purposes of the works, shall remain and be considered as the property of Her Majesty for the purposes and according to the provisions and conditions in the twelfth clause hereof.”

It was held by a majority of the Supreme Court of Canada that in the particular circumstances of that case Clause 17 was a specific provision against vicarious performance without consent of Her Majesty and without such consent the work had to be performed personally by those who had by their contract undertaken to do so, and consequently the contract was personal. In the course of his judgment STRONG, J., said at p. 62:

“Had it not been for the 17th clause of the contract there would have been grounds for saying that the original contractors might have called upon the court to treat the assignment as in the nature of a subcontract, and to have awarded them damages, upon the same principles as would have applied had they proceeded with the work personally. The general rule for the performance of contracts for work, such as that which is the subject of the contract in the present case, is that in the absence of any stipulation against assignments or sub-contracts, it may be performed by the agency of sub-contractors. If, indeed, it appears that the personal skill or taste of the contractor for the performance of the work has entered into the consideration of the other party, or that he has been chosen for some other personal qualification, he must perform the contract personally. But in building and railway contracts such a *delectus personae* is not presumed, and the substitution of a sub-contractor is, in the case of there being no stipulation to the contrary, considered unobjectionable. This is well shewn by the case of *Lea v. British Waggon Co.*, where it was held that a contract by a waggon company to furnish waggons for a term of years might be assigned to another company, and that on the performance of the contract, the original company, jointly with the assignee company, were entitled to recover the contract price. This decision, as is explained by COCKBURN, C J., in his judgment, proceeded upon the ground that in the absence of any special provision against assignment, it was to be presumed from the nature of the contract that actual performance by the first company was not contemplated.

“The contractors in the present case are, however, expressly excluded from the right to perform the contract through the medium of assignees of sub-contractors by the 17th clause of the contract, which, as already shewn, in the observations before made on the question of novation, has never been effectually waived or dispensed with, and they are therefore precluded from recovering under the contract, unless they can show personal performance, and this, upon the evidence, is, of course, entirely out of the question.”

## LICORISH v. ATTORNEY-GENERAL

In the third edition of HALSBURY'S LAWS OF ENGLAND., Vol. 3, at p. 509, para. 1011, the learned author puts it this way:

“1011. How far contractor may sublet performance. The question whether the builder can sublet the performance of the contract depends on whether the contract is a personal one or not. This depends, in the absence of express stipulation making the contract a personal one or prohibiting assignment, upon whether (1) the builder is selected with reference to his individual skill, cleverness, experience, integrity and financial responsibility or other personal qualification (in which case the performance of the contract cannot be assigned to him notwithstanding that the person who is offered to take his place is equally well qualified to perform it, or (2) the contract is one as to which it must be indifferent to the employer whether it is done by the immediate party to the contract, or by some one on his behalf, in which case the contract can be assigned.

“It would appear that the contractor cannot assign his obligations in the following cases: (1) where there is an express stipulation against assignment or subletting; (2) where an intention of the parties not to permit assignment can be implied from the circumstances, as where a particular contractor is employed owing to some particular qualification, either in respect of skill, financial position, or the possession of special plant adapted for the work; (3) where the work is of a special nature, such as the construction of a lighthouse, electrical lighting, well boring, or hydraulic work, or possibly in the case of works of great magnitude, requiring special engineering skill, or the possession of particular plant.”

The learned author of HUDSON'S BUILDING AND ENGINEERING CONTRACTS treat the topic as follows:

“By the nature of building contracts it is not likely that an assignment of the parties's rights, whether of the builder to receive the price or of the employer to have the work done according to the contract, can prejudice the other party to the contract. In certain very special cases, it is conceivable that an assignment by the employer in a contract where the work was not very clearly defined, or to a large extent provisional, and wide powers to order variations were available, might prejudice the builder, depending upon the requirements or standing of the proposed assignee. But usually this will not be so as regards the assignment of contractual liabilities.

“In general, the law permits the vicarious performance of contractual liabilities except in the case of personal contracts where the personal skill, financial credit, or other characteristics of the contracting party, are regarded as of the essence of the contract. Thus in *British Waggon Co. v. Lea*, COCKBURN, C.J., said: ‘Where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference

to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract for the performance of it by the other party, and entitled the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service.'

"Modern forms of contract contain explicit provisions authorising or forbidding sub-contracts, and also providing for the selection or nomination of sub-contractors by the employer. But in the absence of express provisions, the principle is that vicarious performance will not be permitted if the result will be to alter or prejudice the obligations or rights of the other party to the contract."

The learned author of *CHESHIRE AND FIFOOT ON CONTRACT*, 6th Ed., at p. 452 puts it this way:

"It is not, however, permissible in all cases to delegate the task of performance to another person. Each case depends upon its own particular circumstances. In the words of Lord Greene:

'Whether or not in any given contract performance can properly be carried out by the employment of a sub-contractor, must depend on the proper inference to be drawn from the contract itself, the subject-matter of it and other material surrounding circumstances.'

It is clear in any event that delegation is not permissible if personal performance by B., the promisor, is the essence of the contract. If it can be proved that A. relied upon performance by B. and by B. only, the inability or unwillingness of B. to perform his obligation discharges A. from all liability, even though performance has been completed by a third person in exact accordance with the agreed terms. Vicarious performance of a personal contract is not performance in the eye of the law. It neither discharges the debtor nor binds the creditor. If it can be shown that A. has contracted with B. because he proposes confidence in him, as for example where he relies upon his individual skill, competency, judgment, taste or other personal qualifications, or it is clear that he has some private reason for contracting with B. and with B. only, then the inference is that the contract is one of a personal nature which does not admit of vicarious performance. Thus, it has been held that the personal skill and care of the warehouseman is of the essence of a contract for the storage of furniture, and that if he employs a sub-contractor he does so at his own risk."

If, therefore, vicarious performance of a personal contract is not performance in the eye of the law, then if a contract by its terms provides for vicarious performance, personal performance was not necessarily intended, hence it cannot be deemed a personal contract.

## LICORISH v. ATTORNEY-GENERAL

I now proceed to examine the terms of this particular contract.

“1. The Contractor shall carry out and complete the Works in accordance with this contract in every respect in accordance with the directions and to the reasonable satisfaction of the Architect. If the Contractor shall find any discrepancy in or divergence between the Contract Drawings and/or Specification he shall immediately refer the same in writing to the Architect and specifically apply in writing for any necessary instructions from the Architect in relation thereto. The Architect may in his absolute direction and from time to time issue further drawings, details and/or written instructions, written directions, and written explanations (all of which are in these Conditions collectively referred to as ‘Architect’s Instructions’) in regard to:

- (a) The variation or modification of the design, quality, or quantity of the Works or the addition or omission or substitution of any work.
- (b) Any discrepancy in or divergence between the Contract Drawings and/or Specification.
- (c) The removal from the site of any materials brought thereon by the Contractor and the substitution of any other materials therefor.
- (d) The removal and/or re-execution of any works executed by the Contractor.
- (e) The postponement of any work to be executed under the provisions of the contract.
- (f) The dismissal from the Works of any person employed thereupon.
- (g) The opening up for inspection of any work covered up.
- (h) The amending and making good of any defects under clause 12 of these Conditions.

“If any verbal instructions, directions or explanations involving a variation are given to the Contractor or his foreman upon the Works by the Architect or by the Clerk of Works appointed by the Employer, such instructions, directions or explanations shall be confirmed in writing by the Contractor to the Architect within seven days, and if not dissented from in writing by the Architect to the Contractor within a further seven days shall be deemed to be Architect’s Instructions. The Contractor shall forthwith comply with all Architect’s Instructions. If compliance with Architect’s Instructions involves any variation, such variation shall be dealt with under clause 9 of these Conditions and the value thereof shall be added to or deducted from the Contract sum.

“If compliance with Architect’s Instructions involves the Contractor in loss or expense beyond that provided for in or reasonably contemplated by this contract, then, unless such instructions were

issued by reason of some breach of this contract by the Contractor, the amount of such loss or expense shall be ascertained by the Architect and shall be added to the Contract Sum.

“If within seven days after receipt of a written notice from the Architect requiring compliance with Architect’s Instructions the Contractor does not comply therewith, the Employer may employ and pay other persons to execute any work whatsoever which may be necessary to give effect to such instructions and all costs incurred in connection therewith shall be recoverable from the Contractor by the Employer as a debt or may be deducted by him from any monies due or to become due to the Contractor under this contract.

“2. The Contractor shall furnish to the Architect on the signing of this contract a Schedule of Rates upon which the Contractor’s estimate has been based, unless such Schedule has already been furnished. The Contract Drawings and the said Specification and the said Schedule of Rates shall remain in the custody of the Architect so as to be available at all reasonable times for the inspection of the Employer or the Contractor. The Architect without charge to the Contractor shall on the signing of this contract furnish him with two copies of the Contract Drawings and of the Specification, and shall within a reasonable time also furnish him with such further Drawings as are reasonably necessary to enable him to carry out all Architect’s Instructions and with any further details which in the opinion of the Architect are necessary for the execution of any part of the work. If any Bills of Quantities are provided, nothing contained therein shall confer any rights or impose any obligations beyond those conferred or imposed by the Contract Documents, namely, by the Contract Drawings, Specification and Conditions referred to in the Articles of Agreement. The Contractor shall keep one copy of the Contract Drawings and the Specification on the Works so as to be available to the Architect or his representative at all reasonable times. Upon receiving final payment the Contractor shall forthwith return to the Architect all drawings and specifications bearing his name.

“None of the documents hereinbefore mentioned shall be used by either of the parties hereto for any purpose other than this contract, and neither the Employer, the Architect nor the Surveyor shall divulge or use except for the purpose of this contract any information contained in the said Schedule of Rates.

“4. The Architect shall furnish to the Contractor, either by way of carefully dimensioned drawings or by personal supervision at the time of setting out the Works, such information as shall enable the Contractor to set out the enclosing walls of the building at ground level after which the Contractor shall be responsible and shall at his own cost amend any errors arising from his own inaccurate setting out, unless the Architect shall otherwise direct.

## LICORISH v. ATTORNEY-GENERAL

“5(c) The Contractor shall upon the request of the Architect furnish him with vouchers to prove that the materials comply with the requirements of the appropriate paragraph of this condition. The Contractor shall arrange for and/or carry out any test of any materials, which the Architect may in writing require and the cost thereof shall be added to the contract sum unless provided for in the Specification or unless the test shows that the said materials are not in accordance with this contract.

“6. The Contractor shall constantly keep upon the Works a competent general foreman and any instructions given to him by the Architect shall be deemed to be given to the Contractor in pursuance of Clause 1 of these Conditions.

“7. The Architect and his representatives shall at all reasonable times have access to the Works and/or to the workshops or other places of the Contractor where work is being prepared for the contract, and in so far as work in virtue of any sub-contract is to be so prepared in workshops or other places of a sub-contractor (whether or not a nominated Sub-Contractor as defined in clause 21 of these Conditions) the Contractor shall also by a term in the sub-contract so far as possible secure a similar right of access to those workshops or places for the Architect and his representatives and shall do all things reasonably necessary to make such right effective.

“8. The Employer shall be entitled to appoint a Clerk of Works whose duty shall be to act solely as inspector on behalf of the Employer under the directions of the Architect and the Contractor shall afford every facility for the performance of that duty.

“13A. The Contractor shall not without the written consent of the Architect assign this contract or sublet any portion of the works; provided that such consent shall not be unreasonably withheld to the prejudice of the Contractor.

“13B. (f) The Contractor shall be responsible for the observance of this clause by sub-contractors employed in the execution of the Contract, and shall if required notify the Employer of the names and addresses of all such sub-contractors.

“15(a) Without prejudice to his liability to indemnify the Employer under clause 14 hereof, the Contractor shall effect or shall cause any Sub-contractor to effect such insurances (including insurance against Third Party fire risk as may be specifically required by the Specification and shall produce or cause such Sub-contractor to produce as the case may be the relevant policy or policies and premium receipts as and when required by the employer; should the Contractor make default in so doing, the Employer may insure against any risk with respect to which the default shall have occurred and

may deduct the premiums paid from any monies due or to become due to the Contractor.

“21. Where prime cost or provisional sums are included in the Specification for persons to be nominated or selected by the Architect to supply and fix materials or to execute work on the site.

(a) Such sums shall be deemed to include 2½ per cent, cash discount and shall be expended in favour of such persons as the Architect shall direct, and all specialists or others who have been nominated or selected by the Architect are hereby declared to be Subcontractors employed by the Contractor and are referred to in these conditions as ‘nominated Sub-Contractors’. Provided that no nominated Sub-Contractor shall be employed upon or in connection with the Works against whom the Contractor shall make reasonable objection or (save where the Architect and Contractor shall otherwise agree) who will not enter into a sub-contract providing:

- (1) That the nominated Sub-Contractor shall indemnify the Contractor against the same obligations in respect of the sub-contract as those for which the Contractor is liable in respect of this contract.
- (2) That the nominated Sub-Contractor shall indemnify the Contractor against claims in respect of any negligence by such Sub-Contractor, his servants or agents or any misuse by him or them of any scaffolding or other plant, and shall insure himself against any such liability and produce the policy or policies and premium receipts as and when required by the Employer.
- (3) That payment in respect of any work, materials or goods comprised in the sub-contract shall not be due until receipt by the Contractor of the Architect’s certificate under clause 24 of these Conditions which includes the value of such work, materials or goods, and shall when due be subject to a discount for cash of 2½ per cent.
- (4) That the Architect and his representatives shall have a right of access to the workshops and other places of the nominated Sub-Contractor as mentioned in Clause 7 of these Conditions.

(b) The sums directed by the Architect to be paid to nominated Sub-Contractors for work, materials or goods comprised in the sub-contract shall be paid by the Contractor within 14 days of receiving from the Architect a certificate including the value of such work, materials or goods less only (i) any retention money which the Contractor may be entitled to deduct, and (ii) a cash discount of 2½ per cent.

## LICORISH v. ATTORNEY-GENERAL

(c) Before any certificate is issued to the contractor he shall, if requested by the Architect, furnish to him reasonable proof that all nominated Sub-Contractors' accounts included in previous certificates have been duly discharged, in default whereof the Employer may pay such accounts upon a certificate of the Architect and deduct the amount so paid from any sums otherwise payable to the Contractor.

(d) If the Architect desires to secure final payment to any nominated Sub-Contractor before final payment is due to the Contractor, and if such Sub-Contractor has satisfactorily indemnified the Contractor against any latent defects, then the Architect may in a certificate under clause 24 of these Conditions include an amount to cover the said final payment, and thereupon the Contractor shall pay to such Sub-Contractor the amount so certified less only a cash discount of 2½ per cent, and the limit of retention money named in clause 24 of these Conditions and/or the appendix shall be reduced in proportion to the amount so certified and the Contractor shall be discharged from all liability for the work or materials covered by such certificate except for any latent defects.

(e) Neither the existence nor the exercise of the foregoing powers nor anything else contained in these conditions shall render the Employer in any way liable to any nominated Sub-Contractor.

(f) Where the Contractor in the ordinary course of his business directly carries out works for which prime cost or provisional sums are included in the Specification and where items of such works are set out in the appendix to these Conditions and the Architect is prepared to receive tenders from the Contractor for such items, the Contractor shall be permitted to tender for the same or any of them without prejudice to the Employer's right to reject the lowest or any tender. If the Contractor's tender is accepted, he shall not sublet the work without the consent of the Architect.

“22. Where prime cost or provisional sums are included in the Specification in respect of any materials or goods to be fixed by the Contractor.

(a) Such sums shall be deemed to include 5 per cent, cash discount and the term prime cost or the abbreviation P.C. as used in these Conditions shall be understood to mean the net cost to be defrayed as a prime cost or to be defrayed from the said provisional sums as the case may be after deducting any trade or other discount except a cash discount of 5 per cent, and shall include the cost of packing and of carriage and delivery. Provided that, where in the opinion of the Architect the Contractor has incurred expense for special packing or special carriage, the Architect (shall so inform the Surveyor who) shall allow for the same as part of the sums actually paid by the Contractor.

(b) All specialists, merchants, tradesmen or others who have been nominated or selected by the Architect to supply such materials or goods are hereby declared to be suppliers to the Contractor and are referred to in these Conditions as "nominated Suppliers". All payments by the Contractor for such materials or goods shall be in full and shall be paid within 30 days of the end of the month during which delivery is made less only a cash discount of 5 per cent if so paid. Provided that the Contractor shall not be bound to place an order for the supply of materials or goods with a nominated Supplier who will not agree to allow such 5 per cent discount for cash."

The first recital to the contract incorporates "Drawings and a Specification marked 'A' showing and describing the work to be done."

These drawings and specifications reveal that the houses were to be small two- and three-bed-room one-flat houses with shower-baths, toilets, built-in cupboards, dining-room and kitchen, living-room, doors, windows. There is nothing elaborate or unusual about the buildings. In fact it would be difficult to imagine simpler types of construction. The drawings and specifications are detailed; nothing is left to the particular taste or skill of the contractor. Nothing in the contract or in any material surrounding circumstances indicates either expressly or by implication that the contract was intended to be a personal one. On the contrary, the abovementioned clauses seem to indicate a clear intention that every phase of the undertaking was to be under the close supervision of the architect and that, subject to that, strict assignment and/or vicarious performance was not only permissible, but in reasonable circumstances could not be objected to and had to be accepted by the employer.

It is to be noted also that Clauses 9 and 11 of the "Instructions to bidders" incorporated into the contract as contract document "A", although not terms of the contract, are evidence of material surrounding circumstances which assist in ascertaining the intention of the parties if it were not already clear enough from the terms themselves.

"9. The Contract will be awarded to the responsible Bidder submitting the lowest bid, provided his bid is reasonable. The Bidder to whom the award is made will be notified at the earliest practical date. The Department, however, reserves the right to reject any or all the bids and to waive any informalities in the bids. The Department reserves the right to consider as unqualified a Bidder who is unable to satisfy the Department as to his ability to carry out the works contemplated.

"11. Subsequent to the award and within 10 days after notification, the successful bidder must join with the Department in a Contract signed under the R.I.B.A. Form of Contract and including Specification and Drawings. The successful Bidder must within the period specified above furnish a Performance Bond or security to the value of 10% of the contract figure or a maximum of \$10,000 as

## LICORISH v. ATTORNEY-GENERAL

security for satisfactory performance of the contract and for the payment of all persons, firms and corporations to whom the contractor may become legally indebted, for the materials, tools, equipment etc. used by him performing the work. Such a bond to be in the form of a surety letter signed by two persons of known responsibility prepared to bind themselves with the Bidder to execute faithful performance of the work under contract; or sufficient securities lodged in favour of the Housing and Planning Department against faithful performance of the Contract.”

Apart from the general tenor of all the clauses cited above, close construction of Clause 13 A is rewarding

It is trite law that the burden (or liabilities) of a contract cannot be assigned except by a novation. Consequently there is no need to put in an agreement a clause preventing or restricting “assignment” in the strict sense of the word. In order to give it some meaning in Clause 13A, it must be construed with respect to strict assignment as authorising — as distinct from restricting — an assignment through the machinery of a novation; and with respect to “sub-letting” as restricting indiscriminate vicarious performance.

In my view the phrase “shall not be unreasonably withheld” has the same effect in this context as it has when used in covenants concerning subletting in leases in English Real Property Law. That phrase is justiciable and an action will lie if the consent is unreasonably withheld.

In other words, in accordance with this clause the employer is bound, *ex contractu*, to assign in the strict sense by executing a novation or to accept vicarious performance if in the circumstances it is reasonable to do so.

With such a clause embodied in a contract, there is logically no room for the view that it was intended to be a personal contract. I hold that it was a non-personal contract.

I now pass on to consider the effect of the death of a building contractor on his building contract. The relevant law is set out at para. 935 on page 467 of 16 HALSBURY’S LAWS OF ENGLAND, 3rd Edition, as follows:

“On the death of a building contractor before he has completed his contract his personal representatives are bound to perform the contract unless the contractor was employed owing to some special personal qualification, and are entitled to recover payment. If the executor or administrator of the contractor enters into a fresh or supplementary contract in his capacity as personal representative, he will be personally liable on the contract, but may bring an action on it in his representative capacity, and this right of action, if accrued, will pass to an administrator *de bonis non* on the death of the original personal representative.”

In the circumstances the contract devolved on the appellant executrix, and she ought not to have been prevented from performing it — *a fortiori*

when she had made arrangements for so doing satisfactory to the Commissioner through the Architect Mr. Greenwood.

The Commissioner for Housing made performance of the contract impossible. Consequently the appellant's action for damages was well founded. The learned trial Judge, having come to the conclusion that he did, had no reason to consider the question of damages. I would allow the appeal with costs to the appellant here and in the court below certified fit for counsel and would send the matter back to the learned trial judge to assess the damages.

CRANE, J.A. (ag.): This appeal is of some importance from a practical standpoint. The point raised in it is: how well founded in law can the claim of a personal representative be to the right to continue a contract made and entered upon by a deceased testator.

Felix Augustus Harris, deceased, was a building contractor by trade. During his lifetime he carried on business *sub nom* "Felix A. Harris Construction Establishment," at 31 Alexander Street, Kitty. In this appeal his establishment is not involved because on the 10th December, 1956, the Articles of Agreement entered into between him and the Commissioner of Housing were in his personal capacity. The agreement concerned the construction of 50 houses at Cane Grove, East Coast, Demerara. In it there is a stipulation, *inter alia*, that the work would be done in accordance with approved drawings and specifications prepared by and under the direction of an architect of the Central Housing and Planning Department. The work was put in hand in February 1957. Harris took ill about June 1957 but, unhappily, died in September 1957 leaving the greater part of it incomplete.

In October 1957 his executrix, the plaintiff in this case, endeavoured to do so. She introduced one Hopkinson, another building contractor, to the Housing Authorities as a capable successor to Harris for the purpose of completing the work. According to her, Hopkinson was accepted for the job and while he was in the act of making preparation to embark upon it, was prevented by the defendants from doing so. This, she contends, is a repudiation of their new agreement with her; hence this lawsuit against the government in her representative capacity.

In her statement of claim she pleads the agreement between her and the Commissioner of Housing to employ Hopkinson, together with the fact that it was unlawfully determined when the defendants repudiated it by not allowing her to complete the work by vicarious performance through Hopkinson. But there can be no fault found with this pleading since it is quite lawful for one or more subsidiary agreements to arise out of a parent agreement. Damages claimed are in the nature of a loss of profit of \$9,422 namely, the sum Harris' estate would have earned if plaintiff had been permitted to continue the contract after his death.

## LICORISH v. ATTORNEY-GENERAL

The Housing Department being a department of the government, the Attorney General duly entered appearance to the writ, the Governor having signified his approval of the action by the grant of his fiat as required by law.

On the pleadings there is disclosed a clear-cut issue of whether or not the contract was dissolved by his death; it was in fact fought out on this basis before the trial judge. This was so because of the plaintiff's allegation that Harris was awarded the contract simply because he was a qualified building contractor who had submitted the lowest bid, and not because of any individual skill, competency or other personal qualification that he possessed.

The defendants' answer to this plea is that Harris was awarded the contract because the magnitude of the assignment was such that it called for a person of ability to execute it; they say that the proper execution of the contract depended entirely on Harris' individual skill, competency and his experience as a building contractor, coupled with the confidence reposed in him to execute it; that consideration was given the question whether he was possessed of these qualities at the time and they were quite satisfied that he had them. It is contended that it is evident from the terms of the building contract and from the substance of Harris' obligations thereunder, that what he undertook was of a personal nature and incapable of assignment. The defence denies that Hopkinson was ever approved as a substitute for Harris, and in the alternative pleads that even were this so, the plaintiff has suffered no loss as a result of any breach of contract. There is also a plea of plaintiffs acquiescence in the repudiation of her alleged agreement to employ Hopkinson.

In brief, by pleading simply that the obligations of the deceased are of a personal nature which cannot be assigned, the defendants are in fact asserting that the contract was dissolved on the death of Harris. But it will be readily agreed, I think, that were the defendants to succeed on the main issue the matter of whether Hopkinson was indeed employed cannot arise. This is so because of the rule which has become settled in the law: that where a contract is founded on personal considerations, the death of either party before breach of the contract will put an end to the relationship — see per WILLES J. in *Farrow v. Wilson*, L.R. 4C.P. 744, approved in *Nokes v. Doncaster Collieries*, (1940) A.C. 1014, 1019.

On the other hand, if there are no such personal confidences or considerations involved, the plaintiff as personal representative of the deceased contractor, being bound by law to perform the contract, would be entitled to complete the work and to recover the contract price on behalf of the deceased's estate. This is so because the obligations of the deceased would then be impersonal in the sense that it cannot make no material difference to his employers, whether they received performance from the deceased or from Hopkinson — see *British Waggon Co. v. Lea*, (1880) 5 Q.B.D. 149, at page 153. In such a case, the contract is assignable both in respect of the benefit and the burden of it — see *Tolhurst v. Associated Portland Cement Manufacturers*, (1902) 2 K.B. 660, 668.

Today, the old principle expounded by LORD COKE in *Quick and Harris v. Ludborrow*, (1615) 3 Bulst. 29 at p. 30, cited by counsel for the plaintiff still exists: that on the death of a building contractor before he has completed his contract, his personal representatives are bound to perform it. The rule is, however, subject to the qualification that there are no special personal conditions relative to the appointment of the contractor. Therefore, it follows that where a contract is impersonal in nature a personal representative may, in a proper case, assign his obligation to perform it in the sense of vicariously substituting another contractor to do so, if there are no restrictions absolute or qualified to that effect contained in the terms of the contract.

It is well settled that whether a contract is personal or impersonal in nature is to be determined on the true construction of it, principally by the intention of the parties to the contract; that each contract must be considered with reference to its own terms, the relationship between the parties and the nature of the particular engagement.

In my opinion the trial judge was right in finding that this was a personal contract, for it is clear from its terms and the specifications containing instructions to bidders appended to it that Harris was selected by his employers with reference to his individual skill, qualifications, credit, experience and financial responsibility. Without any doubt these are personal qualifications; they are the criteria of his personality and identity as a contractor; they were of importance to his employers and are recognised by the law as introducing the quality of personality into the contract, and I agree with what has fallen from the lips of BOLLERS, C J., on his finding on this question of fact, and without repeating what he has said in that regard, I would accept his analysis as my own. The law is that when the obligation is of a personal nature the collateral right is not capable of assignment because that would substantially alter the nature of the obligation undertaken in the contract – see the *Tolhurst* case, (1902) 2 K.B. 660, 672-3, 680. The principle, when applied to the case under review, means that during his lifetime Harris was in no position to assign his contractual right of performance because his employers would have been entitled to say to him, “We agreed to employ you and you alone, and we cannot be called upon to employ your nominee and substitute instead. To do so would be to substantially alter the contract we have entered into with you.” Harris’ personal representative can therefore be in no better position than he was in this respect.

It has been suggested that article 13A of the Agreement shows that the parties intended their contract to be impersonal. It is argued that from the very fact that they have agreed for sub-contracting in the event of this becoming necessary, means that Harris was in effect bargaining to produce a result either through himself or vicariously through any sub-contractors he may have seen fit to employ, and that he did not personally oblige himself to undertake performance through his own staff set out in his tender.

Article 13A is in the following terms:

## LICORISH v. ATTORNEY-GENERAL

“The contractor shall not without the written consent of the Architect assign this contract or sublet any portion of the works; provided that such consent shall not be unreasonably withheld to the prejudice of the Contractor.”

Having regard to the statement in his tender giving a breakdown of his labour force revealing the number of tradesmen at his disposal for executing the contract, it is clear sub-contracting was expected of him for such items like the sanding and polishing of floors, the furnishing of window frames and other fittings not normally within the scope of masonry or carpentry. In the normal course of things these are always provided vicariously by sub-contractors, so the mere fact that there is a provision for sub-contractors to perform them does not render the contract any less one for the personal services of the contractor. It was this fact which COCKBURN, C.J. recognised in *British Waggon Co. v. Lea* (*supra*) at p. 154 *infra*, when he said:

“Much work is contracted for, which it is known can only be executed by means of sub-contractors, much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by someone on his behalf.”

As I have remarked above, it is from an interpretation of the contract as a whole that the intention which characterises it as personal or impersonal is gleaned. Its relegation into the status of one or other of these two categories is not determined *a priori*, solely by Article 13A. To my mind it is not inconsistent with the personal nature of a contract that such a clause exists. If a contract is personal and contains a provision for assignment or subletting with consent which should not be unreasonably withheld, it is submitted there exists a strong argument for the viewpoint that what is really intended is not really an assignment at all in the true sense of that word, but vicarious performance by sub-contracting, if the need for such arises. This must be so, I think, because the whole point about a personal contract is not only that it cannot be assigned, but that it is impossible from its very nature to assign it.

I think the correct interpretation of Article 13A is this: that when there is a written consent of the architect on the strength of which a builder “assigns” or sublets his contract to a successor in business, the legal effect is that the assignor effectually authorises and empowers the assignee to perform the contract in his stead. Vicarious performance by this substitute has in the law the same effect as performance by the assignor himself. It amounts to the fulfilment of the condition on which the contractual right of payment depends; but there is this limitation: the assignment does not effectually transfer from the assignor to the assignee the legal liability for non-performance of the obligations of the contract. It is by no means a true assignment for if the substitute does not build the house, or builds it improperly, the employer’s right of action will still be against the assignor,

not against the substitute. But if it is duly built by the latter, it will be he, the substitute, and not the assignor who will be entitled to recover the price of it from the employer.

Article 13A therefore can operate as an assignment only of rights and benefits “in cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it” — see *Tolhurst v. Associated Portland Cement Manufacturers Ltd.*, (1902) 2 K.B. 660, 668; but with respect to the obligation of performance by delegation to sub-contractors it cannot amount to an assignment in the true meaning of that word.

As I view it, Article 13A operates as an absolute prohibition against assignment of the contractor’s obligations unless consent is forthcoming from his employer, which must not be unreasonably withheld to the prejudice of the contractor — see Vol. 3, BUTTERWORTHS ENCYCLOPAEDIA OF FORMS AND PRECEDENTS, p. 268, note 14, where this view is maintained. Accordingly, Article 13A can properly apply only to such of Harris’ rights or benefits under the contract, not to his obligation to perform it. All he did was to agree not to vicariously perform the contract by employing sub-contractors without the consent of his employers who undertook on their part not to withhold unreasonably their consent to his prejudice. If it would have been in the interests of Harris to assign the right to the remuneration he earned by substituting another for himself so as to render his employers liable to pay that other, then they could not without sufficient reason refuse to do so. But it is not the meaning of the article under consideration that he should substitute another person to perform the contract so as to render that other legally liable to his employer instead. Harris was to be at all times liable at law, though with consent performance could be through another. This was all his employers were really agreeing to under the clause when they said they would not withhold their consent to his prejudice. They were by no means agreeing, in the event of sub-contracting or subletting becoming necessary, to accept the substitution of another contractor’s legal liability *vice* Harris’.

Though assignment of a right or benefit of a contract generally is, the assignment of an obligation is never permissible unilaterally. Were this so, it would operate to sever the *vinculum juris* between the original contracting parties and to create a fresh one between different parties, an act in the law which is only possible by a novation. This is an extinction of the original agreement and the continuance of it by fresh parties with the concurring wills of the original parties and the substituted person. As the only true assignment of an obligation under contract can be by way of a novation, it is evident that was not the intention of Article 13A.

Once the nature of the contractual obligation has been relegated to the category of a personal one, no assignment of both benefit and the burden of the contract is permissible. See *Robson v. Drummond*, (1831) 2 B. & Ad. 303. The most Harris could have done on his own was to sub-

## LICORISH v. ATTORNEY-GENERAL

stitute someone for himself in respect of such rights or benefits as he had under the contract but he could not substitute someone as assignee in respect of his obligations. This could only have been effected by a tripartite agreement called a novation involving Harris, the substitute and the employers. The important point is, that if Harris was not permitted to assign his contractual obligations during his lifetime, since they were personal, the plaintiff can claim no better right to do so than he had.

Where the contract is personal, there is no right to a vicarious performance by the contractor even for work which is absolutely necessary, and within the type of work contracted for. *Per contra*, where the contract is impersonal and it would make no difference to the employer whether it is done by the contractor himself or by anyone else on his behalf, normally there is such a right to vicarious performance by sub-contracting without consent. See *British Waggon Co. v. Lea*, (1880) 5 Q.B. 149. It seems to me therefore in such circumstances that the true purport of Article 13A is to permit consent to vicarious performance in the one case where the right to it did not exist before, and, in the other case, to stipulate for consent where performance is normally delegated without consent. In both cases consent is necessary under the Article, the only reservation being that it must not be unreasonably withheld. This is one reason why plaintiffs claim to do so must fail.

Another way of expressing the altered circumstances consequent on Harris' death in juridical terminology is to say that the contract to erect the 50 houses went off on the ground of supervening frustration: that Harris' death brought about such an unanticipated and changed circumstance that it so altered performance of the contract as to make fulfilment of its purpose impossible. This principle was not ventilated at the hearing before us nor in the court below, but it is suggested there is nothing amiss in making mention of a well-settled principle of the common law which operates to discharge parties and their privies from obligations on death in personal contracts.

The basis for my suggestion that the doctrine of frustration of the adventure applies to this particular contract is, that both Harris and his employers contracted, even though their contract is silent on this point, on the footing that he would remain alive and complete the contract. I am convinced that is so from an examination of the contract and its appendices as a whole, and from the fact that their contract being a personal one, they would necessarily have stipulated for this condition had they thought of the eventuality of his death. That being the case, the law will imply a term to the effect that it was a condition to the continued existence of the contract that the parties intended that Harris would remain alive to perform it, and in the event that he did not, and had they averted to that they would have said: "If that happens, it is all over between us." See per LORD LOREBURN in *Tamplin v. Anglo-Mexican Products Co.*, (1916) 2 A.C. 397, 403-404.

This theory of the introduction of the implied condition in cases of frustration of the adventure by death of one of the contracting parties

in relation to contracts for personal services is of long standing in the law. It was stated by POLLOCK, C.B. in *Hall v. Wright*, (1858) E.B. & E. 746 at p. 795 as follows:

“All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them; and, should he die, his executor is not liable to an action for the breach of contract occasioned by his death.”

If indeed his executor is not liable to an action for breach thereof, it must follow that the executor cannot bring one to enforce the contract.

Therefore, the finding of the learned trial judge that the contract is a personal one having been well-founded, it follows that it was dissolved on the death of the contractor, and the right to the performance of it did not devolve on his executrix who has sued only in her representative capacity. As I have earlier remarked, all subsidiary issues raised in the pleadings, including the plaintiffs alleged agreement with the Commissioner of Housing to continue performance of the contract through Hopkinson, cannot therefore arise.

For these reasons I agree that this appeal must be dismissed with costs.

*Appeal dismissed — Order of Court below affirmed.*

## BEATRICE FERREIRA

by her Attorney A.C. GOMES v. SOLOMON CROMWELL

[In the Full Court of the High Court (Crane and Mitchell, JJ) — December 16, 1966; January 13; February 10, 1967.]

*Rent Restriction — Excess rent — Premises previously assessed — Maximum rent fixed — Increased — Identity of premises — Whether changed — Whether increase justified — Rent Restriction Ordinance, Cap. 186 (now Rent Restriction Act, Cap. 36:23).*

*Magistrate — Reasons for decision — Statement of findings — No reasons given therefor — Appeal — Whether from decision or from reasons for decision — Duty of Magistrate — Summary Jurisdiction (Appeals) Ordinance, Cap. 16 (now Summary Jurisdiction (Appeals) Act, Cap. 3:04).*

The respondent was the tenant of the appellant in respect of premises situate at 64 Sixth Street, Alberttown, Georgetown, at a monthly rental of \$60. Some seven to eight months after moving in, he discovered that the said premises had already been assessed and he told the appellant's attorney about it but the attorney denied it. The previous assessment had been made during 1950 at the instance of one Mandall who had been the tenant of the said premises during 1947 — 1956 and who gave evidence on behalf of the respondent. The Rent Assessor had found at the time of his inspection in 1950 that the premises consisted of an upper flat and a room below let separately to another tenant and he certified and fixed the 'maximum' rent at \$21.70 per month. Mandall testified that, originally, there were two rooms downstairs, a 'bicycle' room and a living room in which the other tenant lived but that this latter room was demolished in 1959 which fact was corroborated by Public Health Inspector Harry Charran who said that it was demolished because it was unfit for human habitation. The attorney for the appellant, who is her father, testified that general repairs were done to the upper flat and that the room below was removed during 1962 and a 'garage' built in its stead, as well as a second bridge which served the 'garage' and that was the reason why the wording of the receipts had been changed from "Dwelling cottage and bicycle room" to "Dwelling cottage and garage". The respondent denied that the identity of the premises had been altered and this was corroborated by Mandall, who had last visited the premises in 1965, and found them in the same condition as when he was the tenant except that the room was not there, and the respondent contended that, in such circumstances, he ought not to be called upon to pay more than the maximum rent of \$21.70 paid by Mandall. The appellant argued, however, that the identity of the premises was not the same in that it had undergone a change as it was improved since Mandall's time and before the respondent's tenancy began and, therefore, the increase in the maximum rent from \$21.70 to \$60 per month was justified. The Magistrate found for the respondent but merely stated his findings in a perfunctory manner in his Reasons for Decision without revealing the reasons for those findings of fact.

**HELD:**— (*per* Crane, J. delivering the judgment of the Court) that (i) an appeal under the Summary Jurisdiction (Appeals) Ordinance Cap. 16, is from the Magistrate's decision and not from his Reasons for Decision and, if that decision is right, then it will be upheld by the Full Court even though

that Court might prefer to base its judgment on circumstances not specifically stated by the Magistrate in his reasons; (ii) although it was conceded that the Magistrate made no reference in his Reasons for Decision to the question of the 'garage,' nevertheless, having regard to the fact that he believed and accepted the evidence of the respondent and his witnesses to the effect that there was no 'garage' on the premises (a finding that was not unjustified in view of the documentary evidence led in support), then it was fair to conclude that he must have exercised a judicial mind and was well aware of the importance of the matter of the 'garage' in his assessment of the evidence, and (iii) accordingly, the Magistrate's finding of fact that there had been no change in the identity of the premises since they were assessed in 1950 was amply supported by the evidence, notwithstanding that his Memorandum of Reasons was devoid of any reason for such a finding.

(Per Curiam — The valuable instructions of Worley, C.J., in *Braithwaite v. Harris* (1) should be followed by all Magistrates when writing their Reasons for Decision).

(Dicta of Duke, J., in *Hardeen v. Ramdeen* (2) approved and followed).

*Appeal dismissed.*

*Cases referred to:—*

- (1) *Braithwaite v. Harris* (1951) L.R.B.G. 24.
- (2) *Hardeen v. Ramdeen* (1946) L.R.B.G. 35.
- (3) *Yhap v. Ross* (1944) L.R.B.G. 57.
- (4) *Langford Property Co. v. Batten* (1950) 2 All E.R. 1079, H.L.

*B.O. Adams, Q.C.*, for appellant

*S. Wilson* for respondent.

CRANE, J.: This is a landlord's appeal against the decision of a magistrate of the Georgetown Judicial District who found for the tenant on a claim to the refund of the sum of \$ 1,244.75 (one thousand two hundred and forty-four dollars and seventy-five cents), being 32½ months excess rent in respect of premises situate at 64 Sixth Street, Alberttown, Georgetown.

The evidence reveals that the premises now occupied by the tenant, the respondent Solomon Cromwell, was assessed as long ago as 1950 and a certificate (Ex. "A1") with the Rent Assessor's reasons given (Ex. "A2"). The standard rent was then ascertained and fixed at \$15 (fifteen dollars) per month. With the addition of permitted increases under Section 6(1)(a)(b)(c) of the Rent Restriction Ordinance Cap. 186, the maximum rent was fixed at \$21.70 (twenty-one dollars and seventy cents) per month.

It is important to observe that in his reasons for decision the Rent Assessor found at the time he inspected the said premises in 1950, that they consisted of an upper flat and a room below which was let separately to another tenant. That assessment was at the instance of one Mandall who

## FERREIRA v. CROMWELL

was tenant of previous landlords from 1947-1956. Mandall who gave evidence for the respondent in the magistrate's court, testified to the effect that, there were two rooms below — a bicycle room and a living room below the place where he lived. This living room was a dwelling which in 1947 and 1948 was also let by him and occupied by his servant who was not allowed under the condition of the letting to occupy it by day because of its insanitary condition. This dwelling below stated Mandall, was occupied by a tenant in 1949 — most likely the tenant of whom the Rent Assessor spoke in Exhibit A2. This room was however vacated and demolished in 1959 having been condemned by the Sanitary authority as unfit for human habitation; it had not apparently improved in cleanliness since Mandall's servant occupied it some 9 years previously. The bicycle room which he also used as a fowl-coop was still there because he had seen it a fortnight before he testified.

The contention put forward by the respondent tenant is that the premises he now occupies at 64 Sixth Street, aforesaid, are the same premises as those let to Mandall at the time of the assessment, that is to say, their identity has remained unchanged, and this being the case, he ought not to have been called upon to pay more for them than Mandall did.

On the other hand, that advanced by the appellant landlord is that the identity of the premises which the tenant now occupies are not the same; they have undergone a change which was brought about by the fact that they have been improved upon since Mandall's time and before the respondent's tenancy began, and this justified an increase in the maximum rent charged to \$60 (sixty dollars) per month. It is on the basis of these two contentions that this appeal was fought out.

Two witnesses testified in support of the defendant/appellant's contention that the identity of the letting had materially altered since the 1950 assessment. Parris Samuels, a former owner of lot 64 Sixth Street, Alberttown in the 1950's said he had sold it to the appellant in 1964 (Transport Ex. "K" shows it was in 1954). He described the premises as consisting of two flats — upper and bottom flats; but it was evidently a misdescription of the premises below the upper to refer to them as such. It is significant that no other witness did so, not even the appellant's attorney, Mr. Anthony C. Gomes; and certainly not the Rent Assessor in his reasons for decision. It seems clear that what Samuels meant to say, and in fact later says, is, that apart from the room which tenant Wilkie occupied there was no other erection below the apartment above. To call a room consisting of only 156 square feet, below an upper apartment measuring 624.63 square feet, thus, is surely a misdescription. Moreover, a flat is a self-contained unit, not a bare room.

But it is chiefly from the evidence of plaintiff's attorney that it is sought to contend that the premises had undergone a change of identity: Attorney Gomes testified that when the appellant, who is his daughter, had bought the premises at E½ lot 64 Sixth Street, in 1954 (see Ex. "K"),

it consisted of three buildings, the front building (which is that in dispute) consisting of an upper flat with a room below. The yard was an open yard with front paling, but after purchase his daughter did general repairs to the upper flat of the front building and "patched" up the room downstairs, constructing a drain on the eastern side of the enclosure, and two gates leading to the front building. The room below was removed in 1962 and a garage and cycle room (served by one of two bridges) built in its stead. After all this had been done, the enclosed premises consisting of a garage, and cycle room were let to the respondent at a monthly rent of \$60 (sixty dollars).

In support of the respondent's claim that the identity of the premises has remained unchanged, Mandall a former tenant, told the magistrate that he found this was indeed the case when he visited them at the respondent's instance in 1964. The front upper flat was the same premises as when he occupied them during the years 1947 — 1956 save that in 1964 they were painted in yellow. Mandall visited them again in 1965 and found them unchanged; the room below was no longer there. This evidence it will be noted, ties in with that of Harry Charran, the Public Health Inspector, that this room was demolished in 1959 because it was unfit for human habitation and also Parris Samuels for the appellant that he did not see a room there in late 1965, that is to say, the room of which Wilkie of whom he spoke was a tenant.

The respondent's evidence is to the effect that it was some 7 to 8 months after July 1962 when he went into occupation he learnt that the premises occupied by him were previously assessed. He told this to attorney Gomes, but the latter denied it. Sometime after speaking to Gomes respondent observed a carpenter constructing another bridge to the premises. He, the respondent, did not ask for this to be done; he did not tell appellant he was buying a motor car; and, as a matter of fact when he spoke to Gomes, there was only one bridge leading into the yard. When the bridge was completed he observed a change of wording in the rent receipts. Receipts which prior to that dated 26th July, 1963, were worded "Dwelling Cottage & Bicycle Room," were henceforth worded "Dwelling Cottage & Garage" (see Exs. "B, B1 — 6"). Here, it seems to us that the oral testimony of the respondent is plainly supported by the documentary evidence of the receipts (see Ex. "B1"). To be noted however, is the fact that there is evidence that the appellant did make application to the City Engineer to erect a wooden bridge on lot E½ 64 Sixth Street, Alberttown, which was approved (see Ex. "L") on June 26, 1962, only three weeks before respondent began occupation of the premises. The appellant's contention is clearly that this bridge was constructed within the three week period, whereas the respondent's is that it was constructed some months after, and then the receipts were altered as aforesaid; that is to say, after the conversation he had with appellant's attorney which the latter denied telling him that he understood the premises had once been assessed in respect of the maximum rent chargeable.

## FERREIRA v. CROMWELL

Such was the evidence before the learned magistrate in whose memorandum of reasons for decision two facts are found and stated in a rather perfunctory manner thus:

“The court finds as a fact that the premises were the same as were assessed and shown on Exs. “A1” and “A2,” and that maximum rent chargeable is \$21.70 (twenty-one dollars and seventy cents) per month”.

It is evident that the learned magistrate has only stated his findings but has not revealed the reasons for those findings of fact, and in so doing has ignored the instructions of WORLEY, C.J., in *Braithwaite v. Harris* (1951) L.R.B.G. 24 at p. 27, which all magistrates are in duty bound to heed if they are to be of assistance to this court and the cause of justice. Because these instructions are of such great help to us on appeal, we will repeat what the learned Chief Justice advised:

“It is well established that an appellate court will be reluctant to interfere with the findings of fact of a tribunal which has seen and heard the witnesses; but this rule must not be made an excuse for indulgence in vague general statements as reasons for decisions. A statement such as ‘The prosecution established to the satisfaction of the court all the essential ingredients in law and facts’ is of little assistance to this court which requires to be informed which particular ingredient or ingredients were in the magistrate’s view in issue in the case, what evidence was relevant thereto, the magistrate’s findings thereon, and his reasons for so finding. The requirements of the statute are not satisfied by vague generalities which leave us to grope for the issues and require us to presume that the magistrate has appreciated them and fairly weighed the relevant evidence.”

We are now asked, as the Full Court was in the above-mentioned case, to allow the appeal because of this lapse, and to remit the case to the Georgetown Judicial District to be reheard by another magistrate with an intimation that reasons should accompany his findings of fact. That course may well be taken, but would it meet the justice of the case when we are in a position to discern those reasons from the record? In this regard DUKE, J., has stated the position clearly in the case where a magistrate is delinquent in writing reasons for decision when he said in *Hardeen v. Ramcharran* (1946) L.R.B.G. 35 at p. 42 — “. . . . it has been laid down by this court, in the general interests of justice, that an appeal under the Summary Jurisdiction (Appeals) Ordinance, Chapter 16, is from the decision of the magistrate and not from his reasons of decision. If the decision of the magistrate is right, it will be upheld by this court, even if this court prefers to base its judgment on circumstances not specifically stated by the magistrate in his reasons. It is not unusual for two or more judges, although they may approach the consideration of a case from entirely different points of view, to arrive at the same results” — see also *Yhap v. Ross* (1944) L.R.B.G. 57 where SIR JOHN VERITY C.J., upheld a conviction when it

was supported by the evidence even though not by the magistrate's reasons of decision.

When the magistrate found as a fact that the premises were the same as were assessed as per Exs. "A1, A2," he must have believed the evidence of Mandall who lived there from 1947—1956; Mandall said he used to rent the upper apartment and a bicycle room which he also used as a fowl coop, and it is significant in this respect that the receipts produced by the respondent are worded — "for one month's rent of Dwelling Cottage & Bicycle Room;" but when this was altered as from 26th July, 1963, to "Dwelling Cottage & Garage," it must have made a tremendous impression on the magistrate's mind; it must have convinced him, as indeed we were, of the *mala fides* of the appellant, and that what the respondent said about the bridge having been constructed after his tenancy began on 17th July, 1962, was the truth. It must have convinced the learned magistrate that though it was the appellant's intention to improve the premises — the fact that he did apply and got permission from the City Engineer to erect a wooden bridge we think is evidence of this intention— (see Ex. "L"), he had not in fact done so until after the respondent's tenancy began. Thus, when he contracted with the respondent for an increase of rent to \$60 (sixty dollars) per month instead of for the maximum of \$21.70 (twenty-one dollars and seventy cents) fixed by Ex. "A1" there was no foundation for the increase as no expenditure had yet taken place.

Again when the magistrate made his finding he must perforce have believed the evidence of the respondent and his witnesses to the effect that there was no garage on the premises; and this finding we think was not unjustified in view of the documentary evidence led in support which we have just mentioned. In *Langford Property Co. v. Batten* (1950) 2 A.E.R. 1079 H.L., the House of Lords decided that a flat let together with a garage in 1946 differed so substantially from the letting of the same flat alone in 1939, that the flat *cum* garage constituted a dwelling-house first let in 1946. The result was that the standard rent attached from 1946 and not 1939 as the Court of Appeal had thought. It is conceded that the learned magistrate made no reference in his memorandum of reasons to the garage; but on this account, can it be properly argued that by this failure to state reasons on which he found as a fact that the premises were the same, rendered him unappreciative of the appellant's contention that the letting was the upper flat *cum* garage? We think not. For one thing, *Langford's* case was cited to him; and for another, he adjourned so that he could consider the evidence. We therefore think it is fair to conclude he must have applied a judicial mind and been aware of the importance of the matter of the garage in his assessment of the evidence, and rejected the appellant's contention that such indeed existed and formed part of the tenancy.

There was also the evidence of the respondent that he applied in August 1963 for an assessment of the premises. This is evidenced by Ex. "D". The evidence was not challenged that the Rent Assessor did not proceed

## FERREIRA v. CROMWELL

to assessment after the production of Ex. "A," the inference being that the Assessor accepted that the premises were already assessed for its maximum rent chargeable and refrained from adjudicating.

Evidence was however led by appellant's attorney Gomes that after purchase his principal effected general repairs to the upstairs of the front building, enclosed the front building and "patched" up the room downstairs, but as LORD RADCLIFFE has observed in *Langford Property Co. v. Batten* (1950) above at p. 1088, when dealing with the same question of change of identity of premises brought about by improvements or structural alterations with which we are now dealing:

"In the first case I think it reasonably clear that the Acts do not regard mere improvement or structural alteration as effecting a change of identity for the purposes of standard rent. On the contrary, the provision of Section 2(1) (a) of the Act of 1920, which allows the landlord, by way of permitted increase of rent, a certain percentage on the amount of his expenditure on improvements or structural alteration, shows that for the purposes of Section 12(1) (a) of the same Act the dwelling-house as improved or altered is regarded as the same dwelling-house as it was before. Some change more radical than the mere fact of improvement or structural alteration must take place before it can be said that, in effect, the dwelling-house which will then be under consideration has not been previously let."

For the reasons we have given above we must uphold the respondent's contention that there has been no change in the identity of the premises since they were assessed in 1950. The magistrate's finding of fact in this respect is amply supported by the evidence, notwithstanding his memorandum of reasons is devoid of any reason for it.

The appeal is dismissed with costs fixed at \$33.88 (thirty-three dollars and eighty-eight cents).

Mitchell, J. (Ag.). I agree.

*Appeal dismissed.*

Solicitors:

*H. A. Bruton* (for the appellant).

## HEMCHAND BHAGWANDIN v. ERNEST COLLINS

[Court of Appeal (Bollers, C (Ag.), Luckhoo and Cummings, JJ.A).  
December 8, 15, 1966; October 20, 1967.]

*Practice and Procedure — Rules of the Supreme Court, 1955 (now Rules of the High Court, Cap. 3:02) — Writ of Summons — Default of appearance — Matter adjudicated upon ex parte under Order 11 Rule 11 — Whether adjudication a “judgment by default” from which no appeal lies to the Court of Appeal — Federal Supreme Court (Appeals) Ordinance, No. 19 of 1958, as adapted by the British Caribbean Court of Appeal Order in Council, 1962, and the Guyana Independence (Adaptation and Modification of Laws) (Judicature) Order, No. 37 of 1966 (now Court of Appeal Act, Cap. 3:01).*

*Damages — Death of young child — Loss of expectation of life — Economic conditions of country — Principle of moderation.*

## BHAGWANDIN v. COLLINS

The respondent sued the appellant in his capacity as administrator of his deceased son's estate and individually under the Accidental Deaths and Workmen's (Compensation) Ordinance, Cap. 112 (now Cap. 99:05) and the Law Reform (Miscellaneous Provisions) Ordinance, Cap. 4 (now Cap. 6:02). The appellant did not enter appearance and the respondent, in accordance with Order 11 Rule 11, R.S.C., filed a certificate of non-appearance and a statement of claim and the matter was placed on the Bail Court List for hearing *ex parte*. It was duly heard *ex parte* and the trial Judge assessed general damages in the sum of \$3,000 and \$200 as special damages.

In the Court of Appeal, the respondent took an objection in *limine* that the respondent, having obtained judgment against the appellant "by default", the appellant was thereby precluded from lodging an appeal under s. 9(5) of the Federal Supreme Court (Appeals) Ordinance, as adapted.

**HELD** — (Bollers, C (Ag.) and Cummings, J.A.) (Luckhoo, J.A., dissenting) that (i) the judgment obtained in the matter did not flow as a result of any failure on the part of the appellant from either entering appearance to the writ or at the *ex parte* hearing but from an adjudication on the evidence led, and, accordingly, was not an 'order obtained by default' as contemplated by the Ordinance which would have ousted the jurisdiction of the Court of Appeal to entertain the appeal; (ii) the damages awarded were too high and would be reduced to \$2,000.

*Objection in limine over-ruled — Appeal allowed — Order varied.*

[*Editorial Note:*— This case is reported in (1967) 11 W.I.R. 335. See judgment of Stoby, C., in *Samuel Benjamin et al v. John Montgomery Agard*, reported elsewhere in this volume at p. 425 on similar point].

*Cases referred to:*

- (1) Vint v. Hudspith (1885) 29 L.R.Ch. 322.
- (2) Spira v. Spira (1939) 3 All E.R. 924, C.A.
- (3) Evans v. Bartlam (1937) 2 All E.R. 646, H.L.
- (4) Dsane v. Hagan & Anor (1961) 3 All E.R. 380.
- (5) Windsor v. Chalcraft (1939) 1 K.B. 279.
- (6) Murfin v. Ashbridge & Martin (1941) 1 All E.R. 231.
- (7) Yorkshire Electricity Board v. Naylor, *The Times Newspaper*, March, 16, 1967.
- (8) Samuel Benjamin et al v. John Montgomery Agard (1967) G.L.R., p. 425.
- (9) Garnett v. Jagroop & Town Council (1963) L.R.B.G. 259.
- (10) Sue v. D'Andrade (1961) L.R.B.G. 431.

*C. A. F. Hughes* for appellant.

*R. Rawana* for respondent.

CUMMINGS, J.A.: The respondent (plaintiff) sued in his capacity as the administrator of his deceased son's estate and individually under the provisions of the Accidental Death and Workmen's (Compensation) Ordinance, Chapter 112, and Law Reform (Miscellaneous) Provisions Ordinance, Chapter 4, of the Laws of Guyana.

The appellant (defendant) did not enter appearance. The plaintiff having in accordance with the provisions of Order 11 rule 11 filed a certificate of non-appearance and a statement of claim the case was placed on the Bail Court List for hearing *ex parte*. It was duly heard and the learned trial judge assessed general damages in the sum of \$3,000: and \$200: as special damages. In the course of his judgment he said:

“The defendant not having appeared, I was left with the evidence of one Armenius Rose called on behalf of the plaintiff and on that evidence I found that the defendant drove his car negligently on the day in question and that it was as a result of his negligence that Oswald Collins died. The question I then had to consider was the amount of damages to be awarded. There was some evidence given by the father that the child assisted him with his stock and to fetch wood and water and also to carry his lunch to his work-place, but I did not place much store in these allegations having regard to the age of the child. The award I made therefore was restricted to the loss of expectation of life. I gave consideration to the fact that he had not yet passed through the ordinary dangers of childhood, and that the decisions point to a lesser award of damages in the case of children than in the case of adults. I also took into account the chance of the child's happiness of life having regard to the station of life of his parents, and to local conditions, and I also paid some regard to the value of money at the present time. And taking all these matters into account, I felt that an award of \$3,000: as general damages and \$200: as special damages would meet the justice of the case.”

From this judgment the appellant appealed to this court on the following grounds:

- (a) The learned Trial Judge erred in law and applied the wrong principle when assessing the quantum of damages;
- (b) the amount of damages awarded was excessive and out of all proportion to the loss suffered;
- (c) the amount of damages awarded by the learned trial judge was grossly excessive having regard to other awards made in comparable cases and was without precedent.

The respondent objected *in limine* that:

- (a) The judgment was obtained by default in accordance with Rule 11 of Order 11 of the Rules of the Supreme Court 1955;

## BHAGWANDIN v. COLLINS

- (b) s. 9, sub-s. (5) (d) of the Federal Supreme Court (Appeals) Ordinance, No. 19 of 1958, provides that no appeal shall lie from an Order obtained by default or made on an *ex parte* application.

In reply Mr. Hughes, counsel for the appellant submitted:

- (i) The word “default” as used in the Rules of the Supreme Court connotes a failure by a litigant to do something which he is directed to do by one of the Rules of Court.
- (ii) In order for a judgment to be classified as a “judgment by default” within the meaning of section 9(5)(d) of the Federal Supreme Court (Appeals) Ordinance, it must have been obtained by the plaintiff as a result of an act of default of the defendant. In other words the plaintiff must have to rely on the default to support or obtain his judgment.

In the present case the defendant’s “default” was wholly immaterial to and not connected with the judgment which the plaintiff obtained. The plaintiff had to rely on the evidence for success in the instant case. In other words the defendant’s default was not a circumstance on which the plaintiff had to rely to obtain his judgment. It is true he was in default of appearance, but that is not the sense in which “default” is contemplated in the Federal Supreme Court (Appeals) Ordinance.

- (iii) When an action is heard or tried in the absence of the defendant and a judgment is obtained against the defendant, the judgment so obtained is properly described as “a judgment at a trial in the absence of the defendant” and not as “a judgment obtained by default”.

If the word “default” connotes a failure by a litigant to do something which he is directed by the Rules of Court to do, then unless the Rules of Court positively direct or enjoin a defendant to attend at the trial, his failure to attend at the trial would not be a default as contemplated by the ordinance; his failure would merely be an absence.

- (iv) There is no Rule of Court that positively directs or enjoins a defendant to appear at the trial of an action. Consequently his failure so to do is not properly described as a “default” but merely as absence or non-appearance. Any judgment obtained under Order 33 rule 2 of the Rules of Court therefore is “a judgment at a trial in the absence of the defendant”.

We reserved judgment on the objection *in limine* and heard the appeal on its merits. I now deal with the former.

S. 9(2) of The Federal Supreme Court Ordinance, No. 19 of 1958 confers a right of appeal to that court (now this court): “In any cause or

matter from any order of the Full Court or a Judge of the Supreme Court in certain circumstances set out therein.”

S. 9(5) provides that:

“No appeal shall lie under this section . . . (d) from an order obtained by default or made as an *ex parte* application.”

It is clear that the order obtained by default or on the *ex parte* application refers to an Order of the Full Court or a Judge of the Supreme Court (now the High Court of Justice): and that “Order obtained by default” in the ordinance is in effect the same thing as “Judgment by default” in the Rules.

As a close examination of the relevant rules is necessary I set out seriatim hereunder together with my comments on the effect of each rule.

“O. 10.

#### APPEARANCE

1. Except as hereinafter provided, a defendant shall enter appearance in the Registry out of which the writ of summons issued.

4. A defendant shall enter his appearance to a writ of summons by filing in the Registry a memorandum in writing, dated on the day of its filing, and containing the name of the defendant’s solicitor, or stating that the defendant defends in person.

“O. 11.

#### DEFAULT IN APPEARANCE

3. Where the writ of summons is indorsed for a liquidated demand, but is not a specially indorsed writ, and the defendant fails, or all the defendants, if more than one, fail to appear thereto, the plaintiff may file a request for final judgment for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified, if any, or if no rate be specified, at the rate of six per centum per annum to the date of the judgment, and costs, and on his filing a certificate of the Registrar that no appearance has been entered, together with an affidavit verifying the cause of action, the action shall be set down for final judgment in the next Bail Court List: provided that in actions by a money-lender or an assignee for the recovery or money lent by the lender or an assignee for the recovery of money lent by the money-lender or the enforcement of any agreement or security relating to any such money, judgment shall not be given in default of appearance unless the Court or Judge is satisfied that it is just and equitable that judgment should be entered for the amount claimed and that no further notice should be given to the defendant.

