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THE COURT OF APPEAL

AND

THE HIGH COURT

EDITED BY

K. M. GEORGE, ESQ.,

CHIEF JUSTICE

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CORRIGENDUM

- p. 30 — Line 6 of headnote: 'outgoings' instead of 'outgoing'
- p. 238 — 'C.J.' after Bollers not 'C.H.'
- p. 460 — Line 3 of headnote: 'of assets should be deleted'.

THE HON. MR. JUSTICE
FRANCIS VIEIRA

— Puisne Judge

THE HON. MR. JUSTICE
KENNETH GEORGE

— Puisne Judge

THE HON.
MR. RALPH MORRIS

— Puisne Judge
(acting) with
effect from 14.10.68

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JAI MANGAL v. RAMKHELLAWAN AND ETWARIA

[High Court in Chambers (Mitchell, J.), February 28, March 21, April 22,
May 13, October 24, 1967.]

Practice and Procedure — Specially endorsed writ — Application to amend statement of claim after affidavit of defence filed — Amendment not necessary for determination of central issue between parties.

Practice and Procedure — Desertion of action — Effect of interlocutory proceedings — Rules of High Court, O. 32 rr. 1, 3, 8.

On the 30th June 1966 the plaintiff filed a specially endorsed writ, in which he claimed from the defendants a sum alleged to be due as capital and interest on a certain overdue promissory note. In his particulars he stated that a grosse transport was left as collateral. This was confirmed by the defendants in their affidavit of defence which was filed on the 5th August 1966.

On the 10th February, 1967, the plaintiff filed a summons in which he sought leave to amend the particulars of his statement of claim to delete the averment that a grosse transport had been left as collateral. Under O. 32 r. 8(1) a cause or matter is deemed deserted if no request for hearing is filed within six months after the expiration of the period fixed for filing such request. The six month period expired on the 19th March 1967, when the plaintiff's summons was still pending.

HELD: (i) the amendment sought was not necessary for the purposes of determining the real issue between the parties viz. whether the defendants had jointly and severally made a promissory note in favour of the plaintiff and whether payment was overdue;

(ii) as interlocutory proceedings were filed and pending during the six month period after the expiration of the period fixed for filing a request for hearing under O. 32 r. 3(2), the matter could not become ripe for hearing and, therefore, was not deserted.

Application dismissed.

B. S. Rai for the plaintiff.

D. C. Jagan for the defendants.

MITCHELL, J.: The plaintiff's original statement of claim was against the defendants jointly and severally for the sum of one thousand five hundred and eighty-four dollars (\$1,584.00) being capital and interest due owing and payable by the defendants to the plaintiff on a certain overdue promissory note made at Maryville, Leguan, Essequibo on 1st July, 1965 by the defendants, jointly and severally in favour of the plaintiff.

The particulars of the note were set out in the plaintiff's statement of claim, and at number eight (8) of the particulars it is stated "a grosse transport was left as collateral."

This statement of claim was filed on 30th June, 1966.

On 5th August, 1966, both defendants filed an affidavit of defence and at para. six (6) of that affidavit of defence it was sworn and stated by the defendants —

"That at the time of signing the said note for (\$1,000.00) one thousand dollars, we were required to give a grosse transport as collateral security."

From that para. 6 of the affidavit of defence and the particulars of the plaintiff's statement of claim it would appear that it was a fact that a grosse transport was given as collateral by the defendants to the plaintiff, and this was initially admitted by the plaintiff.

The plaintiff subsequently filed an application which was returnable for 14th February, 1967, requesting that he be granted leave to amend the said para. 8 (eight) of the particulars contained in the statement of claim by deleting "a grosse transport was left as collateral" and inserting "nil" in the aforesaid para. 8.

It must be to be appreciated that this amendment sought was not in the nature of an amplification, or, clarification of an existing fact asserted, or in issue, but rather what would amount to a deletion, an extinguishing of a fact which to all intents and purposes existed not only as far as the said plaintiff was concerned, but the defendants also, and on which the defendants based their defence and by means of which they hoped to be able to resist the plaintiff's claim.

JAI MANGAL v. RAMKHELLAWAN AND ETWARIA

It is appreciated that amendments may be made at any stage of the proceedings for the purpose of determining the real questions in controversy “between the parties to any proceedings, or of correcting any defect or error in any proceedings” and as a general rule however late the amendment is sought to be made it may be allowed if it will not cause the opposite party some loss, injury or prejudice the opposite party in some way, or to such an extent as cannot be compensated for by costs or otherwise, or would not in the opinion of the court work an injustice to the other party.

In the instant case the amendment sought, to my mind having regard to the plaintiffs statement of claim, the affidavit of defence and the plaintiff’s affidavit in support of his application is not necessary for the purpose of determining the real questions in controversy between the parties in this matter i.e. whether the defendants jointly and severally made the promissory note in favour of the plaintiff and whether payment is due on the said note or not.

To my mind also, there is more than a slight delay in making this application for the amendment to the statement of claim, and it must be obvious to all the parties in this matter that if the plaintiff was acting in good faith he could have easily, and indeed, without any difficulty at all made this application at a much earlier stage in the proceedings, and should not wait until the defendants had revealed the fact which is a cornerstone of their defence. I do not think that the plaintiff is acting in good faith in the circumstances at this stage and whether he is really, may be still revealed at the trial on the hearing of evidence, when it would still be possible if the court is satisfied that the justice of the case requires it, to grant the amendment with such consequences as the court considers necessary and having regard to the effect of any amendment which when duly made takes effect not from the date when the amendment is made but from the date of the original document which it amends. “What stood before amendment is no longer material before the court and no longer defines the issues to be tried”. per HUDSON, L.J. in *Warner v. Sampson* [1959] 1 Q.B. at p. 321.

Again, this amendment sought is so palpably inconsistent and in such contradiction with the original para. eight (8) of the statement of claim that to my mind, it raises grave doubts as to whether such a statement in para. eight (8) of the statement of claim deliberate and intentional as it was at the time, mellowed by the time from 30th June, 1966 to 10th February, 1967 could ever have been made by mere inadvertence. To my mind it does not seem to be a mistake or error. It is not an omission to say something. Rather it is an assertion of fact to all intents and purposes within his knowledge. To my mind there is no negligence or carelessness revealed in that fact itself or in the manner of asserting the fact.

To my mind granting such an amendment at that stage in those circumstances would appear an injustice to the defendants and I am not satisfied that the justice of this case required such an amendment at that stage. To my mind at this stage, it could possibly prejudice the rights of the defendants

in the action and one does not have to go into the respective rights of either party at this stage as this is an interlocutory application.

Accordingly, I disallowed the application for the amendment sought by the plaintiff with costs to the defendants.

When this application for an amendment to the statement of claim came up for consideration on 21st March, 1967, the defendants through their solicitor contended that the matter became deserted on 19th March, 1967 and it was, thus, not competent for the Court to make an order in the summons having regard to O. 32 r. 8(2) which states:

“When an action has been deemed deserted no further proceedings may be taken thereon, unless and until an order for revivor has been made by the Court or a Judge on the application of any party or a consent to revivor and a request for hearing signed by all the parties thereto have been signed.”

It is to be appreciated that if the contention of the solicitor of the defendants was to be held tenable in the circumstances it was necessary as a prerequisite to find that the matter became deserted.

O. 32 r. 8(1) states:—

“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.”

Thus the failure to file a request for hearing within six months after the time when that request should be filed renders a matter deserted.

When should a request for hearing be filed? The answer to this question is set out in O.32 r. 1(1) which states:—

“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.”

From the foregoing it would be appreciated that the ripeness for hearing of a matter is a necessary prerequisite for the filing of a request for hearing and that if the matter is not ripe for hearing, the plaintiff or other party in the position of plaintiff cannot effectively file a request for hearing.

When does a matter become ripe for hearing? The answer to that question is set out in O.32 r. 3 which states:—

“(1) ‘Subject as hereinafter provided a cause or matter shall be ripe for hearing when – (a) the defendant is in default of appearance or has failed to deliver a defence and the plaintiff has complied with the provisions of O. 11 or O. 25 as the case may be; (b) the pleadings have been closed by the delivery of a reply or if no reply has been delivered after the time for the delivery of a reply has expired; (c) an

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order has been made under O. 12 or under any other Order giving direction as to the trial of the cause or matter:

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

It follows, therefore, to my mind, from the foregoing that a cause or matter shall become ripe for hearing only when the conditions at O. 32 r. 3(1)(a) (b) or (c) have been fulfilled, and the words “subject as hereinafter provided” to my mind indicate that those conditions are “subject” to the operation of some other rule or sub-rule in O. 32, and since O. 32 r. 3(1) (a), (b) and (c) do not in themselves indicate that to which they are “subject”, one must look to a rule or sub-rule other than O. 32 r. 3(1)(a), (b) and (c).

O. 32 r. 3 (2) is obviously and to all intents and purposes an integral part of O. 32 r. 3, and to my mind thus a part of O. 32, r. 3 and cannot, and should not, be read or construed apart from the said O.32 r. 3, and may thus, be read as accompanying and explaining and implementing the full spirit, intent and purpose of the whole of the said O. 32 r.3.

With that in mind, and giving an ordinary reasonable meaning to the words “subject as hereinafter provided” in the said O.32 r. 3, and having regard to the fact that the conditions as set out in the said O. 32 r. 3 (1) (a), (b) and (c) do not indicate that to which they are subject in so far as by these words they must be subject to some thing, I am of the view that the conditions as set out at O.32 r. 3 (1) (a), (b) and (c) are subject to the circumstances as set out in the same O. 32 r. 3, and at sub-r. 2 to the effect that

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

To my mind O. 32 r. 3 (2) has the effect of a proviso to O. 32 r. 3 (1) a), (b) and (c).

“Proceedings” in the context of O. 32 r. 3 (2) to my mind would mean and would apply to the mode of conducting the litigation, be it by way of summons, petition, motion or otherwise, and would be in the course of moving towards judgment and not after it, and “pending” in that context would mean a cause or matter in which some proceedings may still be taken (per JESSEL, M.R. in *re Clagett, Fordham v. Clagett* (1882) 20 Ch. D. at p. 653.

Applying the principles deduced, and the construction placed on O. 32 r. 3, in conjunction with O.32 r. 8, to the facts and circumstances of this matter under consideration, one finds that leave to defend was granted to the defendant under the provisions of O.12 r. 8 on 8th August, 1966 with directions that there be no further pleadings. This matter was not forthwith set down for trial.

The matter on an application of O. 32 r. 3(1) (c) then became ripe for hearing, and it was the duty of the plaintiff or other party in the position of the plaintiff to file a request for hearing within six weeks thereafter as required by O. 32(1) (1). This was not done. Time, thus, started to run towards the period of "desertion" after the expiration of those six weeks having regard to O. 32 r. 8(1) and for "desertion" to have been realised there must have been a period of six months after the expiration of that six week period fixed for filing the request for hearing. That six-month period, according to the computation of time by solicitor for the defendants expired on 19th March, 1967.

However, before 19th March, 1967, and indeed on 10th February, 1967, the plaintiff filed a summons making an application that he be granted leave to amend his statement of claim. This was an interlocutory application.

This application came up for consideration in chambers on 14th February, 1967, and the proceedings thereon were adjourned to 28th February, 1967, when arguments on the merits of the application took place. It was thus part-heard on that date. Further adjournments took place on the application of either or both of the parties until 21st March, 1967, when solicitor for the defendants contended that the matter became deserted on 19th March, 1967. The interlocutory application which was part-heard was still not determined on 19th March, 1967, the proceedings on the interlocutory proceedings, as distinct from the substantive action were still pending.

To my mind in the normal course of events the matter would have become deserted on 19th March, 1967, if no request for hearing were filed before that day, but the filing of such a request for hearing before that day was prevented because of the fact that on that day interlocutory proceedings in the form of the hearing of the application for the amendment by the plaintiff were pending, and that prevented the matter from being ripe for hearing until such interlocutory proceedings were determined, and consequently, since the matter was not ripe for hearing then, no request for hearing could have been made, and thus no desertion could have taken place or could have started to take place.

Interlocutory proceedings concern only those proceedings which do not define and/or decide the rights of the respective parties to an action, or cause or matter, and thus, are ancillary or subsidiary to the main action, and are intended to clarify and settle subsidiary issues before the actual hearing of the substantive action. Accordingly, it will be appreciated as a matter of simple common sense that if subsidiary or ancillary matters are pending and are unresolved, matters which are relevant and perhaps intrinsically necessary for the proper and just determination of the substantive action, that those subsidiary and ancillary matters should be first decided and determined before the court or judge embarks on the actual hearing, consideration, and determination of the substantive action itself, and so a request for hearing of the substantive matter and the actual hearing

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of that matter should not be done until all those subsidiary matters before the court have been determined or resolved.

To my mind that is the spirit, reasoning and purpose behind and in O. 32 r. 3(2) of the Rules of the High Court, 1955.

Accordingly, I did not hold that the matter should be deemed deserted on 19th March, 1967, and rejected the contention of counsel and solicitor for the defendants.

Application dismissed.

Solicitors:

L. L. Doobay for the plaintiff.

M. A. A. Mc Doom for the defendants.

SHIRLEY KALLICHARAN v. RAMDEEN THAKURDEEN

[High Court (Chung, J.) January 15, February 10, 1968.]

Contract — Breach of promise to marry — Infant immigrant — Ability to sue — Indian Labour Ordinance, Cap. 104, ss. 137 and 138, Infancy Ordinance, Cap. 39, s. 3.

Practice and procedure — Seduction — Whether cause of action lies in woman seduced.

The plaintiff and the defendant are both descendants of Indian immigrants. The former was twenty-two years old at the date of the trial and the latter was born on 4th January, 1949. The plaintiff claimed that on the 26th December, 1966 she and the defendant had agreed to marry, but that the latter repudiated that agreement on the 27th March, 1967. She also claimed that the day before i.e., the 26th March, he had seduced her. In the result she filed the present action claiming damages for breach of promise and seduction. Counsel for the defendant submitted *in limine* that neither action was maintainable.

HELD: (i) as regard the action for seduction the person seduced could not institute proceedings;

(ii) although the Indian Labour Ordinance empower the male and female descendants of an immigrant to marry after the ages of fifteen and fourteen years, respectively, without parental consent, under the general law

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an infant would not ordinarily be liable for any breach of contract which had been entered into before attaining the age of twenty-one, and, accordingly, the defendant would not be liable for a breach of the marriage agreement.

Action dismissed.

Ashton Chase for the plaintiff.

K. Zaman Ali for the defendant.

CHUNG, J.: In the present case the plaintiff claims against the defendant:—

(a) damages in excess of the sum of \$500.00 for the breach of promise to marry by the defendant to the plaintiff, made on the 26th December, 1966, the said breach being by repudiation by the defendant on the 27th March, 1967, at Stanleytown, West Bank, Demerara in Guyana.

(b) further and in the alternative damages in excess of \$500.00 for seduction of the plaintiff by the defendant on the 26th March, 1967, at Stanleytown, West Bank, Demerara, in Guyana.

At the trial the following facts were agreed on:—

1. The defendant was born on the 4th day of June, 1949 as per his birth certificate. The plaintiff is twenty-two years old.
2. The defendant having courted the plaintiff from March 1966, promised to marry her in June 1966, and again in December 1966, and in consideration therefor the plaintiff on both occasions agreed to marry the defendant.
3. Both the plaintiff and the defendant are Hindus and agreed to marry according to Hindu rites to be followed by registration of the marriage.
4. The defendant subsequently repudiated both of the above promises and refused to marry the plaintiff.
5. The defendant lawfully married another lady in April 1967.
6. The grandparents of both the plaintiff and the defendant came from India to this country as immigrants under the immigration fund.
7. The defendant seduced the plaintiff in March, 1967.

Counsel for the defendant submitted that on those facts the action should be dismissed since:—

- (a) The defendant being an infant cannot be sued for breach of promise of marriage,
- (b) An action for seduction cannot be brought by the plaintiff.

With regards to the claim for seduction counsel for the plaintiff agrees that no action is maintainable but the court can take into account the fact that the plaintiff was seduced when awarding damages to the claim for breach of promise of marriage.

As to the claim for breach of promise of marriage, he submits that the plaintiff becomes *sui juris* at the age of fifteen years under the Indian Labour Ordinance, Cap. 104. In other words, he can marry after attaining the age of sixteen. He states that under s. 3 of the Marriage Ordinance, Cap. 164 consent of the parents is necessary if the party is under twenty-one years of age, but in the present case the parties are immigrants and agreed to marry according to Hindu rites to be followed by registration of the marriage. Under ss. 137 and 138 the defendant has the capacity to marry without the consent of his parents. In those circumstances he should be treated as an adult and therefore can be sued on an action for breach of promise of marriage.

S. 3(B) of the Civil Law of Guyana Ordinance, Cap. 2 reads as follows:

“The common law of the colony shall be the common law of England as at a date aforesaid”

Under the common law of England an infant contract is generally voidable at the instance of the infant though binding upon the other party. Promise of marriage made by an infant is not binding upon him but an infant can bring an action for breach of such promise by an adult — *Holt v. Ward Clarendieux*, 2 Stra 937. In *Hale v. Ruthven* (1869) 20 L.T. 404 it was held that an infant was not liable in an action of breach of promise of marriage.

An infant attains his full age at the close of the day preceding the twenty first anniversary of birth, but an infant can by an Act of Parliament be declared to be of full age before he attains the age of twenty-one years.

Under the Indian Labour Ordinance 'adult' means an immigrant of and above the age of fifteen years, and under ss. 137 and 138 of that Ordinance a male immigrant not being under the age of fifteen years and a female immigrant not being under the age of fourteen years may marry without the consent of his or her parents.

The question, therefore, is whether the Indian Labour Ordinance, Cap. 104, makes an immigrant fifteen years and over and under twenty-one years liable in an action for breach of promise of marriage, when the parties agree to marry according to Hindu rites to be followed by registration.

S. 3 of the Infancy Ordinance states —

“No action shall be brought whereby to charge anyone upon any promise made after full age to pay a debt contracted during infancy, or upon any ratification made after full age of a promise or contract made during infancy, whether there is or is not any new consideration for that promise or ratification after full age.”

It is submitted by counsel for the plaintiff that there is no definition of infancy under this Ordinance. But when one reads the whole of it there can

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be no doubt that an infant is a person under twenty-one years of age. (See s. 11).

Under s. 6(1) of the Civil Law of Guyana Ordinance, cap. 2 a person attains his majority on attaining twenty-one years of age. Counsel for the plaintiff submitted that the majority only applies to intestate succession. I do not agree with this statement. Moreover as already stated s. 3(B) cap. 2 states “the common law of the Colony shall be the common law of England”, and the age of twenty-one has been fixed as that at which an absolute and unlimited legal capacity to contract shall commence, and the law relating to infants' contracts is the common law as modified by the Infants Relief Act 1874, which is incorporated into our law as s. 3 of the Infancy Ordinance, cap. 39. So that, even though the Indian Labour Ordinance gives an immigrant the right to marry without the consent of his or her parents it does not make him an adult so as to make him liable in an action for any breach of promise of marriage.

In the circumstances, I am of the opinion that the Indian Labour Ordinance was passed for the benefit of immigrants and does not impose a liability on an infant in the sense of making him liable in an action for breach of promise of marriage.

In the circumstances the action is dismissed. Cost to the defendant fixed in the sum of \$200.00 (two hundred dollars).

Action dismissed.

Solicitors:

D. Dial for the plaintiff.

T. A. Morris for the defendant.

ARJUNE GOPIE v. NEW INDIA ASSURANCE COMPANY LIMITED

[In the High Court (Khan, J.) June 12, 1967, February 12, 1968.]

Arbitration — Motor insurance policy — Insurance company repudiating liability for breach of conditions in policy — Action by insured without dispute being referred to arbitration as required by policy — Whether maintainable.

The plaintiff had insured his motor car against loss or damage with the defendants. During the currency of the policy the vehicle was involved in an accident and was damaged beyond repair. His claim on the defendants for compensation under the policy was rejected on the grounds that he had

breached several of the conditions of the policy. The plaintiff rejected this and suggested that the dispute be referred to arbitration, as provided for under the policy. The defendants agreed and suggested someone. The plaintiff without replying instituted the present proceedings.

The defendant submitted *in limine* that the action was not maintainable.

HELD: as the repudiation of liability did not go to the substance of the policy or involve a repudiation of it, but was based on a reliance of certain of its terms and conditions, the failure to go to arbitration was a bar to the filing of the action as no cause of action could arise until the arbitrator had adjudicated.

Action dismissed.

KHAN, J.: On the 25th January, 1966, the defendants issued to the plaintiff a policy of insurance with respect to the plaintiff's motor car PT 271 for the period 11th January, 1966, to 11th January, 1967.

On the 9th day of April, 1966, the plaintiff's motor car PT 271 was damaged beyond repair while it was being driven on the No. 11 Public Road, Corentyne, Berbice. On the 12th April, 1966, the plaintiff submitted his claim to the defendants and on the 21st May, 1966, the defendants wrote the plaintiff the following letter:

Dear sir,

I am writing on behalf of the New India assurance company, of Lot 5, America Street, Georgetown.

I have been instructed that your motor car No. PT-271, was insured with my clients, under a policy of motor insurance.

I am further instructed that this car was involved in an accident on the 9th day of April, 1966, on the No. 11 Public Road, Corentyne, Berbice, and as a result you submitted a claim form, dated the 12th day of April, 1966.

I have been instructed by my clients to repudiate as I hereby do all liability under the said policy, on the grounds of the commission of several breaches by you of the terms of the said policy.

Following are some of the breaches which you have committed:

- (a) using the vehicle for hire and/or reward;
- (b) permitting the vehicle to be driven by an unlicensed driver;
- (c) using the vehicle for pace-making;
- (d) submitting a false statement as to the cause of the accident to the Company.

All for your information and guidance.

Yours faithfully,
(sgd.) C.A.F. Hughes."

ARJUNE GOPIE v. NEW INDIA ASSURANCE COMPANY LIMITED

On the 7th June, 1966, the plaintiff through his solicitor wrote the defendants as follows:

Dear sir,

Claim by Arjune Gopie

I am writing to you on behalf of my client the abovenamed Arjune Gopie, of No. 47 Village, Corentyne, Berbice.

2. I am instructed that my client had taken out a policy of insurance with your company in respect of his Ford motor car no. PT 271 in the sum of \$4,375.00 and that on the 9th April, 1966, his motor car was damaged beyond repair while it was being driven on the No. 11 Corentyne Public Road.

3. I am also instructed that a claim was duly made on you but that it was rejected on the grounds that the vehicle was being used for hire and/or reward; was being driven by an unlicensed driver; was being used for pace-making and that my client had in any event submitted a false statement to your company as to the cause of the accident.

4. I am assured by my client that none of the above reasons are true, and I am to ask you to reconsider your decision. If, however, you are unable to do so, then I would ask that this claim be submitted to arbitration in accordance with para. 9 of the conditions set out in the policy of insurance.

Yours faithfully,

(sgd.) B. S. Rai.

On the 6th July, 1966, the defendants replied as follows:

Dear sir,

Re: Claim by Arjune Gopie

Your letter of the 7th ultimo, addressed to the secretary, New India Assurance Company Limited, has been handed to me for my attention.

In compliance with your request and in accordance with condition (9) of the Policy, I submit the name of Mr. Desmond Hoyte, Barrister-at-Law, to be the arbitrator.

Kindly let me know whether Mr. Hoyte is acceptable to you as a sole arbitrator.

Yours faithfully,

(sgd.) C. A. F. Hughes.”

The plaintiff without proceeding to arbitration filed the present action claiming from the defendants the sum of \$4,375:— by way of indemnity.

At the hearing counsel for defendants submitted in *limine*:

(1) that the plaintiff has no right of action against the defendants because under the terms of the policy of insurance sued herein, no right of action arises against the defendants until there has been a reference of the difference which has arisen between the parties to arbitration and an award made by the arbitrator.

The defendants rely on condition 9 of the policy of insurance which reads as follows:—

“9. All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon this reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the Company. If the Company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.”

Both counsel for the plaintiff and defendants relied on *Scott v. Avery & Others* (1843-1860) All E.R. Rep. 1 and cases following. Mr. Ramcharitar for the plaintiff submitted that defendants repudiated all liability by letter dated the 21st May, 1966 (ex. B1) and this amounted to a repudiation of the whole contract. Defendants cannot then rely on the arbitration clause in the contract. The plaintiff was therefore entitled to bring this action.

In *Scott v. Avery & others (supra)* it was held that it was a defence to claim on an insurance policy that the parties had agreed to make submission of their disputes to arbitration a condition precedent to the enforcement of a claim. Though the parties cannot, by agreeing that no action shall be brought, oust the jurisdiction of the courts, they may agree that no action shall be brought until an award is made.

In *Jureidini v. National British and Irish Millers Insurance* [1915] A.C. 499, an insurance policy clause provided that if a claim should be fraudulent or the loss or damage should be caused by the wilful act or with the con-

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nivance of the insured, all benefit under the policy should be forfeited. It was further provided that, if a difference arose as to the amount of loss or damage, the dispute was to be submitted to arbitration, and it was a condition precedent to any right of action or suit upon the policy that an award by an arbitrator as to the amount of the loss or damage should be obtained first. The appellant insured his stock in trade against loss by fire with the respondents, the policy of insurance including the above clauses. The appellant having made a claim under the policy for loss caused by a fire, the respondents alleged that the loss was caused by the felonious acts of the appellant and that the claim was fraudulent. The appellant brought this action upon the policy and the respondents contended that the condition as to arbitration had to be fulfilled before an action could be brought. It was held that in view of the clause in the policy, the allegation that the claim was fraudulent, if made out, went to the very root of the matter; when there was a repudiation which went to the substance of the whole contract, the person setting up that defence was not entitled to insist on a subordinate term of the contract being enforced, and, therefore, the appellants action was competent although the dispute had not been referred to arbitration.

In *Woodall v. Pearl Assurance Company Ltd.* [1919] 1 K.B. 593, by condition 11 of an accident insurance policy it was provided *inter alia*:

“If any question shall arise touching this policy or the liability of the company thereunder . . . the assured and all persons claiming through the assured may refer and shall be bound, if the company so require, to refer, the same to arbitration . . . and no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration.”

It was held that:

- (i) on its true construction, although under the condition the insurers might not require a dispute to be referred to arbitration, if they did demand arbitration, a reference was a condition precedent to any proceedings being taken by the assured on the policy.
- (ii) where in contesting a claim by an assured under a policy containing such a clause as the above, the insurers repudiate the policy, on the ground, e.g. that the proposal contained untrue statements, and the assured brings an action on the policy, the insurers cannot in defence plead the arbitration clause, but where they merely dispute the claim and do not repudiate the policy that defence is open to them.

It appears from *Woodall v. Pearl (supra)* that the Court of Appeal regarded *Jureidini's* case as establishing that one cannot both dispute the existence of a binding contract and invoke the aid of a clause for arbitration within it. Another strong Court of Appeal took the same view in *Toller v. Law Accident* [1936] 2 All E. R 952

In the instant case it appears that the defendants are doing no more than make allegations which, if established, would relieve them of liability under the terms of the policy. The defendants are not repudiating the policy but relying on the terms of it. They are saying that under the terms they are not liable.

In *Stebbing v. Liverpool and London & Globe Insurance Company Ltd.* [1917] 2 K.B. 433, the applicant made a proposal to the respondents for insurance against burglary and the truth of his answers to the questions on the proposal form formed the basis of the contract. A policy was issued to him which contained a condition that if a false declaration be made or used in support of a claim all benefit under the policy would be forfeited. The policy also provided that "all differences arising thereunder" should be referred to arbitration. The applicant made a claim which was referred to arbitration. Before the arbitrator the respondents disputed the claim on the ground that the applicant had suppressed material facts and had made untrue answers in the proposal form. The applicant contended that the defence set up by the respondents called in question the validity of the policy and therefore was not within the arbitration clause in the policy. It was held that:—

- (i) the respondents were not seeking to avoid the policy but were relying upon the provision in it that the truth of the answers in the proposal should be the basis of the contract, and whether or not a statement was true was a difference arising under the policy to be referred to the decision of an arbitrator.
- (ii) The burden of proving the untruth of the answers in the proposal lay on the respondents.

In *Spurrier and Anor. v. La Coche* [1900] 3 All E.R. r. 277 where a contract is framed so as to give no cause of action unless a certain condition is performed no question of ousting the jurisdiction of the court arises, *vide Atlantic Shipping & Trading Co. v. Dreyfus & Co.* [1922] A.E.R. 559, at pp. 561-2 and *Heyman v. Darwins* [1942] A.C. 356 at p. 366.

In the instant case it appears to me that condition 9 of the policy, ex. A, provides unequivocally for arbitration followed by the making of an award as a condition precedent to any action on the policy. It follows therefore that until the arbitrator has made an award there is no cause of action. The learned author of *Mc Gillivray on Insurance Law*, (5th ed.) vol. 2 at p. 1986 has stated thus:—

“Arbitration as a condition precedent.

There may also be difficulty in determining whether arbitration is made a condition precedent to any action on the policy, or is merely a collateral agreement which does not directly affect the promise to pay. If it is the former then until the arbitrator has made an award there is no cause of action, and any action brought will be dismissed – [*Scott v. Avery* 1856 5 H.L.C. 811; *Caledonian Insurance v. Gilmour* [1893]

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A.C. 85; *Spurrier v. La Cloche* [1902] A.C. 446.] – unless the right to arbitration has been waived, or the condition precedent removed under the power conferred on the court by the Arbitration Act.”

The plaintiffs action is accordingly dismissed with costs fixed at \$250.00

A stay of execution for 6 (six) weeks is granted.

Action dismissed.

GUYANA INDUSTRIAL AND COMMERCIAL INVESTMENTS LTD.

v.

COMMISSIONER OF INLAND REVENUE

[Court of Appeal K. Stoby, C., E.V. Luckhoo, and R.A. Cummings, J.J.A.
April 19, June 6, 8, 1967, February 20, 1968].

Income Tax — Deduction by company from dividends paid to shareholders — Income out of which dividend paid not income on which tax paid or payable — Whether shareholder entitled to a tax credit for the amount thus deducted from income — Income Tax Ordinance, Cap. 299, s. 29(1).

Guyana Industrial and Commercial Investments Ltd., is one of three shareholders of Demerara Sugar Terminals which on the 16th December 1961 paid out a grossed up dividend of \$909,090.00 out of which Guyana Industrial and Commercial Investments Ltd., share was \$72,727.27. Purporting to act under s. 29(1) of the Income Tax Ordinance, Demerara Sugar Terminals deducted a sum of \$409,090.00 as income tax leaving a net sum of \$500,000.00 for actual payment to their shareholders. In respect of Guyana Industrial and Commercial Investments Ltd. the amount deducted was \$32,727.27 leaving a net dividend of \$40,000.00. In their income tax return for the year concerned Guyana Industrial and Commercial Investments Ltd. sought to claim a tax credit of the \$32,727.27 paid on their pre-tax portion of the dividend by Demerara Sugar Terminals. The respondent refused to allow this credit claiming that Demerara Sugar Terminals had not paid and were not liable to pay the sum claimed as a credit.

At the 31st December 1961 the actual profit made by Demerara Sugar Terminals was \$1,384,328.00, but by virtue s. 15 of the Income Tax Ordinance they were only liable to tax on one half this amount. This section was repealed and re-enacted with modification by Ordinance No. 11 of 1962, and given retroactive effect. The result was that Demerara Sugar Terminals' chargeable income was nil. In such a case the tax payer's chargeable income was assessed as two per centum of its turn over. In the case of Demerara Sugar Terminals this amounted to \$52,767.00 out of which the income tax payable was \$23,745.15.

HELD: s. 29 specifically authorises a company to deduct tax from dividends, but it is the law that where tax is not paid or payable by the company on the whole of the income out of which the dividend is paid, the deduction must be restricted to that portion of the dividend which is paid out of income on which tax is paid or payable by the company.

Appeal dismissed.

STOBY, C: S. 29(1) of the Income Tax Ordinance Cap. 299 is as follows:

“Every company registered in the Colony shall be entitled to deduct from the amount of any dividend paid to a shareholder tax at the rate paid or payable by the company (double taxation relief being left out of account) on the income out of which the dividend is paid:

“Provided that where tax is not paid or payable by the company on the whole income out of which the dividend is paid the deduction shall be restricted to that portion of the dividend which is paid out of income on which tax is paid or payable by the company”.

and the question which has to be determined on this appeal arises from the following admitted facts:

The appellant company, the Guyana Industrial and Commercial Investments, Ltd. (G.I.C.I.L.), is a shareholder of Demerara Sugar Terminals, Ltd. (D.S.T.). D.S.T. was incorporated in 1958. It commenced operations in relation to the handling and shipping of sugar on 1st August, 1960. There are three shareholders in D.S.T.: Sandbach Parker & Co. Ltd. is a twenty per centum shareholder; Bookers Shipping Overseas Investments, Ltd. is a seventy-two per centum shareholder; and the appellant company, G.I.C.I.L. is an eight per centum shareholder.

On the 16th December, 1961, dividends grossed up to \$909,090.90 were paid out to their three shareholders by D.S.T., and income tax deducted by D.S.T. was \$409,090.90, leaving a net payment to the three shareholders of \$500,000. The relevant portion of the dividend paid, so far as it affects G.I.C.I.L. is \$72,727.27. D.S.T. (purporting to act under s. 29(1) of the Income Tax Ordinance, Cap. 299), deducted income tax in the sum of \$32,727.27 from G.I.C.I.L.'s dividend of \$72,727.27, so that the net amount paid to G.I.C.I.L. is \$40,000. G.I.C.I.L. claims that it must, in relation to the Commissioner of Inland Revenue receive full credit for the \$32,727.27 deducted by D.S.T.

The Commissioner of Inland Revenue has refused to give credit to G.I.C.I.L., the appellant company, because he claims that D.S.T. has not paid the \$32,727.27 into revenue nor is it liable to pay that tax.

The tax liability of D.S.T. must be explained. The Income Tax (Amendment) Ordinance 1962 (No. 11), although enacted on the 8th June, 1962, was deemed by s. 1(3) to have come into operation with respect to

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and from the year of assessment commencing on the 1st January, 1962. Certain sections were exempted from this provision but they are not relevant to this debate.

At the close of business on the 31st December, 1961, D.S.T. had made a profit of \$1,384,328 but its chargeable income for the year of assessment 1962 was \$692,164 due to the fact that an allowance for past losses in the sum of \$692,164 was permissible under s. 15 of the Income Tax Ordinance Cap. 299 which before its repeal read —

“Where the amount of a loss incurred in the year preceding a year of assessment in any trade, business, profession or vocation, carried on by any person either solely or in partnership is such that it cannot be wholly set-off against his income from other sources for the same year, the amount of the loss to the extent to which it cannot be so set-off against his income from other sources for the same year shall be carried forward and, subject as hereinafter provided, shall be set-off against what would otherwise have been chargeable income for the next five years in succession:

Provided that —

- (i) the amount of the loss allowed to be set-off in computing the chargeable income of any year shall not be set-off in computing the chargeable income of any other year; and
- (ii) in no case shall the set-off be allowed to an extent which will reduce the tax payable for any year of assessment to less than one-half of the amount which would have been payable had the set-off not been allowed”.

When however Ord. 11 of 1962 repealed s. 15 of Cap. 299 and gave the new s. 15 (s. 11 of 11 of 1962) retroactive force, the tax position of D.S.T. improved to such an extent that their chargeable income was nil, since they were able to deduct all past losses and not only 50%. But although the new chargeable income was nil, s. 10 Ord. 11 of 1962 made provision that in such a case a minimum tax of 2% of turnover was payable. So for the year of assessment 1962 D.S.T.’s chargeable income after the 1962 law was \$52,767 (2% of its turnover), and tax payable at the rate of 45 per centum was \$23,745.15. Before the 1962 law D.S.T.’s chargeable income was \$692,164 with tax at 45% being \$311,473.80. This latter sum had been paid but after the change in law this was treated as income, past losses deducted and it became income free of tax.

Counsel for the appellant company has drawn attention to the fact that had D.S.T. remained liable to tax of \$311,473.80, as G.I.C.I.L. is an 8% shareholder G.I.C.I.L.’s proportion of this tax would be \$23,917.04, being 8% of the tax, while on the new situation, where D.S.T.’s tax is \$23,745.15, and G.I.C.I.L.’s proportion is 8% or \$1,899.61, then if

G.I.C.I.L. is still liable for \$32,727.27 less \$1,899.61 G.I.C.I.L. is worse off under the changed law. This lament overlooks the fact that D.S.T., the parent company, received a windfall of nearly \$300,000 which became available for payment of a dividend to G.I.C.I.L. in 1963, and also overlooks the question whether D.S.T. having deducted tax on dividends, is not liable to repay the sum it has deducted if that sum has not been paid to revenue.

The appellant company has not admitted that the \$32,727.27 has not been paid, but in any event, contends that the point cannot be resolved by the simple process of finding whether the amount involved has been paid, and if it has not, then holding G.I.C.I.L. liable. The submission is that s. 29 Cap. 299 is concerned with a company's income out of which dividends are paid, while s. 14 Cap. 299 is devoted to chargeable income which is the income on which tax is payable.

The point which then arises is whether under s. 29(1) a company can deduct tax from a dividend although the income out of which the dividend is paid is not income on which tax has been paid or is payable.

The stand taken by the Commissioner of Inland Revenue is that the Income Tax Ordinance does not exempt dividends from taxation; indeed it specifically makes dividends taxable but permits a company to deduct 45% — the company rate — from the dividend. But this rate can only be deducted if the sum so deducted is paid to the Commissioner of Inland Revenue or is payable to him by the deducting Company.

Counsel for G.I.C.I.L. answered this proposition in several ways which can best be dealt with by stating each argument and dealing with each one.

It was said that although D.S.T. had not paid the tax in the year in which the tax was deducted, the tax was payable. Counsel supported his argument by a hypothetical case of company A with a capital of \$1,000,000, and which made a regular profit of \$500,000. If such a company took full advantage of the Income Tax (In Aid of Industry) law and wrote off \$500,000 of its permissible allowances, there would be no chargeable income in the first year but by the end of the twelfth year when the permitted capital allowances have diminished in amount year by year, total tax of \$2,320,610 would have been paid. On the other hand hypothetical company B with the same capital making the same profit, but writing off capital allowances in a more conservative way, say \$100,000 the first year and reducing its capital allowances in descending order for 12 years, would pay income tax in the first year of \$180,000 and at the end of 12 years \$2,377,115. His illustrations are said to prove that D.S.T. will eventually pay to the revenue all the tax it has deducted from dividends. The illustrations do prove that over a period of 12 years a company that writes off a large proportion of capital allowances eventually pays about the same income tax as a company that does not write off a large sum in

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the early stages of its existence. But the illustrations are faulty in other respects. What is the normal way of preparing a profit and loss account? A company shows its profits on which tax is payable and makes appropriate entries for income tax so that sums deducted from dividends are accounted for in the balance sheet. If the amount retained by a company for payment to the Commissioner of Inland Revenue is not paid, then the company must account for it in its balance sheet. This item will be shown as a liability, probably under the name of income tax reserve. If by the end of the next financial year the sum reserved has not been paid to the Commissioner of Inland Revenue, then it becomes a secret reserve which can be absorbed as capital or can be paid to shareholders. If the latter course is adopted the shareholder has received a dividend out of money deducted from a previous dividend and which should have been paid to revenue; the shareholder has in fact paid no tax on his dividend. Under the Income Tax Ordinance this is impossible. If the tax deducted is treated as capital, the company has increased its capital assets with the revenue's money. This, too, is impossible.

There is another answer to the argument that a company withholding tax in the first year eventually pays it over a long period. Income tax is due and payable every year; each year of assessment is dealt with by itself and the tax payable is assessed for a particular year. If tax due for one year is not paid the revenue loses income for that year, income which if invested could double itself in 12 years. I can see no warrant for a company withholding Government's revenue due in 1962 until the company pays something on account in 1963 and successive years until 1974. An examination of the figures contained in the hypothetical cases put forward by the appellants, while proving that a company which writes off its capital or fixed assets in the earlier years eventually pays a higher tax in later years than the company which writes off its fixed assets by a small percentage every year, also disproves the theory that company A's shareholders would be worse off than company B's shareholders. The total dividends paid to company A's shareholders for the 12-year period is \$2,779,390; to company B's shareholders \$2,722,885. But company A had the benefit of \$500,000 free of tax. Now the Aid to Industry Ordinance was introduced to encourage the establishment or development of industries in the country and to make provision for relief from income tax to persons establishing or developing such industries, and for purposes incidental to or connected with any of the above purposes. The Ordinance was designed to foster industries in a developing country; investors who ventured into a country with a small population with limited markets were being assured that at least their capital was safe. The Ordinance was not designed to make a gift to shareholders. By writing off the capital investment at an early stage of the company's existence company A had \$500,000 available for expansion. If properly utilised, the result of this \$500,000

would be that company A's profits could not possibly remain static, but would exceed company B's. But in the hypothetical case this assumption is made resulting in drawing a wrong conclusion from an arithmetical fallacy. Of course there is nothing to prevent company A paying out the \$500,000 profit as a dividend to shareholders. In the appellants' illustration it is assumed that the \$500,000 vanishes; it does not. Either it is invested or paid out as dividends to shareholders, in which case the company pays no tax but the shareholders pay according to their appropriate rate; if the shareholder is a company, the rate is 45%. Using the appellants' figures, company A's shareholders will receive in the first year \$375,000 as dividends after tax and company B's shareholders \$220,000 after tax. The assumption therefore that the Aid to Industry Ordinance does not benefit company A is incorrect. It benefits the company if the first year's profits are not dissipated in dividends and benefits the shareholders if the profits are distributed.

One argument put forward by the appellants was a curious one. The point was made that D.S.T. had withheld \$32,727.27 from G.I.C.I.L. and if the Commissioner was entitled, as he claims, to \$32,727.27 less \$1,899.61, that is to say, \$30,827.66, G.I.C.I.L. would suffer a loss of \$63,554.93 on its dividend of \$72,727.27 or 88% tax instead of 45%. This argument is founded on the misconception that D.S.T. is entitled to retain \$30,827.66 wrongly deducted. The Commissioner of Inland Revenue cannot proceed against D.S.T. to recover the amount withheld from G.I.C.I.L. because D.S.T.'s assessment is nil.

Although the difference between the income tax position in the U.K. as distinct from that in Guyana has been clearly stated on several occasions, notably in *Inland Revenue Commissioners v. Davson* (1960) L.R.B.G. 178, affirmed by the Privy Council in *Bieber Ltd. v. Commissioners of Inland Revenue* (1962) 3 All E.R. 294, perhaps it is necessary to record once again the difference in the systems of taxation.

In England a dividend paid out of the profits of a U.K. company is not directly assessable on the shareholder to income tax. (*Bradbury v. English Sewing Cotton Co. Ltd.* 8 T.C. 481) This is the direct result of the Income Tax Act 1952, s. 184(1) which states—

“The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying the dividend shall be entitled to deduct tax at the standard rate for the year in which the amount payable becomes due”.

and s. 184 (2) which is —

“Sub-s. (1) of this section shall, in relation to a dividend paid by any body of persons, be construed as authorising the deduction of tax from the full amount paid out of profits and gains

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of the said body which have been charged to tax or which, under the provisions of this Act, would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provisions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period”.

These provisions were formerly r. 20 of the General Rules. When a company pays income tax it is paying its own tax and not paying it on behalf of the shareholders. This is accepted law ever since *Newman v. Inland Revenue Commissioners* [1934] A.C. 215 H.L., and *Cull v. Inland Revenue Commissioners* [1939] 3 All E.R. at pp. 763, where Lord ATKIN said: “. . . it is now clearly established that in the case of a limited company, the company itself is chargeable to tax on its profits, and that it pays tax in discharge of its own liability and not as agent for its shareholders. The latter are not chargeable with income tax on dividends, and they are not assessed in respect of them”. *Hamilton v. Inland Revenue Commissioners* (1931) 2 K.B. 495. The result of the propositions stated above is that where a company pays a dividend out of capital profits and therefore not liable to tax, the dividend is not taxable in the shareholders’ hands. See *Inland Revenue Commissioners v. Reid’s Trustee* [1949] 1 All E.R. 359 where Lord NORMAND said:

“They say justly that a profit derived from the sale of a capital asset would neither have been taxed in the hands of the company if it had been registered in the United Kingdom, nor have been taxed by deductions when the dividends was paid. The company would not have been taxed on this profit, for it would not have been reckoned part of the profits and gains of the company’s business under the rules by which the profits and gains of the company would have been computed if it had been a British company. The shareholder would not have suffered any deduction because the dividend was not paid out of profits and gains brought into charge”.

S. 184(1) of the Income Tax Act 1952 (U.K.) is designed to permit deduction of tax from dividends only where the dividend is paid out of profits which are subject to tax. If the fund out of which the dividend is paid is not taxable in the hands of the company, then the company cannot deduct tax from the dividend. For a company to deduct tax from a dividend, the company must be liable to tax on its profits. The reason for that is that s. 184(1) specifically stipulates that the profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act before any dividend is made. This does not mean that a company cannot pay a dividend out of capital profits, but if it does, it cannot deduct tax from the dividend. If the appellants company was operating under the Income Tax Law as it exists in England, it could

have paid the dividend which it paid, out of profits, but it could not deduct tax on the dividend. The shareholders would have received the whole dividend tax free because the company would not have been exigible to tax.

The question now is whether the law of this country is different. S. 5 of the Income Tax Ordinance, Cap. 299 provides that income tax, “subject to the provisions of this Ordinance, shall be payable at the rate or rates herein specified for each year of assessment upon the income of any person accruing in or derived from the Colony or elsewhere, and whether received in the Colony or not, in respect of —

- (a)
- (b)
- (c) dividends, interest or discounts;”

Dawson’s case settled the point that even when a dividend was paid from a capital profit and not taxable in the hands of the company it was still taxable in the shareholders’ hands. S. 29(1) specifically authorises a company to deduct tax from dividends but it is the law that where tax is not paid or payable by the company on the whole income out of which the dividend is paid the deduction shall be restricted to that portion of the dividend which is paid out of income on which tax is paid or payable by the company. The consequence of this proviso to s. 29(1) is that while a company can pay dividends out of profits which are not taxable it cannot deduct tax from such dividends.

In support of his argument that the appellant company was not exigible to tax on the sum deducted from its dividend and not paid by D.S.T. to the Commissioner of Inland Revenue, counsel stressed the difference in meaning between income as used in s. 29(1) and chargeable income as used in s. 12(1). There is no dispute that a person’s income is a far different thing from his chargeable income. A company in preparing its balance sheet may, for example, write off doubtful debts, may permit various allowances to its directors and by so doing diminish its profits out of which a dividend is paid. The shareholders must accept this. The Inland Revenue may reject these items, making the chargeable income higher than the profit income; the converse is true. The income out of which dividends are paid may be higher than the chargeable income. But since the company is paying its own tax when it pays dividends from a fund which is not liable to tax there is no warrant for deducting tax from the dividend. S. 29(1) is crystal clear. The company can deduct from the dividend tax payable on the income out of which the dividend is paid. In England the shareholder escapes income tax; in Guyana he does not. G.I.C.I.L. will only suffer if the tax deducted by D.S.T. is not repayable to G.I.C.I.L. by D.S.T., and if G.I.C.I.L. has to pay the tax again. If both these propositions are correct, then the provisions of s. 72 of Cap. 299 can be invoked on the ground that a company cannot write off more than its capital investment allowances. A company can therefore lawfully write

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off large allowances in the early stages and retain large gross profits not exigible to tax, but then it ought not to pay dividends in that year as the shareholders may be penalised.

The remaining argument I wish to discuss is whether the remedy of the Inland Revenue is not against D.S.T. rather than against G.I.C.I.L. The answer is not difficult. Although D.S.T. wrongly deducted tax from the dividend, or even assuming the company rightfully deducted tax, the Revenue can only proceed against D.S.T. in respect of D.S.T.'s tax, and since D.S.T. is not exigible to tax other than the sum already paid, there is no process known to the law by which the Revenue can make D.S.T. disgorge money wrongly in its possession. On the other hand D.S.T. is holding G.I.C.I.L.'s money and there are obvious ways in which G.I.C.I.L. can compel D.S.T. to repay.

In my view neither D.S.T. nor G.I.C.I.L. has found a loophole in the law which can be legally exploited and G.I.C.I.L. is liable to pay the tax assessed by the Revenue.

The amount which G.I.C.I.L. should pay, if liable, was the subject of considerable discussion. The judge in the court below varied the amount assessed by the Commissioner from \$30,827.59 to \$12,627.39. He fixed the liability as 45% of \$32,727.27. He assumed that G.I.C.I.L. had paid tax of 45% on \$40,000, the net dividend. But D.S.T. only paid tax on a chargeable income of \$52,767, and as G.I.C.I.L. received 8% of the gross dividends of \$909,090.90, it should be given credit for 8% of 45% of \$52,767, which is \$1,899.61. G.I.C.I.L.'s gross dividend was \$72,727.27. Tax on that sum is \$32,727.20. Since tax lawfully deducted is \$1,899.61, G.I.C.I.L. should pay \$30,827.59.

The appeal is dismissed with costs.

LUCKHOO, J.A.: I concur.

Appeal dismissed.

CUMMINGS, J.A.: I concur.

ISAAC BOXHILL v. ROSALINE ANTIGUA

[High Court (George, J.) January 13, 24, February 4, March 13, April 22, 27, 29, 1967; January 10, February 23, 1968.]

Landlord and Tenant — Building land — Unregistered lease — Purchase by tenant from landlord — Effect on tenancy — Rent Restriction Ordinance, Cap. 186 ss. 2, 21, Deeds Registry Ordinance, Cap. 32 s.23.

Landlord and Tenant — One of two lessees purchasing whole of demised premises — Whether new landlord can claim way of necessity over remaining tenant's holding — Landlord derogating from grant.

Right of way — Use of alternative way on sufferance — Whether landlord entitled to way of necessity over tenant's holding — Applicable law — Civil Law of Guyana Ordinance, Cap. 2, proviso (b) to s. 3(D), Landlord and Tenant Ordinance, Cap. 185, s. 4.

During 1939 the defendant became tenant of the front portion of certain building land situate at lot 28 Princes Street, Lodge. The lot is situate on the northern side of the street and the facade of the demised premises commenced some four feet west of its eastern boundary. In 1943 the landlord rented to a Mrs. H. the plaintiff's future mother-in-law, a second portion which was situate immediately north of the defendant's holding. About eight years later the plaintiff took over the tenancy, and in 1955, entered into a five year agreement with the landlord in respect of this portion of land. The facade of the demised premises was the same as that leased to the defendant. The remainder of the lot was leased to a third tenant in 1953. The passageway between the eastern edge of the premises of the plaintiff and defendant and the eastern boundary of the lot, was used by the plaintiff and the third tenant as a means of ingress and egress from and to Princes Street.

Some time later, lot 28 was divided into sublots A and B. Sublot A had a depth equal to that of the premises demised to the plaintiff and defendant and its facade ended six feet west of the eastern boundary of the lot, thereby maintaining the passageway to Princes Street. Sublot B consisted of the remainder of the lot together with the passageway.

In 1965, the plaintiff, who had purchased sublot A, received transport, and sublot B was vested in the beneficiary of the landlord's estate, the landlord having died some time previously. The plaintiff claimed that, some time during 1961, the defendant unlawfully encroached on his holding by removing his northern fence northward into his holding for a distance of thirteen to fourteen feet. He sought damages for this trespass together with an injunction.

After he obtained transport he caused his solicitor to write the defendant requesting a right of way to Princes Street over her holding. She refused. It is this refusal which forms the subject matter of the second major relief sought by the plaintiff viz. a declaration that he was entitled to a way of necessity.

Editor's Note: The claim for trespass was rejected and this case is reported only on the question of the right of way.

HELD: (i) when the plaintiff became landlord, the defendant's contractual tenancy came to an end, but by virtue of s. 21 of the Rent Restriction Ordinance, Cap. 186, she held over as a statutory tenant and as such was entitled to the benefits of all the terms and conditions of the original tenancy;

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(ii) when the plaintiff purchased his holding and that of the defendant he ceased to have any legal claim to a right to pass and repass over the strip of land which had been reserved in his lease for that purpose;

(iii) accordingly, his continued user of the strip was merely on sufferance by the owner in whom title had been vested;

(iv) notwithstanding the provisions of s. 21 of the Rent Restriction Ordinance the common law principle of a way of necessity had not by implication been revoked;

(v) the Rent Restriction Ordinance was no bar to jurisdiction of the High Court.

Declaration granted.

Editorial Note: The Court of Appeal by a majority (Persaud and Cummings, JJ.A., Crane, J.A. dissenting) dismissed the defendant's appeal (see *Antigua v. Boxwill* (1969) 15 W.I.R. 56); but the Judicial Committee of the Privy Council allowed the defendant's further appeal and ordered that the action should stand dismissed (see *Antigua v. Boxwill* (1971) 16 W.I.R. 136).

R. H. Luckhoo, for the plaintiff.

M. Fitzpatrick for the defendant.

GEORGE, J.: In 1931 Louis and Ellen Joseph, both deceased, became the owners of the south half of 28 Princes Street, South Section Lodge Village, East Coast Demerara, otherwise known as lot 28 Princes Street, Lodge Village, and in 1939 the latter rented a portion of this lot which abuts Princes Street to the defendant. In 1943 she rented another portion of the lot situate immediately behind that rented to the defendant to a Mrs. Hodge, whose daughter was later married to the plaintiff. In 1951 the plaintiff, with the consent of Mrs. Hodge and the landlord, was accepted by the latter as tenant in substitution for the former.

In 1953 Ellen Joseph rented a third portion of the lot situate behind the portion rented to the plaintiff to one Nebert Thomas. It is conceded by both counsel that the portions of land rented to the plaintiff and defendant comprise "building land" as defined by s. 2 of the Rent Restriction Ordinance, cap. 186.

On the 16th April 1956, Ellen Joseph died and between 1961 and 1963, Margaret Kingston, the executrix of her estate as well as administratrix of the estate of Louis Joseph caused the lot to be equally divided into sublots A and B. She sold and transported subplot A to the plaintiff in May 1965 and vested title to subplot B in Hazel Johnson, a minor, aged twelve years. Sublot B consists of the third portion of land leased (in 1953) together with a strip of land six feet wide running within and along the eastern side of the lot leading from this portion to Princes Street. This six feet wide portion had, subject to certain observations, which I will later make, been used by Nebert

Joseph, the third lessee, and the plaintiff as a means of ingress and egress to Princes Street and is still so used. Since the plaintiff became legal owner, the defendant has continued to occupy the land she leased from Ellen Joseph.

In July 1965 he caused his solicitor to write to the defendant requesting a means of ingress and egress over her holding to Princes Street but she has refused this request. It is on account of this refusal that he seeks declaration that he is entitled to such a right of way and an injunction restraining her from preventing him from exercising such a right.

The second limb of this suit unlike the first is one purely of law. Counsel for the defendant drew attention to proviso (b) to s. 3(D) of the Civil Law of Guyana Ordinance, cap. 2, which provides as follows:—

“The law and practice relating to conventional mortgages and hypothesis of movable or immovable property, and to easements, profits a prendre, or real servitudes, and the right of opposition in the case of both transports and mortgages shall be the law and practice now administered in those matters by the Supreme Court.”

He submits that, that as the law and practise administered on the 2nd September, 1916, when this Ordinance was enacted, was Roman-Dutch, it must follow that the proper law to govern the relationship of the plaintiff and defendant on this aspect of the matter is Roman-Dutch. If this view is correct then the principle of law governing a right of way of necessity as enunciated in *Van Schalkwijk v. du Plessis* 17 SC .454, *Gray v. Gray & Estcourt* 28 N L R 151 and *Lentz v. Mullin* (1921) E D L R 268 would apply. These cases all decide that if a claimant to a right of way of necessity has the use of an alternative route to the public road although less convenient, then, despite the fact that he uses such alternative route on sufferance his claim is premature until he is debarred from the use of such alternative route. In the present case the plaintiff does have the use of an alternative way over the six foot passageway part of subplot B, which he has been using since 1965 with the consent of the guardian of the new owner of this subplot. Indeed the plaintiff has led evidence to the effect that he has since built it up. No evidence has been led to show, or from which it can be inferred, that there is any justifiable fear of the imminent loss of such user or that it is in any way less convenient than the one he now claims. Accordingly, it is submitted, he is debarred under the Roman-Dutch law from claiming a right of way over the defendant's land, as of necessity.

In the present case, but for the Rent Restriction Ordinance, when the plaintiff bought subplot A and received transport, he would have been entitled to dispossess the defendant because of the fact that her lease had not been registered. For, by virtue of s. 23(1) (d) of the Deeds Registry Ordinance, Chapter 32, the plaintiff on obtaining transport would have acquired full and absolute title subject only to certain registered encumbrances, including registered leases. In this latter regard, in the case of *Dhanpaul v. Demerara Bauxite Company Limited* 1959 L.R.B.G. 84, LUCKHOO, J., at p. 96 had this to say in relation to an unregistered lease:—

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“On the passing of transport to the defendants in January 1958 by operation of s. 23(1) of the Deeds Registry Ordinance, the plaintiff did not become the tenant of the defendants even though he continued in occupation of the land. As between the defendants and the plaintiff the relationship of landlord and tenant never existed.”

And this is so despite s. 16(1) of the Landlord and Tenant Ordinance cap. 185, unless the property is conveyed subject to the lease (*supra*) p. 94.

However by virtue of the definitions of “landlord” and “building land” in s. 2 of the Rent Restriction Ordinance, the provisions of s. 3(1) (a), and the restrictions placed on a landlord seeking to recover possession contained in s. 16, the defendant is entitled to, and I find did hold over, after transport was passed to the plaintiff, by virtue of s. 21 of the Rent Restriction Ordinance, cap. 186. It should be noted that the plaintiff had unsuccessfully attempted to negotiate a new lease with her (*ex. D*).

In analysing whether what the plaintiff seeks is a servitude, and so governed by Roman-Dutch law, counsel for the defendant draws attention to the observation contained in *Hall and Kellaway on Servitudes* 2nd edition at p. 2 para, (e) which reads as follows:—

“No *praedium* can be the subject of a servitude in favour of itself (Voet. 8.4.14), and it is the application of this principle which operates against the creation of a servitude of way by a reservation in a lease of a right of way for the lessor over the land leased. A right of this kind is a personal right analogous to a servitude.”

Support for this view is to be had in the case of *Ross v. White* (1906) E.D.C. 313. At pp. 317 to 318 KOTZE J.P. had this to say –

“Strictly speaking there can be no question of a servitude reserved to the lessor over his own property”.

Counsel concedes, however, that his contention that the plaintiffs permissive user is a bar to his claim can only be correct if the words “servitude” and “easement” in the proviso include rights and analogous to servitudes or easements, as the same principles are applicable to both. The case of *Quail v. Pollard* 1948 L.R.B.G. 174 appears to deny such a wide meaning to these words for, at p. 177 of the judgment, the Full Court held that the right of a tenant to pass or repass over a portion of land owned by the landlord and which is appurtenant to another portion leased to the tenant, is in no sense an easement as the whole of the property remained in the landlord. Such a right was held to be an irrevocable licence *ex necessitate* so long as the tenancy subsists.

In the view which I have taken however there is no need to pronounce on this aspect of the matter, because of ss. 3 and 4 of the Landlord and Tenant Ordinance, Cap. 185. S. 3 deals with the various types of tenancies, including tenancies from year to year, while s. 4 provides as follows:

“(1) It is hereby declared that the tenancies defined in s. 3 of this Ordinance comprise, and has always since the 1st January 1917,

comprised the relationship between landlord and tenant in this Colony, and that every such tenancy, as the case may be, had and, subject to the provisions of this Ordinance, shall continue to have in the Colony such and the same qualities and incidents as it has by the common law of England.

- (2) It is further declared that the common law of England relating to the said respective tenancies has, since the 1st January, 1917, applied to this Colony, and subject to the provisions of this Ordinance shall continue to apply to and govern the said tenancies.”

It is clear from the foregoing provisions that the common law of England as it relates to a landlord and his tenant is the proper law to be considered in the present case. It would appear that even before the enactment of the Landlord and Tenant Ordinance in 1947, the Guyana Courts have, at least since 1917, consistently applied the English common law of landlord and tenant to such a relationship. *Howard v. Gaskin* 1919 L.R.B.G. 23, *Heyliger v. Savory* 1919 L.R.B.G. 258 and *Ford v. Nurse* 1921 L.R.B.G. 1. In the *British Colonial Film Exchange Ltd. v. S.S. De Freitas* 1938 L.R.B.G. 35, the extent of the application of the English common law of landlord and tenant was considered by VERITY, C.J. at p. 40 he had this to say —

“It may be difficult to determine in this particular connection the precise limits of the application in this colony of the English common law of landlord and tenant bearing in mind that the common law of real property is not to be applied and that full ownership of immovable property is not to be subject to the incidents attached to land tenure in English but I do not think that it would be right to conclude that there is in this colony no law of landlord and tenant distinguishable from the law relating to contracts for the hiring of chattels. I can find no reported case in this colony subsequent to 1917 in which such a conclusion is indicated”

After going on to point out that the relationship of landlord and tenant at common law is essentially one of contract, although by the nature of its subject matter it confers upon the tenant an interest in the land, thus attracting to itself certain incidents attached to the English system of land tenure, the learned Chief Justice had this to say —

“. . . yet this personal contractual relationship remains as a characteristic of the law relating thereto and the dual nature of the relationship was recognised by the term “chattels real” applied to leaseholds which were nevertheless classed as personal property. By s. 2(1) of the Civil Law Ordinance, it is true that “chattels real” are now classed as immovable property, and as such are subject to certain incidents of local statute law. It is only, however, by a certain confusion of thought that this provision could be related back so as to consider them to fall within the common law of real property excluded by s. 3(c) of

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the Ordinance. As I indicated it would appear . . . that the English common law relating thereto (i.e. to landlord and tenant) is applicable in this colony in so far as it does not subject full ownership to any incidents of land tenure attached to land in England and not attached to personal property there.”

It was, in my opinion, to remove any doubt as to the applicability of the English common law of landlord and tenant that s. 4 of the Landlord and Tenant Ordinance was included in the legislation. It does not, however, appear that the legislature intended that any of the incidents of the English system of land tenure, specifically excluded by proviso (a) to s. 3(D) of the Civil Law of Guyana Ordinance should attach to such a relationship, but it is not necessary for me to decide this point.

In so far as ways of necessity are concerned the English common law applies the same principles whether in relation to a grant in fee or for a term of years. 1 Wms. Saund (1871 ed.) 570, *Pinnington v. Gotland* (1853) 9 Exch 1, at p. 12.

The facts and legal issues in the case of *Barry v. Hasseldine* [1952] 2 All E.R. 317 have much in common with those of the present one. The facts were as follows: The defendant sold the northernmost portion of his land which was separated from the rest of it by a concrete roadway to the plaintiffs predecessor in title. The roadway was on land belonging to the defendant and gave access to a disused aircraft runway which was constructed on land not in the ownership of the defendant and in turn gave access to the public road to the east. Another public road ran along the southern boundary of the defendant’s property. The plaintiffs land could be approached from the public roads either by way of the defendant’s land or over the runway, the remainder of the adjoining land being owned by persons other than the defendant but the plaintiff had no right of way over the runway.— He accordingly sued the defendant claiming a right of way over the latter’s land from the southern public road. DANCKWERTS, J. in holding that the plaintiff was entitled by implication to a way of necessity over the defendant’s land had this to say at p. 319 —

“. . . but it seems to me that, if the grantee has no access to the property which is sold and conveyed to him except over the grantor’s land or over the land of some other person or persons being a person or persons whom he cannot compel to give any legal right of way, common sense demands that the grant of a way of necessity should be implied, for the purposes for which the land is conveyed, over the land of the grantor. It is no answer to say that at the time of the grant, a permissive method of approach was in fact enjoyed over the land of some other person, because that permissive method of approach may be determined the day after the grant and the grantee may thus be rendered entirely incapable of approaching the land which he purchased.”

In the present case the position is in the reverse in that it is the landlord rather than the tenant who claims a right of way of necessity. It is well settled law that a landlord cannot derogate from his grant. (*Wheeldon v. Burrows* (1879) 12 Ch. D. 31). In this regard THESIGER, L.J. had this to say at p. 49 –

“The first of these rules is, that on the grant by the owner of a tenement or part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), or, in other words all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted. The second proposition is that if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant . . . , but the second of these rules is subject to certain exceptions. One of those exceptions is the well known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions . . . Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense viz. that a grantor shall not derogate from his grant.”

Before considering whether the plaintiff, as grantor, can derogate from his grant and claim a way of necessity over his tenant’s holding, it will be necessary to consider what, if any, rights of user he has over the six foot passageway now owned by the owner of subplot B. The plaintiff claims it is a permissive way. He states that despite the fact that he was entitled by virtue of his agreement of lease to a right of way over this passage before the lot was divided, he gave up this right when he bought subplot A. If, however, he was, in law, still entitled to use this way even after the lot was divided then, he cannot, in my opinion, pray the fact of his own default in giving it up in aid of his claim to a right of way of necessity over his tenant’s holding.

In arriving at a conclusion on this aspect of the matter the case of *Dhanpaul v. Demerara Bauxite Company Limited* (supra) is of some assistance. Excluding any consideration of the Rent Restriction laws for the moment, as the right of way was not registered as an encumbrance as envisaged by s. 23 of the Deeds Registry Ordinance, the plaintiffs legal right to it was lost when subplot B was transported to its present owner or at best he retained a bare licence, revocable at any time by the owner of the subplot. Has it been saved by the Rent Restriction Ordinance? The answer to this question lies in the extent of the meaning of “building land” in s. 2 of that Ordinance. It is defined as follows:—

“building land” means land let to a tenant for the purpose of the erection thereon by the tenant of a building used, or to be used,

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as a dwelling or for the public service or for business, trade or professional purposes, or for any combination of such purposes, or land on which the tenant has lawfully erected such a building but does not include any such land when let with agricultural land.”

I do not think that this definition includes a right of way, which the tenant would be entitled to either by virtue of s. 19 of the Landlord and Tenant Ordinance, or as a way of necessity, for the use and enjoyment of his holding. It is, in my opinion, only the area of land leased as distinct from any right of way or other easement appurtenant thereto which is covered by the definition of the words “building land.” It follows that, despite the fact that the plaintiff says that he gave up his right of user when the lot was divided and transported, in law, he lost this right unless it was specifically reserved. And I do not agree with the contention advanced that his omission to insist on the inclusion of such a servitude in his transport is a bar to his present claim. I, accordingly, hold the view that the right of user now enjoyed by the plaintiff over subplot B is a permissive one.

Despite the general principle that a landlord cannot derogate from his grant, I do not think that the fact that the plaintiff has this permissive way is any serious bar to the application of the principle enunciated in *Barry v. Hasseldine* (supra). It is only if he had a legal right to the use of the right of way on subplot B, that I would feel myself constrained to the view that he cannot claim a right of way of necessity. This view accords with that of the author of *Gale on Easements* (2nd ed.) at p. 99.

Counsel for the defendant has argued, however, that even if the plaintiff may ordinarily be so entitled the decision in *Chappell v. Mason* (1894) 10 T.L.R. 404 is a bar to such a right. In that case the tenants rented lot No. 12 in a street and afterwards the second and third floors of lot No. 13 belonging to a different landlord. By leave of both landlords a hole was bored through the wall dividing the lots and access was gained to both premises by the staircase of No. 12 and communication by the staircase of No. 13 was cut off. Afterwards a fresh tenancy was granted of the floors in No. 13 for a term which continued after the determination of the tenancy of No. 12. It was held that the second lease did not include the right to use the staircase of No. 13 for access to the rooms in No. 13 notwithstanding without such use, in the events which arose, the tenant could not have any enjoyment of the rooms. The court held at p. 405 that “it was necessary to look at the state of things which existed at the time when the lease was granted” and further that it was clear that at the time when the lease was granted it was not the intention of the parties that they (the tenants) should use the stairs to No. 13.