## BHAGWANDIN v. COLLINS

4. Where the writ of summons is indorsed for a liquidated demand, but is not a specially indorsed writ and there are several defendants, of whom one or more appear to the writ, but another or others of them fail to appear, the plaintiff may, on complying with the provisions of the preceding rule, obtain in like manner final judgment against the defendant or defendants who have not appeared for any sum not exceeding that indorsed on the writ, together with interest at the rate specified, if any, or if none be specified at the rate of six per centum per annum to the date of judgment, and the plaintiff may issue execution upon such judgment without prejudice to his right to proceed with the action against the defendant or defendants who have appeared.

5. Where the writ is indorsed with a claim for pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages, and the defendant fails, or all the defendants, if more than one, fail to appear, the plaintiff may file a request for final judgment and on filing a certificate to the Registrar that no appearance has been entered together with an affidavit or affidavits in support of his claim, the action shall be entered in the next Bail Court List. The judge shall thereupon on the affidavit or affidavits filed or such other evidence as he may require assess the value of the goods or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons: provided that the judge may order a statement of claim or particulars to be filed and verified before assessing any damages, and may order that the value and amount of damages or either of them shall be ascertained in any way which the judge may direct.

6. Where the writ is indorsed as in the last preceding rule mentioned, and there are several defendants, of whom one or more appear to the writ and another or others of them fail to appear, the plaintiff may on complying with the provisions of the preceding rule, obtain in like manner final judgment against the defendant or defendants so failing to appear without prejudice to his right to proceed with the action against the other defendant or defendants but the judge instead of assessing the value of the goods and the damages or either of them, as the case may be or ordering the same to be ascertained may order judgment to be entered against the defendant or defendants suffering judgment by default and direct that the value of the goods and the damages or either of them as the case may be, be assessed against such defendant or defendants at the same time as the trial of the action or issue therein against the other defendant or defendants.

7. Where the writ is indorsed with a claim for pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages, and is further indorsed for a liquidated

demand, whether specially or otherwise, and any defendant fails to appear to the writ, the plaintiff may proceed in the manner set out in the preceding rules of this Order and the judge may give final judgment for the debt or liquidated demand, interest, the value of the goods and the damages, or the damages only, as the case may be, and costs against the defendant or defendants failing to appear or as regards the claim for the value of the goods and damages, may order judgment to be entered and give such directions as he may think fit as to assessing such value and damages and the provisions of the preceding rules of this Order shall apply so far as they may be applicable.

11. In any case in which a writ of summons is not indorsed for a liquidated demand, or where it is indorsed for a liquidated demand, and also with some other claim, and the defendant or all the defendants, if more than one, fail to appear thereto, the account is claimed, on filing certificate of non-appearance and a statement of claim, and a request for hearing, have the action entered on the Bail Court List for hearing *ex parte* and the judge shall hear such action *ex parte* forthwith or fix a day for such hearing and in such case may direct that notice of such fixture be served on the defendant by registered post or otherwise and published in the Official Gazette by the Registrar.”

Although the default attracts the procedure set out in these rules the judgment obtained thereby is really the result of an adjudication.

“8. In case no appearance shall be entered in an action for the recovery of land within the time limited by the writ for appearance or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to file a request for and obtain in Bail Court a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply.

9. Where the plaintiff has indorsed a claim for mesne profits, arrears of rent, double value, or damages for breach of contract or wrong or injury to the premises claimed, upon a writ for the recovery of land, he may proceed to obtain judgment as in the last preceding rule mentioned for the land; and may proceed as in the other preceding rules of this order mentioned as to such other claim so indorsed.”

Here the judgment is obtained on the automatic application of the rules, there is no adjudication.

“O.12.

#### PROCEEDINGS IN SPECIALLY INDORSED WRITS.

1. The parties to a specially indorsed writ shall appear in Bail Court at the time named in the writ.

## BHAGWANDIN v. COLLINS

2. If the plaintiff intends to apply for final judgment he shall at the time of filing the writ or at any time prior to applying for judgment to file an affidavit or affidavits made by himself or by any other person who can swear positively to the facts, verifying and establishing his claim, and stating that in his belief there is no defence to the action.

3. (1) If the defendant, or any defendant if there be more defendants than one, desire to defend the action, he shall not later than eleven o'clock in the forenoon of the day (not being a Sunday or a public holiday) immediately preceding that fixed by the writ of summons for the appearance of the defendant file an affidavit of defence.

(2) The affidavit shall state whether the defence alleged goes to the whole or to part only, and (if so) to what part of the plaintiff's claim and shall contain a memorandum of the address for service of the defendant, which shall be some proper place within one mile of the Registry.

(3) The defendant shall, forthwith after filing the affidavit, serve a copy thereof, containing such memorandum as aforesaid, on the plaintiff.

4. (1) If both the plaintiff and the defendant appear, or the plaintiff appears and the defendant does not appear, the plaintiff may, if he has filed an affidavit verifying claim, apply to the judge for final judgment, for such remedy or relief as the plaintiff may be entitled to upon the statement of claim.

(2) The judge may on any hearing under this Order give judgment for the plaintiff on his application: provided that if the defendant by his affidavit shall satisfy the judge that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend, the judge shall give leave to defend, subject to such terms, if any, as the judge may impose or make such order or orders as may be just or otherwise as the case may require.

(3) The judge may give leave to the plaintiff to file an affidavit in reply if the plaintiff alleges that he has documents to exhibit in answer to the allegations in the defendant's affidavit or may order the defendant, or in the case of a corporation any officer thereof, to attend and produce any leases, deeds, books or documents, or copies or extracts therefrom.

(4) When the writ is indorsed with a claim for mesne profits or for detention with a claim for pecuniary damages or for the value of the chattel or for pecuniary damages, the judge may assess the amount on affidavit or such other evidence as he may require, and give judgment accordingly.

(5) Where the plaintiff's claim is for the delivery up of a specific chattel (with or without a claim for the hire thereof or for damages for its detention) the judge may make an order for the delivery up of the chattel without giving the defendant any option of retaining the same upon paying the assessed value thereof, and such order, if not obeyed, may be enforced by a writ of attachment or a writ of delivery.

(6) Where the plaintiff's claim is for specific performance of a contract for the sale or purchase of property the judge may make such orders of consequential accounts, inquiries and directions as to payment of purchase money, interest, damages and costs or otherwise as the case may require.

10. If neither the plaintiff nor the defendant appears at the time named in the writ, the action shall be struck off the list, and no further proceedings shall be had under the writ unless the judge shall, on the application of the plaintiff, direct that the action be placed again upon the List: provided that if the defendant is not present at the application notice that the case had been placed again on the List and the date of hearing shall be given by the Registrar to the defendant."

In all cases under this Order may be the default of appearance that attracts the procedure set out in the rule the judgment is obtained upon an adjudication or an affidavit.

"O. 25.

#### DEFAULT OF PLEADING

1. If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the court or a judge to dismiss the action with costs, for want of prosecution; and on the hearing of such application the court or judge may, if no statement or claim shall have been delivered, order the action to be dismissed accordingly, or may make such other order on such terms as the court or judge shall think just."

The effect is judgment by default on automatic application of the rule, without any adjudication.

"2. (1) If the plaintiffs claim be only for a debt or liquidated demand, whether the writ is specially indorsed or otherwise, and the defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff may, subject to the provisions of r. 15 of this Order, at the expiration of such time, and on filing a request for final judgment, apply in Bail Court for final judgment for the amount claimed with costs: provided that in actions by a money-lender or an assignee for the recovery of money lent by the money-lender or the enforcement of any agree-

## BHAGWANDIN v. COLLINS

ment or security relating to any such money, judgment shall not be given in default of defence unless the court or judge is satisfied that it is just and equitable that judgment should be entered for the amount claimed and that the plaintiff has complied with the provisions of r. 14 of this Order.

(2) When in any such action there are several defendants, if one of them make default the plaintiff may apply in like manner for final judgment against the defendant so making default, and if he obtains such judgment may issue execution upon such judgment without prejudice to his right to proceed with his action against the other defendants.”

The effect is the same as in O. 25 r.(1).

“3. (1) If the plaintiff’s claim be for pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages, and the defendant, or all the defendants, if more than one, fail to deliver a defence, the plaintiff may, subject to the provisions of r. 15 of this Order, file a request for final judgment against the defendant or defendants, and the action shall be entered in the next Bail Court List. The judge shall thereupon on the affidavit or affidavits filed or such other evidence as he may require assess the value of the goods and damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the statement of claim: provided that the judge may order particulars to be filed and verified before assessing any damages, and may order that the value and amount of damages or either of them shall be ascertained in any way which the judge may direct.

(2) When in any such action there are several defendants, if one or more of them fail to deliver a defence, the plaintiff may obtain in like manner final judgment against the defendant or defendants so failing without prejudice to his right to proceed with his action against the other defendant or defendants but the judge instead of assessing the value of the goods and the damages or either of them, as the case may be or ordering the same to be ascertained may order judgment to be entered against the defendant or suffering judgment by default and direct that the value of the goods and the damages or either of them as the case may be assessed against such defendant or defendants at the same time as the trial of the action or issue therein against the other defendant or defendants.”

Although the procedure is set in motion by the defendant’s default of defence, here this is not the mere application of rules automatically resulting in judgment. There is an adjudication. The matter is dealt with on the evidence then available to the trial judge.

“4 If the plaintiff’s claim be for a debt or liquidated demand and also for pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to deliver a defence the plaintiff may proceed in the manner set out in the preceding rules of this Order and the judge may give final judgment for the debt or liquidated demand, interest, the value of the goods and damages, or the damages only, as the case may be, and costs against the defendant or defendants failing to deliver a defence or as regards the claim for the value of the goods and damages, may order judgment to be entered and give such directions as he may think fit as to assessing such value and damages and the provisions of the preceding rules of this order, shall apply so far as they may be applicable.”

The effect is the same as in the preceding rule.

“5. In an action for the recovery of land or any immovable property, if the defendant fails to deliver a defence, the plaintiff may, subject to the provisions of rule 15 of this Order file a request for and obtain in Bail Court a judgment that the person whose right to possession is asserted in the statement of claim shall recover possession of the land or other immovable property, with his costs.

6. Where the plaintiff has endorsed a claim for mesne profits, arrears of rent, or double value in respect of the premises claimed, or any part of them, or damages for breach of contract or wrong, or injury to the premises claimed upon a writ for the recovery of land or other immovable property, if the defendant fails to deliver a defence or, if there be more than one defendant, some or one of the defendants so fails, the plaintiff may proceed to obtain judgment as in the last preceding rule mentioned for the land and may proceed as in the other preceding rules of this Order mentioned as to such other claim so endorsed.

7. If the plaintiff’s claim be for a debt or liquidated demand, or for pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages, or for any of such matters or for the recovery of possession of land or other immovable property, and the defendant delivers a defence which purports to offer an answer to part only of the plaintiff’s alleged cause of action, the plaintiff may file a request for and apply in Bail Court for judgment for the part unanswered and the judge may give such judgment or make such order as the case may require: provided that the unanswered part consists of a separate cause of action, or is severable from the rest, as in the case of part of a debt or liquidated demand; provided also that, where there is a counterclaim, execution on any such judgment as above men-

## BHAGWANDIN v. COLLINS

tioned in respect of the plaintiff's claim shall not issue without leave of the court or a judge."

Here the judgments result from the automatic application of the rules without any adjudication.

"O. 25.

8. In Probate actions, if any defendant make default in delivering a defence, the action may proceed, notwithstanding such default."

Here presumably if the defendant defaults the plaintiff will prove his case *ex parte*.

"O. 25.

9. (1) In all actions other than those in the preceding rules of this Order mentioned, if the defendant make default in delivering a defence, the plaintiff may, subject to the provisions of r. 15 of this Order, on filing a request for hearing, have the action entered on the Bail Court List for hearing *ex parte* and the judge shall hear such action *ex parte* forthwith or fix a day for such hearing and in such case may direct that notice of such fixture be served on the defendant by registered post or otherwise and published in the Official Gazette by the Registrar.

(2) Where in any such action there are several defendants, then if any of them make default as aforesaid, the plaintiff may either, if the cause of action is severable, proceed as aforesaid to have the action heard *ex parte* against the defendant making default, or may set it down for hearing *ex parte* as against him at the time it is set down for hearing as against the other defendants."

Here again although the default attracts the procedure set out the judgment is the result of an adjudication.

"13. 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.

"O. 33.

## TRIAL

2. If, when a trial is called on, the plaintiff appears, and the defendant does not appear, the plaintiff may prove his claim, so far as the burden of proof lies upon him.

3. If, when a trial is called on, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counterclaim, shall be entitled to judgment dismissing the action, but if

he has a counterclaim, then he may prove such counterclaim, so far as the burden of proof lies upon him.”

Here again there is an adjudication.

It clearly emerges from this analysis that the term “judgment by default” as issued in the rules embraces three situations:

- (1) A judgment obtained by one party in the absence of the other at a hearing of the matter, i.e. an adjudication upon the *vive voce* evidence led by one party.
- (ii) A judgment obtained by one party upon judicial consideration of affidavit evidence filed by one or both parties.
- (iii) A judgment obtained automatically, upon application by one party as a result of the failure of the other to perform some procedural act as provided by the rules.

It may be observed that all three types may be set aside upon application but it does not follow *ipso facto* that they do not attract the right of appeal.

Although Mr. Hughes’ submission were of great assistance to the court in discerning the different situations to which the term is applied by the rules; nevertheless, although the matter is not free from difficulty I am convinced that the fundamental question to be determined is this: To which one or more of these situations did the legislature intend the phrase used in the ordinance to apply? The answer is to be found in the application of well established canons of construction to s. 9 of the Ordinance.

This is a section conferring a right of appeal on an aggrieved person in certain circumstances. Did the legislature intend, while doing this, to exclude by s. 9(d) the attraction of that right to a type of judgment based upon an adjudication on the merits of the case? It is true that in this type of case the evidence for consideration is adduced by one party only either *viva voce* or upon affidavit; but it must nevertheless be judicially processed by the trial judge, that is to say, it must be perceived and evaluated, and the relevant law applied thereunto. The judicial process thereby occasioned — although comparatively limited in scope — is fundamentally the same as if both parties had adduced evidence and fully contested the case before the learned trial judge -and in the instant case this is evident from the judgment of the learned trial judge cited earlier in this judgment. Why then should a party aggrieved by this type of judgment not also have a right of appeal so that the adjudication might be reviewed by a higher tribunal consisting of at least three judges? To construe the phrase as avoiding such a right would in my view impute to the legislature an intention which would result in inconsistency, unreasonableness, harshness, inconvenience and injustice.

The term is, however, open to a construction which limits its application to a type of default judgment where there has been no adjudication on the merits. Such a situation arose in the Court of Appeal in England in the

## BHAGWANDIN v. COLLINS

case of *Vint v. Hudspith* (1885) 29 L.R. Ch. p. 322. In that case the action was dismissed with costs due to the plaintiff's non-appearance.

In the course of his judgment, COTTON, L.J., said at p. 323:

"We are of opinion that the plaintiff's proper course was to apply to the judge to restore the cause on the ground that the plaintiff was absent *per incuriam*. I am far from saying that this court cannot entertain an appeal from a judgment made by default, but in a case like the present it is important to prevent the Court of Appeal from being flooded by having to hear cases in the first instance. It is therefore right that the plaintiff should first apply to the judge who gave the judgment to restore the action. It cannot be said that the plaintiff did not know that the action was going on against him. He has only himself to thank for all the difficulty that has occurred. The appeal must stand over for a fortnight, to give time for the plaintiff to make such application to the judge as he may be advised."

And BOWEN, L.J., at p. 324:

"I agree with the rule as expressed by the Lord Justice, and also with the qualification which he has stated. I should be sorry to decide that the court has not jurisdiction to entertain an appeal from a judgment given by default; but it is equally clear that it is a bad practice to encourage parties to come here without having the cause in the first instance tried by the court below."

The plaintiff accordingly applied for a re-hearing before the learned first instance judge who heard and dismissed the motion on its merits.

It is clear that the court's view in that case was that where there was no adjudication on the merits it was impracticable and inconvenient for the Court of Appeal to have to consider the matter.

It may be that the local legislature while intending to avoid this inconvenience by the enactment of section 9(5)(d) did not intend to create hardship, injustice, inconsistency or inconvenience by excluding from the attraction of the right of appeal an adjudication on its merits.

I accept and adopt as correct, statements of the law applicable to the canons of construction as they appear in the 11th Edition of MAXWELL ON THE INTERPRETATION OF STATUTES AND DOCUMENTS:

"CONSTRUCTION MOST AGREEABLE TO  
JUSTICE AND REASON.

Section 1 — 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 no less, but rather more, force is due to any drawn from an absurdity or injustice. The question of inconvenience or absurdity must be looked at in the light of the state of affairs at the date of the passing of the statute, not in the light of subsequent events. Moreover, a court of law has nothing to do with the reasonableness or unreasonableness of a statutory provision except so far as it may help it in interpreting what the legislature has said.

### Section 2 — 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.”

Applying these presumptions to the construction of the provision under consideration I hold that the judgment in this case, resulting as it did from an adjudication on the merits was not an “Order obtained by default” as contemplated by the ordinance, and consequently the objection *in limine* should be overruled.

We turn now to the grounds of appeal:

In support of these counsel cited several cases to show the pattern followed by the local courts in the awards of damages for loss of expectation of life. Some appear hereunder:

- (1) *Garnett v. Jagroop & T.C. Georgetown*: (1963) LR.B.G.259. Age: 5 yrs. 1 month – \$275.
- (2) *Shewprashad v. Gill*: No. 1852/61 - 14.3.62. Age: 6 years. Total – \$300.
- (3) *Aziza Kundrath v. Premdas*: No. 1006/65. Age: 7 years. \$475.
- (4) -do.- Age: 12 years and has won a place at Common Entrance. \$500.
- (5) *Lewis v. Sira & Pane*: No. 457/60. Girl. Age: 14 years. \$500 for loss of exp. of life.

## BHAGWANDIN v. COLLINS

(6) *Sue v. D'Andrade*: (1961) L.R.B.G. 431. Age: 19 years. \$1,000.

The remarks of their Lordships as they appear in THE TIMES NEWSPAPER (LAW REPORT) of March 16, 1967 are expressly in point here – VISCOUNT DILHORNE said that and warrant full citation:

“Even in these days, with the drop in the value of the pound, his Lordship did not consider that £1,000 could be regarded as a very moderate sum. If Mr. Justice Ashworth had awarded that sum, his Lordship would have said it was an entirely erroneous estimate, not in accordance with *Benham v. Gambling*, and would have thought it right to interfere with his award. But in awarding £500 his Lordship did not see that the judge had acted on a wrong principle of law or misapprehended the facts or made a wholly erroneous estimate of the damage suffered. His judgment should not have been interfered with. The appeal should be allowed.

Lord Morris, concurring, said that there was an air of unreality about the assessment of damages for loss of expectation of life. The best the courts could do was to follow the guidance given in *Benham's* case. Mr. Justice Ashworth had been punctilious in doing so, and there was no warrant for disturbing his estimate. Lord Guest, also concurring, said in view of the appreciable drop in infant mortality rates the expectation of life in a young child must now be much greater than it was, say, 50 years ago.

Lord Devlin, also concurring, said the figure of £200 awarded in *Benham's* case had been taken for the ordinary adult death as if, subject to the change in the value of money, it had been fixed by statute in 1941; the decision had been described as “judicial legislation”. The current figure, which in fact the judge awarded in this case, was £500; the evidence at the trial showed it was almost exactly the equivalent of £200 in 1941.

Counsel for the mother had contended that it was wrong to take £200 as if it or its current equivalent had been settled for all time, and that it was the duty of the trial judge to measure out the appropriate sum of each case on the principles laid down in *Benham's* case. The difficulty about that argument was that it was only in a most exceptional case that the principles there laid down admitted of any flexibility in the result.

Every assessment of general damages for physical injury had to start from the basis of a conventional sum; if it did not, assessment would be chaotic. Every judge had within his knowledge not only the figure of £500 as the conventional sums appropriate to losses of limbs and faculties. But the conventional figure was only the starting point for a voyage of assessment which generally ended at a different figure. To a great reader the loss of one eye was a serious deprivation; the value

of a leg to an active sportsman was higher than it was to an average man.

But while the loss of a single faculty might be more serious for one individual than for another, the loss of all the faculties was, generally speaking, the same for all. Thus for loss of expectation of life the conventional figure had become the norm unless the case was definitely abnormal. What then, apart from the special case, would justify an increase or reduction in the price of happiness? No one — least of all any lawyer — could tell. The directions laid down in *Benham's* case were such that, except in a strictly defined minority of special cases, the starting point must also be the finish. Except for the extremities of childhood and old age, prospective length of years made no difference. Social position and worldly possessions were also irrelevant.

Nevertheless, the figure of £500 was, when compared with awards arising out of comparatively slight physical injury, extremely low. Nor was it immediately obvious why loss of happiness caused by prolonged unconsciousness should command higher compensation than a similar loss caused by death. The fact was that the whole of that branch of the law had been settled on what Lord Wright in *Rose v. Ford* (1937) A.C. called “the basis of convenience rather than of logic.

The law had endeavoured to avoid two results, both of which is considered undesirable. One was that a wrong-doer should have to pay large sums for disabling and nothing at all for killing; the other was that a large sum appropriate to total disablement should come as a windfall to the beneficiaries of the victim's estate. To arrive at a figure avoiding those two undesirable results was a matter for compromise and not for judicial determination.

His Lordship thought it would be a great improvement if that head of damage was abolished and replaced by a short Act of Parliament fixing a suitable sum which a wrong-doer whose act had caused death should pay into the estate of the deceased. While the law remained as it was, it was less likely to fall into disrespect if judges treated *Benham v. Gambling* as an injunction to stick to a fixed standard than if they started revaluing happiness, each according to his own ideas.

Lord Upjohn, also concurring said that in assessing damages which depended in part on loss of future earning capacity the depreciation of the pound and the inevitable rise in wages might be very relevant. But in assessing damages for loss of expectation of life, evidence on the fall in the purchasing power of the pound did not have much relevance.”

Mr. Hughes further submitted that while it was true that the Court of Appeal is not fettered by a standard, yet when it is obvious that a judge has made such departure from an accepted pattern as to make his assessment wholly erroneous, the court would interfere and correct the assessment.

I am of the view that the pattern in this country under this head has been unrealistic and ridiculously low. In endeavouring, however, to correct

## BHAGWANDIN v. COLLINS

this, judges must be careful not to let the pendulum swing too far to the other side. It is clear that the learned trial judge took into consideration all the necessary facts, but in my judgment in his anxiety to correct the pattern he went too far and so was erroneous in his application of *Benham v. Gambling*. Taking into consideration modern trends in England under this head, the rise in the value of money and the state of the economy of this country as compared with England, I would assess the damages for loss of expectation of life in this court at \$1,800.

Consequently, I would allow the appeal and vary the Order of the learned trial judge accordingly. The appellant should have his costs in this court.

BOLLERS, C. (Ag.): I accept the submissions made by counsel for the appellant and concur with the conclusions arrived at by my brother CUMMINGS, J.A., in his judgment. On the preliminary point I am satisfied that this is not a case where there has been a judgment by default. The phrase "judgment by default" as used in the Rules of the Supreme Court, as I apprehend it, connotes a judgment obtained by one party as the result of some failure on the part of the opposite party to do something which he is directed to do by the Rules of Court. As at present advised by the Rules of the Supreme Court there are the following sets of circumstances, under the Rules, by which a judgment can be obtained by default where a defendant or defendants fail to enter an appearance to a writ of summons:

(1) Under the provisions of Order 11 Rule 3 where the writ of summons is indorsed for a liquidated demand but is not a Specially Indorsed Writ, and the defendant or the defendants fail to appear.

(2) Under the provisions of Order 11 Rule 4 where the writ of summons is indorsed for a liquidated demand but is not a Specially Indorsed Writ and there are several defendants but one or other of them fails to appear.

(3) Under the provisions of Order 11 Rule 5 where the writ is indorsed with a claim for pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages and the defendant fails or the defendants, if more than one, fail to appear.

(4) Under the provisions of Order 11 Rule 6 where the writ is indorsed as in Rule 5 and there are several defendants and one or other appears to the writ and another or others of them fail to appear.

(5) Under the provisions of Order 11 Rule 7 where the writ is indorsed with a claim for pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages, and is further indorsed for a liquidated demand, whether specially or otherwise, and any defendant fails to appear to the writ.

(6) Under the provisions of Order 12 Rules 2 and 4(1) if the writ is specially indorsed if both the plaintiff and the defendant appear or the plaintiff appears and the defendant does not appear.

(7) Under the provisions of Order 25 Rule 2(1) where there is a claim for a liquidated demand for a debt on a Specially Indorsed Writ or otherwise and the defendant is in default of defence.

(8) Under the provisions of Order 25 Rule 3(1) and (2) where there is a claim for pecuniary damages only or detention of goods with or without a claim for pecuniary damages and any defendant fails to deliver a defence.

In all these cases, the plaintiff may make a request for final judgment and on filing a certificate of the Registrar that no appearance has been entered, together with an affidavit or affidavits in support of the claim, the action is entered on the Bail Court List for final judgment. In such cases, then, there is a judgment by default, that is, a judgment as a result of the failure of the defendant or defendants to enter an appearance to the writ of summons or to file a defence, whichever the case may be; and the matter is then dealt with on affidavit no evidence being taken, save and except in the case of Order 11 Rule 5 where the judge may take any further evidence he may require for the assessment of the value of the goods and damages, or the damages only, as the case may be.

In the instant case, the claim being one for damages, not a liquidated demand, the procedure laid down by Order 11 Rule 11 was adopted and it makes no mention of the words "request for final judgment or judgment by default" but speaks of a request for hearing of the action *ex parte* which request was in fact made. It reads as follows:

"11. In any case in which a writ of summons is not indorsed for a liquidated demand, or where it is indorsed for a liquidated demand, and also with some other claim, and the defendant or all the defendants, if more than one, fail to appear thereto, the plaintiff may, subject to the provisions of Order 13 where an account is claimed, on filing a certificate of non-appearance and a statement of claim, and a request for hearing, having the action entered on the Bail Court List for hearing *ex parte* and the Judge shall hear such action *ex parte* forthwith or fix a day for such hearing and in such case may direct that notice of such fixture be served on the defendant by registered post or otherwise and published in the Official Gazette by the Registrar."

In *Spira v. Spira* (1939) 3 A.E.R., at page 924 it was established that there is no judgment by default if it is obtained on the hearing of a summons under the English Order 14 at which the defendant does not attend. In that case, the plaintiff in an action for money lent made an application for judgment under the Rules of the Supreme Court, Order 14 Rule 1. Owing to a mistake the defendant's solicitor did not attend the summonses and judg-

## BHAGWANDIN v. COLLINS

ment was signed. The defendant later applied for leave to set aside the judgment under the Rules of the Supreme Court, Order 27 Rule 15, and contended that it was a judgment by default. It was held that there was no judgment obtained by default for a judgment obtained under Order 14 Rule 1 was not a judgment obtained on default and therefore Order 27 Rule 15 had no application. On the facts of this case, as shown by SCOTT, L.J., in his judgment, the Court of Appeal was asked to say that there was a default in regard to the proceedings under Rules of the Supreme Court, Order 14, by reason of the omission of the defendant's solicitor to take the necessary steps to appear at the hearing of the summons. The learned Judge relied on the principle laid down by LORD ATKIN in *Evans v. Bartlam*, (1937) 2 A.E.R. 646 (as set out in the judgment of Luckhoo, J.A.) and arrived at the conclusion that the answer to the question was that there had been no such default in the proceedings under the Rules of the Supreme Court, Order 14, as was contemplated by the Rules of the Supreme Court Order 27 Rule 15. He was of the opinion that the plaintiff had obtained a judgment in strict compliance with the requirement of Order 14 and the fault lay with the defendant for not appealing in time. DU PARCQ, L.J., was clearly of the view that there had been no default and that the judgment could not be set aside. He was of the view that on an examination of the terms of Order 27 Rule 15 what was contemplated was a failure to do something that a litigant is directed to do either by the Rules of the Supreme Court Order 27 or by some other Order and that when one looked at the Rules of the Supreme Court Order 14 Rule 1 under which the judgment had been obtained, far from finding any order that the defendant was to do anything, the Rule only said that the judge could order that the plaintiff could sign judgment. In other words, there was no direction to the defendant, and all that was said was that if the defendant did not satisfy the judge that he had a defence, "judgment shall be signed against him". The learned judge then expressed the view that absence was not a default. The basis for this decision then was that under the particular rule, that is, Rules of the Supreme Court, Order 27 Rule 15, under which it was sought to set aside the judgment on the ground that there had been a judgment by default, there was no failure by the defendant to do anything that he was directed to do either by that order or any other order and that under the Rules of the Supreme Court Order 14 Rule 1, under which the judgment was obtained, the defendant was not required to do anything. Applying, therefore, the principles laid down in *Spira v. Spira* to the instant case, I can find nothing stated in Order 11 Rule 11 of the local Rules of the Supreme Court which required the appellant to do anything in which case there could be no judgment by default, nor can I find anything under Order 11 Rule 12 (under which the appellant could have moved the court to set aside the judgment had he so desired) compelling the appellant to do anything. Order 11 Rule 12 is as follows:

"Where application for judgment is made pursuant to the preceding rules of this Order the court or a judge instead of giving judgment may make such order or give such directions as the court or judge may think fit and where judgment has been obtained pursuant to the

preceding rules of this Order the court or a judge may set aside or vary such judgment upon such terms as may be just.”

And it seems clear to me that whether there has been a request for final judgment made as in the case of Rules 3, 4, 5, 6 and 7 of that Order or a request for hearing *ex parte* as in the case of Rule 11, it is open to a defendant to make application to set aside a judgment obtained under that Order. The remedy of appeal, however, as pointed out by SCOTT, L.J., in *Spira v. Spira* is still available to him.

In *Dsane v. Hagan & Anor.*, (1961) 3 A.E.R. 380, it was stated by BUCKLEY J. that the words “judgment by default” in the Rules of the Supreme Court, Order 14A, the rule he was then considering, indicated a judgment obtained by a plaintiff in reliance upon some default on the part of the defendant in respect of something which he is directed to do by the rules. In that case, Mrs. H. agreed to sell freehold property to the purchasers, the defendants. The purchasers filed an action against her for specific performance of the contract to which she did not enter an appearance. The purchasers then obtained judgment against her for specific performance under the Rules of the Supreme Court Order 14A. Mrs. H. then died. The plaintiff, Mrs. H’s executrix, commenced an action to have the judgment and the contract set aside on certain grounds. The purchasers then sought to have the Statement of Claim struck out on the ground that the matters therein alleged were *res judicatae* and that it disclosed no reasonable cause of action. The purchasers contended that the judgment was final unless it could be set aside under the Rules of the Supreme Court, Order 27 Rule 15 as a judgment by default. It was held that the Statement of Claim would not be struck out because the judgment obtained under the Rules of the Supreme Court, Order 14A, was not a judgment in default within the Rules of the Supreme Court, Order 27 Rule 15, since for the purpose of obtaining such a judgment it was irrelevant whether the defendant had or had not entered appearance and the fact that the defendant did not avail himself of any opportunity to show cause why she should be allowed to defend did not constitute “default” on her part. Rules of the Supreme Court Order 27 Rule 15 was in the following terms:

“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 costs or otherwise as such court or judge may think fit.”

And the question was whether the judgment obtained under R.S.C. Order 14A was a judgment by default within the meaning of R.S.C. Order 27 Rule 15. BUCKLEY J., after an examination of *Spira v. Spira*, arrived at the conclusion that it was not. The learned judge considered whether the fact that the plaintiff had failed to file evidence on the summons and had also failed to enter an appearance made the judgment a judgment by default, and arrived at the conclusion that there had been no judgment by default, as the phrase indicated a judgment obtained by the plaintiff in reliance on some default on the part of the defendant in respect of something which he is

## BHAGWANDIN v. COLLINS

directed to do by the rules. He was careful to point out that a judgment obtained in default of appearance under R.S.C. Order 13 would be such a judgment but not in the case of an application under R.S.C. Order 14A, because it was irrelevant under the particular rule whether the defendant had entered an appearance or not. In the case of R.S.C. Order 13 failure to enter an appearance would be a relevant circumstance. In the course of his decision the learned judge stated:

“If the action is for the type of relief indicated in the rule and if the plaintiff swears the necessary affidavit verifying the cause of action and stating that he believes there is no defence to the action, the court is concerned to see whether the defendant avails himself of the opportunity to show cause why he should be permitted to defend the action. If the defendant does not do so, the court is not concerned under the rule to ascertain whether the defendant has or has not entered an appearance. If the court grants the plaintiff judgment under the rule, the plaintiff’s success owes nothing to the fact, if it be the fact, that the defendant had not entered an appearance. The defendant’s default in entering an appearance is not a circumstance on which the plaintiff relies for obtaining his judgment. In my opinion, therefore, such a judgment cannot properly be described as ‘a judgment by default’.”

In the instant case, while it may be true that under Order 11 Rule 11 before the action can be entered on the Bail Court List for hearing *ex parte*, there must be a certificate of non-appearance filed by the plaintiff, this was not a circumstance on which the plaintiff relied for obtaining his judgment. In other words, the judgment obtained did not flow from the default of the defendant on his failure to enter an appearance even though he is directed to enter an appearance under the provisions of Order 10 Rules 1 and 4, nor was there any default by the defendant when he failed to appear at the *ex parte* hearing as under the Rules of the Supreme Court he is not required to attend. The judgment which was obtained flowed from the evidence which was presented by the plaintiff and heard by the presiding judge. In other words it depended upon an adjudication on the evidence and not upon any default by the defendant. The judge may very well have found on evidence that the plaintiff had not established negligence in the defendant, in which case he could have dismissed the action. Assuming that the learned judge had erred in finding negligence established in the defendant when there was no evidence of it, surely the defendant could have appealed from such a judgment.

In my view the cases of *Windsor v. Chalcraft*, (1939) 1 K.B. 279 and *Murfin v. Ashbridge*, (1941) 1 A.E.R. 231, cited by counsel for the respondent, do not assist the respondent in the circumstances of the present case. In *Windsor v. Chalcraft* the plaintiff in a running down action notified the defendant’s insurers that he had issued a writ against the defendant. The defendant entered no appearance and judgment was obtained against him by default and a summons taken out for the assessment of damages before a

Master, on which occasion the defendant again made no appearance. No notice was given to the insurers that the writ had been served or that the case had been set down for trial. The insurers applied under Order 27 Rule 15 to have the judgment set aside. It was held that there had been a judgment by default and that the judgment ought to be set aside. It is not difficult to see why the majority decision of the court was that in this situation there was a judgment by default which could be set aside under R.S.C. Order 27 Rule 15 and that was, that the nominal defendant had failed to enter an appearance and had failed to notify the insurers, which he is bound to do under the terms of the Policy, that he was not defending the action, as a result of which a stranger to the action, the Insurance Company, was injuriously affected. If the judgment had remained undisturbed by an Order of the court, the Insurance Company would have been liable to pay the plaintiff the sum awarded in the absence of any defence in favour of the plaintiff against the defendant, and GREER, L.J., made the point that in the situation which existed there was a judgment which injuriously affected the Insurance Company in that they were made liable by the Road Traffic Acts of 1930 and 1934 to pay the amount of the judgment. They were, therefore, injuriously affected by the judgment suffered by the defendant by default and a stranger so affected could obtain the defendant's leave to use his name if the defendant had not already bound himself to allow such use of his name to be made. In point of fact, the defendant under the terms of the Policy had bound himself to allow the Insurance Company to use his name. MC KINNON, L.J., after reiterating that under the terms of the Policy the defendant had bound himself to allow strangers to the litigation to use his name, went on to say that by virtue of the provisions of the Road Traffic Acts the Insurance Company, who were strangers to the litigation, had much more than a contractual right with the defendant. They had an actual interest by reason of the liability imposed upon them by statute to make good the amount of the judgment to the plaintiff and they were, therefore, interested in the judgment as being injuriously affected by it. This learned Judge went on to give what appears to me to be the strongest reason why the judgment in this case was declared a "judgment by default" and that was that the Insurance Company's right to set the judgment aside did not depend on the similar right of the defendant but was independent of the defendant's right for the reason that though they were strangers to the proceedings they really had the whole interest as they were injuriously affected by the judgment. The insurers could therefore have defended the action if they so desired. In the words of the learned judge, the rule Order 27 Rule 15 would have very little effect given to it in such a case if it were to be held that the strangers to the litigation could exercise their right under this rule only in a case where the nominal defendant himself had similar rights. In *Murfin v. Ashbridge & Martin*, (1941) 1 A.E.R. 231, it was merely established that although the defendant's policy of insurance contained the usual clause giving the insurers control of any litigation and could take any step in interlocutory proceedings in the name of the defendant in an action brought against him, they were not parties to the action and no application

## BHAGWANDIN v. COLLINS

or appeal could be made in their name. In this case, it was decided that the insurers could not make an application in their name to set aside an interlocutory order in the action by the injured party against the insured, but would have to do it in the name of the insured as the rule of practice was that only a party to the action could be heard or make any application in the action. This case, therefore, in my view, bears no application to the circumstances of the instant case and, indeed GODDARD, L.J., as he then was, referred to *Windsor v. Chalcraft* and stated that in the instant case “the defendant did not appear and gave no notice to his Insurance Company. His Insurance Company knew nothing about the action and did not appear until a default judgment had been signed”, but then went on to give the reason why the judgment was set aside under R.S.C. Order 27 Rule 15 and that was so that the insurers might be admitted to defend the action in the defendant’s name as under the terms of the Motor Insurance Policy they had that right.

The new rule Order 14 Rule 11 introduced into the body of the English Rules of the Supreme Court by the 1962 Revision now reverses *Spira v. Spira* in that a judgment given against a party who does not appear at the hearing of an application under Order 14 Rule 1 may be set aside the effect of which must be that it is now considered to be a judgment by default. See the Annual Practice 1965, pages 211 and 212. It must, however, be pointed out that the English Order 14 Rule 1 is not comparable to the Local Order 11 Rule 11 as under the English Order where the application is by the plaintiff for summary judgment the procedure is by way of affidavit in support of the application and judgment is obtained on the affidavit or affidavits filed by the plaintiff, no evidence is taken as in the case of the local R.S.C. Order 11 Rule 11. The preliminary requirements for employing the summary process of the English Order 14 are:

- (a) The defendant must have entered an appearance.
- (b) The Statement of Claim must have been served on him.
- (c) The affidavit in support of the application must comply with the requirements of Rule 2.

If the plaintiff satisfies these preliminary requirements he will have established a *prima facie* case and he becomes entitled to judgment. In the case of the local R.S.C. Order 11 Rule 11, the defendant must have failed to enter an appearance and on a certificate of such non-appearance being filed the judgment, if any, is entered after the hearing of the evidence which requires an adjudication. Judgment is not given on affidavit as in the case of the English Order 14 Rule 1.

I have reached the conclusion, therefore, that the preliminary point taken by counsel for the respondent must fail and that this court has jurisdiction to entertain the appeal. On the issue as to damages, I am in agreement with the view expressed by CUMMINGS, J.A., guided as I am by the principle of moderation laid down in the decision of the House of Lords in *Yorkshire Electricity Board v. Naylor*, reported in the TIMES NEWSPAPER of

16th March, 1967. Consequently, I would allow the appeal and vary the order of the trial judge to read — “Judgment for the plaintiff in the sum of \$2,000.” The appellant will have his costs of this appeal in this court.

LUCKHOO, J.A.: The respondent in this appeal had secured an award of \$3,000 as general damages, and \$200 as special damages and costs to be taxed. In the Writ the appellant was positively required to enter appearance. The time limited for so doing was 10 days, and he was given notice that in default of his so doing the plaintiff may proceed therein, and judgment may be entered against him in his absence. Order 3 rule 3 of the Rules of the Supreme Court 1955 provides that —

“Every writ of summons, except a specially indorsed writ shall call upon the defendant to enter an appearance within ten days inclusive of the date on which service of the writ was effected.”

He failed to enter appearance within the time specified. The respondent then filed a certificate of non-appearance, a statement of claim, and a request to have the action entered on the Bail Court list for hearing *ex parte*. A fixture was made for hearing on the 27th April, 1966, after the matter was called in Bail Court. The trial judge took evidence on that day, the defendant not appearing and defending the action, and judgment was duly pronounced as aforesaid. The appellant then (for the first time) on the 12th of May, 1966, caused an appearance to be entered on his behalf and chose the path of proceeding to appeal; he took no steps to seek to set aside the judgment.

The appeal questions the award of damages and seeks a reduction thereof on the grounds that —

- (a) The learned trial judge erred in law and applied the wrong principle when assessing the quantum of damages.
- (b) The amount of damages awarded was excessive and out of all proportion to the loss suffered.
- (c) The amount of damages awarded by the learned trial judge was grossly excessive, having regard to other awards made, and was without precedent.

The respondent gave notice of his intention to rely upon a preliminary objection, namely, that the court had no jurisdiction to hear and determine this matter for the following reasons:

- (a) The judgment was obtained by default in accordance with Rule 11 of Order 11 of the Rules of the Supreme Court, 1955.
- (b) Section 9 subsection 5(d) of the Federal Supreme Court Appeals Ordinance, No. 19 of 1958, provides that no appeal shall lie from an order obtained by default or made on an *ex parte* application.

Arguments were heard not only on the preliminary objection, but on the appeal proper. Counsel for the appellant resisted the contention on the preliminary objection by submitting that in order that a judgment should

## BHAGWANDIN v. COLLINS

qualify as being a judgment by default, the plaintiff's success must be based on the act of default of the defendant, that is, the plaintiff must rely on the default to support or obtain his judgment; in this case the defendant's default was wholly immaterial to and not connected with the judgment which the plaintiff obtained; the plaintiff had to rely on evidence for success in the instant case, and the defendant's default was not a circumstance on which the plaintiff had to rely to obtain his judgment. He contended that in a legal sense judgment by default is automatic because of the default, but when, after default, a hearing becomes necessary and evidence is taken, it is open for the judge to dismiss the claim and such an eventuality is not a true consequence of a judgment by default.

At the outset it must be noticed that a judgment by default can occur in a variety of ways. It may be through default of appearance to Writ, to Pleadings; in discovery and inspection of documents; in answering interrogatories, and of appearance at trial, etc.

The relevant rules of the Supreme Court, 1955, governing the procedure in cases of default of appearance are to be found in Order 11 which deals specifically with default of appearance.

Provisions are there made for obtaining judgment in various ways upon default of appearance depending on what is claimed, and the nature of the endorsement of the Writ.

The Writ filed in this case was endorsed only for a claim for pecuniary damages in excess of \$500. The respondent then through the appellant's default of appearance was entitled to invoke the aid of Order 5 Rule 11 in his quest for final judgment. He could have made his request on affidavits filed with a certificate of the Registrar that no appearance had been entered after which the matter would have been entered on the next Bail Court list and the judge in his discretion could have proceeded to assess damages —

- (a) by making use of the affidavit filed, or
- (b) requiring such other evidence as he may direct, or
- (c) by ordering that the amount of damages be ascertained in any way which he may direct.

In whatever way he may have arrived at the quantum of damages, his judgment would have been obtained through the default of the defendant's appearance, and would not be a judgment on its merits.

However, the plaintiff on his own and without an order from the judge filed a statement of claim in which, in addition to a claim for pecuniary damages, there appeared a claim for a liquidated sum, vis. a claim for the sum of \$200 as funeral expenses. This served then to bring the case within Rule 7 of Order 11 which provides for what should take place when there is a claim for pecuniary damages, which is further indorsed for a liquidated demand. The procedure for all practical purposes would be no different from that

described above under Rule 5 Order 11. So that there again whatever judgment may be given would be through the default of appearance.

Before a case can come under Rule 11 Order 11 (under which the plaintiff purported to secure his final judgment) the default of appearance must be in an action not otherwise specifically provided for in the Rules which precede Rule 11, but Rule 5 as has already been seen covers a claim for pecuniary damages and Rule 7 that of pecuniary damages if made with an indorsement in a liquidated demand. The present case, on the writ, would fall within Rule 5, and on the statement of claim within Rule 7, but certainly not under Rule 11, as the words "with some other claim" must mean a claim of a kind not mentioned in Rules 3, 5, 7 and 8, or which does not fall clearly within any of the preceding Rules and may include claims for specific performance, injunction, etc.

Does the fact, then, that the procedure adopted purported to be under Rule 11 make any difference to the situation here? I think not, since what was done was more than that which was required to be done in the first instance. A statement of claim with particulars need not have been filed except ordered by the judge. In all probability, a judge would have wished to have had a statement of claim with particulars, having regard to the nature of the claim, and so the doing of this act did not take away anything from any requirement but added to it. Only an affidavit verifying the claim need have been filed at first, but by requesting judgment *ex parte* the respondent satisfied the maximum requirement which a judge could have asked for. He went into the witness-box gave evidence on oath, and made himself available for questioning to satisfy the trial Judge on any aspect on which he may desire to be better acquainted.

Even if this case did come within the scope of Order 11, Rule 11, it would make no difference to the character of the judgment which would still be a judgment in default; it would still not be on its merits and Rule 12 Order 11 applies equally.

It must not be thought that when an application for judgment is made through the default of appearance under any of the Rules under Order 11, that judgment automatically follows in consequence of such an application. This is made clear by the first part of Rule 12 which states:

"Where application for judgment is made pursuant to the preceding rules of this Order, the court or a judge instead of giving judgment may make such order or give such directions as the court or judge may think fit."

In each case the judicial discretion can be brought into play so that a judge may make such order or give any directions as may be necessary or fitting prior to the giving of judgment.

In this case the judge could have done no more than take evidence, which he did do, and which satisfied him to the point of causing him to order judgment.

## BHAGWANDIN v. COLLINS

The second part of Rule 12 then goes on to provide as follows:—

“Where judgment has been obtained pursuant to the preceding rules of this Order the court or a judge may set aside or vary such judgment upon such terms as may be just.”

This provision affects Rules 5, 7 and 11 equally and sustains my conviction that any judgment under these rules is not a judgment on its merits.

Any judgment obtained pursuant to any of the rules preceding Rule 12 will be a judgment brought about by default of appearance. The mode of leading to judgment may vary from one rule to another, or in the exercise of judicial discretion a different procedure may be ordered to satisfy the judicial conscience, but always the judgment comes from the default of appearance. It is not a judgment on its merits and any proceeding to set aside or vary under this rule applies solely to a judgment so obtained.

As was said by LORD ATKIN in *Evans v. Bartlam*, (1937) A.C. at page 480:

“The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it has the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.”

One could well understand the provision in section 9 subsection 5(d) of the Federal Supreme Court Appeals Ordinance, No. 19 of 1958, which provides that no appeal shall lie from an Order obtained by default or made on an *ex parte* application. If there is express provision for setting aside or varying a judgment brought about through default, why should the matter be taken to appeal? The matter must first be ventilated and adjudicated upon at first instance before the question of an appeal can arise.

The case of *Spira v. Spira*, (1939) 3 A.E.R., at page 924, cited by counsel for the appellant in his argument, was decided under a rule of a different kind to that in this case. There the defendants had applied to set aside the original judgment obtained under English Order 14 Rule 1 on the ground that it had been signed in default of appearance. It was held that a judgment obtained under English Order 14 Rule 1 was not then a judgment obtained at default, and Order 27 Rule 15 had therefore no application. The effort made in *Spira v. Spira* was to apply the rule of one Order to another Order. This could only have been done if the rule sought to be applied could be so used. The power to set aside a judgment by default under English Order 27 Rule 15 could only apply if the judgment obtained under Order 14 Rule 1 was a judgment by default. A judgment only assumes this character if the party, supposedly in default, was directed to take a positive step and failed to do so in consequence of which a judgment was entered against him.

DU PARCQ, L.J., at page 927, said:

“When one looks at R.S.C. Order 14 Rule 1, far from finding any Order that the defendant is to do anything, the rule only says that

the judge can order that the plaintiff should sign judgment unless the defendant shall satisfy him that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the section generally . . . . . There is no direction to the defendant. All that is said is that if he does not satisfy the judge that he has a defence, judgment shall be signed against him.”

At the conclusion of his judgment the Lord Justice said:

“I think that absence is not a default, but I think the point should be left open, and it is not desirable to decide it finally. It may be desirable that the rule should be made clear and the attention of the Rules Committee drawn to it.”

The Rules Committee did subsequently look into the matter. Now the situation is taken care of by English Order 14 Rule 11 which expressly provides:

“Any judgment given against a party who does not appear at the hearing of an application under Rule 11 or Rule 5 may be set aside or varied by the court on such terms as it thinks just.”

The effect of what English Order 14 Rule 11 does for Order 14 Rule 1 by its express provision is comparable to what our Order 11 Rule 12 does for the preceding rules under the said Order by its express provision. It should also be noticed that English Order 14 Rule 1 was intended to provide a useful means of dispensing of cases which are virtually uncontested, and to achieve that result it provided that before judgment could be entered an appearance must be entered by the defendant and an affidavit sworn to by the plaintiff that no defence exists to his claim. If no appearance is entered by the defendant, it would not be possible to proceed under this rule for summary judgment. The procedure will be under another rule through the default of appearance of the defendant.

In this case the defendant was directed to enter an appearance within ten days, inclusive of the date on which service of the writ was effective under Order 3 Rule 3. It was in the nature of a mandatory direction.

The case of *Dsane v. Hagan*, (1961) 3 A.E.R., does not support the argument of counsel for the appellant. There BUCKLEY J., in commenting on *Spira v. Spira*, said at page 383:

“In that case the defendant had entered an appearance but had filed no evidence on the summons under R.S.C. Ord. 14. The question was whether his failure to file evidence constituted a default. It was held not to have done so. The reason for the decision may, I think, be stated as being that since R.S.C. Ord. 14 merely gives a defendant an opportunity to show cause why he should be permitted to defend the action, his failure to avail himself of the opportunity could not be aptly described as a default.

## BHAGWANDIN v. COLLINS

“In my judgment, the words ‘judgment by default’ in this rule indicate a judgment obtained by a plaintiff in reliance on some default on the part of the defendant in respect of something which he is directed to do by the rules. A judgment obtained in default of appearance under R.S.C. Ord. 13 would, I think, clearly be such a judgment. To an application under R.S.C. Ord. 14A, however, it is irrelevant whether the defendant has entered an appearance or not.

“If the defendant does not do so, the court is not concerned under the rule to ascertain whether the defendant has or has not entered an appearance. If the court grants the plaintiff judgment under the rule, the plaintiff’s success owes nothing to the fact, if it be the fact, that the defendant had not entered an appearance; the defendant’s default in entering an appearance is not a circumstance on which the plaintiff relies for obtaining his judgment.”

In the instant case it was the failure of the appellant to enter appearance after he was commanded to do so within a certain time, which enabled the respondent to proceed in the way he has done to procure final judgment. The respondent’s success in obtaining the judgment which he did obtain, owes everything to the appellant’s default. It was this default in entering an appearance which led to the judgment under the particular rule.

I would therefore uphold the preliminary objection that the appellant has no *locus standi* and that his appeal should be dismissed with costs.

*Objection in limine overruled — Appeal allowed — Order varied.*

Solicitors:

*D. Dial* (for appellant.)

*Sase Narain* (for respondent)

## GWENDOLINE CHANGLEE v. JOSEPH CHANGLEE

[In the High Court (Vieira, J) – June 8, 23; July 15; August 26;  
November 4, 1967.]

*Husband and wife — Division of property — Lease of Land in husband's name — Registration of house in wife's name changed to joint names — Respective contributions — Dispute — Summary remedy — s. 15 of the Married Persons (Property) Ordinance, Cap. 169 — (now the Married Persons (Property) Act, Cap. 45:04, s. 15).*

*Husband and wife — Agreed or established rights — Contribution incapable of calculation — Whether judicial discretion unlimited.*

*Equity — Husband and wife — Presumption of advancement.*

*Trusts — Husband and wife — Resulting trust.*

The parties were married on June 1, 1946, and in 1953 the husband erected a building at a cost of about \$5,500. The wife, who was not working at the time, made no contribution either towards the rates and taxes or to the materials used in the construction. The house was on land owned by one Wilson and in respect of which an annual rental of \$30 was paid towards which the wife contributed. The application to build was in Wilson's name and the assessment notice was sent to him. As a result, the two men, during the latter part of 1953, went to the Village Office where Wilson told the Overseer that the building actually belonged to the husband and, the Overseer, on the husband's express instructions, changed the registration into that of the wife's name. On August 5, 1959, Wilson executed a lease in respect of the land in favour of the husband in consideration of the sum of \$1,000 and the lease was duly registered in the Deeds Registry. The wife made a contribution towards the lease but of an unknown amount. In December, 1959, both parties went to the Village Office and, with the wife's consent, the registration was changed to their joint names.

The wife left the matrimonial home on October 10, 1966, and filed proceedings for divorce on October 25, 1966. On April 12, 1967, whilst her petition for divorce was still pending, she filed this present application under s. 15 of the Ordinance.

**HELD:**— (i) although the wife had made no actual contributions towards the rates and taxes and towards the erection of the matrimonial home, nevertheless, under the equitable doctrine of advancement, a presumption arose, which had not in any way been rebutted by the husband, that he intended to give her the house as a gift in 1953 when he instructed the Village Overseer to register the house in her sole name; (ii) when, in 1959, the wife agreed to the change in registration to their joint names, then the property became owned by them jointly in equal shares; (iii) there was a resulting trust in favour of the wife in relation to the lease and the husband was trustee of her share but, as that share could not be mathematically calculated, then this was a fit and proper case for the Court to use an equitable knife and, accordingly, the wife was entitled to a half share or interest in the said lease, and (iv) to effectively implement (iii) the Court would order the husband to convey a half share of his right, title and interest to the wife within six weeks, failing which, the Registrar of Deeds was authorised to amend the lease to their joint names.

(Per Curiam) — s. 15 of the Ordinance is a procedural section and, under it, a Judge does not have an unfettered discretion to achieve a kind of "palm-tree justice" in resolving disputes, albeit in a summary way, between spouses concerning title to or possession of property. Where there are agreed or established rights to property no question of discretion arises and the Judge must give effect to those rights. It is only where the ownership of property becomes incapable of solution or the respective contributions of the spouses become so inextricably entangled or incapable of mathematical calculation that a Judge has a discretion, which is no wider and no narrower than his ordinary discretion in such cases, to do what is just and fair, without paying

## CHANGLEE v. CHANGLEE

too much attention to any niceties, and, if necessary, to use an equitable knife to cut the gordian knot in exceptional circumstances.

*Judgment for the petitioner (Applicant).*

[*Editorial Note:*— In *Pettit v. Pettit* (1969) 2 All E.R. 385, the House of Lords laid down that s. 17 of the Married Women's Property Act, 1882 (U.K.) (upon which s. 15 of the Ordinance is based) was a merely procedural section and that the Courts had no jurisdiction to pass proprietary interests from one spouse to another. ]

*Cases referred to:*

- (1) *Hine v. Hine* (1962) 3 All E.R. 345.
- (2) *Appleton v. Appleton* (1965) 1 All E.R. 44.
- (3) *National Provincial Bank Ltd. v. Ainsworth* (1965) 2 All E.R. 472.
- (4) *H. v. H.* (1947) 63 T.L.R. 645.
- (5) *Short v. Short* (1960) 3 All E.R. 18.
- (6) *Re Rogers' Question* (1948) 1 All E.R. 328.
- (7) *Rimmer v. Rimmer* (1953) 2 All E.R. 863; (1953) 1 Q.B. 63.
- (8) *Jansen v. Jansen* (1965) 3 All E.R. 363.
- (9) *Kingdon v. Bridges* (1688) 2 Vern. 67.
- (10) *Grey v. Grey* (1677) 2 Swans. 594.
- (11) *Glaister v. Hewer* (1803) 8 Ves. 195, 199.
- (12) *Gascoigne v. Gascoigne* (1918) 1 K.B. 223.

*D. Robinson* for applicant.

*J.N. Singh* for respondent.

VIEIRA, J.: This is an application under section 15 of the Married Persons (Property) Ordinance, Chapter 169, whereby the Applicant seeks an Order of the court for the following declarations: —

- (1) that the property situate at Sub-lot 'E', part of the N½ of the W1/3 of lot 54, South Section, Lodge Village, East Coast, Demerara (hereinafter referred to as "the land") together with the front building thereon (hereinafter referred to as "the house") is owned by herself and the Respondent, or such order as to the ownership thereof as may be just;
- (2) that motor car PP 887 is owned jointly by herself and the Respondent, and
- (3) that one Pressure Cooker, one Phillips Stove and one Grundig Radiogram, are her property absolutely.

The parties were married to each other on 1st June, 1946. After the marriage they lived and cohabited at II Bent Street, Wortmanville, George-

town, for about 7 years. Apart from Stephen, the only child of the marriage who was born on 25th November, 1946, and who is now on a government scholarship studying mechanical engineering at Leeds University, there is an older child, viz. Theresa, the result of a union between the Respondent and another woman prior to the marriage, who is now of full age and studying Nursing at Millers General Hospital in London.

In 1953, the Respondent erected a building at a cost of about \$5,500 on the land which was owned by one Joseph Wilson and for which an annual rental of \$30: — was paid. The house measures 41' x 17' with an enclosed kitchen on 7' high concrete blocks. The parties moved into the house on 7th December, 1953, at which time the house was not quite finished downstairs and there still remained some painting to be done inside. The application to build was in the name of Joseph Wilson and the assessment notice was accordingly sent to him. Wilson and both parties then went to the Lodge Village Office where Wilson told the Overseer, one Thomas Parris, that the building actually belonged to the Respondent. On the instructions of the Respondent, the Overseer then entered the Applicant's name in the Village Books as owner of the house.

I am satisfied that the main reason why this was done was because the Respondent was very much in love with his wife at the time and that it was intended that the house was to be a family house, which is admitted, and which I am satisfied he intended should go to her and the children in the event anything should happen to him. Another reason why this was done was clearly, on his own admission, to defraud his creditors.

At this time the Respondent was employed with H.A. Amo Contracting Company at a fixed salary of \$10: — per week plus commission. In April 1954 he left this company and started to work with Nagasar Sawh Ltd. at a weekly salary of \$18: — plus commission. He is still employed with this company and presently holds the responsible position of Chief Wharfinger.

On 5th August, 1956, the Respondent was involved in an automobile accident as a result of which, unfortunately, he lost his right leg below the knee. During some 3 months of hospitalisation and convalescence I accept that he received his then weekly salary of \$25:— without any reduction. He was, however, unable to earn any commission during the period of his incapacity and did not fully resume work until November, 1956.

As a result of her husband's accident, I am satisfied that the wife was forced to work for the first time since the marriage and she obtained employment at Bookers Stores Limited (hereinafter referred to as "Bookers"), on 10th September, 1956, at a basic salary of \$15.60 per week.

In October, 1956, the Applicant received a cheque on her husband's behalf from the B.G. and Trinidad Insurance Company as compensation for his injury. I accept that this amount was \$2,000 and not \$925 as stated by the Respondent.

Sometime in late 1956 or early 1957, the kitchen was removed downstairs and a dining room put in and later a patio added.

## CHANGLEE v. CHANGLEE

In 1957 Joseph Wilson made another application to the Village Council, this time to add an extension to the existing building, which was approved by the Council. The Respondent paid \$625 to two of his creditors, De Freitas Ltd. and Glasgow & Sons Ltd. and with the balance of the compensation money purchased more materials with which he erected an addition to the house measuring 24' x 17' on the top flat and 13' x 15' on the bottom flat at an approximate cost of \$2,500. This addition, to which no claim is being made by the Applicant, is completely self-contained and there is no communication between it and the house. It was first rented in 1957 at a rental of \$42.50 per month and is presently being rented for \$45:— per month.

I accept that during 1957 the applicant went on the permanent staff of Bookers as a monthly servant. As a result of her changed status she was entitled to an increment of \$10:— per month per annum and also a discount of 10% on all articles purchased by her from her employers. A deduction of \$10:— per week was taken from her wages which went towards a Savings Scheme upon which she could draw at any time and for any amount. I accept that during 1956 and 1957 she worked overtime at .90c per hour but I do not accept that she did so on an average of 10—12 hours most weeks as alleged by her.