I am of the view that *Chappell v. Mason* is distinguishable from the present case. Unlike the latter, *Chappell v. Mason* dealt with a situation which ought reasonably to have been within the contemplation of the parties. Here, however, at the time when the lease to the plaintiff and defendant were entered into, the question of their intention as to a way over the latter’s

holding was not a relevant factor because they both held of the same landlord and a right of way was reserved to the former. In addition, and besides the fact that the plaintiff was not a party to the agreement with the defendant, it could not at any material time, have been reasonably contemplated that the land would have been sub-divided in its present form.

There is, however, another aspect of the matter to be considered. As I have already pointed out in the absence of some evidence that he had accepted her as his tenant, it is only by virtue of the provisions of the Rent Restriction Ordinance that the defendant could have lawfully held over after the plaintiff became legal owner of the subplot. (*Dhanpaul v. Demerara Bauxite Company Limited*) (supra). S. 21 of the Ordinance provides that a tenant who retains possession by virtue of the Ordinance, shall observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy. Notwithstanding this provision it does not, in my opinion, follow that the common law principle of a way of necessity is by implication revoked. "Statutes," said the Court of Common Pleas in *Arthur v. Bokenham* (1708) 11 Mod 148 at p. 150, "are not presumed to make any alteration in the common law further or otherwise than the Act does expressly declare." The cases of *Minet v. Leman* (1865) 20 Beav 269; *Rolfe v. Flower* (1865) L.R. 1 P.C. 27 and *Leach v. R* [1912] A.C. 305 are also to the same effect. S. 21 is, therefore, in my opinion, no barrier to the plaintiff's claim.

The defendant has given evidence that her holding is now 30 feet wide thus leaving a passage way of 2 feet from the western boundary of the passage way on subplot B. This I feel is too narrow a way and it should be at least 3 feet wide in order to allow for proper access.

The only remaining question is whether in virtue of the provisions of s. 26 of the Rent Restriction Ordinance, which provides as follows:

"Subject to the provisions of sub-s. (3) of s. 3 of the Summary Jurisdiction (Petty Debt) Ordinance, and any claim or other proceedings (not being proceedings under the Summary Jurisdiction Ordinance or proceedings before the Rent Assessor as such) arising out of this Ordinance shall be made or instituted in a Magistrate's Court." the plaintiff has instituted this aspect of his claim in the proper form. The extent of jurisdiction given to the magistrate's court by this section, and its counterpart in the Rice Farmers (Security of Tenure) Ordinance 1956, No. 31 of 1956, has been the subject matter of much litigation. (*Evelyn v. Latchman Singh* (1961) 3 W.I.R. 107 and *Small v. Saul* (1965) 8 W.I.R. 351.)

In the latter case it was held that a magistrate's jurisdiction does not include power to grant a declaration or injunction and that in matters arising out of the Rent Restriction Ordinance, proceedings in respect of which must be taken in a Magistrate's Court, such remedies can only be sought in the High Court. But it would appear that no such remedy can be sustained or properly instituted until a decision has been reached on the measure which

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gives it life. It may be argued that what in effect the plaintiff claims, is that the implied reservation of a right of way has, since he obtained title, become part of the contractual relationship between him and the defendant. His claim, in substance, therefore, ought to be for damages for a breach of this implied term and accordingly he cannot, at least before taking appropriate steps in the magistrate's court, successfully prosecute this aspect of his suit in the High Courts. As against this however, it should be noted that s. 21 only encompasses the terms and conditions of the original contract of tenancy. Here, the right of way claimed does not form part of the original contract of tenancy. It only arises by virtue of, and simultaneously with, the passing of title to the plaintiff. In my opinion this distinguishes the present case from that of *Saul v. Small*, for I do not think that it can be said that the plaintiff's claim is based on any term or condition carried over from the contractual relationship. It is based on his common law right to a way of necessity, which in the peculiar circumstances of this case, is *de hors* the previous contractual relationship.

I, therefore, hold that this Court has jurisdiction to grant the reliefs sought and accordingly I declare that the plaintiff is entitled to a way of necessity at least three feet wide over and along the defendant's holding leading to Princes Street and enjoin the latter from preventing him from using such a way.

The plaintiff is awarded half the costs of this action certified fit for counsel.

Declaration granted.

Solicitors:

Dabi Dial for the plaintiff.

David de Caires for the defendant.

URIAH MUNIAN v. CLAUDE LA MAISON

[In the Full Court on Appeal from a Magistrate of the Georgetown Judicial District (Bollers, C.J., Chung, J.) February 16, 23; March 1, 1968.]

Criminal Law — Policeman assaulted while preventing unauthorised use of telephone in police station — Whether assault of a peace officer in the execution of his duty — Summary Jurisdiction (Offences) Ordinance, Cap. 14, s. 28(b).

The appellant had been taken to a police station for enquiries. There he attacked a man who was sitting on a bench in the station and they were

involved in a scuffle. They were separated, but the appellant again attacked the man and threatened to kill him 'for his wife.' The appellant was warned, but he began to use indecent language. He again assaulted the man whom he had previously attacked. The man ran out of the station and the appellant rushed to a desk at which a police constable was sitting. He said he wanted to use the telephone and used more indecent language. The constable held on to the telephone and the appellant pushed him. He fell. A scuffle ensued for the telephone. Eventually the constable was able to wrest it from him.

HELD: (i) the incident over the telephone was but part and parcel of the whole incident concerning the appellant and what had occurred at the police station;

(ii) the constable was acting in the course of his duty as the appellant's previous behaviour clearly demonstrated that there was reasonable cause for the constable to apprehend a further breach of the peace.

Appeal dismissed.

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

W. G. Persaud for the respondent.

JUDGMENT OF THE COURT: On the 23rd February, 1967, at 8.45 p.m., P. C. Thorne was on duty in the enquiries office at Brickdam Police Station when a private of the G.D.F. brought in to the office a man named Sudeen. An inspector of police also brought in the appellant who is a police constable and said in the presence and hearing of the appellant that he had brought him in for enquiries for the offence of disorderly behaviour. While the inspector was speaking, the appellant attacked the man Sudeen who was sitting on the bench and became involved in a scuffle with him. The policemen who were present separated the two men, but the appellant repeated the attack on Sudeen and had to be held off by the policemen. The appellant then used indecent language saying that he was going to kill Sudeen for his wife. The appellant was warned about his behaviour by police constable Thorne who reminded him that he was a policeman and that he was misconducting himself in the enquiries office in the presence of civilians. The appellant replied that he could leave the work at any time and used indecent language. The man Sudeen was then conducted outside of the office, whereupon the appellant rushed at him and dealt him blows with his fists. Sudeen ran out of the office. The appellant was then put to sit on a bench in the office, but he got up from where he was placed to sit down and rushed to a table where there was a telephone, stating that he wanted to speak to his mother. He was told by constable Thorne that if he wanted to use the telephone he should have asked his permission as he was in charge of the office. At that time the appellant was in a disreputable condition, his shirt was out of his trousers and he appeared to be enraged and annoyed. He again made use of indecent language and said that he could use the telephone at any time. At that stage the constable held on to the telephone and the appellant pushed him and as a result he fell and hit his forehead on the

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table. The constable held on to the telephone and the two men scuffled for it and eventually Thorne succeeded in wresting the telephone from the appellant and replacing it on the table.

In these circumstances the appellant was charged and convicted for the offences of disorderly behaviour, contrary to s. 136(b) of the Summary Jurisdiction (Offences) Ordinance, cap. 14, and assaulting a peace officer acting in the execution of his duty, contrary to s. 28(b) of the Summary Jurisdiction (offences) Ordinance, cap. 14. It is from the latter conviction that he now appeals to this Court on the ground that the learned magistrate erred in law when he found that, at the time of the assault on constable Thorne, the constable was a peace officer acting in the execution of his duty.

Counsel for the appellant has submitted that the act of the appellant in holding on to the telephone and using it without permission was not by itself a breach of the peace or an offence which threatened the commission of a breach of the peace. He argues that there were two aspects of the matter to be considered. Firstly, whether the act by itself of taking up the telephone without permission was something which brought into exercise any duty of the police constable. He stressed that it must be a legal duty fixed by statute or at common law or it must be the exercise of a power allowed by statute or common law in the aid of the exercise of a duty, and at the most the act of taking up the phone without permission would be a mere civil trespass. Secondly, assuming the intervention by the police constable in holding the telephone was not an act within the execution of his duty, the question to be considered is would it bring it within the ambit of doing something in the exercise of a duty because it happened immediately after an act of disorderly behaviour? The reply of counsel for the respondent was that at the police station there was a breach of the peace committed by the appellant. There was a fight between the appellant and the man Sudeen, an assault committed by the appellant on Sudeen, indecent language used by him and conduct on his part which amounted to disorderly behaviour. The police constable merely tried to abate this course of conduct on the part of the appellant and while this was going on the incident with the telephone took place. There was, in other words, no cessation of the behaviour on the part of the appellant, and when, therefore, the police constable sought to prevent him from using the phone without permission he was acting in the execution of his duty.

S. 28(b) of the Summary Jurisdiction (Offences) Ordinance, cap. 14, is similar to the English s. 38 of the Offences against the Person Act, 1861, and we concede as this Court stated in *Semple v. Singh* and *Semple v. Marks* (Full Court Appeal No. 6 of 1967) where the authorities on this question were fully reviewed, that the English cases of *Thomas v. Sawkins* [1935] 2 KB. 249 and *Duncan v. Jones* [1936] 1 K.B. 218 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 and furthermore it is

his duty to prevent anything which in his view may cause a breach of the peace. In *Duncan v. Jones* the facts were, that an open air meeting was about to begin when a police officer told the accused that she could not hold it at that particular place on the ground that on a previous occasion the accused had addressed a meeting at the same place, which had been followed by a breach of the peace. There being a reasonable cause to apprehend a breach of the peace it was held that the police were entitled to forbid the meeting and that the accused by persisting in continuing with it was guilty of obstructing the police in the execution of their duty.

In *Piddington v. Bates* [1960] 3 All E.R. at p. 660, it was held that P., a police constable, was acting in the course of his duty in forbidding D. to join two persons picketing the entrance to certain premises. Notwithstanding the provision of the Trade Disputes Act, 1906, that it is not unlawful for one or more persons to picket, the police have a duty to limit the number of pickets if it is necessary to maintain the peace and this is a duty at common law. The basis for this decision was that the peace officer had reasonable grounds for anticipating that a breach of the peace was a real possibility and therefore was acting in the execution of his duty in taking action to prevent such breach. A police officer, therefore, charged with the duty of preserving the peace, should be left to take such steps as on the evidence before him he thought to be proper, and accordingly D. had been rightfully convicted.

It is clear, therefore, that from the authorities we are in agreement with counsel for the appellant that a true statement of the law of the point in question is, that for it to be said that a peace officer is acting in the execution of his duty he must be acting under a duty at common law or under a statute or he must be acting in the exercise of a power allowed by statute or common law in aid of the exercise of such a duty. In the *Waterfield case* [1964] 1 Q.B. 164 the test was laid down by ASHWORTH, J., in the Court of Criminal Appeal. He stated that in most cases that 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 instant case we take the view that the incident, which took place over the telephone at the time when the police constable was assaulted, merely formed part and parcel of the whole incident concerning the appellant which took place in the enquiries office that evening, and must be considered as one transaction and cannot be isolated as a separate incident. Applying then the test laid down in the *Waterfield case*, there can be no question of the police constable interfering with the liberty or property of

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the appellant. The police constable at that stage was acting under the common law duty imposed upon him in preserving the peace or any breach of the peace which he might reasonably have apprehended would be likely to take place. In view of the previous conduct of the appellant in the enquiries office in which he was engaged in a fight, the commission of an assault, the use of indecent language and an attempt to use the telephone without permission at the same time using indecent language, there was a strong probability that the appellant, although he said he wanted to speak to his mother, might well have used indecent language over the telephone, or damaged or destroyed the instrument in some way, or encouraged other persons to follow suit. In that situation it was the duty of the police constable to prevent him from so doing. There can be no question of this anticipated conduct on the part of the appellant being speculative or mere conjecture, as his previous behaviour clearly demonstrated that there was a reasonable cause to apprehend a further breach of the peace. Just as in *Duncan v. Jones* (supra) it was held there was reasonable cause by the police constable to apprehend a breach of the peace following the meeting because of what had taken place on the previous occasion, or as in *Thomas v. Sawkins* [1935] 2 K.B.D. 249, where it was decided that police officers were acting in the execution of their duty when they entered and remained on private premises at a meeting open to members of the public, because they reasonably anticipated a breach of the peace, although no breach of the peace was actually committed, this being part of their preventive power, and in *Piddington v. Bates* (supra), where there was anticipated a real possibility of the breach of the peace when one person was forbidden to join two persons picketing, so too in the instant case there was a probability that over the telephone the appellant would have committed a further breach of the peace. When, therefore, police constable Thome prevented the appellant from using the telephone without permission, he was acting in the execution of his common law duty to preserve the peace and when the assault took place he was assaulted in the execution of that duty.

In *Glasbrook Bros. Ltd. v. Glamorgan County Council* [1924] All E.R. Rep. 579, Viscount CAVE said:

“No doubt there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, or for protecting property from criminal injury”

That obligation we consider to be a duty at common law. Under s. 3(2) of the Police Ordinance, No. 39 of 1957, it is enacted that the police force shall be employed, inter alia, for the prevention and detection of crime, the preservation of law and order and the preservation of peace and the protection of property. Constable Thorne then, being in charge of the enquiries office, under this section of the Ordinance was not merely entitled to the preservation of order and peace in the enquiries office but was also under a statutory duty to take such steps to preserve law, order and peace in that office. When therefore he sought to prevent the appellant

from using the phone without permission he was acting in the execution of a duty imposed both by statute and at common law. One is reminded of the observations of BRAMWELL, B. in *R. v. Prebble* (1858) 1 F. & F. 325, where in holding that a constable, in clearing certain licensed premises of the persons thereon, was not acting in the execution of his duty, he said: "It would have been otherwise had there been a nuisance or disturbance of the public peace, or any danger of the peace."

For these reasons this appeal must be dismissed and the conviction and sentence of the magistrate affirmed with costs to the respondent fixed at \$33.64. Leave to appeal if necessary is granted.

Appeal dismissed.

ALLICOCK v. DEMERARA BAUXITE CO., LTD.,

[In the High Court, (George, J.) January 25, 31, March 14, 15, August 8, 10, 14, 1967, January 10, March 16, 1968.]

Executor and Administrators — Administration — Individual action filed before grant — Whether properly instituted — Whether plaintiff can apply at trial to be joined as administrator and litem.

Executor and Administrators — Action based on fraud — Whether survives for benefit of estate.

Immovable property — Transport obtained by fraud — Limitation of action — Deeds Registry Ordinance, Cap. 32, proviso to s. 23(1).

Solicitor and client — Nature of relationship — Whether dependent on payment of remuneration.

Equity — Laches and acquiescence.

Over fifty years after the plaintiff's father and other relatives had alienated 787 acres of land which they had owned by prescription at Pln. Retrieve Demerara River, the plaintiff filed an action against the defendant company, the successor in title of the original purchaser Winthrop Neilson. He claimed a declaration that the transports to Neilson had been obtained by fraud and undue influence and that the defendant company had purchased the land with full knowledge of the fraud. He also sought consequential orders for a rescission of the transports of conveyance of his share in his father's estate and accounts.

Prior to the argument between Neilson and the Allicocks the lands in question had been found to contain bauxite ore and under the agreement it

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was clear that the purchaser had intended to extract the ore. The agreed price was \$2.00 per acre and the purchaser and his solicitors, who were not involved in the negotiations for the purchase price, undertook to make the necessary applications to have title in the vendors by reason of the long possession and user. They were appointed the vendor's attorneys and were also given power to convey the land so vested in the purchaser. This was done in 1915. In 1916 the defendant company was incorporated and some twenty parcels of land including the block in dispute, were transported to them. The purchaser's solicitors, who were father and son, were two of the subscribers to the memorandum and articles of association. They were appointed directors. Among the other subscribers was Neilson who became the company's secretary. The elder solicitor was also appointed chairman of the board of directors and the younger, the company's assistant secretary/legal adviser. The father's active association with the defendant company continued until his death and that of the son at least until 1963.

HELD: (1) as the plaintiff's father died after the 1st January, 1920 any cause of action which survived the deceased survived for the benefit of and would vest in his estate and accordingly the plaintiff was not entitled to sue individually except in certain circumstances none of which were relevant in the present case;

(ii) even before the enactment of Part IV of the Law Reform (Miscellaneous Provisions) Ordinance in 1952, except for personal actions for which damages only could be recovered, the general rule was that all personal actions in which a testator might have sued in his lifetime survived his death and were transmitted to his personal representatives;

(iii) the word fraud in the proviso to s. 23(1) of the Deeds Registry Ordinance and common law fraud and if successful action to set aside a conveyance is brought within one year of its discovery the conveyance is a nullity. This does not, however, bar the court from ordering the rescission of a transport obtained by fraud and ordering a reconveyance of the property if an action is brought after one year from the discovery of the fraud;

(iv) the fact that a client does not pay any fees to a solicitor or indeed did not know him is not decisive of the relationship of the solicitor and client;

(v) even if there was fraud, having regard to the long delay in commencing the action, the plaintiff was guilty of laches and/or acquiescence.

Action dismissed.

GEORGE, J.: Early in the year 1914 John Bain Mc Kenzie a representative of the Republic Mining and Manufacturing Company Incorporated, a company incorporated in the United States of America, and hereinafter referred to as "the Corporation" came to British Guiana, for the purpose of buying bauxite bearing lands. He was reputed to be an expert on bauxite. Soon after his arrival he engaged the services of Joseph Arthur King, Crown Solicitor of the then colony, who was allowed private practice as his solicitor.

In April of that year, Arthur George King, the son of J. A. King returned to the colony, having qualified as a solicitor in the United Kingdom,

and joined his father's office. Thereafter both he and his father acted as solicitors for Mc Kenzie and this relationship continued until the latter left the country in 1916. Around December 1914 Winthrop Cunningham Neilson, the president of the Corporation, came to British Guiana, and thereafter until after 1920 made periodic visits to the colony. He also engaged the services of A. G. King and J. A. King as his solicitors. Indeed so close a relationship developed between them that he was considered a family friend of the Kings.

Mc Kenzie remained in the colony for about two years, during which time he lived at what is now called Mc Kenzie, (presumably named after him) except for occasional visits to Georgetown. His quest for bauxite lands was concentrated in the upper reaches of the Demerara River (hereinafter called "the area"), on its east bank from Noitgedacht southwards to Maria Elizabeth, and on its west bank from Wismar southwards to Akaima. During the years 1915 to 1918 these areas were undeveloped, and the residents, poor. They eked out a livelihood by growing and marketing oranges, vegetables and timber. Mc Kenzie sunk short pits at various points in the area in order to ascertain whether the lands were bauxite bearing and at some time during 1914 he intimated to A.G. King that he had discovered bauxite. Both the plaintiff and the witness A. G. King agree that from the year 1914 onward the fact of the discovery of bauxite was well publicised in the daily newspapers then circulating in the colony. The plaintiff admits that both he as well as his brothers and sisters read about the discoveries of bauxite in the area from that year until 1918. Although he at first denied it, the plaintiff admitted that his father knew about bauxite about two or three years before his death, which event occurred between 1919 and 1920. He goes on to say that there was great excitement in his father's lifetime (around 1915) when it became known that bauxite was discovered in the area and that the inhabitants felt that they would stand to gain financially if bauxite mining operations were commenced in the area. He, however, states that his father and uncles did not know about bauxite when they sold their lands in 1915.

Between the years 1914 and 1918 one hundred and fifty (150) to two hundred (200) persons in the area sold their lands to Mc Kenzie and Neilson at prices which ranged from \$2.00 to \$5.00 per acre. Some of them obtained independent legal advice before selling their holding. Among the persons who sold their lands were the plaintiff's father, Thomas Allcock, and his uncles Josiah Nathaniel Allcock, John Patterson Allcock, Robert Fredrick Allcock and Robert Hill Mansfield in his quality as legatee under the last will and testament of Joseph Allcock, deceased. These persons, however were not among those who had benefited from any independent legal advice. They had had possessory rights over portions of land at Plantation Retrieve also called Plantation Noitgedacht, and these lands were later transported in two parcels comprising 213 acres and 787 acres to Mc Kenzie and Neilson respectively on the 17th April and 5th October 1915.

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To assist Neilson and Mc Kenzie in the tracing and investigation of the claims of prospective vendors who had possessory rights, and indeed in the preparation of agreements of purchase and sale and subsequent transfers of legal 'titles, one Newman Small was, from the years 1915 to 1917, employed and paid by them. He had been a conveyancing clerk attached to the offices of Messrs Cameron and Shepherd, a firm of solicitors and was recommended to Mc Kenzie by both A. G. King and his father. With regard to Small's functions A. G. King has this to say:—

“Small would investigate the title and prepare affidavits for the purpose of proving title by long occupation. Small used to live up the Demerara River during these investigations. These affidavits would be sent down to Georgetown to my father and me and, if we were of the opinion that they were not full enough, would return them to Small with the necessary instructions. The affidavits were first sent down in draft. They would on return, be engrossed by Small, sworn to and forwarded to my offices. They were in due course submitted to the court for the issue of the necessary title. At the same time as Small forwarded the engrossed and sworn affidavits to us, he would also send a power of attorney from the vendor, in favour of my father and me to pass transport”.

On the 1st March 1915, the Allicocks executed a power of attorney to J. A. King and A. G. King empowering them jointly and severally to give instructions to the Registrar of Deeds to advertise, and thereafter to appear before one of the judges of the Supreme Court of British Guiana and pass transport of then right, title or interest in and to their 213 acres holding to and in favour of Mc Kenzie.

On the 23rd March 1915 George Bain Mc Kenzie executed what in the document itself (ex. A4) is called an irrevocable power of attorney in favour of Neilson and J. A. King with regard to the transfer of title in respect of the 213 acres from “the Allicocks” to him. Small prepared three affidavits evidencing their title by long occupation. Two of these affidavits were sworn to at Christianburg and Retrieve, Demerara River, and the third in Georgetown. On the same day on which the third affidavit was sworn i.e. the 17th April 1915 they were all filed in the Registry of Deeds and Berkeley, J., on representation made in that regard by J. A. King., awarded title to the Allicocks on the basis of these affidavits. On that same day the title so obtained was passed before Berkeley, J., to George Bain Mc Kenzie who in turn and also on the same day passed the same to Neilson.

It should be noted that the affidavits of the vendors and purchaser, required by the Deeds Registry Ordinance, were sworn to on the 1st and 10th March in 1915 respectively, while the instructions to advertise were signed by J. A. King on the 4th March 1915. A. G. King appeared and signed the grosse transport on behalf of both vendors and purchasers. The purchase price was \$690 or some what over \$3.00 per acre. Mc Kenzie it should be noted paid all the legal expenses involved in the application for and transfer of title.

There can be little room for doubt that in so far as this transaction was concerned J. A. King acted as solicitor for the Allicocks.

With regard to the parcel of land the subject matter of this suit, namely, 787 acres of Plantation Retrieve, "the Allicocks" entered into a written agreement between 28th May and 22nd June 1915 to sell and transport the same to Neilson at \$2.00 per acre. In this agreement it was provided that those proprietors whose houses were situate on and who were cultivating parts of the land and their descendants in direct line would be permitted for a period of forty-nine years to retain their houses and live in them and cultivate such lands as were then being used by them. They were also permitted to cultivate and cut timber for the purpose of effecting repairs and/or addition to their houses as well as for use as fuel. It was also provided if any of them desired to sell their building Neilson would be given the option of purchasing the same. In the event of a removal or sale of their dwelling however the rights reserved to them would immediately cease. To Neilson were reserved rights of way, over the land occupied by any of the parties, for the purpose of mining or excavating bauxite ore or minerals or for any other purpose provided that if any such user entailed the removal of any house or if any crops were damaged such compensation would be paid as may be awarded by three competent disinterested persons mutually appointed for that purpose by the occupier affected and Neilson or his nominee. On 23rd June, 1915 "the Allicocks" executed a second power of attorney, constituting J. A. King and A. G. King jointly and severally their attorneys for the purpose of giving instructions to the Registrar of British Guiana to advertise, and thereafter to appear before a judge of the Supreme Court and pass transport to and in favour of Neilson or his nominee in respect of the 787 acres. Both the agreement of sale and purchase and the power of attorney are in the handwriting of Small. Small also prepared the affidavits filed in support of an application by "the Allicocks" for prescriptive title i.e. title by long occupation. J. A. King, solicitor, assumed the legal responsibility for these affidavits as they purported to have been drawn by him.

The vendor and purchaser affidavits were sworn to by J. A. King pursuant to powers in that regard contained in the powers of attorney executed by Neilson and the Allicocks. He also signed the instructions to advertise the transport and on 5th October 1915 appeared before Berkeley, J. and signed on behalf of the Allicocks the documents evidencing the transfer of title to Neilson. His son, A. G. King, signed on behalf of the latter. None of the conditions included in the agreement were, however, incorporated in the transport.

With regard to the transfer of both portions of land it should be pointed out that there is no evidence to show that either A. G. King or J. A. King were in any way involved in the negotiations for their purchase or in the fixing of the purchase prices.

The defendant company was incorporated in British Guiana under the Companies Ordinance 1913 on 18th September 1916 with a share capital

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of \$100,000. The memorandum and articles of association were drafted by both Kings. J. A. King travelled to the United States of America to discuss and settle them but no evidence has been led to show with whom these documents were discussed. Among the seven subscribers to the memorandum and articles of association were J. A. King, A. G. King and Neilson. Each of the subscribers took up fifty shares. This company was a subsidiary of the Aluminium Company of Canada and some twenty-two parcels of land, including those in respect of the 213 acres and the 787 acres brought by Mc Kenzie and Neilson from the Allicocks, were transported to it. A. G. King and J. A. King signed the grosse transport on behalf of the company at the time of the passing. How, in the face of the statement contained in the power of attorney dated 23rd March 1915 to the effect that all purchases made by Mc Kenzie were for and on behalf and in his capacity as trustee of the Corporation, the lands were transported to the defendant company rather than to the Corporation is unexplained. The only evidence in this regard is that of A. G. King who says that he did not know what became of the interests of the Corporation in the lands purchased by Mc Kenzie and Neilson admittedly with its money. However it would appear that funds for the purchase of the defendant company's plant and machinery were provided by its parent company, the Aluminium Company of Canada.

Both A. G. King and J. A. King were appointed directors of the new company and in addition the former was appointed its solicitor and assistant secretary. The latter became the first chairman of its board of directors an office which he held until the year 1924. Both father and son were paid a sum of \$200 per month each for their services as director and chairman and director and assistant secretary of the company. J. A. King continued to receive this sum until his death in 1954 although he had been bedridden for the last twenty years of his life and this condition prevented him from attending meetings of the board. If one additional director was required to constitute a quorum of the board, however, and this was a rear eventuality, the meeting would repair to J. A. King's home and be held there, he being then included as the member required to properly constitute the meeting. In effect, therefore, during the last twenty years of his life J. A. King virtually performed no services for the defendant company in his capacity as a director. When asked why his father was permitted to remain a director, A. G. King opined that it was because of the services rendered by him to the defendant company. He A. G. King continued as assistant secretary/director until 1938 when he was appointed secretary in place of Neilson. He retained also his directorship and continued to be the company's solicitor. He held these offices until, at his own request, he was relieved of the office of secretary and most of his duties as legal adviser to the defendant company in 1963. It should be noted that in addition to performing the duties of assistant secretary/director A. G. King also carried out the duties of general manager of the defendant company for six months during 1918. When acting as such he negotiated with H. C. Humphreys, a barrister-at-law for the pur-

chase of lands owned by one Hubbard, situate in or near to the area explored by Mc Kenzie comprising 1200 to 1500 acres, for \$13,200.

According to A. G. King the subscribers to the memorandum and articles of association of the defendant company were only nominal holders of the shares issued to them. So far as he and his father were concerned they had neither paid any money nor given any other consideration whatsoever for their shares. He further states that they did not receive any financial benefits from them; and he says that on the same day that the shares were issued to them, both he and his father signed blank transfers on the reverse side of the share certificates. Thereafter they were forwarded to the secretary of the Aluminium Company of Canada. He states that the shares were issued to them merely in order to qualify them to attend the annual general meetings of the defendant company in the colony. The first share certificates issued to A. G. King and J. A. King were cancelled on the 11th May 1938. It would appear that some time between the date of issue i.e. the 29th September 1916, and the date of cancellation, the transferee's name i.e. the Aluminium Company of Canada and its address were inserted. On the date of the cancellation a new share certificate for two shares (photostat ex. A13) was issued to A. G. King. He states that no new share certificate was issued to his father although he continued to be a director. The memorandum of association of the defendant company was not tendered in evidence and it therefore could not be ascertained whether provision is made for directors to hold qualifying shares. As in the case of the former share certificate a transfer in blank was executed by A. G. King and forwarded either to Mc Kenzie or the Aluminium Company of Canada. This transfer does not bear any date nor has the transferee's name ever been inserted. This certificate was cancelled on the 22nd September, 1948 and a new one for two shares photostat (photostat ex. A19) was issued to him. Again he went through the exercise of signing the transfer form on the reverse side of share certificate. Although he states that the transfer form was signed on the same date as the issue of the shares certificate the transfer bears no date nor has the transferee's name been inserted. As with the first share certificates A. G. King states that no consideration passed for the issue to him of the certificates dated the 11th May 1938 or the 22nd September 1948 nor has he ever received any dividend and other remuneration from the share. Indeed he executed a declaration, on the 22nd September 1948 (photostat ex. A21) with regard to the share certificate issue on that day, to the effect it was not his property either directly and indirectly but was subject to the control of the Aluminium Company of Canada and has been assigned and delivered to that company.

Based on the foregoing facts the plaintiff asked for the following reliefs: —

- (a) a declaration that he is entitled to one undivided twenty-fourth part or share in and to the estate of his father Thomas Allcock, deceased.

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- (b) a declaration that transport no. 876 of the 5th October 1915 in respect of the interest of Thomas Allcock deceased, in 787 acres of Retrieve Demerara River was obtained by fraud and undue influence;
- (c) a declaration that the defendant company purchased the said land and took transport no. 147 dated the 26th January 1918 with full knowledge of the said fraud;
- (d) an order rescinding the above mentioned transport as well as transport no. 303 and 304 of the 17th March 1920 in respect of the plaintiff's one undivided twenty fourth interest in the 787 acres of Retrieve;
- (e) an order compelling the defendant company to convey to the plaintiff one undivided twenty-fourth part or share in and to the said land;
- (f) an order that the defendant company do deliver up to the plaintiff possession of the said land to the extent of his one undivided twenty-fourth part or share therein;
- (g) an order that the defendant company do deliver accounts to the plaintiff of all the profits derived by them from any mining of bauxite done on the said land from the time of such mining to the date of the judgment;
- (h) an order that the defendant company do forthwith pay to the plaintiff one twenty-fourth part or share of or in the said profits subject to the payment by the plaintiff to the defendant company of one-twenty of the purchase price paid by them for the said land;
- (i) an order that the defendant do pay to the plaintiff an occupational rent to be fixed by the court for and in respect of one twenty-fourth part or share in and to the said land with interest thereon at the rate of six per centum per annum from the date of the conveyance by transport no. 876 dated 5th October 1915 to the date of the delivery of possession to the plaintiff of the said land; and
- (j) any further order as to the court shall seem fit for the purpose of restoring the plaintiff and the defendant company to their former position as before the conveyances referred to above.

The substantial reliefs sought by the plaintiff are contained in the paragraphs (b) and (c) above and all the other relief flow from these central issues. In support of his allegation of fraud and undue influence several particulars are set out in paragraph 6 of the statement of claim and in the further and better particulars ordered by the court.

The first question to be determined is that of the plaintiff's right to sue in his personal capacity. His claim to be so entitled is based on the fact that he is one of the lawful issue of Thomas Allcock and his wife Eleen, both of whom died before the year 1921. It was this Thomas Allcock who, to-

gether with others was granted title to the 787 acres, the subject matter of this action, by virtue of their long occupation, and who transported the area so acquired to Neilson.

Before considering the legal position on this aspect of the matter, however, I must make reference to the evidence as to the date of death of the plaintiff's father. Such an examination is important because of the evidence of the plaintiff which places the death as having taken place either in the year 1919 or the year 1920. If it took place in the former year that is before the commencement of the Deceased Persons Estates Administration Ordinance, Cap. 46 then despite the case of *Croker v. Unique Friendly Society* (1921) L.R.B.G. 14 to the contrary it appears to me that the property of his father who died intestate would immediately vest in him and not as provided for after its commencement in 1920, when all "the estates" of the deceased vest in his personal representative. (s. 24(1)). A copy of a death certificate of one Thomas Branch Allcock (ex. A1), who died on the 23rd March 1920, was tendered by consent. Although the plaintiff at first stated that his father, whose name he gives as Thomas Allcock, died in the year 1920, under cross-examination he states that he died between one and two years after the end of the First World War. No attempt was made to show by any direct evidence that the Thomas Branch Allcock mentioned in ex. A1 was one and the same person as Thomas Allcock, the plaintiff's father. I am, therefore, left to draw an inference, if such is possible, from whatever facts have been led in the evidence. This consists merely of evidence to the effect that Thomas Allcock was a woodcutter and died at Retrieve. In ex. A1 the Thomas Branch Allcock mentioned therein was also a woodcutter and also died at Retrieve. Although it is somewhat tenuous I feel that on a balance of probabilities I can draw the inference that the Thomas Branch Allcock mentioned in ex. A1 was the plaintiff's father and I accordingly so do.

In considering his right to sue personally, it must not be overlooked that in an action such as the present one, the relevant time at which the fraud, undue influence or breach of fiduciary relationship must be proved to have been taken place is the date of the contract. *Revell v. Hussey* (1813) B. 2 and B. 280 at p. 288. According to ex. A9 the contract for the purchase and sale of the 787 acres was executed between the 28th May and the 22nd June 1915. It must follow that the right to sue came into existence at that time.