During the early part of 1959 the Applicant attended Carnival in Trinidad where she remained for two weeks. She spent her own money during this holiday but her husband paid her passage.

On 5th October, 1959, Joseph Wilson executed a lease in respect of the land in favour of the Respondent which was duly registered in the Deeds Registry in consideration of the sum of \$1,000. I accept that the Applicant did make a contribution towards the purchase of this lease but I am unable to say with any mathematical accuracy what was the exact amount of her contribution. Although she has not stated in her evidence, she has sworn in her Affidavit that she contributed \$15:— per week towards the land. I do not accept this figure. No change was made by the Overseer in the Village Books as a change in the registration of land is only done by him on the production of a transport and not a lease.

On 22nd October, 1959, the Applicant entered into a hire purchase agreement with Bookers for the purchase of one five piece Chrome Dining Suite, 1 Phillips Kerosene Oil Stove, 1 Chrome Trolley and 1 Standard Lamp for \$636.32 which was fully paid off on 24th April, 1961.

I accept the evidence of the Respondent and the Overseer that in December, 1959, both parties went to the Village Office and the registration of the house was changed to their joint names. I do not believe the Applicant when she said she never changed the registration from her name to their joint names or authorised anyone to do so. It is difficult to say with any certainty why this change was made due to the paucity of evidence on this point. I am prepared to accept, however, on the balance of probabilities, that the change was made because the parties were still very much in love

and it was both their wish and desire that the house should be owned by the two of them jointly. On this aspect I considered it rather significant that just two months after the lease was executed, the change in the registration of the house was made in their joint names.

On 13th March, 1961 the land was sold by Joseph Wilson to one Hugh Alvin Massay for an undisclosed sum and the Overseer changed the registration of the land to the name of the new owner. During this same year both parties went to Trinidad and Barbados on vacation. There is no dispute that the passages and all the holiday expenses were solely paid for by the Respondent.

On 8th May, 1962, the Applicant entered into a hire-purchase agreement with Bookers for the purchase of a Wolseley 1500 car, PN 215, for \$4,006.35. This car was fully paid off on 15.3.65. In December 1964, Bookers sold PN 215 for \$2,200 and the Applicant entered into another hire-purchase agreement for the purchase of a second car, a Morris 1100 car, PP 887 for the same price of \$4,006.35. This car has not been fully paid off and there is still remaining a balance of \$626: — outstanding. The last instalment on this car was made on 29th April, 1967.

As regards these two cars, I am satisfied that the Respondent paid the deposit of \$900 on each car solely but I do not believe him when he said his wife paid nothing towards these two vehicles. It is accepted that on both cars a sum of \$395 was deducted representing a 10% discount on the cost price of \$3,950. It seems to me that these deductions must be considered as contributions on the wife's part. I am satisfied that the Applicant made monthly contributions of \$40 towards the instalments on each car, which, over a period of 30 months, represents a sum of \$1,200.

On October 10, 1966, the Applicant left the matrimonial home and on 25th October, 1966, filed proceedings for Divorce which are still pending. This present application was filed on 12th April, 1967.

The Respondent is only resisting the claim to the stove. He admits that the Pressure Cooker, Radiogram, Dining Suite, Trolley, Lamp and a Refrigerator belong to his wife absolutely. She has made no claim in respect of the Refrigerator, suite, trolley and lamp, her reason being that she is afraid to collect these articles from the home.

As regards the stove I am satisfied that the deposit of \$152.50 and the monthly instalments of \$26.88 were solely contributed to by the Applicant. I accept that in 1959 she received the sum of \$240 as "box-money" her contribution to the box being \$20 per month which she threw with one Mrs. Christiani and she then utilised this sum towards the purchase of the stove and the other articles which were bought at the same time.

As regards the second car PP 887 I accept that the Applicant's contribution amounted to \$395 representing 10% of the cash price as a discount plus 30 monthly instalments of \$40 \$1,200, making a total of \$1,595. This represents approximately 40% of the purchase price of \$4,006.35 on terms.

## CHANGLEE v. CHANGLEE

As regards the house the Applicant stated that she spent about \$3,000 towards the cost of this. Having regard to the evidence as a whole and, in particular, their respective earnings, I find this contention untenable.

Her salary in 1956 was about \$60 basic per month. In 1957 she went on the monthly staff from when she was entitled to annual increments of \$10 per month. She only worked overtime in 1956 and 1957. If she worked for \$10:— overtime a week in these two years she would be earning about \$100 per month in 1956 and \$110 per month in 1957. From 1958 she worked no overtime. She should therefore be earning \$80:— per month in 1958 and \$90:— per month in 1959. She said she earned \$85 per month in 1957 and \$95 per month in 1959. She was unable to say what her salary was in 1958, 1960, 1961, and 1962 but in 1963, when she bought the radiogram she said she was earning \$175 nett per month. I cannot accept this figure because during 1963 she was still paying \$40 per month towards the first car PN 215. Deductions for P.A.Y.E. and contributions to a Sickness and Pension Scheme were being made every month in addition to the deduction of \$ 10:— per week towards her savings scheme. But she had no savings since 1961, on her own admission, except the box-money of \$240 per annum. Deductions of at least \$100 per month were being made from her salary in 1963 which with normal monthly increments of \$ 10 should have been \$130 per month. I considered it impossible therefore for her to have earned \$175 nett in 1963. One only has to consider her present salary in 1967 which is admitted as being \$210 per month gross of which \$100 per month is also admitted as being taken out leaving a net salary of \$110 per month, to see how absurd her figure for 1963 is. She admitted that she stopped saving in 1965 and that she is now on a fixed salary without any increments in her present capacity as Supervisor.

She claimed that on the average she gave her husband half of her salary which was the general trend until she left the matrimonial home in October, 1966. Their resources were pooled but she never really counted the money she gave her husband.

She alleged that the \$3,000 contributed by her went towards paying the rates and taxes, the articles on hire-purchase and the materials for the house but she could give no specific sum as her contribution towards the lease although in her Affidavit she swore that she made a contribution of \$15 per week towards the land. All the paints she bought, both for the house and the addition, after she began to work and they were bought one tin at a time. But she did not begin to work until 3 years after they moved into the house.

The entire evidence of the Applicant concerning her salary, the deductions made therefrom and her contribution towards the materials for the home were most unsatisfactory to say the least. She alleges she had a Post Office Savings Account but nowhere does she say when this was started or what was the amount of those savings. It is perfectly clear that she did not go out to work until 10 years after the marriage.

Compare her financial position with that of the Respondent. Although he was earning a small salary at Amo, I accept that his commission was quite considerable. His salary was better at Nagasar Sawh and I accept that he earned commission between \$100 — \$300 per month. One of his creditors, Toolsie Persaud Ltd. had sued him in the Supreme Court during the early part of 1954 and obtained judgment against him in the sum of \$400 with costs which he paid off that very year in 8 equal monthly instalments. Rent was flowing in from the addition, at first at the rate of \$42.50 per month and later at \$45:— per month. Apart from this and the compensation money he sold some land in Berbice in either 1958 or 1959 for \$600 which has not been contradicted or even disputed in this case.

He stopped earning commission in 1958 when he was placed on the monthly staff at a salary of \$150 per month. I accept that in 1959 the debts outstanding amounted to about \$1,000 which he fully paid off in 1962 during which year his salary was \$215 per month. Although there is no evidence as to what his present salary is, I cannot, for myself, see him earning less than \$300 — \$400 per month 5 years later, especially having regard to his present position as Chief Wharfinger at Nagasar Sawh Ltd.

It was the husband who paid the wife's passage to Trinidad in 1959 and the passages for the two of them and all the expenses incurred on their vacation to Trinidad and Barbados in 1961.

Having regard to the evidence as a whole, I am satisfied, on the balance of probabilities, that the Applicant made no contribution whatsoever towards the rates and taxes and the cost of the materials of the house.

I am satisfied, however, that apart from her contributions to the furniture and the two cars, she did make a contribution towards the land rent and an unknown amount towards the purchase of the lease.

The first hire-purchase did not take place until October, 1959, by which time she had already been working at Bookers for 3 years and very few, deductions if any, were being taken out during that time. It was only after 1959 that I consider her contributions went solely towards the furniture and the two cars.

This matter aptly illustrates the uncertainties of married life. When two young people are very much in love and marry each other, it never enters their heads that this blissful state of affairs could ever possibly come to an abrupt end, still less that the intervention of the courts might be necessary to resolve disputes as to title or possession of property to which, in the majority of cases, they have both made contributions but no record has been made setting out in detail the precise amount of the respective contributions.

Section 15 of Chapter 169 provides a very useful and inexpensive procedure for settling such disputes in a summary manner by a judge of the High Court, and is based upon section 17 of the Married Women's Prop-

## CHANGLEE v. CHANGLEE

erty Act, 1882, which has received considerable attention by both English and Commonwealth Courts within recent times.

The material parts of section 15 are as follows: —

“15. In any question between husband and wife as to the title to or possession of property either party . . . may apply in a summary way to a judge of the Supreme Court, and the judge may make any order with respect to the property in dispute . . . as he thinks fit. . . .”

At first sight, section 15 appears to give a judge a very wide discretion. But is this really so? Does this section confer any new substantive rights on either spouse or is it merely procedural?

In *Hine v. Hine* (1962) 3 All E.R. 345, C.A., LORD DENNING, M.R. said at p. 347 —

“It seems to me that the jurisdiction of the court over family assets under S. 17 is entirely discretionary. Its discretion transcends all rights, legal or equitable, and enables the court to make such order as it thinks fit.”

Again in *Appleton v. Appleton* (1965) 1 All E.R. 44, C.A. LORD DENNING, M.R. said at p. 46: —

“A judge can only do what is fair and reasonable in the circumstances. Sometimes the test has been put in the cases. What term is to be implied? What would the parties have stipulated had they thought about it? That is one way of putting it. But, as the parties never did think about it at all, I prefer to take the simple test: what is reasonable and fair in the circumstances which no one contemplated before?”

In *National Provincial Bank Ltd. v. Ainsworth* (1965) 2 All E.R. 472, H.L. which demolished the so-called doctrine of the deserted wife’s equity to remain in the matrimonial home as expounded by DENNING, L.J. (as he then was) in *Bendal v. McWhirter* in 1952, LORD WILBERFORCE, in speaking of section 17 of the 1882 Act, said at p. 493: —

“This section has proved itself as one of very general utility, and it would be undesirable that anything said here should circumscribe its usefulness. What is material for present purposes is, first, to observe that it only applies as between husband and wife themselves, including probably their legal personal representative ( . . . . . ) . . . . .) Not as between their respective successors in title. Secondly, the section has been treated, rightly in my opinion, as conferring on the court power, without disturbing established property rights, not to allow those rights to be fully enforced where to do so would run counter to the duties of one spouse to another.”

LORD UPJOHN said at p. 486:—

“ . . . I cannot understand how a purely procedural section such as S. 17, can confer any new substantive rights on either of the spouses. The section provides a very useful summary method of determining between husband and wife questions of title and the right to possession of property. With all respect to Lord Denning, M.R. I am of the opinion that he has put a far too wide construction on this section. In *H. v. H* (69) he said in reference to the ambit of S. 17: “The judge should have a free hand to do what is just.” In the recent case of *Hine v. Hine* (70) he said of the section: “Its discretion transcends all rights, legal or equitable . . . . .” I prefer the approach of Devlin L.J. in *Short v. Short* (71). The powers of the court under S. 17, as the learned Lord Justice said, are substantially the same as in any other proceeding where the ownership or possession of property is in question. The discretion of the court is no wider and no narrower than the ordinary discretion of the court in such cases.”

At p. 487 LORD UPJOHN continued:—

“Title must be decided as a matter of fact and law; but there will be many cases where, after years of happy married life, frequently with one banking account to which both contribute and no one taking much heed as to who pay for what, the ownership of property has become so inextricably entangled or become legally incapable of solution than an equitable knife must be used to cut the Gordian Knot. Re: *Rogers’ Question* (74) and *Rimmer v. Rimmer* (75) are typical examples. When once the relevant document has been construed, however, or the rights as to title have been determined by judicial decision on the available evidence as must be necessary (if possible) in the first place, no further question of discretion on questions of title arise . . . . .) Depending as they do on a too wide construction of S. 17, I would not myself regard the recent cases of *Hine v. Hine* (76) and *Appleton v. appleton* (77) as correctly decided.”

In *Jansen v. Jansen* (1965) 3 All E.R. 363, C.A., LORD DENNING, M.R. referred to the comments made by Lord Upjohn but did not agree with them and held that *Appleton v. Appleton* still was good authority. The learned Master of the Rolls said at p. 366: —

“It has been said that S. 17 is a procedural section which confers no jurisdiction which did not previously exist. I would point out, however, that before 1882 husband and wife were one person in law, and neither could sue the other ( . . . . . ) It is plain, therefore that S. 17 is not merely procedural. It gives rights where none existed before, and given a remedy where before there was none. Where the existing rights can clearly be ascertained, effect

## CHANGLEE v. CHANGLEE

must be given to them; but where it is not possible to ascertain them, the court can only do what the Statute says that it should so, that is, make such order “as it thinks fit.”

RUSSELL L.J. dissented and said at p. 370: —

“My own view remains that S. 17 is merely a procedural section, designed to achieve an inexpensive and private solution of property disputes between husband and wife; that it confers no jurisdiction which did not previously exist as a matter of substantive law; that it merely recognises the fact that in some cases between husband and wife one must do one’s best to deal with some situation by applying a knife to the Gordian Knot, as Lord Upjohn remarked in *National Provincial Bank Ltd. v. Ainsworth* (15).”

Speaking for myself, and with all due respect to LORD DENNING, I prefer the views expressed by LORDS WILBERFORCE and UPJOHN and RUSSELL, L.J.

In *Rimmer v. Rimmer* (1952) 2 All E.R. 863, C.A. SIR RAYMOND EVERSLED, M.R. cited the case of *Newgrosh v. Newgrosh* (1950) (unreported) where BUCKNILL L.J. referred to the principle of “palm-tree justice” which principle the learned Lord Justice stated he understood to mean —

“justice which makes orders which appear to be fair and just in the special circumstances of the case.”

In *National Provincial Bank Ltd. v. Ainsworth* (*ubi supra*) LORD HODSON referred to this principle of “palm-tree justice” and said at p. 477—

“Questions have arisen in considering the extent of the discretion of the court under S. 17 of the Act of 1882, but, broadly speaking, the view is accepted that the court has a discretion to be exercised in the interests of the parties to restrain or postpone the enforcement of legal rights but not to vary agreed or established rights to property, in an endeavour to achieve a “kind of palm-tree justice.”

It seems clear to me, having regard to the authorities, that a judge does not have an unfettered discretion under section 15 to achieve a kind of “palm tree justice” in resolving disputes, albeit in a summary way, between spouses concerning title to or possession of property. When there are agreed or established rights to property no question of discretion arises and the judge must give effect to those rights. It is only where the ownership of property becomes incapable of solution or the respective contributions of the spouses become so inextricably entangled or incapable of mathematical calculation that a judge has a discretion, which is no wider and no narrower than his ordinary discretion in such cases, to do what is just and fair, without paying too much attention to any niceties, and, if necessary, to use an equitable knife to cut the gordian knot in exceptional circumstances.

It is a fundamental principle of Equity that where A advances the money to purchase the property but the conveyance is taken in the name of

B then, in the absence of any explanatory facts, such as an intention to give the property to B, a resulting trust arises in favour of A.

But where, as here, the parties are husband and wife, another presumption of Equity arises, viz. the presumption of advancement. Where a husband purchases or transfers property or makes an investment in the name of his wife, a gift to her is presumed in the absence of evidence of an intention to the contrary and no question of a resulting trust arises. This equally applies where the conveyance is taken in their joint names, in which case the wife would be entitled to a half share — *Kingdon v. Bridges* (1688) 2 Vern 67; *Glaister v. Hewer* (1803) 8 Ves. 195, 199.

Furthermore, the presumption does not operate where a wife purchases or transfers property or makes an investment in her husband's name or in the joint names. In all such cases, the husband is presumed to be a trustee for the wife in the absence of evidence of a contrary intention.

It is important to note that the presumption of advancement is merely an evidential one — *Grey v. Grey* (1677) 2 Swans. 594 — and may be rebutted by evidence of the real purchaser's actual intention.

What was the real intention of the Respondent in this matter? Clearly, in my opinion, he caused the registration of the house after its completion to be put in his wife's name for two reasons: —

- (i) as a result of his natural love and affection for his wife and children in the event anything should happen to him and
- (ii) to defraud his creditors.

In *Gascoigne v. Gascoigne* (1918) 1 K.B. 223 it was held that a gift was to be presumed even if the wife's name was used by the husband with her connivance in order to defeat his creditors.

I am therefore satisfied that the Respondent intended to give his wife the house as a gift in 1953 when he instructed the Overseer to register the house in her name and I am further satisfied that this presumption has not in any way been rebutted by him.

I am also satisfied that the Applicant agreed to the change in their joint names in 1959 and, it is significant, that nothing has been done since that time by either party to change the status quo. Consequently, it is clear, I think, that since 1959 the house has been owned and is still owned by both of them jointly in equal shares, despite my finding that the applicant has contributed nothing towards the cost of same.

What about the lease? It is clear that no lease existed in 1953 when the house was erected. Land rent was being paid all the time until the lease was executed and duly registered in October, 1959. In view of my finding that the wife did contribute towards the purchase of the lease, albeit of an unknown amount, then this clearly, in my opinion raises the presumption of a resulting trust and the husband would be trustee of that unknown share. I have already indicated that I considered it significant that just two

## CHANGLEE v. CHANGLEE

months after the lease was executed, the registration of the house was changed to their joint names. This confirms my belief that it was agreed and understood between the parties that not only the house but the lease was to belong to them jointly in equal shares. As I am unable to distinguish or evaluate their respective contributions towards the purchase of the lease, this is a proper circumstance for me to use an equitable knife to sever the gordian knot.

A difficulty arises as regards the car PP 887. In the absence of evidence to the contrary, I do not think it unreasonable to assume that this car has not been repossessed by Bookers. Clearly I cannot order a sale as the legal title still remains in the hirer, viz. Bookers. It seems to me that all I can possibly do is to declare that the Applicant is entitled to a 40% interest or share in this vehicle and leave it like that. I would suggest, if it is at all possible now, that either or both of the parties pay off the outstanding arrears of \$626 and then the vehicle can be sold in which case the Applicant would be entitled to 40% of the nett proceeds of sale.

In conclusion I make the following orders:—

- (1) that it is declared that the Applicant is entitled to a half share or interest jointly with the respondent in respect of both the house and the lease. The Respondent is hereby ordered to convey a half share of his right, title and interest in the lease to the Applicant within six (6) weeks, failing which, the Registrar of Deeds is hereby authorised to amend the lease to their joint names in accordance with the above declaration;
- (2) that the Applicant is declared entitled to a 40% share or interest in motor car PP 887 and
- (3) that it is declared that the Stove, Pressure Cooker and Radiogram are the property of the Applicant absolutely.

In addition, an Injunction is hereby granted restraining the Respondent, his servants, and/or agents from selling or otherwise disposing of (a) the Applicant's half share or interest in the house and lease and (b) the Stove, Pressure Cooker and Radiogram.

There will be costs to the Applicant fixed in the sum of \$400. A stay of Execution for six (6) weeks is hereby granted to the Respondent.

*Judgment for petitioner (applicant).*

Solicitors:

*V. Lampkin* (for applicant);

*Dabi Dial* (for respondent).

PATRICK NORMAN v. EUSTACE HARDING,  
DETECTIVE CONSTABLE No. 4740

[Court of Appeal (Stoby, C., Cummings and Crane, JJ.A).  
November 2, 6, 1967.]

*Criminal Law — Appeal — Conviction and sentence in Magistrate's Court — Affirmed in Full Court — Right of further appeal to Court of Appeal — Federal Supreme Court (Appeals) Ordinance, No. 19 of 1958, as adapted by the British Caribbean Court of Appeal Order in Council, 1962, and the Guyana Independence (Adaptation and Modification of Laws) (Judicature) Order, No. 37 of 1966 — (now s. 31 of the Court of Appeal Act, Cap. 3:01).*

The appellant was convicted and sentenced to one month's imprisonment by a Magistrate for assaulting a peace officer in the execution of his duty. His appeal to the Full Court was dismissed and the conviction and sentence affirmed. He then sought an extension of time within which to apply to the Court of Appeal for leave to appeal, but that Court, in declining jurisdiction to entertain the application —

**HELD** — (i) the clear result of the Ordinance was that appeals to the Court of Appeal from the Full Court were limited to questions of law (s. 33(1)); (ii) even where questions of law are involved, either the Full Court or the Court of Appeal must first give leave before the appeal will be entertained (s. 33(2)); (iii) an appeal against sentence is not a question of law alone and, accordingly, the Court had no jurisdiction to entertain the application for leave to appeal.

(Per Stoby, C.) — The only legal aspect of a sentence is the maximum which the law permits a Judge or Magistrate to impose. The question as to whether the sentence is heavy or lenient is never a question of law but always of Judicial discretion exercised in accordance with certain humanitarian or sociological principles, which if not taken into account, may be a ground for variation of the sentence by an appellate court with jurisdiction to review sentences. In this matter the Full Court exercised its discretion in accordance with recognised sentencing principles.

*Application for leave to appeal not entertained.*

[*Editorial Note:*— This case is reported in 23 W.I.R. 22]

*Cases referred to:*

None.

*B. De Santos* for appellant.

*J. Gonsalves-Sabola*, Assistant Director of Public Prosecutions, for respondent.

## PATRICK NORMAN v. EUSTACE HARDING

STOBY, C. On the 6th September, 1963, the applicant was convicted by a magistrate of the Georgetown Judicial District of assaulting a peace officer in the execution of his duty and sentenced to 1 month imprisonment.

He appealed to the Full Court against conviction and sentence, but both were affirmed on the 18th September, 1964.

He now seeks an extension of time within which he may apply to this court for leave to appeal. The right to appeal to this court from an order of the Full Court is regulated by the Federal Supreme Court (Appeals) Ordinance No. 19 of 1958 as adapted by the British Caribbean Court of Appeal Order in Council 1962 and the Guyana Independence (Adaptation & Modification of Laws) (Judicature) Order No. 37 of 1966.

S. 33(1) provides —

“Where the Full Court makes an order on appeal from an inferior court in a criminal cause or matter, any party to such appeal may appeal to the Federal Supreme Court from the order of the Full Court —

- (a) upon any ground which involves a question of law alone;  
or . . . . .”;

and s. 33(2) —

“No appeal shall lie under subsection except with the leave of the Full Court or of the Federal Supreme Court.”

The clear result of that section is to limit appeals to this court from the Full Court to questions of law and even where there is a question of law alone involved, either the Full Court or this court must first give leave before the appeal will be entertained. To my knowledge this has been the practice of this court and it is a practice which has never been questioned.

Counsel for the applicant has urged that an appeal against sentence involves a question of law as the very act of sentencing necessitates consideration of legal principles by the judicial authority before the sentence is imposed; hence, he said, sentencing involves law and whether the discretion was correctly exercised is only relevant when the merits of the appeal are being heard.

In SALMOND ON JURISPRUDENCE the subject is fully discussed. He says at para. 10 p. 71 —

“the question whether he has done the act so alleged against him is a question of fact, be determined in accordance with the evidence; and the question as to what is the just and reasonable punishment to be imposed upon him for his offence is a question of right or judicial discretion, to be determined in accordance with the moral judgment of the court.”

After an examination of various aspects, he expresses the view that the imposition of a sentence is a question of fact or at most mixed law and fact.

At para. 10 p. 74 he says —

“there are many cases in which the freedom of judicial discretion on any point is not wholly taken away by a fixed rule of law, but is merely restrained and limited by such a rule, and is left to operate within the restricted sphere so allowed to it. In such a case the question to be determined by the court is one of law so far as the law goes, and one of fact or judicial discretion as to the rest. The proper penalty for an offence is usually a question of this nature. The law imposes a fixed maximum, but leaves the discretion of the court to operate within the limits so appointed.”

My own view is that the only legal aspect of a sentence is the maximum which the law permits a judge or magistrate to impose. Whether a heavy or lenient sentence is inflicted is never a question of law but always a question of judicial discretion. That judicial discretion is not exercised in accordance with legal principles but in accordance with certain humanitarian or sociological principles which have evolved as a result of modern psychological studies. So deeply rooted have the factors of age, nature of offence, prevalence of the offence and so on, become steeped in the court's approach to sentence that a judicial officer who does not take these factors into account may have the sentence he has imposed varied by an appellate court with jurisdiction to review sentences. But whether an offender is a first offender and ought to be put on probation, fined or imprisoned, does not depend on any legal principle. A tremendous amount of research is going on in the U.K. and in this country on the reason for crime and whether the recognised forms of punishment and treatment are correct or can be improved. A judge or magistrate who keeps abreast of contemporary publications, e.g. Howard Jones, Leo Page, Roger Mays, will be aware of what society demands before he imposes a sentence, but if he is unaware of modern trends, he breaks no rule of law.

One final word, perhaps, of commiseration. This is an application to appeal from the Full Court's decision, not the magistrate's decision. It would be necessary to show that the Full Court erred. This is the Full Court's decision:—

“We therefore took into consideration all that was urged by counsel for the appellant and also the fact that the maximum sentence which may be imposed for such an offence is imprisonment for six months. We considered that having regard to the nature of the offence, the circumstances under which the offence was committed and the fact that it was committed against a member of one of the law enforcement agencies in the exercise of his duties as such member, a sentence of imprisonment for one month was not unduly severe.”

This extract from the Full Court's decision proves conclusively that the Full Court exercised its discretion in accordance with recognised sentencing principles.

## PATRICK NORMAN v. EUSTACE HARDING

In the result I hold that an appeal from a sentence is not a question of law alone and this court has no jurisdiction to entertain the application for leave to appeal.

CUMMINGS, J.A.: I agree with the conclusions reached by Milord Chancellor, but would limit the application of the reasons therefore to the facts of this particular appeal.

CRANE, J.A. (Ag.): I concur with the decision delivered by the Chancellor.

*Application for leave to appeal not entertained.*

## CATHERINE LAVERICK v. JAIPATI

[In the High Court (George, J. (Ag) — September 12, 19; October 5; November 18, 1967.]

*Equity — Trust — Land — Transport — Fictitious agreement of sale — Fraudulent transaction to defeat creditor — Executory contract — Locus poenitentiae — Right to rescind — Declaration.*

*Land — Transport — Agreement of sale — Not evidenced in writing — Not pleaded — Effect of — Proviso (d) to s. 3D of the Civil Law Ordinance, Cap. 2 (now proviso (d) to s. 3D of the Civil Law Act, Cap. 6:01) — Order 17 Rule 15 of the Supreme Court Rules, 1955 (now Order 17 Rule 15 of the Rules of the High Court, Cap. 3:02 (Subsidiary)).*

The plaintiff was a very old woman and the legal owner of substantial property at lot 68, Corentyne, Berbice, including seven house lots, the subject matter of this action. After the death in 1964 of one Outar Balkissoon who had managed her property for many years, his son, one Phagooram, filed an application before the Berbice Rice Assessment Committee claiming to be a tenant of the plaintiff in respect of 32 acres together with a proportionate area in the second depth to which she was entitled to an interest. The plaintiff denied that Phagooram was ever her tenant, but the Committee made an assessment, which, by necessary implication, involved a recognition of Phagooram as her tenant. The plaintiff appealed against the Committee's decision and also filed a writ of summons for trespass against Phagooram (Action 196/1964 — Berbice). The appeal was dismissed and Phagooram instituted committal proceedings in the High Court against the plaintiff.

In order to prevent Phagooram, were he to be successful in the action for trespass and in the committal proceedings, from levying execution, the plaintiff, the defendant's husband, one Khodie and one Tulsie, both friends

and/or confidantes of the old lady, met at the defendant's house and, in the presence of the Village Overseer, it was agreed between the three of them that the plaintiff would transport her property to the two men who, in turn, agreed to transport the said property back to her after the cases in the High Court had been concluded. Pursuant to this oral agreement two memoranda were prepared purporting to be receipts for \$10,100 and \$10,000 in the names of Khodie and Tulsie respectively and two promissory notes were prepared by the two men for their respective sums but no money was ever actually paid. Before the memorandum of sale to Khodie was made out, the plaintiff expressed concern about the debts that he owed and it was then agreed that although the memorandum would remain in his name, the property, however, would be transported instead to his wife, the defendant herein.

On November 24, 1965, transport of the property described in Khodie's memorandum dated January 6, 1964 (Ex. "C") was passed to the defendant but the plaintiff continued to pay the village rates and to live in the house on the said property. An opposition was filed to the passing of transport to Tulsie sometime during 1966 and, while it was still pending, the plaintiff and Phagooram settled their legal disputes. In keeping with their agreement, Tulsie has not insisted on the passing of title to him. After the settlement with Phagooram the plaintiff requested the defendant to re-convey the property transported to her but she has refused to do so.

Counsel for the defendant did not address on the facts but submitted that even if the Court found on the facts for the plaintiff (which it did) then the plaintiff's action must nevertheless fail because (a) as the agreement relates to the sale of land it must be evidenced in writing signed by the defendant or her agent in accordance with proviso (d) to s. 3D of the Civil Law Ordinance, Cap. 2. Here, he argued, the memorandum in question (Ex. "C") made no reference to a re-conveyance and, in any event, had not been signed by the defendant or her agent, and (b) the plaintiff is here seeking, *inter alia*, a declaration that the defendant holds the property in "trust" for her but the facts disclose a fraudulent transaction, *viz.*, to defeat a creditor.

**HELD:**— that (i) although the maxim "in pari delicto potior est conditio defendentis" is applicable to illegal contracts such as the present one, nevertheless, a party seeking a release from such a contract would be permitted to rescind same where the contract is still executory, in which case, the law itself allows a "locus poenitentiae" and the rescinding party is permitted to recover; (ii) in this matter, neither the defendant nor her husband had any means and, accordingly, the promissory note was worthless. As the plaintiff had clearly 'repented' the transaction while it was still executory, then Equity would not permit the defendant to retain the property since this would be tantamount to permitting her to perpetuate a fraud upon the plaintiff; (iii) in this regard, therefore, proviso (d) to s. 3D of the Civil Law Ordinance, Cap. 2 could not be prayed in aid so as to permit the defendant to retain the property and, in any event, the defendant had not specifically pleaded the provisions of the said proviso and, accordingly, could not now rely upon it, and (iv) having regard to all the circumstances, therefore, the plaintiff was entitled to a declaration that the defendant held the property, the subject-matter of the action, in 'trust'

## LAVERICK v. JAIPATI

for her and the defendant would be ordered to transport the said property to the plaintiff at the latter's expense within six weeks from date of judgment, failing which, the Registrar of Deeds would be ordered to effect the necessary conveyance. Further, the promissory note in relation to the transaction in question was to be delivered up to the Court for cancellation.

*Judgment for Plaintiff.*

[*Editorial Note* — The defendant's notice of motion filed on September 18, 1968, seeking an extension of time to lodge security for costs as ordered by Persaud, J.A., on May 25, 1968, was refused on November, 8, 1968, by the Court of Appeal (Persaud, Cummings & Crane, J.J.A.)]

*Cases referred to:—*

- (1) Alexander v. Rayson (1936) 1 K.B. 169.
- (2) Bone v. Ekless (1860) 29 L.J. Ex. 438.
- (3) Taylor v. Bowers (1876) 1 Q.B.D. 291.
- (4) Kearley v. Thomson (1890) 24 Q.B.D. 742.
- (5) Bigos v. Bousted (1951) 1 All E.R. 92.
- (6) Symes v. Hughes (1870) 9 L.R. Eq. 475.
- (7) Davies v. Otty 35 Beav. 208.
- (8) Gascoigne v. Gascoigne (1918) 1 K.B. 223.
- (9) Rochefoucauld v. Boustead (1897) 1 Ch. 196.
- (10) Dawkins v. Baron Penrhyn 4 App. Cas. 51.

*M. Poonai* for Plaintiff.

*R. Rawana* for Defendant.

GEORGE, J. (Ag.): In this action the plaintiff claims from the defendant.

- (a) a declaration that she is the legal owner of the following immovable property viz: —

House lots numbers 129, 130, 131 and 132 Section A, house lots 130, 131 and 132 Section B, West halves of cultivation lots numbers 19 and 44, and South half of reef lot number 18 in lot 68 in the Lots 67 – 74 Village District, situate on the Corentyne Coast, in the county of Berbice, Guyana, as shown on a diagram of Lot No. 68 by J.L. Yhap, Sworn Land Surveyor, dated 10th July, 1950 and deposited in the Deeds Registry at New Amsterdam, Berbice, on the 20th September 1950 with the building and erections on house lot 129 section A, aforesaid,

- (b) an order that the defendant holds the property above described by transport No. 960 of 1965 Berbice in trust for the plaintiff, and

- (c) an order compelling the defendant to re-transport the afore-described property to the plaintiff.

The plaintiff also claimed an injunction restraining the defendant, by herself her servants or agents from entering and/or remaining or interfering with the plaintiff's right of quiet and peaceful possession and occupation of the property.

The plaintiff, who appears to be a very old woman, was until the 24th November 1965, the legal owner of substantial property situate at lot 68 Corentyne, Berbice, including the property more fully described above. She states that for many years prior to his death in 1964 one Outar Balkissoon managed her property on her behalf. After his death his son Phagooram claimed to be a tenant in respect of 32 acres of the land together with a proportionate area in the second depth in which she was entitled to an interest. She did not recognise him as her tenant and he filed an application to the Berbice Rice Assessment Committee for an assessment of the lands. The Committee did make an assessment, and this, by necessary implication, involved a recognition of Phagooram as her tenant. She appealed against this decision, and also instituted a Writ of Summons (Action No. 196 of 1964, Berbice) against Phagooram for trespass. The appeal against the decision of the Rice Assessment Committee was dismissed and Phagooram instituted committal proceedings in the High Court against the Plaintiff.

While the proceedings before the Assessment Committee were pending the defendant's husband, one Khodie, and one Tulsie, who appear to have been close friends and/or confidantes of the plaintiff frequently accompanied her to the Committee's sittings. This fact is not denied by the defendant's husband. Indeed, he states that the plaintiff was a regular visitor of their home. However, his reasons for so accompanying the plaintiff differ from the latter's version. She states that their reason for accompanying her was because of their desire to rent a portion of her lands for rice cultivation. She goes on to state that she did, in fact, rent eight beds of the land under tenancy to Phagooram, to Tulsie, and permitted the defendant's husband to plant twenty beds in consideration for is giving her the proceeds of ten beds.

The plaintiff further states that Phagooram had threatened to take away her property, presumably by way of levying execution, in the event of his being successful in the action for trespass and the committal proceedings, pending in the High Court. In order to obviate this possible outcome it was agreed between her, the defendant and Tulsie, that she should transport her property to the latter and they in turn agreed to transport back the property to her, after the cases had been concluded. The agreement to transport the property to the two men arrived at in the defendant's home and in the presence of the Village Overseer of the Lots 67 – 74 Village District.

Pursuant to this oral agreement, two memoranda were prepared purporting to be receipts for \$10,100 and \$10,000 the sale of the plaintiff's property to the defendant's husband and Tulsie. According to Tulsie before the memorandum of sale to the defendant's husband was made, the plaintiff

## LAVERICK v. JAIPATI

in his presence and that of the Defendant and Khodie said, that she had heard that the defendant owed debts to certain persons and that she was afraid to transport any of her property to him. The Village Overseer then suggested, and it was agreed between the parties, that the plaintiff would transport the property originally intended to be passed to Khodie, to her the defendant.

In the memorandum of sale to Khodie, the purchase price was stated to be \$10,100 while in that to Tulsie it was \$10,000. Promissory Notes were prepared by Khodie and Tulsie in respect of these sums and no money was actually paid when the memoranda were signed. I accept the evidence of the plaintiff that nothing has since been paid on these notes. Indeed she states that the Promissory Notes were not kept by her, but after execution, were left with the Village Overseer, as the transactions were never intended to be genuine sales. It may not be inappropriate at this juncture to draw attention to the evidence of Richard King whose evidence I accept in preference to Alfred Teekalall as to the value of the property transported to the defendant. He values the land now held by the defendant at \$14,000: – and the house at \$1,200: – Teekalall states that the value of the land transferred to the defendant is about \$11,000: —

Transport in respect of the property described in the memorandum dated the 6th January 1964 (Ex. “C”) was passed to the defendant on the 24th November 1965. The plaintiff has, however, continued to pay the village rates in respect of the land sold and to live in the house situate thereon. With regard to Tulsie, an opposition was filed to the passing of transport to him and sometime during the year 1966 while this opposition was still extant the plaintiff settled her legal disputes with Phagooram. In keeping with the oral agreement between them, Tulsie has not insisted on the passing of title to him.

After the settlement with Phagooram the plaintiff states that she requested both the defendant and her husband to re-convey the property to her, but they have refused to do so. One Johnny Hanoman was called as a witness by the plaintiff and I accept his evidence, when he states that as a result of discussions which he had with the plaintiff in May 1966, he accompanied the latter to the defendant’s home. There he spoke with her and her husband and requested them to return the property to the plaintiff, but they refused. Hanoman further states that in the presence of the defendant he asked her husband whether any money had been paid towards the purchase price and he admitted that none had been paid.

In answer to the plaintiff’s case the defendant states that the sale to her was a genuine one and that her husband, Khodie, bought on her behalf and transacted all business leading up to her purchase. Her husband acknowledges that he acted as such. She further states that she has known the plaintiff for a long time but denies that the latter ever visited her home except once when she came to offer the property subsequently bought by her to her husband for sale. She further states that this was also the day

when the purchase price of \$10,100 was agreed upon. She admits that she had no money in any bank but kept money belonging to her and her husband at home. Although she intended to use this money to pay for the purchase, she admits that when her husband went to the Village Office on the day of the signing of the agreement he took none of it with him. She, however, states that her husband did give the plaintiff over \$200 — the exact amount she was unable to say — on the day when the plaintiff visited her home. However, she later states in cross-examination that when the plaintiff told her and her husband that she wanted to sell her land she, the defendant, mortgaged her property situate at Lot 69 Village, Corentyne for \$2,000: — in order to purchase the land offered by the plaintiff. She then states that she gave her husband \$1,000 of this amount to give to the plaintiff when the latter visited them and that he paid over the same to the plaintiff in her presence. She goes on to state that her husband, on her behalf, has since been paying money to the plaintiff out of the proceeds of rice cultivation of the land and that she has actually seen her husband make payments to the plaintiff.

Her husband on the other hand states that the plaintiff, whom he has known for about six to seven years has been a frequent visitor of their home, and that it was on one of these visits that she offered the disputed land for sale. He admits, that at his own expense, he has accompanied the plaintiff to court in New Amsterdam, on at least two occasions, and that he has gone there to pay lawyers on her behalf on many occasions. When the plaintiff came to offer him the property for sale, he and his wife, between them, had about \$30 to \$40 at home and no money was paid to the plaintiff when she paid this visit. He, however, states that the sale was a genuine one and the memorandum of sale Ex. "C" and the promissory note were executed on the date recorded thereon i.e. the 6th January 1964. He also states that it was agreed that the purchase price should be paid in ten equal yearly instalments, and that the plaintiff put him in possession of the rice land after the memorandum Ex. "C" was executed.

According to him the plaintiff has been paid over \$2,000 since she executed the memorandum but he has no receipts for this sum and, in fact, cannot remember the exact amount paid. He also states that he has paid sums totalling \$647 for and on behalf of the plaintiff and tendered receipts to substantiate this. In this regard the plaintiff states that she had given the sums mentioned in the receipts to him to make the payments on her behalf. After stating that the plaintiff did advise that the property be transported in his wife's name because he owed money on a judgment, this witness denies that such a conversation ever took place. Besides, he at first states that he occupied 12 beds of the plaintiff's land after the memorandum Ex. "C" was executed and denied that he ever occupied 20 beds in partnership with the plaintiff. It was only after it was brought to his attention that Ex. "C" states that he was in occupation of 20 beds did he admit that this was in fact so. Both he and the defendant admit that the plaintiff is still in possession of the house which was sold to the latter and that neither he

## LAVERICK v. JAIPATI

nor the defendant has paid any of the rates due and payable from the year 1964.

The last witness called on behalf on the defendant was the Village Overseer who, *inter alia*, states that he did not know how the transport was passed to the defendant. I construe this to mean that he is not aware of the circumstances, if any, surrounding the negotiations and subsequent conveyance of the disputed property to the defendant.

Besides the obvious discrepancies in the evidence of the defendant and her husband it is inconceivable that the plaintiff, in a genuine sale transaction, would not have insisted on some part payment of this substantial purchase price. I get the impression that it was when the defendant was confronted with this unreasonable situation in cross-examination that she states that she gave her husband \$1,000 to pay to the plaintiff. I was not impressed with the demeanour of the defendant or her husband or for that matter that of the Village Overseer, who appeared to me to be out to help the defendant, and, wherever the evidence of the plaintiff and her witnesses conflicted with that of the defendant and her witnesses I accept and believe the evidence of the former.

I accordingly find that the plaintiff and the defendant's husband agreed that the former would convey by transport the immovable property, the subject matter of this action, in order to deny to Phagooram the proceeds of an apprehended judgment and/or costs which he may have obtained as a result of the action for trespass (Action No. 196 of 1964 Berbice) and the committal proceedings. I further believe and accept that although the memorandum of sale signed by the plaintiff, Ex. "C" speaks of a sale to the defendant's husband, it was subsequently agreed that the property should be transported to the defendant, because of the knowledge that the latter's husband had a substantial debt or debts, outstanding. I also believe that neither the defendant nor her husband paid any money to the plaintiff or on her behalf at any time but that the latter executed a promissory note which was never intended to be acted upon, the parties full well knowing that neither of the former had any means and that the transaction was one intended to defeat an apprehended creditor viz. Phagooram. I also find that transport was passed to the defendant on the 24th November 1965 but that some time early in 1966 the plaintiff settled with Phagooram all outstanding legal issues; that in May 1966, she requested the defendant and her husband to reconvey the property to her but they refused, asserting that it was the sale was a genuine one. I also find that the defendant had full knowledge of the reason for the conveyance and/or that her husband who also had that knowledge was acting as her agent.

Counsel for the defendant did not address on the facts, but stated that even if I found against the defendant and for the plaintiff on the evidence the plaintiff's action must still fail because: —

- (a) the agreement relates to the sale of land and by virtue of proviso (d) to Section 3D of the Civil Law of Guyana Ordinance, Chapter

2, must be evidenced by some note or memorandum in writing signed by the defendant or her agent. On this aspect he submits that the memorandum of sale Ex. "C" makes no reference to a reconveyance to the plaintiff and in any event has not been signed by the defendant or her agent;

- (b) the plaintiff's action prays inter alia for a declaration that the defendant holds the property in trust for her and that the facts disclose a fraudulent transaction, viz. to defeat a creditor. In such a circumstance, he submits, the plaintiff cannot plead in aid of her claim, her illegal or fraudulent contract with the defendant.

I shall consider the latter submission first. It is a well established principle of law that where the purpose of a contract is illegal, immoral or contrary to public policy neither party can sue on it. See *Alexander v Rayson* (1936) 1 K.B. 169 at p. 182.

The court will not lend its aid to a man who founds his cause of action on an immoral or illegal act, not for the sake of the defendant but because it will not lend its aid to the plaintiff. In the present action the evidence discloses what clearly amounts to an illegal contract, and unless the plaintiff can bring herself within one of the two exceptions relevant in the context of these proceedings, her action must fail. She is, in effect, seeking a release from her contract and the maxim *in pari delicto potior est conditio defendentis* would apply.

One of the exceptions to this maxim is if she can prove that she was not in *pari delicto* with the defendant with regard to the illegal transaction. The only evidence pointing to this is the age of the plaintiff as compared with that of the defendant and her husband, both of whom appear to be much younger than she. Although she is obviously an old woman no evidence has been lead as to her actual age or the state of her mental and/or physical health. Indeed I formed the impression that she was, at the material time, and still is, in full control of all her faculties. I do not, therefore, think that it can properly be said that, because of the great inequality in the ages of the plaintiff and the defendant they were not in *pari delicto*.

The other exception to the rule of non-recovery of property transferred under an illegal contract arises out of a party's right to rescind such a contract while it is still executory. In such a circumstance the law allows a *locus poenitentiae* and the rescinding party is permitted to recover. See *Bone v Ekless* (1860) 29 L.J. Ex 438 at p. 440. If however, the illegal purpose has been wholly or substantially effected, or if it has been merely frustrated, the law allows no such *locus poenitentiae*.

Four cases may usefully be cited to illustrate these principles. In *Taylor v Bowers* (1876) 1 Q.B.D. 291 the plaintiff being in embarrassed financial circumstances, in pursuance of an agreement between himself and A made over all his stock in trade to A, and fictitious bills of exchange

## LAVERICK v. JAIPATI

were given by A in the plaintiff's favour. Possessions of the goods were given to A, together with an inventory but, no bill of sale was executed by the plaintiff. The object of the transaction was to prevent the plaintiff's creditors getting hold of the goods and so being paid in full. The defendant was a creditor for £100 and was cognisant of what was concocted between the plaintiff and A. After A had removed the goods from the plaintiff's premises, two meetings of the plaintiff's creditors were held, but no compromise was effected with them. Some months afterwards A executed a bill of sale to the defendant for the alleged purpose of securing the debt due from the plaintiff to the defendant, but the plaintiff was not a party to the bill of sale, nor did he sanction or know of it. After an unsuccessful demand by the plaintiff of A and the defendant for the return of the goods, he brought an action against the defendant for their detention. It was held both by the Queen's Bench and the Court of Appeal that, the fraudulent purpose not being carried out, the plaintiff was not relying on the illegal transaction but was entitled to repudiate it and recover his goods from A, and the defendant had no better title than A as he knew how A had become possessed of the goods. At pages 298 to 299 *ibid*, MELLISH, L.J., had this to say: —

“I think the only question open upon the rule is, assuming the plaintiff had never really intended to part with his good to Alcock or to Bowers, whether he is precluded from recovering the goods from Bowers on the ground that he could not do so without proving the illegal transaction to which he was a party.”

and later at pages 299 and 300 he said: —

“He is not bringing the action for the purpose of enforcing the illegal transaction, . . . nevertheless, if the illegal transaction had been carried out, the plaintiff himself, in any judgment, could not afterwards have recovered the goods, but the illegal transaction was not carried out; it wholly came to an end. To hold that the plaintiff is enabled to recover does not carry on the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon and before the parties took any step to carry it out. That I apprehend is the true distinction in point of law.”

In *Kearley v Thomson* (1890) 24 Q.B.D. 742 on the other hand, the court came to the conclusion that the contract was illegal but that it had been substantially performed and accordingly refused any relief to the plaintiff. The facts are as follows: —

The defendants were solicitors who were acting for a petitioning creditor in bankruptcy proceedings. They had incurred costs which were to be paid out of the estate but which had not been paid, because the estate lacked assets. The plaintiff, a friend of the bankrupt, offered to pay to the defendant's the costs which were owing, if they would undertake not to appear at the public examination of the bankrupt and not to oppose his discharge. The defendants, after obtaining the consent of their client, agreed

to what the plaintiff suggested and received the money. They did not appear at the public examination but, before any application could be made to discharge the bankrupt, the plaintiff brought an action to recover back his money from the defendants. It was held that the plaintiff was not entitled to recover, the reason for the decision being that, as the defendants had refrained from appearing at the public examination, the illegal agreement to pervert the course of justice has been partly performed and this partial performance prevented the plaintiff from succeeding in his claim. In his judgment FRY, L.J. said at p. 8745 *ibid*: —

“As a general rule where the plaintiff cannot get at the money which he seeks to recover without showing the illegal transaction he cannot succeed. In such a case the usual rule is *potior est conditio possidentis*”

and at pages 746 and 747 he had this to say: —

“Can it be contended that if the illegal contract has been partly carried into effect and partly remains unperformed the money can still be recovered? In my judgment it cannot be contended with success . . . I hold, therefore, that where there has been a partial carrying into effect of any illegal purpose in a substantial manner, it is impossible though there remains something to be performed, that the money paid under that illegal contract can be recovered back.”

Although in *Kearley v Thomson* the case of *Taylor v Bowers* was severely criticised by FRY, L.J., PRITCHARD, J. in *Bigos v Bousted* (1951) 1 A.E.R. 9’2 at page 97 has this to say about the two decisions:—

“whereas in the latter nothing had been done in pursuance of the illegal contract, in the former something had been done in pursuance of the illegal agreement.”

This to my mind is the important distinction between the two cases. With regard to the effects of frustration, the cases of *Alexander v Rayson* (1936) 1 K.B. 169 and *Bigos v. Bousted* (1951) *ibid* illustrate the approach taken by the courts.

In the former case a landlord leased a flat at a rent of £450 per annum and at the same time contracted in writing with the tenant for the provisions of certain services at an annual payment of £750 — £1,200 in all. The services under contract were substantially the same as those already provided under the lease. Although the actual terms of the two documents were not illegal, immoral or contrary to public policy, their execution was alleged to have been obtained by the landlord for the purpose of defrauding a valuation authority by deceiving them to believe that the true rent received by the landlord in respect of the premises was £450, and by concealing the terms of the contract the landlord failed in his attempt to deceive the authority. It was held that despite the fact that the landlord’s attempt to deceive had been frustrated by a third party, to wit, the valuation authority, if the facts were true he could not seek the court’s assistance to obtain either rent under the lease or payments under the contract. In his judgment ROMER, L.J., on page 190 *ibid* said;

## LAVERICK v. JAIPATI

“The plaintiff’s repentance came too late namely, after he had been found out. Where the illegal purpose has been wholly or partially effected, the law allows no *locus poenitentiae*. . . . It will not be any readier to do so when the repentance, as in the present case, is merely due to the frustration by others of the plaintiff’s fraudulent purpose.”

In *Bigos v. Bousted* owing to the restrictions then in force on English currency, the defendant was unable to obtain from the Treasury what he considered an adequate allowance to enable his wife and daughter, who was unwell, to stay outside the United Kingdom for a sufficiently long time for the visit to be of benefit to the latter. He entered into an agreement with the plaintiff whereby the latter agreed to make £150 of Italian currency available for the wife and daughter in Italy within one week, and the defendant promised to repay her with English money in England. As security for his promise he deposited with the plaintiff a share certificate for 140 shares in a company. The defendant’s daughter and wife went to Italy but the plaintiff failed to make any Italian currency available. They were forced, as a result, to return to England sooner than they would have returned if they had had the money. The defendant asked the plaintiff to return to her, his share certificate but she refused to do so. In any action by the plaintiff to recover the share of £150 from the defendant on the ground that she had made a loan to him of that sum. The defendant denied the loan, and set out the true facts of the transaction and counter-claimed for the return of the certificate. The plaintiff abandoned her action but the defendant proceeded with her counter-claim and contended that although the contract was an illegal one, as it was still executory, he was allowed a *locus poenitentiae* and, therefore, entitled to succeed. It was held per PRITCHARD, J., at page 101 *ibid* that:—

“On the return of the defendant’s wife and daughter from Italy the whole project fell to the ground. There was no repentance which caused the contract not to be carried out. The defendant desired that it should be carried out until the plaintiff failed to do so, and when she failed the plaintiff’s wife and daughter returned to England, because, as a result of the plaintiffs failure they could no longer afford to stay in Italy. By the plaintiffs failure the whole venture was frustrated and in those circumstances I do not think that the reason for this illegal contract not having come to fruition was the repentance of the defendant . . . . In these circumstances I have come to the conclusion that the words of Macnaghten, J. (1936) 2 A.E.R. 462 in *Berg v Sadler and Moore*, should apply to this case.

“If dishonest people pay money for a dishonest purpose and then by good fortune the offence which they designed to commit is not committed, are they entitled in this court to come and ask for recovery of the money? In my opinion they are not.”

As was the case in *Taylor v. Bowers* the illegal transaction in the present action was with a view to defeating a creditor. I do not think that it can be

said that by effecting a settlement with Phagooram there was a frustration of the contract either at the instance of the defendant or any third person, for what did happen was that, even before judgment could be entered in favour of Phagooram, the plaintiff and he arrived at a settlement of the two suits against her. There is no evidence as to whether or not the settlement resulted in an agreement whereby the plaintiff should pay to Phagooram any money. If she agreed to make some monetary compensation to him then, assuming that payment has not been effected if the plaintiff's success in these proceedings would result a recovery of the property for the benefit of Phagooram. See *Symes v. Hughes* (1870) 9 L.R. Eq. 475. If, on the other hand, any money settlement has been satisfied, I do not think that it can be said that this act on the plaintiff's part has resulted in a frustration of the illegal purpose or an execution thereof whether partially or otherwise. Her act of payment would be the very antithesis of defeating her creditor.

The fact that the plaintiff did pass transport to the defendant must not, however, be lost sight of. At least in this regard the facts of this case differ somewhat from those in *Taylor v. Bowers* where, although there was a delivery of the goods, no bills of sale were executed. The question therefore is, does this make any difference to the plaintiff's chances of success. I think not, and in this regard I again refer to the case of *Symes v. Hughes* (1870) 9 L.R. Eq. 475. There the plaintiff being in pecuniary difficulties, assigned certain leasehold property to another, in consideration for £170 expressed in the deed to be paid with a view to defeating his creditors. In fact no consideration had been paid. Two and one half years afterwards he was adjudged a bankrupt, but obtained the sanction of his creditors, under the provisions of the Bankruptcy Act 1861 (UK), to an arrangement by which his estate and effects were revested in him, he covenanting to prosecute a suit for the recovery of the assigned property and to pay a composition of 2s. 6d. in the pound to his creditors in case such suit had a successful termination. The fact of his illegal transaction to defeat his creditors was pleaded by him in a supplemental bill. Although it was argued that as the assignment had been made by the plaintiff to defeat his creditors and accordingly the court ought not to interfere between him and the defendant, it was held that he was entitled to have the property reconveyed to him by the defendant as the illegal purpose had not been effected. In *Davies v. Otty* 35 Beav. 208 the same conclusion was arrived at.

The facts in the case of *Symes v. Hughes* are unlike those of *Gascoigne v. Gascoigne* (1918) 1 K.B. 223, where the plaintiff failed in his suit for a declaration that his wife was a trustee for him, of certain leasehold property, which he had taken in her name together with the building situate thereon and built by him, on the ground that his action was done with a view to defeating his creditors. He and his wife had separated subsequent to the construction of the building and he brought the proceedings after she refused to assign the lease to him. It was held that he could not use his own fraud to rebut the presumption of a gift to his wife in the circumstances.

## LAVERICK v. JAIPATI

Having regard to the above authorities and to my finding that neither the defendant nor her husband had any means and that accordingly the promissory note was worthless, I am of the view that equity would not permit the defendant to retain the property. The plaintiff, in my opinion, has repented the transaction while it was still executory, and to allow the defendant to retain the property would be tantamount to permitting her to perpetrate a fraud on the plaintiff. In this regard proviso (d) to section 3D of the Civil Law of Guyana Ordinance cannot be prayed in aid so as to permit the defendant to retain the property. See *Rochevoucauld v. Boustead* (1897) 1 Ch. 196.

In any event the defendant has not specifically pleaded the provisions of proviso (d) to sec. 3D of the ordinance and cannot now rely on it. See *Dawkins v. Baron Penrhyn* 4 App. Cas 51 and Order 17 Rule 15 of the Rules of the High Court 1955.

In the circumstances I hold that the plaintiff is entitled to a declaration that the defendant holds the property, the subject matter of this suit, on trust for her and an order that the defendant do transport the said property to plaintiff at the latter's expense, and I so declare and order. In the event of her failure to comply with the order to reconvey within six weeks of this judgment the Registrar of Deeds is ordered to effect the necessary conveyance. I further order that the promissory note in relation to the transaction be delivered up to the court and be cancelled. There shall be costs to the plaintiff.

*Judgment for Plaintiff.*

Solicitors:

*Mr. P. Poonai*, (for plaintiff);

*Mr. S. Narain*, (for defendant).

## MAHADAI v. SOOKRAM RAGBEER

[In the High Court (Vieira, J.) – May 12; June 19, 30; November 18, 1967.]

*Equity — Parties not legally married — Mutual agreement to live together as man and wife — Equal contributions towards repairs and renovation of house — Whether resulting trust arises.*

*Evidence — Written agreement — Executed and attested in lawyer's chambers — Plaintiff's copy stolen by defendant — Whether office copy retained by counsel admissible in evidence.*

*Contract — Written agreement — Consideration — Whether agreement invalid.*

The plaintiff was the manageress of several houses of ill-repute but expressed a desire to become 'respectable' to a female friend, one Mrs. Ishmael, with whom the defendant was also acquainted. A meeting was then arranged and they both met at a birthday party at Mrs. Ishmael's house in October, 1965. The defendant was 48 years of age and was a married man who had been separated from his wife for nine years. The plaintiff was a young, buxom and comely woman who had two children from a man that she had married according to Hindu rites. The defendant was greatly impressed with the plaintiff but she was very level-headed and wisely insisted in seeing her future home. The next day they went to the defendant's house in the Mon Repos Squatting area and the plaintiff was greatly shocked at the make, size and condition of same and she made it quite clear that she was not prepared to live in such a building which had no proper sanitary facilities. They then agreed that they would each contribute money towards the repairs and renovation of the said building and they both spent about \$800: each towards this end. The parties then moved into the renovated house and the plaintiff brought along her two children as well as her brother. As would be expected with such a tenuous arrangement things did not go well and the plaintiff was worried about her contribution as well as the defendant's failure to honour a promise that he had made before they had moved in that he would have an agreement drawn up concerning the house. After much persuasion she eventually got him to go with her to her lawyer's chambers where an agreement in relation to the house was drawn up and signed by them and attested by two witnesses, the lawyer's clerk and a male friend of the defendant. Both copies were placed by the plaintiff in a chest of drawers in the bedroom which she locked but two days later she discovered both missing and the defendant, on being confronted, admitted that he had the documents and he bluntly refused to give her back her copy. She then went and made a report to her lawyer who wrote a letter to the defendant on her instructions.

The plaintiff then filed this action seeking a declaration that she was the owner of one-half of the building, alternatively, the sum of \$800: being the value of her half-share. She also claimed damages for trespass as well as a consequential injunction. In his amended defence, the defendant contended that assuming, but not admitting, that he had entered into such an agreement, then it was invalid since it was made for a past and/or an immoral consideration.

**HELD:**— that (i) the agreement had not been entered into because the parties were living in concubinage or because of his love and affection for her (she not having made any, contribution) but it was a clear assertion of an existing fact that the building was owned by them jointly with a right given to either of them to be given the first option to purchase the half-share of the other if certain conditions occurred; (ii) since the equitable "presumption of advancement" can only arise where the parties are legally married, then the parties had to be treated as "strangers" and under the principle laid down in *Bull v. Bull* (6) a "resulting trust" arose in favour of the plaintiff which had not been negated by any evidence to the contrary, and, accordingly, Equity will not allow either party to put the other out and each

## MAHADAI v. RAGABEER

is entitled concurrently with the other to the possession, use and enjoyment thereof; (iii) in this matter, the Court would direct that the building be put up for sale at public auction and that the proceeds of sale be apportioned equally between them after deducting the necessary expenses, and, until that time, the plaintiff was entitled to a declaration that she is the owner of one undivided half-part or share in and to the said building and that a consequential injunction would be granted restraining the defendant, his servants and/or agents from removing and/or selling or otherwise disposing of the said building without the plaintiff's consent.

*Judgment for Plaintiff.*

*Cases referred to:—*

- (1) Lucas v. Williams & Sons (1892) 2 Q.B. 113, (C.A.).
- (2) Alivan v. Furnival (1834) C.M. & R. 277.
- (3) Rider v. Kidder (1806) 12 Ves. 202.
- (4) Haliman-Ali v. Carl Pereira (1965) No. 258 (Demerara) (unreported).
- (5) Lutchmin v. Baijnauth called Munda (1966) No. 23 (Berbice) (unreported).
- (6) Bull v. Bull (1955) 1 Q.B.D. 234.
- (7) Diwell v. Fames (1959) 1 W.L.R. 624.

*F.R. Jacob for plaintiff.*

*B.S. Rai for defendant.*

[*Editorial Note* — The defendant's appeal to the Court of Appeal in the case of Lutchmin v. Baijnauth called Munda (1966) No. 23 (Berbice) (5) (supra) was withdrawn on July 29, 1967.]