On the assumption that the plaintiff's father died in 1920 it was submitted that s. 24(1) of the Deceased Persons Estates Administration Ordinance, Cap. 46 vests the estate of a person dying after the 1st January 1920 in his personal representative. This section reads as follows:—

"From and after the commencement of this Ordinance the estates of all persons dying testate or intestate shall vest in the personal representative or representatives of the deceased and shall be administered and distributed according to law under a grant of probate or letters of administration by the Registrar upon an order of the court."

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It is submitted by junior counsel for the defendant company that, as no such grant has been made to the plaintiff, he cannot sue for the reason that if any fraud was committed or there was a breach of a fiduciary relationship, it was against the deceased and the cause of action would accordingly vest in the estate. In considering this aspect of the matter it would be necessary to consider what rights of action are transmissible on a person's death. Although s. 24(1) of the Deceased Persons Administration Ordinance vests "all estates" in the personal representative of a deceased person it gives no guide as to what should be included in the estate, and until December, 1952 when Part IV of the Law Reform (Miscellaneous Provisions) Ordinance came into operation, there were no statutory provisions setting out what if any causes of action survived for a deceased's estate. In the interregnum one must look to the common law and equity for the answer. Except for those personal actions for which damages only could be recovered the general rule has been established from earliest times that with regard to all other personal actions as are founded upon any contract, debt, covenant or other duty, the right of action on which a testator might have sued in his lifetime survives his death, and is transmitted to his executor or administrator. *Wheatley v. Lane* 1 Saund 216 at p. 216 (a) note (1). This was also the principle followed at equity. Subject to certain exceptions which are not here relevant this legal principle was made statutory in Guyana by the enactment of Part IV of the Law Reform (Miscellaneous Provisions) Ordinance Cap. 4. It follows that an action such as the present one at, all material times, survived the deceased.

I now go on to consider whether it survived for the benefit of his estate only or whether in any circumstances a beneficiary of the estate could personally sue. In support of his contention in favour of the former proposition junior counsel for the defendant company drew attention to the cases of *Croker v. Unique Friendly Society* (1921)L.R.B.G. 14 and *Ingall v. Moran* [1944] 1 All E.R. 97. In the former case in which the plaintiff sue for a sum of \$70.00 alleged to be due to her deceased husband who died intestate, it was held at p. 17 that in the absence of a grant of letters of administration she had no right to sue personally or to claim any benefits to which the deceased or his estate became entitled to on his death.

In so far as the plaintiff's claim for a rescission is based on the breach of fiduciary relationship it is a claim in equity and courts of equity have always permitted a personal representative to institute proceedings before a grant of probate or letter of administration provided the granting of such probate or letters of administration is alleged in the statement of claim. *Fell v. Lutwidge* 2 Atk. 120, *Horner v. Horner* 23 L.J. Ch. 10. These cases show, however, that the action must be brought in order to protect the estate. See *Ingall v. Moran* [1944] 1 All E.R. 97 at p. 103. Unlike the cases of *Fell v. Lutwidge* and *Horner v. Horner* the present action cannot be said to be for the protection of the estate of Thomas Allcock. And, except in certain circumstances as for example against a deceased's partner who is also his executor (*Bowsher v. Watkins* 1 R & M 277), the only instance when a legatee or beneficiary may personally sue a third person on behalf of an estate is where he alleges fraud

or collusion between the personal representative and the person sued. *Yeatman v. Yeatman* 7 Ch.D. 210, *Travis v. Milne* 9 Ha 141 *Stainton v. Baxter* 12 App. Cas. 167. Even so the action cannot be maintained without the personal representative being a party. None of the above circumstances have any relevance in the present case. The case of *Henley v. Stone* (1840) 3 Beau 355 cited by counsel for the plaintiff does not carry the matter any further for in that case both collusion and fraud were alleged by the legatee. Nor do the cases of *Belamy v. Sabine* 17 L.J. Ch. 105 or *Charter v. Trevelgan* 8 E.R. 1273. In the former case the plaintiff was seised in fee of one estate and the tenant for life of the other and accordingly, as the owner of legal estates in the lands, was entitled to sue personally. In the latter, the suit was instituted by the legal owner of the lands, but he died testate before an answer was put in, and his son who was his heir-at-law, residuary devisee, and executor filed a bill of revivor. It is not stated in which of his capacities he filed the bill but an heir-at-law became entitled and was vested with the deceased's real property which then did not go to his personal representative, for, as is well known, under English law, reality did not vest in an executor or administrator until the enactment of the Land Transfer Act, 1896, but passed directly to the heir-at-law.

In *Ingall v. Moran* (supra) it was held, approving the decision in *Chetty v. Chetty* [1916] 1 A.C. 603, that an administrator derives his title solely from his grant and cannot, therefore, institute an action as administrator before he gets that grant. In that case the respondent, who described himself as administrator, had instituted proceedings in September, 1942 although letters of administration were not granted to him until November, 1942.

In the present case, after decision on this issue was reserved on the 21st July 1967, the plaintiff made an application by way of summons seeking to have himself appointed administrator *ad litem* of the estate of his father and as such, to be joined as an added plaintiff in the action. (see s. 17 of the Deceased Persons Estates' Administration Ordinance, Cap. 46, and O. 14 r. 14 of the Rules of the High Court 1955). Arguments on this summons were concluded on the 10th January, 1968. I cannot but deprecate the rather belated nature of the application. The plaintiff's legal advisers must have been fully aware of the fact that the defendant company had, by their defence filed on the 26th June 1966, made an issue of the question of the capacity to sue.

With regard to the application proper, as I have already pointed out, an administrator derives his authority entirely from the appointment of the court. It is true that when a grant of administration is made the intestate's estate including all choses in action vests in the person to whom the grant is made, but the question here is, does this entitle him to adopt, and be added as plaintiff in, an action in which his intestate's estate may be concerned and in which the original plaintiff has been misjoined? This seems to me very doubtful but in the view which I take of the other aspects of the case it is unnecessary for me to pronounce decisively on this point.

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I, therefore, propose to pass on to consider, assuming that the plaintiff has a right to sue personally, the issue of fraud. As I understand the plaintiff's case, he claims that his father was the victim of a fraud which entitled him to a declaration that the transport obtained by the defendant company is either —

- (a) void by virtue of the proviso to s. 23(1) of the Deeds Registry Ordinance, or
- (b) voidable, and so in equity must be rescinded and his portion of the inheritance transported to him.

It may not be inappropriate at this stage to examine the provisions of s. 23(1) and the proviso thereto. This section declares that from and after the 1st January 1920 every transport of immovable property vests in the transferee a full and absolute title subject to certain claims and rights which are not relevant in the present context. The proviso goes on to state as follows:—

“Provided that any transport, whether passed before or after the 1st January, 1920, obtained by fraud shall be liable in the hands of all parties and privies to the fraud to be declared void by the court in an action brought within twelve months after the discovery of the fraud or from the 1st October 1925 whichever is more recent”.

I shall return to the question of the limitation period later in the judgment but for the moment shall confine myself to an examination of the meaning of the words “fraud” and “void” in the proviso. With regard to the former word BELL, C.J., in *Stafford v. Coombs* (1952) L.R.B.G. 49 had this to say at p. 72.

“As far as I am aware no considered opinion has yet been expressed by the courts on the meaning of the word “fraud”. I cannot, however, conceive that when this word was used in section 23 the Legislature intended it to be limited to common law fraud”.

Although little assistance can be had from the English authorities it may be useful to draw attention to the cases of *Beaman v. A.R.T.S. Ltd.* [1949] 1 All E.R. 465 and *Kitchen v. R.A.F. Association and others* [1958] 3 All E.R. 241 in which meaning of the word “fraud” as used in s. 26 of the Limitation Act 1939, of which the Guyana counterpart is s. 21 of the Title to Land (Prescription and Limitation) Ordinance, Cap. 184, was considered. In the latter case Lord EVERSLED, M.R. said at p. 249;—

“It is now clear, however, that the word ‘fraud’ in section 26(b) of the Limitation Act 1939 is by no means limited to common law fraud or deceit. Equally it is clear having regard to the decision in *Beaman v. A.R.T.S. Ltd.* [1949] 1 All E.R. 465, that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord HARDWICKE did not attempt to define two hundred years ago and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which having regard to some special relationship between

the two parties concerned it is an unreasonable thing for the one to do to the other.”

I think that the above observation made in construing the word ‘fraud’ in a limitation statute lends some support to the observations of BELL, C.J., in *Stafford v. Coombs* (supra). I adopt and agree with the learned Chief Justice’s definition of the word and hold that it extend to and includes ‘equitable fraud’ by which expression I include undue influence and/or breach of a fiduciary relationship.

With regard to the word ‘void’ it is a well settled general principle that except where the fraud is such as to bring about a fraudulent mistake, a contract or other transaction induced or tainted by fraud is not void, but only voidable at the election of the party defrauded, *Rawlins v. Wickham* (1858) 3 De G & J. 304; and when a transaction is voidable for fraud it will usually be voidable in equity only because the method of setting it aside is the equitable remedy of rescission. It is, in my opinion, with this legal distinction in mind that one must approach consideration of the proviso to s. 23 of the Deeds Registry Ordinance. In my understanding of it, the proviso deliberately excludes the general principle referred to above, for it makes a conveyance obtained by fraud void as distinct from voidable, against the persons mentioned therein. In other words what the proviso means is that any transport obtained by fraud is of no effect – a nullity – and must be so pronounced by the court. The resulting effect must be a cancellation of transport so obtained and, by necessary application, a restoration of the title from which it claimed its existence.

However, the proviso does not, in my opinion, deny to the court its power under the general principles of equity, to order a rescission of a transport obtained by fraud, and accordingly one which is voidable, and to direct a reconveyance of the property to the plaintiff in a suit brought after one year from the discovery of the fraud.

I now go to consider whether on the evidence the plaintiff has established a case of fraud at common law or in equity. As I understand his case, and it is amply set out in para. 6 of the statement of claim and also in the particulars supplied, the gravamen of the fraud of which he complains is a breach of the fiduciary relationship of solicitor and client existing between J. A. King and A. G. King, who were solicitors for the purchaser Neilson, and his father, one of the vendors. Other factors on which he bases this allegation are:—

- (a) the failure of the solicitors to make full disclosure of all material facts to his father and the other vendors, (the Allicocks).
- (b) the price at which the lands were sold viz: \$2.00 per acre was grossly unfair and the vendors did not have the benefit of competent or for that matter any independent advice.
- (c) the fact that vendors gave to their solicitors a power of attorney for the purpose of affecting the sale and transport of the disputed lands.

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- (d) the fact that A. G. King and J. A. King did not only prepare the documents for the purpose of incorporating the defendant company but also together with Neilson and others were its first directors, and shareholders, A. G. King being in addition its assistant secretary and legal adviser and J. A. King its chairman.
- (e) the relation of A. G. King with the company subsists up to the present time and that of his father until his death in 1954, and
- (f) accordingly the defendant company must be considered the privy of A. G. King and J. A. King as they and Neilson are persons through whom the defendant company claim title.

With regard to the existence of a fiduciary relationship at the material time I am of the opinion that there is ample evidence to support the view that both A. G. King and his father did act as solicitors for Mc Kenzie and Neilson as well as the Allcock family. Although A. G. King states that the documents relating to the application for title by long occupation in respect of both the 213 acres and the 787 acres were drafted by Newsam, he admitted that he and his father vetted them and took full responsibility for their legal effect. This is amply supported by the last paragraph of each of the three affidavits in support of the application which are stated to have been drawn by J. A. King. That J. A. King acted as solicitor for the Allcocks is further borne out by the fact that it was he who made representations to Berkeley J. for the grant of title in respect of the 213 acres after the affidavits were filed. Thereafter pursuant to a special power of attorney to him and A. G. King jointly and severally in that regard (ex. A10) instructions were given to the Registrar of Deeds to advertise transport by J. A. King and he appeared before Berkeley J. and passed transport to Mc Kenzie. The foregoing facts are sufficient evidence of the existence of a relationship of solicitor and client between the Kings and the Allcocks and I hold that this relationship commenced from the 1st March 1915 the date of the execution of the first affidavit in support of the application for prescriptive title. With regard to Mc Kenzie and Neilson the evidence discloses that all monies and fees required and payable were paid by the former who in fact employed the Kings to obtain title on behalf of the Allcocks although the latter did not know them. This fact however does not in my opinion alter the relationship of solicitor and client existing between J. A. King and the Allcocks. Nor for that matter can the fact that no remuneration was received from the vendors have this effect. If a gratuitous acting as such is sufficient to absolve a solicitor from his obligation of full disclosure and of otherwise acting with the utmost propriety to his client then a court of equity would find itself in the impossible and ridiculous position of condoning what may, in a given set of circumstances, be a most fragrant breach of his duty to protect his client's interests and to give the best advice he possibly can.

This solicitor and client relationship continued for, in June 1915 J. A. King drew an affidavit (ex. All) in support of an application by the Allcocks for title, by long occupation, for the 787 acres the subject matter of the present suit, and his son, A. G. King prepared the necessary documents

for the passing of transport in respect of this area of 787 acres to Neilson. No evidence has however been led to show that the Kings participated in the negotiations leading to the signing of the agreement of sale or indeed sold on behalf of the Allicocks any of their lands to Mc Kenzie or Neilson. On the contrary, the only evidence on record leads to me the opposite conclusion. Mc Kenzie installed himself in the Mc Kenzie area and employed Newsam, who also took up residence in the area, for this purpose. All the conditions of purchase and sale were worked out and negotiated by them in the area and the Kings were only involved in an examination of the documents prepared by Newsam with a view to advising on their legal efficacy and to prepare or approve the necessary affidavits in support of the applications for title by long prescription as well as those of vendor and purchaser. It may be argued with some force that Newsam was the agent of the Kings, albeit a gratuitous one, in so far as he drafted legal documents for them, but this in my opinion is not sufficient from which to draw the inference that he was their agent in any negotiations for the sale of the lands to Mc Kenzie or Neilson.

With regard to the price paid, an examination of twenty-seven transports of lands in the Mc Kenzie area, brought by Mc Kenzie or Neilson, or the defendant company, during the years 1915 and 1916 and which are tendered, reveals that only one vendor was paid \$5.00 per acre. Of the others six, were paid \$3.00 per acre, six between \$2.25 and \$2.50 per acre, four were paid \$2.00 per acre and the remaining ten sums ranging from \$1.50 to 19 cents per acre.

No evidence has been led to show that the sum of \$2.00 per acre for the 787 acres was inadequate, let alone so grossly inadequate, as in itself to furnish evidence of fraud. In this regard what I would have expected was some evidence to show the real value of the land at the time of the sale but none was forthcoming.

The fact that J. A. King and A. G. King were appointed directors and in the case of the latter chairman of the defendant company on its formation has not been denied. I believe and accepted the evidence of A. G. King to the effect that when the two parcels of land, that is the 213 and 787 acres areas, were transported to Mc Kenzie and Neilson neither he nor his father knew of any intention to float a company and vest these and other parcels of land purchased by Mc Kenzie and Neilson in this company. In his evidence he states that he was surprised at the appearance of the Aluminium Company of Canada on the scene, because he had, at all times, formed the impression that the principals of Mc Kenzie and Neilson were the Republic Mining and Metal Company Incorporated. This latter fact is borne out by the power of attorney (ex. A4) to which reference has already been made. I further believe the evidence of A. G. King that neither he nor his father have or even had any beneficial interest in the shares issued to them, whether on the formation of the company or subsequently. I believe him when he says that they paid no money for the shares allotted to them and at all times held them as nominees. Nor has evidence been led to show that the fees paid to A. G. King and his father as directors and chairman and assistant secretary or

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or secretary of the defendant company were excessive and I accordingly do not take this into consideration; nor do I believe that these two solicitors who had acted for Mc Kenzie and Neilson and who were very close to the latter, were appointed to important position in the defendant company as part of or in keeping with any conspiracy between them and Mac Kenzie whether before or after the sale of the lands to the company. I do not believe that they (i.e. the Kings) had any knowledge in 1915 that it was intended to form and incorporate the defendant company or for that matter any company.

Based on the foregoing facts and circumstances taken both individually or collectively, I am of the opinion that the plaintiff has failed to prove any fraud whether at common law or in equity. It has been urged upon me by counsel for the plaintiff that assuming privity between the Kings and the defendant company, the existence of the fiduciary relationship of solicitor and client is sufficient evidence *per se* from which a court can presume undue influence so as to cast upon the latter the onus of proving the propriety of the transaction, i.e. by proving that the vendors received independent advice and that the price was absolutely fair. As I understand the legal position, however, the principle of the presumption of undue influence is only valid in the context of a fiduciary relationship when a gift or bounty is made by the person in the ‘servient’ position, e.g. a client, to one in the ‘dominant’ position, his solicitor. *Morgan v. Minett* (1877) 6 Ch. D 638 and *Wright v. Carter* 87 L.T.R. 624; but so far as a solicitor buying from or selling to his client is concerned the rule is somewhat less strict. Generally speaking, the burden of proving that —

- (a) the client was fully informed,
- (b) he had competent advice, and
- (c) the price was a fair one, rests on the solicitor.

The position is somewhat different with regard to a solicitor acting for both parties. In *Goody v. Baring* [1956] 2 All E.R. 11 at p. 12 DANKWERTS, J. had this to say—

“It seems to me practically impossible for a solicitor to do his duty to each client properly when he acts for both vendor and purchaser”.

This view has also been clearly expressed by SCRUTTON, L.J., in *Moody v. Cox & Hatt* [1917] 2 Ch. 71 at p. 91.

“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. The case has been put of a solicitor acting for vendor and purchaser who knows of a flaw in the title by reason of his acting for the vendor and who if he discloses the flaw in the title which he knows as acting for the vendor may be liable to an action by the vendor and who, if he does not disclose the flaw in the title, may be liable to

an action by the purchaser for not doing his duty as solicitor for him. It will be his fault for mixing himself up with a transaction 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 serious risk of liability to one or the other owing to the duties and obligations which such a curious position puts upon them”.

Because of the comparatively simple system of conveyancing operative in this country the Guyanese solicitor may not be faced with many of the pitfall which beset his English counterpart. This does not, however, mean that in a given case, the former cannot find himself liable, or a transaction declared void if he fails in his duty to fully disclose everything that may be material to the judgment of his clients before the transaction is completed.

Although it is pleaded that the power of attorney given by the Allcockes included a power to sell the evidence does not support this. What was in fact given was a special power of attorney to appear and pass transport. Nor is there any evidence that the Kings played any part in the negotiations leading up to the sale of the lands in dispute or the payment of the consideration finally agreed upon. The negotiations leading up to the sales appear to have all been carried out and finalised by the purchaser and/or his agent Newsam in the Mc Kenzie area. All the Kings were employed to do was to obtain titles for the Allcockes and prepare the necessary documents for their transfers to the purchasers. Nor does the evidence disclose that the Kings were ever given power to purchase any lands on behalf of Mc Kenzie or Neilson and as their agents (see ex. A4).

As I have already pointed out the plaintiffs father knew that he and the others were selling bauxite bearing lands and must have known that the purchasers intended to exploit these lands as such. In this latter regard he states that the residents in the area were excited at the prospect of the ore being mined because they felt that it would materially alter their standard of living for the better. The facts of this case are, in my view, quite unlike those in *Hesse v. Briant* 43 E.R. 1375. There both Hesse and Briant were clients of the same solicitor to whom Briant gave an authority to sell certain property. On the 4th June 1853 the solicitor wrote to Hesse telling him that the property was for sale; and having previously appointed Briant to be with him on the 6th June, but refraining from telling him of Hesse's anticipated visit, wrote to the latter requesting him to come to his office on that day to treat. On the 10th June an agreement of purchase and sale was entered into between the solicitor and Hesse. Briant refused to complete the sale because of failure to disclose the purchaser and Hesse filed a bill for specific performance.

In his judgment at p. 1378 the Lord Chancellor made the following observations —

“Now I don't find that this was ever communicated to Mr. Briant, though it was very important to a man in the defendant's position to know who was likely to become purchaser, as if he had known that Mr.

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Hesse was the person he might have insisted upon his giving a higher price. If then there was no communication it would in my opinion have upset the whole transaction because any fact which ought to have been made known and which was not communicated would be enough for that purpose”.

One fact which the Kings did know about but which they did not disclose, was that Neilson and Mc Kenzie were the agents of the Republic Mining and Metal Company of the United States of America. Not only does the plaintiff not plead this failure as being a non-disclosure of a material fact, but in the circumstances of the case I hold that it was not material. I do not think that the Allicocks knew or ever heard of this company nor do I think that the disclosure of this information would in any way have influenced them. They must have known that Mc Kenzie and Neilson were purchasing a great deal of land in the area, and consequently realised that they must have had at their disposal some considerable sums of money not only for this purpose but also for the anticipated exploitation of the lands so purchased.

There was another omission on the part of the Kings but not in relation to the sale as such. The agreement of sale (ex. A9) contained several conditions including the right of the vendors to live in and maintain their dwellings on the land. None of these encumbrances was registered or mentioned in the transport (ex. A). Although this omission, may be the ground for a rectification of the transport – I am not required to pronounce on this – it cannot in my opinion be a ground for a rescission.

Even if the plaintiff had established the existence of fraud the evidence lead as to the time when he first became aware of it is so unconvincing that I find myself left with no alternative but to reject it. He states that it was as a result of a discussion with a cousin Walter Allcock that he became aware of it. This discussion which took place, according to him, in December 1965 was at his cousin's home at Retrieve. The latter asked him whether he knew if the Kings had any connection with the defendant company and after he answered in the negative told him to travel to Georgetown to seek legal advice. He further states that his cousin also told him that there was a condition in the agreement of sale of the 787 acres that the vendors were to be allowed to live on and cultivate the land sold and cut timber thereon, a fact which he had not known of before. His cousin also showed him a copy of the agreement similar to ex. A9 which he read throughout. This document was in manuscript form. He also states that Walter Allcock showed him an agreement between John Patterson Allcock, one of the vendors, and the defendant company whereby the former renounced his rights under ex. A9. Walter Allcock on the other hand states that he spoke to the plaintiff, not at his home, but at the latter's and did not suggest that he should launch this action. He further states that the only documents which he showed the plaintiff were the writ of summons and the statement of claim. He never showed him a copy of the agreement (ex. A9) or the renunciation (ex. A12) both of which he admits he had been seeing for the first time in court and

had never heard of before. Indeed he states that he never had any information whether directly or indirectly as to the circumstances or conditions relating to the sale of the land in dispute, nor did he know what were the negotiations leading up to that sale.

I gained the impression that the only reason why these two witnesses gave evidence as to a conversation in December 1965, was in an attempt to bring the suit within the one year limitation period provided for in the proviso to s. 23(1) of the Deeds Registry Ordinance, Cap. 32. My impression is not in any way weakened, on the contrary it is strengthened, when regard is had to the fact that the action was launched less than two months after he says he first consulted his legal advisers. In other words he was able, if the plaintiff's story is to be believed, within this short period of time to accumulate all or most of the mass of documentary evidence tendered in this suit. I do not believe the evidence led in this regard and I am accordingly left with no evidence as to the time when the plaintiff first became aware of the facts on which he alleges the existence of the fraud committed on his father.

But, again assuming that the evidence does disclose fraud, the fact of its discovery outside the one year limitation period is not necessarily a bar to the claim, for the agreement would then be voidable subject to any equitable defences against the grant of relief. However having regard to my rejection of the plaintiff's evidence as to the time of the discovery of the fraud the void leaves me with no evidence from which it cannot be said in the face of the long delay – from 1915 to 1966 – in commencing proceedings, that the plaintiff is guilty of acquiescence and/or laches. In this regard all the facts set out in the particulars of fraud and to which reference has already been made except the formation of the company and the positions held by the Kings therein must have been known to the plaintiff's father. Yet he did nothing. As I have already stated I accept the evidence of A.G. King as to the circumstances leading to its formation and their relationship with it. It is, therefore, only in relation to what the plaintiff's father must have known that the plaintiff must rely on. Even if this knowledge does amount to fraud the delay has been too long.

In the view which I have taken on the several aspects of the case which I have considered I do not think it necessary to consider the question of the meaning of the word "privies" in the proviso to s. 23(1) of the Deeds Registry Ordinance.

Accordingly and for the reasons set out above I have no alternative but to dismiss this action with costs certified fit for two counsel.

Action dismissed.

Solicitors:

J. A. Jorge for the plaintiff.

D. Bernard for the defendants.

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v.

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[High Court – In Chambers (Mitchell, J.) March 14, 18, 1968.]

Practice and procedure — Order of court perfected by entry — Error made by Registrar — Whether error can be rectified by summons — Rules of Court, O.26 r. 11.

The applicants had obtained an order to sell certain immovable property belonging to the respondent on which they held a first mortgage. When the mortgage was first passed it was in respect of a larger area of land, but subsequently, by mutual agreement, a portion had been released, and a suitable annotation made on the mortgage deed. It was in respect of the remaining area that the order for foreclosure and sale had been made. Through an error on the part of the Registrar, the order as entered authorised the sale of the larger area which initially had formed the subject matter of the mortgage.

The applicants filed a summons to have the order as entered rectified.

HELD: (i) the order failed to reflect the judgment of the court and accordingly either by virtue of O.26, r. 11 or its inherent powers, the court could rectify the order as entered;

(ii) the proper procedure to have the order rectified was by summons.

Application granted.

J. A. King for the plaintiffs.

E. A. Gunraj for the respondent.

MITCHELL, J.: This is an application by way of summons made on behalf of the plaintiff for leave to amend the order flowing from the judgment pronounced in this matter and dated 20th March, 1967 and entered on 27th April, 1967, by the insertion of certain words on the ground that a certain fact asserted in the original statement of claim by the plaintiff and mentioned in the particulars of that statement of claim were not taken into consideration by the Registrar, and were inadvertently overlooked by him when the order of court was made and entered. The plaintiff applicant has contended that the omission by the Registrar to take the fact asserted by the plaintiff into account in the order was an accidental slip or omission which may be corrected by the court on summons without an appeal, within the scope and meaning of O.26 r. 11 of the Rules of the Supreme Court 1955, or by means of its inherent jurisdiction.

Counsel for the respondent in opposing the application for leave to amend the order contended that there was nothing on the record to show that the Registrar erred in drawing up the order, that the plaintiff's statement of claim is capable of the construction reflected in the order and that the order was made out at the instance of the plaintiff applicant and perfected.

According to the learned author of 22 Halsbury's Laws, 3rd ed. at p. 740

"The terms "judgment" and "order" in their widest sense may be said to include any decision given by a court on a question or questions at issue between the parties to a proceeding properly before the Court"

and a final judgment is

"a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined in favour either of the plaintiff or of the defendant."

To my mind this is really an application to amend the order of court rather than the judgment.

On 20th March 1967 the court gave judgment in favour of the plaintiff. The solicitor for the defendant-respondent appeared on behalf of the defendant and consented to the judgment and it was made in his presence and hearing. The judgment to which the defendant through his solicitor consented was in the sum of \$15,100.78 together with interest on the sum of \$14,265.64 at the rate of 7 per cent per annum from 16th January, 1967 until payment. The court also made an order for foreclosure as prayed by the plaintiff with costs in the sum of \$107.50. In so far as the order for foreclosure is concerned the plaintiff claimed to foreclose the said mortgage and bring the mortgaged property to sale at execution and recover from the proceeds of such sale the sum of \$15,100.78.

The mortgaged property at the time of making the mortgaged deed on 8th October 1958 was described as

"lot number 126 (one hundred and twenty-six) Laluni Street in that part of Georgetown called Queenstown ward in the county of Demerara and colony of British Guiana and on all the buildings and erections thereon."

When the matter came up for adjudication before the court on 20th March 1967 it was asserted at the para. 2 (two) of the plaintiff's statement of claim that "on 3rd day of September, 1962, the aforesaid mortgage was for the sum of \$3,000.00 cancelled in respect of:

Sub-lot lettered 'B' part of lot numbered 126 (one hundred and twenty-six) Laluni Street, in Queenstown district, in the city of Georgetown, in the county of Demerara and colony of British Guiana, the said sub-lot being laid down and defined on a plan by D. C. S. Moses, Sworn Land Surveyor, dated 20th December, 1957, and deposited in the deeds Registry on 27th day of February, 1962, and the buildings and erections thereon and subject to a right of way in favour of the owners and occupiers of subplot lettered A as shown in the said plan over and along the north-western portion of the said sub-lot lettered B leading to Laluni Street."

and in the particulars of the plaintiffs statement of claim it was also so stated:—

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September 3. By receipt for release of sub-lot "B" of lot 126 Laluni Street Queenstown \$3,000.00"

So on that date it was obvious to all concerned that the mortgaged property was not the same as when the mortgage deed was first made. The defendant was, also given credit for the said amount of \$3,000.00 in those particulars and in arriving at the final amount of \$15,100.78 which was claimed by the plaintiff, and which was the amount which was actually given in the judgment of the court and to which the defendant consented, the court must have taken that fact into account.

I hold the view that both the plaintiff and the defendant were at a consensus as to the amount of \$15,100.75 involved in the judgment of the court and to the property, the subject matter involved in that judgment, on which the mortgage was secured at the date of the judgment.

The consensus of the plaintiff and of the defendant with regard to the property subject to the mortgage was supported by and reflected in the mortgage deed which was then handed to the court for verification, and on this mortgage deed was recorded clearly in red ink "cancelled only as regards sub-lot 'B' part of within property as shown on plan by D. C. S. Moses dated 20th December 1957 and deposited in the D.R. (Deeds Registry) on 27.2.1962 before and this 3rd day of September, 1962, Deputy Registrar of Deeds (ag.)."

To my mind if the court was to give a decision on the matter which came before it on 20th March, 1967, it was necessary for the court to consider the questions at issue between the parties then, and give a decision accordingly. Those questions concerned the amount outstanding as the balance of principal and interest due under the bond and mortgage deed, and the property on which the mortgage was secured.

There was no mistake as between the parties that the amount then due was \$15,100.78 with the appropriate interest (the defendant consented to the amount) and there was no mistake on the part of the court in so far as the court gave judgment to the plaintiff in that sum with the appropriate interest, and it was so recorded in the judgment.

There was no mistake as between the parties that the property subject to the mortgage was the property mentioned in the mortgage deed as lot number 126 Laluni Street, Queenstown except subplot 'B' of the within property (lot 126) which was cancelled the same 3rd September 1962, and for which the plaintiff gave the defendant credit in the sum of \$3,000.00, and which credit the defendant accepted. There was no mistake on the part of the court in so far as in the amount of \$15,100.78 as distinct from the debit amount of \$18,100.78, the court gave recognition to the credit of \$3,000.00 given to the defendant and to the property to which it was related. Moreover, the court also had to verify the mortgage deed and the contents of the mortgage deed by a perusal of the deed itself with the obvious and manifest annotation on

the face of the one mortgage deed in red ink that sub-lot 'B' was cancelled. The plaintiff prayed for a foreclosure order in respect of the property which would be foreclosed on the mortgage deed, as it was before the court at the time of the judgment. To my mind it could not be otherwise, and when the judgment was given as "order for foreclosure granted as prayed" the court could have intended only that the property covered by the mortgage deed would be the only property to which the foreclosure order could apply.

There, thus, to my mind could be no error or mistake, or area for error or mistake, as to the intention and decision of the court, having regard to what was before it when the judgment was given for the amount of \$15,100.78 with interest at the rate of seven per cent per annum on \$14,065.64 from 16th January, 1967, until payment with the order for foreclosure granted as prayed and costs to the plaintiff in the sum of \$107.50.

This is an application which is made before the judge who gave the judgment, and from which the order as between the parties was made, and while not revising or altering the judgment, that judge is in the best possible position to appreciate the record of his judgment and the order which is made from that judgment.

The 'mistake' or 'error' arising in this matter to my mind has arisen as a result of the registrar's omission to take into account what was manifestly and clearly stated on the mortgage deed, and which was already taken into account by the parties themselves, by the judge, and to which the judge obviously intended to give expression in his judgment, when the registrar entered the order. To my mind this is a clear instance of a mistake or error arising from an accidental slip or omission on the part of the registrar and this to my mind necessitates an amendment.

Apart from the authority to amend as conferred on the court by O.26 r. 11 of the Rules of the Supreme Court, 1955, the court has an inherent power to vary its own orders so as to carry out its meaning and to make its meaning plain. In this case, however, the meaning of the court and the one and only commonsense meaning which could have emerged in relation to the issues to be determined, was quite clear, and it was a meaning which must have been understood by the parties themselves at the time in so far as there was no request by either of them for clarification of the judgment itself as then given in open court. But it is now necessary to have that meaning clarified in so far as the same meaning has not been conveyed to parties as the court intended, but rather has been misinterpreted by the registrar. This is not an instance of a variation or rectification of a judgment or order previously given but a mere clarification of a detail of an existing order, flowing from that unaltered judgment, which detail was in part made in error.

Accordingly, having regard to all the circumstances of this case, I think it most appropriate that leave be granted to the applicant to amend the order of court (not the judgment) previously entered on 27th April, 1967 by the insertion after the words "on all the buildings and erections thereon" the words "save and except sub-lot lettered 'B' part of lot numbered 126 (one

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hundred and twenty-six) Laluni Street, in Queenstown District in the city of Georgetown, in the County of Demerara and colony of British Guiana, the said sub-lot being laid down and defined on a plan by D.C.S. Moses, Sworn Land Surveyor, dated 20th December, 1957, and deposited in the Deeds Registry on the 27th day of February, 1962, and the building and erections thereon and subject to a right of way in favour of the owners and occupiers of sub-lot lettered "A" as shown on the said plan over and along the northwestern portion of the said sub-lot lettered "B" leading to Laluni Street, and I so give leave.

In granting the applicant leave to amend the order which was inaccurately made and entered by the registrar I gave due consideration to the case of *Nasibia Hanooman v. Mustapha Ali*, No. 67 of 1965, a decision of the Full Court in which the cases *Hatton v. Harris* (1892) A.C. 547; *Re Swire. Mellor v. Swire* (1885) 30 Ch. D. 239; *Oxley v. Link* [1914] 2 K.B. 734; *Hulbert v. Thurston* [1931] W.N. 171 were considered, but I hold the view that in this case the effect of granting the application to amend would not be to make an order different from that which was made in the first instance, but only to make the order in conformity with the order which the court had pronounced then, and in so far as it is necessary to correct the error in expressing the clear intention of the Court.

There will be costs to the applicant fixed in the sum of \$75.00

Application granted.

Solicitors:

Cameron & Shepherd for applicant.

Dabi Dial for Respondent.

DAPHNE COZIER v. ALEXANDER COZIER

[High Court (Bollers, C.J.) February 1, 22, March 6, 21, 1968.]

Divorce — Cruelty — What constitutes — Whether question of fact Whether corroboration necessary.

Divorce — Cruelty — Condonation.

Divorce — Malicious desertion — What constitutes.

The petitioner and respondent were married in October 1961, some five years after they began living together as man and wife. During this period three children were born of the union. After the marriage, two others were born. There was a significant age difference, the petitioner being of thirteen years younger than the respondent. He was of a jealous nature and the marriage was never a happy one. The respondent, over the years that they lived together, had constantly accused the petitioner of infidelity with various men. There were frequent quarrels. He threatened her on several occasions and on more than one occasion beat and/or otherwise publicly humiliated her. As a result of his treatment the petitioner was forced to obtain psychiatric treatment. In addition, although providing a reasonable home, he gave the respondent little money.

Eventually an order for possession was made against the respondent to quit the house in which he and his family lived on the 1st March, 1967. At the time of giving up possession he suggested that the petitioner and children should go to live with his mother, where a room was available, and he, to a hotel. The petitioner refused. The respondent then suggested that she and the children should go to her cousin's home. She then decided to leave alone for her cousin's. From then on she made no attempt to get in touch with either the respondent or their children as she had no intention to resuming cohabitation. At the trial the respondent said that he desired his wife to return to resume cohabitation.

HELD: (i) cruelty was always a question of fact, and having listened to both parties, although there was no conduct proved which caused danger to life or limb, the conduct of the respondent was such as to endanger the petitioner's mental health or to give rise to reasonable apprehension of such danger. Accordingly he was guilty of cruelty;

(ii) corroboration of the petitioner's evidence of acts of cruelty, although desirable, was not essential;

(iii) although the petitioner continued to submit to cohabitation during the period of time that the acts of cruelty were taking place she had no alternative because of her indigent state, and taking all the circumstances into account, her continued presence in the matrimonial home could not be said to be condonation of the respondent's cruelty;

(iv) malicious desertion must be viewed not only from the angle of the deserting spouse but also from the attitude of the deserted spouse in relation to the marriage, and the petitioner had shown that the respondent's conduct was against her will. His protestation that he desired his wife's return was only a sham.

Decree nisi granted.

M. C. Young for the petitioner.

C. A. F. Hughes for the respondent.

BOLLERS, C.J.: This is a wife's petition for the dissolution of her marriage to her husband, a commission agent and businessman, on the ground of cruelty and malicious desertion. The marriage in the first instance started off on a wrong footing, the parties had lived and cohabited together

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as man and wife for a period of five years and three children were born of that union before the marriage took place on the 28th October, 1961. There was a wide gap in the ages of the petitioner and her husband, she was 21 and he was thirteen years her senior. Before marriage there were quarrels mainly because of the respondent's jealousy but he promised to marry her and behave himself. On marriage, however, the parties never lived happily together and two more children were born. He kept her at home and when she did go out he followed her to watch her movements. He gave her very little money to run the home, he would accuse her of adultery and in the first year of marriage he beat and kicked her. He would taunt her when she asked for money and pose the question 'why did she not go outside and look for men'; If she replied, he would assault her. In 1962, the petitioner met a gentleman by chance on the road in Subryanville and when they were engaged in conversation the respondent appeared and said, "This is my wife you are walking with." The man replied that he was merely talking with the respondent's wife. The respondent in a fit of anger tore down his wife's clothes and humiliated her in public. In 1966 the respondent would threaten his wife with a knife and a bottle which he said contained acid and threatened that he would throw it in her face. On the 20th November, 1966, the petitioner left the matrimonial home to go to the cinema and the respondent followed her there later to see whether she would emerge from the cinema with a male friend of his named Blair. Blair had attended the cinema but did not sit with the petitioner. When the petitioner returned home that evening, the respondent accused her of not going to the cinema at all. She replied rudely that he could ask his friend Blair, whereupon he accused her of being friendly with Blair and beat her with a bicycle lock. The petitioner reported the matter to the police station and was taken to the hospital where she was examined and treated by a doctor. The doctor confirmed on oath that she was suffering from a swelling on the left front and top of her scalp and that such an injury was consistent with a blow from a blunt instrument. That night the petitioner remained at her aunt's home but returned to the matrimonial home when her children appeared and called her. After that there were frequent quarrels when the respondent would threaten the petitioner with a cutlass. On one occasion when the petitioner was assisting in a drug store run by the respondent, her husband appeared and announced that he had been informed that she was friendly with a man who lived in a house behind the matrimonial home. The petitioner denied the charge, the respondent refused to accept her denial and started to beat her. She ran on to the road. He followed her, held her and dragged her back to the store. He cuffed her, threw her over the counter and threatened her with a knife and said that he was going to kill her. The respondent was not satisfied with this exercise. That same evening he waited with a cutlass for the neighbour to return home and expressed threats to the man. Over this period of time the petitioner's nerves became affected and she could not sleep at nights and eventually she consulted a psychiatrist who treated her and prescribed capsules. Nevertheless, in spite of this treatment, the petitioner remained in the matrimonial home and executed her domestic duties and continued

to live and cohabit normally with her husband. On her own admission she had sexual intercourse with him, although there were occasions when she sought to lock him out of her bedroom when he would break open the door.

There could be little doubt that the main cause of the difficulties between the parties was the insane jealousy of the husband, brought about principally by the disparity in age and the illicit relationship that existed between them before marriage when, perhaps, he considered that other men could do what he had already done. On one occasion after November 1966, the respondent brought his friend Blair to the matrimonial home and they repaired to a liquor restaurant nearby where they drank and quarrelled and there was an ugly scene when the respondent accused Blair of having an affair with his wife.

The damning evidence against the respondent is a note written in his own handwriting in which he states that from observations made from the month of September 1966, he had come to the conclusion that his wife was unfaithful and having sexual relations outside of her marriage. He had formed this impression because on December 26, 1966, when he had sexual intercourse with her he found looseness in her private parts although he had not had intercourse with her since the 3rd December, 1966. This note was left lying around carelessly so that his wife could find it and read it. It then transpired that a possession order was made against the respondent whereby he was ordered to quit the house in which he and his family lived on the 1st March, 1967, and when the time came to leave the house the respondent had made no preparation for the accommodation of his wife and family elsewhere. The suggestion was that he would move into a hotel and that his wife and family should go to his mother's place. When the petitioner refused, the only alternative that the respondent could offer was that his wife and family should go to her cousin's place. It was in these circumstances that the petitioner tired, miserable and weary of her husband's treatment towards her decided to leave the matrimonial home and go to reside with her cousin leaving her five children behind because (as she said in her own words) of her husband's treatment to her which was affecting her health. After the petitioner left the matrimonial home she did not see her husband and children for two months and made no attempt to get in touch with them as she had left with the intention of not going back to her husband and living with him again.

In fairness to the respondent there was the other side of the picture. He provided his wife with a reasonable home, fairly well furnished and with modern domestic appliances. There was a domestic servant and a telephone which he kept under lock and key. He sent his wife to a charm school and paid the fees for commercial lessons. He made her a director of a company which he formed, insured her life, out of which of course she received no remuneration.

It will be seen that I have accepted the petitioner's evidence and rejected that of the respondent, as listening to the story unfold itself

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I was satisfied that her side of it was true. The petitioner's manner and demeanour in the witness box convinced me that she was a witness of truth and a victim of circumstance. Life for her as a young woman who quite naturally would want to go to a cinema or a dance must have been intolerable with the older type of man who was insanely jealous, and who would prefer to remain at home brooding over his wife's activities and follow her in order to trace her movements rather than accompany her himself. On his own admission the respondent stated in evidence that in 1964, when his wife went out with a lady friend he followed her, and his account of the incident in Subryanville was unconvincing and unbelievable, more particularly when he said that he held on to her and she pulled herself away and her dress got torn. I do not accept his evidence that the petitioner complained to him in 1965 that the neighbour Henry was molesting her. It seemed to me that the respondent went too far when he endeavoured to get a lawyer to speak to his wife and his testimony that the neighbour Henry told him to stop his wife molesting him was incredible. I was satisfied that it was as a result of the respondent's conduct towards his wife which forced her to leave him and live elsewhere. Indeed, he had no accommodation to offer her other than a room in his mother's house which she would be called upon to share with five children.

On these facts, counsel for the respondent has submitted that the acts proved by the petitioner could not in law amount to legal cruelty and indeed there was no corroboration of the petitioner's evidence in relation to the acts of cruelty. He also submitted that in any event, if there were acts of cruelty committed these acts were condoned by the petitioner. The definition of cruelty was laid down in the celebrated case of *Russell v. Russell* (1897) A.C. 395 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, and it was made clear by the Federal Supreme Court in *Delph v. Delph* [1959] 1 W.I.R. 394 that the question whether or not the respondent has treated the appellant with cruelty is a question of fact. It is well settled that there may be cruelty in the popular sense without injury to health and there may be injury to health without cruelty: it is elementary that the Court cannot grant relief against mere unhappiness. While it may be true that in the instant case there was no conduct proved on behalf of the respondent which caused danger to life or limb, in my view it was proved that the conduct on the part of the respondent endangered the mental health of his wife or was such as would give rise to reasonable apprehension of such danger. There were constant quarrels and he beat her on many occasions. In 1962 in the Subryanville incident he tore down her dress in public view. On the 20th November, 1966, he accused her of infidelity with Blair. More quarrels followed in which the respondent threatened the petitioner. Then came the drug store incident when the respondent cuffed the petitioner and threatened her with a knife. It was at that stage that her nerves reached breaking point and she consulted a psychiatrist. I concur in the observations made by counsel for the petitioner

that for a person in this country to consult a psychiatrist it must mean that she considered that her mental health was in danger. In my view the cumulative effect of all these circumstances amounted to legal cruelty as I understand it in the law of divorce. As Lord MERRIMAN stated in *Jamieson v. Jamieson* [1952] A.C. at p.525.

“It is desirable to bear in mind particularly in connection with the charge of cruelty how much depends on the general picture of the married life of the parties, which it is so difficult to appreciate without a proof.”

In *Waters v. Waters* [1956] 1 All E.R. 432 at p. 434, the same learned judge emphasised that the whole story in the matter of cruelty is all important, particularly in cases which may be described as borderline. In all such cases it is very important to get the whole atmosphere from both sides. Having heard both sides in this petition, I am satisfied that the petitioner and her husband lived in an atmosphere which was tense, vulgar and intolerable, and that the charge of cruelty has been clearly established on a balance of probability.

On the submission that there was no corroboration of the petitioner's evidence in respect of the acts of cruelty, I need only to refer to the decision in *Delph v. Delph* in order to see that such evidence, though desirable, is not essential. Bruises and the like without more may be evidence of cruelty. In this petition Dr. Sheo Sankar has given the evidence that at least on one occasion he found the petitioner to be suffering from a swelling on the left front and top of scalp which in his opinion was consistent with a blow from a blunt instrument. In *Fromhold v. Fromhold* [1952] 1 T.L.R. 1522, it was held that it was open to a judge or jury who are satisfied that physical violence by the respondent has produced on the petitioner's body bruises, cuts or other physical injuries, to find that a case of cruelty has been made out without proof of injury to general health and in *Eastland v. Eastland* [1954] 3 All E.R. 159, KARMINSKI, J., found that the wife's health had suffered and that her nervous system was affected although no medical evidence was called, being satisfied that her evidence and that of her mother was true. There is therefore no need for corroboration of the petitioner's evidence and *Lawson v. Lawson* [1955] 1 All E.R. at p. 341, cited by counsel for the respondent, is not authority for the proposition that corroboration is required as a matter of practice in an allegation of cruelty. *Lawson v. Lawson* must be considered in the light of its peculiar facts where the allegation of persistent cruelty was made in a summons for maintenance in the Magistrates Court by the wife on the ground that her husband on many occasions had tried to force her to submit to sodomy, and it was held by the Court of Appeal that she was in fact not a consenting party and no rule for corroboration applied. Had she been a consenting party her evidence alone might not have been sufficient. In the present case the acts of cruelty alleged bear no similarity to sodomy and there is no question of the petitioner being a consenting party.

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I must confess the question of condonation has caused me some difficulty and indeed some concern but after a consideration of the whole of the evidence I have come down on the side of there being no condonation as I considered that there was no alternative left to this woman but to submit to cohabitation with her husband during a period of time in which the acts of cruelty took place. What was this poor woman to do. She was in the matrimonial home with her five children without means of subsistence and she bore her position as long as she could. As counsel for the petitioner has submitted, the parties must be together for a period of time for cruelty of this kind to operate, as the Court must be in a position to get the whole picture and to capture the atmosphere in which the parties lived. Had the petitioner left the matrimonial home at an earlier stage, it might be said that she was too precipitate. While it is true that the last incident of violence took place on the 31st December, 1966, and the petitioner did not leave the matrimonial home until the 1st March, 1967, and during that period of time cohabited with her husband, it cannot be said that there was forgiveness and reconciliation with full knowledge of all the material circumstances on the part of the petitioner (see *Peacock v. Peacock* (1858) 1 Sw and Tr. 183). In view of her circumstances there was little else she could do but to remain and submit. In any event, even if there was condonation by the petitioner, each act of cruelty in the conduct of the respondent revived the previous act of cruelty. And when the situation was reached whereby the parties were forced to quit the matrimonial home and the respondent had made no preparation for the accommodation of the petitioner that was the last act of cruelty which would revive all former acts of cruelty. I would hold therefore that there was no condonation on the part of the petitioner and, indeed, condonation was not pleaded.

In respect of the allegation of malicious desertion the case for the petitioner is based on the doctrine of constructive desertion and I am prepared to hold, having found the allegations of cruelty made out against the respondent and having found he had made no preparation to provide suitable accommodation for his wife at a time when they were due to leave the matrimonial home, that he was guilty of conduct which justified the petitioner in leaving him. His conduct in all respects was of a grave and weighty nature which justified the petitioner in leaving the matrimonial home and clearly demonstrated an impossibility on the part of the petitioner to discharge the duties of her married life (*Evans v. Evans* 161 E.R. 466). See also the decisions in *Buchler v. Buchler* [1947] 1 All E.R. 319 and *Edwards v. Edwards* [1949] 2 All E.R. 145, which establish that conduct which falls short of cruelty may justify one spouse in leaving the other providing if it is of a grave and convincing character. The concept of malicious desertion was stated in the celebrated case of *Matthews v. Matthews* (1931 — 1937) L.R.B.G. 459, to 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 and counsel for the respondent has pointed out that before I could find malicious desertion on the part of the respondent

I must be satisfied that he actually and wilfully brought to an end the existing state of cohabitation with the deliberate purpose of abandoning conjugal society and in this connection the conduct and attitude of the deserted spouse is relevant. In support of his contention counsel cited *Stull v. Stull* (1946) L.R.B.G. 76 where LUCKHOO, C.J. (ag.), stated that under our system of law malicious desertion must be viewed not only from the angle of the deserting spouse but also from the attitude of the deserted spouse in relation to the marriage and the court must be satisfied that there is a genuine willingness on the part of the deserted spouse to resume conjugal relationship. Counsel urges that in this case on the state of the evidence the respondent is saying that he desires a reconciliation with his wife and the petitioner is saying that she does not desire to resume cohabitation with her husband and therefore in accordance with the statement of the law of malicious desertion by LUCKHOO, C.J. (ag.), in *Stull v. Stull* the petitioner should be denied a decree. It must be remembered however that *Matthews v. Matthews* and *Stull v. Stull* are authorities dealing with malicious desertion simpliciter, it could hardly be urged in a case of constructive desertion where the conduct on the part of the deserting spouse has driven the deserted spouse out of doors, that the deserted spouse should evince an attitude of reconciliation or an intention to return to the matrimonial home where his or her (in the case of the wife, the petitioner) life, health and limb is endangered or there is reasonable apprehension of such danger. As VERITY J., said in *Matthews v. Matthews* at p. 60:

“It is in accordance with what I conclude to be the fundamental principles of the divorce laws of this Colony that the respondent should be shown by evidence of his or her conduct definitely to have reached a final determination to repudiate the obligations of the marriage state and also that it should be shown by evidence of the petitioner’s conduct that such repudiation is against his or her will.”

The petitioner has shown that the conduct on the part of the respondent was against her will. In any event when the respondent in this case states that he desires his wife to return to the matrimonial home that could only be a plea of a sham nature in view of his previous conduct. In my view there has been a complete breakdown of this marriage the parties having lost all respect and affection for each other and it would be pointless to keep the parties tied to each other when there is no hope of them once again living together and even if this were possible it would be a most undesirable atmosphere for the children of the marriage.

The petitioner will therefore have a decree nisi for a dissolution of marriage, on the grounds of cruelty and malicious desertion, with costs against the respondent certified fit for counsel and I order accordingly.

Decree nisi granted.

Solicitors:

Dabi Dial for the petitioner.

H. B. Fraser for the respondent.

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[High Court (Fung-a-Fatt, J.) September 20, 30, October 4, 17, November 3, 29, 1967, March 22, 1968.]

Trespass to land — Defence of prescriptive title — Prescriptive title — Onus of proof — Grazing cattle on each others land — Whether sufficient evidence of exclusive possession.

Prescriptive title— Failure expressly to plead statute— Effect — Title to Land (Prescription and Limitation) Ordinance. Cap. 184. s. 51.

Res judicata — Sufficiency of proof — Burden of proof.

The plaintiff and the defendant owned adjoining lots viz., lots 48 and 49 La Grange, West Bank Demerara. The plaintiff alleged that their relationship was cordial until August 1961 when the defendant caused a fence to be erected which enclosed a substantial portion of the northern part of her lot. She accordingly filed an action for trespass, an injunction and a declaration. The defendant, in her defence, pleaded that she and her predecessors in title had been in adverse possession of the disputed area for upwards of thirty years. She also alleged that the plaintiff's claim was *res judicata*.

Between the years 1961 and 1964 the parties were involved in litigation both in the Magistrate's Court and the High Court. The latter, on which the plea of *res judicata* was based, was an action in which the defendant had sued the plaintiff for trespass to her land and had obtained judgment.

HELD: (i) on the facts the plaintiff and her predecessors in title were at all material times before August, 1961, in sole and undisturbed possession of the whole of lots 48 and that no fence excluding any portion of that lot had been in existence before that time;

(ii) the onus of proof of exclusive user for the statutory-period of twelve years was on the defendant and the grazing of cattle owned by the parties on each others land was not sufficient evidence of exclusive user;

(iii) in order to take advantage of the Title to Land (Prescription and Limitation) Ordinance, Cap. 184, a defendant must expressly plead the Ordinance and a plea of exclusive user for over twelve years was not sufficient;

(iv) in order that the defence of *res judicata* may succeed, it is necessary for a defendant to know that the matter on which the plea is based was actually put in issue in the previous case;

(v) in the previous case the issue was not concerned with encroachment of boundaries.

Judgment for the plaintiff.

F. H. W. Ramsahoye for the plaintiff.

S. Brotherson S.C., for the defendant.

FUNG-A-FATT, J., the plaintiff, who is a married woman, is the owner by transport no. 498 of 1956 of cultivation lot numbered 48, section F, La Grange, West Bank of the Demerara River. The plaintiff purchased this lot from George Ten Pow and obtained from him transport and possession of it on the 5th day of March, 1956.

Before Ten Pow became the proprietor of lot No. 48, Boodoo Singh was the owner for many years and had resided thereon until his death in 1951 when his widow remained and continued in occupation of it. Boodoo Singh's daughter married Joseph Sundar, a witness called by the plaintiff in this action and he lived with her for about 6 months in the year 1947 at lot 48.

The defendant, who is an elderly nurse midwife, is the proprietor by transport of cultivation lot 49, section F, La Grange, which is north and contiguous to the plaintiff's lot 48. She obtained transport for her lot 49 in 1948 from Chandarpal, called Dharundhar, who also gave evidence in this case. Before Chandarpal's time, it appeared that one Yarde had bought this lot in 1942 either from Leola Hopkinson or from her husband who died in 1958 but the evidence is not quite clear on this point.

At first the relationship between the older defendant and the younger plaintiff was that of good neighbours and they lived like mother and daughter. But in August, 1961 the defendant had a fence erected in a west to east direction along what she claims was the common boundary line between lots 48 and 49. This fence undoubtedly enclosed a portion of the northern part of lot 48 and consequently, relations between the plaintiff and the defendant were marred by this unilateral act on the defendant's part and rapidly deteriorated.

They soon found themselves in opposing camps in the Magistrate's Court and later in the Supreme Court, action No. 613 of 1964, Demerara, in which the defendant instituted proceedings against the plaintiff and obtained a judgment before Crane, J., on the 15th April, 1966.

Lots numbered 48 and 49 were laid down and defined on a diagram of Plantation La Grange by E.C.H. Klautky, Sworn Land Surveyor, dated 18th April, 1908, and deposited in the office of the Registrar on the 31st day of September, 1910. Before the erection of the defendant's fence there was no other survey.

The plaintiff was undoubtedly perturbed and irritated by the placing of the fence on a portion of her lot and objected to the encroachment, but her complaint was rejected by the defendant. As a result the plaintiff went to the village office, and Parbudyal, who was then the chairman of the La Grange Local Authority, consulted the village council's plan and went and measured the lots. According to his measurements, the defendant's fence encroached upon the plaintiff's land about fourteen feet from the northern boundary of lot 48 on the eastern or river dam side.

It is to be observed that the boundary line separating lot 48 from lot 49 runs west from the public road to east at the river dam. Both the plaintiff

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and Parbudyal pointed out to the defendant this fact and the extent of the encroachment but she remained adamant and uncompromising.

The plaintiff was then compelled to obtain the services of a sworn land surveyor, H. R. Ramsagar, who gave evidence on her behalf. Ramsagar made a plan dated the 15th March, 1965, and recorded it in the Department of Lands and Mines on the 12th day of April, 1965, as plan No. 11506. The fence erected by the defendant is indicated on the plan by broken red lines. The northern boundary of lot 48 is 1167 feet. The western end of the defendant's fence commences about 2 to 3 feet within lot 49 and after a distance of about 500 feet from the public road enters lot 48 and runs diagonally within lot 48 for the remaining distance. The area of the triangle of land taken away by the defendant from lot 48 as a result of the erection of the defendant's fence is approximately 4200 square feet.

The plaintiff alleges that before August, 1961, there was no fence between the two lots on the eastern half of her northern boundary and the defendant did not encroach on her lot. Her claim is for damages for trespass, an injunction restraining the defendant by herself and her servants and agents from further trespassing upon the plaintiff's said lot No. 48 and from interfering with or disturbing the plaintiff's use and enjoyment of same, and a declaration that the northern boundary of lot No. 48 as shown on Ramsagar's plan is the true and correct northern boundary of the said lot.

The defendant in her defence says: —

- (a) that she and her predecessors in title had been in adverse possession of the disputed triangle of land for upwards of 30 years before the filing of the action;
- (b) that the fence, the subject matter of the complaint, was erected by her predecessors in title and has ever since separated the two lots;
- (c) that the occupational boundary was demarcated by a row of trees to the south of the said fence and was even farther within lot 48 than the fence;
- (d) that the plaintiff's claim is *res judicata*; and
- (e) that the plaintiff is stopped from bringing this action.

Counsel for the plaintiff has rightly submitted that the defendant has not counter-claimed for a declaration of prescriptive title to the disputed triangle and has not relied as a shield on any of the provisions of the Title to Land (Prescription and Limitation) Ordinance, Cap. 184, especially section 5 thereof, which reads as follows: —

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

The plaintiff's evidence is that from the time she bought lot 48 up to August, 1961, she occupied the whole of the lot, including the disputed portion, and that up to that time there was no fence on the eastern half of the northern side of her lot. She said that the mango trees were south of the fence on her land and were near the public road and that her lot was a clean lot without any bush.

The witness, Chandarpal, who transported lot No. 49 to the defendant and who was called on the plaintiff's behalf, said that there was no fence separating the two lots and that Boodhoo Singh lived on lot 48 and weeded it; that there were a couple of mango trees near the public road and Boodhoo Singh had a five rod wire fence on his lot near the roadside as he had a kitchen garden there but that the riverside or eastern portion of the lot had no fence and that there was a small drain between the two lots which he regarded as the boundary.

Joseph Sundar, the son-in-law of the late Boodhoo Singh, stated that there was a small fence measuring about 5 rods near the roadside so as to prevent cows from entering Boodhoo Singh's garden but that there was no fence between the lots other than this.

Parbudyal, another witness called by the plaintiff, said that he had known lots 48 and 49 since 1942 and that before 1961 no fence separated lot 48 from 49. A visual examination of the fence in 1961 indicated that it looked new.

J. E. Rutherford, a sworn land surveyor, was called by the Court. He surveyed lot No. 49 in January, 1967, at the defendant's request. He confirmed that Ramsagar's survey was accurate and that the defendant's fence was comparatively new. He informed the defendant that Ramsagar's paals fell on the correct position according to the original survey.

The defendant gave evidence that Boodhoo Singh had a row of mango trees on the land from the public road to the river dam and that this row of trees was regarded as the boundary of lots 48 and 49. She said that when she purchased lot 49 in the year 1948 there existed an old fence extending from west to east, which was broken but went right through the land and that she repaired it in 1948 and not in 1961. The defendant admits that according to Rutherford's survey she was occupying about 3 to 4 feet of lot 48, the plaintiff's land.

Under cross-examination she denied that in 1965 she had told CRANE, J., that she had erected her fence eight years ago but her denial is contradicted by a certified copy of the notes of evidence of the learned judge. The defendant admitted that she had given evidence before CRANE, J., to the effect that when she bought her lot of land, it was not fenced at all but that there were indications of a derelict fence. She denied that she had told CRANE, J., that she considered the old southern fence the boundary of her land but her denial is not supported by the judge's notes of evidence.

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She admitted that she had told the learned judge that her land was not “jib land” and that her lot of land should have the same amount of facade both at the back and in front.

I was impressed neither by the defendant’s evidence nor by that of her witness Leola Hopkinson. They struck me as being unreliable and there were, moreover, material discrepancies between the evidence they gave before me and what they were recorded as saying before CRANE, J. I therefore, rejected their testimony in cases where their evidence conflicted with that of the plaintiff and her witnesses.

After a review of all the evidence I accepted and believed the evidence of the plaintiff and her witnesses. I find that the plaintiff and her predecessors in title were at all material times before August, 1961, in sole and undisturbed possession of the whole of lot 48 as defined by the plan and survey of Ramsagar, sworn land surveyor, and exercised all rights of ownership thereon.

I find that the defendant and her predecessors in title were not, before August, 1961, in possession of any part of lot 48, in particular the triangle of land wrongfully and unlawfully taken in by the defendant’s fence, and, that the plaintiff protested at all material times in and after August, 1961, against the defendant’s encroachment.

So far as the middle and eastern portions of the northern side of the plaintiffs land are concerned, I have no hesitation in finding that before August, 1961, no fence existed there. It was only at the roadside or western portion that a short fence was erected. I accept and believe that in August, 1961, for the first time a fence was erected by the defendant at such an angle as to cross the boundary line with the plaintiff’s lot, and since then the defendant has been trespassing on the disputed area of land.

It appears from the evidence that prior to the erection of the fence in 1961, cows from lot 48 grazed on the rear or eastern portion of lot 49 and cows from lot 49 grazed on the rear portion of lot 48. This grazing of cattle is indicative of the good relations that once existed between the plaintiff and the defendant as neighbours, and it is a reasonable inference that it was based on mutual permission.

But I also accept the positive evidence of the plaintiff and her witnesses that before August, 1961, the defendant and her predecessors in title never claimed any portion whatsoever of lot 48 and that from August, 1961, the defendant’s pretended claim to the “jib” in lot 48 was seriously challenged by the plaintiff.

“Proof of ownership is *prima facie* proof of possession, unless there is evidence that another person is in possession but if there is a dispute as to which of two persons is in possession, the presumption is that the person having a title to the land is in possession. Evidence of possession of part of the land in question may be evidence of possession of the whole.”

The foregoing passage from *Clarke and Lindsell on 'Torts'* (12th ed.) p. 596, para. 1138, gives in my opinion, a correct view of the law.

Counsel for the plaintiff has correctly submitted that the onus was cast on the defendant to establish that she was for at least twelve years, in adverse possession of the land which fell within the description of the plaintiff's transport. She has failed to discharge this onus.

Counsel referred to the Privy Council decision of *West Bank Estates Limited v. Arthur*, 1966, 11 W.I.R. 220, in which the Privy Council found the treatment of the evidence by BOLLERS, J., (as he then was) preferable to that which was accepted in the Federal Supreme Court. In that appeal Lord WILBERFORCE, in delivering judgment, had this to say: —

“The learned judge, (i.e. Bollers, J.) as their Lordships read his judgment, applied his mind correctly to the question whether the respondents had proved “sole and undisturbed possession, user and enjoyment” of the disputed strip. As the Federal Supreme Court itself stated, these words convey the same meaning as possession to the exclusion of the true owner. The learned judge gave recognition to the fact that what constitutes possession, adequate to establish a prescriptive claim, may depend upon the physical characteristics of the land. On the other hand, he was, in their Lordships' view correct in regarding such acts as cutting timber and grass from time to time as not sufficient to prove the sole possession which is required.”

It is my considered opinion that the occasional grazing of cattle on each other's back lands does not establish a sufficient degree of sole possession and user to satisfy Cap. 184, and, I therefore agree with submission of counsel for the plaintiff. If counsel for the defendant were relying on section 5 of Cap. 184, then he should have pleaded it or at least the Ordinance, (vide *Basir v. Goolcharan*, 1962, L.R.B.G. 135.)

I turn now to the submission of counsel for the defendant that the plaintiff's claim is *res judicata* or that the plaintiff is estopped from bringing this action because of the decision of CRANE, J., in the defendant's favour in action No. 613 of 1964, Demerara. Mr. Brotherson addressed me at great length on this question of *res judicata* and cited several authorities, all of which I have carefully considered.

In 15 HALSBURY'S LAWS (3rd ed.), p. 184, para. 357, it is correctly stated as follows —

“Where *res judicata* is pleaded by way of estoppel to an entire cause of action, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which have involved the determination of questions of law as well as findings of fact. To decide what questions of law and fact were determined in the earlier judgment the Court is entitled to look at the judge's reasons for his decision and is not restricted to the record but,

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as a general rule, the judge's reasons cannot be looked at for the purpose of excluding from the scope of his formal order any matter which, according to the issues raised on the pleadings and the terms, of the order itself, is included therein."

In para. 358 of the same volume the essentials of *res judicata* are set out as follows:

"In order that a defence of *res judicata* may succeed, it is necessary to show not only that the cause of action was the same, but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of *res judicata* must show either an actual merger, or that the same point has been actually decided between the same parties. Where the former judgment has been for the defendant, the conditions necessary to conclude the matter are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed."

In action No. 613 of 1964, Demerara, the defendant, Melville, filed a writ and in her statement of claim alleged that the plaintiff had broken down a portion of her wire fence and had driven a bulldozer over her land across to the plaintiff's (Lackhraj's) land. The plaintiff in her defence said that a mango tree, which had been knocked down by a bulldozer used on behalf of the defendant, fell on and broke down the defendant's fence. The defence was rejected by the trial judge who gave judgment for the defendant who is the plaintiff in this action.

In the former action the fence was broken down at a point twenty rods from the public road. It was at that point clearly on the defendant's land and no dispute arose or could have arisen that it was on Lackhraj's land. To my mind the encroachment of the defendant's fence on the plaintiff's land was not relevant in deciding the issue which was before the court in action No. 613 of 1964, as it was trespass at a point or points on the defendant's land as the learned judge said in his judgment: -

"The trespass complained is both the cutting down of the wire fence and allowing the bulldozer to cross it."

Further, any reference to the fence in the order of court dated 16th April, 1966, must relate to the issues raised on the pleadings.

In this action the plaintiff is complaining solely in relation to that portion of the defendant's fence which crosses into her land about five hundred feet from the public road and which extends to the river dam on the eastern side of her property. Moreover, in the former action, the present plaintiff denied damaging the defendant's fence.

Speaking about the survey of Ramsagar, Sworn Land Surveyor. CRANE, J., had this to say:—

“I need hardly mention that the revelations in the Ramsagar survey are capable of adjustment in appropriate proceedings.”

The plaintiff, Lakhraji, in my opinion, has brought appropriate proceedings before this Court and I can see no reason why her claim should be considered as *res judicata* or that she is estopped from bringing this action.

For these reasons there shall be judgment for the plaintiff with the following orders:—

- (a) an injunction restraining the defendant by herself or agents from trespassing upon the plaintiffs lot No. 48 and from interfering with or disturbing the plaintiff's use and enjoyment of her said property;
- (b) a declaration that the northern boundary of the said lot 48 as shown on the plan of H.R. Ramsagar, Sworn Land Surveyor, dated 15th March, 1966, is the true and correct northern boundary of the said lot No. 48; and
- (c) the defendant pay to the plaintiff the sum of \$100:— as damages for trespass with taxed costs certified fit for counsel

Judgment for the plaintiff.

Mr. S. M. A. Nazir for the plaintiff.

Mr. A. Vanier for the defendant.

MEER SAFDAR ALLI-SHAW v. J. WAILOO

[High Court (Vieira, J.) September 6, 1967, February 3, March 23, 1968.]

Contract — Sale and purchase of immovable property — Vendor and purchaser affidavits — Smaller sum stated as consideration than had been agreed by parties — Whether difference recoverable by vendor — Nature of illegal contracts — Severability.

The plaintiff and the defendant entered into an agreement of sale and purchase of certain immovable property for a consideration of \$18,000.00. A sum of \$2500.00 was paid, and a receipt, which embodied certain terms, issued in the defendant's wife's name. It was expressly stipulated that the defendant would pay a further sum of \$3500.00 by the end of December

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1962 and the balance of \$12,000.00 on his obtaining a mortgage within six months of the date of the receipt. Some time later the defendant intimated to the plaintiff that he could only raise a mortgage of \$10,000.00 and did not have enough money to pay the whole of the remainder of the purchase price. At the defendant's request the plaintiff amended the receipt so as to reflect a purchase price of \$15,000.00 and accepted a 'good' from the defendant for \$3,000.00. Of this latter sum the defendant's wife paid the plaintiff \$300 before transport was passed on the 14th April 1964. Since then the plaintiff had made several abortive requests for the payment of the sum of \$2,700.00 due on the 'good'. He accordingly filed the present action.