VIEIRA, J.: In this matter the Plaintiff seeks (1) a declaration that she is the owner of one-half of the following building: —

“A wooden building, body house measuring 18' x 11' with gallery measuring 18' x 9', and Kitchen measuring 12' x 8', with zinc roof, all standing on 6' wooden blocks with concrete bases, situate at Mon Repos Squatting Area, East Coast, Demerara.”

(2) alternatively, the sum of \$800 being the value of her half-share of and in the said building;

(3) \$1,000 as damages for trespass and wrongful dispossession;

(4) an Injunction restraining the defendant from removing and/or selling or otherwise disposing of the aforesaid building without the plaintiff's consent;

(5) such further and other relief as may be just and

(6) costs.

It is difficult to know, with any certainty, where the real truth lies in this matter, due to the very conflicting nature of the evidence. Nevertheless, on the balance of probabilities, I am prepared to accept the plaintiff's story in respect of the important issues in this matter in preference to that of the defendant.

About five (5) years ago the plaintiff became separated from one D'Arcy with whom she had gone through a ceremony of marriage according to Hindu rites and for whom she had borne two children. After they split up she lived at various places including Vigilance, East Coast, Demerara, the Gaumont Hotel in High Street, Georgetown, the White Coconut Tree and the Rajmahal Boarding Houses, both in Lombard Street, Georgetown. She managed all those three establishments where rooms were hired to males and females for no other conceivable purpose, I consider, than sheer unadulterated sexual promiscuity.

The defendant is forty-eight years old and is a cartman who makes a rather precarious living by buying and selling bottles. He is legally married but he has been separated from his wife for the past 9 years.

Both parties were friends of one Jaitoon Ishmael and were visitors of her home at Annandale, East Coast, Demerara. During one of these visits, the plaintiff expressed remorse at the type of life she was living at the Gaumont Hotel and expressed a desire to become 'respectable' and, with that object in mind, asked Mrs. Ishmael to look around and see if she could find some man suitable for her to which Mrs. Ishmael promised she would do her best.

I accept that one Sunday in October, 1965, the parties met for the first time and were introduced to each other at a birthday party held in Mrs. Ishmael's house. After some talk they mutually agreed to live together as man and wife. I have no doubt that the defendant was delighted in finding a young, mature and, without doubt, a sexually experienced woman of comely appearance and rather Junoesque proportions. The plaintiff, however, was no fool and quite sensibly insisted on seeing her future home.

As a result, on the following day, both parties went to the defendant's home in the Squatting Area at Mon Repos, East Coast, Demerara, accompanied by Mrs. Ishmael. The plaintiff was dismayed at what she saw and there can be no doubt, I think, that her fears were well founded. The house was a mere shoe-house on 3' wooden blocks without any front door or front steps. The bedroom had no door and the kitchen windowless. This type of house is typical of so many that have mushroomed in this country on land to which the squatters have absolutely no title and which pose serious threats to health in the absence of any proper sewerage or water facilities. These conditions are the unfortunate but direct aftermath of the bloody and senseless racial carnage that cleaved the two major ethnic groups during the civil disturbances of 1962, 1963 and 1964.

## MAHADAI v. RAGABEER

On seeing this dilapidated ruin, the plaintiff made it quite clear that she was not prepared to live under such conditions with her two children and brother. The building was not suitable and would have to be extended and, having regard to their previous agreement that the house was to belong to them jointly, she was prepared to expend \$700 towards its reconstruction, \$500 of which she had in cash and \$200 in materials belonging to her father.

I have no doubt that the defendant did spend about \$600 on the house which included the sum of \$50 he had obtained from pledging two pairs of gold bangles loaned him by Mrs. Ishmael. I do not believe Mrs. Ishmael and the defendant, however, when they said that the plaintiff told them that she did not have one cent. In paragraph 6 of her Statement of Claim, and in her evidence, the plaintiff alleges that the building was and still is valued at \$1,600. This figure is admitted in paragraph 2 of both the Defence and Amended Defence. It seems to me that the old shoe-house could not possibly have been worth more than \$300.

I accept that during the said month of October, 1965, Mrs. Bhagmania Rambarran, the owner of Rajmahal Boarding House, handed over \$500 in cash to the plaintiff in the presence of both Mrs. Ishmael and the defendant, money which had been saved by the plaintiff from time to time and given to Mrs. Rambarran to keep.

Later the said October, 1965, the plaintiff, accompanied by Mrs. Ishmael bought \$500 worth of materials from Toolsie Persaud Ltd. and other Saw Mills and later took them along with her father's materials valued \$200 to the defendant's home.

I do not believe and/or accept the evidence of the defendant and Mrs. Ishmael that after they went with the plaintiff to see the house for the first time that the defendant told the two women that he had \$300 which was not enough to put on a gallery, and that Mrs. Ishmael told them that if he runs short she would assist them. The defendant has made a bold statement that he spent about \$600 but he has only accounted for \$350. There is absolutely no evidence where he got the balance of \$250 from although it was put to the plaintiff in cross-examination that the day after they visited the house Jaitoon Ishmael promised to lend the defendant the sum of \$250. This was denied by the plaintiff. Even Mrs. Ishmael herself never said anything about promising to lend the defendant such a sum or that any such sum was lent by her to the defendant. I think I am being quite generous in accepting that the defendant spent \$600 on the house.

I accept that the plaintiff expended in all \$800 towards the house, being the \$700 worth of materials and \$100 she obtained from pledging some of her jewellery. I am also prepared to accept that the defendant's contribution was also the sum of \$800, being \$350 for materials actually purchased by Mrs. Ishmael on his behalf, \$300 being the value of the old shoe-house and \$150 (which I consider a reasonable sum) to pay the car-

penter, George Barry, for the repairs and reconstruction to the old house, which I am satisfied were of quite a considerable nature.

Whilst the repairs and reconstruction were being carried out by George Barry, the parties started to live together as man and wife for the first time in a nearby house for about two weeks.

The parties then moved into the re-constructed house as well as the plaintiff's two children and her brother. Their hopes and aspirations were short-lived, however, as they only in fact lived together as man and wife for about five months.

Things did not go well and the plaintiff became rather apprehensive that the defendant would not honour his promise to have an agreement drawn up concerning the house which I accept he did make prior to their moving in. She kept chiding him and constantly reminded him of his promise. Eventually, on 17th March, 1966, the parties went to the chambers of the plaintiff's lawyer, Mr. F.R. Jacob, of counsel, where an agreement in relation to the house was drafted by Counsel and handed to his then clerk, one Goolcharran, who typed out the document. Goolcharran then read out the terms of the agreement to both parties in the presence of one John Seegobin, a friend of the defendant who had come along to witness the agreement.

I am perfectly satisfied that both parties signed the agreement in duplicate and that both copies were attested to by Goolcharran and Seegobin.

I consider that both the defendant and Seegobin are unmitigated liars when they both swore that no document of any nature was ever signed by them.

After the agreement was signed in duplicate, the defendant gave his copy to the plaintiff and she later locked both copies in a chest of drawers in the bedroom of the house. About two days later the defendant threatened to put the plaintiff out of the house. Later she went to the chest of drawers and discovered the envelope in which she had the two copies of the agreement missing. She spoke with the defendant about this and he admitted that he had them but he refused to give her copy. Two days later she made a report to her lawyer and on her instructions a letter was written to the defendant.

I have no reason to disbelieve that not only was the defendant prepared at all costs to have both copies of the agreement in his possession but he was even prepared to go so far as to bribe Goolcharran to let him have the office copy as well which Goolcharran rightly refused.

Despite strenuous objections by counsel for the defendant I allowed the office copy (this is used in the loose sense of the copy retained by Counsel and not in the strict legal sense) of the agreement to be tendered (Ex. "A"). Counsel objected on the ground that this was breach of privilege between Counsel and client. I agreed with Counsel for the plain-

## MAHADAI v. RAGABEER

tiff that this was really a question of a document inter partes tendered through Goolcharran, a witness giving evidence as to a written agreement signed by both parties in his presence, albeit in a lawyer's office, and, therefore, material and relevant to the issues in this case.

In his amended defence, the defendant contended that assuming, but not admitting, that the defendant did enter into such a written agreement, then such agreement was invalid and of no effect as it was made for a past consideration and/or an immoral consideration.

It is a general rule of evidence that the original document must be produced in court and proved to have been executed. But secondary evidence may be given in the absence of the better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better evidence — *per* *ESHER, M.R. in Lucas v. Williams & Sons* (1892) 2 Q.B. 113 at p. 116 C.A.

One of the recognised grounds where secondary evidence of a document is admissible is where the original is lost provided proof is given of an adequate search of the missing document. When there are duplicate or multiple originals, it is necessary to account for the absence of both or all — *Alivan v. Furnival* (1834 C.M. & R. 277 at p. 292.

In my opinion all these conditions have been satisfied in this case. I have no doubt whatsoever that the defendant appropriated the plaintiff's copy and has bluntly refused to give it back to her. Further, I am satisfied that the plaintiff made a diligent search but without success. Further and better particulars were given by Solicitor to plaintiff in this matter. What more could the plaintiff possibly have done in the circumstances? It is my considered opinion that the office copy was properly admitted as secondary evidence in this matter.

Is this agreement invalid because of a past and/or immoral consideration? In my opinion clearly not. It was not entered into because the parties were living in concubinage. It was not entered into because she made absolutely no contribution but he intended to give her half because of his love and affection for her. The equitable presumption of advancement does not apply to parties who, though cohabiting, are not in fact legally married — *Rider v. Kidder* (1806) 12 Ves. 202. The agreement (Ex. "A") is quite explicit.

"1. WHEREAS the parties hereto are the joint owners of a building situate at Mon Repos Squatting area, East Coast, Demerara, the description of which is as follows: —

" a wooden building, body house measuring 18' x 11' with gallery measuring 18' x 9' and Kitchen attached measuring 12' x 8' with zinc roof, all standing on 6' wooden blocks with concrete bases."

2. AND WHEREAS the parties desire that the said building should be put in their joint names, each party being entitled to one-half share of and in the same building."

It seems to me quite clear on a perusal of this document that it merely asserts an existing fact that the building is owned by them jointly and then it goes on to set out certain conditions in the event certain occurrences happen such as either party being given the first option to purchase the half-share of the other in the event of any of them wishing to sell his or her half share or portion or what happens if a lease is granted for the land or if the building has to be removed etc.

This agreement confirms and fortifies my opinion that the defendant well knew that the plaintiff paid half the expenses towards the reconstruction of the house.

As there is no presumption of advancement arising in this case then, clearly in my opinion, a resulting trust arises in favour of the plaintiff and since this has not been negated by any evidence to the contrary such as an intention on her part to make a gift of her contribution to the defendant, then the defendant is a trustee of the monies expended by her which I accept was the sum of \$800.

Somewhat similar circumstances involving persons living in concubinage were recently considered in the cases of *Haliman Ali v. Carl Pereira* (1965) No. 2518 Demerara and *Lutchmin v. Baijnauth called Munda* (1966) No. 23 Berbice, (now on appeal to the Guyana Court of Appeal). (See Editorial Note). In both these cases the parties were dealt with as strangers and the principle laid down in *Bull v. Bull* (1955) 1 Q.B.D. 234 applied.

In *Bull v. Bull* (ubi supra) a son purchased a dwelling house jointly with his mother, as a home for themselves. The son provided the greater part of the purchase money and the conveyance was in his name. The mother had no intention to make a gift to the son of her part of the money. After they had lived in the house together for some four years, the son married and it was arranged that the mother should occupy two rooms and the son and his wife the remainder of the house. Differences having occurred between the mother and her daughter-in-law, the son gave his mother notice to quit and sued her in the county court for possession of the two rooms. The action was dismissed by the county court judge. The son appealed but the appeal was dismissed and the decision of the county court judge affirmed. DENNING, L.J. (as he then was) said at pp: 236-237:—

“The judge has found that the mother did contribute a substantial amount towards the house and that she did not intend to make a gift of that money to her son. There was therefore no presumption of advancement, but a resulting trust in her favour. . . .

Similar circumstances must often arise in families, but strangely enough there is no authority on the point. The son is, of course, the legal owner of the house; but the mother and son are, I think, equitable tenants in common. Each is entitled in equity to an undivided share in the house the share of each being in proportion to his or her respective contribution.”

## MAHADAI v. RAGABEER

The learned Lord Justice then went on to say at p. 239. —

“My conclusion is, therefore, that the son although he is the legal owner of the house, has no right to turn his mother out. She has an equitable interest which entitles her to remain in the house as tenant in common with him until the house is sold. If they fall out the house should be sold and the proceeds divided between them in the proper proportion; but he cannot at his will turn her out into the street.”

Whether a person contributes as purchaser is a question of fact in each case. In *Diwell v. Fames* (1959) 1 W.I.R. 624 a man bought a house in his own name and lived in it with his mistress. She paid off most of the debts to the Building Society and it was held that she had made the payments as purchaser and was thus entitled to a share in the house.

It is clear to me, therefore, on a consideration of the authorities, that the parties to this action, not being legally married, have to be treated as strangers, and, therefore, no presumption of advancement arises, and consequently, a resulting trust arises in favour of the plaintiff to the extent of the \$800 contributed by her towards the repairs and reconstruction of the building in dispute, which amount I consider represents approximately half the value of the said building. This being so, Equity will not allow either party to put the other out and each is entitled concurrently with the other to the possession, use and enjoyment thereof.

In this matter the defendant has used every conceivable device to deprive the plaintiff of her just and equitable rights. Both parties went into this association with their eyes wide open. She knew that he was a married man and he well knew the type of life she was previously leading.

In conclusion, I hereby order that the said building is to be put up for sale at public auction within six (6) weeks from date hereof and that the proceeds of sale be apportioned equally between them after deduction of the necessary expenses.

Until that time the court hereby grants: —

- (1) a declaration that the plaintiff is the owner of one undivided half part or share of, in and to the said building;
- (2) possession of the said building; and
- (3) an Injunction restraining the defendant, his servants and/or agents from removing and/or selling or otherwise disposing of the said building without the consent of the plaintiff.

There will be costs to the plaintiff fixed in the sum of \$350. A stay of execution for six (6) weeks is hereby granted.

*Judgment for Plaintiff.*

Solicitors:

*A Vanier* (for Plaintiff);

*L.L. Doobay* (for defendant).

## MOHAMED YUSUF v. GEORGE CUMBERBATCH, P.C. 6928

[In the Full Court of the High Court (Bollers, C.J., and Van Sertima, J.)  
October 11, 1966; February 16, 1967]

*Criminal Law — Attempt to commit a felony — Break and Enter and Larceny — Actus reus — Mens rea — Requisite legal and factual issues to be determined.*

Two policemen saw the appellant and another man loosening a bulb to the side of a house, outside of which they were in ambush, causing the light to go off. The other man then began to prise at a louvre pane of a window situate on the western side of the house whilst the appellant, who was not more than one foot away, shone the beam of a torchlight on the said pane. The other man was then seen to remove the louvre pane and place it on the ground about three feet away from the building. At that point in time, a police van passed along the road and the two men jumped over the fence and ran away but were subsequently apprehended and charged with the offence of attempt to commit a felony, to wit, breaking and entering a dwelling house with intent to commit larceny therein. On appeal against conviction and sentence, it was argued that the appellant could not in law be convicted of the offence as charged since on the evidence adduced it was not only possible for the appellant to have committed the offence of larceny of the louvre pane but also that there was sufficient evidence to establish an actual breaking for the purposes of the completed offence.

**HELD:**— (Bollers, C.J., delivering the judgment of the Court) that (i) whether the *actus reus* amounts to a mere act of preparation or is an act sufficiently proximate to point, *prima facie*, to the commission of the completed offence, is a question of law for the Magistrate to determine; (ii) however, with regard to the issue of *mens rea*, this is a question of fact to be determined by the Magistrate in his capacity as Judge of the facts; (iii) there was sufficient evidence led to support the learned Magistrate's finding that both the requisite *actus reus* and *mens rea* of an attempt had been satisfactorily established and, accordingly, his decision was a reasonable one.

*Appeal dismissed — Conviction and sentence affirmed.*

*Cases referred to:*—

R. v. Eagleton (1855) Dears, 376, 515; 19 J.P. 546.

R. v. Parsram (1962) L.R.B.G. 482; (1962) 5 W.I.R. 1.

R. v. Robinson (1915) 2 K.B. 342; 11 Cr. App. R. 124.

R. H. McKay for appellant.

N. Graham, Senior Crown Counsel, for respondent.

BOLLERS, C.J.: — In this matter the appellant appeals against the conviction and sentence of the magistrate of the Georgetown Judicial District for

## YUSUF v. P.C. CUMBERBATCH

the offence of Attempt to Commit a Felony, namely, to break and enter a dwelling house with intent to commit larceny therein, contrary to section 36 of the Criminal Law (Offences) Ordinance, Chapter 10.

There are three grounds of appeal and two have been argued. The third ground of appeal relates to the sentence imposed by the learned magistrate and was not argued. The two remaining grounds were argued simultaneously with the leave of the court.

The grounds argued were —

1. The decision was erroneous in point of law because —
  - (a) the learned magistrate misdirected himself on the law relating to attempts;
  - (b) the learned magistrate acted on a wrong principle.
2. The decision was unreasonable and could not be supported having regard to the evidence.

The evidence led, and for that matter the facts as found by the learned magistrate, were not seriously disputed before us. So far as they are material for the purposes of this appeal, the facts as found were that the appellant and another man were observed by two policemen late one night in a residential area. They jumped over the fence of a yard in which one Julian Cole had his dwelling-house. The police went into ambush. The two men went to the back of the house on the west side and there one of them slackened the bulb at the side of the house causing the light to go off. The two men were at that time about one foot from each other. The other man with the appellant prised at a louvre window from the western side of the house, whilst the appellant shone the beam of a torchlight on the pane. The other man removed the louvre pane and placed it on the ground about three feet away from the building. Just at that point a police van passed along the road and the appellant and the other man ran away and jumped over the fence. They were later apprehended and charged with the offence stated.

The householder gave evidence that the building was his dwelling-house and that he had not given anyone permission to remove the louvre pane from his window. He stated also that nothing was found to be missing from the house after the incident.

It was submitted before us that, accepting all of the facts as found by the learned magistrate, the appellant could not in law be convicted of the offence as charged, namely, of attempting to break and enter the dwelling-house with intent to steal.

It was conceded by counsel for the appellant that so far as the evidence went it was not only possible for the appellant to have been convicted of the offence of larceny of the louvre pane but also that there was sufficient evidence to establish an actual breaking for the purposes of the complete offence. There was nothing before us to indicate whether the police had made a charge for larceny of the pane but, if this had not been done, then it is to our

minds a serious oversight on their part. There could have been no legal objection to both charges being laid.

With respect to the charge as laid, it was contended that there was not an act sufficiently proximate to constitute the necessary *actus reus* required for the proof of an attempt. Counsel urged that the act that was required was one that should be unequivocally referable to the commission of the complete offence. Reviewing the evidence counsel stated that it was not the contention of the prosecution that the hole made by the removal of the pane was large enough to accommodate either of the two defendants and that removal of the pane was the last act of the men that could be considered proximate. There was no evidence that either of the men had placed any part of their bodies into the space made in the window. There was, therefore, nothing more on the evidence from which it could be established that the men had any intention other than, possibly, to steal the louvre pane.

It is self-evident that the appeal in this matter is based on the two main approaches to the ingredients of the offence, namely, the legal requirements of the offence and the determination of the factual issues. The two elements of the law with respect to criminal attempt are often so inextricably bound up that it may be difficult in some cases to consider them separately, particularly where, as here, the learned magistrate had the dual responsibility of determining both the questions of law and the questions of fact.

The problem is perhaps most succinctly manifested in the definition of a criminal attempt given in SALMOND ON JURISPRUDENCE (9th Edn.), p. 530, as follows —

“An attempt is an act of such a nature that it is itself evidence of the criminal intent with which it is done.”

Nevertheless, we apprehend that the requirements of the law are that to constitute an attempt, there must be in addition to the *mens rea* an *actus reus*: as was stated in *R. v. Eagleton* (1855) Dears. C.C. at 538 —

“The mere intention to commit a misdemeanour is not criminal. Some act is required.”

Before referring to the next quotation we may observe that the principle on this point is the same for felonies.

In SALMOND ON JURISPRUDENCE (*ubi supra*) it is stated —

“Every attempt is an act done with the intent to commit the offence so attempted. The existence of this ulterior intent or motive is of the essence of the attempt.”

The determination of the two separate issues is clearly set out, in our opinion, in the following passage from ARCHBOLD, 35th Edn. at paragraph 4105—

“The *mens rea* necessary on a charge of an attempt to commit a crime is an intention to commit the crime with which the prisoner is

## YUSUF v. P.C. CUMBERBATCH

charged with attempting. It is for the jury to decide whether the prisoner had that intention. But it is a question of law for the judge whether his conduct amounted to sufficient *actus reus* to constitute the attempt. . .”

We are of the opinion that the determination of the matter before us has to be settled on the basis of the answers to the following questions, having regard to the points raised above —

- (a) Did the learned magistrate err in finding on the evidence before him that there was, as a matter of law, sufficient evidence before him to constitute the *actus reus* necessary for the offence with which the defendant had been charged?
- (b) Was the learned magistrate wrong in finding on the facts before him that the evidence supported the intention necessary for the offence with which the defendant had been charged?
- (c) Can it be said that the learned magistrate had acted unreasonably in convicting the appellant by determining the above questions in the prosecution’s favour?

With respect to question (a), above, the matter being one of law, we feel that the question has to be decided at the close of the case of the prosecution, in the same way that a Judge has to decide the question before submitting the matter to the jury, who sit as judges of the facts.

In this regard we are of the opinion that the ruling of the learned trial judge in the matter of *R. v. Parsram*, (1962) 5W.I.R. 1.; (1962) L.R.B.G. 482, who reviewed all of the leading authorities on the law relating to the offence of attempting a felony, was a correct one.

In that case the defendant was accused of an offence of attempting to commit arson. The evidence led by the prosecution was that the accused around three o’clock one morning was found by the occupier of his dwelling-house crouching under the stairway to the house shortly after the occupier had heard a sound as if a liquid was being splashed against his door. Between the door and the ground sill there was a liquid smelling of gasolene. The accused, when asked, denied having thrown the liquid and walked away. He was followed and was seen to remove and throw away a tin from his bosom. Upon analysis, the contents were found to be a mixture of kerosene oil and paint oil an inflammable substance. The accused was arrested and on his way to the police station was found to be in possession of a box of matches. Under the door of the premises there was also found a piece of plastic over which had been thrown a mixture of kerosene oil and paint oil.

Submission on behalf of the accused that the prosecution had failed to make out a *prima facie* case of attempt were overruled. It was held that an attempt is not necessarily constituted by the commission of the penultimate act.

The present case is stronger than *R. v. Parsram* inasmuch as there is direct evidence of the appellant having done the acts that the prosecution has

relied on as constituting the *actus reus*. In Parsram the prosecution relied wholly on circumstantial evidence. But that as it may, the principle seems to us to be that the tribunal must determine whether or not the act relied on by the prosecution as constituting the attempt were *prima facie* consistent with the commission of the full offence. In effect, the principle involved is the same as that which every trial judge trying a criminal matter has to direct the jury that where there are two inferences reasonably to be drawn from the same set of circumstances, one equally favourable to the accused and another equally favourable to the prosecution, the defence must be given the benefit of the inference favourable to itself.

It is on this basis in our opinion that the law distinguishes between mere acts of preparation and acts that are sufficiently proximate to attempts.

Further upon analysis of the principles set out in all of the authorities it will be found that the same process of reasoning requires that in determining whether a given series of acts of an accused person amounts to the requisite *actus reus*, no recourse should be had to a statement made by the accused as to his intention in doing that series of acts. If this principle is understood, then the decision of *R. v. Robinson* (1915) 2 K.B. 342 presents no difficulty. In that case the acts of the defendant standing by themselves were quite capable of an innocent interpretation and at their highest, could not have amounted to any more than acts of preparation.

In Parsram's case the acts of the accused as stated in the prosecution's case were not on the basis of the inferences that could be drawn with equal reason as between the prosecution and the defence, more capable of any innocent interpretation. It is true that there was in that case no evidence of there being the penultimate act, which would have been the striking of the match found in the possession of the accused. But on the totality of the evidence there was sufficient evidence for the learned trial judge to find in law that that evidence amounted to the necessary *actus reus*.

In that case as in the present one, there was no evidence in the prosecution's case of any statement by the accused to determine what his intention was and so the principle in *R. v. Robinson* is not involved.

The question to be determined is whether the acts of the accused person relied on by the prosecution amount to acts of mere preparation for the commission of the offence or are equivocal as such, on the one hand, or whether they amount to acts that are sufficiently proximate to point *prima facie* to the commission of the complete offence. It is because of the complexity of the legal principles involved that this matter has to be determined as a question of law. In effect, to leave this as a matter of fact to be determined by a jury may result not only in inconsistencies in the decided cases but also to a large number of injustices. One need refer only to the case of *R. v. Robinson*, cited above, to support the view that most laymen would adopt the attitude that if the accused had done what the prosecution alleged in *R. v. Robinson*, then he should be convicted of the offence as charged.

## YUSUF v. P.C. CUMBERBATCH

We conceive, however, that because the tribunal, be it magistrate or judge, has to determine the question on the evidence before him in each particular case, that each case must depend on its own circumstances. To that extent it is only possible to lay down wide rules of guidance and the only rule is that of determining whether the acts amount to acts of mere preparation, or acts on the evidence, that are sufficiently proximate to the commission of the complete offence.

If the principle in the case of *R. v. Robinson* is understood, then the question of distinguishing between the *actus reus* and the *mens rea* or criminal intent becomes a simple matter. It has to be conceded that the question may become unnecessarily complicated by the fact that the expression, *actus reus*, literally the criminal act, naturally involves a consideration of the mental state of the person performing the act upon which the prosecution relies. In our opinion, however, this ought not to be so.

Two simple analogies may serve to revolve the question, as we see it. It could hardly be contended that if a member of the fire brigade had done what the prosecution alleged that the defendant had done in this case, or if workmen had been engaged by the householder to effect certain repairs to the dwelling-house, which of necessity involved the removal of the louvres of the window, that such persons had not committed what in law would constitute a breaking. And, if charged, their acquittal would have been attributed, not to the absence of an *actus reus*, but to the absence of any criminal intent. It is irrelevant to take into account in our opinion, the fact that the Police might not have charged these persons if they had known all of the facts.

We are of the opinion, therefore, that if a magistrate or a trial judge has before him evidence of an act or a series of acts that would constitute, not merely an act or acts of preparation, but such act or acts sufficiently proximate to the commission of the offence, then he would be entitled to find that the *actus reus* has been proved. As indicated earlier it would not be relevant to take into consideration that the defendant may have intended to commit either an innocent act or even a different crime. We cannot find on the evidence presented by the prosecution that the learned magistrate erred in his finding that sufficient evidence had been led to establish the necessary *actus reus*. There was certainly a "breaking" within the meaning of the law for the purposes of the completed offence and the acts, in our opinion, went far beyond mere acts of preparation. Further, in making his finding the learned magistrate was entitled to take into account the time of and the manner of effecting the breaking.

With regard to the question of the intent necessary, this is clearly a question of fact to be determined by the magistrate in his capacity as judge of the facts. The *actus reus* having been constituted as a matter of law, the necessary intent has to be established either directly or as a reasonable inference, more strongly in favour of the prosecution than of the defence.

In the present matter, there was no evidence directly of the defendant's intention. There was certainly no inference of an innocent intention that could reasonably have been drawn in favour of the defence. It has been contended that there being two possible inferences that might have been drawn, namely, that the defendant could have equally had an intention to steal the louvre as well as and as distinct from an intention to break and enter the premises for the commission of a felony, the learned magistrate erred in finding that the latter was the intention of the appellant, and, accordingly, the conviction was bad.

Upon an analysis of this reasoning we find that the learned magistrate was justified in drawing either inference, since either inference led to the proof, not only of an intention to commit a crime, but of an intention to commit a crime of a similar nature. There may have been some room for argument if the alternative intention related to an offence of a completely different nature. Such is not the case before us and it is not necessary to go into that matter. In the present case the appellant and his alleged accomplice could only have had one other reasonable intent, namely, to steal the louvres, a kindred offence. For us to hold that the learned magistrate erred in finding that the appellant had the intention of breaking and entering the premises when there was evidence to support it, would not only offend against common sense but to grant a reward for dishonesty.

Finally, it has been urged that the learned magistrate's decision was unreasonable and could not be supported having regard to the evidence. Much of what has been stated above would indicate why we reject this contention. We should like to point out a very simple further reason why this ground cannot be sustained. Even if the learned magistrate had stated in his memorandum of reasons that he had given full consideration to the possible alternative intention and had rejected it in favour of the intention that he found, it could not be suggested that he acted unreasonably in so doing. In this case the acceptance of an intention merely to steal the louvres would have the effect of finding that the appellant and his alleged accomplice, being persons who would set out to steal the louvres, would be likely to resist the temptation of entering the dwelling-house to commit further acts of larceny after they had removed the only obstacle between themselves and the interior of the dwelling-house.

For the reasons stated above, we find that the learned magistrate was correct in finding that there was sufficient evidence before him to support his finding, as a matter of law, that the prosecution had established the necessary *actus reus* required for the commission of the offence, that is to say that the acts went beyond the proof of mere acts of preparation for the commission of the completed offence and were sufficiently proximate to the commission of the completed offence.

Further, that the learned magistrate, not only had sufficient evidence to sustain his finding of fact that the appellant had the intent necessary for

## YUSUF v. P.C. CUMBERBATCH

the commission of the offence charged, but was justified in making that finding.

Finally, that the learned magistrate's decision was reasonable and was adequately supported, having regard to the evidence led before him, to sustain his finding that the offence as charged had been properly made out by the prosecution.

This appeal is accordingly dismissed with costs to the respondent fixed at \$30.28 and the conviction and sentence affirmed.

*Appeal dismissed — Conviction and sentence affirmed.*

## RAMKELLAWAN DARSAN v. ENMORE ESTATES LIMITED

[Court of Appeal (Stoby, C., Cummings and Crane, JJ.A).  
November 13, 24, 1967]

*Appeal — Privy Council — Conditional leave — Final leave — Whether procedural requirements properly carried out — Guyana (Procedure in Appeals to Privy Council) Order, 1966.*

On 31st October, 1966, the Court of Appeal delivered judgment in the appeal of *Enmore Estates Limited v. Ramkellawan Darsan* and dismissed same with costs. On November 16, 1966 the respondent company petitioned the Court of Appeal for leave to appeal to Her Majesty in Council, and, in accordance with secs. 4 & 5 of the Guyana (Procedure in Appeals to Privy Council) Order, 1966, a single Judge of the Court granted conditional leave on the company entering into a good and sufficient surety in the sum of £300 and it was stipulated that final leave would be granted upon production of a certificate by the Registrar of the due compliance with the conditions of the order. At the hearing of the application for final leave, Counsel was unable to produce the certificate and a week's adjournment was granted and the document was then produced. Counsel for the appellant workman argued that the bond in the sum of £300 was not lodged with the Registrar until January 30, 1967, when the last date for lodging same was January 28, 1967; alternatively, although the Registrar had orally consented to the surety as a fit and proper person, no further action had been taken by him —

**HELD** — (i) although it is desirable to deliver the bond to the Registrar at the time of entry, a procedure that should be followed in the future, nevertheless, failure to do so was not fatal; (ii) although the words “entering into a bond to the satisfaction of the Registrar” connotes the Registrar’s being satisfied at the time when the bond is executed, which is a procedure that should be followed in the future, here, however, since the bond was entered into before a Notary Public and the surety was the same surety about whom the Registrar had previously expressed his approval, then the Registrar’s certificate that the company had complied with the order was to be considered as re-affirming his satisfaction with the surety at the time it was entered into.

*Objection to grant of final leave over-ruled — Order of single Judge affirmed — Costs to abide final result of appeal.*

[*Editorial Note:*— 1) The company’s appeal to the Privy Council was allowed and the decision of the Court of Appeal (which is reported in (1967) 9 W.I.R. 499) was reversed — see (1970) 15 W.I.R. 192.

2) Section 10 of the Guyana Independence Order, 1966 (Statutory Instruments No. 575/1966) (which makes provision for certain appeals to Her Majesty in Council) in so far as it forms part of the laws of Guyana, was repealed by section 8 of the Republic

## DARSAN v. ENMORE ESTATES

Act, Cap. 1:02, which came into force on February 20, 1970. By the Judicial committee of the Privy Council (Termination of Appeals) Act, No. 14 of 1970, the right of appealing by special leave of the Judicial Committee was abolished also and, finally, the right of appeal in constitutional matters was terminated by the Constitutional (Amendment) Act, No. 19 of 1973.

*Cases referred to:*

None.

*Dr. F. H. W. Ramsahoye* for appellant.

*G. M. Farnum, Q.C.* for respondents.

STOBY, C. On the 31st day of October, 1966, the Guyana Court of Appeal delivered judgment in the appeal of *Enmore Estates Limited (appellants) v. Ramkellawan Darsan (respondent)*.

On the 16th day of November, 1966, the appellant company petitioned the Court of Appeal for leave to appeal to Her Majesty in Council, and in accordance with sections 4 and 5 of the Guyana (Procedure in Appeals to Privy Council) Order 1966, conditional leave to appeal was granted provided certain terms were compiled with. Section 4 of the 1966 Order states:

“Leave to appeal to Her Majesty in Council in pursuance of the provisions of any law relating to such appeals shall, in the first instance, be granted by the court only —

- (a) upon condition of the appellant, within a period to be fixed by the court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the court in a sum not exceeding £500 sterling for the due prosecution of the appeal and the payment of all such costs as may become payable by the application in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the appellant to pay the costs of the appeal (as the case may be); and
- (b) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purposes of procuring and preparation of the record and the despatch thereof to England as the court, having regard to all the circumstances of the case, may think it reasonable to impose.”

The petition for conditional leave was heard by a single judge of the court who made the following order:

“THE COURT DOTH ORDER that subject to the performance by the said petitioners (appellants) of the conditions hereinafter mentioned and subject to the final order of this Honourable Court upon due compliance with such conditions leave to appeal to Her Majesty in Council against the said judgment of the Court of Appeal of the Supreme Court of Judicature by and the same is hereby granted to the petitioners (appellants).

AND THIS COURT DOTH FURTHER ORDER that the petitioners (appellants) do within six (6) weeks from the date hereof enter into good and sufficient security to the satisfaction of the Registrar in the sum of £300 with one or more surety or sureties or deposit into court the said sum of £300 for the due prosecution of the said appeal and for the payment of all such costs as may become payable by the petitioners (appellants) in the event of the petitioners (appellants) not obtaining an order granting them final leave or of the appeal being dismissed for non-prosecution or for the part of such costs as may be awarded by the Judicial Committee of the Privy Council to the respondent (respondent) on such appeal as the case may be.

AND THIS COURT DOTH FURTHER ORDER that the petitioners (appellants) do within four (4) months from the date of this order in due course take out all appointments that may be necessary for settling the record in such appeal to enable the Registrar of the court to certify that the said record has been settled and that the provisions of the order on the part of the petitioners (appellants) have been complied with.

AND THIS COURT DOTH FURTHER ORDER that the petitioners (appellants) be at liberty to apply within five (5) months from the date of this order for final leave to appeal as aforesaid on the production of a certificate under the hand of the Registrar of this court of due compliance on their part with the conditions of this order.

AND THIS COURT DOTH FURTHER ORDER that the costs of and incidental to this application be the costs in the cause.

LIBERTY TO APPLY.”

When the applicant applied for final leave it was submitted by the respondents that the order of the single judge had not been complied with, in that the bond by which the applicant purported to enter into good and sufficient security for £300 was not deposited with the Registrar within six weeks of the date of the order; alternatively, that there was evidence on the file that the Registrar had not properly exercised his discretion in that while he had orally consented to the surety as a fit and proper person, no further action had been taken by him.

The single judge who heard the application for final leave, overruled these submissions and gave final leave.

## DARSAN v. ENMORE ESTATES

The objection to the grant of final leave has been repeated to the court consisting of three judges.

Since in the petition under review an appeal lies to Her Majesty in Council as of right, no question of the judge's discretion is involved. The sole point is whether the procedural requirements to ensure that the respondents will be able to collect their costs if the applicant is unsuccessful, have been properly carried out.

It will be observed that in the order made by the single judge who gave conditional leave, it was stipulated that final leave would be granted upon production of a certificate under the hand of the Registrar of due compliance with the conditions of this order. When the application for final leave was made, counsel was unable to produce this certificate, so a week's adjournment was granted. On the resumption the certificate was available. Normally, this would be an end of the matter, but counsel for the respondents drew the court's attention to the fact that the bond in the sum of £300 was not lodged with the Registrar until the 30th January, 1967, when the last day for lodging it was the 28th January, 1967.

I take the view that until set aside the Registrar's certificate is conclusive evidence that the terms of the order have been properly fulfilled, but as the correctness of the Registrar's certificate was challenged and ruled upon by the single judge, this court heard the arguments and will settle the procedure for future guidance.

The first objection to the Registrar's certificate was found on a note made by the Registrar in the file that some weeks before the 28th January, 1967, he had orally approved of the proposed surety. The submission is that approval should be given on presentation of the bond. I agree that the words "entering into a bond to the satisfaction of the Registrar" connote the Registrar's being satisfied at the time when the bond is executed, and this procedure should be followed in future. In this case, however, the Registrar indicated to the applicant that he would approve of a certain company being the surety; there is no issue about the financial competence of the surety, nor is there any suggestion that the bond was not executed on the 28th January, 1967. Since the bond was entered into before a Notary Public and the surety was the same surety about whom the Registrar had previously expressed his approval, I consider the Registrar's certificate that the applicant had complied with the order as reaffirming his satisfaction with the surety at the time it was entered into.

The other point submitted was that the validity of a bond depends on its delivery. I agree that the whole purpose of the bond is for it to be in the Registrar's custody so that costs can be easily recovered if the event arises; such being the case, it is desirable to deliver the bond to the Registrar at the time of entry, and this procedure should be followed in future. But failure to do so is not fatal. It is the bond which makes collection of costs possible, and it is the bond which the judge directed should be executed within 42 days.

The delivery of the bond on the 44th day does not invalidate it; the bond remains in full force and effect. The applicant had five months to apply for final leave. When he applied for final leave, the following conditions existed:

- (a) A bond in the sum of £300 with a surety had been entered into.
- (b) The bond was entered into within six weeks.
- (c) The surety was to the satisfaction of the Registrar.
- (d) The bond was in possession of the Registrar.

In these circumstances the Registrar was justified in issuing his certificate, and I would affirm the order. The costs of this application should abide the final result of the appeal.

CUMMINGS, J.A. I Concur.

CRANE, J.A.(Ag.). I concur

*Objection to final leave over-ruled — Order of single Judge affirmed — Costs to abide final result of appeal.*

Solicitors:

## THE QUEEN v. CARLTON ADAMS &amp; JAMES LAWRENCE

[Court of Appeal (Stoby, C, Cummings and Crane, JJ A.). November 17, 24, 1967.]

*Criminal Law — Evidence — Robbery with violence — Alibi — Duty of trial Judge — Whether special direction needed — Burden of proof — Fundamental principle.*

X was robbed by one of the appellants as he was about to enter a shop. Two constables who were on duty in plain clothes at a nearby corner were attracted by shouts of “thief” and saw when one of the appellants joined the other one, who had a bicycle, and the two of them rode away. The two constables gave chase and subsequently apprehended the appellants who, at their trial, gave sworn evidence testifying that they were somewhere else: one said he was shopping, whilst the other said that he was making enquiries about work. In his summing up, the trial Judge directed the jury on the burden of proof and on the standard of proof but at no time did he specifically explain that the defence was an alibi or give any specific direction regarding the alibis. On appeal against conviction and sentence —

## R. v. ADAMS &amp; LAWRENCE

**HELD:**— (*per* Stoby, C, delivering the judgment of the Court) that (i) an alibi, as such, is not a defence, and, accordingly, there is no evidential burden cast upon an accused; (ii) where an alibi has been set up, as here, then it is not necessary for the trial Judge to give a special direction as he must where certain defences such as provocation, self-defence, drunkenness, etc., are raised, once he makes it quite clear that the jury must be satisfied beyond reasonable doubt that the accused committed the offence charged. If this is not done, then the accused is entitled to the benefit of any reasonable doubt.

*Appeals dismissed — Convictions and sentences affirmed.*

[*Editorial Note:*— This case is reported in (1967) 11 W.I.R. 166.]

*Cases referred to:* —

- (1) R. v. Maraj, Basdeo & Dookram (1962) 4 W.I.R. 277.
- (2) R. v. Harold Narine (1967) G.L.R. 139.
- (3) R. v. McPherson (1957) 41 Cr. Appeal. Rep. 213, C.A.
- (4) R. v. Lobell (1957) 41 Cr. App. Rep. 100, C.C.A.; (1957) 1 All E.R. 734; (1957) 2 W.L.R. 524.
- (5) Steinberg v. The King (1931) 4 D.L.R. 8; (1931) S.C.R. 421; 56 Can. Crim. Cas. 9.
- (6) R. v. Gomes (1963) L.R.B.G. 206.
- (7) Bratty v. Att.-Gen. for N. Ireland (1963) A.C. 386; (1961) 3 W.L.R. 965; (1961) 3 All E.R. 523.
- (8) Regina v. Wood, *The Times*, 16th November, 1967.
- (9) R. v. Prince (1941) 28 Cr. App. Rep. 60, C.C.A.; (1941) 3 All E.R. 37; 57 T.L.R. 21.

*D. Christian* for appellants.

*W. G. Persaud, Acting Senior Crown Counsel*, for respondent.

STOBY, C., delivered the judgment of the court: This appeal, which was admirably argued by Mr. Christian for the appellants, raises once again the question of what is the proper direction to be given to a jury when the accused's answer to the charge is an alibi.

The appellants were charged with robbery with violence. A witness gave evidence that as he was about to enter a shop in Regent Street one of the accused attacked and robbed him. This witness chased that accused and saw him join the other accused who was waiting on a bicycle at Regent and Alexander Streets. The two accused rode away and were pursued for a considerable distance by this witness. Unknown to the participants of this incident, two police constables on duty in plain clothes were standing at the corner of Alexander and Regent Streets. Attracted by shouts of "thief" they saw one of the accused join the other accused and saw them both ride away.

They followed on a motor cycle and caught up with them some distance from the starting point. As the policemen approached the two accused, the latter abandoned their cycle and ran into a nearby yard. The police followed. After a chase which involved entering into various yards and out on to various streets, one accused was apprehended by one policeman at the corner of Light and North Streets, and the other at Robb and Light Streets. The policemen said the two accused were always within their vision and the effect of their evidence was that the men arrested were the men who were chased from Alexander and Regent Streets.

Both accused gave sworn evidence. One said he had shopped that morning at the material time with his mother in the market. After concluding his purchases he walked to Light and North Streets, where he was arrested. The other accused said that he was sent to Robb Street to do some work about 1.15 p.m. He went there and made enquiries at the first house between Light and Cummings Streets and was sent further down Robb Street. While walking in Robb Street he was arrested.

One accused called two witnesses to support his alibi.

In his summing-up the judge directed the jury on the burden of proof and the standard of proof, but at no time did he specifically explain that the defence was an alibi or give a specific direction regarding the alibi. He did, however, deal very fully with the defence in language which will be referred to hereunder.

Counsel for the appellants in submitting that the convictions should be quashed for non-direction, amounting to misdirection, referred to *R. v. Maraj* (1), where it was contended that the trial judge erred in not giving to the jury the direction that ought to be given where a defence of alibi is set up. In delivering the judgment of the court, GOMES, C.J., said (1961-1962), 4, W.I.R. 277, at p. 278):

“Where the defence of alibi is set up, the requirement for an adequate direction to be given by the judge to the jury is of such an elementary nature that it should not require constant repetition. The fundamental principle is that before a jury can return a verdict of guilty, they must feel sure that the prosecution has discharged the onus of establishing the guilt of the accused. Where an alibi is set up as a defence, not only does that onus remain on the prosecution, but the trial judge is required to go a step further and direct the jury that, even if they reject or do not believe the defence of alibi, they must, nevertheless, still consider whether the prosecution has proved all the ingredients of the charge that must be established before they can convict.

The main reason why that further direction or reminder is required to be given is that, where an accused person gives evidence or calls witnesses, or does both of those things, in support of his alibi, the jury is confronted with two diametrically opposed versions which are created by the presentation of evidence, the truth or falsity of which can be tested

## R. v. ADAMS &amp; LAWRENCE

and be determined by them. In such event, a jury, in the absence of the further direction, might think that if they reject the alibi, they must or can only accept the version put forward by the prosecution.

That situation, however, does not arise where no evidence in support of an alibi is given by the defence or otherwise appears, as is the case here, and the trial judge was, therefore, not required to give to the jury the further direction mentioned above.”

Counsel argued that the appellants had not only given sworn evidence of their alibis but had called witnesses and consequently this case came squarely within the rule laid down by GOMES, C.J.

In *R. v. Harold Narine* (2) this court distinguished *R. v. Maraj* (1), while accepting that in certain circumstances a judge should follow the pattern laid down by GOMES, C.J.

The reason why in some cases a judge ought to give a special direction in respect of an alibi is solely to make sure that the jury approach the consideration of a verdict in the correct way.

While the plea of “not guilty” puts every fact which has to be proved by the prosecution in issue, there are certain defences which if not raised need not be discussed by the judge. Such defences like provocation, self-defence, drunkenness, must be raised by the accused. This can be done by cross-examination or by evidence by or on behalf of the accused. The evidential burden, the necessity to show that there is evidence of provocation or self-defence or drunkenness, usually comes from the accused, although there are cases where the evidence emerges from the prosecution itself. But if there is no evidence of provocation, self-defence or drunkenness, a judge is entitled to withdraw these issues from the jury; where there is evidence of one or more of these defences, then the judge must leave them to the jury. As LORD GODDARD, C.J., said in *McPherson's* case (3), repeating what he had said in *Lo-bell* (4) ((1957), 41 Cr. App. Rep. 100, at p. 104):

“If an issue relating to self-defence is to be left to the jury, there must be some evidence from which a jury would be entitled to find that issue in favour of the accused, and ordinarily, no doubt, such evidence would be given by the defence. But there is a difference between leading evidence which would enable a jury to find an issue in favour of a defendant and in putting the onus upon him. The truth is that the jury must come to a verdict on the whole of the evidence that has been laid before them. If on a consideration of all the evidence the jury are left in doubt whether the killing or wounding may not have been in self-defence the proper verdict would be ‘Not Guilty’. A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution, but that they must also consider the evidence for the defence which may have one of three results: it may convince them of the innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal,

or it may and sometimes does strengthen the case for the prosecution. It is perhaps a fine distinction to say that, before a jury can find a particular issue in favour of an accused person, he must give some evidence on which it can be found, but none the less the onus remains on the prosecution; what it really amounts to is that, if in the result the jury are left in doubt where the truth lies, the verdict should be 'Not Guilty', and this is as true of an issue as to self-defence as it is to one of provocation, though of course the latter plea goes only to a mitigation of the offence."

In the type of defences referred to above it is essential to give a special direction in relation to the defence lest the jury believe that the onus is on the accused to prove the defence he has raised.

Where the defence of an accused is an alibi the position is not the same. The judge can never say that the evidence of an alibi is not enough; an alibi is not a defence which has to be raised; there is no evidential burden on the accused. The jury must be satisfied beyond reasonable doubt that the accused committed the offence whether an alibi is the defence or not. This point was admirably dealt with in the Canadian case of *Steinberg v. The King* (5), where the Supreme Court of Canada held that:

"Where the defence is an alibi it is not necessary for the trial judge to deal with that defence separately before approaching the rest of the case, or to tell the jury that if, after considering the evidence as to alibi, they have any reasonable doubt as to the presence of the accused, they should give him the benefit of the doubt.

Where the trial judge repeatedly tells the jury that the weight and effect of the evidence is for them alone, that the onus is on the Crown, and that the prisoner is entitled to the benefit of the doubt, it is not necessary for him to repeat specifically these rules with regard to the defence of alibi."

ANGLIN, C.J.C., agreed with the observations of MIDDLETON, J.A., in the Ontario Supreme Court Appellate Division:

"It may be convenient to speak of alibi evidence as a defence. Strictly speaking, alibi is only one method of negating the Crown case, and I can see no warrant for the idea that it has to be dealt with in the charge in any such way as to make the reiteration of the statement that the accused is entitled to the benefit of the doubt either necessary or desirable."

In *R. v. Gomes* (6) where the defence was duress and it was contended on appeal that "the burden of disproving duress is on the prosecution and that accordingly directions to the jury on that issue should be given as are necessitated by defences of automatism, self-defence, and accident", the C.C.A. (JACKSON, P.), adopted VISCOUNT KILMUIR, L.C.'s words in *Bratty v. A.-G. for Northern Ireland* (7) [1961] 3 W.L.R. 965, that "once the defence have surmounted the initial hurdle to which I have referred and have satisfied

## R. v. ADAMS &amp; LAWRENCE

the judge that there is evidence fit for the jury's consideration, the proper direction is that, if that evidence leaves them in a real state of doubt, the jury should acquit."

The recent case of *R. v. Wood* (8), is instructive. The accused was convicted for attempted grievous bodily harm, dangerous driving and conspiring to pervert the course of justice. His defence was an alibi. He appealed on the ground that the judge had not dealt with his alibi in the correct manner. In dismissing his appeals LORD PARKER, C.J., said:

"There was no rule of law that when an alibi was raised a particular direction should be given to the jury on the burden of proof. There was only a duty on the judge to tell the jury that it was for the prosecution to negative such an alibi if there was a danger that the jury thought, because an alibi was put forward by the defence, the burden lay on the defence to prove it."

One of the essential functions of a judge when he sums up in a criminal trial is to explain the fundamental principles concerning the burden of proof. He must do so in language which admits of no ambiguity and to this end when defences like automatism, duress and the others mentioned above are introduced, the directions must be given in such a way that the jury clearly understand that the accused does not have to prove his defence. The Court of Criminal Appeal in *R. v. Prince* (9), substituted manslaughter for murder because the judge had omitted to direct the jury that, if upon a review of all the evidence, they were left in reasonable doubt whether, even if the prisoner's explanation were not accepted, the act was provoked, he was entitled to be acquitted on the charge of murder.

In the case of an alibi a special direction may or may not be necessary. If the circumstances are such, and the general direction so casual, that the jury is in danger of misunderstanding on whom the burden lies, then a special direction should be given. But the present case was a very simple one. The prosecution asserted that the two accused were pursued and caught; the defence was that two innocent pedestrians were apprehended who had just been about their lawful business. The judge summed up for forty-nine minutes during which he dealt with the burden of proof on six occasions. He told the jury the burden of proof never shifts; he explained that if an accused were to lie that was no ground for convicting him unless the case was proved. He told them to convict only on the strength of the prosecution's case and in arriving at their verdict look at the whole of the evidence. There was much more in this strain. There could be no doubt whatsoever that when the case was left to the jury they knew on whom the burden lay.

The appeals are dismissed and the convictions and sentences affirmed.

*Appeals dismissed.*

## THE QUEEN v. BOODRAM LALL

[Court of Appeal (Stoby, C., Cummings and Crane, JJ.A).  
September, 18, 27, November, 24, 1967.]

*Criminal Law — Evidence — Corroboration — Whether trial Judge correct in directing jury that the unsworn evidence of a child could corroborate sworn evidence — Whether Misdirection — Evidence Ordinance, Cap. 25, proviso to s. 71 as amended by Ordinance 29 of 1961 (now Evidence Act, Cap. 5:03, s. 71(3)).*

The appellant was indicted on two counts, firstly, for ‘burglary with intent to commit rape’ and, secondly, ‘rape’ on K, the mother of K.R., a nine year old girl. The trial Judge questioned the child and recorded his opinion that she was of sufficient competent understanding to give evidence but he did not permit her to be sworn as he did not think she understood the nature of an oath and, as a result, she gave unsworn evidence. Her testimony, if admissible and if believed, afforded strong corroboration of her mother’s evidence. The jury were directed that the rule of practice was to look for corroboration of the mother’s evidence. Quite properly he told them that they could convict on the uncorroborated evidence of the mother but he also told them over and over again that K.R.’s unsworn evidence corroborated the mother’s testimony.

**HELD** — (i) the unsworn evidence of a child could not be used to corroborate the sworn testimony of another person; (ii) the directions were of such a nature that it was impossible to say whether the jury relied for their verdict of “Guilty” on the uncorroborated evidence of the mother alone coupled with the warning that they were so entitled to do, or, on the evidence of the child as corroborative of the mother’s testimony.

Dictum of Lord Goddard in *R. v. Campbell* (4) (*infra*) not followed.

*Appeal allowed — Convictions and sentences quashed.*

*Cases referred to:*

- (1) *Omychund v. Barker* (1744) 1 Atk. 222.
- (2) *R. v. Powell* (1775) 1 Leach 110.
- (3) *R. v. Brasier* (1779) 1 Leach 199.
- (4) *R. v. Campbell* (1956) 2 All E.R. 272.
- (5) *R. v. William Davies* (1915) 11 Cr. App. R. 272.
- (6) *R. v. Manser* (1934) 25 Cr. App. R. 18.
- (7) *R. v. E.* (1964) 1 All E.R. 205.
- (8) *R. v. Noakes* 5 C & P 326.
- (9) *R. v. Baskerville* (1916) 2 K.B. 658.

## R. v. LALL

[*Editorial Note*:— This case is reported in (1967) 11 W.I.R. 161.]

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

*N. A. Graham, Senior Crown Counsel*, for respondent.

STOBY, C. The trial of this appellant took place at the Demerara Assizes on the 10th of April last. He was arraigned on an indictment containing two counts, the first charging 'burglary with intent to commit the felony of rape,' and the second, 'committing rape' on K., the mother of K.R.

After a trial lasting two days, he was convicted on both counts and sentenced to concurrent terms of imprisonment of seven years.

At his trial, a nine-year-old girl, K.R., was called by the Crown as a witness. The Judge questioned the child and at the conclusion of his questioning recorded that in his opinion she was of sufficient competent understanding to give evidence. The judge did not permit her to be sworn as he did not think she understood the nature of the oath, and in the result she gave unsworn evidence. Her evidence, if admissible, and if believed, afforded strong corroboration of her mother's evidence.

The main ground of appeal is whether the trial judge was correct in directing the jury that the unsworn evidence of a child could corroborate sworn evidence.

The manner in which the law developed to permit the unsworn testimony of witnesses is not without interest. In early times all evidence had to be given on oath and on the Gospel; no one but a Christian could testify. Competency to testify depended upon acceptance of the witness' belief in the Gospel. Non-Christians and children of tender years were deemed to be ignorant of the nature and obligation of an oath; they were not allowed to be sworn and so could not testify. Such was the state of the law until the celebrated case of *Omychund v. Barker*, (1744) 1 Atk. 22 in which the depositions of Indian witnesses of the Gentoo religion taken by order of Court according to the local ceremonies on commission in the East Indies were admitted and read in evidence after being objected to. In the report of this case at page 29, LORD CHIEF JUSTICE LEE remarked that it was determined at the Old Bailey upon mature consideration, that a child should not be admitted to give evidence without oath; and LORD CHIEF BARON PARKER in the same case said that it was so ruled at Kingston Assizes before LORD RAYMOND, where, upon an indictment for rape, he refused the evidence of a child without oath.

The old cases of *R. v. Powell*, (1775) 1 Leach 110 and *R. v. Brasier*, (1779) 1 Leach 199, both emphasize the fact that though there was no precise or fixed rule as to the time within which infants are excluded from giving evidence, the testimony of an infant was not receivable under any circumstances except under oath.

As time went on it became obvious that too rigid an adherence to the old common law rule served only to defeat the ends of justice by not affording protection to women and young girls from defilement. Hence in England the enactment of the Criminal Law Amendment Act 1885, which permitted children to give unsworn evidence, but stipulated that no one was to be convicted on such unsworn evidence unless it was corroborated. This Act was replaced by the Children and Young Persons Act 1933; under it similar provisions were made concerning children.

In this country in 1894, the Legislature passed an Evidence Ordinance by which a child and certain other categories of people who were ignorant of the nature and obligation of an oath could give evidence without oath, provided the judge considered the child or other persons were of competent understanding to give evidence. See Cap. 25 s. 71. Although the 1894 Ordinance, Cap. 25, was amended several times between 1929 and 1952 no change was made in respect of a child's evidence until 1961. Thus, up to 1961 the unsworn evidence of a child was enough on which a conviction could be founded although a rule of practice developed for judges to advise juries not to convict without corroboration. Ordinance 29 of 1961 was passed on the 12th July, 1961. It amended the proviso to s. 71 Cap. 25 by providing that where the evidence of a child admitted by virtue of s. 71 is given by the prosecution, the accused shall not be liable to be convicted of the offence unless the evidence is corroborated by some other material evidence in support thereof implicating him.

The effect of this amendment is that the law of Guyana is the same as the law of England in respect of the evidence of children.

Until 1956 the precise point of whether the unsworn evidence of a child can corroborate sworn evidence does not seem to have arisen. In 1956, however, in the case of *R. v. Campbell*, (1956) 2 All. E.R. 272, LORD GODDARD said: "The evidence of an unsworn child can amount to corroboration of sworn evidence though a particularly careful warning should in that case be given."

That case was concerned with the sworn evidence of children and the advisability of having corroboration of the evidence of young boys; consequently the passage referred to above was not necessary for the decision. At least two text writers seem to have assumed Lord Goddard's dictum to be correct. PHIPSON ON EVIDENCE, 10th Edition, paragraph 1501, citing *R. v. Campbell*, states: "The sworn evidence of one child may be corroborated by the evidence sworn or unsworn of another child, although careful direction to the jury is necessary." CROSS ON EVIDENCE 3rd Edition, p. 165, states: "It was said in *R. v. Campbell* that the unsworn evidence of one child might corroborate the sworn evidence of another child"; the footnote on this sentence is "the statement was obiter but the proposition has never been doubted."

## R. v. LALL

In *R. v. Campbell* the proviso to s. 38 of the Children and Young Persons Act, 1933 was not discussed but there are other cases prior to and after where the proviso was the subject of consideration.

As long ago as 1915 the case of William Davies 11 Cr. App. R. 272 came before the Court of Criminal Appeal. In the course of his decision, READING, L.C.J., said:

“The judge failed to direct the jury that this was evidence by a boy of tender years, and that under the statute ‘a person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused.’ That is by s. 30(a) of the Children Act, 1908, which has been applied to all offences by s. 28(2) of the Criminal Justice Administration Act, 1914; it therefore applied to this case. Where evidence is given by a child not on oath, in pursuance of these two statutes, it is necessary that the judge should direct the jury not to convict the prisoner on that evidence unless it is corroborated by some other material evidence in support thereof implicating the accused.”

This case, of course, does not deal with the question of unsworn evidence corroborating sworn evidence. What the boy testified to stood alone and was not corroborated, so there was a clear breach of statutory provision.

An even stronger opinion was expressed in Manser’s case (1934) 25 Cr. App. R. 18 where an accused was convicted of carnal knowledge of a girl under the age of thirteen years. At his trial the evidence of a girl nine years of age was accepted without oath. HEWART, L.C.J., in quashing the conviction, said:

“There is one further matter which is the most important of all and may indeed be regarded as conclusive. The story of the little child Doris, who was nine years of age and had given evidence without taking the oath, was treated as corroborative of the evidence of the girl Barbara. Now by statute the evidence of the little child who had not been sworn was not to be accepted as evidence at all, unless it was corroborated.”

LORD GODDARD’s dictum was not followed by BRABIN, J., in *R. v. E* (1964) 1 All E.R. 205. In this case the accused was indicted on seven counts involving sexual offences against two girls, one aged eight and the other aged seven years. In the Magistrate’s Court the girl aged eight gave sworn testimony and the girl aged seven unsworn testimony. Brabin, J., said he would direct the Jury that unsworn evidence of one child could not corroborate the sworn evidence of the other child. BRABIN, J., pointed out that in *R. v. Campbell*, Manser’s case was regarded as authority for the proposition that the unsworn evidence of a child cannot corroborate the unsworn evidence of another child. During the discussion in *R. v. E*. the view was expressed that one of the children had been sworn in Manser’s case. In view of

the uncertainty about what took place in Manser's case, I consider it unsafe to extract any principle from it.