HELD: (i) under s. 46 of the Deeds Registry Ordinance, Cap 32, a duty is imposed on both vendors and purchasers of immovable property to make and file with the Registrar of Deeds, affidavit setting forth the full and true consideration to be paid or payable for the transfer;

(ii) in swearing falsely both the plaintiff and the defendant opened themselves to the sanction of the criminal law, for making false declarations, which is a misdemeanour under s.4 of the Statutory Declarations Ordinance, Cap. 36;

(iii) whatever may have been the motive for swearing to a lower purchase price, it amounted to a fraud upon the revenue and was clearly illegal and offending against public policy and accordingly the plaintiff could not recover.

Action dismissed.

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

R. L. Millington, for the respondent.

VIEIRA, J.: The plaintiff is a man of many parts. He is a registered medical practitioner and runs his own private hospital. In addition, he owns a business concern known as the Farm Fresh Inn, and also dabbles in real estate. The defendant is a postmaster. The parties have known each other for some 30 years, and were not only good friends, but also members of the former British Guiana East Indian Cricket Club, of which the witness Bridg Bahadur was also a member.

As regards the facts of this case, I accept, on the balance of probabilities, the evidence of the plaintiff and his witness Bridg Bahadur in preference to that of the defendant, his wife and son-in-law.

I am satisfied from the evidence as a whole, that during the latter part of 1962, Bahadur negotiated with the defendant concerning the sale of a house and land situate at Sub-lot 'E' 215 Camp Street, Georgetown, the property of the plaintiff. As a result of these negotiations the parties and their witnesses met at Bahadur's house in Camp Street, which is obliquely opposite the said property, on the 18th September, 1962 between 4.30 to 5.30 p.m.

I accept that the plaintiff agreed to sell and the defendant agreed to buy the property in question for the sum of \$18,000, and not \$15,000 as stated by the defendant and his witnesses.

The defendant paid down the sum of \$2,500 in cash for which the plaintiff issued a receipt in the name of the defendant's wife, Helen Wailoo (Ex. "B"). It is expressly stipulated therein that the sum of \$3,500 was to be paid by the end of December, 1962 and the balance of \$12,000 to be paid on the obtaining of a mortgage from the Demerara Mutual Life Assurance Society within 6 months from date thereof.

I accept that the defendant told the plaintiff that he could only get a mortgage for \$ 10,000 from the Demerara Life (which in fact he did obtain later from the Insurance Company) and that he did not have enough cash to pay off for the property. The plaintiff then amended the receipt (Ex. "B") at the defendant's request by changing 'eighteen' in words and figures to 'fifteen' in words and figures, and by deleting the words 'twelve thousand'. The plaintiff then proceeded to make out a 'good' for the balance of \$3,000 on one of his letterheads (Ex. "A") which the defendant signed.

I have no doubt, whatsoever, that the defendant did sign Ex. "A" despite his vehement denial, and despite the evidence of his wife and son-in-law that the defendant signed no document in their presence. In cross-examination the defendant said "I am not prepared to swear that the signature 'J. Wailoo' on Ex. "A" is not mine. It looks like my signature and may be mine. When Ex. "A" was shown to his wife in cross-examination she said "I see a signature 'J. Wailoo' on Ex. "A" I don't know it. It has a resemblance to my husband's signature. I can't swear one way or the other whether it is my husband's signature or not". The son-in-law's evidence is negative on this aspect as he had never seen his father-in-law's signature.

On the 15th January, 1964 the defendant's wife paid the sum of \$300 to the plaintiff at his home, and he recorded this on Ex. "A".

On 17th January, 1964, the plaintiff swore to an affidavit (ex. "D") that he sold the property to the defendant for the sum of fifteen thousand dollars and on the 22nd January, 1964, the defendant swore to an affidavit (Ex. "E") that the full and true consideration paid by him for the property was the sum of fifteen thousand dollars and no more. On this basis transport (Ex. "C") was passed to the defendant on 1st April, 1964.

The plaintiff made several demands for the balance of \$2,700 outstanding on the good (Ex. "A") but the defendant kept putting him off, by always promising to pay but never in fact doing so. Finally on 13th January, 1967, the plaintiff filed this present action claiming the said balance of \$2,700.

Counsel for the defendant submits that, even if I accepted that the defendant did in fact sign Ex. "A", the claim must still fail as being contrary to public policy, since it is clear that the affidavits and the transport were false, in that they set out a lower price than the real value and could amount to nothing less than a fraud upon the revenue.

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Counsel for the plaintiff submits that the plaintiff's claim is valid on two grounds, viz: —

(1) the contract, forming the basis of the acknowledgement (Ex. "A") on which the plaintiff sues, was a lawful contract even though the parties carried out the object of the contract by a method which, whether they thought about it or not, resulted in a fraud upon the revenue. What the plaintiff is seeking to enforce is the promise to pay the balance of the purchase price agreed upon but not the agreement as to how the conveyance should be carried out. The promise to pay the balance of \$3,000 is not illegal neither is the consideration, viz, the plaintiff transferring his title to the defendant;

(2) the plaintiff, is suing on an acknowledgement dated the 18th September, 1962, and on the implied promise to pay arising out of such acknowledgement. He has sued on the acknowledgement and not on the oral contract.

In general, illegal contracts may be broadly divided into two classes viz: —

(1) contracts illegal at *common law*, which have been entered into with the object of committing an illegal act or of doing that which is against public policy, and

(2) contracts whose making or performance is expressly or impliedly prohibited by statute.

There is a presumption of law in favour of the legality of contract and it lies upon the party seeking to set aside a contract for illegality to prove it — *per* BOWEN L.J., in *Hire-Purchase Furnishing Co. v. Richens* (1887) 20 Q.B.D. 387 at p. 389. But if the contract on the face of it shows an illegal intention, the onus lies upon the party supporting the contract to show the legality of the intention — *Holland v. Hall and Gill* (1817) 1 B. & Aid. 53.

If the illegality of a transaction is brought to the notice of the court, whether the contract *ex facie* shows illegality, or it appears in the course of the proceedings and the person invoking the aid of the court is himself implicated in the illegality, the court will not assist him, even if the defendant has not pleaded the illegality and does not wish to raise that objection. (See *Scott v. Brown Doering Mc Nab & Co* (1892) 2Q.B.724.). In this matter illegality was not pleaded by the defendant.

A contract is illegal where the subject matter of the promise is illegal, or where the consideration or any part of it is illegal. — *Herman v. Jeuchner* (1885) 15 Q.B.D. 561, C.A. at p. 563 *per* BRETT, M.R. A contract which on the face of it is perfectly legal may yet be an illegal one, if the purpose for which it is made is illegal or it is intended to use documents of the transaction for an unlawful purpose or it is the intention of one party that the other should, as an innocent instrument, break the law.

Where the purpose of a contract is illegal, immoral or contrary to public policy and both parties are aware of that purpose, it is settled law that neither can sue upon it.

Illegality, to my mind, is one of the most difficult branches of the law of contract and none of the recognised text books are particularly helpful in drawing a clear and simple distinction between ‘illegal and void’ contracts, which is of great importance in relation to collateral agreements. Even the decided cases show an imprecise and rather indiscriminate use of terminology that leads to some confusion, much of it due, I think, to the fact that the doctrine of public policy cuts right across any clear-cut classification.

The foundations for the doctrine were effectively laid by the judges in the 18th century. On the one hand it was considered in the public interest to uphold contracts freely entered into and, on the other hand, any contract that tend to prejudice the social or economic interest of the community was frowned upon and forbidden. The doctrine did not remain static. and varied according to the progress of society and changing conditions over the years. Many transactions which are now upheld by the courts would, in a former generation, have been avoided as contrary to the supposed policy of the law at the time. It is now settled that new heads of public policy will no longer be invented.

What therefore is public policy? The classical exposition, which has prevailed since it was enunciated in 1853, is that of PARKE, B. in *Egerton v. Brownlow (Earl)* 4 H.L.C. p. 1.

“It is the province of the judge to expound the law only; the written from the “statutes”; the unwritten or common law from the decisions of our predecessors and of our existing courts, from text writers of acknowledged authority and upon the principles to be clearly deduced from them by sound reason and just interference; not to speculate upon what is best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good, for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law, and we are, therefore, bound by them, but we are not hereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise”.

Within recent times the judges in England have taken a more realistic view of the scope of illegality in the law of contract, and have concluded that the so-called illegal contracts fall into two separate groups according to the degree of mischief that they involve. It was first formulated in *Bennett v. Bennett* [1952] 1 All E.R. 413 at p. 421 and was followed up in *Goodinson v. Goodinson* [1954] 2 All E.R. 255 where SOMERVELL, L.J. said at p. 256:—

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“In *Bennett v. Bennett* (*supra*) it was pointed out that there are two kinds of illegality of differing effect, the first is where the illegality is criminal or *contra bonos moros*, and in those cases . . . such a provision (sic) if an ingredient in the contract, will invalidate the whole, although there may be many other provisions in it. There is a second kind of illegality which has no such taint, the other terms in the contract stand if the illegal portion can be severed, the illegal portion being a provision which the court, on ground of public policy, will not enforce. The simplest and most common example of the latter class of illegality is a contract for the sale of a business which contains a provision restricting the vendor from competing in or engaging in trade for a certain period or within a certain area. There are many cases in the books where, without in any way impugning the contract of sale, some provisions restricting competition has been regarded as in restraint of trade and contrary to public policy. There are many cases where not only has the main contract to purchase been left standing but part of the clause restricting competition has been allowed to stand”.

Mr. Haynes, in his usual most thorough manner, has submitted quite a number of authorities some of which, with all due respect, to my mind, have very little, if any, relevant bearing to the particular facts in this case. What may be termed the ‘revenue cases’ cited by him, viz— *Johnson v. Hudson* (1809) 11 East 180; *Brown and others v. Duncan* (1829) 10 B & C 93; *Wetherell v. Jones* (1832) 3 B & Ad. 221 and *Learoyd v. Bracken* (1894) 1 Q.B.D. 114, C.A. were all cases where failure to comply strictly with a statute that imposes a duty or lays down a particular procedure to be adopted (for which a penalty is imposed for non-compliance) did not debar the plaintiff from suing upon the original contract which in itself is lawful. A good example of a ‘revenue’ statute is afforded by the case of *Smith v. Mawhood* (1845) 14 M and W 452, where a tobacco manufacturer sued for the price of tobacco he had sold to the defendant. He was not licensed to sell tobacco and his name was not printed on his place of business as was required by statute under a penalty of £200. Held, he was not prevented from recovering since there was nothing in the Act to prohibit every sale, and its only effect was to impose a penalty for the purpose of the revenue on the carrying on of the trade without complying with its requirements.

These ‘revenue’ cases involve a construction of the particular statute concerned. I accept as a true proposition of law the statement contained in 8 Halsbury Laws, 3rd ed. p. 141, para. 245, viz:

“If the penalty is recurrent, that is to say, if it is imposed not merely once for all but as often as the act is done, this amounts to a prohibition. Where the object of the legislature in imposing the penalty is merely the protection of the revenue, the statute will not be construed as prohibiting the act in respect of which the penalty is imposed with the object of protecting the public though it may also be for the protection of the revenue, the act must be taken to be prohibited and

no action can be maintained by the offending party on a contract which is made in contravention of the statute”.

A good example of a statute imposing a prohibition for the public benefit is illustrated by the case of *Cope v. Rowlands* (1836) 2 M and W 149. where a statute provided that any person who acted as a broker in the city of London without first obtaining a licence should forfeit and pay to the city the sum of £25 for every such offence. The plaintiff who was unlicensed sued the defendant for work done by him in buying and selling stocks. The claim was dismissed and PARKE, B. said at p. 159.

“The legislature had in view, as one object, the benefit and security of the public in those important transactions which are negotiated by brokers. The clause, therefore, which imposes a penalty must be taken . . . to imply a prohibition of all unadmitted persons to act as brokers and consequently to prohibit by necessary inference all contracts which such persons make for compensation to themselves for so acting”.

Mr. Haynes places great reliance upon the case of *Bowmakers Ltd. v. Barnet Instruments Ltd.* [1945] K.B. p.65 C.A. and he particularly asks this court to apply the principles of that case, although he admits that the facts are different.

Bowmakers case is not an easy decision to understand and has been criticised, but the principle propounded by the Court of Appeal was applied by the Privy Council in the Malayan case of *Singh v. Ali* [1960] A.C. 167.

In *Bowmakers* case, one Smith sold machine tools to the plaintiffs which was illegal, since it contravened an order made by the Minister of Supply under the Defence of the Realm Regulations. The plaintiffs delivered the tools to the defendants under three separate hire purchase agreements which were assumed by the Court of Appeal to be themselves illegal. The defendants, after paying only a few of the instalments due under the contracts, sold the tools delivered under the first and third agreements and refused the demand of the plaintiffs to redeliver those that were the subject-matter of the second agreement. CROOM-JOHNSON, J. held that no illegality had been proved in respect of any of the hiring agreements and accordingly entered judgment for the plaintiffs against the defendants for damages for conversion. The defendants appealed but their appeal was dismissed by the Court of Appeal. DU PARCQ, L.J. delivering the judgment of the Court said at p. 71 —

“In our opinion a man’s right to possess his own chattels will, as a general rule, be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question come into the defendant’s possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to

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found his claim on the illegal contract or to plead its illegality, in order to support his claim”.

It would appear that this case has placed a limitation upon the application of the well known maxim *ex turpi causa oritur non actio* which prevents either party to a contract invoking the aid of the courts in respect of any contract which, to the knowledge of them both, is tainted by what the law regards as a disreputable or unworthy object.

The effect of this maxim together with the operation of the principle *in pari delicto potior est conditio defendentis*, is that neither party can maintain an action against the other if he requires any aid from the illegal transaction to establish his case. In *Scott v. Brown, Doering, Mc Nab & Co. (supra)* SMITH, L.J. said at p. 734: —

“If a plaintiff cannot maintain his cause of action without showing as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action”.

In *Taylor v. Chester* (1869) L.R. 4 Q.B. 309, the plaintiff deposited with the defendant the half of a £50 note as a pledge to secure the payment of money due for a debauch held by the plaintiff and divers prostitutes at the defendant’s brothel. An action for detinue, based upon a refusal of the defendant to redeliver the note, failed, for the plaintiff could not impugn the validity of an existing and admitted pledge without setting forth the immoral character of the contract.

There are two recognised exceptions to the general rule that a party could recover what he has given to the other party under an illegal contract, viz: —

(1) where the parties are not in *pari delicto*, the presumption is that both parties to the illegal contract are equally delictual, but the plaintiff is allowed to rebut this by proof that he has been the victim of fraud, duress or oppression at the hands of the defendant, or that the latter stood in a fiduciary position towards him and abused it — *Harse v. Pearl Life Assurance Co.* [1904] 1K.B. 558 at p. 563.

(2) where the contract is still executory, a party to an illegal contract is allowed a *locus poenitentiae*. He may then recover money or property delivered to the other party, provided that he takes proceedings before the illegal purpose has been substantially performed.

It has already been pointed out that the test for severability was laid down in *Goodinson v. Goodinson (supra)*. It would appear, however, that there are two underlying principles limiting the court’s power to sever, and these are, (1) the courts will not make a new contract for the parties, whether by rewriting the existing contract or by basically altering its nature and (2) the courts will not sever the bad from the good unless this accords with public policy.

It is to be noted that in this context a distinction must be drawn between a merely 'void' and an 'illegal' consideration. The former class include agreements to oust the jurisdiction of the Courts and contracts which are merely in restraint of trade. The latter include agreements the object of which is to defraud the revenue.

An example of an illegal consideration amounting to a fraud on the revenue is provided of the case of *Miller v. Karlinski* [1945] 62 T.L.R. 85 where the court refused to utilise the doctrine of severance. In that case, the terms of a contract of employment were that the employee should receive a salary of £10 weekly and repayment of his expenses, but that he should be entitled to include in his expenses account the amount of income tax due in respect of his weekly salary. In an action brought to recover 10 weeks arrears of salary and £21. 2s. 8d. for expenses it was disclosed that about £17 of this latter sum represented his liability for income tax. It was held that the contract was illegal, since it constituted a fraud upon the revenue. No action lay to recover even arrears of salary, for in such a case the illegal stipulation was not severable from the lawful agreement to pay the salary.

So also in *Alexander v. Rayson* [1936] 1 K.B. 169, the plaintiff agreed to let a service flat to the defendant at an annual rental of £1200. This transaction was expressed in two documents, one a lease of the premises at a rent of £450 a year, the other an agreement by the plaintiff to render certain specified services for an annual sum of £750. It was alleged that his object was to produce only the lease to the Westminster Assessment Committee, and by persuading this body that the premises were worth only £450 a year, to obtain a reduction of their rateable value. The defendant was ignorant of this alleged purpose. The plaintiff ultimately failed to accomplish his fraudulent object. He sued the defendant for the recovery of £300 being a quarter's instalment due under both documents. It was sought to draw a distinction between cases where the design was to use the subject matter for some unlawful purpose and the instant case where it was the formulation of the contract in two documents, not the subject matter, of which an unlawful use was to be made. This distinction found no favour with the Court of Appeal which held that if the allegation of fraud was substantiated, the plaintiff could sue neither on the lease nor on the agreement.

In *Napier v. National Business Agency Ltd*, [1951] 2 All E.R. 264, the defendants engaged the plaintiff to act as their secretary and accountant at a salary of £13 a week together with £6 a week for expenses. Both parties were aware that the plaintiff's expenses could never amount to £6 a week, and, in fact they did not exceed £1 a week. Each week the defendants deducted from the salary of £13 a week the amount of income tax appropriate to that sum, and the payment of £6 a week was represented as a re-imbursment of expenses on the returns made to the Inland Revenue Commissioners. The plaintiff was summarily dismissed and claimed payments from the defendants in lieu of notice, of £13 a week for a certain period. Held (i) the

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provisions of the service agreement relating to expenses were intended to mislead the taxation authorities and evade tax, and, therefore the agreement was contrary to public policy (ii) although the plaintiff sought only to enforce the provisions of the agreement relating to salary, those provisions were not severable from the rest of the agreement and were equally unenforceable.

Having regard to the law and facts in this matter I am satisfied that the contention of the plaintiff cannot be sustained.

In my considered opinion this whole transaction is tainted with illegality and it seems to me that the acknowledgement sued upon by the plaintiff cannot be severed from the oral contract as embodied in the receipt (Ex. 'B') as it forms part and parcel of it. *Bowmakers* case is clearly inapplicable, in that the plaintiff cannot recover the balance of \$2700 since he has clearly disclosed the illegality of the transaction on his own admission and, in point of fact his whole claim is based upon the illegal contract.

Further, both parties are in *pari delicto* and public policy forbids this court from giving any recognition to what is clearly a fraud upon the revenue.

Both parties have clearly not complied with the provisions of s. 46 of the Deeds Registry Ordinance, Cap. 32, which, for the purpose of ascertaining the correct duty payable under any future Tax Ordinance, which imposes a duty on transports of immovable property, imposes a mandatory duty for both vendors and purchasers to make and file with the Registrar, affidavits setting forth the full and true consideration paid or payable for such transports.

Further, both parties have laid themselves open to the sanction of the criminal law for making false declarations which is a misdemeanour contrary to s. 4 of the Statutory Declarations Ordinance, Cap. 36.

Whatever may be the reason for the plaintiff acquiescing to the defendant's request to amend the receipt to show a lower price than that agreed upon, whether because of friendship or out of sympathy that the defendant could not find the whole balance of the purchase price, it is nevertheless, not open to him to say now that he did not mean to offend the law of this country by swearing to a false affidavit for a lesser consideration than that agreed upon, which amounts to nothing less than a fraud upon the revenue and therefore be clearly illegal on the ground of public policy. *Ignorantia juris neminem excusat*.

This case should not only serve as an example but be a warning to all vendors and purchasers of immovable property that, not only will the courts not countenance illegal transactions of this nature, but there also remains the grave danger that they lay themselves wide open to the sanctions of the criminal law.

For these reasons this action must necessarily fail and hereby stands dismissed; as the parties are in *pari delicto* in relation to a patently illegal transaction, each of them will bear his own costs, except that the plaintiff

will pay the costs granted to defendant in any event on the 10th April 1967, which was fixed in the sum of \$20.00.

Action dismissed.

Solicitors:

Sase Narain for plaintiff.

A. Vanier for defendant.

JEWNANDAN v. SEW MAHADEO

[High Court (Crane, J.) May 30, June 14, 15, 26, 27, 29, 30, 1967.
March 23, 1968].

Practice and procedure — Previous judgment made by consent — Action to set aside — No fraud or misrepresentation or non-disclosure found — When maintainable.

Immovable property — Undivided interests — Several owners — One party to action agrees to exclusive possession in the other party — agreement, bona fide but not well founded in law — whether order embodying it should be set aside.

During 1964 the parties, who are two of the owners in undivided shares in Pln. Palmyra, agreed to settle an action for trespass to land which the defendant had brought against the plaintiff. The land in dispute was a strip which formed the common boundary between the lots which they physically occupied and which according to their transports was also owned in undivided shares.

Under the settlement, the terms of which were made an order of the Court, the plaintiff, who was in possession, undertook to give up possession to the defendant within two weeks after reaping his then growing rice crop. He, however resiled and never gave up possession. On the contrary he filed the present action seeking to have the order in the previous action set aside on the grounds of fraud, misrepresentation, non-disclosure of material facts and illegality.

HELD: (i) from the evidence the settlement of the previous action was not obtained by fraud, misrepresentation or non-disclosure but *bona fide*;

(ii) the re-definition of the boundaries by a surveyor cannot change the legal ownership of the land or any other rights of the legal owners;

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(iii) the compromise which the parties had arrived at in the previous action, viz., to divide undivided land by mutual agreement, was something which in law had no foundation, as such a division could only be effected by transport;

(iv) as the compromise was entered into *bona fide* and was not *ultra vires* the parties, even though it may be unfounded in law, there can be no valid reason for setting it aside.

Action dismissed.

A. S. Manraj, for the plaintiff.

B. O. Adams, S.C., for the defendant.

CRANE, J.: In early 1964, the defendant sued out a writ of trespass to land against the plaintiff. That case concerned a dispute about the ownership and possession of a narrow strip of land which formed the common boundary between their respective lots on Pln. Palmyra, Wakenaam. The action did not come on for hearing, however, as the parties compromised it by agreeing on certain terms of settlement which were embodied into writing and signed by both of them.

Foremost among those terms was an undertaking by the plaintiff, who apparently from the time of purchase of his lot always was, and still is in possession of the disputed strip. His undertaking was that he would give up possession of it within two weeks after reaping his growing rice crop. The parties also agreed that the said terms of settlement should be made an order of court.

Formal judgment was accordingly pronounced on those terms of settlement on September 15, 1964, but the plaintiff resiled from them by refusing to give up possession. In this action he now seeks an order setting aside that judgment of September 15, 1964, pleading fraud, misrepresentation, non-disclosure of material facts and illegality as grounds for setting it aside.

The parties are owners of undivided shares in Pln. Palmyra, Wakenaam, Essequibo. On the surveyors' plans tendered in evidence, lots 29 and 31 in the possession of the defendant, are shown to be immediately north and contiguous with lots 30 and 32 which are in the possession of the plaintiff; but so far as the evidence reveals, the history of these lots and others in the neighbourhood is that in times past they formed part of what used to be called Martha's vineyard and comprised the lands formerly known to the Dutch colonists as Twee Vreenden Nieuven Anley and Kow.

“The transports for their respective interests both show them to be owners of undivided shares in the plantation; that the defendant acquired his in 1960 from one Dinanath, while the plaintiff his, in 1962, from one Etwaroo called Khairatee; and that both these properties are laid down and defined with reference to the old plan of crown surveyor Chalmers of 1900

which is deposited in the Lands and Mines Department. The Chalmers' plan is not in evidence, though two later ones were put in, both of which refer to Chalmers'. These are the Rahaman (Ex. "P"), and the Harnandan Singh plans. (Ex. "O"). Rahaman's plan was drawn at the request of the proprietors of Palmyra named therein who hold in undivided shares, no doubt, with the object of ensuring their more beneficial occupation of the plantation and of securing for themselves evidence of title.

Surveyor Rahaman began his work in April 1961 and completed it later in the same year after surveying, sub-dividing and paaling-off Palmyra *cum annexis* into lots. The Singh plan, which is dated January 20, 1964, was drawn up at the instance of the defendant. It refers to both the Chalmers and Rahaman plans and has as its object, as Singh himself stated, the re-definition of the boundaries of lots 29, 31, 30 and 32 as shown on Rahaman's plan. Rahaman is now dead, but Harnandan Singh testified in support of his plan in which he showed the area in dispute to lie between the common boundary of lots 29 and 31 and 30 and 32. This he indicates by a red east-west line to the south of lots 29 and 31, and a four-foot drain running above and approximately parallel to it (see Ex. "O"). This area which is the bone of contention is there seen to be a narrow strip of land some 2,100 feet long and 42 feet wide (approximately). The defendant's case is that he was in possession of it ever since he acquired transport for his lots 29 and 31 in the year 1960, that is to say, more than two years before the plaintiff who acquired his transport in 1962 on the basis of the boundaries demarcated and defined on the Rahaman survey.

The evidence led by and on behalf of the plaintiff is to the effect that he was unaware of the Rahaman survey, he having acquired his interest from his predecessor, Khairatee, by measurement from the four-foot drain, and not from Rahaman's paals. Khairatee however, testified in favour of the defendant supporting his possession of the strip. He said he sold the plaintiff the property from the Rahaman's paals and not, as plaintiff claims, from the four-foot drain above. I have above remarked that the parcels clause in both transports are described with reference to Chalmers' plan of 1900, not Rahaman's, and on the very important fact that both parties hold their respective interests in undivided shares.

The allegations of fraud, misrepresentation and non-disclosure of material facts are that the plaintiff was induced to sign the terms of settlement because of the following representations made to him by the defendant's solicitor, Mr. Doobay viz., that (i) it was competent for one owner A of an undivided interest in immovable property to arbitrarily divide the same so as to carve out a proportionate specific share for himself, without an order of court and without the consent of his co-owner B; (ii) that after a sworn land' surveyor had surveyed the jointly owned property and carved out a specific proportionate share thereof to A and deposited it in the department of Lands and Mines, A and B became automatically bound by such survey; (iii) that it was competent for A to sue B for trespass if it transpired that land previously occupied by B in the jointly owned property fell within the

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portion arbitrarily carved; (iv) that the defendant's costs at that stage amounted to \$600.00, and were not less than \$300.00.

The plaintiff contends that the above representations were false and calculated to deceive and did deceive him as he acted upon them believing they were true, and that had he so known he would never have signed the terms of settlement; though he signed he did not read them, nor did he receive independent legal advice on them as he ought to have done from one other than the defendant's solicitor in whose office they were typed and signed. On this point I must say that I am quite satisfied that Mr. Doobay was not acting as solicitor for and on behalf of the plaintiff in the transaction. I accept that all that Mr. Doobay did was to scrutinise the draft of terms which had already been written and agreed on between plaintiff and defendant and presented to him when they went to his office. I so find because after four copies of the draft had been typed in the solicitor's office, the plaintiff took away one, at his request, to Mr. Theophilus Lee, barrister-at-law who, it appears, was previously engaged in correspondence in the matter on his behalf, and sought advice on it. The plaintiff at first denied doing so though he was forced to admit it later, and Mr. Lee, whose evidence I accept without hesitation, testified to the effect that the plaintiff brought one unsigned copy of the terms to him seeking advice on the proposed settlement; although he, Mr. Lee, gave none because he did not receive his fee. This will show quite clearly, I think, that the plaintiff was not relying on Mr. Doobay's advice to enable him to make up his mind whether to sign the terms. The plaintiff said he did not read them before signing. This would be entirely his own fault because he read them alright in court when asked to do so by counsel for the defendant; so I can hardly believe him that he did not.

The principal objection raised on plaintiff's behalf is in relation to the order of court. It is contended that this ought to be set aside because it was made in his absence, it having been represented to him by Mr. Doobay that his presence in court was unnecessary since the proceedings in chambers were only formal and ex-parte. While it is a fact that originally the defendant did attempt to have the judgment entered ex-parte on the terms of settlement, the judge in chambers was careful to order that the plaintiff should be put on notice and served with a copy of them and the related documents, after which he adjourned the proceedings to September 1964 for his attendance. There is no doubt that the plaintiff received such notice for he himself said he did. It was then clearly his own fault that he did not attend court and so he cannot be heard to say in the circumstances that the order was made ex-parte. No point, therefore, can be validly made of the mistake in the order as formally drawn up, which indicates that he was present in court.

What then is the legal position on these facts? It is clear that the plaintiff has never gone out of possession of the disputed strip and the four-foot drain which, he says, provides him with drainage and irrigation for his lands, and for this reason makes it impossible for him to give up

possession. He has pleaded that he has never indeed so done, despite the fact that the terms he signed gave him two weeks within which to leave after reaping his crop; but the defendant is insistent that plaintiff had given up possession but returned to the land some six months after giving it up, although the evidence has not established this. It seems to me that the position is that very shortly after signing those terms, perhaps immediately afterwards, he made up his mind he would no longer be bound by them. This seems clear from the evidence of the defendant that in April 1964 after he, the defendant, had picked coconuts on the disputed strip the plaintiff warned him it must be the last time he should ever do so. This will show that plaintiff was disputing the defendant's attempt to enter possession which he, the plaintiff, had no intention of relinquishing. But is it possible for him to resile from them when my finding is that they were made *bona fide* and that he signed after probably reading them with full knowledge of their import? He has pleaded that the judgment giving effect to them is void and of no effect for the reason that the judge had no jurisdiction to make an ex-parte order in the proceedings. It has already been shown that the order was not indeed made ex-parte, but after service on the plaintiff who was in default of appearance.

Having given the matter much thought, I have come to the conclusion both on principle and authority that there is no valid and sufficient reason for setting aside the order of court of the 15th September, 1964, on any of the grounds stated above.

It is very clear from the evidence led by and on behalf of the defendant that the plaintiff's vendor intended that the interest sold should commence from the southern boundary of lot 31 as laid down and defined on the Rahaman plan. This is established by Khairatee, the plaintiff's predecessor in title, who testified on behalf of the defendant to the effect that he had indicated to the plaintiff that the line of paals struck by Rahaman was the boundary from where the property he was selling him was to commence, and not from the *medium filum* line of the four-foot drain as the plaintiff contends. This evidence avails the defendant nought, however, since Khairatee did not transmute his intention by conveying the interest with reference to the Rahaman plan which sub-divides Palmyra into lots, instead of Chalmer's under which, according to the transports, both parties are expressed to hold in undivided shares. "It requires something more than a surveyor's tapeline to divide immovable property".

In re-defining the southern boundary of lot 31, it was necessary for surveyor Singh to shorten both the eastern and western boundaries of that lot. This can be seen from a comparison between Rahaman's plan and his own. The transports of both plaintiff and defendant, however, show they are owners of undivided shares in Pln. Palmyra, so that despite Harnandan Singh's re-definition of the southern boundary of lot 31 and the claim by the defendant to the possession of the disputed strip, the interests of both in Pln. Palmyra still remain in undivided shares. Therefore, the legal position is that all that their respective transports can validly give them title to, are those interests the extent of which are stated in the undivided land in Pln.

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Palmyra *cum annexis*, in the transports and no more, no matter what the tape-measure of the surveyor may have been intended to achieve. The Singh survey cannot affect the rights of the parties to the ownership of the disputed strip of land – see s. 19 of the Land Surveyors Ordinance, Cap. 171.

Now, there is no doubt that the compromise reached was an attempt by the parties to do something which in law had no foundation, because clearly what the purported terms of settlement essayed was to effect a division of undivided shares in immovable property by mutual agreement and seek to give it the impress of authority of a consent judgment of the court; this the authorities show may only be properly effected by transport. See *Liverpool v. Johnson and McPherson* (1894) L.R.B.G. 131, where this principle was applied in an opposition action to a sale at execution. Though given under somewhat dissimilar circumstances from the instant case, the judgment of SHERIFF, J., is short and instructive, and for this reason, it is thought worthy of recording it in full. The learned judge said:

“This is an opposition suit. The original defendant Johnson, having recovered judgment against the co-defendant McPherson, the marshal being thereunto duly authorised, gave notice that he would sell the west-half of lot 6, part of Pln. Uitvlugt. The plaintiff opposed as one of the heirs of Rose Carter under whose will John McPherson was appointed usufructuary of one-quarter of the said lot 6, and of no more. It appears that Rose Carter and William France lawfully acquired lot No. 6 under the will of Catharine Tinne. One of the reasons of opposition is that there was never any division of the testatrix’s property. From *the evidence it appears that the services of a surveyor were obtained who surveyed the land and prepared a plan*. France was the moving party and although there is a conflict of evidence I am satisfied that Rose Carter not only knew of the survey but acquiesced in the division thereby effected. *But this may well have been an agreement between these persons, who by the way were brother and sister, for their mutual convenience. It certainly amounts to no more in law. It requires something more than a surveyor’s tape line to divide immovable property*. In re Belmonte’s petition, (1892) L.R.B.G. 42 was cited by the plaintiff. It appears to me to be in point. *It comes to this, that a division can only be effected by transport*. The plaintiff has been successful and there will be the usual decree.”

In the instant case, the matter has gone a stage further than in *Liverpool’s case* (above), by the parties obtaining a consent judgment to what in law there was no foundation for doing by agreement. The question therefore arises as to what is the effect of the consent order. Can the compromise judgment be properly set aside in the circumstances? On this point it was held by WARRINGTON, J., in *Halsworthy Urban District Council v. Rural District Council of Halsworthy* [1907] 97 L.T.R. 634, that so long as a compromise is entered into *bona fide* and is not *ultra vires* the parties, no matter it may have been unfounded in law, there can be no valid ground for

setting it aside. The learned judge observed on the endeavours of two district councils to effect a compromise of their differences under strikingly similar circumstances as follows, at p. 636:

“It is no ground for setting aside a compromise that the claim, or one of the claims, made by one of the parties was not wellfounded in law, provided it is put forward *bona fide* —. That a compromise, if entered into *bona fide*, and if it does not involve the doing of an act by one of the parties which is itself *ultra vires*, may be made by and may be binding on a corporation just as on an individual is established by two cases”

I have already indicated my finding that the terms of settlement were made *bona fide* by both parties with a view to settling the dispute between them. I find that their agreement to accept surveyor Harnandan Singh's survey without resorting to a conveyance by way of transport was valid and within their powers. It seems to me their agreement was merely an informal expedient for their mutual benefit although it carried no force in law, albeit it was a mistake of law as to the effect of the legitimate limits of mutual agreement in avoiding recourse to the law courts, which, even though devoid of any legal basis, justice, reason and commonsense would demand that recognition be given to it. Indeed, if the law were so unreasonable as to require strict conformity to law in all compromise agreements, the inevitable result would be to discourage them, since no litigant would feel assured that any genuine attempt by him to compromise his differences can reach finality until its validity has been pronounced upon by the highest appellate tribunal. *Interest rei publicae ut sit finis litium* is a maxim of the law which has always been observed by the courts.

In the result, both action and counterclaim must be dismissed with costs; the former, since in my judgment, the compromise represents a genuine, though misconceived attempt to settle a lawsuit rather than a resort to the courts; and the latter on the ground that the defendant, not being in possession of the disputed strip, when action brought, if indeed there was a right of action, the necessary basis for preferring his cross-action is lacking.

Action and counterclaim dismissed.

Solicitors:

O. M. Valz, for the plaintiff.

L. L. Doobay, for the defendant.

HARPRASHAD v. KARAMAT AND RAMOTAR MISIR

[Court of Appeal (E. V. Luckhoo, G. L. B. Persaud, P. A. Cummings, JJ.A)
March 6, April 2, 1968].

Immovable property — Subdivision into lots and reserves for streets and drains — When owner ceases to have interest in reserves.

Contract — Agreement to change user of immovable property — Notice of repudiation by one of parties — Effect.

Immovable property — Right of way — Nature of — How transferrable.

The owner of Waller's Delight on the West Bank Demerara subdivided the front lands into 115 house lots, and also provided for reserves for streets and drains. The sub-divisions and as well as the reserves were laid down and defined on a surveyor's plan, which was submitted to the department of Public Health. Later he was issued with a certificate which approved the scheme. Some six years afterwards, he sold some of the lots to the first respondent and later that year the remaining lots were sold to the appellant and the other respondent. No reference was made in their respective transports to the reserves.

After the purchasers entered into possession of their holdings they agreed to change the user and to cultivate rice. They engaged the services of a land surveyor to re-survey the land with the reserves. The previous owner filed an action against the appellant and first respondent for trespass to the reserves. The action was settled by the appellant and the first respondent paying him further sums by way of consideration, the former for three strips of land each marked "reserved for streets and drains" and the latter for "excess land at Pln. Wallers Delight". Later separate actions were brought by the first respondent and appellant against the former owner for specific performance based, their respective settlements. The action by the first respondent was dismissed, while that by the appellant was abandoned. The appellant then brought another action for damages for trespass and an injunction and declaration. This was also dismissed.

The appellant then gave notice to the respondents of his intention to revert to the original idea of the utilisation of the land as house lots. This was ignored. He then brought an action which is the subject matter of the present appeal, in which he contended that, by virtue of the original plan, he is entitled as a lot holder to the use of all the reserves for the purpose of ingress and egress.

HELD: (i) where a landowner files a plan, upon which land is divided into lots and reservations of public streets and squares are marked, and he sells lots in accordance with the plan, he dedicates the streets and open spaces to the public and cannot reserve control over the property so dedicated;

(ii) no dedication to the public is complete until it is accepted by the public generally or by some local authority;

(iii) on the facts of the present case it can hardly be said that there was a dedication to the public by the original owner;

(iv) as the parties had together decided on a different user of the land than as house lots, it was too late for them to retrace their footsteps, except by mutual consent;

(v) (per Luckhoo and Persaud JJ.A) a right of way is a real servitude and except by will or intestacy, can only be transferred by transport.

Appeal dismissed.

S. L. van B. Stafford, Q.C., with J. Stafford for the appellant.
F. Ramprashad, Q.C., for the first respondent.
Dr. F. H. W. Ramsahoye for the second respondent.

PERSAUD, J.A.: In 1950, the owner of Waller's Delight situate on the West Coast of Demerara – one Abdul Hack – had a portion of the front lands of his estate surveyed, sub-divided and paled off by a sworn land surveyor, and a plan prepared. The land was divided into lots for building purposes and numbered 1 to 115. The entire block of land was bounded on the north by a trench bordering the public road, on the east by a middle walk dam, on the south by the rest of the estate and on the west by a side-line trench. The surveyed land was laid out in such a fashion that a strip of land described on the plan as having been reserved for street and drains stretched roughly from north to south over most of the area and approximately along its centre. Two other strips of similar width and similarly described traversed the entire facade of the area and crossed the first strip at two points, thus creating four rectangular blocks and two quadrangular blocks, in all of which lots 1 to 115 were de-marked.

The plan was submitted to the department of Public Health in 1951 and in the same year the Board of Health issued its certificate approving of the scheme as a housing scheme. The plan was then deposited in the Deeds Registry in 1953.

On the 27th May, 1957, Hack sold a number of lots to the first respondent, and later the same year he sold the remaining lots to the appellant and to the second respondent. The effect of these three sales was to vest title in the entire area to the three purchasers — the first respondent (Karamat) bought the entire portion west of the north to south reserve, the appellant (Harprashad) a portion east of that reserve, and the second respondent (Ramotar Misir) the remainder eastwards to the middle walk dam. No reference was made in any of the documents of title to the reserve. The north to south reserve separated the first respondent from the appellant

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while each purchaser had portions of the two east to west reserves cutting across his lands.

The purchasers then entered into possession of their respective blocks of land, and agreed among themselves that they would cultivate rice thereon, with the result that a different form of user was to be substituted for that originally contemplated.

In pursuance of this agreement, the three parties employed one Mohamed, a sworn land surveyor, in 1957 to re-survey the land, to subdivide without the reserves so essential to any housing scheme, providing as it would ingress and egress, drainage, etc. This caused Abdul Hack to bring an action in trespass against both Karamat and Harprashad as defendants (Action No. 1358 of 1958 Demerara), the allegation being that they had trespassed on the reserves.

That action was settled. On the 4th January, 1961, Harprashad paid Hack \$250: for "excess lands at Plantation Waller's Delight" and on the 19th January, Karamat paid Hack \$200: and he and Hack signed terms of settlement whereby Hack agreed to sell "all those portions of three strips of land each marked 'Reserved for streets and drains' " and adjoining the lots which Karamat then already owned to the latter. This would mean the western portion of the two east to west strips plus the entire north to south strip. If regard is had to a clause in the agreement, it is easy to understand why Karamat (and perhaps the other purchasers too) have not insisted on being given title to the strips. That clause reads thus –

“. . . subject to the condition that if transport cannot be passed for any reason except the unwillingness of the plaintiff, then the first-named defendant will accept a receipt therefor by way of title . . .”

Later in the agreement, however, the Registrar is authorised to pass title in the event of Hack failing to do so.

In 1961, by action 1846 Karamat sued Hack for specific performance of the agreement, and in the alternative for damages, alleging that Hack had refused and/or neglected to convey title to the strips and had given someone else permission to occupy one of the strips. Harprashad was joined as a defendant by order of Court. On June 5, 1963, the suit against Hack was dismissed, but damages were awarded against Harprashad for trespass to the north to south strip.

In 1962 Harprashad sued Hack (Action No. 2022 of 1962) for specific performance of an agreement by the latter to sell to the former certain reserves, including the north to south reserve. That action was abandoned.

In 1964, Harprashad brought an action against Hack and Karamat in which he sought *inter alia* a declaration that he was entitled to use for drainage and egress and ingress all the strips of land, an injunction, damages for trespass and an order for rectification of his transport to include the words "together with a right of way and of drainage over along and through the said strips of land . . . marked 'reserved for streets and drains'".

It would appear that in that action, the appellant took the line that by virtue of the plan by Insanally, a servitude had been created, and in the alternative, if a servitude had not been created, then Hack was under an obligation to convey a servitude. In dismissing that action, the judge found that a servitude had not been created, and said even if he had not found that a servitude had not been created, he would have refused relief, as in his opinion, the appellant had mis-conceived his remedy; that the appellant should have sued in specific performance if he felt he was entitled to a servitude. The judge also said:—

" . . . it may be that if the plaintiff desired to use his land in separate lots he would by a period of notice to the other purchasers recover his right to the use of the reserves as streets and drains."

No doubt this dictum of the judge prompted the appellant in this appeal to give the respondents notice of his intention to revert to the original idea of the utilization of the land as house-lots thereby unilaterally resiling from the agreement with the other parties to cultivate rice thereon. No notice was taken of this communication, hence this action, which was dismissed, and now this appeal.

There can be no doubt that Karamat bought that portion of the east to west reserves that ran through his lots, together with the north to south reserve while Harprashad and Misir each bought those portions of the east to west reserves that passed through their respective lots. In so doing they were mutually carrying out their intention to acquire more lands for rice cultivation, implicit in which was the abandonment of the housing scheme by the acquisition of the reserves and putting those reserves to a use inconsistent with a housing project. The appellant Harprashad now contends that by virtue of the original plan, he is entitled as a lot-holder to the use of all the reserves for purposes of ingress and egress.

It has been submitted before this court that the lodgment and registration of Insanally's plan amounted to a dedication of the reserves as a highway, and as a result a statutory servitude was created in which the general public has an interest.

The survey and sub-division of the land purported to have been executed under the provisions of s. 135 of the Public Health Ordinance (Cap. 145) and the transports were passed in accordance with the plan so prepared, but no reference is made in the transports to the reserves. It is contended

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that in these circumstances Hack did not have the authority to dispose of the right of way, but that even if he had, Harprashad having given notice of his intention to occupy in accordance with the plan, he was entitled to do so.

It is clear to my mind that the whole of Part XII of the Public Health Ordinance, of which s. 135 is part, applies to land laid out for building purposes, and no doubt Harprashad might have been on firm ground had the land been used and kept for this purpose.

Perhaps the appellant's contention was conceived out of a statement which appears in Hall and Kellaway on Servitudes (at p. 49) to this effect –

“Where a land-owner files a plan upon which land is shown to be divided into lots and reservations of public streets and squares are marked on it and he sells lots in accordance with that plan, he dedicates the streets and open spaces to the public and he cannot resume control over any part of the property he has so dedicated (section 28), but the rights of servitude which may be claimed by reason of an alleged dedication by a sale of lots according to a plan do not go beyond what may fairly be understood to accrue to any particular lot (section 29).”

But this passage must be read in conjunction with the next following paragraph which is as follows:—

“No dedication to the public is complete until it has been accepted by the public generally or by some local authority. In some cases such acceptance may be inferred from user, but in other cases formal acceptance by an authorized body is required. Where the only evidence of dedication is used by the public such use must be shown to have continued for the period of prescription but no adverse user need be shown as would be the case if prescriptive acquisition were claimed (section 45).”

On the facts of this case such as they are, it can hardly be said that there was a dedication to the public of the reserves by Hack. As I have already indicated, it is patent that the parties – and this includes Hack – agreed to the alteration of the use to which the land was to be put. Each party altered his position by virtue of the subsequent agreement with full knowledge of what was involved and its consequences. They had altogether decided to take a different road from which was originally envisaged. It is too late in the day to retrace their footsteps (except with the mutual consent of all) in order to take the original route. That way has been blocked by the doctrine of estoppel, the parties having mutually altered their original positions without prejudice to any other.

It should be pointed out that as long ago as 1860, the Privy Council held in *Steele v. Thompson* (1859-65) L.R.B.G. (O.S.) 42:—

. . . that the servitude in question is of the character of immovable property, and like other immovable property can only be passed according to Roman Dutch Law which prevails in the colony, by the proceeding in the presence of some judge at the place in which the property is situated.”

In *Rose v. Hanoman* (1951) L.R.B.G. 145, BOLAND, J., said:—

“A right to a praedial or real servitude is, as stated, one which is vested in a person by reason of his ownership of land in contiguity with the land bearing the burden. It would seem that by the doctrine of Roman Dutch law the owner of the right to the real praedial servitude has two distinct pieces of immovable property.

And in *Jaigopaul v. Clement* (1960) 2 W.I.R. 203, Luckhoo, C.J. held that a right of way is a real servitude and as such is of the character of immovable property, and except by will or on intestacy, can only be transferred by transport.

I am of the view that none of the purchasers in this case can be said to be the owner of a real servitude. Even if they could be so regarded, this was not endorsed on the transports, and in addition, they all had agreed to alter the nature of the user of the land. Therefore the appellant must fail on this ground also.

In my opinion this was no more than a case where the parties concerned agreed among themselves not only to alter the use of the land, but also took in other lands for which they each gave valuable consideration which signified an abandonment of the housing idea for the acceptance and carrying out of their rice cultivation schemes. Now one of those parties proposes to go back on the agreement. He cannot be allowed to do this; and he cannot do this even though he has given notice of his intention to the other parties as was done in *Dean v. Bruce* [1951] 2 All E.R. 926 – a case relied upon the appellant in this case. In that case the original contract of tenancy was varied by notice whereby the tenant became liable to increased rent under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and it was held that the landlord was not estopped from demanding the higher rent as once a contractual tenancy is at an end and the tenant remains in possession by virtue of the Rent Act, the rent is regulated by the Acts.

In my judgment once the parties themselves have voluntarily agreed for valuable consideration to alter the use of the land to the prejudice of no one else the provisions of the Public Health Ordinance pertaining to housing and planning would cease to apply and for this reason *Dean v. Bruce* would not be applicable.

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Having found as above I do not consider that it is required to state any further reasons.

I would dismiss this appeal, affirm the judgment of the court and order the appellant to pay the costs of the respondents.

LUCKHOO, J. A., I agree.

CUMMINGS, J. A.: I agree that the appeal should be dismissed with costs. I only wish to add that it is, in my view, unnecessary to decide in this case whether the interest in the reserves created by compliance with s. 135 of the Public Health Ordinance, Cap. 145 is or is not a servitude. Whatever the precise nature of the interest, the finding of fact is that all parties concerned are *sui juris* and arranged for valuable consideration to alter the user thereof. There had been no user in accordance with the plan and consequently no other persons were affected. I know of no legal principle which prohibits such an arrangement. Even though notice of a proposed return to the *status quo* was served by one of the parties on the others, the general principles of the law of contract do not permit of such a unilateral termination of the contract, unless it can be shown that the relationship was one of licensor and licensee; and this is excluded by the findings of fact in this case.

Solicitors:

J. A. Jorge for the appellant.

P. Poonai for the respondents.

Appeal dismissed.

AMEER ABDOOL v. TRANSPORT & HARBOURS DEPARTMENT

[High Court (Vieira, J.) May 29, June 6, 1967, January 4, 1968].

Limitation — Transport and Harbours Department Ordinance, Cap. 261, s. 23(1) and (2) — Failure to plead — Effect of rules of the Supreme Court, O. 7 r. 15, — Whether a bar to defendants setting up statutory provision.

The plaintiff claimed from the defendants a sum representing the value of several items of goods which had been sent to him on the defendants'

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railway, for delivery at their bond but which were never delivered. The items were in two consignments dated the 15th November 1965 and the 11th August 1966. The plaintiff commenced his action on the 11th March 1967 by specially endorsed writ to which the defendants filed an affidavit of defence. The action was tried without further pleadings and at the close of the case for the plaintiff, counsel for the defendants submitted, *inter alia*, that the action was barred by virtue of sec. 23(2) of the Transport and Harbours Department Ordinance, Cap. 261. This section provided that an "action shall be commenced within six months after the thing done or omitted and not otherwise". It was argued by counsel for the plaintiff that the defendants could not avail themselves of that provision as they had not pleaded it in keeping with the requirements of O. 17 r. 15 of the Rules of the Supreme Court, nor had they sought any amendment to do so.

HELD: (1) sub-sec. 2 of s. 23 is concerned with and lays down a matter of substantive law and not merely procedure;

(ii) having regard to the use of the words "and not otherwise", after a lapse of six months not only the remedy but also the right became extinguished;

(iii) accordingly any proceedings brought thereafter was a nullity.

Action dismissed.

H. W. Shah, for the plaintiff.

Doodnauth Singh, Senior Crown Counsel, for the defendants.

VIEIRA, J.: On June 5, 1967, I dismissed the plaintiff's action and I now give my reasons therefor.

On 15th Nov. 1965, A. Gafoor and Sons shipped, three Canadian bed frames, one bundle of nails and one bag containing 12 castors, by the defendants' railway from Georgetown to Rosignol for delivery to the plaintiff at the defendants' bond at Stanleytown, New Amsterdam, and a freight note (Ex. "A") was issued for that purpose. The cartons were valued at \$30.00.

On 11th Aug., 1966, a case of thread valued \$390.00 was shipped by the plaintiff's customs clerk by the said railway for delivery to the plaintiff at the said bond, and a freight note dated 2nd Aug. 1966 (Ex. "B") was issued for that purpose.

None of the article was ever received by the plaintiff and, as a result, he went to the Stanleytown bond twice, viz., in March and August 1966, but to no avail. He also spoke to one Mr. Soodhoo, the assistant traffic superintendent at the defendants' head office in Georgetown who promised to investigate the matter. This was after his lawyer had sent a letter of demand (Ex. "C") dated 6th Oct., 1966 on his behalf.

The plaintiff was offered castors by the defendants but he refused as they were not of the same type as he had ordered.

This present action was filed on 11th March, 1967. On 22nd April, 1967 an affidavit of defence was filed by one Eustace Anthony, personnel officer of the defendant corporation, and on 24th April, 1967, I granted leave to defend without further pleadings. The matter was fully heard on 29th May, 1967, and I gave an oral decision on 5th June, 1967, dismissing the claim with costs to the defendants fixed in the sum of \$150:

The defendants led no defence but closed their case at the close of the plaintiff's case. Counsel for the defendants submitted the following –

(1) the notice (Ex. "C") was out of order as it did not comply with s. 8(1) of the Justices Protection Ordinance, Cap. 18;

(2) On the evidence itself the claim was outside the statutory six (6) months limit; and

(3) the conditions laid down in the two freight notes (Exs. "A" and "B") have the sanction of law as they are derived from Rules made under ss. 8 to 13 of the Transport and Harbours Department Ordinance, Cap. 112 (now Cap. 261 of the Laws of Guyana (Kingdon ed.)

Counsel for the plaintiff, in reply, submitted that –

(1) the plaintiff's cause of action did not arise until 5th Oct., 1966 when the final demand was made for delivery of the articles;

(2) the non-delivery amounted to a fundamental breach of a contract which no exemption clause could remedy; and

(3) this was a case of non-delivery not short delivery.

I must confess that I found this to be an extremely difficult matter involving as it did the law of limitation under three separate ordinances, viz;

the Justices Protection Ordinance Cap. 18, the Limitation Ordinance, Cap. 26, and the Transport and Harbours Department Ordinance, Cap. 261.

It has been truly said that limitation hovers uneasily between the rules of substantive law and the rules of procedure, a result of the general principle that the effect of the statute is to remove the remedy by proceedings without affecting the right. If the statute removes the right as well, it forms part of substantive law; if the remedy alone, of procedural law. (See *Limitation of Actions by Michael Franks* at p. 3.)

In this country limitation generally is based upon the Limitation Ordinance, Cap. 26. There is no other general act of limitation. There are, however, quite a few special statutes of limitation which fix special periods of limitation in particular cases.

In *Gregory v. Torquay Corporation* [1912] 1 K.B.442, COZENS-HARDY, M. R. said at p. 444 –

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“We all know in this Court that there are a good many statutes of limitation, and to say that the Public Authorities Protection Act, 1893, is not a statute of limitations, when you find it imposes a limit of six months within which many kinds of action must be brought, passes altogether my understanding.”

It seems clear to me that the whole point in this matter was whether the defendant corporation could (1) successfully raise the special defence of limitation without expressly pleading it and further (2) whether by entering an unconditional appearance to the writ issued more than six (6) months after the cause of action accrued, they did not waive the right of pleading the protection of a statute of limitation in their defence and raising it at the trial of the action.

The defendants are a statutory corporation set up by special ordinance, viz., the Transport and Harbours Department Ordinance, Cap. 261. S. 23 provides as follows: –

“(1) No action or suit shall be commenced against the Department for anything done in pursuance or execution or intended execution of this Part of this ordinance *until the expiration of one month after notice in writing has been served on the Department* stating the cause of the action or suit, the name and address of the person bringing it and the name and address of his legal practitioner.

(2) Every such action or suit *shall be commenced within six months after the thing done or omitted and not otherwise*”.

In the *Llandoverly Castle* [1920] p. 119 at p. 124, HILL, J. said –

“It was contended that the defendants by appearing waived that right. I am unable to follow that argument. The section says (i.e. s. 8 of the Maritime Conventions Act, 1911) – I am leaving out the irrelevant words – “No action shall be maintainable against the owners in respect of any salvage services unless proceedings are commenced within two years of the date when the service is rendered.

If owners are sued after the period of limitation has expired, how are they to raise that defence? The usual way to rely on a defence based on a statute of limitation is to plead the statute. O. XIX r. 15, provides that “the defendant must raise by his pleading all matters which show the action or counter-claim not to be maintainable.....as for instance.....Statute of Limitations”. S. 8 is a statute of limitations. About that there is no doubt. If there be any doubt, see *Gregory v. Torquay Corporation*, which deals with the Public Authorities Protection Act and the limitations contained in it.”

I had and have no doubt whatsoever that Cap. 261 is itself a statute of Limitation. This is abundantly clear from the wording of s. 23 thereof.

O. 17 r. 15 of the Rules of the Supreme Court 1955 is based upon, and is in almost identical terms with O. 19 r. 15 of the English Rules of the Supreme Court 1883, as amended.

The general rule of pleading is that a party must not merely traverse the allegations in his opponent's pleading but must confess and avoid them. The defendant must make it quite clear what line of defence he is adopting. As a general rule no evidence of any special defence or of matters which would be likely to take the opposite party by surprise can be given unless they are expressly pleaded.

In *Re Robinson's Settlement; Gant v. Hobbs* [1912] 106 L.T.R. 443, BUCKLEY, L. J. said at p. 451 –

“But then it is said that the defendant Stevens has not pleaded this point. I will assume that he has not. Paragraph 3 of this defence is not very plain. But let us assume that he has not pleaded the statute. The first answer is to be found in the judgment of Lindley and Smith, L. JJ, in *Scott v. Brown, Overing, Mc Nab and Co.*, (67 L.T. Rep. 782; (1892) 2 Q.B. 724), of which the Master of the Rolls has already read part. But beyond that it seems to me Order XIX, r. 15, relied upon by the plaintiff as excluding the defendant Stevens from setting the statute up, has not that effect. O. XIX, r. 15, no doubt provides that the defendant to an action must by his pleadings do various things. It names no consequences if he does not do those things. It is not addressed, as Mr. Cave said, for a moment to where a statute is the thing to be pleaded.

It applies to all cases of grounds of defence or reply which if not raised would be likely to take the opposite party by surprise or raise issues of fact not arising out of the pleadings. Where the defendant ought to plead all things of that sort the rule does not say that if he does not the court shall adjudicate upon the matter as if a ground perfectly valid in law did not exist which does exist. If in the course of the proceedings it was proved the deed sued upon was a forgery, and the defendant does not plead it or know it was a forgery, the court would not give judgment upon the deed on the footing that it was a valid deed.

The effect of the rule is, I think, for reasons of practice and justice and convenience that a party ought to tell his opponent what he is coming to the court to prove. If he does not do that, the Court will deal with it in one of two ways. It will say that it is not open to you. You have not raised it, or the court will give you leave to amend by raising it, and protecting the other party by letting the case stand over. The rule is not one that excludes from the consideration of the court the relevant subject matter for decision simply on the ground that it is not pleaded. I think, therefore, it was open to the defendant Stevens, and on that ground I think that he succeeds on this appeal.”

In *re Hepburn Ex parte Smith* (1885) 14 Q.B.D. 394, CAVE, J. said at pp. 399 – 400: –

“It is said that the statute bars the remedy but not the right, and consequently that the executors still remain indebted to the joint

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creditors although the latter cannot enforce their right by action. This, although not an uncommon, is in my judgment an incorrect, way of stating the effect of the statute of Limitations. *There is in law no right without a remedy; and, if all remedies for enforcing a right are gone, the right has in point of law ceased to exist.* In the case of a debt the ordinary and universal remedy is by action against the debtor. There may, however, and sometimes does exist another remedy, not by action against the debtor, but arising out of the possession of property of the debtor which by law or contract may be detained by the creditor until the debt is paid. This latter remedy may exist, although the remedy by action is barred; and in that case the debt continues to exist so far as is necessary for the enforcement of this right of lien but not for enforcing the remedy by action. When the debt is barred by the statute and the creditor has no lien, the debt is gone for all purposes. This limited right is recognised in bankruptcy; and, where a creditor has a lien, he may make use of it to enforce payment of his debt, although it is statute barred and the debtor has become bankrupt. But for the purpose of proving, the remedy by action can alone be looked at; and, if that is barred, there is no longer any right to prove, because there is no longer any right to the debt capable of being enforced by action.”

In this matter no statute of limitation and/or the Justices Protection Ordinance Cap. 18 was expressly pleaded by the defendants, neither did they at any stage of the proceedings after filing of the writ make any request for an amendment which, in a proper case, the Court may permit, provided that the plaintiff can be entirely compensated by an order as to costs, (*Aronson v. Liverpool Corporation* [1913] 29 T.L.R. 325; *Welch v. Bank of England* [1955] 1 Ch. 509, 540.)

What, therefore, was the true position in this case? In my considered opinion the whole proceedings was a nullity. The words “*and not otherwise*” in subsection 2 of sec. 23 of Cap. 261 are clear, absolute and mandatory. In *Stroud’s Judicial Dictionary of Words and Phrases* (3rd ed.) under the caption Distress it is stated—

“(6) The power to recover tithe rent charge under a contract made prior to the Tithe Act, 1891 (54 & 55 Vict., C. 8), “by distress *and not otherwise*” (S. 1(3), is by distress alone; no action therefore can be maintained (*Church v. Maxsted*, 67 L. J. Q.B. 823).

In *Church v. Maxsted* [1898] (*supra*), DAY, J. said at pp. 824 – 825 –

“The only remedy that is reserved under the Act of 1891 (i.e. the Tithe Act) to the plaintiff here is a right to distrain. I think the words of the Act are very plain, and sub-section 3 of section 1 is that the amount is to be “recoverable from the occupier by distress” Under the statute of William 4, “and not otherwise”. That is the main point

on which I decide this matter. Even if I had come to the conclusion that there had been a distinct definite agreement by the tenant to pay the tithe in consideration of his being given time to pay, I should still hold that the plaintiff is not entitled to recover in this action, on the ground that no action would lie for the tithe, nor does any action lie for monies recoverable qua tithe. Therefore, if there had been a distinct agreement as distinguished from an understanding to pay the tithe, I should still hold the plaintiff was not entitled to recover under section 1, subsection 3 of the Act of 1891. That provision, in my judgment, is a bar to the action being maintained at all."

It was my considered opinion that any action or suit brought outside the six (6) months time limit laid down by s. 23(2) of Cap. 261 *extinguishes both the right and the remedy* and is, therefore, null and void of no legal effect whatsoever.

In this matter the castors were shipped on the 15th November, 1965, and Ex. "A" issued therefor. On 2nd August, 1966, Ex. "B" was made out in respect of the case of thread which was not shipped until 11th August, 1966. Both these were clearly separate causes of action and yet counsel for the plaintiff made only one demand by letter (Ex. "C") in relation to both those items. The action was not filed until 11th March, 1967, clearly more than 6 months after both items were shipped.

The submission of counsel for the plaintiff that the plaintiff's cause of action did not arise until the 6th October 1966 when the final demand was made (Ex. "C") was not only ridiculous but spurious. S. 23(2) is absolutely clear—

“— Every such action or suit shall be commenced within six months AFTER THE THING DONE OR OMITTED.”

Neither counsel in this matter were of any particular assistance to this court. In fact I have had to do all the research myself which should not be. It is counsel's duty to furnish the court with all the relevant authorities both for and against.

It seemed to me that, although one ought always to plead a statute of limitation, or to make a request for an amendment if this is not done, nevertheless, where, as in this matter, a special statute of limitation, extinguishes both the right and the remedy if the action or suit is filed outside the time stipulated, then a failure to expressly plead such a statute or to request an amendment, will not debar a defendant from raising the issue at any stage of the proceedings or indeed prevent the court itself from raising and determining the issue of its own motion.

In my opinion it was not necessary for me to look beyond the provisions of s. 23(2) of Cap. 261 in this matter which, I considered, fully disposed of this matter for the reasons I have given.

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In conclusion, therefore, I am fully satisfied that in view of the words *and not otherwise* in s. 23(2) of Cap. 261, the plaintiffs failure to bring his action within the six (6) month period laid down, was absolutely fatal and forever extinguished both his right and his remedy. In effect this means that s. 23(2) of Cap. 261 is really substantive law and not merely procedural law.

Action dismissed.

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[In the Court of Appeal (Luckhoo, Persaud, Cummings, J J.A.)
April 25, 30, 1968.]

Criminal Law — Plea of Guilty — Whether incumbent on trial judge to take plea into account in imposing sentence

The appellant was indicted for murder, but following the Crown's willingness to accept a plea to the lesser count of manslaughter, the trial judge permitted this to be done, although, on the depositions there was no indication of any circumstances to justify the acceptance of such a plea.

The appellant was sentenced to ten years imprisonment. In his plea in mitigation, counsel said *inter alia* that the appellant had suffered great mental anguish.

The appellant appealed on the ground that the trial judge had made no allowance in his sentence for the fact that he had pleaded guilty and had not contested any issue before the court.

HELD: (i) (per Luckhoo and Persaud, J. J.A.) a plea of guilty does not necessarily mean that the prisoner genuinely regrets his act;

(ii) if a sentence appears to be proper and appropriate, it matters not that something was taken into account which ought not to have been or something was taken into account which ought to have been;

(iii) on the facts as appeared in the depositions, there was little, if anything, to mitigate the crime which had been committed, and in any event, if there was remorse the judge's memorandum of sentence showed that he must have had it in mind;

(iv) (per Cummings J.A.) the trial judge did not take into account several facts which he ought to have taken cognisance of, including the plea of guilty to manslaughter, but in an appeal against sentence the court is called upon to exercise a discretion and in so doing must have regard to all the circumstances.

Appeal dismissed'

B. C. De Santos for the appellant.

J. Gonsalves-Sabola for the Crown.

LUCKHOO, J.A.: There is an application in this appeal for leave to appeal against sentence on the ground that the learned trial judge failed to give adequate consideration to the appellant's plea of guilty to manslaughter. He was on a charge of murder when the court, following the Crown's willingness to accept that plea, permitted this to be done.

The appellant was sentenced to 10 years' imprisonment for what could well be described as a bestial and dastardly act in stabbing his reputed wife at least twice with a knife, which must have been at least 1½" in diameter, in the region of her heart and liver, puncturing the apex of the left ventricle, and the lobe of the liver.

On the depositions the learned trial judge on the authority of *R. v. Soanes*, [1948] 32 C.A.R. 136, would have been entitled to refuse to allow the appellant to plead guilty to manslaughter, because there was no indication on the deposition that circumstances existed to justify the acceptance of that plea. In other words, no evidence appeared on the record from which it could be said that the deceased had done any act to the appellant which would and did cause in him a sudden and temporary loss of self-control rendering him so subject to passion as to make him for the moment not master of his mind.

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Counsel for the appellant has cited the case of *R. v. de Haan*, [1967] 3 All E.R. 618, as an authority for his contention that the trial judge had not made any allowance in his sentence for the fact that the appellant had pleaded guilty and had not contested any issue before the Court.

There can be no doubt that credit can be given when a person does plead guilty to the fact that that person is facing up to realities and shows some signs of repentance to justify a reduction from what would otherwise have been the sentence.

Indeed in *de Haan's* case, although the learned Deputy Chairman had considered that the plea of guilty there offered was the only mitigation that he could find, EDMUND DAVIES, L.J., in the Court of Criminal Appeal said: "We have come to the conclusion that taking an all-round view of the circumstances of this case, to sentence the appellant, grave though the offences are and bad though his record is, to four and a half years, is to give inadequate consideration to that mitigating element.

Another court, differently constituted, may not have taken the same view. The motivating factor in the favourable outlook there taken was clearly based on what was put to the court – that the accused "was a person who may respond to outside help", and the court said, "That outside help we have decided to extend to him." It was no more than a concession which the court felt it ought to exercise in the particular circumstances.

It must not be thought that –

- (1) the mere entering of a plea of guilty calls for some favourable reaction from the Court in regard to sentence, or
- (2) if the court does not take into account the plea of guilty, the sentence will necessarily be disturbed by an appellate court.

The level of sentence which will properly reflect the gravity or relative gravity of the offence may properly be reduced under certain circumstances.

The court is entitled to ask itself whether the accused has shown genuine remorse for what he has done, and this may go some way in encouraging the thought of a more lenient sentence than would otherwise have prevailed.

But the court is not entitled in the converse as when there is a plea of not guilty or an attack is made on the prosecution witnesses, or because of the way the defence is run, to increase the sentence above the level which would have been originally contemplated. It would be wrong to do so or to think of doing so. (See *R. v. Harper*, [1967] 3 All E.R. 619).

When a plea of guilty is entered, this may be done for anyone of a number of reasons. It does not necessarily mean that genuine remorse is implicit in so doing. An accused may decide upon this course only because the opportunity is open to him to plead guilty to a lesser count which may secure less punishment than otherwise, or he may wish to get his case over quickly so that he may serve his sentence and the sooner be able to continue his life of crime to which he was devoted. So that it is not the plea of guilty which matters so much as the reason why that plea was entered.