Counsel for the Crown contends that the dictum is right; he sought to draw a distinction between evidence which could lead to a conviction and evidence which was tendered in support of evidence leading to a conviction. In other words, a complaining child's unsworn evidence, he said, must be corroborated by sworn evidence, but a complaining child's sworn evidence need only be corroborated by unsworn evidence.

I have scrutinised the Ordinance 27 of 1961 carefully and I am unable to find any indication in the legislation that corroboration of an unsworn child's evidence depends on the nature of the evidence given. As already pointed out, in Guyana at one time a child could give unsworn evidence provided he or she was of competent understanding. No doubt the Legislature, after a long period of trial and with the benefit of the experience of other criminal jurisdictions, appreciated the danger of convicting on the unsworn evidence of a child. Judges, whose business it is to try and understand the workings of an innocent mind, realise that a child lives in a world of fantasy. A child may daydream or see visions of some incident long past and attribute it as happening to itself or its immediate relatives. The childlike mind is prone to accept suggestions and will repeat as a fact matters which have been injected into its mind by a process of indoctrination.

The safeguard against these evils is the sanctity of an oath or the bulwark of corroboration. The proviso to s. 71 of Cap. 25, as amended by 27 of 1961, is mandatory; it admits of no equivocation.

There still remains the further argument that the child's evidence was in fact corroborated by the mother's. In this case the jury was directed that the rule of practice was to look for corroboration of the mother's testimony. If the mother's evidence ought to be corroborated, then surely such corroboration must be by evidence which can be acted upon by itself. Since the child's evidence is not to be used to convict an accused unless there is other evidence implicating him, and since it is dangerous to act on the mother's evidence without corroboration, the two cannot corroborate each other. An accomplice's evidence ought to be corroborated, but the evidence of another accomplice cannot supply the corroboration. *R. v. Noakes* 5 C. & P. 326; *R. v. Baskerville*, (1916) 2 K.B. 658.

In order for the mother to corroborate the child, the jury would first have to examine the mother's evidence without looking at the child's. It is only when the mother is believed can her evidence be used to corroborate the child, whereas what the practice of warning juries about the danger of acting on the uncorroborated evidence of a woman in a sexual case means, is that the jury must examine the other evidence in the case and decide whether from that other evidence her story is corroborated. I am of opinion that the facts in this case do not permit of mutual corroboration.

In my view the dictum in *R. v. Campbell* ought not to be followed. I go further and express the opinion that in any criminal trial where a judge comes

## R. v. LALL

to the conclusion that a child ought not to be sworn because he does not understand the sanctity of an oath, the child should not be permitted to give evidence unless there appears on the deposition evidence of corroboration. It must be wrong to lead evidence which the jury will hear and then direct the jury to discard such evidence. Such evidence ought not to be heard at all.

Having found the unsworn evidence of K.R. was uncorroborated, the question arises whether her evidence affected the propriety of the conviction. Quite properly the Judge directed the jury that they could convict on the uncorroborated evidence of the mother, but he also told them over and over again that K.R.'s unsworn evidence corroborated the mother's evidence. Five examples will suffice:

“Counsel for the accused have asked you to give very little weight to the evidence of K.R. You will have to decide if you will accept the evidence and the weight you will put on the evidence if you accept it. You may very well find that you can rely on her evidence in that regard and if you do not find you can rely on her evidence, you have the evidence of the mother alone, bearing in mind that it is dangerous and unsafe to convict on the uncorroborated evidence of the prosecutrix in cases of this kind.”

Again —

“In this case, we have, initially, the direct evidence of K. and then the possible corroboration in the evidence of K.R., if you accept it and you so find.”

And—

“In this case you will recall that the evidence of K.R., the daughter was unsworn. She did not give evidence on oath. You will also recall that she is a child of nine years. As I said, there are various bits of her evidence which may tend to corroborate the evidence of K., if you accept, but you have to approach your acceptance of the evidence of the child with some degree of caution and care and I venture to suggest with great care and then you will decide if you will accept the various bits of her evidence I may indicate as corroboration or not.”

Also —

“If, indeed, you think that you cannot accept or rely on the evidence of the child to corroborate the mother's evidence well, then, you will reject it, discard it from your minds.

And —

“In all these instances she (K.R.) supports her mother's evidence tending to implicate the accused in so far as the circumstances immediately concerned with the events are concerned, and in so far as those circumstances are concerned the Crown is inviting you to believe that they point conclusively and unequivocally to the commission of the offence of rape.”

There were many similar directions.

There was clearly no direction in the light of the proviso to s. 71; but the alternative situations on either of which it was suggested to them they could act were put in this manner: (a) they might either return a verdict on the uncorroborated evidence of the mother K. alone, though it would be dangerous for them to do so; or, (b) if they were not so minded and desired corroboration of it, they might choose to find it in her child's evidence, provided they could safely rely on it. If, however, they found they could not rely on the child's, they would be left only with the mother's evidence on which it would be dangerous to act.

Such being the directions of the learned judge, it is impossible for us to say which of these two alternative situations the jury accepted — whether they relied for their verdict of “Guilty” on the uncorroborated evidence alone coupled with the warning as they were entitled to do, or on the evidence of the child as corroborative of the mother's. Indeed, the jury, having been told it would be dangerous for them to act on the uncorroborative evidence of K. alone may very well, it is contemplated, have heeded the judge's warning and convicted with the help of the evidence of the child which was repeatedly suggested to them as being capable of corroborating the mother's. It seems to us that the Likelihood of a verdict of “Guilty” returned in such circumstances, without the proviso (14) being explained to them is unsafe, and founded as it is on a non-direction which amounted to a misdirection in law ought to be set aside in the interests of justice.

Thus far I have dealt solely with the count of rape. The count for breaking and entering with intent to commit rape is founded on the same facts as the count for rape. Without deciding whether this count could be properly joined or not, it is clear that if the accused is acquitted of the rape, he cannot, having regard to the Crown's case, be convicted of the first count.

The appeal is allowed and convictions and sentences quashed.

CUMMINGS, J.A. I concur.

CRANE, J.A. (ag.) I concur.

*Appeal allowed — Convictions and sentences quashed.*

## HANSRAJ SINGH &amp; JOSEPHINE JUNOR

v.

## DRAINAGE &amp; IRRIGATION BOARD

[Court of Appeal (Stoby, C., Cummings and Crane, JJ. A).  
November 9, 24, 1967.]

*Statutory body — Drainage and Irrigation Board — Omission to ensure adequate defences — Flooding — Loss of cultivation — Action for damages.*

*Negligence — Old buried box-koker cause of flooding — Existence of same known to Board prior to flooding — Whether consequences of harm reasonably foreseeable.*

*Rule in Rylands v. Fletcher — Strict liability — Escape of water — Whether rule applicable.*

*Justices Protection — Not pleaded that act done maliciously and without reasonable or probable cause — Whether obligatory to do so — secs. 2 & 14 of the Justices Protection Ordinance, Cap. 18 (now secs. 2 & 14 of the Justices Protection Act, Cap. 5:07).*

*Limitation of actions — Whether action filed within requisite statutory period — s. 8(1) of the Justices Protection Ordinance, Cap. 18 (now s. 8(1) of the Justices Protection Act, Cap. 5:07).*

The appellants were adjacent plot-holders of strips of land on an estate known as Jacoba Constantia on the west bank of the Demerara River and situate within the Canals Polder Drainage and Irrigation area which fell under the management and control of the respondent Board. On the southern side of the Estate there were two parallel artificial water-courses known as the “B” line canal and the Feeder trench, both of which are separated by a dam known as the “B” line dam. The Feeder trench was fed from the “B” line canal and it was from this source that farmers occupying and cultivating estates in the vicinity, including Jacoba Constantia, irrigated their holdings by making cuts in the bank containing it. Between December 20, 1964, and January 20, 1965, water from the “B” line canal escaped into the Feeder trench inundating Jacoba Constantia and resulted in the almost total loss of both appellants’ provision cultivation.

The appellants brought almost identical separate actions which were consolidated and tried together by consent. They pleaded that the Board were in breach of their duty of care in negligently causing or permitting water to escape from the “B” line canal into the Feeder trench and on to their cultivation; alternatively, that there was strict liability in the Board under the rule in *Rylands v. Fletcher*. The Board denied the allegations of negligence and counter-alleged that the appellants were negligent in failing to provide a proper system of drainage on their holdings. They also contented that the appellants had failed to comply with s. 2 of the Justices Protection Ordinance, Cap. 18, in that they did not allege in their statement of claim that the act was done maliciously and without reasonable or probable cause and that they

had in fact failed to prove that the act was done without such cause. The learned trial Judge dismissed the action with costs holding that there was no negligence on the part of the Board neither were they liable under the rule in *Rylands v. Fletcher* because of the operation of the principle of joint benefit.

**HELD** — (Crane, J.A. (Ag.), delivering the judgment of the Court) — that (i) the respondent Board owed a duty of care to the appellants after they had discovered the defective condition of the box-koker in respect of which there had been several complaints; (ii) the Board's liability was properly grounded on their failure to have taken the necessary precautions against the eventuality of the likelihood of damage of the type that had occurred since they ought, as reasonable persons, to have foreseen such likelihood of damage; (iii) the learned trial Judge's consideration that the Board was not liable under the rule in *Rylands v. Fletcher* because of the principle of joint benefit, i.e., the right of the owner of land to use the water in adjoining land, was not correct, since the authorities showed that this principle is excluded where a defendant owes a duty of care to a plaintiff to see that the damage which occurred did not in fact occur; (iv) as this was a case of justices acting in a purely ministerial capacity there was, therefore, no necessity for the appellants to have pleaded that the act was done maliciously and without reasonable or probable cause since such a plea is only applicable where the justices have acted in a purely judicial capacity (v) the appellants had filed their writ on July 6, 1965, which was well within the statutory period of 6 calendar months next after January 20, 1965, and one month after notice of intended action, as provided for by sec. 8(1) and 8(2) respectively of the Ordinance.

(*Payne v. Town Clerk of Georgetown* (5) (*infra*) expressly approved).

*Appeal allowed — Matter remitted back to trial Judge for re-opening and assessment of quantum of damages.*

*Cases referred to:*

- (1) Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (1961) 1 All E.R. 404, P.C.
- (2) R.H. Buckley & Sons v. N. Buckley & Sons (1898) 2 Q.B. 608.
- (3) Rylands v. Fletcher (1866) L.R. 1 Exch. 265; (*affd.*) (1868) L.R. 3 H.L. 330; 19 L.T. 220.
- (4) Mohamed Din v. Drainage & Irrigation Board (1963) L.R.B.G. 434.
- (5) Payne v. Town Clerk of Georgetown (1915) L.R.B.G. 199.
- (6) Everett v. Griffiths (1921) A.C. 631.
- (7) Linford v. Fitzroy (1849) 13 Q.B. 240; 18 L.J.M.C. 108; 13 Jur. 303.

*Dr. F. H. W. Ramsahoy* for appellants.

*S. M. H. Rahaman, Senior Crown Counsel*, for respondents.

## SINGH &amp; JUNOR v. D. &amp; I. BOARD

CRANE, J.A. (ag.): Jacoba Constantia is an estate on the west bank of the Demerara River within the Canals Polder Drainage and Irrigation area. It is flanked by the estates Les Desir on the west and Mes Delices on the east. On the north it is bounded by a facade drainage trench bordering the public road, and on the south, irrigated by two parallel artificial water-courses known as the "B" line canal and the Feeder trench, both of which are separated by a dam known as the "B" line dam.

For some years prior to 1965, it appears that these three estates were declared drainage and irrigation areas under the Drainage & Irrigation Ordinance, Cap. 192.

The Feeder trench is fed from the "B" line canal and abuts on Jacoba Constantia and nearby estates; it is from this source that farmers occupying and cultivating estates in the vicinity are wont to irrigate their holdings by making cuts in the bank containing it.

The plaintiffs are two of these farmers. They are adjacent plot-holders of strips of land on Jacoba Constantia on which they cultivate a variety of provisions. Between 20th December, 1964, and 20th January, 1965, disaster befell them. Water from the "B" line canal escaped into the Feeder trench inundating Jacoba Constantia and resulted in an almost total loss of cultivation on both farms for which they claim damages in excess of \$500 in one case, and \$500 in the other in statements of claim couched in substantially identical terms.

No one knew at first how flood-water came to escape from the "B" line canal. As a matter of fact, it took several days of searching to discover that the source of the overflow into a drainage trench on the east of Jacoba was from an old box-koker embedded some four feet beneath the surface of the "B" line dam at a point adjacent to Mes Delices which is owned by one Dookhan. No one in fact knows of the origin of this old box-koker; but the respondent Board disclaims it by asserting it is not one of their works originally erected or taken over subsequently by them; they say it was left buried where it was found when the "B" line canal was dug some years ago, which seems to be a clear admission that its existence must have been known to the Board at least from that time. The escape of water was discovered on January 21, 1965; it was reported to the drainage authorities on January 23, 1965, and the koker sealed up by them two days later.

On the pleadings there are both allegations and counter-allegations of negligence. The plaintiffs in this consolidated action, claim that the defendants are liable in negligence in that they caused or permitted water to escape from the "B" line canal into the Feeder trench by not taking care to contain it therein within the required limits; by carelessly constructing and using their drainage and irrigation works; and by omitting to ensure adequate defences against flooding in times of rainfall. In the alternative and further alternative, strict liability is pleaded in the respect that water, a dangerous thing, was permitted to escape from the "B" line canal and the Feeder trench, and did escape therefrom on to the plaintiffs' farms.

The respondent Board denies the allegations of negligence. They assert in turn that the plaintiffs were negligent in that they failed to construct a proper system of drainage on their holdings; that they did so in an inefficient manner by making cuts on a dam to the east of the estate abutting on an eastern side-line trench; and that they neglected to block up the cuts when directed to do so. Alternatively, it is pleaded that the damage complained of was the result of a third party, one Dookhan, the owner of the estate Mes Delices. The defendants do not admit the loss claimed by the plaintiffs, but raise the further plea that the claims are barred by section 8 of the Justices Protection Ordinance, Cap. 18.

Such were the issues the Judge had to decide which we considered necessary to narrate in view of the fact that he gave no reason for his conclusion that the Board was not liable in negligence. But before setting out his findings on them, it is thought that a brief comment on the sparsity of evidence led by both parties in this case will not be out of place. Evidently, neither side appeared to consider weight of evidence of any significance in the case; each contented itself with mere assertion of its own and denial of its opponent's case. The plaintiffs were the only witnesses in support of their cases; and apart from what the witness Ashford Kwang said on their behalf the defendants made very little effort to rebut the allegations of negligence both on the statements of claim and in the evidence of the plaintiffs which they clearly ought to have done. In short, the case was improperly conducted from an evidential standpoint, and on this account, it is not surprising to find the comment in the judgment, even though not wholly correct, that "neither the plaintiffs nor the defendants are in a position to dispute the evidence led by the other".

In a reserved judgment, after stating the facts of the case and the particulars of negligence in the statements of claim, the learned trial Judge stated simply:

"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 in *Rylands v. Fletcher* if the defendants were not negligent?"

The judgment is altogether silent, as indeed it ought not to be, on the reasons which prompted the above conclusion, which, it is apparent, were not reached by way of an analysis of the elements of negligence, the essential ingredients of which are; whether a duty of care was owed by the defendants to the plaintiffs, whether there was a breach of that duty, and whether damage was the result therefrom; it was apparently reached, at least only so far as we are able to determine, from the bald statement of opinion that "there was no negligence on the part of the defendants as alleged".

As an appeal is always from the conclusion and not from the reasons or absence of reasons given for it, it will be necessary for us to determine whether it can be sustained from the evidence led.

## SINGH &amp; JUNOR v. D. &amp; I. BOARD

In this regard it having been admitted that the two water-courses and the dam were the property of the Board and in their sole control and management, counsel for the appellants contended that since the box-koker was discovered beneath the dam's surface, it necessarily formed part of the works of the Board and, for that reason, knowledge of its existence could be imputed to the Board either as a matter of law or common-sense. Counsel was, however, forced to concede, on being pressed, that he had no authority for this proposition which seemed to us so startling and novel. He obviously appears to have based it, though he did not say so, on the well-known maxim of the law that "he who is owner of the soil owns everything in it from the sky above to the bowels of the earth"; but while this is a principle which is applicable to the concept of possession in law, it has no relevance to the determination of tortious liability for negligence arising from the existence of things found in the sub-soil, and cannot ground liability therefor unless there arises in the owner of the soil a duty to take care. Insisting that the Board owned the appellants a duty of care not to permit water to flow from the "B" line to the Feeder trench, counsel rested his argument on this ground by maintaining that the appellants had at the trial raised a *prima facie* case of negligence which went unanswered by the respondent Board.

On the facts, it seems to us that the solution to the question lies in considering and applying the test of reasonable foreseeability of the consequences of harm flowing from the Board's act of construction of the "B" line dam with knowledge of the existence of the disused box-koker embedded in its surface. In the application of this test the Board's position must be considered from the standpoint of the hypothetical reasonable man and the question asked whether, when so placed, the very harm which occurred could not have been foreseen by its engineers as the likely result to such persons in the situation of the plaintiffs when the canal and dam were in the course of construction. If a reasonable man could indeed have foreseen that such would have been the result of the respondents' act, and damage did in fact occur, a case of negligence is made out. We consider this to be the proper approach and the one which the Judge ought to have followed in view of the evidence given by the Board's overseer to the effect that the box-koker was left where it was discovered — some four feet beneath the surface of the dam ever since the "B" line canal was dug, and that in order to prevent the escape of water both its ends had to be sealed up with earth. This is a clear admission, it seems to us, that the koker's existence was known to the respondents at the time of the construction of the canal. Further, when the evidence of both plaintiffs is considered in the light of this admission, namely, that they had both spoken and complained to the superintendent and ranger of the Board about the flood-water and the former had blamed it on the carelessness of his rangers, also that one of the rangers said he had already made several complaints about the koker, it becomes quite clear that not only did the Board know about the existence of the koker, but also knew of its defective condition well before the mishap on December 20, 1964.

Without doubt, prudence, foresight and caution ought to have counselled the complete removal of the koker by the engineers at the time of constructing the dam; but maybe it was both the fact that the koker was already sited where it was and the fact that the Board was not taking it over as one of its works, that burying and sealing it into the dam was considered just as effective a means of disposing of it as by the removing of it altogether, but that was a matter within the skill and judgment of the respondents' engineers.

We propose to call in aid to a solution to this problem the principle which has been re-stated recently by the Judicial Committee of the Privy Council in *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd.*, (1961) 1 All E.R. 404, referred to as the *Waggon Mound* case. In this case, owing to the carelessness of the appellants' servants furnace oil from a ship was spilt into a bay. The oil itself, unignited, also caused slight damage to the respondents' wharf but no claim to compensation was made for this damage. In an action by the respondents for damages for negligence, it was found as a fact that the appellants did not know and could not reasonably have been expected to know that the furnace oil was capable of being set alight when spread on water. Their Lordships humbly advised Her Majesty that the test of liability for the damage done by fire was the foreseeability of the injury by fire and, as a reasonable man would not, on the facts of this case, have foreseen such injury, the appellants were not liable in negligence for the damage, although their servants' carelessness was the direct cause of it.

We also think the case of *R. H. Buckley & Sons v. N. Buckley & Sons*, (1898) 2 Q.B. 608, which is not entirely dissimilar on the facts from the instant case, is also of assistance to us, although it was not cited at the Bar, particularly as it involves the principles of joint benefit on which the trial judge found his conclusion of non-liability. This was a case where the owner of land on the bank of a river, for the purpose of bringing water from the river to a mill which he erected, made a water-course with a shuttle at the head of it to control the flow of the water from the river into the water-course, and afterwards conveyed away a portion of his adjoining land, and his successor in title subsequently granted to the owner of the adjoining land so conveyed a right to use the water for the purposes of a mill belonging to him. Much the same as in the instant case, the action was for "negligently and improperly permitting the sluice gate or shuttle at the head of a goit belonging to the defendants to be out of repairs, and not managing, regulating, and controlling the same and the said goit, by reason whereof large quantities of water flowed into the goit and from thence on to the plaintiffs' land, and did damage to goods stored thereon." The Court of Appeal held that the existence of the right in the owner of the adjoining land to use the water did not affect the obligation of the owner of the water-course towards the owner of the adjoining land to keep the shuttle in repair so as to prevent flood-water from the river getting into the water-course and overflowing on to his land.

## SINGH &amp; JUNOR v. D. &amp; I. BOARD

The important point of similarity in the above case to the present is with respect to the principle of joint benefit as revealed in the judge's finding that water in the "B" line canal existed for purposes of irrigation and for the benefit of all farmers in the area, including the plaintiffs, from which he concluded the respondents were not liable under the rule in *Rylands v. Fletcher*.

There can be no dispute, in view of section 11 of the Drainage & Irrigation Ordinance, Cap. 192, that Jacoba Constantia being within the Canals Polder Area, the "B" line canal was constructed with a view to providing water for the benefit of all farmers in the area, nor about the correctness of the judge's finding in that respect, but the point of joint benefit on which he rested his conclusion of non-liability for negligence under *Rylands v. Fletcher* is shown by the authorities to be excluded if a defendant is considered to have owed a duty to take care to the plaintiff to see that the damage which occurred did not in fact occur. It is this aspect of the matter that was stressed by VAUGHN WILLIAMS, L.J., in *Buckley's* case (above) when he said at page 614 of the report:

"There can be no doubt that down to 1874, when the plaintiffs' predecessor in title acquired a right to the continuance of the flow of water in the goit, the defendants' predecessors in title, who had made and maintained an opening in the bank of the river and an artificial water-course leading therefrom for their own purposes, were under an obligation to the owners of adjoining land, including the owners of the plaintiffs' land, to take care that the water so conducted along their water-course did not break loose and do damage to those owners."

In just the same way, we think, as the defendants in *Buckley's* case owed a duty to take care to see that the shuttle was in a fit state of repairs, we think the respondents, being on their own admission, aware of the presence of the koker and the fact that it was a constant source of trouble, owed the appellants a duty of care to prevent flood-water from escaping from the "B" line canal into the Feeder trench. In our view the facts of this case amply justify the application of the above principle, since it would not be unreasonable to hold, notwithstanding the scanty and not altogether accurate description of the koker based on inadequate evidence, that the damage caused the plaintiffs was reasonably foreseeable from something known to the Board to exist, namely, the presence of the damaged box-koker in the "B" line dam. Very little is known of how it came to be there; no one knows for certain who put it there or for how many years it has lain there; but though embedded within their property, it is not one of the works originally erected or subsequently assumed and maintained by the Board. If indeed the koker was 10 feet in length and lay concealed four feet below the surface of the dam which was given as some 14 to 24 feet wide, its existence ought to have been virtually concealed from anyone; but evidently this was not so. Its presence in the dam must have been obvious to give the ranger cause to complain to the Board on several occasions concerning it.

In our view, the respondents were in flagrant breach of a duty of care which they owed to the plaintiffs, after they discovered the defective condition of the box-koker from the several complaints to that effect. They ought as reasonable persons to have foreseen the likelihood of damage of the type that occurred being occasioned to farmers in the neighbourhood, and to have taken precautions against its eventuality, and it is in this respect that their liability is grounded rather than on any presumption of law or common-sense, for in our opinion the damage resulting from the presence of the box-koker and the absence of proper precautions was reasonably foreseeable, and as the Board did nothing about it they must compensate the plaintiffs for the loss suffered as a result of the negligence.

There is no note on the record of the arguments raised on section 8 of the Justices Protection Ordinance, Cap. 18, which is pleaded with a view to limitation of action. However, it appears from the judgment that the argument on this aspect of the case was confined to sections 2 and 14 instead, and that a submission was made on the respondents' behalf that the action should be struck out as disclosing no cause of action on the ground that the statements of claim failed to allege that "the act was one maliciously and without reasonable or probable cause". To this submission the appellants replied that such was only necessary in a case where a justice performs strictly judicial functions since section 2 is to the effect that the act must be done by him in execution of his duty as a justice. Reference was made to the case of *Mohamed Din v. The Drainage & Irrigation Board*, (1963) L.R.B.G. 434, in which it was held that section 8 of the Justices Protection Ordinance applies to the defendant Board for acts done by the Board, and to *Payne v. The Town Clerk of Georgetown*, (1915) L.R.B.G. 199. In this case, it was held that an action for negligence did not lie against the Town Clerk and judgment of non-suit was entered because of the protection that Ordinance afforded him. The learned trial judge, after considering the relevant facts and excerpts from those two decisions, concluded as follows:

"I am therefore of the opinion that section 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, section 2 does not apply, and once negligence is proved the Board would be liable."

At the commencement of the hearing before us, counsel for the respondents applied for and obtained leave to file and serve notice (presumably under Order 11 rule 5(1), of his intention to contend that the judgment of the trial Judge should be affirmed on additional grounds. We note that the rule speaks of varying of the decision of the court below, not of affirming it, and so we proceed on the assumption that it is with that end in view that counsel's application is directed and should be dealt with. In short, what the respondents' notice has in mind is the varying of that portion of the judgment above which excludes the application of section 2 to any pro-

## SINGH &amp; JUNOR v. D. &amp; I. BOARD

ceedings save those in which a justice “and all other persons” exercise judicial or quasi-judicial functions.

There is no doubt that section 14 extends the protection of the Justices Protection Ordinance, Cap. 18, to the respondent Board by virtue of the words therein — “and all other persons for anything done in the execution of their office under and by virtue of any ordinance”, and this being the case, the question of whether the necessity for pleading that the act was done maliciously and without reasonable or probable cause, applies to actions against persons under the aegis of Cap. 18 other than justices of the peace performing acts now characterised as strictly judicial or quasi-judicial arises for consideration. The trial judge found that section 2 applies to both judicial and administrative acts in the erroneous exercise of judgment and that where the exercise is not in relation to a judgment *stricto sensu*, then section 2 does not apply.

At common law, when a justice acted without or in excess of jurisdiction, he rendered himself liable in trespass for all wrongful acts done in pursuance of what he ordered. When, however, he acted within his jurisdiction, though erroneously, it was obligatory in order to ground an action against him, to allege that he was actuated by malice when making the order he made. To be contrasted with this position of the justice of the peace at common law, is the following *dictum* in the opinion of VISCOUNT FINLAY in *Everett v. Griffiths*, (1921) A.C. 631 at page 666 to the following effect:

“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, and its provisions have not the effect of rendering justices of the peace liable to be sued in respect of purely judicial acts, even if alleged to be malicious.”

The first section of the statute referred to by VISCOUNT FINLAY above, is from the Justices Protection Act 1848 (U.K.) on which our section 2 is modelled. His reason for saying that he thought that the protection afforded by it is not wanted and does not apply was because he considered justices are not liable to be sued in respect of purely judicial acts within their jurisdiction, even if there is an allegation that those acts are malicious.

We think the solution to this matter is to be found in the determination of whether the functions exercised by the justice are to be characterised as judicial or administrative in nature, (1) because legal accountability for judicial acts depends not upon the particular office which the officer holds, but upon the function which he performs on the occasion in question. The functions of a justice of the peace may be (a) purely judicial, as when he hears the evidence for both parties in a law-suit, applies the law to the facts and pronounces his judgment thereon, or (b) administrative or ministerial, as when he sits as a liquor licensing or cinematograph justice, or (c) when he ex-

ercises functions savouring of the characteristics of both (a) and (b); the hearing of an application for bail will fall into this category. (2) The question of whether the particular function or act falls into one or other category is not always easily distinguishable, because the character of the act being judicial is not determined solely by the status of the particular functionary who performs the act. For example, subordinate officers in courts of justice, many of whose duties are ministerial, frequently perform judicial acts also. Broadly speaking, however, a "judicial act" is one which involves the exercise of a discretion on which the officer concerned (not necessarily a judicial officer), has heard a matter and exercises a decision on it; while in the case of a "ministerial act", the law circumscribes the particular course of action, leaving the officer no alternative choice as to how the act must be performed. Ministerial acts therefore are such as are necessary for carrying into execution what the law has already determined. In *Everett v. Griffiths (supra)*, at pages 682-683; the following extract from the opinion of LORD ATKINSON is most pertinent:

"I know no better definition of a judicial act than that given by May, C.J., in the Irish case of *Reg. v. Dublin Corporation*. In that case the corporation by certain orders, directed (illegally it was alleged) that certain liabilities should be paid out of their borough fund. A *certiorari* was moved for to bring up these orders with a view to having them quashed as illegal. The Chief Justice said: 'It is established that the writ of *certiorari* does not lie to remove an order merely ministerial: . . . . . but it lies to remove and adjudicate upon the validity of acts judicial. In this connection the term "Judicial" does not necessarily mean acts of a judge or of a legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, imposing liability and affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequences would be judicial acts.'

But a justice of the peace when acting in an administrative capacity is not acting as a magistrate; this is so because his functions being in the main statutory, it is only when he purports to act under the Summary Jurisdiction and related Ordinances does he act as a magistrate, and it is only in this respect that his functions may rightly be termed judicial so as to bring him within the ambit of judicial privilege; but he is entitled to this immunity only so far as he acts judicially, not administratively. In this regard we adopt as a correct statement of the law what is said in 30 HALSBURY'S LAWS OF ENGLAND, 3rd Edition, para. 1354, page 709:

"The protection of judicial privilege applies only to judicial proceedings as contrasted with administrative or ministerial proceedings; and, where a judge acts both judicially and ministerially or administratively, the protection is not afforded to acts done in the latter

## SINGH &amp; JUNOR v. D. &amp; I. BOARD

capacity. Thus, the act of hearing and determining an action is a ministerial act, and therefore a refusal, even by a judge of a superior court, to try a case may be actionable, while a wrong decision is not. (In other words, the decision to try or not is a ministerial act, but the decision in the case is a judicial act.) Similarly, where justices of the peace make an order in their judicial capacity, and subsequently carry it out in their administrative capacity by their servants, negligence in the latter operation is actionable. Duties, however, which are partly judicial and partly ministerial, such as the duty of admitting to bail, are not severable so as to admit of liability for any part of the acts done in fulfilment thereof."

The position which emerges from the authorities then is clearly this: Where a justice performs in a purely judicial capacity within jurisdiction, and an action is brought against him for an act done or omission made in relation thereto, the gist of the action is corrupt motive, therefore for a plaintiff to succeed he has got to allege malice and want of reasonable or probable cause in his statement of claim. *Per contra*, when he acts simply and purely in a ministerial capacity, there is no need for that allegation because the gist of the action for the tort of negligence will not be a corrupt motive, but the breach or omission of a duty to take care. It must follow that in the instant case there was no necessity for the plaintiffs to have pleaded as it is claimed they ought to have.

We consider the phrase in section 2 "any matter within his jurisdiction as justice" to mean any matter in which he exercises a judicial as distinct from a purely administrative or ministerial function. It is only in such matters that the law requires the allegation expressly to be made that the justice acted maliciously and without reasonable or probable cause. As LORD DENMAN, C.J., said in *Linford v. Fitzroy*, (1849) 13 Q.B. 240:

"We are of opinion. . . . . that unless the duty of the magistrate is simply and purely ministerial, he cannot be made liable to an action for a mistake in doing or omitting to do anything in execution of that duty unless he can be fixed with malice which in this case has been negatived by the jury."

The matter of the box-koker was not one on which the Board was called on to exercise a strictly judicial or quasi-judicial function in any sense of that phrase; therefore it seems to us that the Judge was correct when he said that section 2 does not apply where the administrative acts are not in the exercise of a judgment, which we interpret to mean a quasi-judicial function.

In passing, we must observe that *Payne v. Town Clerk of Georgetown* (above), though not based on such analysis as we have endeavoured to give, was nevertheless, we considered, rightly decided, and the trial Judge's remark in support of it that it may be argued that the Town Clerk had exercised a judgment, that is to say, a discretion that the property had been put up for execution was well justified in view of the extract from LORD ATKINSON'S speech above. Indeed, the decision of the Town Clerk to put

up Mrs. Payne's property for sale for non-payment of rates for the year 1914, was a purely judicial act. The Town Clerk was within his jurisdiction as an authority competent to enquire into the facts of whether she had paid her rates on her property or not, and to make a decision affecting her rights to it by ordering that it should be put up for sale at execution for non-payment thereof.

The matter of the box-koker, however, being concerned with a purely administrative act of the Board, section 2 of Cap. 18 cannot apply, and we must therefore conclude that it was not obligatory on the appellants to plead the words it is suggested they ought to have pleaded, because it is clear that the alleged negligent act was committed by the Board otherwise than in the process of making a judgment, decision, or in exercising a discretion.

With respect to the plea of limitations in section 8 of Cap. 18, the plaintiffs are well within time having filed their writ on the 6th July, 1965, within six calendar months next after 20th January, 1965, and one month after notice of intended action dated 4th June, 1965.

We allow the appeal and remit the case to the learned judge for him to re-open it and assess quantum of damages. Costs of appeal to the appellants, but in the court below reserved for the trial judge.

*Appeal allowed — Matter remitted to trial Judge for re-opening and assessment of quantum of damages.*

## EILEEN ALEXANDER v. MUNIA

[In the Full Court of the High Court (Bollers, C.J., and Mitchell, J.)

— November 27, 28, 1967.]

*Crown lands — Rice lands — Deceased husband tenant — Wife Executrix and legatee — Notice to landlord that wife would continue tenancy — Rice Farmers (Security of Tenure) Ordinance, No. 31 of 1956 (now Rice Farmers (Security of Tenure) Act, Cap. 69:02) — Applicability of.*

*Crown lands — Rice lands — Landlord's testator licensee of Crown lands — Sub-letting — Commissioner of Lands and Mines — Permission of — Not pleaded or argued — Crown Lands Regulation, Cap. 175 (Subsidiary Legislation) (now State Lands Regulations, Cap. 62:01 (Subsidiary)).*

*Trespass — Rice lands — Action for damages — Proper forum.*

Sometime prior to 1962, one Shewnarain, the respondent's husband, became the appellant's tenant in respect of 10 acres of rice lands situate at

## ALEXANDER v. MUNIA

Second Depth, Dingwall, Corentyne, Berbice, and in that year the maximum rent of holding was assessed, fixed and certified by the Berbice Rice Assessment Committee at \$12 per acre in accordance with s. 11(a) of the Rice Farmers (Security of Tenure) Ordinance, No. 31 of 1956. Shewnarain died on March 13, 1964, and left a will in which the respondent was named executrix and Probate of her husband's estate was granted to her on December 15, 1964. Under her husband's will, the respondent became the legatee of the 10 acres of rice lands aforesaid and, on March 25, 1964, her solicitor addressed a letter to the appellant in accordance with the provision of the 1956 Ordinance informing her that the respondent was the executrix and legatee named in the last will and testament of the deceased and that she would continue her husband's tenancy. Meanwhile, on March 14, 1964, the appellant, her daughter and son-in-law, went on the land with two tractors and reaped the crop then growing and ploughed the land. Despite protest and the intervention of the police, the appellant said that the land was hers and she continued to plough the land and subsequently prevented the respondent, her servants and agents from going on the land during 1964, 1965 and 1966 for the purpose of preparing the land for planting and, in the result, the respondent was dispossessed and evicted from the said land.

The respondent, in her capacity as beneficiary and executrix of the deceased estate, then brought an action against the appellant in the Magistrate's Court for damages for trespass claiming \$12,000 for the loss of the rice crops for the years 1964, 1965 and 1966. The defence was based mainly upon the argument that the respondent had already filed proceedings against the appellant in the High Court in Action 328 of 1964 in which she claimed substantially the same relief now claimed in the Magistrate's Court, which proceedings were still pending and, accordingly, the Magistrate's Court had no jurisdiction to grant the relief sought, since the land, the subject-matter of the action, was "Crown land" which could not be granted to her under the provision of the 1956 Ordinance. Apparently, however, before the action was heard and determined in the Magistrate's Court, the proceedings in the High Court were withdrawn. At the close of the respondent's case, solicitor for the appellant immediately closed his client's case and submitted that the Magistrate had no jurisdiction in the matter but, assuming that he did have such jurisdiction, nevertheless, the respondent would be 'estopped' by reason of the withdrawal of the High Court action. These submissions were overruled by the Magistrate and judgment was entered in favour of the respondent in the sum of \$4,400 together with a fee of \$450.

On appeal to the Full Court, solicitor for the appellant raised two main points, viz., (a) that the Magistrate's Court had no jurisdiction to hear and determine the matter, as it was admitted by both parties, after a notice to admit certain facts were served on the respondent, that the land in question was 'Crown land' and the appellant's testator was lessee of the said 'Crown land' and, therefore, the 1956 Ordinance had no such application to such land, and (b) assuming, however, that the Magistrate's Court did have such jurisdiction, nevertheless, there was no evidence by the respondent that the lessee of the 'Crown lands', who was the appellant's testator, had the permission and consent of the Commissioner of Lands and Mines to sub-let the lands in question to the deceased. In reply, counsel for the respondent submitted that the Magistrate's Court did have jurisdiction and was the proper tribunal to hear and determine the action since the subject-matter was "rice

lands” within the meaning of the 1956 Ordinance and, if there was an agreement of tenancy in relation to such rice lands, then the said Ordinance would apply.

**HELD:**— (per Bollers, C.J. delivering the judgment of the Court) that (i) the Rice Farmers (Security of Tenure) Ordinance, No. 31 of 1956, contain principles, some of which are similar to the Rent Restriction Ordinance, Cap. 186, but there is one vital distinction between the two statutes, viz., the latter applies ‘in rem’ whereas the former operates merely ‘in personam’ (except for s. 25 (1) (b) against the landlord). Under the latter a status is conferred on the premises to which the statute applies, whereas, under the former, the only status conferred by the Ordinance is on the agreement of tenancy between the parties and not upon the land itself; (ii) although the Crown is not bound by the 1956 Ordinance as between the Crown and subject or where a party sets up the defence that he has entered the land under the authority of the Crown, nevertheless, it does bind lessee and sub-lessee, i.e., between subject and subject in respect of Crown lands, and that was the true position in this matter; (iii) the issue that there had been an infringement of the Crown Lands Regulations in relation to ‘subletting’ was never in fact raised in the Magistrate’s Court at all, either on the pleadings or by way of argument and, accordingly, it must be presumed that the lessee of the Crown, whether the appellant or her testator, had obtained the necessary permission of the Commissioner of Lands and Mines to sub-let the 10 acres of Crown lands, and (iv) there is abundant authority that the proper forum for bringing an action for damages for trespass to rice lands within the meaning of the 1956 Ordinance, the tenancy of which is protected by that Ordinance, and where the tenant relies on his tenancy to prove his claim arising out of the said Ordinance, is the Magistrate’s Court.

(Dictum of Adams, J. (Ag.) in *Chattergoon v. Outar & Anor.* (1) approved but facts distinguished from this matter).

*Appeal dismissed — Order of Magistrate affirmed.*

*Cases referred to:—*

- (1) *Chattergoon v. Outar & Anor* (1961) L.R.B.G. 251.
- (2) *Rudler v. Franks* (1947) K.B. 530; 176 L.T. 326; T.L.R. 109.
- (3) *Clark v. Downes* (1931) 145 L.T. 20.
- (4) *Tamlin v. Hannaford* (1950) 1 K.B. 18; (1949) 2 All E.R. 327; 65 T.L.R. 422.
- (5) *Wirral Estates Ltd. v. Shaw* (1932) 101 L.J.K.B. 370; (1932) 2 K.B. 247; 147 L.T. 87.
- (6) *Critchley v. Clifford* (1961) 3 All E.R. 288, C.A.
- (7) *Bishundyal v. Ross* (1962) L.R.B.G. 299 (F.S.C.)
- (8) *Khan v. Rahaman* (1963) L.R.B.G. 353.
- (9) *Small v. Saul & Saul* (1965) L.R.B.G. 228; (1965) 8 W.I.R. 351 (B.C.C.A.).
- (10) *Evelyn v. Latchmansingh* (1961) L.R.B.G. 12; (1961) 3 W.I.R. 107.
- (11) *White v. White* (1962) L.R.B.G. 316.

## ALEXANDER v. MUNIA

*O. M. Valz* for appellant.

*M. Poonai* for respondent.

BOLLERS, C.J.: Some time prior to the year 1962, Shewnarain, now deceased, became the tenant of the appellant in respect of 10 acres of rice lands situate at Second Depth, Dingwall, Corentyne, and in that year the maximum rent of the holding was assessed, fixed and certified by the Assessment Committee Zone VII, at \$12.00 per acre, per annum, in accordance with Section 11 (a) of the Rice Farmers (Security of Tenure) Ordinance 1956.

Early in 1964 while Shewnarain was still alive Hilton Thom was employed by him to plough the land which he proceeded to do when on the 13th March, 1964, Shewnarain died. Shewnarain's wife, Munia, the respondent, became the legatee of the tenancy in respect of the 10 acres of rice lands under the last will and testament of her husband wherein she was named as Executrix, and on the 15th day of December, 1964, Probate of the estate of Shewnarain, deceased, was granted to her. On the 25th March, 1964, the respondent through her solicitor addressed a notice to the appellant/(defendant) in terms of the provisions of the Rice Farmers (Security of Tenure) Ordinance whereby the appellant was informed that Munia was the Executrix and legatee named in the last will and testament of Shewnarain, deceased, who was a tenant of the 10 acres of rice lands and that Munia would continue the tenancy of the deceased.

Meanwhile, on the 14th March, 1964, the appellant/(defendant) her servants and agents, that is to say, her daughter and son-in-law, went on to the land with two tractors and reaped the crop which was then growing on the land and ploughed the land. The respondent's son intervened with the assistance of the Police but without avail and was told by the appellant that the land was now hers and she continued to plough the land and subsequently prevented the respondent, her servants and agents from going on to the land in the years 1964, 1965 and 1966 for the purpose of preparing the land for planting and, in the result, dispossessed and evicted the respondent from the said land.

It was in these circumstances that the respondent, in her capacity as beneficiary and Executrix of the estate of the deceased, brought an action against the appellant in the Magistrate's Court for damages for trespass, in which she claimed the sum of \$12,000 for loss of the rice crops in the years 1964, 1965 and 1966. The defence to the action was, in the main, that the respondent had already filed proceedings against the appellant in action No. 328 of 1964 in the High Court of the Supreme Court of Judicature in which she claimed substantially the same relief as now claimed in the action in the Magistrate's Court, which proceedings were still pending, and that the Magistrate's Court had no jurisdiction to grant to the plaintiff the relief sought because the land which was the subject matter of the action was Crown Land

and that under the terms and provisions of the Rice Farmers (Security of Tenure) Ordinance such provision could not be granted to her.

It appears that before the action in the Magistrate's Court was heard and determined the respondent withdrew the proceedings which were pending in the High Court of the Supreme Court of Judicature. At the close of the respondent's case, Solicitor to the appellant immediately closed his client's case and made the submission that the court had no jurisdiction in the matter and assuming that the court had jurisdiction the respondent was estopped by reason of the withdrawal of the proceedings in the High Court by seeking the relief now sought by her in this court. The learned magistrate overruled these submissions and entered judgment in favour of the respondent in the sum of \$4,800 with a fee of \$450.00

It is from this judgment that the appellant (defendant in the court below) now appeals to this court and solicitor for the appellant has raised two main points: – Firstly, that the Magistrate's Court had no jurisdiction to hear and determine this matter as it was admitted by both parties after a notice to admit certain facts was served on the respondent that the land in question was Crown Land and that the appellant's testator was the lessee of the Crown Land and therefore the Rice Farmers (Security of Tenure) Ordinance had no application in respect of lands of the Crown. Secondly, assume that the Magistrate's Court had jurisdiction there was no evidence by the respondent that the lessee of the Crown Land, who was the appellant's testator, had the permission and consent of the Commissioner of Lands and Mines to sublet the land to Shewnarain, deceased. In support of this contention, solicitor cited the cases of *Chattergoon v. Outar & Anor.* (1961) L.R.B.G. p. 251 and *Rudler v. Franks* (1947) K.B. 530.

Counsel for the respondent, on the other hand, submitted that the Magistrate's Court had jurisdiction in this matter and was the proper tribunal to hear and determine this action as the subject matter of it was rice lands within the meaning of the Rice Farmers (Security of Tenure) Ordinance and if there was an agreement of tenancy in relation to rice lands then the 1956 Ordinance would apply.

In *Chattergoon v. Outar & Anor.*, the circumstances were that one Sadeo and Ramnarain held leases of two tracts of Crown Lands, and without the consent of the Commissioner of Lands & Mines they sublet certain portions of the property to the plaintiff Chattergoon and his brother Dinoo. These leases expired on January 31, 1953, and were not renewed, but the plaintiff and Dinoo continued in occupation. In 1958 the plaintiff applied to the District Commissioner for a lease of the areas he was occupying and paid to the Commissioner's clerk fees and one year's rent in advance. The plaintiff alleged that he was told by the clerk that he might occupy the areas applied for but admitted that no leave was given to him in writing by the Lands & Mines Department. In 1958 the defendants applied to the Commissioner of Lands & Mines for a lease of 15 acres, being part of the same

## ALEXANDER v. MUNIA

area applied for by the defendants under Regulation 7(1), (2), (3) of the Crown Lands Regulations to occupy and commence work on the 15 acres. The defendants then ploughed and planted the 15 acres and as a result the plaintiff claimed damages for trespass and an injunction. It was held by ADAMS J. (ag.): (1) as the Commissioner of Lands & Mines had not given Sahadeo and Ramnarain permission to sublet, the creation of the plaintiff's *de facto* subtenancy was an infringement of the Crown Lands Regulation and could not be recognised by the Crown; (2) that the District Commissioner's clerk had no authority to create a tenancy that was binding on the Crown and having accepted rent the doctrine of estoppel could not operate to give him such power; (3) grants, leases, licences and permissions issued under the Crown Lands Ordinance in relation to rice lands are exempted from the provisions of the Rice Farmers (Security of Tenure) Ordinance 1956.

It is this last holding by the learned judge that solicitor for the appellant presses upon this court that as the land in question which was originally leased to the appellant's testator is a lease of Crown Land, it is exempted from the provisions of the Rice Farmers (Security of Tenure) Ordinance and therefore the Magistrate's Court would have no jurisdiction in respect of an action brought in relation to trespass on the land arising out of a tenancy which would otherwise be based on the Rice Farmers (Security of Tenure) Ordinance.

In *Chattergoon v. Outar*, the judge stated in the course of his decision that in his opinion even if there had been an agreement of tenancy of rice lands between the Crown and the plaintiff the 1956 Ordinance would have no application. The learned judge considered that the contention that the plaintiff was entitled to the protection of the Rice Farmers (Security of Tenure) Ordinance, No. 31 of 1956, on the ground that with knowledge that the plaintiff was occupying his block of land for the purpose of rice cultivation, the District Commissioner's clerk accepted rent from him and issued receipts to him was untenable. He referred to section 58 of the 1956 Ordinance which contained a provision for the general savings of rights and is in the following language:

“Except as in this ordinance expressly provided, nothing in this ordinance shall prejudicially affect any power, right or remedy of a landlord, or tenant, or other person, vested in or exercisable by him by virtue of any other ordinance or law, or under any custom of the country, or otherwise, in respect of any agreement of tenancy or other contract, or of any fixtures, tax, rate, rent or other thing.”

and to the clause for the savings of rights to the Crown in the Interpretation Ordinance Chapter 5 section 23 which enacts as follows:

“No enactment shall in any matter whatsoever affect the right of the Crown, unless it is therein expressly stated, or unless it appears by necessary implication that the Crown is bound thereby.”

and stated:

“In my view, the combined effect of these two last sections is that grants, leases, licences, and permissions under the Crown Lands Ordinance in relation to rice lands are exempted from the restrictive provisions of the Rice Farmers (Security of Tenure) Ordinance. There is nothing in this Ordinance that abrogates the Crown’s rights as prescribed in the earlier Ordinance, either expressly or by necessary implication. To hold otherwise would mean not merely putting a wrong construction of the various Ordinances but to invite inconvenient, embarrassing and absurd consequences in the relations between the Crown and applicants. For example, at the termination of a lease through effluxion of time, unless the Crown can put forward one of the statutory grounds for possession, a lessee of rice lands might be able to remain indefinitely in occupation. Further, the nice distinctions between leases on the one hand and licences and permissions on the other hand might be extinguished.”

As authority for the proposition that the Crown was not bound by the provisions of the Rice Farmers (Security of Tenure) Ordinance and that grants, leases, licences and permissions issued under the Crown Lands Ordinance in relation to rice lands are exempted from the provisions of the 1956 Ordinance, the learned judge relied on the case of *Clark v. Downes* (1931) 145 L.T. 21 and *Tamlin v. Hannaford* (1950) 1 K.B. 18, where DENNING, L.J., (as he then was) in the course of his decision at page 22 said:

“It is, of course, a settled rule that the Crown is not bound by a statute unless there can be gathered from it an intention that the Crown should be bound; and it has been held that, under this rule, the Crown and its servants and agents are not bound by the Rent Restriction Acts.”

We concur with the learned judge in his observations and final conclusion that the Crown would not be bound by the 1956 Ordinance as there is no clear intention in the statute that the Crown should be so bound, but we must point out that although the Crown was not a party to the action in *Chattergoon v. Outar & Anor.*, it was necessarily for the judge to consider the question whether the 1956 Ordinance applied to the Crown or not, because the defendants were claiming to have entered on the land and to have committed the acts complained of by virtue of the permission of the Crown through its agent the Commissioner of Lands & Mines. Therein lies the distinction to be drawn between the decision in *Chattergoon v. Outar* and the circumstances of the instant case. Indeed, the learned judge made it clear in his decision that even if the plaintiff’s possession of the portion of 15 acres in dispute was *de facto* and wrongful, this was sufficient to found an action of trespass against persons who could not show a better title. He then went on to make it quite clear that the defendants had not merely set up a better title in the Crown but had shown that the Commissioner of Lands & Mines as authorised by the Governor under the provisions of the Crown Lands Ordinance has given them permission to take possession and they had acted on

## ALEXANDER v. MUNIA

such written authority, actual notice of which had been brought to the attention of the plaintiff. *Chattergoon v. Outar* is not therefore authority for the proposition that the 1956 Ordinance does not bind lessee and sub-lessee, that is to say, between subject and subject in respect of Crown Lands but is authority for the proposition that the Crown is not bound by the Ordinance as between Crown and subject or where a party sets up the defence that he has entered the land under the authority of the Crown.

Solicitor for the appellant has relied strongly on the case of *Rudler v. Franks* (1947) K.B. 530 in support of his submission that the 1956 Ordinance has no application to Crown Lands whether subject to a tenancy of subtenancy, but before we consider this authority it would be necessary to consider *Clark v. Downes* (1931) 145 L.T. 20 and *Wirral Estates Ltd. v. Shaw* (1932) 101 L.T. K.B. 370.

In *Clark v. Downes* certain huts built by the Crown became vacant in 1923. They were subsequently let to tenants. In 1928 the Crown sold the property to Wirral Estates Ltd. who leased the same to the plaintiff. The rental value of the premises brought them within the Rent Restrictions Act. The plaintiff sought possession of the premises occupied by the defendant whose tenancy commenced from October, 1924. The County Court Judge dismissed the claim, holding that the premises were controlled and the plaintiff appealed. The case was argued on the footing that the Rent Restriction Acts did not bind the Crown. The Divisional Court held that the appeal must be allowed. It was conceded that the Crown was not bound by the Rent Restriction Acts and that the Acts operated *in rem* and not *in personam*, and so if the principal Act did not apply to the premises, the Act of 1923 also did not apply. There must therefore be an order for possession. ROMER, L.J. in the course of his decision pointed out that it was agreed by both parties that the Rent Restriction Acts do not affect the rights of the Crown and that it was also agreed that having regard to the authorities these Acts must be treated as operating *in rem* and not *in personam*, and that when sub-section (2) of section 12 of the Act of 1920 which defined what houses were within The Acts was considered, it must be read as though it said in express terms that the Act shall apply to a house other than a house belonging to the Crown. The learned judge showed that it had been laid down by the Court of Appeal that for the purpose of considering whether a house did or did not come within the provisions of that sub-section the time to be regarded is the time at which the house was let. That being so, it followed as a matter of course that the house was not within the operation of the Acts because it clearly was not within the operation of the Acts at the time of the letting. He then went on to give another reason why the Rent Restriction Acts would not bind the Crown when he stated:

“The Acts not binding the Crown, it is the duty of the Courts so to construe the Acts that the Crown and its property are in no way prejudicially affected by the Acts. Now, if the learned county court judge is right and these houses became subject to the operation of the

Acts, the moment they passed out of the ownership of the Crown it follows that the reversion to the houses while in the possession of the Crown was worth considerably less than it would have been but for the Acts. The Acts so construed, therefore, would prejudicially affect the property of the Crown. Having regard to what I have said, the Acts should therefore not be construed in that way.”

One year later, in *Wirral Estates Ltd. v. Shaw*, LORD HANWORTH, M.R., explained what ROMER, L.J. meant by those words and that was that the Lord Justice was speaking of the reversion upon existing tenancies — tenancies which have been created by the Crown immune from the Rent Restriction Acts — and saying that it would be impossible to hold in respect of those tenancies that the Rent Restriction Acts applied, for the position of the landlord and tenant would have been in so many respects modified by those Acts. Therefore, so long as that tenancy continued which had been created apart from the Acts, so long must the immunity continue, even though the reversion had passed from the Crown. The M.R. concluded his judgment by stating that there was no authority which showed that there was a sort of immunity running with the land which is to inure in favour of subsequent purchasers after the tenancies created by the Crown had come to an end. This decision established then, that houses, the property of the Crown, are not subject to the Rent Restriction Acts, and this immunity continues during the currency of a tenancy which the Crown has created after the Crown has sold the property. It is not, however, an immunity running with the land and, therefore, where a purchaser from the Crown creates a new tenancy the liability to rent restriction revives.

The case of *Rudler v. Franks* established once more that the Rent Restriction Acts operate *in rem* and not *in personam* and will accordingly continue to be inapplicable to Crown property even when the property has been let to a tenant who has sublet to a sub-tenant who would otherwise have been within the protection of the Acts. LORD GODDARD, L.C.J., who delivered the judgment of the Divisional Court, rejected the opinion of the Justices that the application for possession was covered by the Rent Restriction Acts since the tenancy was not created by the Crown but was a transaction between subjects without any reference to Crown ownership and at no time were the Crown or its agents concerned with the terms of the subtenancy, or as to whether in fact there was a sub-tenancy at all. In the opinion of the Justices the exemption of the Crown from the Rent Restriction Acts did not extend to buildings under the control of a lessee. LORD GODDARD stated:

“So far as this court is concerned, the case is concluded by *Clark v. Downes*, which must be taken to have been approved by the Court of Appeal. The same two Lords Justices who decided *Clark v. Downes*, sitting as a divisional court, considered their own decision when sitting in the Court of Appeal in *Wirral Estates, Ltd. v. Shaw*. As I understand the decision, it is this: The Rent Restriction Acts apply *in rem*, and not *in personam*. The meaning of that is that the Acts attach or apply to the

## ALEXANDER v. MUNIA

property itself; and, therefore, as the Crown is not bound by the Rent Restriction Acts, the house, as long as it remains Crown property, never becomes affected by the Acts. Of course, if the lease has been granted by the Crown, no one could have disputed that the Rent Restriction Acts would not apply, because, the Crown not being named in the Acts, obviously, on all the well-known rules of construction, the Crown is not affected by them. The reason why the Acts do not apply when the tenant of the Crown creates a sub-tenancy is, first, because, as I have just said, the Acts operate *in rem*, and so is never attached to the house at all, and, secondly, as pointed out by Romer, L.J., the Crown's rights would or might be affected if the Acts applied to the premises, for if it sold the reversion it would probably get less if the Acts applied because the purchaser would not be able to have vacant possession. We are not presuming to limit our judgment to cases where the Crown is still the owner, for it seems clear from *Wirral Estates, Ltd. v. Shaw* that, although the Crown may sell a property, the immunity of that property from the Acts would last so long as the tenancy granted by the Crown remained in existence."

It follows from these authorities that if the Rice Farmers (Security of Tenure) Ordinance (which contains principles some of which are similar to the Rent Restriction Acts) was in the same position as the Rent restriction Acts the sub-tenant of a lessee of Crown Land so long as the lease between the Crown and the lessee is in existence or so long as the land remains Crown Land could not claim the protection of the Ordinance. HALSBURY'S LAWS OF ENGLAND, Third Edition, Vol. 23 p. 721, para. 1466 states:

"The Rent Restriction Acts are sometimes said to operate *in rem* or to impose a status on a house. Various propositions are said to flow from or illustrate this principle. Thus, the standard rent before 1957 was based on the rent at which the premises was let at a particular date, and this standard rent attached to the premises so that it was binding on all subsequent landlords and tenants of the premises. . . ."

Another consequence said to flow from the proposition that the Acts imposed a status on the house is that if a tenant of controlled premises grants a sub-tenancy to which the Acts do not apply, for example, for business purposes, the Acts cease to apply to the premises and the head tenant himself loses protection. It will thus be seen from this statement of the law that the Rent Restriction Acts impose a status on a dwelling house to which the Acts are applicable. It is for this reason that LORD GODDARD in *Rudler v. Franks* stated that the Acts apply *in rem* as they attach or apply to the property itself. Is the position the same in regards to the Rice Farmers (Security of Tenure) Ordinance? We think not. The local Rent Restriction Ordinance Cap. 186 which contains provisions similar to the Rent Restriction Acts in England, speaks in section 3 of the Ordinance applying (a) to all dwelling houses whether let furnished or unfurnished; (b) to all public or commercial building whether let furnished or unfurnished; (c) to all building land. Thus the

Ordinance confers a status on dwelling houses, commercial buildings and building land within the section. The Rice Farmers (Security of Tenure) Ordinance, on the other hand, confers no status on the rice lands to which the Ordinance is to apply. In section 3 it is enacted that anything in law or in any agreement in respect of the letting of rice lands to the contrary notwithstanding every agreement of tenancy, whether written or oral, shall be deemed to be an agreement of tenancy from year to year and no such agreement, whether made before or after the commencement of this Ordinance, shall be terminated by the landlord or by the tenant, except as in this Ordinance provided; and rice land is defined in section 2 of the Ordinance as meaning any land which is let or agreed to be let the subject of an agreement of tenancy which is used either wholly or mainly for the cultivation of paddy, such land being at the time of letting fit for the cultivation of paddy according to normal agricultural standards but does not include any land forming part of an estate which is being used by the owner (or any person claiming title through the owner) mainly for the cultivation of any crop other than paddy, and is let for the cultivation of paddy at an annual rental of not more than six dollars per acre. Section 25(1) enacts:

“A certificate issued by a committee under section 18 or under section 20 of this Ordinance shall, in all courts of law and before every assessment committee —

- (a) be conclusive evidence as between the landlord and the tenant who were parties to the investigation;
- (b) be conclusive evidence notwithstanding any chance of landlord, for or against the tenant who was a party to the investigation; and
- (c) be *prima facie* evidence in all other cases,

that the maximum rent of the premises described in the certificate is as stated therein.”

Thus the status, if any, is conferred by the Ordinance not on the land or rice land itself but rather on the agreement of tenancy between the parties which only applied *in rem* against a landlord in accordance with section 25(1)(b), otherwise the proceedings before the Assessment Committee operate *in personam*. *Therein* lies the distinction between the Rice Farmers (Security of Tenure) Ordinance and the Rent Restriction Acts. It is not difficult to see why this is so as the land, as in this case, which was originally leased by the Crown, was not leased as rice lands or for the purpose of growing rice but was leased for agricultural purposes in which case agricultural crops of any kind could have been grown on the land. The status conferred by the 1956 Ordinance if any, was not conferred on the land itself but rather on the user of the land, but only in so far as the landlord was concerned.

We consider that the case of *Critchley v. Clifford* (1961) 3 A.E.R. 288 is analogous to the instant case. There the tenant (who was in fact a sub-

## ALEXANDER v. MUNIA

tenant) had rented a cottage on a farm from his landlord who was not the owner of the freehold property. The landlord was himself the tenant of the farm and cottage let to him by the Liverpool Corporation as part of the farm. The tenant took no part in the running of the farm but used the cottage entirely for the purposes of occupation by himself and family. The County Court Judge held that as the Rents Acts operated *in rem* and not *in personam* the Acts did not apply to the premises in question and in the circumstances the tenant was not entitled to protection. The Court of Appeal arrived at the conclusion that this view was wrong. The court held that in deciding whether the sub-tenant was entitled to the protection of the Rent Restriction Acts the determining factor was the letting of the cottage, that the sub-tenancy being the "letting" to which the word "let" in proviso (iii) to section 12(2) of the Act of 1920 referred, that sub-tenancy was within the Rent Restriction Acts and therefore the sub-tenant was entitled to their protection. It was conceded that the occupying sub-tenant would not be protected by the Rent Restriction Acts as against the superior landlord if the tenancy of the farm were determined. Section 12(2) (iii) reads as follows:

"(iii) for the purposes of this Act, any land or premises let together with a house shall, if the rateable value of the land or premises let separately would be less than one quarter of the rateable value of the house, be treated as part of the house, but, subject to this provision, this Act shall not apply to a house let together with land other than the site of the house."

ORMEROD, L.J., pointed out that it is clear that this sub-section applied and therefore the farm and buildings let with the farm were not within the purpose of the Rent Acts. It was contended however on behalf of the landlord that as the Rent Acts operated *in rem* and not *in personam* the exception was created when the tenancy was granted by the Liverpool Corporation to the landlord, and in those circumstances an intermediate letting was likewise deprived of the protection of the Acts. The issue therefore was whether the Rent Acts applied to the particular letting or whether their effect was to exclude this letting from the protection of the Acts, thereby justifying an order for possession. The landlord relied on *Rudler v. Franks* on this issue. The learned Judge distinguished *Rudler v. Franks* from the circumstances of this case he had to decide and construed the word "let" in proviso (iii) to section 12(2) to mean "let to the occupying tenant" and if that were so the only tenancy to consider was the tenancy of the cottage which was let to the tenant and occupied by him. It may be that at the time when the present landlord obtained a tenancy of the farm, the whole farm was then outside the protection of the Rent Acts, but the point that mattered was at the time the landlord, that is to say, the tenant of the farm, let the cottage to the tenant he was letting the cottage to an occupying tenant for the purpose of occupation as a dwelling. Consequently, the tenant would be entitled to the protection of the Acts. The learned judge, when disposing of the case of *Rudler v. Franks*, observed that the court was there dealing with property which was owned by the Crown and remained Crown property and it was

well established that the Rent Acts did not apply to Crown property, and that rule remained in force no matter how many lettings and sub-lettings there were. In the circumstances of *Rudler v. Franks* any sub-letting of the property would be subject to the same properties and characteristics as the original letting and the principal characteristic is that it being Crown property the Rent Acts would not apply. WILMER, L.J.'s observation on *Rudler v. Franks* was that the principle to be extracted was that there were some houses which, whether by a rule of law or by express statutory provision, are altogether and for all purposes excluded from the operation of the Rent Acts. Such houses have a particular quality which affects their status, so as to prevent the occupying tenant from obtaining protection.

At once, it will be seen, that the distinction to be drawn between the circumstances of *Rudler v. Franks*, on the one hand, and those of *Critchley v. Clifford* and the instant case, on the other, is that the properties and characteristics of the original letting remained the same in regard to the subletting in the former case but in the latter case the properties and characteristics of the original letting did not remain the same in the subsequent subletting, for example, in *Critchley v. Clifford* the subletting was in relation to an occupation of a mere cottage on the farm by a tenant who took no part in the management of the farm and in the instant case whereas the original lease by the Crown was for agricultural purposes the subletting was in respect of rice lands, a particular agricultural purpose. It cannot, therefore, be said that a particular characteristic attached itself to the property at the time of the original letting, though a particular characteristic might have attached to the tenancy. If, therefore, indeed, the Rice Farmers (Security of Tenure) ordinance, as far as the landlord was concerned applied *in rem* and not *in personam* to the property the cases would be limited to the position where the land was used solely as rice land as defined by the Ordinance at the time of the original letting. We have reached the conclusion, then, that the Rice Farmers (Security of Tenure) Ordinance would apply in this case. Indeed, in *Bishundyal v. Ross* (1962) L.R.B.G. 299, decided by the Federal Supreme Court, the Ordinance was held to apply to rice lands which were in fact lands of the Crown and there is no basis for the contention that the case was decided *per incuriam* as counsel for the respondent argued that the judge had erred in law in finding that the appellant's possession was protected by the Ordinance No. 31 of 1956.

On the second point submitted by Solicitor for the appellant it must be observed that in the written defence the appellant did not allege that she or her testator had failed to obtain the permission of the Commissioner of Lands & Mines to sublet the 10 acres of Crown lands for the purpose of growing rice in accordance with Regulations 42 and 86 of the Crown Lands Regulations nor did the appellant lead any evidence that the necessary permission was not obtained, nor was any cross-examination of the respondent directed to show that there was no permission obtained. The issue, therefore, was never raised in the Magistrate's Court that there had been infringement of the Crown Lands Regulations in relation to subletting and it therefore must be presumed

## ALEXANDER v. MUNIA

that the lessee of the Crown, whether it be the appellant or her testator, had obtained the necessary permission of the Commissioner of Lands & Mines to sublet the 10 acres of Crown lands.

There is abundant authority for the proposition that the proper forum for bringing an action for damages for trespass to rice lands within the meaning of the Rice Farmers (Security of Tenure) Ordinance 1956, the tenancy of which is protected by that Ordinance, and where the tenant relies on his tenancy to prove his claim arising out of the Ordinance, is the Magistrate's Court — see the decisions of the Federal Supreme Court in *Khan v. Rahaman* (1963) L.R.B.G. 353 and *Small v. Saul & Saul*. (1965) L.R.B.G. 228: (1966) 8 W.I.R., p. 315. In the latter case the tenants (plaintiffs) launched an action in the Supreme Court against the landlord (defendant) alleging trespass and claiming damages for breach of the covenant for peaceful and quiet enjoyment and an injunction to restrain the defendant from continuing the wrongful acts. The plaintiffs succeeded in obtaining an interim injunction to be continued until the final determination of the action and later obtained a judgment for damages for trespass and breach of the covenant. On appeal, the British Caribbean Court of Appeal held: (i) that as the respondents were statutory tenants after the date of the notice, the action arose out of the Rent Restriction Ordinance, Chapter 186 (B.G.), which gave them a specific remedy, and therefore the Supreme Court had no jurisdiction to hear the action for damages, but the exclusive jurisdiction lay in the Magistrate's Court; (ii) that the Supreme Court had no jurisdiction to entertain the respondents' substantive claim, but was limited to intervention by way of injunction *ad interim*. ARCHER, P. in the course of his judgment, stated at p. 355 on the Report:

“In this case it is an essential part of the respondents' (plaintiffs) cause of action that they have a possession in themselves consistent with the appellant's ownership, that is to say, that they are statutory tenants, and they must invoke the assistance of the ordinance to prove it. Having, therefore, to rely on the ordinance, to sustain both trespass and breach of the implied terms guaranteeing quiet enjoyment their whole action arose out of the ordinance.”

In *Evelyn v. Latchmansingh* (1961) 3 W.I.R. 107; (1961) L.R.B.G. 12, LUCKHOO, C.J. dealt with the question of jurisdiction in a case where a statutory tenant was claiming damages for breach of covenant of quiet enjoyment, eviction and trespass in relation to premises protected by the Rent Restriction Ordinance. Delivering his judgment the learned Chief Justice said as follows:

“In the present action the plaintiff's claim is wholly dependent upon the question whether or not she was protected by the Rent Restriction Ordinance and that being so the claim should have been instituted in the Magistrate's Court and cannot validly be brought in the Supreme Court, the jurisdiction of the Supreme Court having been

ousted by the provisions of sec. 26(1) of the Rent Restriction Ordinance, Cap. 186.”

In the case of *Khan v. Rahaman*, the Federal Supreme Court had cause to consider the question of jurisdiction in relation to lands protected by the Rice Farmers (Security of Tenure) Ordinance 1956 and the Chief Justice of that court observed that the Ordinance introduced some of the principles of the Rent Restriction Acts of the United Kingdom and that the main object of the Ordinance was to give security of tenure to tenant rice farmers. It achieved that object by imposing restrictions on the common law rights of landlord and tenants of rice lands and by the constitution of Assessment Committees in whom it vested power and authority to adjudicate upon matters arising out of the relationship of landlord and tenant, and to make orders and give directions in relation thereto and he pointed out that by section 5 (1) that a tenancy of Rice lands runs from year to year commencing from the 1st May and a landlord may not evict a tenant or give him notice to quit or otherwise terminate a tenancy, nor may the tenant terminate it except in the terms of the provisions of the Ordinance. In a latter passage of his judgment the learned Chief Justice stated that the jurisdiction of a superior court is not taken away except by express words but that the legislature had seen fit to vest in Assessment Committees the power and jurisdiction to make orders for the recovery of possession of holdings of rice lands, and he pointed out that it was clear that the legislature expressly intended to provide inexpensive remedies wherever disputes arose in relation to such tenancies irrespective of the extent of the holdings or the amount of rent that may be payable. It was this statement containing the observations of the Chief Justice on the 1956 Ordinance that ADAMS, J.(ag.) used in his decision in *White v. White* (1962) L.R.B.G. 316 to found his decision that a claim for damages for trespass and an injunction and declaration brought by a tenant against his landlord in respect of certain rice lands protected by the Ordinance could not be entertained by the Supreme Court in view of section 51(1) of the 1956 Ordinance which provided that any claim or other proceedings (not being proceedings before the Assessment Committee as such) arising out of this Ordinance shall be made or instituted in the Magistrate's Court.

We agree that in order to give the Magistrate's Court jurisdiction in this matter the plaintiff (respondent) would have to show that he was a tenant of rice lands within the meaning of the Rice Farmers (Security of Tenure) Ordinance 1956 for the matter to arise out of the Ordinance according to section 51(1) of the Ordinance, and the proper authority for determining the relationship of landlord and tenant is the Assessment Committee. In the Ordinance “landlord” and “tenant” is defined under section 2 and before the Committee can proceed under section 11 (a) to assess, fix and certify the maximum rent to be paid, they must first of all be satisfied and hold that there is a tenancy in existence between the parties and that the relationship between landlord and tenant exists. This relationship the Committee found

## ALEXANDER v. MUNIA

to exist between Shewnarain and the appellant/defendant when they issued the certificate fixing the maximum rent on 29th June, 1962, to take effect from 1st May, 1961. "Tenant" is defined in the Ordinance as including an executor or legatee of a tenant and, therefore, the respondent (plaintiff) was entitled to sue both in her capacity as Executrix and legatee of the estate of Shewnarain, deceased. For these reasons, we are of the opinion that this appeal must be dismissed and the order of the magistrate affirmed. Costs to the respondent fixed at (N.B. — there is no record of what was the amount of costs arrived at).

*Appeal dismissed — order of Magistrate affirmed.*

## FELIX WILTON AUSTIN v. RUBY ALEXANDRINA AUSTIN

[In the High Court (Vieira, J.) — October 30; November 2, 3 & 6; December 9, 1967.]

*Divorce — Husband philanderer — Wife indifferent housewife — Personal habits of wife — Impact of personalities — Consideration of.*

*Divorce — Adultery of petitioner — Frankness of disclosure — Exercise of Court's discretion.*

*Divorce — Cruelty — Proper test — Mental cruelty.*

*Divorce — Desertion — Whether kindred offence to cruelty — Whether subject to the same test — Constructive desertion.*

*Divorce — Petitioner's evidence — Corroboration — Whether rule of law or practice.*

*Divorce — Grounds — Standard of proof — Whether beyond reasonable doubt.*

*Statute — Construction — Meaning of "satisfy," "is not satisfied" and "is satisfied" in secs. 9(6), 10(1) & (2) of the Matrimonial Causes Ordinance, Cap. 166 (now secs. 9(6), 10(1) & (2) of the Matrimonial Causes Act, Cap. 45:02).*

The parties were married to each other in 1939 when the petitioner was a third class constable in the then British Guiana Police Force. By dint of perseverance, application and self-discipline, the petitioner rose steadily in the ranks. He became an officer in 1957 and, in January 1967, reached his zenith as Commissioner of Police. The marriage had gone reasonably well until 1952 when he was a sergeant and the N.C.O. in charge of Whim Police Station on the Corentyne. He was having a difficult time with the men under his command and, his wife, instead of supporting him, kept criticising him for not being able to handle his men properly. She was apathetic in her attitude and incompetent in her household duties and he had to rely heavily on his 18 year old daughter, the result of a union with another woman prior

to his marriage. In 1957 he became an officer and that very year suffered a great personal loss when his daughter left to get married. To make matters worse, his wife developed a diseased finger which, as the result of her constant picking, infected all the other nine fingers. Things, however, really came to a head during 1963—1964 when there were large scale civil disturbances throughout the country. During this period the petitioner was a Senior Superintendent and Officer in charge of “B” Division, Berbice. During 1964 the respondent caught her husband in bed with a teacher and he was also having a clandestine affair with a nurse who bore him a child in January, 1965. This was particularly hurtful to the respondent since she was childless. In February, 1965, the parties moved into the petitioner’s home in Fifth Avenue, Subryanville, where, in May 1965, the respondent caught a female relative of hers standing near her husband’s bed after he had barred her entrance to his bedroom (the two of them having slept in different bedrooms for the last few years of their married life and being almost strangers to each other). Considering this outrage the last straw, the respondent struck her husband on his shoulder with a window stick and he promptly cuffed her twice in her face. In January, 1967, the petitioner was appointed Commissioner of Police and he removed from the matrimonial home and went to live alone in official quarters at Rabbit Walk, Eve Leary. He then filed proceedings for divorce alleging cruelty and constructive desertion. Apart from the single act of physical assault when his wife struck him with the window stick in May, 1965, the petitioner alleged acts amounting to ‘mental’ cruelty which he relied upon to show that, by their cumulative effect, he was forced to leave the matrimonial home without any fault on his part.

**HELD:**— that (i) although the wife may well have been careless and indifferent in her household duties and her constant picking at her fingers was no doubt a genuine source of irritation to the husband, nevertheless, she was not a vulgar and abusive woman as her husband sought to make her out but, in fact, a decent woman of remarkable fortitude and forbearance who had just cause for annoyance over her husband’s philandering with other women; (ii) the apathy and indifference of the wife did not amount to ‘mental’ cruelty since they were largely brought about by the husband’s over-ambition, pride, unfaithfulness and over-sensitivity to legitimate criticism; (iii) there was no constructive desertion by the wife since the acts complained of by the husband were blown out of all proportion to what really had happened and amounted to no more than the ‘normal wear and tear of married life,’ and, consequently, there was no reasonable or justifiable cause for his withdrawal from cohabitation; (iv) cruelty and constructive desertion are kindred offences and subject to the same test, viz., “was the conduct of such a grave and weighty nature as to make cohabitation virtually impossible?” (v) if the conduct complained of is in the nature of cruelty then it should be pleaded as such and not as constructive desertion since it is not possible to build up a case of constructive desertion by what is really a case of unproved cruelty; (vi) although corroboration in both cruelty and desertion is not required as an absolute rule of law, nevertheless, in practice, it is usually required, unless its absence can be satisfactorily accounted for. Here, there was absolutely no corroboration of the petitioner’s evidence, and (vii) the standard of proof for grounds of divorce, including cruelty and desertion is not ‘beyond a reasonable doubt’ but on the ‘preponderance of

## AUSTIN v. AUSTIN

probability' and, accordingly, the words "satisfy," "is not satisfied" and "is satisfied", in secs. 9(6), 10(1) & (2) of the Matrimonial Causes Ordinance, Cap. 166, should be construed accordingly.

[Dictum of Sir Jocelyn Simon, P., in *Saunders v. Saunders* (14) (infra) approved and adopted. Dictum of Lord Denning in *Blyth v. Blyth* (22) (infra) followed. ]

*Petition dismissed.*

*Cases referred to:*

- (1) *Russell v. Russell* (1897) A.C. 395.
- (2) *Matthews v. Matthews* (1931--1937) L.R.B.G. 459.
- (3) *Watt (or Thomas) v. Thomas* (1947) 1 All E.R. 582, H.L.
- (4) *Waters v. Waters* (1956) 1 All E.R. 432, D.C.
- (5) *Lang v. Lang* (1954) 2 All E.R. 571, P.C.
- (6) *Gollins v. Gollins* (1963) 2 All E.R. 966, H.L.
- (7) *Williams v. Williams* (1963) 2 All E.R. 954, H.L.
- (8) *Westall v. Westall* (1949) 65 T.L.R. 337.
- (9) *Kaslefsy v. Kaslefsy* (1950) 2 All E.R. 398, C.A.
- (10) *Hall v. Hall* (1962) 3 All E.R. 518, C.A.
- (11) *Buchler v. Buchler* (1947) 1 All E.R. 319, C.A.
- (12) *Lauder v. Lauder* (1949) 1 All E.R. 76, C.A.
- (13) *Lane v. Lane* (1952) 1 All E.R. 223, C.A.
- (14) *Saunders v. Saunders* (1965) 1 All E.R. 838, D.C.
- (15) *Pike v. Pike* (1953) 1 All E.R. 233, C.A.
- (16) *Skull v. Skull* (1954) 1 All E.R. 1030, D.C.
- (17) *Jamieson v. Jamieson* (1952) 1 All E.R. 875, H.L.
- (18) *Young v. Young* (1962) 3 All E.R. 120, C.A.
- (19) *Timmins v. Timmins* (1953) 2 All E.R. 187, C.A.
- (20) *Ginesi v. Ginesi* (1948) 1 All E.R. 373, C.A.
- (21) *Davis v. Davis* (1950) 1 All E.R., C.A.
- (22) *Blyth v. Blyth* (1966) 1 All E.R. 524, H.L.
- (23) *King v. King* (1952) 2 All E.R. 584, H.L.
- (24) *Marjoram v. Marjoram* (1953) 2 All E.R. 1 D.C.
- (25) *Senat v. Senat* (1965) 2 All E.R. 505, D.C.
- (26) *Barron v. Barron* (1963) 1 All E.R. 215, D.C.
- (27) *Lewis v. Lewis* (1958) 1 All E.R. 859, C.A.
- (28) *Blunt v. Blunt* (1943) 2 All E.R. 76, H.L.
- (29) *Dennis v. Dennis* (1955) 2 All E.R. 51, C.A.
- (30) *Burford v. Burford* (1955) 3 All E.R. 664, C.A.

*C.A.F. Hughes with M. Commissiong*, for petitioner.

*G.M. Farnum, Q.C. with Mrs. A. Ali-Khan*, for respondent.

VIEIRA, J.: In this matter the husband petitions for a dissolution of his marriage on the grounds of cruelty and malicious desertion.

The parties were married to each other at Christ Church, Georgetown, on 15th April, 1939, after having known each other for 8 years. At the time of the marriage they were both 26 years of age and the petitioner was a third class constable in the then British Guiana Police Force.

It is not disputed that the marriage went reasonably well for many years, during which time the petitioner, by dint of hard work, perseverance and self-discipline, steadily rose in the Force.

It is the allegation of the petitioner that from 1952 he noticed a marked change in his wife's conduct and attitude, the circumstances of which persisted throughout thereafter and which ultimately forced him to leave the matrimonial home without any fault or even desire on his part. At that time he was a Sergeant and Subordinate Officer in charge of Whim Police Station on the Corentyne. He was having a difficult time with the men under his command and instead of his wife supporting him she kept on criticising him for not being able to handle his men properly and mocked and generally abused him. She began to neglect his health and comfort and became disinterested in his general welfare. She was apathetic and incompetent in her household duties and, as a result, he had to lean more and more heavily on his 18 year old daughter, Maude Evadne, the result of a union with another woman prior to the marriage, and who was a member of his household. There was an incident with his daughter and a young constable by the name of Rodney which ended up in the rather unseemly spectacle of the two men becoming engaged in fisticuffs which he considered would not have occurred but for his wife's interference, an allegation, in my opinion, most unjust and without any foundation.

In 1953 he was transferred to Albion and promoted Sub-Inspector. . . . He then hired a domestic as he felt the time had come when he could afford this luxury due to his improved salary and status.

In 1957 he suffered a great personal loss when his daughter left to get married. During that same year he went on long leave and attended a course abroad. At this time he was an Assistant Superintendent. On his return home he bought a book on household hints to housewives as he felt it necessary to inculcate in his wife those social graces so necessary to his position as an officer and gentleman. His wife did not take kindly to this however, and instead of showing appreciation, abused and mocked him for attempting to be what he was not and told him that she did not need any book but that it was he who needed improvement as he had no table manners.

Around this time she developed a diseased finger. Despite minor surgery it did not get better, and in fact, got much worse and, ultimately, spread to all ten fingers due to her constant picking of them over a period of several years. I have no doubt that this must have been a constant source of irritation to the petitioner. He bought her a pair of gloves which appears to have

## AUSTIN v. AUSTIN

been of considerable benefit as the condition of the fingers greatly improved, I do not accept the evidence of the petitioner that his wife picked her fingers at the table and in the kitchen when handling food. I have no reason to disbelieve the respondent that she hardly ever cooked or handled food which was properly the function of the cook.

Things really came to a head in 1963-1964 when he was a Senior Superintendent and Officer in charge of 'B' Division, Berbice. There can be no doubt that during this period, when there were large scale civil disturbances in this country, the petitioner, like all members of the Police Force and other law enforcement agencies, worked exceedingly long hours and under great stress and strain. He rarely came home before 8 p.m. and sometimes as late as midnight and even during the early hours of the morning. Invariably his wife was in bed and his food would be left out on the table and on many occasions he had to speak to her about not covering his food which would often be crawling with ants and cockroaches and sometimes even rodents. She hardly ever did any housework and he had to clean the bathroom and toilet himself and later show the servant and the barrack room labourer how to do these chores. She was vulgar and abusive in front of the servant and barrack room labourer and, what was even worse, before his friends. She was of little or no assistance to him whenever he held a social function and invariably he had to seek the assistance of his relatives and even outsiders. He considered that the situation was becoming intolerable and he warned her on several occasions that her attitude was affecting him adversely and it was becoming more and more impossible to live with her, and, if she did not change, he would have to leave.

The respondent admits that it was her practice not to wait up for her husband as he had no particular hour to come home plus the fact that there were a lot of mosquitoes out at night. She denied that her husband ever complained to her about the state of his food or that she ever left his food uncovered.

One cannot consider this particular aspect without regard being paid to all the circumstances of their daily lives during their stay in New Amsterdam during this period.

There is no dispute that a violent quarrel took place between them in their house in King Street sometime during 1963 after the petitioner's sister-in-law had left after spending about 2 months with them. The respondent told the petitioner that he was a nobody and playing what he was not and that he was a hypocrite and a "never-see come see" (whatever that means). I do not accept that the respondent told her husband that she was living with his daughter. I accept that what she really told him was that he could live with anyone and that if he could live with a young girl like that (alluding to a young woman about the same age as his daughter whom she alleged he was going around with) then he could live with his daughter. I have no doubt that the respondent was exceedingly angry and spoke in a loud tone of voice and threatened to tell the people in the District what type of man he was.

I consider that the respondent had just cause for being annoyed with the petitioner's philandering with other women. He was clearly carrying on a clandestine affair with a nurse, one Enid Guymo, who bore him a child in January 1965 on their return from leave in the United States. He was also playing around with a teacher by the name of Util Burke, who was a visitor of the home and whom I accept was found in bed with him one morning during 1964.

Could any decent wife be expected to put up with such reprehensible conduct? I have no doubt that had he treated her with love, kindness and respect she would have indeed waited up for him, however late he may have come home at night. In my opinion she was shabbily treated and, human nature being what it is, one cannot blame her for not showing any particular affection to the petitioner during this trying period. I have no reason to doubt that insects may have been at his food but I certainly don't believe it happened as often as he tried to make it out and I do not believe that she was so callous and indifferent as to leave his food uncovered. It is common knowledge that when food is left on a table in tropical countries there may be every likelihood of its being attacked by insects. Did he expect that she would be as kind and loving to him and look forward to his arrival from work however late he may be, despite his unfaithfulness? Surely not.

He appears to have been annoyed at finding her dirty underwear on his towel. Even accepting that this took place, is it not one of the normal and factual incidents of married life that spouses do tend to leave their underwear strewn carelessly around the house and, in particular, the bedroom and bathroom?

I have no doubt that she may not have been a particularly efficient housewife and may have even been rather careless and indifferent in her household duties. Does this make her abnormal or belong to some weird and unknown species that has to be scrutinised under a microscope? I totally reject the allegations of the petitioner that his wife was a vulgar and abusive woman. On the contrary, I consider her to be a decent woman of remarkable fortitude and forbearance. But, like all of us, she was no saint and martyr and I have no doubt she let him have the length of her tongue whenever his conduct and attitude became impossible and unbearable. I have no doubt that she criticised him about the way he handled the men under his command but I accept that the context of this criticism was that if he did not handle his men properly they would have no respect for him. This is not destructive but constructive criticism.

During their holiday in the United States in 1964—1965, I have no reason to disbelieve that she undid all the benefit she obtained from specialist treatment by continuing to pick at her fingers. Unfortunately, this would appear to have been an obsession with her.

After their return from leave in January 1965 they stayed at his daughter's home in Light Street, Alberttown and then moved into the petitioner's home at 53, Fifth Avenue, Subryanville, around the end of

## AUSTIN v. AUSTIN

February, 1965. Another important incident took place here in connection with a female relative of the respondent, one Mavis Chesney, who was engaged as a domestic. As regards this incident I accept the evidence of the respondent in preference to that of the petitioner.

On 3rd May, 1965, the respondent went to a concert and returned home between 6—7 p.m. She saw Chesney's bag on the floor but did not see the girl or her husband. She called out for 'Mavis' several times but received no reply. She then went to her husband's bedroom which had no lock or bolt at the time and as she pushed the door inwards her husband came to the door. He stood up in such a position that she was unable to see into the bedroom. She spoke to him concerning a message she had for him from Father Lalljee. She left the door but was rather suspicious and, to satisfy her curiosity, went into her bedroom which adjoined her husband's own and climbed on a chair and peeped over the partition and she saw Chesney standing by her husband's bed. At this time the petitioner was pacing up and down the passage. She came off the chair and took up a window stick and sat down on a chair. To her this was the last straw and she made no bones to speak her mind. As she so quaintly put it "I don't talk but this afternoon you are going to hear my voice". The husband went back into his bedroom and later Chesney ducked out of his bedroom, picked up her bag and left the house. The respondent then struck the petitioner on his shoulder with the window stick and he promptly cuffed her twice on her face. She then left and went to his sister in Sheriff Street, Campbellville, to whom she made a complaint. The two women returned to the house where the sister spoke to her brother. There was a general argument and the petitioner left the house. About one week later Chesney left of her own accord and the petitioner began to take his meals at his daughter's house.

In January 1967, the petitioner was appointed Commissioner of Police and moved out of the house and went to live alone in Official quarters at Rabbit Walk, Eve Leary, after telling the respondent that he was doing over his house and she would have to get out.

On 8th May 1967 the petitioner went to the respondent accompanied by a lawyer's clerk who served a petition upon her but she refused to sign the citation.

At the end of June 1967 the petitioner went on a course abroad and did not return until September 1967. It is not disputed that during this time he gave her no financial support whatsoever. In fact the only money she has received since May 1967 was the sum of \$90: — which amount he consented to in a petition for alimony pending suit brought by her.

I consider that the petitioner has been most vindictive because the respondent has refused to give him a divorce and has treated her with great callousness and indifference since May 1967, for which he should be thoroughly ashamed. She now lives in appalling conditions in the Subryanville house without any lights, water or toilet. Apart from her alimony

she is without means and has only been able to exist and keep body and soul together by her fortitude and the assistance of her mother and neighbours. He has made little or no effort to find suitable alternative accommodation for her. Her present circumstances are truly pathetic indeed.

In *Russell v. Russell* (1897) A.C. 395, the House of Lords laid down definitively and clearly the limits within which alone cruelty should be found as being.

“Conduct of such a character as to have caused danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger.”

In *Matthews v. Matthews* (1931-1937) L.R.B.G. 459 VERITY, J. laid down for the first time in the history of this country an authoritative and comprehensive definition of malicious desertion as follows at p. 460 —

“... malicious desertion must at least include a deliberate, definite, and final repudiation of the marriage state by one spouse against the will of the other and without just cause or legal justification.

The desertion complained of here is not actual desertion but constructive desertion, which occurs where the respondent is shown to have been guilty of conduct which, though it need not amount to a matrimonial offence must, nevertheless, be of a grave and convincing character, and which is equivalent to an expulsion of the petitioner from the matrimonial home.

Apart from one single act of physical violence, which is admitted, when the respondent struck the petitioner with a window stick in May 1965, all the alleged acts of cruelty complained of are of a non-physical and nonviolent nature i.e. amounting to what has been termed mental cruelty. It is clear, I think from the evidence in this matter, that these very same alleged acts are being relied upon by the petitioner to show that, by their cumulative effect, he was forced to leave the matrimonial home without any fault on his part.

In *Watt (or Thomas) v. Thomas* (1947) 1 All E.R. H.L. at p. 587 LORD THANKERTON forcefully observed that matrimonial causes —

“... form a class in which it is generally most important to see and hear the witnesses, and particularly the spouses themselves, and, further, within that class cases of alleged cruelty afford an even stronger example of such an advantage.”

In *Waters v. Waters* (1956) 1 All E.R. 432, a wife petitioned for divorce on the ground of her husband's cruelty. She alleged that he was unbearably taciturn, completely indifferent to her state of health, callously neglectful of her, deliberately refusing to co-operate over the running of the home and farm and had some unknown but horrible disease of both legs. His personal habits were revolting in that he absolutely declined ever to have a bath but washed in the Kitchen sink instead and cut his toe-nails at the dining table. The justices found that her husband had no intention of being cruel to his

## AUSTIN v. AUSTIN

wife, that he was of limited intelligence and set habits and that he did not deliberately conduct himself so as to drive the wife away from the house or bring the matrimonial home to an end. The Divisional Court held that the justices had misdirected themselves in saying that as there was no proof of wilful ill-treatment of the wife by the husband and that he had not deliberately conducted himself so as to drive the wife away from the home, then there was no cruelty or constructive desertion.

LORD MERRIMAN P referred to the decision of the Privy Council in the Australian case of *Lang v. Lang* (1954) 2 All E.R. 571, where their Lordships' Board said at 580 —

“If the husband knows the probable result of his acts and persists in them, in spite of warning that the wife will be compelled to leave the home, and indeed, as in the present case, has expressed an intention of continuing his conduct and never indicated any intention of amendment, that is enough, however passionately he may desire or request that she should remain. His intention is to act as he did, whatever the consequences, though he may hope and desire that they will not produce their probable effect. To say that it is not enough unless he knows that separation must inevitably result from his action is to ask too much. Men's actions and judgments are not founded on certainty — in most cases certainty is unascertainable — but on probabilities. No doubt a high degree of probability is required but no more.”

The Learned President then went on to say at p. 441 —

“Although the observations were directed to cases of constructive desertion, I know of no reason why precisely the same considerations should not be applied to mental cruelty. If a reasonable man would know, as this husband did know, that continuance in the course of conduct complained of would have an injurious effect on his wife's mental health what more is necessary? In what way does this differ from the test which Lord Normand adopted in *Jamieson v Jamieson* (7) (1952) 1 All E.R. at pp. 877, 888, that the spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim? It seems to me that essentially the two phrases convey the same idea, and I do not think that there is any reason here for distinguishing between the two charges which are made.”

In *Gollins v. Gollins* (1963) 2 All E.R. 966 H.L. LORD REID also referred to *Lang v. Lang* (*ubi supra*) and said at pp. 973-974 —

“A great deal was said about intention and presumption but, as I read the judgment, the facts were quite simple. The man deliberately ill-treated his wife. He knew that this was likely to cause her to leave him, but he desired or hoped that she would not leave. He did not act with the intention of driving her out, but he acted with

the knowledge that that was what would probably happen. There are references to what a reasonable man must have known, which I take to mean that it was proper to hold on the evidence that he did know. So in the result his desire to keep his wife or lack of intention to drive her out was irrelevant.

The Act said nothing about intention it used the word "wilfully". So the decision was that if without just cause or excuse you persist in doing things which you know your wife will probably not tolerate, and which no ordinary woman would tolerate, and then she leaves, you have wilfully deserted her, whatever your desire or intention may have been. That seems to me to be in line with what I am now submitting to your lordships is the law in cases of cruelty.

I shall now re-state briefly the result at which I have arrived. If the conduct complained of and its circumstances are so bad that the petitioner must have a remedy, then it does not matter what was the state of the respondent's mind. That I shall develop in *Williams v. Williams* (25). In other cases the state of mind is material and may be crucial."

*Gollins v. Gollins (ubi supra)* is undoubtedly the most important decision on cruelty in modern times and must be read in conjunction with *Williams v. Williams* (1963) 2 All E.R. 954, H.L. which was a case where the wife alleged that her husband's insane delusions, which expressed itself in persistent allegations of adultery with men in the loft of the house whose voices he heard constantly, caused damage to her health and amounted to cruelty.

It is clear since the decisions of *Gollins v. Gollins (ubi supra)* and *Williams v. Williams (ubi supra)* that an actual or presumed intention to hurt is not a necessary element in cruelty and much of the previous case law concerning the significance of intention cannot be relied upon as authoritative and therefore is now merely of academic interest. Thus the dictum of DENNING L.J. (as he then was) in the Court of Appeal in *Westall v. Westall* (1949) 65 T.L.R. 337, which was followed in *Kaslefsy v. Kaslefsy* (1950) 2 All E.R. 398 to the effect that in cruelty cases, it is an essential element that there must be conduct which is in some way "aimed at" one spouse by the other, has been rejected. The doctrine that there is a presumption in cruelty cases that the respondent intended the natural and probable consequences of his conduct has also been rejected as being as vague as the "aimed at" theory.

In *Gollins v. Gollins (ubi supra)* the House of Lords by a majority decision of 3—2, observed that whether cruelty, as a matrimonial offence has been established is a question of fact and degree, which should be determined by taking into account the particular individuals concerned and the particulars of the case, rather than by any objective standard; accordingly, in cases where the two spouses are of normal physical and mental health, and the conduct of the respondent spouse, so considered, is so bad

## AUSTIN v. AUSTIN

that the other should not be called upon to endure it, cruelty is established, and then it does not matter what was the respondent's state of mind.

In *Williams v. Williams (ubi supra)* it was held that the fact that the husband did not know that his acts were wrong in terms of the second limb of the Mc Naghten Rules did not of itself constitute a defence to a suit for divorce on the ground of cruelty although insanity is a factor to be taken into account in applying the test whether in all circumstances of the case the respondent's conduct is of such gravity that he has by his acts treated the petitioner with cruelty.

LORD EVENSHEDED, M.R. said at p. 1007 —

“I therefore conceive that the first essential thing is to decide what is meant by the word “cruelty”. The word is one of common use and is defined as meaning “delight in or indifference to pain or misery in others.” I observe at once there is therefore inevitably involved the case, which must be common if perhaps not the most common of all cases where the conduct is founded not in delight in the pain of others but on indifference. The cases indeed show clearly enough that so often the spouse charged with cruelty is doing little else than indulge his or her own purely selfish desires or instincts. It follows, therefore, in my opinion, that this essential meaning of the word must dispose of the argument involved in the proposition that the so-called cruel acts must in some sense be “aimed at” the other party concerned. If a man's acts are founded on stupidity or on disregard of anyone else or of anything but his own self-interest it is clear that he nevertheless may fairly and properly be guilty of cruelty.”

In *Hall v. Hall* (1962) 3 All E.R. 518, the Court of Appeal cited with approval and applied the observations of ASQUITH L.J. in *Buchler v. Buchler* (1947) 1 All E.R. 319 at p. 326 where the learned Lord Justice said —

“It is, I think, possible to say of certain courses of conduct that they could not amount to constructive desertion, and of certain other courses that they could not fail to do so. This would appear to be a question of law, involving, as it does, the issue whether there was any evidence to support the judge's conclusion. But between the extreme indicated there is obviously a no-man's land where the issue is one of fact. This does not debar an appellate tribunal from disturbing the judge's findings if, in the view of that tribunal they are plainly wrong.”

ORMEROD L.J. said at p. 522 —

“It is not easy to say where the line should be drawn between conduct which, although blameworthy, is not enough to justify a wife in leaving her husband, and conduct which no spouse can reasonably be expected to endure.”

DANCKWERTS, L.J. in the course of his judgment referred to what PEARCE J (as he then was) said in *Lauder v. Lauder* (1949) 1 All E.R. at p. 90—

“Cruelty cases more than any other class of case, depend particularly on a careful estimate of the witnesses for in a cruelty case the question is whether this conduct by this man to this woman, or vice versa, is cruelty.”

The Learned Lord Justice then went on to say at p. 542

“Similarly, in cases like the present, in my view the question is whether this man’s conduct to this wife has been of such a nature that she could not reasonably be expected to endure it further, and so was justified in leaving him. This is a matter of human relationship and should not be governed by cold judicial principles.”

Although the actual decision in *Buchler v. Buchler* has been criticised by DANCKWERTS L.J. in *Hall v. Hall* and by LORD PEARCE in *Gollins v. Gollins* the proposition of law contained in the judgments in *Buchler v. Buchler* have been cited with approval and applied over and over again, e.g. by the Court of Appeal in *Lane v. Lane* (1952) 1 All E.R. 223 and by the Divisional Court in *Saunders v. Saunders* (1965) 1 All E.R. 838.

What is the proper test that a court should apply in considering the question of cruelty? The test whether the conduct complained of can properly be described by the word “cruelty” in the ordinary sense of that term’ has been rejected by the House of Lords in *Gollins v. Gollins*. In my opinion, the proper test to be applied in both cruelty and constructive desertion cases is that stated by SIR JOCELYN SIMON P in *Saunders v. Saunders* (ubi supra) at p. 843 -

“The test is still: was the conduct of such a grave and weighty nature as to make cohabitation virtually impossible?”

Somewhat difficult considerations arise in considering the question of constructive desertion in relation to cruelty. In *Pike v. Pike* (1953) 1 All E.R. 233 C.A., it was held that a charge of constructive desertion cannot be proved by evidence of conduct alleged to have caused the petitioner to leave the matrimonial home, of the nature or cruelty, but not amounting to cruelty in law. A charge of cruelty must be distinctly pleaded and proved as such. In *Skull v. Skull* (1954) 1 All E.R. 1030, LORD MERRIMAN P said at p. 1033 —

“The same allegations were put forward as cruelty and constructive desertion. The cruelty was dismissed although the learned Commissioner does not expressly say that he finds the cruelty not proved, he had already said, after hearing the husband’s story of the married life, that he did not see how cruelty could possibly be proved, and he pronounced a decree only on the ground of desertion. This

## AUSTIN v. AUSTIN

appears to raise in a clear-cut form, the possibility of a misdirection, in as much as the commissioner does not appear to recognise the decision in *Pike v. Pike* (4) where it was held that, in the absence of any evidence directed to the question of expulsion other than that directed to an unproved charge of cruelty, the same conduct could not be dressed up as constructive desertion.”

I think it is true to say that like negligence, the categories of cruelty are not closed. The acts and conduct of a man may be expressed in a multitude of ways. As LORD TUCKER said in *Jamieson v. Jamieson* (1952) 1 All E.R. 875 H.L. —

“It is my opinion undesirable — if not impossible — by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in cases where no physical violence is averred. Every such act must be judged in relation to its surrounding circumstances, and the physical or mental conditions or susceptibilities of the innocent spouse, and the offenders knowledge of the actual or probable effect of his conduct on the other’s health ... are all matters which may be decisive in determining on which side of the line a particular course of conduct lies.”

It is, I think, quite clear from the above authorities, that cruelty and constructive desertion are kindred offences which are to be determined not by any objective standard, but by a consideration of the particular individuals concerned and the particular circumstances of each case. Both are subject to the same test, viz — ‘was the conduct of such a grave and weighty nature as to make cohabitation virtually impossible?’ In both, intention is not a necessary or essential element. It is recognised that there is a large ‘no man’s area’ with no defined limits which may amount to constructive desertion, which has to be considered not as a question of law but one of fact and degree, and which is peculiarly within the province of the trial court and which finding of fact is subject to review by an appellate tribunal. It is to be noted that if the conduct complained of is in the nature of cruelty it should be pleaded as such and not as constructive desertion as it is not possible to build up a case of constructive desertion by what is really a case of unproved cruelty. If the conduct is not of sufficient gravity to justify a charge of cruelty it is not of sufficient gravity to excuse withdrawal from cohabitation; SIR JOCELYN SIMON P in *Young v. Young* (1962) 3 All E.R. at p. 124 reconciling *Timmins v. Timmins* (1953) 2 All E.R. 187 with *Pike v. Pike* (ubi supra).

In *Ginesi v. Ginesi* (1948) 1 All E.R. 373 it was held by the Court of Appeal that adultery must be proved with the same strictness as is required in a criminal case, i.e. beyond a reasonable doubt. The same standard of proof was applied to cruelty in *Davis v Davis* (1950) 1 All E.R. 40 C.A. In *Blyth v. Blyth* (1966) 1 All E.R. 524, however, the House of Lords by a majority decision did not apply *Ginesi v. Ginesi* (ubi supra). LORD DENNING

(with whom LORD PEARCE and LORD PEARSON concurred) held that the words “is satisfied” in section 4(2) of the Matrimonial Causes Act, (now section 5(3) of the Matrimonial Causes Act, 1965) do not mean satisfied beyond a reasonable doubt; so far as the grounds for divorce are concerned a case, like any civil case, may be proved by a preponderance of probability, but the degree of probability depends on the subject matter, and in proportion as the offence is grave, so ought the proof to be clear.

I must confess that I find this rather confusing and somewhat difficult to understand. As is pointed out by the learned editors of *RAYDEN ON DIVORCE* (10th Edition (1967) para. 105 at p. 170 —

“but it seems that all matrimonial offences are “grave” and the application of this varying standard of proof would in many cases, create considerable complexity and difficulty.”

In the absence of any definitive pronouncement by the Privy Council or by the Guyana Court of Appeal I consider myself bound by the decision in Blyth’s case. It is clear, therefore, that the standard of the “preponderance of probability” equally applies to both cruelty and constructive desertion, which are the grounds charged in this matter. I am prepared to hold therefore, that the words ‘satisfy’ and ‘is not satisfied’ and ‘is satisfied’ in sections 9(6), 10(1) and 10(2) respectively of Chapter 166 should be given the same construction.

In *King v. King* (1952) 2 All E.R. 584 at p. 586, LORD NORMAND said that before coming to a conclusion, the Judge must consider the impact of the personality and conduct of one spouse on the mind of the other, and all incidents and quarrels between the spouses must be weighed from that point of view.

Throughout this case the petitioner has given me the impression of a dignified but fastidious man, who does not act without careful and measured thought. Like Caesar he was highly ambitious and he would appear to be most sensitive to any form of criticism. His great love was undoubtedly the Force of which he was a proud and efficient member. He is a man of great self-discipline who would deal harshly with insubordination and who would brook no interference in his plan to reach the top of his profession. Nothing less than Commissioner of Police would suffice for him.

Unfortunately, like so many men of over-ambition and pride, he was not popular with his subordinates and lacked that human quality of understanding and tolerance that is so necessary for men in command.

Great credit must be given to the petitioner in his rise from the lowest rank in the Force to the very top of the ladder as Commissioner of the now Guyana Police Force, a body with a great historical and traditional background for over a century and from which he has recently honourably retired at the comparatively early age of 55 years, years that he has borne well as his appearance amply testifies. His was a magnificent performance indeed.

## AUSTIN v. AUSTIN

Unfortunately and this, I think, is the tragedy of this case, he brought these same qualities to bear in his domestic life with disastrous results. He looked at his wife through a magnifying glass and found her wanting. It was a constant source of annoyance and amazement to him that she did not measure up to the standard he demanded, not only from the men under his command, but also from himself. He demanded nothing less than perfection itself and merely got mediocrity in return.

Through over-ambition, pride, unfaithfulness and over-sensitivity to criticism, he has lost the love and respect of the person most near and dear to him. As he rose higher and higher in the Force he was inexorably drawn more and more into a strange and sophisticated society with its aura of symbolism and cynicism. To a man of humble birth like himself this was no doubt a matter of great satisfaction and achievement.

It was just the opposite with the respondent who struck me as a rather amiable and placid type of woman. She also was of humble birth but, unlike her husband, she knew her limitations.

I believe that she tried to do her best to improve herself although she was, I think, an indifferent housewife. I have no reason to doubt that she was proud of her husband's successful career but, because of her very nature, she was unable to keep pace with his restless and relentless energy and ambition. She was strong enough, however, not to become an automaton and lose her individuality and identity and was not prepared to be treated and dealt with in the same manner as the men under his command.

It was no doubt as great a disappointment to her, as I am sure it was to her husband, that she was childless, and one can readily understand and appreciate how deeply hurt and grieved she must have been at her husband's confession of adultery with Enid Guymo who bore a child for him. The incidents with Util Burke and Mavis Chesney can be considered in no other light but a flagrant and crude disrespect of the sanctity of the matrimonial home. Very few wives indeed would have shown such tolerance and restraint in such circumstances.

To the respondent, marriage is a sacrament, inviolable in its sanctity and not to be merely thrown aside however much she may have suffered as a result of her husband's unfaithfulness and philandering and despite his unnecessary and unreasonable demands on her to satisfy his ego and ambition. What he construed as indifference and callousness, I consider was no more than a resigned acceptance on her part that her husband could and would not change and there was nothing much she could do about it. She was in fact thoroughly fed up and disgusted with his whole attitude and conduct and ultimately resigned herself to live with a man who had killed all the love that there was in her to give and, certainly, for whom she no longer had any respect. For the last few years of their married life they slept in different bedrooms and were almost strangers to each other.

In both cruelty and desertion, corroboration, although not required as an absolute rule of law, is, in practice, usually required, unless its absence

can be satisfactorily accounted for. As was said by LORD MERRIMAN P in *Marjoram v. Marjoram* (1953) 2 All E.R.D.C. 1 at p. 7. —

“It is always desirable in matrimonial cases to have corroboration of the story, if possible.”

Any fact will be corroboration which renders it more possible that the witness's testimony is true on any material point — Per SIR JOCELYN SIMON P in *Senat v. Senat* (1965) 2 All E.R. at p. 507. In desertion cases, what is required, if available, is corroborative evidence as to the circumstances and terms of the parting — *Barron v. Barron* (1963) 1 All E.R. 215.

There is absolutely no corroboration of the petitioner's evidence in this matter. He cannot be heard to say that such evidence was and is unavailable. He could have called his daughter, sister-in-law, servants, barrack room labourer and policemen. He has not seen fit to do this.

In *Lewis v. Lewis* (1958) 1 All E.R. 859 C.A. it was observed that philandering with other women may constitute cruelty where the wife's health is thereby adversely affected and, where such an allegation is made, the wife is entitled to cross-examine the husband as to whether he has committed adultery.

The modern principles in relation to the exercise of the court's discretion in relation to the petitioner's adultery were summarised in *Blunt v. Blunt* (1943) 2 All E.R. 76 H.L. It is trite law that complete frankness in the disclosure of the petitioner's adultery is a paramount condition of the court's discretion. I am not satisfied that the petitioner has been completely frank with the court in this respect, especially in relation to the teacher Util Burke. As Singleton L.J. said in *Dennis v. Dennis* (1955) 2 All E.R. 51 p. 55 —

“If a man and a woman who are attached to each other, as Mr. Spillet and the wife were, go to her bedroom and take off the greater part of their clothing and lie on the bed together, there will arise in most cases a presumption of adultery, which may be extraordinarily difficult to rebut.

One of the considerations mentioned in *Blunt v. Blunt* (*ubi supra*) in which the court may exercise its direction in respect of a petitioner's adultery and one which was vigorously urged in this case, is the question of the interest of the community at large judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on a marriage which has utterly broken down.

There can be no doubt that as the present position now stands there is little if any hope of reconciliation between the parties. He doesn't want her any more and she is not prepared to live with him any longer and, in fact intends to go to live abroad. I have no doubt that when he left her in January 1967 and moved over to Rabbit Walk, Eve Leary, she was prepared to take him back and continue to live with him. Can anyone blame her for

## AUSTIN v. AUSTIN

changing her mind having regard to the disgraceful and shameful way he has treated her since then? Bitter and adamant she may be now but, in my opinion, there is every justification for her present attitude.

It is clear however that this consideration does not arise in this matter because the discretion of the court can only be exercised where the court is satisfied on the evidence that the petitioner's case has been proved — *Burford v. Burford* (1955) 3 All E.R. 664, C A., *Lewis v. Lewis* (ubi supra).

It seems to me that the real aggrieved party in this matter has been the respondent. It was her health that suffered not his as is witnessed by her nervous breakdown in 1961 or 1962. Unlike her husband, the passage of time is indelibly imprinted, upon her face.

I have rarely if ever seen a witness procrastinate so much as the petitioner did when, for about 15 minutes, he either refused or evaded to answer the question put in cross-examination whether it was a matter of indifference to him that he had left his wife without giving her any financial support whatsoever. To show the type of man he is, he admits that his wife has good qualities, then in the very next breath he says "she can make a good fly. She is a nice person to know until one picks holes in her."

In conclusion, it is my considered opinion, having regard to the facts and law in this matter, that the petitioner has absolutely and utterly failed to prove either cruelty or constructive desertion or even that the incidents alleged and complained of, fall within the 'no-man's land' of fact and degree. Even as regards the admitted physical assault itself (which was merely trivial) can there be any doubt that this was committed under great provocation?

The Courts have interpreted the words 'cruelty' and 'desertion' in a narrow and restrictive sense. If this had not been done, then Divorces would be granted in all manner of circumstances amounting to no more than mere instances of incompatibility. This is especially true of 'constructive desertion.' The courts have rightly, in my opinion, taken a firm stand and have held that any extension of cases or grounds for Divorce must come from the Legislature and not from the judges under the guise of interpreting that which Parliament has said.

It seems to me that the petitioner has blown this case up out of all proportion to what I consider has really been nothing more than trivial incidents even though some may have been somewhat irritating, incidents which ASQUITH, L.J. referred to in *Buchler v. Buchler* as the "normal wear and tear of married life."

For these reasons, therefore, this petition is dismissed with costs to the Respondent certified fit for one counsel.

*Petition dismissed.*

Solicitors: *M.E. Clarke* (for petitioner).

*Miss D.P. Bernard* (for respondent)

GUYANA MARKETING CORPORATION v. PETER TAYLOR &  
COMPANY LIMITED & ANOTHER

[In the Full Court of the High Court (Crane, Chung and Van Sertima, JJ).  
February 24, 1967].

*Practice and Procedure — Pleadings — Libel — Allegations of “falsely and maliciously” — General denial — Whether pleadings embarrassing — Summons to strike out— Order 17 Rule 31 of the Supreme Court Rules, 1955 (now Order 17 Rule 31 of the Rules of the High Court, Cap. 3:02 (Subsidiary)).*

*Libel — Whether plea of “fair comment” in ordinary form adequately answers allegations of “falsely and maliciously” — Whether cured by application for particulars.*

*Libel — Neither “justification” nor “privilege” pleaded “in the first instance” — Necessity for so doing.*

The appellants sued the respondents for libel discrediting their reputation as wholesalers and retailers of foodstuffs. In their statement of claim they alleged that the respondents “falsely and maliciously” printed and published of and concerning them certain words set out in para. 3 thereof. In para. 2 of the statement of defence the respondents admitted both printing and publishing the words complained of but denied doing so “falsely and maliciously”. The appellants, being dissatisfied with this method of pleadings, considering it embarrassing, took out a summons in chambers under Order 17 Rule 31 of the Supreme Court Rules, 1955, with a view to having the offending phrase struck out. The learned Judge in chambers (Bollers, C.J.) refused the application and dismissed the summons with costs.

On appeal to the Full Court, it was argued on behalf of the respondents, that (a) by pleading “fair comment” in its ordinary form in para. 4 of their defence, the matter was taken out of the ambit of the rule in *Belt v. Lawes* (1) since the appellants could not now show in what manner they were em-

barrassed; (b) the matter was eminently one which could be cured by an application for ‘particulars’ a view that the learned Judge in chambers had himself agreed with, and (c) the effect of a plea of fair comment in addition to the traverse, adequately answered the allegations “falsely and maliciously” in the statement of claim and, accordingly, the appellants’ proper remedy, if further clarification was sought, was an application for particulars and not a summons to strike out.

**HELD:**— (*per Crane, J.*, delivering the judgment of the Court) that (i) since the decision of *Belt v. Lawes* (1) it is now an established rule of pleading that in an action for libel a defendant may not deny generally in his defence that he wrote or published the same “falsely or maliciously”, “or as alleged”, but he must set out the facts upon which he relies, either to ‘justification or ‘privilege’; (ii) since the decision of the Court of Appeal in *Penrhyn v. Licenced Victualler’s Mirror Ltd* (3) the plea of “fair comment”, even in its rolled-up form, will not avail a defendant who traverses the averments of “falsely and maliciously” in the statement of claim and protect them from being struck out from the defence if ‘justification’ and ‘privilege’ are not pleaded; (iii) since the decision of the House of Lords in *Sutherland v. Stopes* (6) ‘fair comment’ and ‘justification’ are considered totally distinct and separate defences; (iv) the word “falsely” unlike the word “maliciously” is relevant to both defences of ‘justification’ and ‘fair comment’, just as “malice” is relevant to both ‘qualified privilege’ and ‘fair comment’, and (v) accordingly, there must necessarily remain a statement of uncertainty and ambiguity on the pleadings as to whether the respondents intended to set up the defences of ‘justification’ and ‘privilege’ when they had not pleaded them and the appellants ought not to have to wait until the trial to know this, as was suggested. This was precisely the ‘mischief that Order 17 Rule 31 was designed to avert.

*Appeal allowed — Ruling of Judge in chambers set aside.*

[*Editorial Note:* — Decision of Bollers, C.J. reported in (1966) L.R.B.G. 198 reversed.]

*H. D. Hoyte* for appellants.

*A. S. Manraj* for respondents.

*Cases referred to:*—

- (1) *Belt v. Lawes* (1882) 51 L.J.Q.B. 359.
- (2) *Warner v. Sampson* (1959) 1 All E.R. 120.
- (3) *Penrhyn v. Licenced Victualler’s Mirror Ltd.* (1890) 7 T.L.R. 1.
- (4) *Lowry v. New Zealand Times Co.* (1910) 29 N.Z.L.R. 570.
- (5) *Norton v. Bertling* (1910) 29 N.Z.L.R. 1099.
- (6) *Sutherland v. Stopes* (1925) A.C. 47.
- (7) *Magena v. Wright* (1909) 2 K.B. 958.
- (8) *Walcott v. Hinds* (1964) 8 W.I.R. 50.
- (9) *Aga Khan v. Times Publishing Co., etc.*, (1924) 40. T.L.R. 299.

## G.M.C. v. PETER TAYLOR &amp; CO.

CRANE, J.: The appellant corporation sued the respondents for libel praying the usual consequential reliefs for damage done to their credit and reputation as wholesalers and retailers of foodstuffs.

Their statement of claim contains the familiar allegation that the defendants have “falsely and maliciously” printed and published of and concerning them certain words set out in paragraph 3 thereof.

In their statement of defence (paragraph 2), both printing and publication of those words are admitted, but the defendants have denied doing so “falsely and maliciously”.

The appellants are dissatisfied with this manner of pleading; they say that it is an infringement of o. 17 r. 15 of our local Rules of Court 1955, that they are embarrassed, and this caused them to take out a summons in chambers under o. 17 r. 31 with a view to having the offending phrase struck out of the defence.

This appeal now before us is from the ruling of the learned judge in chambers who refused the plaintiffs an order striking out those words.

O. 17 r. 15 directs 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, and 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.”

Ever since the decision of *Belt v. Lawes* (1882) 51 L.J.Q.B. 359, it has come to be established as a rule of pleading that in an action for libel a defendant may not deny generally in his statement of defence that he wrote or published the same “falsely or maliciously”, “or as alleged”, but he must set out the facts upon which he relies, either to show justification or privilege. No one will deny the soundness of this rule which well illustrates the danger of too literal a traverse, that is to say, a traverse may become ambiguous and evasive if it follows *totidem verbis* the allegations in a previous pleading, and the result may be the insinuation of an affirmative averment, see *per* LORD DENNING, in *Warner v. Sampson* (1959) 1 A.E.R. 120 at p. 123. *Belt v. Lawes* decided that merely to deny that the words were spoken falsely or maliciously, or falsely and maliciously is an embarrassing pleading, and that such a denial is in effect no more than an informal mode of pleading justification or privilege.

The law presumes after printing and publication have been proved that the defamatory words are false and malicious until the defendant proves

either justification or privilege. The onus is on him to do so; so that if the defendant merely traverses that allegation he cannot be said thereby to have effectively pleaded to it as the traverse would merely be superfluous, unless he pleads both justification and privilege and sets out the facts on which he relies to show how the publication was privileged and justified.

The defendants have however, unlike in *Lawes'* case, pleaded fair comment in its ordinary form in paragraph 4 of their defence; namely, that — “the said words are a fair and *bona fide* comment made without malice upon a matter of public interest . . .” By so pleading, they contend, the matter is taken out of the ambit of the rule in that case, since the plaintiffs cannot now show in what manner they are embarrassed. Counsel on their behalf contends that the matter is eminently one which can be cured by an application for particulars and we must here mention that the learned judge in chambers was in accord with this view. Counsel further argues that the effect of a plea of fair comment in addition to the traverse is that it adequately answers the allegations “falsely and maliciously” in the statement of claim, so that if the plaintiffs feel the need for further clarification on the issue, their proper course is to resort to particulars and not to an application to strike out.

In support of his contention defence counsel referred to volume 10, p. 539 footnote (b) in the *ENCYCLOPAEDIA OF COURT FORMS AND PRECEDENTS IN CIVIL PROCEEDINGS BY LORD ATKIN*, but we will observe that this note in effect is only a restatement of the rule in *Belt v. Lawes*, the only innovation therein being the inclusion of a plea of fair comment in addition to pleas of justification and privilege which that case requires from a defendant who traverses the allegations of falsity and malice. To the same effect is footnote (n) in Vol. 25 at p. 117, *op. cit.*

This addition of the plea of fair comment in footnote (b) undoubtedly originates from the decision of the Court of Appeal in *Penrhyn v. Licenced Victualler's Mirror Ltd.* (1890) 7 T.L.R. 1 which was decided six years after *Belt v. Lawes*. Fair comment was not pleaded in the latter's case. In *Penrhyn's case*, *Lawes'* case was not considered; as a matter of fact, the report of the case which was conducted before a Divisional Court on appeal is only in indirect speech by the barrister who reported it; nonetheless it is an authority showing that the plea of fair comment, even in its rolled up form, will not avail a defendant who traverses the averments of falsely and maliciously in the statement of claim, and protect them from being struck out from the defence if justification and privilege are not pleaded. *Penrhyn's case* therefore goes one step further than *Lawes'* in that there was a plea of fair comment in the statement of defence, whereas in the latter case there was neither justification and privilege nor fair comment pleaded.

In his ruling in chambers the learned judge, referring to *Penrhyn's case*, said he was worried over it, but after careful consideration reached the conclusion that as he thought it was decided *per incuriam* he would not follow it for the reason that the Court of Appeal overlooked the relevancy of the

## G.M.C. v. PETER TAYLOR &amp; CO.

words “falsely and maliciously” in establishing the defence of fair comment. But we respectfully suggest that the learned judge has taken too much upon himself to say so when he only had before him the scanty report of a case in indirect speech. He gives the Court of Appeal no credit whatever for the course it adopted, and, as it seems to us, there is no ground at all for saying that the relevancy of those words was overlooked in relation to the defence of fair comment. But though we will readily concede that the striking out of those words and replacing them with the words “as alleged” was indeed done *per incuriam*, we cannot say striking them out in the absence of pleas of justification or privilege was wrong, for the reason that the essentials of fair comment were overlooked. By striking them out the Divisional Court advertently or inadvertently followed the principle in *Lawes’ case*. There is support for this view of ours in the case of *Lowry v. New Zealand Times Co.* (1910) 29 N.Z.L.R. 570, which is on all fours with *Penrhyn’s case*.

With respect, it seems to us that this is where the learned judge erred — he overlooked the fact that a plea of fair comment is not a plea of justification. There was indeed a time when these two pleas were so considered; particularly, after the introduction of the rolled up plea in *Penrhyn’s case*. See *Norton v. Bertling* (1910) 29 N.Z.L.R. 1099, at p. 1101. The interrelation between these two defences resulting from a misunderstanding of the onus of proof of malice, and the requirement that the defendant establishes the truth of the facts from which he alleges fair comment is an inference had once led judges and pleaders of experience to conclude that there was fusion of the two pleas, until the decision of the House of Lords in *Sutherland v. Stopes* (1925) A.C. 47 enlightened the profession in the view that they were totally distinct and separate defences.

It is well known that to establish satisfactorily the defence of justification “the justification must be as broad as the charge and must justify the precise charge” — to use the language of ODGERS ON PLEADING. This is not a *sine qua non* however, in the case of the plea of fair comment, for even though in its rolled up form the pleading runs — “in so far as the words complained of consist of allegations of fact, they are true in substance and in fact . . .”, if a defendant were to base his comments on the statements of another person, he need not prove those statements to be true with the exactitude and precision as the quotation from ODGERS, above indicates. See *Magena v. Wright* (1909) 2 K.B. 958, 976-977, *per* PHILLIMORE, J., and also LORD FINLAY’S explanation of the difference between the two pleas in *Sutherland v. Stopes* (above) at pp. 62-63 where that learned and noble Lord says:

“The averment that the facts were truly stated is merely to lay the necessary basis for the defence on the ground of fair comment. This plea of justification of a libel on the ground of truth, under which the defendant has to prove not only that the facts are truly stated, but also that any comments upon them are correct.”

We must acknowledge that the allegation of ‘malice’ is relevant in the plea of fair comment, while it is irrelevant in the plea of justification be-

cause of the presumption of law following on publication of the libel which we have mentioned above, just as we do in the cases of qualified privilege and absolute privilege that malice is respectively relevant and irrelevant; and for this matter alone, it may be harmless if that word alone were allowed to stand.

We cannot agree, however, that this is so with respect to the allegation 'falsely'. The latter postulates the opposite of truth which we have just shown to be relevant when the defence pleads fair comment.

But though the qualities of truth and falsity must always remain in antithesis, yet, they are paradoxically, it would seem, inextricably linked when enquiry is directed into the one or the other of them. It is axiomatic that nothing can be true which is false, and nothing false which is true. When the truth of a matter is in issue the question of its falsity necessarily arises, and if it is found to be false the truth is not established. The converse is also true.

Thus the word "falsely" unlike the word "maliciously" is relevant in both defences of justification and fair comment, just as "malice" is relevant in both qualified privilege and fair comment; and this being the case, there must necessarily remain a state of ambiguity and uncertainty on the pleadings as to whether the defendant intends to set up the defences of justification and privilege when he has not pleaded them.

The above is precisely the mischief which the rule is designed to avert, and that is why we are unable to agree with the learned judge that the situation would be harmless if a traverse of the offending words is followed by only a plea of fair comment; or that the matter is one which an order for particulars can cure. We consider ourselves bound by the decision in *Belt v. Lawes* which we would point out, has been consistently followed throughout the years in England, the Commonwealth (see Lowrey's case above) and in the West Indies — see *Walcott v. Hinds* (1964) 8 W.I.R. 50; and we think that the presence of a plea of fair comment can now make no inroad on its authority.

We feel that the following words of MR. JUSTICE FIELD in *Lawes'* case at p. 361, are very apt in this connection:

"As to the allegation that it was published "falsely", a libel *prima facie* imports a wrong, which it could not do if the alleged libellous matter were true, and therefore the onus of proving the truth thereof is cast on the defendant. There is therefore no good done by a traverse of the allegation that the defendant published "falsely"; but it is, on the other hand, mischievous, as under it a defendant might set up a defence of truth as a justification, and Order XIX rule 18 (1) (which in substance is our o. 17), shews that a plaintiff is entitled to know if such defence is contemplated."

We find ourselves in agreement with the respectful submission of counsel for the appellant that the learned judge misunderstood footnote (b) p.

## G.M.C. v. PETER TAYLOR &amp; CO.

539 of ATKIN'S, *op. cit.* This note distinctly says “. . . unless the Defence pleads justification (in the first instance) or privilege or fair comment (in the second) . . .”. The words in parenthesis are important, and when one considers the directive in o. 17, r. 15 to the effect that a defendant must raise by his pleading “. . . all such grounds of defence . . .”, we can clearly see the true purport of footnote (b) is in harmony with that rule of court, which is not only that all defences must be pleaded, but justification must certainly come first and foremost if a literal traverse of the words “falsely and maliciously” in the statement of defence is employed.

It is a mistake we think, to read footnote (b) and to interpret it in the sense that a pleader having traversed the allegations of falsity and malice is at liberty to ignore the defences of justification and privilege and choose fair comment as an alternative on the ground that it adequately answers those allegations. The fact of the matter we suggest is, that the defences of justification and privilege themselves involve a consideration of those self-same allegations, and that is why it is essential for justification to be pleaded “in the first instance”. We will observe that this is also the purport of footnote (n) p. 117. Vol. 25 *op. cit.*, which is to the effect that a defendant must not traverse the words “falsely and maliciously” without pleading the positive defence in the one case, of justification and in the other of privilege or fair comment.

So that notwithstanding the relevancy of the words complained of in establishing the defence of fair comment, the plaintiff, in the words of FIELD, J., above, is entitled to know if the defences of justification and privilege are contemplated. The plaintiff may not wait until the trial to know of this, as has been suggested; the form of pleading embarrasses him and he is entitled to know it now.

Lastly, we have observed that the defendants have pleaded fair comment in its old and general form. We do so again only for the sake of indicating the basis of the order for particulars which we make hereunder is on the remarks of BANKES, L.J., in the case of *Aga Khan v. Times Publishing Co. etc.*, (1924) 40 T.L.R. 299, at p. 300.

The appeal is therefore allowed, and setting aside the ruling in chambers we order as follows:—

- (1) that leave be and is hereby granted to the defendants to rectify their pleading, if they so desire, by filing and delivering an amended defence containing a plea of justification in the first instance within 14 days setting out the facts showing how the publication was justified, failing which, the words “falsely and maliciously” be struck out from paragraph 2 of the defence;
- (2) in the absence of a plea of justification aforesaid, that the defendants do file and serve on the plaintiffs within 14 days particulars of the material on which they rely on in support of their plea of fair comment;

- (3) that the defendants do pay cost of this appeal, and in the court below fit for counsel.

CHUNG, J.: I agree.

VAN SERTIMA, J.: I agree.

*Appeal allowed — Ruling of Judge in chambers set aside.*

Solicitors:

*M. E. Clarke* (for the appellants);

*L. T. Persaud* (for the respondents)

## LUCILLE CELESTE HARRY v. J. T. THOM

[In the Full Court of the High Court (Crane, Van Sertima and Jhappan, JJ.)  
December 2, 9, 1966; March 18, 1967].

*Practice and Procedure — Originating summons — Construction of statute — Reg. 60(3)(b) of the Education Code, Cap. 91 (Subsidiary Legislation) now Reg. 48(3)(b) of the Education Code, Cap. 39:01 (Subsidiary)).*

*Practice and Procedure — Originating summons — Declaration sought — Whether consequential relief also obtainable — Order 42 Rule 2 of the Supreme Court Rules, 1955 (now Order 42 Rule 2 of the Rules of the High Court, Cap. 3:02 (Subsidiary)).*

*Crown Servant — Unauthorised act — Whether liable personally.*

*Constitutional Law — Deduction of pay on grant of sick leave — Whether breach of fundamental right of protection from deprivation of property — Article 8(1) of the Constitution of Guyana, Cap. 1:01.*

The appellant was a Grade I school teacher and in June, 1964, she applied to the Chief Education Officer, the respondent herein, for sick leave for a certain period of time in accordance with reg. 60(3)(b) of the Education Code, Cap. 91 and submitted a medical certificate along with her application, as required by the Code and she subsequently received a notification from the Chief Education Officer, 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 appellant then

## HARRY v. THOM

took out an originating summons under Order 42 Rule 2 of the Supreme Court Rules, 1955, seeking the determination of the following two questions: (1) Whether the Chief Education Officer or other official of the Ministry of Education had power to withhold the plaintiff's salary under the said Code or otherwise for the period June 28, 1964, to July 15, 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 was entitled to her salary for the above-mentioned period.

Although the summons was brought against the respondent in his personal capacity all the allegations made against him in the body of the summons and affidavit in support were in his capacity as Chief Education Officer. Indeed, in his affidavit in reply, the respondent admitted 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 appellant's salary.

The learned trial Judge did not go into the merits of the application but heard arguments on an objection *in limine* taken by counsel for the respondent that (a) the proceedings were misconceived in that the appellant had wrongly proceeded against the respondent in his personal capacity, and (b) that a declaration could not be properly made against the respondent in his individual capacity which would have the effect of involving the Crown's purse. In dismissing the summons the learned Chief Justice (Bollers, C.J.) held on the first question raised in the summons, that the respondent could not be sued in his official capacity as a servant of the Crown and although the Crown would not grant a declaration against him in his personal capacity since this would, in effect, involve the Crown's purse and amount to seeking to do indirectly what could not be done directly, nevertheless, he would be prepared to consider that the respondent had been properly sued in a personal capacity and grant a negative declaration on the first question provided only that the second question was abandoned. But even if the second question was abandoned, the first would still be merely hypothetical and academic since the appellant would be in no position to enforce the payment of salary for the period in dispute. The learned Chief Justice declared that it would be 'unconstitutional' to grant a declaration in respect of the second question and, as the matter in respect of the first question was academic when the second question was abandoned then, in the exercise of his discretion, he would refuse to entertain an application for a declaration on the first question since the result of any such declaration would not put an end to further litigation between the parties.

On appeal to the Full Court it was argued, *inter alia*, that (a) the learned Chief Justice was in error in thinking that there were two questions for construction; all the appellant was asking was to have determined a question of a construction of a statute in the form of a declaration which was not enforceable as a sanction; (b) he was also in error in holding that it would be unconstitutional to grant a declaration because the respondent was exercising statutory powers in the exercise of which the Crown was not involved; as a court is entitled to enquire into the exercise of statutory powers, and (c) the learned Chief Justice was also in error in thinking that the issues were hypothetical and misunderstood the scope of Order 42 Rule 2

when he held that the declaration could not be granted because it would not put an end to litigation between the parties.

**HELD:**— (*Per Crane, J.*, delivering the judgment of the Court) that (i) although Bollers, C.J., was correct in holding that the respondent was a servant of the Crown and, as such, no judgment could be entered against him for any unauthorised act done by him in that capacity, nevertheless, an action for damages could be maintained against him in his individual capacity since, here, he was not acting under the authority of the Crown but under a regulation, i.e., the Education Code; (ii) the learned Chief Justice's view overlooked the true nature and scope of a declaration on an originating summons under Order 42 Rule 2 which is derived from the English Order 5 4A. There was no second question to be determined since what was thought to be a second question was merely a declaration of the rights of the appellant that the judge needs must make consequent on the determination of the question of "construction" which is being sought. There is really only "one" question for determination, not "two"; they are intimately bound up. Order 42 Rule 2 enables him to grant no consequential relief apart from the question of construction sought of him. This distinguishes it from declaratory proceedings under Order 23 Rule 3 where consequential relief is obtainable. A declaration under Order 42 Rule 2 merely proclaims the existence of the legal relationship; it does not contain an order which may be enforced against a defendant; (iii) the learned Chief Justice misdirected himself in his approach to the matter when he refused the appellant a hearing of her summons on its merits for the reasons he has given. Here, the appellant's affidavit disclosed *a prima facie* existence of a legal right to receive sick leave on full pay by virtue of reg. 60(3) (c) of the Education Code, Cap. 91. If indeed the respondent did grant sick leave without pay then a question of "construction" of the relevant legislation necessarily arose since it has to be ascertained whether the respondent is peremptorily given power to grant sick leave with no pay, or whether he is given a discretion to allow such leave with or without pay, and if so, whether he has judicially exercised that discretion; (iv) *prima facie*, it is unconstitutional to deduct 18 days pay unless it was done under due process of law. Although the point was not taken before the Court, it would appear that the question of the deprivation of a fundamental human right is involved, viz., the protection from deprivation of property under Article 8(1) of the Constitution of Guyana, Cap. 1:01 in which the words "no interest in a right over property of any description" means "money". There was nothing 'unconstitutional' in considering the declaration sought by the appellant and for the learned Chief Justice to have so ruled was a wrongful exercise of his discretion in considering whether to grant or refuse the declaration on the first question.

*Appeal allowed — Matter remitted to a Judge in Chambers for hearing on its merits.*

[*Editorial Note:* — This case is reported in (1967) 10 W.I.R. 348 and reversed the decision in the court below — reported in (1966) 9 W.I.R. 470] [See also (1966) L.R.B.G. 198.]

*H. D. Hoyte* for appellant.

*Doodnauth Singh* for respondent.

## HARRY v. THOM

*Cases referred to:—*

- (1) Raleigh v. Goschen (1898) 1 Ch. 73; 77 L.T. 429; 14 T.L.R. 36.
- (2) Abrams v. The Members of the Governing Body of the Anglican Schools in B.G. & Others (1960) L.R.B.G. 78; (1960) 2 W.I.R. 187.
- (3) Dyson v. Att. Gen. (1911) 1 K.B. 410; 105 L.T. 753; 27 T.L.R. 143.
- (4) Bombay & Persia Steam Navigation Co. v. Maclay (1920) 3 K.B. 402; 124 L.T. 602.
- (5) China Mutual Steam Navigation Co. v. Maclay (1918) 1 K.B. 33; 117 L.T. 821; 34 T.L.R. 81.
- (6) Lewis v. Green (1905) 2 Ch. 340; 93 L.T. 303.
- (7) Pierre v. Mbanefo (1964) 7 W.I.R. 433.
- (8) Liversidge v. Anderson (1942) A.C. 206; (1914) 3 All E.R. 338; 116 L.T. 1; 58 T.L.R. 35.
- (9) Nireaha Tamaki v. Baker (1901) A.C. 561; 84 L.T. 633; 17 T.L.R. 496.
- (10) Progressive Supply Co. Ltd. v. Dalton (1943) Ch. 54; (1942) 2 All E.R. 646; 59 T.L.R. 63.
- (11) Point of Ayr Collieries Ltd. v. Lloyd-George (1943) 2 All E.R. 546, C.A.
- (12) Yoxford & Darsham Farmers' Assocn. Ltd. v. Llewelyn (1946) 2 All E.R. 38; 175 L.T. 506.
- (13) Adams v. Naylor (1946) A.C. 543; 2 All E.R. 241; 62 T.L.R. 434; 175 L.T. 97.
- (14) Re Man Power Citizen Assocn. (1964) L.R.B.G. 436; (1964) 8 W.I.R. 52.
- (15) Lilleyman & Others v. I.R.C. & Att.-Gen. (1964) L.R.B.G. 15; (1964) 13 W.I.R. 224; (affd.) (1964) 7 W.I.R. 496., B.C.C.A.; (1964) L.R.B.G. 221.
- (16) Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd. (1921) 2 A.C. 438; 126 L.T. 35; 37 T.L.R. 919: Subsequent proceedings sub. nom. British Bank for Foreign Trade Ltd. v. Russian Commercial & Industrial Bank, 38 T.L.R. 65.

CRANE, J.: The appellant took out an originating summons under Order 42 rule 2 claiming to be entitled to a legal right depending upon a question of construction of the Education Code, Chapter 91 — particularly rule 60 of the said Code. Her summons sought the determination of the following questions, the first two of which are referred to in the ruling under appeal as the first and second questions:

- (1) “Whether the Chief Education Officer or other official of the Ministry of Education has power to withhold the plaintiffs 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 Regulation 60(3)(b) and the said leave had been granted under Regulation 60(3)(c) of the said Code.

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

On August 4, 1966, a judge made an order in Chambers dismissing her application with costs; he did so on a preliminary point. Lucille Harry now appeals against that order, on the following grounds:

- (1) “The learned Chief Justice (acting) erred in law when he held that it would be unconstitutional for the Court to grant the declaration sought by the plaintiff (appellant).
- (2) The learned Chief Justice (acting) erred in law and exercised his discretion on a wrong principle in refusing to construe Rule 60 of the Education Code and to make the consequential declaration.”

In her affidavit in support of the originating summons, Lucille Harry affirms her status as a Grade I teacher attached to St. Aloysius Roman Catholic School, New Amsterdam, Berbice; also that she was in July 1964 in the same capacity attached to the New Market Anglican School at No. 64 Village, Corntyne, at a salary of \$210.00 per month. She was unwell, she says, and so applied in June 1964 to the Chief Education Officer that she be granted sick leave for the period 28th June — 15th July, 1964, in accordance with Regulation 60(3)(b) of the Education Code, at the same time submitting the necessary medical certificate along with her application. This was approved for the required period, but without pay, for on receiving salary for August 1964, she observed that eighteen (18) days pay representing the period of sick leave granted her had been deducted. A protest to the Chief Education Officer achieved nothing save a letter to the effect that the latter was abiding by his previous decision to grant sick leave without pay.

It was in these circumstances that she sought legal advice which culminated in this summons.

The rubric shows that the respondent James Theophilus Thom is proceeded against in a personal capacity. In his reply to Harry’s affidavit, Thom declares he is the Chief Education Officer attached to the Ministry of Education and Race Relations. But while his reply substantially admits the facts in Harry’s affidavit, including the fact that eighteen (18) days sick leave had been granted her, somehow illogically and inconsistently, it would appear, goes on to allege that he had been informed and verily believes that the plaintiff absented herself from school from the 29th June, 1964, i.e. the day after her sick leave commenced, without authority or without assigning any reason, though he believes she attended the In-Service Teacher Training Programme at the Skeldon Centre. In his reply there are also other unrelated and irrelevant allegations of Harry’s refusal to comply with the directions of the Headmaster of the school to which she was attached and truculent behaviour by her. We say irrelevant since those allegations were prior to the grant and did not appear to have any influence on it.

## HARRY v. THOM

As has been stated, the merits of the application were not explored, and the matter fell *in limine* on a two point submission by counsel for the defendant/respondent.

The first point taken was that the proceedings were misconceived in that the plaintiff had wrongly proceeded against the defendant in his personal capacity; and the second that a declaration could not be properly made against him in his individual capacity which would have the effect of involving the Crown's purse.

On the first point, it seems to us that the learned judge was quite right when he classified the Chief Education Officer as a servant of the Crown and considered that no judgment could be entered against him for any unauthorised act done by him in that capacity, though an action for damages may be maintained against him in his individual capacity. This is in consonance with settled authorities such as *Raleigh v. Goschen* (1898) 1 Ch. 73, and *Abrams v. The Members of the Governing Body of the Anglican Schools in British Guiana & others* (1960) L.R.B.G. 78; though it is possible 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, see *Dyson v. The Attorney-General* (1911) 1 K.B., 411. All these authorities were duly considered by the learned judge.

In *Abrams' case*, it was held that the Director of Education was a Crown servant, not a body corporate, and as such, was not a legal person amenable to suit. The post of Director of Education has now however been replaced by that of Chief Education Officer, so with *Abrams' case* in mind it is not difficult to see why the Chief Education Officer was not named as defendant in the summons. But it is contended before us, just as it was before the judge, that if this circumvention in the summons were allowed it would permit the plaintiff to achieve indirectly what she cannot directly do. It is contended that the whole purport of Lucille Harry's affidavit consisting as it does of allegations against the Chief Education Officer and not the defendant Thom personally, renders her application an oblique means of proceeding against the Crown with a view to binding the purse of the Crown.

The learned judge having considered the above authorities referred to the case of *Bombay & Persia Steam Navigation Co. Ltd. v. Maclay* (1920) 3 K.B. 402, per ROWLATT, J. In this case the plaintiffs, the owners of the steamship "HORNAYUN," sued the defendant, who was at all material times His Majesty's Shipping Controller, claiming a declaration that they were entitled to compensation for the loss and expenses incurred by them by reason of a certain direction given by the defendant under Regulation 39 BBB of the Defence of the Realm Regulations, and that the amount of compensation should be referred for assessment either to the Admiralty Transport Arbitration Board or to such other referee or tribunal as the Court might direct. No statute or regulation had imposed upon Maclay any financial responsibility in the matter. It was held *in limine* that the action was mis-

conceived and must be dismissed because the plaintiffs, by suing the defendant in the only way open to them — namely, as an individual — could not obtain a declaration of their rights to compensation.

It must be explained, however, that the *Bombay case* was instituted by action in which, in addition to a declaration that the plaintiffs were entitled to compensation for loss and expenses incurred by them, a declaration in the nature of executory relief was also claimed that the amount of compensation should be referred for assessment either to the Admiralty Transport Arbitration Board or to such other referee or tribunal as the court might direct; this would clearly involve the Crown. It is submitted there is no conflict whatever between the *Bombay case* and the *China case* (below). When ROWLATT, J., dismissed the action *in limine* on the preliminary objection, it must have been clear to him from the pleadings as they stood that the plaintiffs were attempting indirectly to bind the purse of the Crown, when in an action against Maclay personally, they sought a declaration that they were entitled to compensation from the Treasury. The learned judge said, at page 406 of the report:

“It is not sought in this case to sue Sir Joseph Maclay for money payable by statute, but the question is whether when a person has a demand of this kind he can get a declaration of his rights against the Treasury by suing an official in his own name because he cannot sue him in any other way.”

In other words, ROWLATT, J., considered the form of proceedings before him and concluded it was not the appropriate mode having regard to the declaration sought: this is what he obviously meant by saying that the action was misconceived.

This is not so however, in the matter under review, which is an application under Order 42 Rule 2, not an action for a declaration under Order 23 Rule 3, in which consequential relief is being sought; nothing but a question of construction of a regulation is in contemplation. Notwithstanding there is prayed a declaration that the plaintiff is entitled to her salary for the period in question, this does not mean that the defendant or anyone else is to be held liable to pay it — certainly not the Treasury of Guyana as it was sought of the English Treasury in the *Bombay case*. The latter case is therefore held to be authority for the proposition that procedural difficulties in the way of a plaintiff cannot be overcome by claiming a declaration against a public officers in his individual capacity. The instant case, which as far as our researchers have been able to reveal, is the first of its kind locally. But though the learned judge when applying the *Bombay case* considered it “dead against the plaintiff since 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,” he quite readily conceded that he might indeed, following the earlier authority of *China Mutual Steam Navigation Company v. Maclay* (1918) 1 K.B., 33, consider that the defendant had been properly sued in a personal capacity and grant a negative

## HARRY v. THOM

declaration on the first question raised in the summons (see above), provided the second question therein were abandoned. But even if the second question were abandoned, he considered, the first would be merely hypothetical or academic “as the plaintiff, if the negative declaration were granted, would be in no position to enforce payment for the period in dispute.” Accordingly he refused to grant the application *inter alia* for the following reasons:

“as it would be unconstitutional for this court to grant a declaration in respect of the second question, 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.”

Briefly put, the criticisms levelled against the above ruling of the judge by counsel for the appellant may be summarised thus:

“The learned judge was in error in thinking there were two questions for construction, in thinking that the appellant was seeking to enforce a money judgment against the Crown; all the appellant is asking is to have determined a question of construction of a statute in the form of a declaration which is not enforceable as a sanction. He was also in error in holding that it would be unconstitutional to grant a declaration which is not enforceable as a sanction. He was also in error in holding that it would be unconstitutional to grant a declaration because the defendant was exercising statutory powers in the exercise of which the Crown is not involved. A court is entitled to enquire into the exercise of statutory powers. The judge was also in error in thinking that the issues were hypothetical and misunderstood the scope of Order 42 rule 2 when he held that the declaration could not be granted because it would not put an end to litigation between the parties.

Counsel concluded by asking us to remit the matter to Chambers with a direction that it be heard on its merits.

While we must agree with the view expressed by the learned judge that it was quite open to him to determine the question of construction of the Education Code and grant a negative declaration in spite of the *Bombay Case* which, as we have indicated he considered to be “dead against the appellant,” we cannot agree that course can be taken only if the second question raised in the summons viz., the declaration that the plaintiff is entitled to her salary were to be abandoned, because in effect, there is really only one question for determination, not two; they are intimately bound up, and not separate questions as the learned judge thought. Order 42 rule 2 enables him to grant no consequential relief apart from the question of construction sought of him.

With respect, we say the judge’s view, it seems, overlooks the true nature and scope of a declaration on an originating summons under Order 42 rule 2, which was explained by WARRINGTON J., when considering the

English Order 54A on which ours was modelled. In *Lewis v. Green* (1905) 2 Ch. 340, he explained the position at page 343 as follows:

“In the first place, the order is confined to questions of construction. Of course, in a sense, every question of construction may involve some question of fact. It may be a question about which there is no dispute, but in order to raise any question of construction some facts must be proved or admitted. But for all that the order is confined to enabling the court to decide questions of construction and nothing else, and the order does not enable the court to grant any relief; it can only determine the question of construction, and declare the rights of the parties.”

It seems therefore clear, on the above authority, that it was a mistake to have considered that Order 42 Rule 2 enables relief of any sort. There is indeed no second question. What is thought to be a second question is not; it is merely a declaration of the rights of the appellant that the judge needs must make consequent on the determination of the question of construction which is being sought. In fairness to the learned judge, we are constrained to believe that he was, from the very beginning, misled in his approach to the matter by the appellant's summons which speaks of “the determination of the following *questions*,” when in fact there was only one question for determination. This is why he considered the matter involved two separate questions calling for two separate declarations from him. As CHIEF JUSTICE WOODING of Trinidad & Tobago when expressing full agreement with the above case in *Pierre v. Mbanefo* (1964) 7 W.I.R. 433, at page 437, said in relation to the same Order:

“It will be observed that both these rules make it plain beyond dispute that they are concerned with the determination of construction *only*. Any declaration which may be made thereunder is, in our judgment, entirely consequential.”

Such, it is submitted, is the true nature of declaratory proceedings under Order 42 Rule 2, and it is in this vital respect, which is frequently lost sight of, that they differ from proceedings under Order 23 Rule 3. The declaration merely proclaims the existence of the legal relationship; it does not contain an order which may be enforced against a defendant. Once this fact is appreciated the role of the court is easily understood. But throughout his judgment, the mere thought of a plaintiff seeking indirectly to do what she could not do by direct means, that is to say, to enforce a money judgment against the Crown was so repugnant to the judge's ideas of propriety that he made it a dominant feature in his decision which undoubtedly weighed greatly with him in the exercise of his discretion to grant or refuse the application.

We have already observed that the learned judge was right and that he is supported when he said that the Chief Education Officer is a servant of the Crown, that he is not a legal person and cannot be sued;

## HARRY v. THOM

but it is respectfully submitted he was in error when he considered the defendant was acting under the authority of the Crown, and being a Crown servant no declaration could be made against him personally. The fact of the matter is, we think, that the Chief Education Officer was not acting under the Crown; he was acting under a regulation.

The case of *Liversidge v. Anderson* (1942) A.C. 206, postulates that if a Crown servant personally commits or orders or authorises the commission of a tort, the plaintiff may sue him in his individual capacity for damages and for a declaration that his acts are invalid, notwithstanding that those acts may have been done in the course of Crown duty. The *Bombay case* (above) is authority for the proposition that where a Crown servant does an act which he is lawfully authorised to do, an action for a declaration that the plaintiff is entitled to compensation from the Treasury for the loss incurred by that act, will not lie against him personally. *Per contra*, such an action will certainly lie against him personally if the acts were unlawful whether they amount to breaches of contract or tort — see the *China case* (above), at page 41 in which BAIL-HACHE J., adopted the observations of ROMER J., in *Raleigh v. Goshchen* (1898) 1 Ch. 73 to the effect that:

“It appears to me that if any person commits a trespass (I use the word advisedly as meaning a wrongful act or one not justifiable) he cannot escape liability for the offence, he cannot prevent himself being sued, merely because he acted in obedience to the order of the executive government, or of any officer of State.”

and also the statement of the law of the Attorney-General in argument in the same case to the effect that:

“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 by this court; and in such a case it does not matter whether the defendant is head of a department or not.”

And more directly in point was the advice of LORD DAVEY in the Privy Council in *Nireaha Tamaki v. Baker* (1901) A.C. 561, 576.

“Their Lordships hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority.”

His Lordship did not say in what capacity he should be sued, but it is clear that a personal capacity is meant. Baker who was the Commissioner of Crown Lands was sued, as the case shows in a personal capacity, and when it was suggested in argument that the Attorney-General should have been defendant instead of Baker the learned and noble Lord disagreed with that contention.

It seems quite clear from the authorities therefore, that personal actions for declarations against Crown servants in respect of alleged unlawful

acts, quite distinct from whether they are contract or torts, have long been entertained by the courts — see *Progressive Supply Co. v. Dalton* (1943) Ch. 54; *Point of Ayr Collieries Ltd. v. Lloyd George* (1943) 2 A.E.R. 546; and *Yoxford & Darsham Farmers' Association Ltd. v. Llewellyn* (1946) 2 A.E.R. 38, in all of which the declarations sought were dismissed on the merits and in no one was the objection taken that the defendant was wrongly sued. Indeed, it seemed at a later date to have become the practice of not taking preliminary objections to the *locus standi* of Crown servants when sued for allegedly committing unlawful acts in the course of duty even when they clearly had only a remote if no connection at all with the proceedings. It would appear as if the Crown was anxious in such cases to mitigate the severity of the ancient maxim that the King could not be sued, which was later extended to mean that Government Departments or its officers could not be sued in his Courts of Justice. In some cases the Crown would even suggest who were its servants to be sued, a practice deplored by the House of Lords in *Adams v. Naylor* (1946) A.C. 54. From a historical standpoint, it is said this trend began since 1921 when LORD BIRKENHEAD appointed a committee to consider the position of the Crown as litigant owing to the hardship of the subject occasioned by the above. This practice culminated in the unfortunate case of *Adams v. Naylor* (above) a decision exposing the glaring injustice of the Crown's claim to immunity. This result was the Crown Proceedings Act of 1947 which placed the Government Departments fairly and squarely under the law. They appear now every day in English courts just as any other litigant. It is clear that similar legislation is required in Guyana today, now a free and independent nation within the Commonwealth.

It is our opinion, therefore, that the reasons given by ROWLATT J., at page 406 of the report in the *Bombay case* about suing the defendant for money under a contract which he made as a representative of a public department for money under the contract in the hope of gaining obliquely a declaration of his rights against the Treasury do not apply to the matter in hand. For one thing, those proceedings, unlike these now before us, were instituted by action for a declaration, presumably under the English equivalent to our Order 23 Rule 3, in which consequential reliefs were claimed against the Treasury, and also in the form of the mode of assessment of such compensation; and for another, the *China case* though argued in, was not mentioned nor distinguished in the judgment of the *Bombay case*.

We have attempted above to show the distinction between those two cases; but it is submitted that the essential difference between the case under review and the *Bombay* and *China* cases lies in the forms of the declarations which were sought. In neither of those two English cases, as in the present, was the plaintiff claiming entitlement to a legal right dependent upon a question of construction of a statute, which includes a regulation made thereunder. The direction of Sir Joseph Maclay diverting the vessel from her course to Port Said in the *Bombay case* was a perfectly lawful one, therefore Maclay was not acting unlawfully and could not be personally liable; he was doing something which he was lawfully entitled to do. On the other hand, in the

## HARRY v. THOM

*China case*, while Maclay's direction requisitioning the plaintiff's steamer under regulation 39 BBB was quite lawful, he acted *ultra vires* when he requisitioned the services of the shipowners also. Again in the *Bombay case*, ROWLATT J., disposed of it on a preliminary objection which we respectfully consider to have been entirely justified because Maclay's act was plainly lawful; it was not tortious; not so however in the *China case* where the pleadings must have disclosed the wrong of requisitioning services also, and therefore a ground for a decision on the merits, as was indeed the case.

In the matter in hand, the affidavit of Lucille Harry discloses *prima facie*, the existence of a legal right in her to receive sick leave on full pay by virtue of Regulation 60 (3) (c) of the Education Code, Chapter 91 for a period not exceeding one calendar month in any school year if certain conditions are fulfilled.

In her affidavit there is a statement to the effect that she is in possession of a letter from the Chief Education Officer that he is standing by his previous decision to grant sick leave with no pay. If indeed the Chief Education Officer did make *a priori* such decision, a question of construction of the relevant regulation under which he granted the period of 18 days sick leave necessarily arises. This must be so in order to ascertain whether he is peremptorily given power to grant sick leave with no pay, or whether it gives him a discretion to allow such leave with or without pay, and if so, whether he has judicially exercised that discretion. It is submitted that what has been said in *Re Man Power Citizens Association* (1964) 8 W.I.R. 52, at p. 63 is equally applicable to the case of a ministerial discretion which Thom exercised, namely:

"It is well known that a discretion is not to be exercised in a capricious and arbitrary manner, but in a disciplined and responsible way. A quasi-judicial discretion requires that the matter shall not be a *chose jugée*, but shall be approached with an open mind."

The Chief Education Officer has approved of the eighteen (18) days sick leave for which she applied. On the face of it therefore, she is entitled to sick leave with full pay unless with good reason he exercised his discretion to the contrary. That discretion is exercised against her; she disputes its exercise invoking Order 42 rule 2; she says that a question of construction of the regulation arises, but is told that as the first question raised in her summons is academic merely, the judge will not entertain it because the second question praying for a declaration that she is entitled to salary for the period she was absent on sick leave is unconstitutional.

It is our respectful opinion that the learned judge misdirected himself in his approach to the matter when he refused Lucille Harry a hearing of her summons on its merits for the reasons he has given.

We have already indicated there is really only one question, even though the appellant herself posed what is one as two questions in her summons, because a declaration of the entitlement to the right is merely

the outward and visible manifestation of a determination of the question of construction. Be it remembered that the whole purport of Order 42 rule 2 is that the person “may apply by originating summons for the determination of such question, and for a declaration as to the right claimed.”

On the contrary it is our considered opinion that the deduction of 18 days pay is *prima facie* unconstitutional unless made under due process of law. By an improper exercise of his discretion under the aforesaid regulation the Chief Education Officer could well render the deduction unconstitutional. It is precisely the exercise of that discretion that Harry is seeking a ruling on.

It appears, though the point was not taken before us, that the question of the deprivation of a fundamental human right is involved, the protection of which is enshrined in the Constitution of Guyana. Article 8 (1) Chapter II of which reads as follows:—

“No property of any description shall be compulsorily taken possession of, and no interest in a right over property of any description shall be compulsorily acquired, except by or under the authority of a written law and where provision, applying to that acquisition or taking of possession is made a written law.”

This fundamental right of the subject to protection from deprivation of property under the above Article has of late received judicial interpretation in the case of *Denis Lilleyman & Others v. C.I.R. & A.G.* — (1964) L.R.B.G. 15; (1964) 13 W.I.R. 224 — affirmed on appeal to the British Caribbean Court of Appeal in *C.I.R. & A.G. v. Lilleyman* (1964) 7 W.I.R. 496; (1964) L.R.B.G. 221. At page 509 the view of CUMMINGS J., at first instance was upheld: that the phrase “interest in or right over property of any description” under Article 12 of the Constitution of British Guiana which is in substance Article 8 of the Constitution of Guyana means “money”.

Accordingly, we hold there was nothing unconstitutional in considering the declaration sought by the appellant, and we respectfully say that for the learned judge to have so ruled was a wrongful exercise of his discretion in considering whether to grant or refuse the declaration on the first question.

We have already shown the true nature of a declaration under Order 42 Rule 2 to be that it is not an order which may be enforced against a defendant; this is why we believe that it is also wrong to say, when the judge considered what he referred to as “another aspect of the matter,” that if a declaration to the first question in the summons is granted, it will not achieve the desideratum of settling litigation between the parties. The crucial question for him to answer when considering the prospect of future litigation is: apart from the matter of construction, can there possibly arise any further question which can give rise to future litigation? Are there other issues of fact for decision, besides those necessary to raise the question of

## HARRY v. THOM

construction itself? If yes, then he ought to refuse the declaration for this reason.

What the judge was in effect saying was that there was insufficient utility shown for his grant of the declaration asked for. Admittedly, this is always an important question to be considered. In *Lewis v. Green* (above), the applicant took out an originating summons under Order 54A Rule 1 (of England), claiming a declaration of the true construction of certain deeds as to whether the respondent owed him a certain sum of money. Objection was taken by the respondent that the issue could not properly be decided on such a summons, because he had distinct defences to the claim, quite apart from any question of construction of the deeds. He however successfully contended that these defences might be raised in further litigation. WARRINGTON J., the trial judge said at page 344:

“The result will be this: the court may, after considerable litigation, involving an argument in a court of first instance, an argument in the Court of Appeal, and possibly an argument in the House of Lords, come ultimately to the decision that on the question of construction raised by this summons the applicant is right. Well, what then? No relief can be given on that. There are other points which have to be decided. They can only be decided by bringing an action, and in that action it may turn out that, notwithstanding the applicant is right on the questions of construction, he is ultimately found to be wrong. The respondent will have had to pay all the expense of the litigation on the question of construction, which will be utterly useless. It seems to me that where one finds circumstances such as I find here, the procedure under Order 54A is improper. It is only intended to enable the court to decide questions of construction where the decision of those questions, whichever way it may go, will settle the litigation between the parties.”

But the reason assigned in the instant case is that: it will be necessary for Lucille Harry to bring further proceedings against the defendant to enforce payment of the sum deducted from her salary if the declaration be granted, and in such event, the respondent Thom will be in a position to raise the defence of involvement of Crown funds. In our view, however, this cannot be so; the position here is not comparable to that in *Lewis v. Green*; at least the learned judge did not in his reason say so, viz., that there was a question of mixed fact and law so necessarily tied that it rendered Order 42 rule 2 the inappropriate mode of procedure. His reason abovementioned was entirely different. We express no opinion on whether it was open to him so to say on the facts as revealed in the affidavits, notwithstanding the allegation in the respondent's affidavit that the appellant absented herself without leave as from 29th June, 1964, which is, incidentally, the day after her leave commenced. This, as we have remarked, seems to derogate from the grant to the appellant of 18 days sick leave, and it is reasonable we think, to suppose such information must have come to his knowledge after the grant. The inference suggested is that she procured

her leave by a subterfuge and attended the In-Service Training Centre during that time. Admittedly, these are important facts which, if established to the satisfaction of the judge, may well have justified his refusal, we do not say, to grant sick leave in Harry's case with pay. But these were not the reasons of the learned judge; he did not address his mind to those facts; he did not yet reach that stage in the argument of the merits of the matter, but decided it on the preliminary point against the appellant.

A declaration will not render Thom personally liable to Harry for the amount of the deduction, because it gives Harry no relief; so Harry could not sue Thom on the declaration. Therefore, there can be no involvement of Crown funds whatever, for the simple reason that a declaration made against a Crown servant in his private capacity cannot bind the Crown.

We must be careful however, to say nothing which will affect the merits of a matter which has not yet been gone into, but from a utilitarian standpoint such a declaration may not prove to be a mere *brutum fulmen* as it is urged on us. For one thing, Harry will know her entitlement; and for another, the Crown, ever alert and helpful in maintaining the rule of law in the welfare state, may not be so intransigent after all. At least, one can confidently expect the Crown to respect the ruling of its own court, and, if it sees fit, to bestow its bounty for which it is well known on cases declared to be deserving. These are without doubt, powerful and impelling influences in the cause of justice.

Now that Guyana has a written constitution it behoves the subject to be ever watchful of his rights therein and to invoke the court's protection against any administrative action thought to be faulty or whenever there are adequate grounds for believing they are denied him. This is why Lucille Harry seeks construction of the regulations under o. 42 r. 2 of which provides an appropriate remedy for checking abuses of governmental power in absence of a local Crown Proceedings Act.

It was also a mistake, we respectfully say, to have considered that the first question would be hypothetical or academic merely, if the second were withdrawn. As we view it, this could not be so as the very nature of a hypothetical question posits that the issue framed for decision is not real but feigned; the question posed is hypothetical when it is a theoretical one in the sense that the parties have no personal interest in it. On the contrary it seems to us that Lucille Harry's interest in the proceedings was patently live seeing that it touched and concerned depriving her of her money which we have shown to be a fundamental right protected by the Constitution, unless the discretion to deprive her of it were properly exercised.

Lastly, still on the matter of the hypothetical question, it is thought it would be instructive to mention the following test laid down by LORD DUNEDIN for its determination — see *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd.* (1921) A.C. 438, at page 448, where the learned law lord expressed his opinion as follows:

## HARRY v. THOM

“The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.”

It is our considered opinion that this appeal must be allowed. The application must be remitted to a judge in Chambers with the intimation that he deals with it on the merits.

The respondent will bear the costs of this appeal, fit for counsel.

VAN SERTIMA, J.: I agree.

JHAPPAN, J.: I agree.

*Appeal allowed — application remitted  
to a Judge in Chambers to be dealt with  
on the merits.*

Solicitors:

*Vibert Lampkin* (for the appellant),

*The Crown Solicitor* (for the respondent).

## J. O. SEERATTAN v. NANDALALL

[In the Full Court of the High Court (Bollers, C.J., and Chung, J.)  
– January 13, 1967.]

*Criminal Law – Manufacture of Spirits – Distillery apparatus – “possession” of charged – Evidence disclosed “custody” of – Power of Court to amend – S. 104(3) of the Spirits Ordinance, Cap. 319 (now s. 104(3) of the Spirits Act, Cap. 82:24).*

*Criminal Law – Manufacture of spirits – Place where distillery apparatus found – Person “deemed” to be in possession – Onus – Failure to discharge – Effect of – S. 104(6) of the Spirits Ordinance, Cap. 319 (now s. 104(6) of the Spirits Act, Cap. 82:24).*

## SEERATTAN v. NANDALALL

On March 31, 1966, about 1.10 p.m., the appellant, an officer of the Customs and Excise Department, went with another Customs Officer and a party of policemen to the backlands of Perseverance, Essequibo, where in a very bushy area the respondent was found sitting in a boat in a branch of Mainstay Lake and another man was seen swimming about 10 yards away from the said boat, in which was found a copper coil and a retort with attached gooseneck. The appellant disclosed his identity and told the respondent that he believed that the said articles to be part of a bush rum still, whereupon the respondent said that he was going to make a drum of bush rum for his son's wedding. He was then arrested and, along with the articles seized, was taken to the Anna Regina Police Station where he was later charged with being in "possession" of distillery apparatus for the manufacture of spirits, contrary to s. 104(3) of the Spirits Ordinance, Cap. 319. The respondent closed his case after the close of the case for the prosecution and the Magistrate dismissed the respondent, upholding his counsel's submission that the charge was brought under the wrong section and should properly have been brought under s. 11 of the Spirits Ordinance, Cap. 319 (which relates to distilling spirits without a licence).

In her Reasons for Decision, the Magistrate stated that she found that the respondent was found in possession of the above-mentioned articles and that those said articles could have been used for the manufacture of spirits but she was of the opinion that the prosecution could not succeed under s. 104(3), the section charged, as that section envisaged a warrant and seizure which was not the case before her and, although the exhibits could have been used for the manufacture of spirits, they were not in fact so being used when the respondent was found in possession of them and she accordingly dismissed the complaint.

The prosecution appealed on the ground that the learned Magistrate was erroneous in point of law when she held that the charge was brought under the wrong section.

**HELD:** – (per Bollers, C.J., delivering the Reasons of the Court) that (i) the submission that the appellant should have been authorised to enter and search the place where the distillery apparatus was found was worthless in view of sub-section (5) of section 104 of the Ordinance, since that made it quite clear that any Customs Officer may seize any distillery apparatus without a warrant; (ii) under sub-section (6) of section 104 of the said Ordinance it is provided that anyone found in a place where distillery apparatus for the manufacture of spirits is found or in the vicinity thereof, shall be "deemed" to be the owner or person in charge of the apparatus unless he proves to the contrary, and, here, the respondent had never even attempted to discharge that onus; (iii) the statement of offence and particulars were wrongly worded and the proper charge should have been according to the wording of s. 104(3) itself, viz., – "custody" of distillery apparatus – instead of "possession" of distillery apparatus – and this would present no real difficulty since the Magistrate had found that the respondent was in possession of distillery apparatus for the manufacture of spirits and it was trite that anyone who is in possession of something must necessarily be in custody of it; (iv) accordingly, the acquittal of the respondent by the Magistrate was clearly wrong and a conviction ought to have ensued. The Court, in order to achieve that object, would order that a conviction

for the offence of “custody” of distillery apparatus contrary to s. 104(3) be substituted and that the complaint and conviction order be amended accordingly and the Court would impose a fine of \$250 or three months’ imprisonment plus one day’s imprisonment and the respondent would be given three months to pay the said fine.

*Appeal allowed – Order of dismissal set aside.*

*Cases referred to:—*

(1) *Lilman v. D’Oliveira* (1965) L.R.B.G. 400

*J. Gonsalves-Sabola*, Assistant Director of Public Prosecutions, for appellant.

*E. Hanoman* for respondent.

BOLLERS, C.J.: In the Magistrate’s Court the respondent was charged with the offence of possession of distillery apparatus for the manufacture of spirits contrary to Section 104(3) of the Spirits Ordinance, Chapter 319 and duly acquitted by the magistrate. The particulars of the offence read as follows:

“Defendant on Thursday 31st March, 1966 at Perseverance Essequibo, in the Essequibo Judicial District was found in possession of Distillery apparatus for the manufacture of spirits.”

The evidence led by the prosecution disclosed that the appellant, an officer of the Customs and Excise (complainant in Court below) accompanied by another officer of Customs and Excise and a party of constables on Thursday, 31st March, 1966 about 1.10 p.m. went to the backlands of Perseverance, Essequibo, where in a very bushy area found the respondent sitting in a boat in a branch of the Mainstay lake. There was another man named Pooran swimming in the river about 10 yards away from the boat in which the respondent was sitting. The party went towards the boat and examined it and there found a copper coil and a retort with a gooseneck attached. The appellant informed the respondent that he was an officer of the Customs and Excise Department and that he believed those articles to be part of a bush rum still, whereupon the respondent replied that he was going to make a drum of bush rum for his son’s wedding. The respondent was then arrested and taken to the Police Station at Anna Regina where he was subsequently cautioned by a Police Constable and elected to make a statement in which he said that he was going to make “a charge of bush rum” and he had asked Pooran for a drop in his boat and Pooran had carried him and dropped him there. There was the further evidence by an expert – a sworn weigher and gauger of several years’ experience in the manufacture and testing of spirituous liquor including bush rum – that those articles were used in the manufacture of spirits, to wit, bush rum.

At the close of the case for the prosecution, the case for the respondent was closed and the learned magistrate upheld the submission of counsel for

## SEERATTAN v. NANDALALL

the respondent that the charge was brought under the wrong section and should have been brought under Section 11 of the Spirits Ordinance, Chapter 319 and proceeded to dismiss the case against the respondent.

In the Memorandum of Reasons for Decision, the magistrate stated that at the close of the case for the prosecution she found that the respondent was found in possession of the articles (as already stated) and that these articles could have been used for the manufacture of spirits, but she was of the opinion that the prosecution could not succeed under Section 104, subsection (3) as this section envisaged a warrant and a seizure which was not the present case and although the exhibits could have been used for the manufacture of spirits, they were not so being used when the respondent was found in possession of them and accordingly she dismissed the complaint against the respondent. It was from this order of dismissal that the prosecution appealed on the ground that the decision of the learned magistrate was erroneous in point of law when the magistrate held that the charge was brought under the wrong section. The relevant portion of Section 104 reads as follows:

“104.(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.

“(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.

“(3) All distillery apparatus, spirits, and materials for the manufacture of spirits so seized shall be absolutely forfeited, and the owner of any distillery apparatus, spirits or materials for the manufacture of spirits, or the person in whose custody they are found, shall be liable for every house or place in which they are found, and also for the distillery apparatus, spirits, or materials for the manufacture of spirits, to a penalty not exceeding one thousand dollars, and, in addition to the penalty to imprisonment, with or without hard labour, for any term not exceeding twelve months.

“(4) If any damage is done by the forcible entry and the search is unsuccessful the damage shall be made good.

“(5) Any officer may seize the distillery apparatus, spirits, or materials for the manufacture of spirits without a warrant.

“(6) Anyone found in a house or place where the distillery apparatus, spirits, or materials for the manufacture of spirits are found, or in the vicinity thereof, shall be deemed, unless he prove the contrary to the satisfaction of the magistrate, to be the owner or person in charge of the distillery apparatus, spirits, or materials for the manufacture of spirits.”

Under sub-section (1) if an officer states on oath that there is cause to suspect that a distillery apparatus etc. for the manufacture of spirits is being unlawfully kept or deposited in any place and states the grounds of his suspicion, he may obtain a warrant authorising him to search the place. Under subsection (2) if he is so authorised, he may break open and forcibly enter any place and seize the distillery apparatus etc. for the manufacture of spirits found therein. Under sub-section (3) all distillery apparatus etc. for the manufacture of spirits so seized, that is, seized under the authority of a search warrant, shall be forfeited and the owner of such apparatus etc. or the person in whose custody they are found shall be liable for the distillery apparatus etc. to a penalty. Sub-section (5) makes it quite clear that any officer may seize the distillery apparatus etc. for the manufacture of spirits without a warrant and sub-section (6) states that anyone found in a place where the distillery apparatus etc. for the manufacture of spirits is found or in the vicinity thereof shall be deemed to be the owner or person in charge of the apparatus unless he proves the contrary.

In the present case the respondent never attempted to discharge the onus placed upon him in respect of Sub-section (6) and therefore must be deemed to be the owner or person in charge of the distillery apparatus for the manufacture of spirits. The submission that the Customs Officer should have been authorised by warrant to enter and search the place where the distillery apparatus was found was worthless in view of Sub-section (5) which empowers him to seize the distillery apparatus without a warrant. The acquittal of the respondent by the magistrate was therefore clearly wrong and a conviction ought to have ensued. We therefore allowed the appeal and set aside the order of dismissal. We, however, concurred with the observation of counsel for the appellant that the statement of offence and particulars of offence in the charge were incorrectly worded and the proper charge should have been according to the wording of Section 104(3) – “custody of distillery apparatus” – instead of “possession of distillery apparatus” as appears in the statement of offence and particulars of offence. This situation presented no difficulty for the magistrate found that the respondent was in possession of the distillery apparatus for the manufacture of spirits and it is trite that anyone who is in possession of something must be in custody of it (see *Lilman v. D’Oliveira* (1965) L.R.B.G. 400) and, indeed, the evidence in the present case clearly disclosed that the respondent was in custody of the distillery apparatus. Hence we made the order that a conviction for the offence of custody of distillery apparatus contrary to

## SEERATTAN v. NANDALALL

Section 104(3) be substituted and that the complaint and conviction order be amended accordingly and a fine of \$250.00 or three months imprisonment and one day's imprisonment be imposed. The respondent was given three months to pay the fine.

*Appeal allowed – Order of dismissal set aside.*

## CECILE NOBREGA v. ATTORNEY GENERAL OF GUYANA

[Court of Appeal (Stoby, C, Luckhoo and Cummings, JJ.A.). September 16, 1966; April 3, 1967.]

*Contract of service — Teacher employed by Ministry of Education — Letter from Ministry purporting to rescind appointment and reducing status with lower salary — Effect of rescission.*

*Crown servant — Right of Crown to dismiss at pleasure — Public policy — Whether Crown has right to unilaterally alter terms of contract.*

*Constitutional Law — Reduction of Crown servant's pay — Whether an unauthorised compulsory taking of property violative of Article 12 of the Constitution of British Guiana, 1961 (now Article 8 of the Constitution of Guyana, Cap. 1:01).*

The appellant was first appointed a teacher at Lodge Government School on December 11, 1964, as a Grade I, Class I, teacher, at a salary of

\$251 per month. On March 17, 1965, she was requested by the Ministry of Education, with whom she was employed, to furnish her birth and academic certificates by messenger or return mail. She failed to do so and, on March 19, 1965, she received a letter from the Ministry which stated (a) that by reason of such failure her appointment as a Grade I, Class I, teacher, was rescinded from that date, and (b) “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”. When she next received her salary it had been reduced to \$92 per month as from March 20, 1965. At first, she did not accept the reduced salary but later did so without prejudice to her case. She then brought an action seeking (1) a declaration that she was entitled to receive a salary of \$251 per month, (2) a declaration that the purported reduction of her salary was *ultra vires*, and (3) a declaration that the purported rescission of her appointment as a Grade I, Class I, teacher, was *ultra vires*.

The respondent led no evidence and it was submitted that since the Crown could dismiss at pleasure then the right to reduce salary was within the discretion of the Crown. This view was accepted by the trial Judge who refused to grant the declarations sought and dismissed the action with costs.

**HELD** — (Stoby, C., and Cummings, J.A.), (Luckhoo, J.A., dissenting) that (i) although the Crown has the right to dismiss at pleasure unless restricted by statute it has no right to unilaterally reduce the salary of an employee without his consent; (ii) there was no legal ground upon which the contract could have been rescinded and, accordingly, the appellant had not been dismissed; indeed, counsel for the Crown had not contended that the Crown had dismissed the appellant and a new contract entered into; (iii) the effect of the letter of March 19, 1965, was not to offer a new appointment but for the appellant to continue in her employment albeit at a reduced pay, and (iv) (Per Cummings, J.A.) — the purported reduction of the appellant’s salary effected a compulsory taking violative of Article 12 of the 1961 Constitution.

(Per Luckhoo, J.A.) — there was a rescission of the appellant’s appointment by the clear and unequivocal language of the letter of March 19, 1965, and she was accordingly dismissed and ceased to be a Grade I, Class I, teacher, as from that date, and, consequently, upon her dismissal there was no infringement of any legal right which the appellant had under the constitution or otherwise.

*Appeal allowed.*

[*Editorial Note:* — 1. This case is reported in (1967) 10 W.I.R. 187).  
2. The respondent’s appeal to the Privy Council was later allowed — see (1970) 3 All E.R. 1604, P.C., where their Lordships’ Board held (1) that despite

## NOBREGA v. ATTORNEY-GENERAL

(b) above, the proper effect of the Ministry's letter dated March 19, 1965, was a 'termination' of the appellant's contract as a Grade I, Class I, teacher, and (2) that no question of unilateral 'variation' of a contract thus arose.]

*Cases referred to:*

- (1) Zamulinski v. The Queen (1957) 10 D.L.R. 685.
- (2) Venkata Rao v. Secretary of State for India (1937) A.C. 248; 156 L.T. 261.
- (3) Rederiaktiebolaget Amphitrite v. R. (1921) All E.R. Rep. 542; (1921) 3 K.B. 500.
- (4) Riordan v. War Office (1959) 3 All E.R. 552; (1959) 1 W.L.R. 1046; (affd.) (1960) 3 All E.R. 744, n.
- (5) Shenton v. Smith (1895) A.C. 229; 72 L.T. 130; 64 L.J.P.C. 119.
- (6) Dickson v. Combermere (1863) 3F.&F. 527, N.P.
- (7) Reilly v. R. (1934) 150 L.t. 384; 103 L.J.P.C. 41; 50 T.L.R. 212, P.C.
- (8) Worthington v. Robinson et al (1896) 75 L.T. 446. C.A.
- (9) Hill v. Peter Gorman Ltd. (1957) 9 D.L.R. (2d) 131.
- (10) Cameron v. Lord Advocate (1952) S.C. 165 (Scot.).
- (11) Faithorne v. Territory of Papua (1938) 60 C.L.R. 772.
- (12) Re Poe (1833) 5 B& Ad. 681; 110 E.R. 942.
- (13) Grant v. Secretary of State for India (1877) 2 C.P.D. 445; 46 L.J.Q.B. 681.
- (14) De Dohse v. R. (1886) 3 T.L.R. 14, H.L.; 66 L.J.Q.B. 422, n.,
- (15) Dunn v. R. (1896) 1 Q.B. 116; 65 L.J.Q.B. 279; 73 L.T. 695.
- (16) Gould v. Stuart (1896) A.C. 575; 65 L.J.P.C. 82; 75 L.T. 110; 12 T.L.R. 595, P.C. P.C.
- (17) Rodwell v. Thomas (1944) 1 K.B. 596; (1944) 1 All E.R. 700; 171 L.T. 278.
- (18) Terrell v. Secretary of State for the Colonies (1953) 2 Q.B. 482; (1953) 2 All E.R. 490.
- (19) Inland Revenue Commrs. v. Hambrook (1956) 1 All E.R. 807; (affd.) (1956) 2 Q.B. 641.
- (20) Boston Deep Sea Fishing and Ice Co. v. Ansell (1888) 39 Ch. D. 339; 59 L.T. 345, C.A.
- (21) Westville Shipping Co. v. Abram Steamship Co. Ltd. (1923) A.C. 773; 130 L.T. 67, H.L.
- (22) R. v. Gresham (Inhabitants) (1786) 1 Term Rep. 101; 99 E.R. 996.
- (23) Freeth v. Burr (1874) L.R. 9 C.P. 208; 29 L.T. 773; 43 L.J.C.P. 91.

- (24) *Mersey Steel & Iron Co. v. Naylor, Benson & Co.*, (1884) 9 App. Cas. 434; 51 L.T. 637.
- (25) *Vos v. Rubel Bronze & Metal Co. Ltd.* (1918) 11 L.T. 348; (1918) 1 K.B. 315.
- (26) *R. v. Fisher* (1903) A.C. 158, P.C.
- (27) *Williams v. Howarth* (1905) A.C. 551; 93 L.T. 115; 21 T.L.R. 670, P.C.
- (28) *Carey v. The Commonwealth* (1921) 30 C.L.R. 132.
- (29) *Powell v. The Queen* (1873) 4 A.J.R. 144.
- (30) *Dyson v. Attorney-General* (1912) 1 Ch. 158; 105 L.T. 753; 28 T.L.R. 72, C.A.
- (31) *Lilleyman et al v. Attorney-General & anor* (1964) L.R.B.G. 15; (1964) 13 W.I.R. 224; (affd.) (1964) 7 W.I.R. 496, B.C.C.A.

*Dr. F. H. W. Ramsahoye* for appellant.

*L. F. Collins, Senior Crown Counsel*, for respondent.

STOBY, C. During the year 1963 the appellant was awarded a Commonwealth Bursary. She proceeded to the United Kingdom where she spent one year at the Institute of Education and the University of London. At the conclusion of the course she was given two certificates, one of which stated that she had satisfactorily completed the full time course in writing Production and Distribution of Textbooks provided in the Department of Education in Tropical Areas with the co-operation of members of the Publishers Association during the session 1963-4.

On the 15th October, 1964, the Ministry of Education of British Guiana wrote to her offering employment should she return. This she did and was given an appointment as a Grade I Class I Mistress at the Lodge Government School at a salary of \$251.00 a month. Although her appointment was as a teacher at the Lodge Government School she was seconded to the Ministry of Education from the 11th December, 1964 until the 4th February, 1965, when she was directed to perform her substantive duties as a teacher. On the 8th February, 1965, she began teaching at Lodge Government School.

On the 17th March, 1965, she received the following Letter signed on behalf of the Chief Education Officer:

Ministry of Education, Youth, Race  
Relations and Community Development,  
21 Brickdam, Georgetown,  
British Guiana.  
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

## NOBREGA v. ATTORNEY-GENERAL

from 4th December, 1964, I am to request that you send to this 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,  
? Blackman  
for Chief Education Officer (ag.).

Mrs. Cecile Nobrega,  
61 Croal Street,  
Stabroek, Georgetown.

cc. Miss Doris Fraser,  
Manager, Lodge Govt. School,  
E.C. Demerara.

The appellant did not immediately comply with the Education Officer's request, and on the 19th March, 1965, the following letter was received:

Ministry of Education, Youth, Race,  
Relations and Community Development,  
21 Brickdam, Georgetown.  
British Guiana  
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,  
G. O. Fox  
Chief Education Officer (ag.).

Mrs. Cecile Nobrega,  
61 Croal Street,  
Stabroek, Georgetown.

cc. Manager,  
Lodge Govt. School.

Upon receipt of the letter of 19th March, the appellant, the same day, submitted the relevant documents. No further information was given to her nor was there any other communication, but when she received her salary, it had been reduced to \$92 per month from the 20th March, 1965. At first she did not accept the reduced salary but subsequently took it without prejudice

to her case. She is performing the same duties assigned to her on the 8th February, 1965.

The appellant brought an action for: —

- “(a) 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 \$251.00 (two hundred and fifty one dollars) per month.
- “(b) a declaration that the purported reduction of the Plaintiffs salary by the Government of British Guiana acting by or through their servants and/or agents for \$251.00 (two hundred and fifty one dollars) per month in respect of such service to \$92.00 (ninety two dollars) per month is *ultra vires* and of no effect;”

No evidence was offered by the respondent, but before the trial judge, counsel submitted that since the Crown could dismiss at pleasure the right to reduce salary was within the discretion of the Crown. This view was accepted by the trial judge and the declarations asked for were not made.

On appeal counsel for the appellant did not contest the right of the Crown to dismiss at pleasure unless the Crown's right was restricted by statute. His only argument was that the Crown could not unilaterally vary a contract. He submitted there was a variation in this case in that without dismissing the appellant the Crown reduced her salary although she was performing the same duties.

Counsel for the Crown did not contend that the Crown had dismissed the appellant and entered into a new contract. He specifically rejected the court's suggestion, or at least did not adopt it, that the letter of the 19th March could be treated as a dismissal. He relied on the submission that the Crown had a right to reduce salary without the consent of an employee. This was the issue we were asked to decide.

It can be appreciated why counsel for the Crown took the stand he did. The letter of the 19th March said “your appointment . . . . has been rescinded as from today”. It also went on to say that “upon receipt of those documents your status as a teacher will be determined and a new letter of appointment issued.” No new letter of appointment was issued. No one was informed whether her status as a teacher has been determined and if determined no one has been allowed to know what her status is. Making full allowance for the use of the word rescission by a layman: assuming he intended to dismiss her or cancel her appointment his course of conduct shows there was no dismissal and no re-employment. If she was dismissed and not re-employed then why has she been teaching in the school and receiving a salary? If she has been re-employed then why was a letter not sent to her stating the terms of her employment and the duties expected of her? The appellant at all times made it clear she was not accepting a variation of her contract.

## NOBREGA v. ATTORNEY-GENERAL

On the other hand if rescission was used in its legal connotation there was no rescission of the contract. There was no legal ground on which the contract could be rescinded; no fraud, no mistake or any of the other legal grounds on which a contract could be legally rescinded. The tenor of the correspondence does suggest that the appellant's academical qualifications were being questioned. No doubt if the teaching position was obtained by presenting false certificates, if the appellant had represented to the Crown, even innocently, that her certificates entitled her to a degree and such misrepresentation was acted upon, then the contract could have been rescinded. Although the concept of rescission involves restoring parties to their original position (which was impossible in this case) this contract if properly rescinded would have been valid until rescinded. But after a rescission there is no longer an existing contract, and since reduction of an employee's salary presupposes the existence of a higher contractual salary it is clear the contract was never rescinded. Notification to one party to a contract by the other party that the failure to perform a duty not required by the contract has resulted in rescission, is not a rescission; it would be an alarming state of the law if a party to a contract can rescind it without assigning any reason. All these factors must have been present in the respondent's mind when in the court below and at the Appeal the case was presented to the respective courts on the basis that the Crown had a legal right to vary contracts with its employees unilaterally. I think it would be wrong for an Appellate Court to say that rescind means dismissed when the employer says it does not, when he has not pleaded it and neither side has argued it.

I turn now to the case as argued.

Counsel for the appellant conceded that Crown servants can be dismissed at pleasure. In a newly independent country with a Constitution designed to protect the liberty of citizens I think it would be wrong for an Appellate Court to remain silent and not offer a few observations on the position at law of Crown Servants.

In Canada, s. 319 of the Civil Service Act specifically sets out the right of the Crown to dismiss at pleasure. Despite this statutory provision it was held by THORSON P., in *Zamulinski v. The Queen* (1957) 10 D.L.R. 685 that damages would lie not for wrongful dismissal but for failure to follow statutory procedure prior to dismissal. In *Zamulinski's* case Regulation 118 made by virtue of the authority given by s. 5 of the Civil Service Act, provided that "no employee shall be dismissed without having been given an opportunity to present his side of the case to a senior officer of the department nominated by the deputy head". *Zamulinski* was dismissed without being given the opportunity to present his case. His claim for wrongful dismissal was not allowed on the ground that despite regulations 118 he could be dismissed at pleasure, but his claim for damages was successful on the ground that had the proper procedure been followed his dismissal must have been delayed.

In India, s. 96B of the Government of India Act provides that “subject to the provisions of this Act and of rules made thereunder every person in the civil service of the Crown in India holds office during His Majesty’s pleasure”. In *Venkata Rao v. The Secretary of State for India in Council* (1937) A.C. 248 the Privy Council held that the terms of s. 96B assure that the tenure of office though at pleasure will not be subject to capricious or arbitrary action but will be regulated by the rules, but there was no right in the appellant enforceable by action to hold his office in accordance with those rules and an employee could therefore be dismissed notwithstanding the failure to observe the procedure prescribed by them.

In those common law countries where there is no statutory provision regarding dismissal the law was stated by ROWLATT, J. in *Rederiaktiebolaget Amphitrute v. R* (1921) All E.R. Reprints 542 to be —

“ . . . . . in the case of the employment of public servants, . . . . . it has been laid down that, except under an Act of Parliament, no one acting on behalf of the Crown has authority to employ any person except on the terms that he is dismissible at the Crown’s pleasure; the reason being that it is in the interests of the community that the ministers for the time being advising the Crown should be able to dispense with the services of its employees if they think it desirable.”

DIPLOCK, J. took the same view in *Riordan v. The War Office* (1959) 3 All E R. 552 when he expressed agreement with a passage in STUART ROBERTSON’S CIVIL PROCEEDINGS BY AND AGAINST THE CROWN (1908) at p. 357 where it is said —

“ The Crown’s absolute power of dismissal can only be restricted by statute, and anything, short of a statute, which purports to restrict it, is void as contrary to public policy.”

The Privy Council in *Shenton v. Smith* 1895 A.C. 229 stated the law thus:

“Their Lordships consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law-suit, but by an appeal of an official or political kind”.

In the light of these positive statements and because *Shenton v. Smith* is binding on this court it is not open to us in a case occurring before the grant of Independence to express a different view. Suffice it to say that in a case occurring after the 26th May, 1966, having regard to Article 96(1) of the Constitution of Guyana the position of Crown servants may have to be re-examined and determined afresh. The reasons which impelled the

## NOBREGA v. ATTORNEY-GENERAL

U.K. Government to arbitrarily dismiss her servants on grounds of public policy no longer represent modern thinking and may not be valid in those countries with a written Constitution. It is recognised that different considerations will always apply to the armed forces. In *Dickson v. Combermere* (1863) 3 F. & F. 527 COCKBURN, C.J. said:

“The Sovereign has the power of dismissing any officer. He receives his commission from his Sovereign and holds it at his pleasure, and it is the will of the Sovereign to withdraw it.”

I have already said that I must accept the law as it stands as clear that the Crown can dismiss at pleasure except in certain circumstances not relevant to this case. I accept too that unless there is a clause to the contrary there *will be an* implied term in the *contract* that dismissal may be at pleasure, But there is very little authority on the subject of a Crown *servant's legal position who has not been dismissed but has had her salary reduced.*

The proposition is elementary that if a contract exists (as admitted in this case) then until the contract is determined, the rights and liabilities under the contract remain. The appellant had a right under her existing contract to receive a specific salary for specific work. Apart from dismissal, where a contract exists the Crown is in no different position from a private employer. LORD ATKIN in *Reilly v. The King* (1934) 150 L.T. pointed out that it is important to bear in mind that a power to determine a contract at will is not inconsistent with the existence of a contract until so determined. This proposition is self-evident, but the law of landlord and tenant affords a good illustration. In the case of a tenancy created by express contract at a specific rental, the contract must be determined by notice to quit in order to vary the rental. The offer of a new tenancy at a higher rental may be included in the notice to quit, but there can be no variation without a determination.

The trial judge relied on a passage by GLANVILLE WILLIAMS in his work on CROWN PROCEEDINGS:

“ 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.”

There is nothing objectionable in that statement if the important qualification it contains is fully appreciated. “If the Crown can dismiss at will it can offer to mitigate the exercise of its legal right.” To my mind this suggests that what the writer is postulating is that the Crown can inform its servant that it is proposed to dismiss him but instead of so doing a new contract at a reduced salary is being offered. The employee may accept

the new contract or refuse it. If he adopts the former course the matter is at an end; if the latter, then he is dismissed. Looked at in that way the statement of the law is correct, but that is not how the judge interpreted it.

Counsel for the Crown interpreted the passage in *GLANVILLE WILLIAMS* as an unequivocal right in the Crown to vary an existing contract by unilateral action. He submitted that *RIGBY, L.J.*'s judgment in *Worthington v. Robinson et al* (1897) 75 L.T. 446 supported the view that there was a right to reduce unilaterally. *RIGBY, L.J.* did say —

“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 re-appointment.”

But in *Worthington v. Robinson* (supra), the Crown never contended that the servant was dismissed. The facts were that a Supervisor of Inland Revenue accepted appointment under an Act which provided that he could be reduced in status by the Commissioner of Inland Revenue. He was given certain duties to perform inconsistent with his position as a Supervisor. He refused to perform the duties and was reduced in status. He brought an action for damages. The Solicitor General for the Crown relied on the Act as justifying the reduction. *SMITH, L.J.* upheld the reduction on the ground argued by the Solicitor General. With respect, the reasons given by *RIGBY, L.J.* were inconsistent. The revenue officer was never dismissed. The Act of Parliament gave the Commissioner of Inland Revenue power to “suspend, reduce, discharge or restore as they see cause.” They reduced, they did not discharge. Normally in the civil service dismissal involves total loss of pension rights, reduction does not. I do not regard this case as authority for the proposition that the Crown can alter a contract without the consent of the other party to the contract.

In *Hill v. Peter Gorman Ltd.* (1957) 9 D.L.R. 131 *MACKAY, J.A.* said —

“Where an employer attempts to vary the contractual terms, the position of the employee is this: He may accept the variation expressly or impliedly in which case there is a new contract. He may refuse to accept it and if the employer persists in the attempted variation the employee may treat this persistence as a breach of contract and sue the employer for damages, or while refusing to accept it he may continue in his employment and if the employer permits him to discharge his obligations and the employee makes it plain that he is not accepting the variation, then the employee is entitled to insist on the original terms.

I cannot agree that an employer has any unilateral right to change a contract or that by attempting to make such a change he can force an employee to either “accept it or quit.”

## NOBREGA v. ATTORNEY-GENERAL

This is a correct statement of the law.

Although no case has been cited us and I have found none, there are two cases which tend to lend support to the view that while the Crown can under certain circumstances dismiss at pleasure and while no action will lie for wrongful dismissal, the Crown cannot unilaterally alter the terms of a contract.

*Cameron v. Lord Advocate* is a Scottish case (1952) S.C. 165, and unfortunately not available in Guyana. This was a case where the plaintiff accepted an offer of civil employment by the Crown in Nigeria but on his arrival there the contract was repudiated. LORD MACKAY said "For that breach of contract I know of no law that immunises the Government and its responsible officials from paying damages."

In the present case if the Crown had repudiated the appellant's contract shortly after her return to Guyana, she would have been entitled to damages. I can see no sound reason why she should not be entitled to some form of relief when instead of repudiating it on arrival, it was repudiated a year after.

The other case is *Faithorn v. The Territory of Papua* (1938) 60 C.L.R. 772. The headnote reads:

The plaintiff was an assistant resident magistrate in the Public Service of the Territory of Papua. He was suspended by the Lieutenant-Governor, but his suspension was not approved by the Governor-General under sec. 18(2) of the Papua Act. The Lieutenant-Governor then reduced him in office, purporting to act under reg. 53(14) of the Public Service Regulations 1926, and he was required to act as a patrol officer at a reduced salary. The plaintiff brought an action against the Territory of Papua, claiming a declaration that the Order in Council reducing him in rank was invalid and that he was still entitled to the office and salary of assistant resident magistrate. Before the trial of the action a notification was inserted in the Government Gazette that the order which reduced the plaintiff to the position of patrol officer was cancelled. On 23rd April 1938 the Administrator (acting for the Governor-General) terminated the plaintiff's appointment, and on the same day the Lieutenant-Governor appointed the plaintiff as a patrol officer at the reduced salary. The plaintiff was paid arrears of salary as assistant resident magistrate up to the date of his dismissal. The plaintiff then brought a second action, claiming a declaration that he was still holder of the office of assistant resident magistrate and that the dismissal was invalid.

Held, by Rich, Dixon and McTiernan JJ. (Latham C.J. dissenting), that after the suspension of the plaintiff had been disapproved no power remained in the Lieutenant-Governor under reg. 53(14) of the Public Service Regulations to reduce the plaintiff in

rank and, up to the time of his dismissal on 23rd April 1938, he was entitled under reg. 53(8) to salary on the basis that his suspension had not been approved and no other punishment had been awarded; but, by the whole court, that the plaintiff was lawfully dismissed on 23rd April 1938, inasmuch as he held office during the pleasure of the Governor-General under sec. 17(1) of the Papua Act: the regulations governing the Lieutenant-Governor's power of suspending officers did not 'otherwise provide' within the meaning of that section.

Held, further, by Rich, Dixon and McTiernan JJ., as to the first action, that the Territory of Papua was the proper defendant and that a declaration of right, as sought by the plaintiff, was the appropriate relief; the plaintiff was accordingly entitled to his costs of that action".

The importance of this decision is that when the plaintiff filed his action for a declaration that he was still a magistrate the government restored him to his original position and then dismissed him. The judgments of three of the four judges indicate that the original action for a declaration of right establishing he was still a resident magistrate would have succeeded. The decision in this case, although admittedly based on local legislation, is some authority for the proposition that a right to dismiss does not include a right to reduce. If the Crown instead of dismissing can reduce salary there is no limit to which contractual terms may be changed. The doctor who has contracted to be employed on the condition that he has a right of private practice may suddenly be deprived of it; the headmaster in receipt of \$500 may suddenly be paid \$100, and so on. The Crown must accept its mistakes like any other person. It would have been simple, if the Crown did not wish to be accused of acting arbitrarily by dismissing without cause, to give the appellant reasonable notice of the termination of contract. This obvious course was not followed, and the result must be that the declarations asked for will be granted. I would allow the appeal with costs.

LUCKHOO, J.A.

There does not appear to be any dispute on the facts; the issues are matters of Law.

The Ministry of Education (which will be referred to as 'the Ministry') for the main part governs and regulates the affairs of government owned schools, of which the Lodge Government School is one. The Appellant was on the 11th day of December, 1964, appointed a teacher of this school with effect from the 4th December of that year. Notification of that fact was contained in a letter from 'the Ministry' to the Manager of the school. It is as follows:—

"The appointment of Mrs. Cecile Nobrega as Grade I Class I Mistress is approved with effect from 4th December, 1964, subject to Medical examination by a Government Medical Officer. Mrs. Nobrega will be informed later about the date of her medical examination by the Ministry of Health.

## NOBREGA v. ATTORNEY-GENERAL

2. Details of age, qualifications etc., should be entered on the attached 'Statement of Particulars' and returned to this office as early as possible. Salary at the rate of \$251.00 p.m. in the scale \$118 x 7 — \$195/211 x 10 — 251 x 7 — 258 x 10 — \$288, Mrs. Nobrega is seconded to the Ministry of Education."

The appellant served in that capacity from the 4th December, 1964, to the 19th March, 1965, at the stipulated salary of \$251 per month.

On the 17th March she was urgently requested by 'the Ministry' in a written communication to send them her birth and academic certificates,

"if possible by the Ministry's messenger or by return mail."

This she did not do; and on the 19th March, 1965, the following letter of that date (referred to as 'the letter') was delivered to her from 'the Ministry':—

"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,

G. O. Fox

Chief Education Officer (Ag.)

Mrs. Cecile Nobrega,  
61 Croal Street,  
Stabroek, Georgetown.

c.c. Manager  
Lodge Govt. School".

On that very day, after receiving the same, the appellant delivered to the Education Officer at 'the Ministry' certain certificates and documents; she did not withdraw, but continued, and is still continuing, to give of her services. At the end of March, her pay slip indicated that she was to have been paid Salary to the 19th March, 1965, at \$251: — per month, and from the 20th March, to the end of the month at \$92: — per month (the pay of an unqualified assistant mistress); she did not accept that payment, but

brought suit in April, 1965; and in October, 1965, accepted that amount and further payments at \$92:— per month as an unqualified assistant teacher, without prejudice to her case.

Her claim is for —

- (a) a declaration that the purported rescission of her appointment as a Grade I Class I teacher was ultra vires and of no effect;
- (b) a declaration that she is entitled to receive from the Government in respect of her services as a teacher at the school salary at the rate of \$251:— per month;
- (c) a declaration that the purported reduction of her salary from \$251:— per month to \$92:— per month is ultra vires and of no effect.

The learned trial Judge refused to declarations sought with costs to the defendant to be taxed.

It may be useful here to look at the pleadings to see what the parties said took place after ‘the letter’ was received. It was the Appellant’s case that since the 19th March, 1965, she was offered payment as an unqualified assistant mistress with salary at the rate of \$92: —, and that the purported reduction of her salary and status was effected without lawful authority. The Defence said: that after her certificates were evaluated, she was on the 25th March, 1965, appointed as an unqualified assistant mistress with effect from the 20th March, 1965, at a salary of \$84: — per month in the scale \$72 x 4 — \$104 x 6 — \$116, and that she was awarded two increments on the scale as a result of her one-year overseas training, which were made payable with effect from the 20th March; and that she was not entitled in law to the Orders claimed as (according to the particular pleading) “the questions of her appointment and/or reduction of salary are matters which are exclusively within the discretion of the Crown.”

Although inelegantly expressed I have no doubt the intention was to notify the opposite party that the defence would contend that there was a right, at the discretion of the Crown, to terminate the Plaintiffs appointment; alternatively to reduce her salary.

In her evidence the Appellant said:

“When I went to receive my salary (that is for the month of March) the pay slip had one salary to the 19th March, 1965, at \$251:— per month and another salary at \$92:— per month calculated from the 20th March, 1965, to the end of the month. . . . From what was said in the letter on the 19th and because of the short payment I came to the conclusion that my status was reduced.”

No evidence was led for the Defence. Although the Appellant did not expressly deny that on the 25th March she was appointed as an unqualified assistant mistress at a certain salary, the inference to be drawn from her evidence is that she received no such communication, and the matter must

## NOBREGA v. ATTORNEY-GENERAL

be examined in that light. Perhaps, (in language not unfamiliar to Government departments) ‘the matter is still under consideration,’ or ‘a reply will be sent in due course.’

It is the appellant’s case that, in law, she is entitled to payment of salary at the rate of at least \$251: — per month from the 20th March, 1965, onwards, and that, the payment of \$92:— per month cannot be justified.

To test the validity of the arguments presented on her behalf, I intend to consider the following questions:—

- (1) Does the Crown have the right to dismiss the Appellant at pleasure?  
If the answer to (1) is in the affirmative,
- (2) Was she in fact dismissed?  
If the answer to (2) is in the affirmative,
- (3) Did she in any way suffer any infringement of any legal rights?

It is well to observe here that the Appellant’s appointment was not for any fixed term; nor did it contain any provision purporting to limit dismissal on the part of the Crown; and no statute was applicable to the relationship between herself and the Crown.

Counsel for the Appellant conceded that the right of the Crown to dismiss at pleasure was to be implied in the Appellant’s contract of service (this he also did at the trial). However, I propose to examine briefly the state of the law.

In the absence of special statutory provisions, all contracts of service under the Crown are terminable without notice on the part of the Crown. This is so, even though there be an express term to the contrary in the contract: for the Crown cannot deprive itself of the power of dismissing a servant at will, and that power cannot be taken away by any contractual arrangement made by an Executive Officer or Department of State (See HALSBURY 3rd Ed. Vol. 7, pg. 252, para 547).

The principle first emerged in the case of Military servants (See *Re Poe* (1833) 5 B & Ad. 681, 688; *Grant -v- Sec. of State for India* (1877) 2 C P D 445, *De Dohse -v- R* (1866) 3 T L R 114); then later for civil servants (See *Shenton -v- Smith* (1895) A.C. 229; *Dunn -v- R* (1896) — Q.B. 116; *Gould -v- Stuart* (1896) A.C. 575).

In *Shenton -v- Smith* the Privy Council considered that:—

“unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagements, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law-suit, but an appeal of an official or political kind”.

In the Court of Appeal in *Dunn - v - The Queen* it was held that there was no remedy for a public servant who was appointed for the fixed term of 3 years, but who was dismissed within that period. LORD ESHER M.R. at pg. 118 quoted with approval the following opinion of LORD WATSON in the House of Lords in *De Dohse -v- Reg.* (supra).

“Such a concluded contract, if it had been made, must have been held to have imported into it the condition that the Crown has the power to dismiss . . . if any authority representing the Crown were to exclude such a power by express stipulation, that would be a violation of the public policy of the country and could not derogate from the power of the Crown.”

He then went on to say; that the case of *Shenton -v- Smith*, appeared to him, to be “really conclusive of the matter”.

LORD HERSCHELL at pg. 119 was of a similar opinion that —

“there must be imported into the contract for the employment of the petitioner the term which is applicable to civil servants in general, namely, that the Crown may put an end to the employment at its pleasure.”

and KAY, L.J., at pg. 120 and 121, said:

“It seems to me that the continued employment of a civil servant might in many cases be as detrimental to the interests of the State as the continued employment of a Military Officer . . . . In my opinion Sir Claude Mc Donald had no power to appoint a subordinate officer for a definite time, so as to bind the Crown not to dismiss him before that time expired.”

In *Rodwell v. Thomas* 1944 K.B. pg. 596 at p. 602 TUCKER J., treated the rule as clearly settled and said:—

“The authorities show not only that, prima facie, an established civil servant can be dismissed at pleasure, but that the court will disregard any term of his contract expressly providing for employment for a specified time or that his employment can only be terminated in specific ways. The court regards such a provision in a contract as a clog on the right of the Crown to dismiss at pleasure at any time.”

At common Law the trend of Judicial decisions and dicta seems to be that on grounds of Public policy, there is an implied term in such contracts of service, that servants are dismissable at the pleasure of the Crown; and that this right is unfettered, except limited by Law itself.

Since *Rodwell v. Thomas* support for this rule has been forthcoming from a number of cases including *Terrell v. Sec. of State for Colonies* (1953) 2 Q.B. pg. 482; *Inland Revenue Commissioner v. Hambrook* (1956) 1 A.E.R. 807 and *Riordan v. War Office* (1959) 3 A.E.R. 553, affirmed on appeal (see 1960) 3 A.E.R. 774).

## NOBREGA v. ATTORNEY-GENERAL

The last mentioned case amply illustrates the wide application of the rule. There DIPLOCK J., said

“It is well established law that the Sovereign, through her officers (in this case the Commanding Officer) can terminate at pleasure the employment of any person in the public service except in special cases where it is otherwise provided by law: (per Lord Goddard C J. in *Inland Revenue Commissioners -v- Hambrook* 1956 1 A.E.R. 807 affirmed (1956) 3 A.E.R. 338). Therefore, unless the plaintiff can show that his is a special case where it is otherwise provided by law, he can have no cause of action. Even if his employment was determined summarily by the Commanding Officer on behalf of the Crown without the plaintiff’s consent . . . ; but in so far as the regulations do purport to take away the Crown’s right to dismiss the plaintiff summarily, whether by way of contract or otherwise, they are in my view void; per Halsbury L.C. (obiter) in *De Dohse v. R*; Tucker J. in *Rodwell v. Thomas* and Lord Goddard C.J. in *Terrell -v- Secretary of State for the Colonies*. These cases were based upon contract, as was *Dunn v. R*, which is a direct authority binding upon me, that such a provision purporting to exclude the Crown’s power to terminate services at pleasure, if purporting to be made by way of contract as distinct from statute, is ultra vires and so void: see also *Gould v. Stuart* . . . . In my view the law is correctly stated by Mr. George STUART ROBERTSON at p. 359 of his book (CIVIL PROCEEDINGS BY AND AGAINST THE CROWN), where he says:

“The Crown’s absolute power of dismissal can only be restricted by statute and anything, short of a statute, which purports to restrict it, is void as contrary to public policy. I hold therefore that the plaintiff can have no cause of action arising out of termination of his employment.”

In the absence of any statutory limitation (and there was none in this case) to take away, abridge, or affect the right, one sees that it could even be used arbitrarily, so that where it is desired to provide safeguards against the possibility of abuse, legislation must so enact to achieve this end.

The answer to the first question then must be in the affirmative.

It will now be necessary to consider the second question, that is, whether in fact the Appellant was dismissed. The submission of Counsel for the Appellant was: that the right of the Crown to dismiss the Appellant was not exercised; that the purported rescission of the Appellant’s appointment as a Grade I Class I teacher was ultra vires and of no effect; because the contract of service with the Crown could only have been rescinded for such a reason as would have permitted the rescission of any other contract, and such ground as for example, fraud or misrepresentation or the like, in the formation of the contract was alleged and/or proved.

The arguments of counsel on both sides before the trial judge, and in this court proceeded on the basis that there was a contract of service between

the Appellant and the Crown. Without pausing to enquire whether this is strictly so or not, I propose to assume in favour of the proposition, and deal with all questions as though a contract did exist.

Such a contract could only be found in the letter of appointment which contained the terms which the Appellant accepted. Put shortly, it could only have been: on the part of the promisor, "I will employ you as a Grade I Class I teacher at a certain salary, on a certain scale": on the part of the promisee: "I will serve you as such on those terms and conditions"; this (of course) subject to the promisor's right at law to dismiss at pleasure.

If for any reason this appointment should cease to subsist, the contract must necessarily cease to exist. This, could occur by repudiation, which may be lawful and justified, or wrongful and unjustified. Whichever it be, it will determine the contract, and will entitle the other party to treat the contract as at an end. (See MODERN LAW OF EMPLOYMENT BY FRIDMAN at 479). Repudiation may take the form of acts and conduct, or may arise from words, or a combination of both. Where it comes from some documents, the question whether the writing amounts to a repudiation is one of law.

In this case therefore, apart from the acts and conduct of the parties, the construction of 'the letter' must be of considerable importance together with its implications. However, before coming to that, it may not be amiss to see what the right to rescind really means.

This right to rescind is a right which a party to a transaction sometimes has to set that transaction aside, and by entirely rejecting and repudiating it, no longer makes himself bound thereby.

That right arises in different ways and not always with the same consequences.

BOWEN L.J., in his judgment in *Boston Deep Sea Fishing and Ice Co. -v- Ansell* (1888) 39 Ch. D. 339 refers to three distinct senses in which it is used and occurs when he said:

"Some confusion always arises, as it seems to me, from treating these cases between master and servant as instances of a rescission of the original contract. It is not a rescission of the contract in the sense in which the term ordinarily is used – namely, that you relegate the parties to the original position they were in before the contract was made. That cannot be, because half the contract has been performed. It really is only a rescission in this sense, that an act occurs which determines the relation of master and servant for the future, and you may regard that determination in two ways; it is either a determination in conformity with the rights of the master which arise under the contract itself, there being, as I have said, in every contract of service an implied condition that if faithful service is not rendered the master may elect to determine the contract, and the determination takes place on that implied condition; . . . or you may regard it under the

## NOBREGA v. ATTORNEY-GENERAL

more general law, which is not applicable to contracts of service alone — you may treat it as the wrongful repudiation of the contract by one party, being accepted by the other, and operating as a determination of the contract from that time — that is, from the time the party who is sinned against elects to treat the wrongful act of the other as a breach of the contract, which election on his part emancipates the injured party from continuing it further.”

Counsel for the Appellant in making his above submission undoubtedly had in mind the sense in which the term ordinarily is used, which is adequately explained by LORD ATKINSON in *Westville Shipping Co. v. Abram Steamship Co. Ltd.*, 1923 A.C. 773 as follows:—

“Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in *statu quo ante* and restores things, as between them, to the position in which they stood before the contract was entered into. It may be that the facts impose upon the party desiring to rescind the duty of making restitution in integrum. If so, he must discharge this duty before the rescission is, in effect, accomplished: but if the other party to the contract questions the right of the first to rescind, thus obliging the latter to bring an action at law to enforce the right he has secured for himself by his election, and gets a verdict, it is an entire mistake, I think, to suppose that it is this verdict which by itself terminates the contract and restores the antecedent status. The verdict is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified, was effective, and put an end to the contract.”

No question of fraud, misrepresentation or the like having arisen the use of the term in this sense obviously could not apply. If it were the only sense recognised by law counsel’s argument would merit serious consideration, but, this is neither by authority, or, common sense, so, as BOWEN L.J. has pointed out in *Boston Deep Sea Fishing Co. v. Ansell*, it has another sense in which there is a determination of the relation of master and servant for the future, in conformity with the rights of the master which arise under the contract itself.

The right to rescind in this case does not spring from any arbitrary or fanciful assertion; it is the logical consequence of the right to dismiss at will given by law to the Crown and which is said to be implied in such a contract of service with the Crown; it is the instrument to achieve a purpose, or bring about a result, countenanced by law and must be given the same recognition and acknowledgement as if it were an express term of the contract.

In rescinding, the determination takes place on that implied condition in the same way as a master may elect to determine a contract of service when a servant is in breach of an implied condition to give faithful service.

Was there then any rescission of the Appellant's appointment which brought about her dismissal? The answer to this question will be forthcoming from a construction of 'the letter' already herein set out at length. The crucial intimation there was:

"I have to inform you that your appointment as a Grade I Class I teacher has been rescinded as from today 19th March, 1965."

The language here is unequivocal. There could be no doubt as to the meaning of the words employed. They told the Appellant bluntly that her appointment was brought to an end. The annulment was unconditional; a reason was, but need not have been given. As from the 19th March, then, the Appellant ceased, to be a Grade I Class I teacher. The salary which belonged to that appointment became lost to her; and its scale inapplicable. This meant that the further performance of the contract under her original appointment was no longer possible; that contract was discharged; an end was put to it; and she stood dismissed from that post.

And when once a contract is rescinded in any way provided or permitted by law it is completely discharged and cannot be revived (see *R. v. Inhabitants of Gresham* (1786) 1 Term Rep. 101).

So that she would have had to vacate her office immediately after the extinguishment of that appointment, unless a new opportunity of service was offered and accepted which would result in continuity. This offer was made in the second paragraph of 'the letter'; she accepted and resumed employment upon the terms and conditions there stated. She was under no obligation to do so since whatever contract there was originally was swept away after rescission. In effect she was really being told:

"we will have you as an unqualified assistant mistress pending the submission of the documents asked for" — "If you submit these documents then your status as a teacher will be determined; after which a new letter of appointment will be issued to you."

The intention was that she should continue on a temporary basis, if she wished to do so, at a certain rate of pay until (a) she had complied with the demand to submit documents and (b) those documents were evaluated to determine her future position. If she did not wish in the first instance to give of any further service then that would have been the end of the matter; but if, however, she was minded to serve temporarily and submit the documents requested, then the door was left open for the offer of anew appointment, which, again, she would have the option of refusing, if it did not suit her.

## NOBREGA v. ATTORNEY-GENERAL

It may well be that the language in the second paragraph could have been more relaxed and less imperious; but I do not consider that this has in any way jeopardised the meaning which arises so naturally. In essence there was a proposal on terms, so that when the Appellant resumed duties albeit the same duties, it was certainly not on the same conditions as had hitherto prevailed.

When she did so, she knew:—

- (a) That her original appointment had been rescinded as from the 19th March; that she was no longer a Grade I Class I teacher, with the pay pertaining thereto;
- (b) That if she continued to work thereafter it would be as an unqualified assistant mistress, with payment on that basis;
- (c) That if she submitted her documents review of her position with the offer of a new appointment.

When therefore, with the knowledge which she had as set out at (a), (b), and (c), she served further after the rescission of the original appointment was communicated to her, and then, without reservation, and proceeded to submit her birth and academic certificates, this conduct could only be interpreted as an unqualified acceptance of the proposals contained in the second paragraph of the letter. I am coerced to conclude that she accepted a new appointment from the 19th March; and by complying with, and acting upon, the request to submit the documents asked for, she was seeking to be considered for yet another. She had made a deliberate choice and elected to continue on a new basis. Her only entitlement then would be to have what is specifically stated in ‘the letter’.

I cannot agree that rescission was there used to mean less than it does; it has a precise meaning.

In considering whether there was repudiation, the test laid down by LORD COLERIDGE C.J. in *Freeth v. Burr* (1874) L.R. 9 C.P 208 and approved in *Mersey Steel & Iron Co. v. Naylor, Benzon & Co.* (1884) 9 A.C. 434 is –

“Whether the acts and conduct of the party evince an intention no longer to be bound by the contract.”

In this case this intention was evinced by an express declaration by the employer that the particular appointment was determined which meant that services under that appointment could no longer subsist. Also, at the end of that month the Appellant’s pay slip clearly confirmed this declaration by providing for payment as a Grade I Class I teacher only up to the time of the rescission of that appointment. There was no necessity to have said in ‘the letter’: “You have been or are dismissed as a Grade I Class I teacher”. The words used sufficiently indicate this. In *Vos -v- Rubel Bronze & Metal Co. Ltd.* (1918) 118, L.T. pg. 348 an employer suspended his servant from the position which he held as a general manager and there-

after prevented him from exercising his duties or giving orders, the ground alleged being inefficiency, with a view to carrying out a full investigation. MC CARDIE J. there said —

“Dismissal may be effected by conduct as well as words. A man, in my opinion, dismisses his servant if he refuses by word or conduct to allow the servant to fulfill his contract of employment . . . I see no distinction in such a case as the present between a wrongful repudiation by the defendants of their contractual obligations and a wrongful dismissal in the ordinary sense of the phrase.”

Rescission does not vary, it dissolves. Any contract rooted in an appointment must be dissolved with the dissolution of the appointment, and any new agreement which follows on the original cannot revive it.

As LORD MANSFIELD C.J. said in *R v. Inhabitants of Gresham* (1786) I Term Report 101):

“If it appear the contract has been once dissolved, it cannot be set up by a new agreement.”

There is nothing to prevent the Crown from dismissing and re-employing subsequently, or, immediately afterwards, that is, dismissing to dispense with services pertaining to a particular status, which carries a particular rate of pay, with or without reasons for so doing, in order to re-employ at another level, and, another rate of pay; as for example, to dismiss a Grade I Class I teacher at \$251:— per month in order to re-employ the same person immediately as an unqualified assistant mistress at \$92:— per month. Just as it could be for good reason, so also it could be malicious and vindictive; but, as long as this absolute right to dismiss remains, to probe the motivation would be useless, except some statutory provision exists to ground dismissals in a legal way for cause only.

The learned trial judge in his Judgment at first approached the issue somewhat illogically when he said:—

“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 it’s servant”.

The question posed does not follow from what both counsel were able to agree upon.

Later the learned Judge went on to say —

“In the present case Ex. “F” (‘the letter’) clearly communicated that the plaintiff’s appointment as a Grade I Class I teacher has been rescinded as from the 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 the new appointment, subject to her rights being determined by the court. She can still refuse to serve if she wishes.”

## NOBREGA v. ATTORNEY-GENERAL

Although it was appreciated that there was a ‘rescission’ and acceptance of a ‘new appointment’, yet the consequence of this was not fully explored. If the Appellant (as the learned Judge held) could have exercised the right to leave the service, was it not because of the ‘rescission’ of her original appointment, which constituted a dismissal therefrom? And also was it not because there were no subsisting ties which bound her to the Crown?

Was not the offer of ‘A new appointment’ and acceptance thereof, confirmatory of a termination of the ‘first appointment’ which it is claimed, still exists? If the rescission was not *ultra vires*, then what else could it have effected, but a dismissal? Any re-employment after dismissal, even if it follows immediately afterwards creates and establishes a fresh relationship distinct from and independent of that which originally existed, and under these circumstances there could be no question of ‘reducing’ the former salary; The device of dismissal and re-employment could be legitimately used to bring about a reduction in status and salary, provided the servant agrees to serve again. It is within his province to say: “I do not wish to serve you any longer – I will not accept a lesser status or salary than I had before.” In this case when the Appellant served after rescission (as was pointed out before) she did so with full knowledge of the conditions applicable, set out in paragraph 2 of the letter. If the termination was not *ultra vires* and was effective then the fact that she did not uplift Her salary at the end of the month, or did so without prejudice months after, cannot affect the situation; she could not have been forced to serve, but she did.

In *Worthington v. Robinson* (an unsuccessful action for damages for loss of salary against a superior officer who had reduced the plaintiff in rank), RIGBY L. J. said: —

“I have never heard of such a thing as a Civil Servant, holding office at pleasure, having the right to question the acts of those Civil Servants who had 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 re-appointment.”

There, the learned judge was treating the reduction in rank as a re-appointment at a lower salary following on an implied dismissal. Although this statement was unnecessary, for the purpose of the decision, since the Inland Revenue Regulations made express provisions for a reduction in rank, yet, it seeks to ascertain whether in the absence of express language which amounts to a dismissal, ‘what has happened’ could be treated as ‘a dismissal’, and whether what purports to be the continuation of the original employment, is not in reality a ‘new appointment’. I find this to be a very useful form of approach.

The second question as to whether the Appellant was in fact dismissed must be answered in the affirmative.

On the remaining question counsel argued that the Appellant’s right to the contractual salary is a right of property which was protected by Article

12 of the then Constitution of British Guiana (now article 8 of the Constitution of Guyana) and the unilateral action of the Crown in depriving the Appellant of the contractual salary except in accordance with a term of the contract expressed or implied was a violation of the said article rendering the deprivation unconstitutional and illegal.

Assuming the contractual salary is a right of property, so protected, the significant words in this submission are 'except in accordance with a term of the contract expressed or implied'. Since in this case there exists the right to dismiss at will *ex hypothesi*, there could be no unconstitutional deprivation of any right or property; this right to have will cease as a result of the exercise of that right of dismissal.

In *Reilly v. The King* (1933) 150 The Law Times at page 384, the appellant was in 1928 appointed a member of the Federal Appeal Board which had been constituted by an Act to amend the Pensions Act (Cap. 62 of the Statutes of Canada, 1923) for a term of five years. By an Act to amend the Pensions Act passed in 1930 the Federal Appeal Board was superseded by a Pensions Tribunal and a Pensions Appeal Court. Neither the appellant nor any of the members of the old Board were appointed to the new tribunal or court, nor was any compensation paid to them. The appellant accordingly presented a petition of right alleging that in breach of contract he had been dismissed and claimed damages. It was held:

That so far as the rights and obligations of the Crown and the appellant rested on statute, the office held by the appellant was abolished and there was no statutory provision made for holders of the office so abolished. So far as the rights and obligations rested on contract, further performance of the contract had been made by statute impossible, and the contract was put an end to. In the result, therefore, the appellant had failed to show a breach of contract upon which to found damages.

LORD ATKIN said at page 386:—

“Finally, and almost inevitably in such a case, an appeal was made to the British North American Act, and it was said that legislation abolishing the office without compensation was an interference with “property and civil rights”. But, as before, if the right was in itself determinable by statute, there was no interference with it.

It would be strange that the Dominion should have power to create an office, but not power to abolish it except on the terms of awarding compensation apparently for the full term of the original office. The case on this point may be put in two ways. Either the Act of 1930 did not interfere with any civil right, or, if it did, its interference was necessarily incident to the undoubted power of the dominion to abolish the old and create the new office. For the reasons above given the former seems preferable, but neither will suffice”.

## NOBREGA v. ATTORNEY-GENERAL

I fail to see in this case what property or right over property was compulsorily taken possession of by the Crown, or how it could be said that there was interference with property rights, when by a justifiable step in law, the original entitlement became lost.

In the result therefore I hold that the Crown had the right in this case to dismiss at pleasure; that such a dismissal did take place and that consequent upon this dismissal there was no infringement of any legal right which the Appellant had under the Constitution or otherwise.

I would dismiss the appeal with Costs.

CUMMINGS, J. A. As the learned trial judge stated in his judgment, the facts of this case were in short compass and not disputed.

The appellant, a married woman, from the time of leaving school up to the time she opened her own school, the "Children's Alma Mater", filled several important secretarial posts both in and out of the local Civil Service and in Trinidad. She has written and published many short stories, poems, booklets and a Children's Reader. She served on the Publicity Committee of the Ministry of Education for two years. The work of that Committee was evaluating and publishing in relation to the promotion of Education. She was a teacher of music and singing, and held several awards for her musical compositions. She wrote a musical story for children.

In 1963 on a submission by the Government of British Guiana she was awarded a Commonwealth Bursary by the United Kingdom Government. She spent one year at the Institute of Education and the University of London doing a full-time course for the academic year 1963-1964. She said:—

"We had to learn to write a book, we had to learn mechanical side as well as the professional side. We also had to learn the process of printing, and noting paper, selecting material, grading, and the entire process of assimilation of the written work by a child to enable them to grasp without forcing them. This is the syllabus at the Institute of Education (tendered, and admitted by consent and marked Ex. "A"). In paragraph 5 contains the reference to the subjects. At the conclusion of the course I was awarded these two certificates (tendered, admitted and marked "B1" - "B2"). At the end of my course I got an offer from the Rose Bruford School of Speech and Drama. It was an offer to study Drama as a teaching aid but with special emphasis in writing plays for children. I was unable to take the offer because I decided to return to the country after receiving a letter dated the 15th October, 1964, from the Ministry of Education, British Guiana."

That letter is in the following terms:—

“Ministry of Education,  
Co-operatives & Social Security,  
21, Brickdam, Georgetown,  
British Guiana,  
15th October, 1964.

Dear Madam,

Mrs. Cecile Nobrega – Employment.

I am directed to refer to previous correspondence on this subject and to inform you that the Ministry had wished to offer you a position on its staff. The constitutional machinery which must be involved in this process is not now functioning and, regretfully, arrangements to create this new post had to be deferred to 1965.

2. In the meantime however, the Ministry is prepared to offer you, on your return to the country, a temporary appointment as a primary school teacher at the salary of about \$250.00 per month pending the creation of a suitable post.

3. Meanwhile, the Ministry will utilise your services in the field in which you have been trained.

Yours faithfully,  
(Sgd.) B. Hinds  
for Permanent Secretary

Mrs. Cecile Nobrega,  
1, Lancaster Avenue,  
Wimbledon, S.W. 19.”

The appellant was by another letter dated 11th December, 1964, this time addressed to The Manager of The Lodge Government School appointed by the Chief Education Officer, acting on behalf of the Ministry of Education of the Government of Guyana (then British Guiana) as a Grade I Class I mistress at the Lodge Government School with effect from 4th December, 1964. The terms of this letter were as follows:—

Ministry of Education,  
Co-operatives & Social Security,  
P.O. Box 63,  
Georgetown, British Guiana,  
11th December, 1964.

Dear Sir,

Lodge Government School — Staffing

The appointment of Mrs. Cecile Nobrega as Grade I Class I mistress is approved with effect from 4th December, 1964, subject to

## NOBREGA v. ATTORNEY-GENERAL

medical examination by a Government Medical Officer. Mrs. Nobrega will be informed later about the date of her medical examination by the Ministry of Health.

2. Details of age, qualifications etc., should be entered on the attached 'Statement of Particulars' and returned to this office as early as possible.

Salary at the rate of \$251.00 p.m. in the scale \$118 x 7 - \$195/ 211 x 10 - 251 x 7 - 258 x 10 - \$288. Mrs. Nobrega is seconded to the Ministry of Education.

Yours faithfully,  
(Sgd.) S. K. Singh,  
for Chief Education Officer.

The Manager,  
Lodge Government School."

She was duly informed, took up her appointment and served as a teacher in the said school. She received salary at the rate of \$251 per month from 4th December, 1964. In March 1965, she received the following letters:

"Ministry of Education, Youth,  
Race Relations and Community  
Development,  
21 Brickdam, Georgetown,  
British Guiana,

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 this 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,  
? Blackman  
for Chief Education Officer (g.)

Cecile Nobrega,  
61 Croal Street,  
Georgetown.

cc. Miss Doris Fraser,  
Manager, Lodge Govt. School,  
E.C. Demerara."

“Ministry of Education, Youth, Race  
Relations and Community Development,  
21 Brickdam, Georgetown,  
British Guiana  
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 1-7th March, 1965, I have to inform you that your appointment as 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,  
G.O. Fox  
Chief Education Officer (Ag.)

c.c. Manager,  
Lodge Govt. School.”

Mrs. Cecile Nobrega,  
61 Croal Street,  
Stabroek, Georgetown.

She continued to perform the same duties but refused to accept the reduced salary. On the 9th April, 1965, she instituted this action in the then Supreme Court (now High Court of Justice) and claimed for —

- “(a) 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 \$251.00 (two hundred and fifty-one dollars) per month;
- “(b) a declaration that the purported reduction of the plaintiffs salary by the Government of British Guiana acting by or through their servants and/or agents from \$251.00 (two hundred and fifty-one dollars) per month in respect of such service to \$92.00 (ninety-two dollars) per month is *ultra vires* and of no effect;
- “(c) further or other relief;
- “(d) costs.”

In October 1965 while the action was still pending, she accepted payment notifying the Ministry by letter that she did so without prejudice to her

## NOBREGA v. ATTORNEY-GENERAL

rights. She remained in the same teaching position and held it at the time judgment in the action was given in the court below.

The learned trial judge dismissed the action and gave judgment with costs in favour of the defendant.

From this judgment the appellant now appeals to this court. She does so on several grounds, but these can be conveniently merged into two questions:

- (a) Did a contract of employment subsist between the Crown and the appellant?
- (b) If so, could the Crown rescind the contract, or unilaterally vary it so as to effect a reduction of her pay?

The evidence does not disclose neither was it pleaded nor urged, that the appellant induced the contract by any false representation of fact with the intention that such fact should have been acted upon. If therefore the Chief Education Officer by his letter of 19th March, 1965, purported to rescind the Crown's contract with the appellant, such purported rescission was illegal and of no effect.

I agree with the submission of counsel for the appellant that "dismiss" within the meaning of the expression "the right to dismiss at pleasure" connotes a dispensation with services. It is a sending away, a removal from office or employment. Moreover, it seems that counsel for the Crown conceded that the Crown had not exercised its right to dismiss, but that the effect of the letter of March 1965 was a continuance in her employment but at a reduced pay. Indeed the learned trial judge in the course of his judgment said:—

"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 is whether or not the Crown can, without dismissal, reduce the salary of its servant."

It seems to me that implicit in that statement is a finding that there was no dismissal. Nevertheless the learned trial judge went on to find that —

"In the present case Ex. "F" clearly communicated that the plaintiff's appointment as a Grade I Class I teacher has 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."

The evidence does not in my view support the finding that a new appointment was offered to the appellant. The letter purported to rescind the appointment — an aspect with which I have already dealt in this judgment — and then went on to state that she "would be paid as an unqualified assistant

mistress.” Its effect was merely to reduce her pay. It stated nothing about the nature of her duties. Even if the letter could be interpreted as an offer of a new appointment she was under no obligation either to accept it or leave the service. I agree with Mr. Ramsahoye’s submission that she was perfectly free to hold the Crown to the payment of the contracted salary while continuing to perform the same duties, and that her refusal to leave the service and to seek redress in the courts could not be considered an acceptance of the reduced salary or of an appointment on different terms.

It was also conceded that the Education Code enacted in accordance with the provisions of the Education Ordinance, Cap. 91 applies only to Denominational Schools and Church Schools and not the Government Schools. Consequently, no statutory provisions applied to this appointment.

There are numerous authorities which established that in the circumstances of this case there subsisted a binding contract between the Crown and the appellant, subject to the Crown’s right – in the absence of statutory provision to the contrary – to terminate the service and consequently the right to salary, at pleasure. *R. v. Fisher*, (1903) A.C. p. 158; *Williams v. Howarth*, (1905) A.C. p. 551; *Riordan v. The War Office*, (1959) 3 A.E.R., p. 552; *Reilly v. R.* (1934) A.C. 176; *Gould v. Stuart*, (1896) A.C. 575.

In *Riordan v. The War Office*, (1959) 3 A.E.R., p. 552, DIPLOCK, J., said:

“These regulations seem to me to purport to lay down mutually binding terms of employment between the Crown and the employee, to which the assent of the employee has to be obtained on his entering into the service of the Crown. Whether this involves what is strictly a contractual relationship between the Crown and persons who have assented to serve subject to the regulations (as the Judicial Committee of the Privy Council appears to have thought it might in *Reilly v. R.*) or not, it seems to me that it is at least sufficiently analogous to a contractual relationship to make it proper for me to construe the regulations in the same way as I would the terms of a contract of employment. Applying these canons of construction, it seems clear that reg. 437, by providing for a specified period of notice of termination of his employment to be given to an employee by the Crown except in the specific case of casual employees, purports to exclude the Crown’s right to terminate the employee’s service at pleasure that is to say, at any time and without any previous notice, but in so far as the regulations do purport to take away the Crown’s right to dismiss the plaintiff summarily whether by way of contract or otherwise, they are in my view void: per Lord Halsbury, L.C. (obiter) in *De Dohse v. R.*; Tucker, J., in *Rodwell v. Thomas*; and Lord Goddard, C.J., in *Terrell v. Secretary of State for the Colonies*. These cases were based on contract, as was *Dunn v. R.*, which is a direct authority binding on me, and such a provision purporting to exclude the Crown’s power to terminate services at pleasure, if purporting to be made by way of contract as

## NOBREGA v. ATTORNEY-GENERAL

distinct from statue, was ruled against as *ultra vires* and so void: *Gould v. Stuart*.”

In the High Court of Australia in *Carey v. The Commonwealth* (1921) 30 C.L.R., p. 132, HIGGINS, J., in the course of his judgment said at p. 137:

“But it is said that there is no *contract* with the plaintiff – that the plaintiff was merely appointed, placed in a condition of service; and that certain correspondence between the department and the plaintiff which took place before the Gazette notice is not evidence. This correspondence (13th to 16th June) 1919 shows an offer to the plaintiff and an acceptance by him before the Gazette notice of appointment; and the defendant argues that this correspondence is not admissible, and that because it is not admissible, there is no contract proved. The Crown, it is said does not contract with its servants. In my opinion, both these arguments are wrong. The relation between the Crown and its servants involves a contract (cf. *Williams v. Howarth*).

In view of Crown Counsel’s concession of this point in the court below and in this court it is unnecessary to dilate upon it any further. The only question for determination now is whether the Crown could unilaterally vary the contract so as to effect a reduction of the appellant’s pay.

In coming to the conclusion that the Crown could legally do this, the learned trial judge relied on the following statement of PROFESSOR GLANVILLE WILLIAMS IN “CROWN PROCEEDINGS”:

“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.”

PROFESSOR WILLIAMS cites the judgment of RIGBY, L.J., in *Worthington v. Robinson*, (1897) 75 L.T. p. 446, as authority for that proposition. The latter said at p.

“I have never heard of such a thing as a civil servant holding office of 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 re-appointment.”

In that case, however, there was statutory provision for the reduction or discharge of any officer and the other judge, based his judgment on that. In those circumstances the statement of RIGBY, L.J., is no more than *obiter*; with which I respectfully disagree. Also with great respect, I do not agree with PROFESSOR GLANVILLE WILLIAMS that the Crown’s “right” to reduce its servant’s pay “follows as a logical consequence from the right to

dismiss at will". The reason for the Crown's overriding right to dismiss a civil servant at will, in spite of a term to the contrary in his contract, is stated in *Re-deriaktiebolaget Amphitrite v. The King* (1921) 3 K.B. 500 at pp. 5034: —

"The government cannot by contract hamper its freedom of action in matters which concern the welfare of the State. Thus in the case of the employment of public servants, which is a less strong case than the present, it has been laid down that, except under an Act of Parliament, no one acting on behalf of the Crown has authority to employ any person except upon the terms that he is dismissible at the Crown's pleasure; the reason being that it is in the interests of the Community that the Ministers for the time being advising the Crown should be able to dispense with the services of its employees if they think it desirable."

This reason cannot in my opinion be advanced for a reduction in pay. To say, therefore, that the right to reduce pay logically follows the right to dismiss is a "*non sequitur*".

In my view in order to justify a reduction in pay – well intended compromise though it may be on the part of the Crown – there must be an enabling term in the contract or provision in a relevant statute; failing either of these, any variation of the contract must be mutual.

In *Hill v. Peter Gorman, Ltd.* (1957) 9 D.L.R. p. 124 the headnote reads as follows:—

"Indefinite hiring on commission basis – Subsequent withholding by employer of percentage of earned commissions as reserve for bad debts – Protests by employee but continuance in employment — Whether original contract properly varied – Plaintiff was employed by defendant as a salesman under a contract providing for an indefinite employment terminable on two weeks' notice and which fixed his remuneration as a stipulated rate of commission on nett sales. The contract included a restrictive covenant applicable for one year in respect of the area of employment should plaintiff's employment be terminated for any cause. Defendant was concerned about delinquent customers' accounts and, although plaintiff's contract did not so provide, defendant subsequently began to deduct (withhold) 10% of commissions, earned by plaintiff and by other salesmen as a reserve for bad debts. Plaintiff complained periodically about the deductions but remained in defendant's employ for over a year after they were initiated. In an action to recover the withheld commission, the trial Judge found that plaintiff had never agreed to have his commissions reduced by a reserve for bad debts and he preferred plaintiff's evidence to that of defendant's president. *Held*, on appeal, by a majority, the trial judge's findings of fact must be supported, and the judgment for plaintiff affirmed. *Per* J.K. Mackay, J.A.: Mere continuance in employment does not amount, in law, to an acceptance by an employee of unilateral

## NOBREGA v. ATTORNEY-GENERAL

variation by his employer of his contract of employment. Plaintiff was entitled, as he did, to insist on the original terms and defendant was bound thereby on its failure (in view of plaintiff's position) to terminate plaintiff's contract and offer him employment on new terms. *Per* Gibson J.A. dissenting: Plaintiff was at liberty to accept or reject the new terms of employment offered the salesman and, on his own evidence, he said he accepted 'because he had no alternative', that is, he chose to remain in defendant's employ and must be taken to have done so under the new terms. Defendant had given reasonable notice of its intention to set up the reserve for bad debts, and thus terminated the existing contract of employment."

MACKAY, J.A., in the Ontario Court of Appeal said at p. 131 *et seq.*—

"I am respectfully of opinion that it cannot be said, as a matter of law, that an employee accepts an attempted variation simply by the fact alone of continuing his employment. Where an employee attempts to vary the contractual terms, the position of the employee is this: He may accept the variation expressly or impliedly in which case there is a new contract. He may refuse to accept it and if the employer persists in the attempted variation the employee may treat this persistence as a breach of contract and sue the employer for damages, or while refusing to accept it he may continue in his employment and if the employer permits him to discharge his obligations and the employee makes it plain that he is not accepting the variation, then the employee is entitled to insist on the original terms.

"I cannot agree that an employer has any unilateral right to change a contract or that by attempting to make such a change he can force an employee to either accept it or quit.

"If the plaintiff made it clear to Gorman that he did not agree to the change made in September 1954, the proper course for the defendant to pursue was to terminate the contract by proper notice and to offer employment on the new terms. Until it was so terminated, the plaintiff was entitled to insist on performance of the original contract."

In *Fairthorn v. Territory of Papua*, 60 C.L.R. 772 the employment of an assistant resident magistrate was regulated by the Papua Act 1905-1934 and the Public Service Ordinance 1907. The plaintiff was reduced in rank by the Lieutenant Governor purporting to act under statutory provisions and was required to act as a patrol officer at a reduced salary. He brought an action for a declaration that the order reducing him in rank was invalid. Before trial the order was cancelled. On the day following the cancellation his appointment was terminated and he was appointed a patrol officer at a lower salary. He then claimed in a second action a declaration that he still held the office of assistant magistrate and that his dismissal was invalid. All the members of the High Court on appeal from a dismissal of the actions held that there could be no complaint about the termination of the employment. A majority held that the reduction was not in accordance with the

relevant statutory provisions and the plaintiff was given the costs of the first action which was considered to have been properly brought.

In *Powell v. The Queen*, (1873) 4 A.J.R. 144, it was held that a police sergeant irregularly reduced to the ranks could sue for the difference of pay. It is true that in that case the employment was governed by a statute which provided that "Every person who has taken and subscribed such oath" (the policeman's oath of office) "shall be taken to have extended into a written agreement with and shall be thereby bound to serve His Majesty as a member of the Force at the regular rate of pay of his rank." In my view, once a contract of service is established, the result is the same.

Neither principle nor binding authority, therefore supports the view that a contract between the Crown and its servants — except with regard to the implied term of dismissal at pleasure — must be construed in a manner different from the ordinary contract of Master and Servant.

In the circumstances I conclude that the reduction of the appellant's pay was in breach of her contract with the Crown, and therefore illegal.

Article 12 of the Constitution of British Guiana (now Article 8 of the Constitution of Guyana) provides:—

"12. (1) No interest in or right over property of any description shall be compulsorily acquired, and no such property shall be compulsorily taken possession of, except by or under the authority of written law and where provision applying to that acquisition or taking possession is made by such a law —

- (a) requiring the prompt payment of adequate compensation;
- (b) giving to any person claiming such compensation a right of access, for the determination of his interest in or right over the property and the amount of compensation, to the Supreme Court; and
- (c) giving to any party to proceedings in the Supreme Court relating to such a claim the same rights of appeal as are accorded generally to parties to civil proceedings in that court sitting as a court of original jurisdiction

(2) Nothing in this article shall affect the operation of any law of the Legislature in force immediately before the date when this Constitution comes into force, or the making after that date and operation of any law which amends or replaces any such law as aforesaid and does not —

- (i) add to the interests, rights or property that may be acquired or taken possession of;
- (ii) add to the purposes for which or circumstances in which any interest, right or property may be acquired or taken possession of;

## NOBREGA v. ATTORNEY-GENERAL

- (iii) make the conditions governing entitlement to any compensation or the amount thereof less favourable to any person having any interest in or right over any property; or
- (iv) deprive any person of any right such as is mentioned in subparagraph (b) or sub paragraph (c) of paragraph (1) of this article

(3) Subject to the provisions of paragraph (5) of this article, nothing in this article shall be construed as affecting the making or operation of any law so far as it provides for the acquisition or taking of possession of property —

- (a) in satisfaction of any tax, rate or due;
- (b) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence;
- (c) as an incident of a lease, tenancy, mortgage, charge, bill of sale or contract;
- (d) of the Amerindians of British Guiana for the purpose of its care, protection and management;
- (e) by way of the vesting and administration of trust property, enemy property, or the property of persons adjudged or otherwise declared bankrupt, persons of unsound mind, deceased persons, or bodies corporate or unincorporate in the course of being wound up;
- (f) in the execution of judgments or orders of courts;
- (g) by reason of its being in a dangerous state or injurious to the health of human beings, animals or plants;
- (h) in consequence of any provision with respect to the limitation of actions; and or
- (i) for so long as may be necessary for the purposes, of any examination, investigation, trial or inquiry, or, in the case of land, the carrying out of work thereon for the purpose of soil conservation.

(4) Nothing in this article shall be construed as affecting the making or operation of any law for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property interest or right is held by a body corporate which is established directly by any law in force in British Guiana and in which no moneys having been vested other than moneys provided by any Legislature established for British Guiana.

(5) The resumption of possession by or on behalf of the Crown of any property expressed (in whatever manner) to be held by any person during Her Majesty's pleasure otherwise than by reason of a

breach of any condition of defeasance subject to which such property was held as aforesaid shall be deemed to be a compulsory taking of possession of such property for the purposes of this article:

Provided that such resumption of possession shall not be required to be authorised by a written law.”

The illegal reduction of the appellant’s pay resulted in an unauthorised compulsory taking of the appellant’s property in violation of this provision and is consequently void and of no effect.

In *Dyson v. Attorney General* (1912) 158 where a similar declaration was sought FLETCHER MOLTON, L.J., said at p. 168:—

“I think that an action thus framed is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions. Such questions are growing more and more important, and I think of no more suitable or adequate procedure for challenging the legality of such proceedings.”

This procedure is also in my view most suitable and adequate in the instant case. See also *Lillyman et al v. Attorney General & Commissioner of Inland Revenue*, (1964) L.R.B.G. 15 affirmed by the British Caribbean Court of Appeal, (1964), 7 W.I.R., p. 496, in which I expressed the same view.

Accordingly, I would allow the appeal, set aside the judgment and order of the learned trial judge, enter judgment for the appellant and declare that —

(a) The appellant’s contract of service with the Government of British Guiana (now Guyana) as a teacher at the Lodge Government School — as evidenced in the letters from the Ministry of Education — (i) No. 1/54/6/482 dated 15th October, 1964, addressed to Mrs. Cecile Nobrega; (ii) No. 2/82/83/340 dated 11th December, 1964, addressed to the Manager, Lodge Government School, subsists.

(b) The purported reduction of the appellant’s salary effected a compulsory taking in violation of Article 12 of the Constitution of British Guiana, now Article 8 of the Constitution of Guyana and was therefore void and of no effect.

(c) The appellant is entitled to receive from the Government of Guyana in respect of her services as a teacher at Lodge Government School including her period of secondment to the Ministry of Education, salary at the rate of \$251: (two hundred and fifty-one dollars) per month as from 4th December, 1964.

The appellant should have her costs in this court and in the court below certified fit for counsel.

*Appeal allowed.*