It must be brought home to the court, not by the plea itself, but by the reason for the plea, that the wrongdoer genuinely wanted to demonstrate his remorse and contrition, and that there appears to be some hope of redeeming him. In those circumstances, naturally a court would be moved to a kindlier approach if satisfied that such is the case.

However, even if in sentencing an offender no remark was made of his remorse when this appeared to exist, courts will not interfere if the sentence is proper, and that principle has been shown in the case of *R. v. Skone*, [1967] Crim. L.R. 249, where the appellant was convicted on three counts of sexual intercourse with a girl aged 13. The girl who was regarded as being of bad moral character, helped at his shop, and the jury made a recommendation for leniency, considering that he was as much sinned against as sinning. The judge, observing that he took into account the conduct of the defendant involved an attack on the police, sentenced him to six months' imprisonment. This sentence was upheld by the Court of Appeal which said that he should have resisted temptation and that a sentence of imprisonment was inevitable despite the girl's character. The court went on to point out, however, that the conduct of the defendant should not have been taken into account in passing sentence, but that six months was appropriate and would have been so even if he had pleaded guilty.

If the sentence then appears to be proper and appropriate, it matters not then that something was taken into account which ought not to have been, or that something was not taken into account which ought to have been.

In this case the appellant had gone to his mother-in-law, Seupallie, for lunch during which he had imbibed a certain quantity of drink. The evidence reveals that three persons drank a quarter bottle of rum. After having his lunch he returned back to his home with his wife and children. Seupallie was on her verandah not far from the appellant's home when she heard talking. Presumably there was a quarrel. She then saw her daughter go out on her own verandah and the appellant followed her saying that he was going to kill her, whereupon she said to him, "Kill me nah!" He then plunged a knife into her body which Seupallie saw used more than once. Soon after the daughter fell to the floor and died. Seupallie shouted for help and one Paul Benjamin and another went on to the scene.

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There was no evidence that the appellant's wife had in any way provoked this grave attack on her. Paul Benjamin admitted that he took a piece of wood and he struck the appellant on his head for the purpose of disarming him because at that point of time he had a cutlass in his hand.

The appellant gave up the cutlass and the knife and told people about the place that he had killed his wife and he wanted to be taken to the police station. At the police station he repeated that statement – that he had killed his wife. He made a written statement to the police in which he said, “Ah stab she wid the knife pun she left side because Paul Benjamin she brother lash me wid ah bellnah pan me head.” Paul Benjamin, on the evidence at the preliminary enquiry, was not at the appellant's home at the time when he stabbed his wife. He went there afterwards.

In that setting then, can this court say that that sentence of 10 years was excessive? Or was it not an appropriate sentence? Lord DENNING in his memorandum to the Royal Commission on Capital Punishment used these words in relation to punishment.

“Punishment is the way in which society expresses its denunciation of wrong-doing: and in order to maintain respect for the law it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them.”

The denunciatory aspect in those words was again repeated in another way in the case of *R. v. Blake*, [1961] 3 All E.R. 125. That was a case in which the appellant had pleaded guilty to five offences under the Official Secrets Act, and had been sentenced to 14 years' imprisonment on each count, the sentences to run consecutively on the first three counts, making 42 years' imprisonment in all. The Court of Criminal Appeal refused leave to appeal against sentence, and HILBERY, J., said:

“It is of the highest importance, perhaps particularly at the present time, that such conduct should not only stand condemned, should not only be held by all ordinary men and women in utter abhorrence but also should receive when brought to justice the severest possible punishment.”

And this also was the attitude in *R. v. Mitchell*, [1965] Crim. L.R. p. 292, where the appellant had thrown bleach into the eyes of pursuers attempting to apprehend him. The court observed it was a “horrible offence” and the sentence had to mark public revulsion.

On the facts as appear on the depositions there was little, if anything, in mitigation of the crime committed. The appellant had had the benefit of his plea to manslaughter accepted which was an extraordinary advantage in the circumstances. I will assume that there was genuine remorse. Surely the trial judge must have had this in his mind when he said in his memorandum of sentence:

“Having regard to all the circumstances of this case, the character of the defendant and with the hope of effecting a reformation on the defendant. . . I imposed a sentence of 10 years.”

Counsel for the appellant had told the trial judge that the appellant had suffered great mental agony. A sentence of life imprisonment could have been imposed. Was not the trial judge in a lesser sentence leaving room for “effecting a reformation”? And was not the hope of so doing because he was satisfied that there was genuine remorse although he did not say so in so many words?

In any event in this case it is immaterial whether the appellant’s remorse did or did not enter into the judge’s consideration when imposing sentence, as the sentence on the facts was appropriate and a proper one.

It is the judgment of this court then that the application for leave to appeal be refused. The appeal is dismissed and the conviction and sentence affirmed.

PERSAUD, J.A: I concur.

CUMMINGS, J.A.: I agree that this appeal should be dismissed, but I prefer to put my reasons in a slightly different way — in simpler form. I do not consider that the fact that the offence originally charged was murder and that it was reduced to manslaughter, was a circumstance to affect one way or the other the sentence to be imposed.

This court is called upon now to exercise a discretion, for that is what we do when we review the discretion exercised by the trial judge.

The trial judge in giving his reasons for his sentence said:

“I took into consideration the age and previous good character of the defendant. I took into consideration the repercussions actual and anticipated on the defendant and also on the members of his family. I gave due consideration to the circumstances of provocation suggested by the defence. It seemed to me, however, that assuming that there was some provocation (and it seems questionable to me in these circumstances) the mode of resentment did not bear a reasonable proportion to the provocation. In my view the defendant was rather fortunate that the Crown accepted a plea of guilty to the lesser offence of manslaughter in the circumstances.”

It is clear from that that the trial judge had expressed the factors that motivated the sentence which he delivered. He does not appear from what he has expressed to have considered the fact that the appellant had pleaded guilty, the fact that he was drinking (which is a circumstance for mitigation of sentence), the fact that the medical evidence revealed or led to the inevitable conclusion that a knife, a sharp-pointed instrument, was used and not a knife and a cutlass, and that the defence was that the appellant was at

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the material time peeling tannias with the knife. These are things that a trial judge ought to have taken into account in exercising his discretion. But when we are called upon to exercise our discretion, it is incumbent upon us, in addition to examining the manner in which he exercised his discretion, also to look at the facts of the case for ourselves.

The provocation, whatever it was, appears to have been slight, and the instrument used by the appellant a lethal one. Even, therefore, if the other circumstances which the learned trial judge overlooked when exercising his discretion were now to be considered, was the sentence on the facts, as disclosed, an appropriate one? I find myself unable to say that the sentence was inappropriate in these circumstances, and consequently am not in a position to disturb the discretion exercised by the learned trial judge.

Appeal dismissed.

R. v. EDWIN OGLE

[In the High Court (Crane, J.,) May 6, 1968]

Evidence — Tender of depositions of witness who is out of Guyana — Circumstances to be taken into account.

Construction — Statutory provision — May — Whether implying discretion or to be construed a mandatory — s. 95(1) of Evidence Ordinance, Cap. 25.

Constitutional law — Fundamental rights provision — fair trial within a reasonable time — Art. 10(1) of Constitution of Guyana.

On the 25th March, 1965 the accused was committed to stand trial at the next sitting of the Criminal Assizes for Demerara for certain offences of forgery alleged to have been committed between August, 13 and 26, 1964. Some twelve assizes later, on May 6, 1968, the indictment containing ten counts came on for trial. On his arraignment the accused pleaded not guilty to all the counts. The prosecution, after opening their case, sought by the usual method to lead evidence with a view to have admitted into evidence the deposition of a witness who was then resident abroad, and had intended to adopt the same procedure with regard to two other witnesses. Counsel on behalf of the accused objected and arguments were heard in the absence of the jury.

HELD: (i) the word 'may' in s. 95(1) of the Evidence Ordinance Cap. 25 is permissive and not mandatory;

(ii) in exercising that discretion a court must look at both sides of the picture.

(iii) under art. 10(1) of the Constitution it is mandatory that an accused person have a fair hearing within a reasonable time, and when the time is long delayed between committal and trial the burden is on the prosecution satisfactorily to explain the delay. In the present case no explanation has been proffered for what was clearly a long period of delay;

(iv) when art. 10 is read in conjunction with s. 71 of the Criminal Law (Procedures) Ordinance, Cap. 11, the words “next practicable sitting” of the Assizes means any subsequent sitting at which the Crown can conveniently arraign the accused and not necessarily to very next sitting after committal;

(v) taking all the circumstances into consideration, to permit the depositions of the three absent witnesses to be read would operate to the prejudice of a fair trial;

(vi) the most appropriate time to make a submission such as the one under consideration is before the accused is put in charge of the jury.

Objection sustained.

[Editorial Note: After the trial judge’s ruling the prosecution offered no evidence and an acquittal was directed.]

R. Sharma for the Crown.

C. A. Massiah for the accused.

CRANE, J.: On the presentment of the Director of Public Prosecutions, the accused, Edwin Ogle, stands indicted on ten counts. These charge him with various offences alleged to have been committed between April 13, 1964, and August 29, 1964, and involve allegations of forgery of certain receipts for money purporting to be receipts of the Guyana Airways Corporation, with an intent to defraud, contrary to s. 257 of the Criminal Law (Offences) Ordinance, Cap. 10.

The accused pleaded not guilty to all ten counts; thereupon the prosecutor opened the Crown’s case and sought to call evidence to prove the deposition of a witness who is now resident abroad. Mr. Massiah for the accused, immediately objected to the course proposed, intimating that what he intended to say would apply equally to the case of two other depositions which the Crown would also seek to prove in the course of the trial. The jury accordingly withdrew.

Mr. Massiah then submitted that the depositions of the three witnesses, Gordon, Pugh and Phillips, who are at the moment resident in England, and who testified at the preliminary inquiry constitute, as he put it – “the body and soul” of the case against the accused, meaning that the prosecution had no chance of success without them. He referred to s. 95(1) of the Evidence Ordinance, Cap. 25 by virtue of which the Crown sought to put in those depositions, and urged that the word “may” in the subsection gives the court a discretion as to whether it ought or ought not to admit depositions of

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witnesses who are out of the country; he submitted the court is not bound to admit them and that it would be an injustice and prejudicial to the accused to receive them in evidence in the circumstances of this case, notwithstanding the conditions for their admissibility had been observed at the preliminary inquiry.

The English case of *R. v. Linley* (1959) Crim: L.R. 123, was cited in support of the contention that the word “may” in the subsection is discretionary. That was a case which was tried before ASHWORTH, J. at the Leeds Assizes on December 16, 1958. Linley was charged with robbing one Champion. Before the trial commenced, counsel for the defence asked the judge to rule that the depositions of Mr. Champion ought not to be read at the trial although he had given evidence on oath before the examining justices. He was an old man and his physical condition had deteriorated to such an extent that it was virtually certain that he would never be in sufficiently good health to be able to come to give evidence at the trial. The judge ruled that it would not be right in all the circumstances of the case to permit the deposition of Mr. Champion to be read at the trial. The trial proceeded with what other evidence was available and the accused was acquitted.

I will observe-that the submission was made before the trial commenced, and though nothing turns on that, I believe from the point of view of practice it would be desirable in cases in future to make such a submission either before or immediately after arraignment, but certainly before the accused is given in charge to the jury, when it is appreciated by counsel that the Crown intends to put in the depositions of absent witnesses at a trial. One obvious beneficial result would be that it saves the jury’s intervention and their having to withdraw in the course of the trial as they have done in the present case. I mention this only as a practice point anyway.

Counsel for the Crown has stressed with vigour that s. 95(1) is specific and that it must be carried out and that no manifest injustice can occur by putting in the depositions. On reflection, however, it seems to me that the sub-section does indeed give the court a discretion in the matter.

The word “may” I interpret in a permissive and not mandatory sense, and in the exercise of my discretion I do so in a judicial manner I must weigh the pros and cons of the application to admit the deposition by looking at both sides of the picture. Now, taking this approach as my yard-stick, what do I have here? When I look at the date of committal of the accused for trial I see that it was as long ago as the 25th March, 1965 – just over three years ago. I must, therefore, ask myself what excuse does the Crown have for having kept him so long awaiting his trial, when s. 71 of the Criminal Law (Procedure) Ordinance, the heading of which reads: “Committal for Trial”, lays it down that:

“If upon the whole of the evidence the magistrate if of the opinion that a sufficient case is made out to put the accused person upon his trial, he shall, subject to the provisions of section 9 of this Ordinance, commit

him for” trial to the next practicable sitting of the Court for the county in which the enquiry is held”.

Now, the key phrase in that section being “the next practicable sitting”. I must ask myself whether from the 25th March, 1965 to this day of Grace, the 6th May, 1968, would really constitute the next practicable sitting within the meaning of that section and the Constitution of Guyana which I will discuss in a moment.

I am fully alive to the probability of this ruling of mine being cited as a precedent at Assizes in the future whenever it is sought to have depositions of witnesses abroad read in evidence. It is, however, a decision which turns on its own peculiar facts. However that may be, the course taken by each judge must always vary with the exercise of the individual discretion, and will be entirely dependent on the facts of the particular case. I am also alive to the probability that the Crown may be forced to offer no further evidence following on the course which I intend to take, but I have no regret whatever taking it, feeling, as I do, that were I to permit the depositions of the three absent witnesses for the Crown to be read in the circumstances of this case, it would operate to the prejudice of the accused to have a fair trial.

Neither counsel asks for a postponement, nor does a situation arise for the exercise of the court’s discretion under s. 95(5) of the Evidence Ordinance, Cap. 25. In the present case what the accused asks is that a judicial discretion be exercised against allowing the three depositions to be read, and for the case to proceed without further delay, particularly as he has been awaiting trial for over three years through no fault of his own. It is, however, urged upon me that I have no discretion save to permit these depositions to be read; but I find myself in entire agreement with MILLER, J. in *R. v. Insanally* 1960 L.R.B.G., 12 at p. 14, when he considered a kindred application in which it was pressed upon him that no injustice would be occasioned by reading the depositions of absent witnesses, since the accused had full opportunity to cross-examine them at the preliminary inquiry. MILLER, J. clearly thought as did ASHWORTH, J., in *R. v. Linley* (above) that there was a judicial discretion to be exercised when he observed thus:

“While, with respect, the latter observation is something which should, no doubt, be considered, *it should not be the only consideration*. The interests of justice as a whole should be the overriding and paramount consideration”.

It is commonplace that the interests of justice demand that a trial should be speedily conducted for it has been truly said that “justice delayed is justice denied”. In conformity with this principle, therefore, when an examining magistrate commits an accused person for trial after declaring that there is a sufficient *prima facie* case made out, the law as above stated, directs him to “commit him for trial to the *next practicable sitting* of the court for the county in which the inquiry is held”. This provision must, however, be read in the light of art. 10(1) of the Constitution of Guyana, the supreme law of the State which reads:

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“If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a *fair hearing within a reasonable time* by an independent and impartial court established by law.”

In my view the accused cannot be said to have been “afforded a fair hearing within a reasonable time”, if he is now called upon to defend himself by having depositions read in evidence on behalf of the Crown more than 3 years after he was committed to stand trial, unless a very satisfactory explanation for the delay be forthcoming from the prosecution. Admittedly, *nullum tempus occurrit regi* is a maxim of the common law, but it is not inflexible, for even this time-honoured principle must give way to the Constitution, as indeed it has had to yield to the Assizes Relief Act, 1889 (U.K.), s. 3 of which enacts that if a person who is committed for trial at quarter sessions, is not tried at the next quarter sessions, the next court of assize may on his application, unless there are any special reasons to the contrary, as specified in the Act, either try him or discharge him. In other words, the Act ensures that an accused must be tried or discharged within a reasonable time. Guyana has no such Act. However, but happily, there is now an entrenched provision in our constitution for securing what is tantamount to the same object, viz., a fair trial within a reasonable time after committal.

When regard is paid to the fact that there have been close on twelve statutory Assize sessions since the date of committal in March 1965, and no explanation whatever has been forthcoming from the prosecution as to whether this is the next practicable sitting thereafter, on which it has been convenient for them to have the accused brought to trial, I can find no evidence before me on which I can say that the case has been proceeded with, fairly, within a reasonable time after committal. The *onus* will be on the prosecution to establish this matter of constitutional importance whenever it is challenged by the accused.

Now that Guyana has a written constitution, all other legislation must be read and interpreted in accordance with its express provisions, and if inconsistent therewith, void to the extent of such inconsistency. I interpret the phrase “next practicable sitting” in s. 71 of Cap. 11 (above) to mean any subsequent sitting on which the Crown can conveniently arraign an accused, though not necessarily the *very next sitting* after committal to the High Court of the county in which he is committed for trial. However, I must interpret it conjointly with art. 10, which says that the hearing must be within a reasonable time.

What is a reasonable time will, of course, always be a question for each court to decide in the exercise of its discretion, after listening to any explanation offered by the prosecution for the delay in the hearing, and the greater the lapse of time between committal and trial, it seems to me, the stronger must be the excuse. However, none has been offered in this case, only an insistence on the part of the prosecution that *I must*, without any exercise of discretion, permit the three depositions to be read; but I am un-

able to agree, since that view would exclude altogether the power of the judge to do justice in the particular case. I think the decision of the Court of Criminal Appeal in the case of *R. v. Collins* (1938) 26 Cr. App. R. 177, confirms my view beyond peradventure. In that case, Collins had intimated his intention at the preliminary inquiry, of pleading guilty at Assizes. The witnesses were, therefore, conditionally bound over; but at his trial he pleaded not guilty. The prosecution were placed in a dilemma since no witness was present to testify. The Deputy Chairman, on the application of the prosecution, allowed all the depositions to be read under s. 13(3) of the Criminal Justice Act 1925, and the jury convicted without the benefit of having seen any of the witnesses in the box. HUMPHREYS, J., in delivering the judgment of the Court of Criminal Appeal, held that though the course adopted was within the express words of the sub-section, they were not within the spirit of it, for it "was not intended by the statute and could never have been contemplated by Parliament" which "was passed simply with the object of saving time and expense in cases where no possible injustice could be done to anybody, that it should be used to abolish in such a case as this the ordinary method of trial by jury"; and in words which unequivocally put it beyond doubt that a trial judge does have a discretion to admit or to reject the depositions, the learned judge continued at p. 183:

"In this case it would have been far better if the Deputy Chairman had exercised in favour of the appellant what is no doubt a discretion and had granted an adjournment of the case. Notice could then have been given at least to those witnesses for the prosecution who could not be described as formal witnesses, and, on the trial, the prosecution could have proved the facts of the case".

Art. 10 is entrenched in our Constitution for the protection of a fundamental right, designed to secure the protection of law to the individual; it involves the liberty of the subject and must always be observed by the prosecution. Admittedly, the accused may have been on bail throughout the period of waiting, but for one to have a prosecution hanging over one's head for three long years like "the sword of Damocles", seems to strike at the roots of the judicial process, and speaking for myself, I believe it is high time for the judges of the land to take as firm a stand as possible in a matter of this sort, where the principle involved is of infinitely more importance than the case.

The objections to the proving of the deposition are therefore sustained.

Objection sustained.

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[Court of Appeal (Stoby, C., G. L. B. Persaud and P. A. Cummings, JJ. A.)
March 28, May 6, 1968.]

Evidence — vicarious liability — Father bought motor car for business and household use — Had no objection to son driving motor car at anytime — Son regularly drove car in connection with father's business — Motor car driven by son at time of accident — Whether sufficient evidence that son was at material time servant or agent of father.

On the 14th November 1965, the appellant's motor car was badly damaged as a result of the negligent driving by the respondent's son of his motor car along the East Bank Demerara public road. The appellant's vehicle was a total wreck. He brought an action against the respondent claiming damages for the negligence of the driver. The respondent, who was a non-driver, had bought his motor car for the purposes of his business and the use of his household, of whom the son who was driving at the time of the accident was a member. He had no objection to his sons, of whom there were three, driving the motor car at any time.

At the time of the accident he was at his farm, having left the car at his home. He had no knowledge of the accident until some time later,

HELD: (Cummings, J.A. dissenting) having regard to the user to which the respondent said the car was put and his admissions at the trial, there is sufficient evidence on which the trial judge should have found in favour of the appellant.

Appeal allowed.

Judgment for the appellant.

[Editorial Note: On a further appeal to the Judicial Committee the majority judgment was reversed and the decision of the trial judge restored.]

PERSAUD, J. A.: On the 14th November, 1965, the appellant was driving his Vauxhall Victor motor-car No. PN 904 along the East Bank public road in a northerly direction from Atkinson Field. In the vicinity of Coverden which is some distance south of Atkinson Field, he passed the respondent's Rambler motor-car No. PL 799 parked on the western side of the road. The appellant continued his journey for about 2 miles when he felt an impact from behind. The impact was caused by PL 799 ramming his car and pushing him forward for a distance of about 80 feet. PL 799 then overtook the appellant's car, travelled some 200 feet on the western parapet, struck down two small trees and stopped against another tree. Eventually, car PL 799 continued on its way without the appellant being able to ascertain the identity of the driver.

The appellant's car was severely damaged; in fact the trial judge found that it was damaged beyond repair, and assessed the appellant's loss on the car at \$3,000:

The appellant then brought an action against the respondent claiming damages for the loss of his car as a result of the negligence of the driver of the respondent's car. That action was dismissed, the judge being of the view that there was insufficient evidence from which he could have come to the conclusion that the driver of the respondent's car was at the material time acting as the latter's agent or servant. This appeal stems from that dismissal.

During the course of the trial, the respondent admitted that he had permitted and authorised the driver to drive motor-car PL 799 at the time of the accident. He further admitted that his son Leslie had admitted to him having been the driver at the material time. He also testified that he was a non-driver, that he had bought the car to be used for the business of a chicken farm which he operated on the East Bank of Demerara, and for the benefit of his household, of whom Leslie was one; that he had no objection to his sons using the car at any time; and that his sons drove the car regularly, and in connection with his business.

The learned judge found that the damage to the appellant's car was due wholly to the negligence of the driver of the respondent's car.

The question to be determined is whether from the evidence, it could be said that the respondent's son was acting as the father's agent at the time of the accident.

The respondent contends that at that time, as indeed on all journeys made by the car, the three sons were bailees of the car as was the case in *Chowdhary v. Gillot* (1947) 2 All E.R. 541. In that case, the plaintiff took his car to the manufacturers for repair, and upon handing it over to the receptionist, requested a 'lift' to the nearest railway station. One G. a regular employee of the manufacturers was deputed to drive the plaintiff and his wife. On the way to the station there was an accident caused by G.'s negligence, as a result of which, the plaintiff and his wife were injured. It was held that having received the car for repairs, the manufacturers were at the time of the accident, bailees of the car, and, so long as the bailment continued, the plaintiff had no right of control over the bailee's servants for whose negligence the bailee was liable.

I do not agree that the facts in the *Chowdhary's case* can be equated to the facts in the instant case, and accordingly hold that that case does not apply.

I will examine three English cases often quoted in matters such as this with a view to extracting the legal principles applicable to cases of this nature, and then make reference to a local case, and a more recent case decided in the English Court of Appeal.

I will commence with *Barnard v. Sully* 47 T.L.R. 557, where it was held that where a plaintiff in an action for negligence proves that damage has been caused by the defendant's motor-car, the fact of ownership of the motor-car is *prima facie* evidence that the motor-car, at the material time,

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was being driven by the owner, or by his servant or agent. In giving the judgment, SCRUTTON, L.J. said:—

“. . . it was admitted that the motor-car was owned by the defendant, but the defendant denied liability. At the trial it was proved that a motor-car, admittedly owned by the defendant, ran into the plaintiff's van and damaged the van and injured the plaintiff. The county court judge withdrew the case from the jury on the ground that there was no evidence that the motor-car was being driven by the defendant or his servant or agent. The question was whether the learned judge was right. No doubt, sometimes motor-cars were being driven by persons who were not the owners, nor the servants or agents of the owners. As illustrations of that there were the numerous prosecutions for joyriding, and there were also the cases where chauffeurs drove their employers' motor-cars for their own private folly. But, apart from authority, the more usual fact was that a motor-car was driven by the owner or the servant or agent of the owner, and therefore the fact of ownership was some evidence fit to go to the jury that at the material time the motor-car was being driven by the owner of it or by his servant or agent. But it was evidence which was liable to be rebutted by proof of the actual facts.”

In *Hewitt v. Bonvin* 161 L.T. 360, a son after being prohibited by his father from using the latter's car, obtained his mother's permission to do so, she being authorised by the father to give such permission, and went on a journey for his own purposes when an accident occurred. It was held that the father would only be liable if it were established (1) that the son was employed to drive the car as his father's servant, and (2) that he was, when the accident happened, driving the car for his father, and not merely for his own benefit.

In the course of his judgment, DU PARCQ, L.J. said (at p. 362) —

“It is plain that the appellant's ownership of the car cannot of itself impose any liability on him. It has long been settled law that, where the owner of a carriage or other chattel confides it to another person who is not his servant or agent, he is not responsible merely by reason of his ownership for any damage which it may do in that other's hands.

It is true that if a plaintiff proves that a vehicle was negligently driven and that the defendant was its owner, and the court is left without further information, it is legitimate to draw the inference that the negligent driver was either the owner himself or some servant or agent of his.”

And again:

“It must be added that, in the present case, agency is not negatived merely by the fact that the appellant had parted with the possession of the car to his son. It is, I think, plain, both on principle and on author-

ity, that the owner, or other person having the control of the vehicle, may be responsible for the acts of the person driving it on the ground of agency even though he was not present in or near the vehicle so as to be able to exercise control over the driver.”

In *Ormrod & Anor. v. Crosville Motor Services Ltd.* [1953] 2 All E.R. 753 – another case in which this question arose – DENNING, L.J. said—

“It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner’s consent, driving the car on the owner’s business or, for the owner’s purposes.”

And later –

“The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, or his friend or anyone else.”

It seems to me that the principles have been well settled, and do not now admit of dispute, that is to say, that the owner of a vehicle, when not himself the driver at the time of the accident where another’s vehicle is damaged by the negligence of the former, is only liable where it is shown that the driver was at the material time his servant or agent, and that ownership of a vehicle in these circumstances raises a *prima facie* case that at the material time the driver was so acting.

It is also apparent that in the cases hitherto referred to, there was evidence before the court of trial by the owner of the negligent vehicle as regards the journey during which the vehicle concerned was used when the accident occurred. Even a casual observer would regard this as necessary in order that the court may arrive at a conclusion on this very important issue. The point I am seeking to make is, that with the possible exception of *Barnard v. Sully* (where the case was withdrawn from the jury), in the cases hitherto referred to, and in the recent case of *Carberry v. Davies & Anor.* all the evidence was before the court. I am not persuaded that that is the position in the instant case.

In *Natram v. Bovell* (unreported) I came to the conclusion, after examining the evidence, that the plaintiff had not proved that the second defendant (the son and driver of the vehicle) was either the servant or agent of the first defendant (the father and owner of the vehicle) and I said: –

“I am not unmindful of the fact that such facts as would lend support to a plaintiff’s case in this regard are usually within the knowledge of the defence only, and it is the easiest thing in the world for an owner to say that the driver was not his agent or servant. This, however, does not absolve the plaintiff from the burden of proof.”

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But it must be borne in mind that in that case, the evidence was that the son had borrowed his father's car with the latter's permission to go on an errand of his own, namely, to take a lady friend to the cinema. If the law is that the fact of ownership of a motor-car is *prima facie* evidence that the car at the material time was being driven by the owner, or by his servant or agent, then where that fact has been established, the onus is shifted to the owner of the vehicle to lead evidence relating to the particular journey as was said by SCRUTTON, L.J. in *Barnard v. Sully* (supra), "But it was evidence which was liable to be rebutted by proof of the actual facts." If the owner refrains from adducing evidence of the actual facts, then the onus has not been discharged, and the *prima facie* case remains unanswered, in which event he would be entitled to succeed.

"*Prima facie* evidence is that, which, not being consistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour, that it must prevail if believed by the jury unless rebutted or the contrary proved."

(*Jowitt's Dictionary of English Law*).

The law has recently been restated by HARMAN, L.J. in *Carberry v. Davies & Anor.* (Times of April 10, 1968) to be that the owner of a car is liable for the negligence of the driver, even though the driver was not the owner's servant, if the driver had the owner's authority, express or implied to drive the car on the owner's behalf. In that case the facts were as follows: D. was a coal merchant who had three lorries, one of which was driven by H. who was married to the former's niece. D. also owned a Ford Zodiac motorcar, the use of which he wished all the family to have. But he would let nobody except H. drive the car. When D.'s 16-year-old son wished to go out in the evenings he was allowed by his father to have the use of the car, provided H. drove it. On such an occasion, when the son was on a social jaunt, an accident occurred as a result of H.'s negligence, and the plaintiff was injured. It was held that D. was vicariously liable for H.'s negligence on the ground that H. was his agent at the time of the accident, acting as his unpaid chauffeur.

In *Hopkinson v. Lall* (1959) L.R.B.G. 175 – a matter which engaged the attention of the Federal Supreme Court – the respondent lent his car to one R. to be used by the latter for his own business or pleasure. As a result of R.'s negligence, the appellant was injured in an accident while R. was returning with the appellant in the car from a drive. It was held that R. was not on the respondent's business at the time, and therefore the respondent was not liable to the appellant. No doubt, *Barnard v. Sully* was pressed upon the court, for LEWIS, J. said (at p. 178) —

"In my view, *Barnard's* case only applies where the court finds that a vehicle was negligently driven and that the defendant was its owner, and is left without further information."

In the case before us, however, the court is left without further information in the sense that the respondent has not, as I have already indicated, given any evidence as to the journey which was being made at the time of the accident, although from his own lips, he must have had that evidence available. It is clear from the evidence which the judge accepted, that on the day of the accident, the respondent was on his farm having left the car at his home – two different places – some time previous, and that he had no knowledge of the accident until some time later. He was not a licensed driver; he did not employ a regularly paid chauffeur, except in the event of any of his sons not being available when he would pay someone to drive him for a particular occasion only. He went on to say —

“Usually my sons drive the car. They drive it regularly. I had no objection to my sons using the car at any time. The car was for the use of my family. I have a wife and eleven children.”

First of all, I agree with the trial Judge’s inference from the evidence that the defendant had not given any express instructions to anyone to use the motor-car on his business whether personal or otherwise, referring to the occasion when the accident occurred. But it seems to me to be wrong to extract the sentence. “I had no objection to my sons using the car at any time” out of the context of the rest of the evidence, and to attach any meaning to it other than the car was for the use of his family. The evidence can be regarded thus. Whenever the vehicle was used in connection with the respondent’s business and in his interest (whether he himself was in the car or not, and except when he employed a chauffeur for a particular trip), one of his sons would drive the car. On the day in question one of his sons was driving the car with his permission, and when it is borne in mind that there is the ever-existing implied authority, it is difficult to escape the conclusion that a strong *prima facie* case has been established which the defendant does not answer. In my view, having regard to the uses to which the respondent said the car was put, and his admission at the trial (already alluded to), the appellant was in a much stronger position than merely establishing a *prima facie* case and ought to have been awarded judgment in these circumstances, as it can be said from the state of the evidence - as was held in *Carberry v. Davies & Anor.* (ubi supra) – that the respondent’s son Leslie was at the time of the accident acting as his unpaid chauffeur.

If the judge were to award damages, he would have awarded the appellant the sum of \$3,026.80. I would make the same award. Accordingly, I would allow this appeal by reversing the judgment of the court below, and awarding to the appellant the sum of \$3,026.80. The appellant is also entitled to his costs of appeal and in the court below.

STOBY, C. I have read the judgment of Persaud, J.A. and agree with it, but desire to make a few observations.

The question in this case is whether the defendant’s car was being driven by his servant or agent at the time of the accident.

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The law is, that the owner of a vehicle is liable for the negligence of the driver if the driver is his servant or, even though the driver was not the owner's servant, if the driver had the owner's authority, express or implied, to drive the car on the owner's behalf. An owner escapes liability if the driver is not his servant or agent at the time of the accident. The chauffeur who is employed to drive a car on the owner's business and is involved in an accident when on a frolic of his own, is not authorised to drive at the time of the accident, and, therefore, although the owner's servant, was acting outside the scope of his authority. The owner who lends his car to a friend is not liable for the friend's negligence because the friend is not his agent.

In determining whether the driver of a car is a servant or agent, the creation of the particular relationship is important. In *Hill v. Beckett* (1915) 1 K.B. 578, AVERY, J. said:

"There is no better working rule for the purpose of determining the relationship of master and servant than whether the alleged servant is under orders of and bound to obey the alleged master; if he is, then the relationship of master and servant exists."

Proof of this, of course, is always a matter of fact.

Agency can be created in many ways, but the type of agency being here dealt with is normally created by express authority or by inference from proved facts. If the defendant's son, Leslie, was driving the car as a result of a general authority given by the defendant whereby Leslie could drive at any time on behalf of the defendant, then the defendant is liable. If it was Leslie who asked his father for the loan of the car for his own use or took the car without his father's consent, express or implied, then the defendant is not liable.

The plaintiff proved that the defendant's car was negligently driven. He was unable to establish whether it was being driven by the defendant or his servant or agent.

Reliance was placed on *Barnard v. Sully* 47 T.L.R.557 where it was held that ownership of the car was *prima facie* evidence that it was being driven by the defendant, his servant or agent. This *prima facie* evidence can be rebutted by proof of the actual facts.

The defendant sought to rebut the *prima facie* evidence by saying that his children can use the car at any time. He also said he could not drive and did not employ a regularly paid chauffeur; if his sons were not available to drive he might pay someone to drive for an occasion but usually his sons drove the car. He had no objection to his sons using the car at any time as the car was for the use of the family. On the day of the accident he did not know the car was being used.

At the commencement of the case, the plaintiff's counsel said: "The defendant admits that the driver of motor-car PL 799 was permitted and authorised by the defendant to drive the car at the time of the accident." Counsel for the defendant confirmed that statement.

The pleadings are revealing. In answer to the allegation in the statement of claim that "the car was being driven by the defendant, his servant or agent," the defendant pleaded a bare denial and proceeded to plead that the statement of claim disclosed no cause of action.

I assume counsel for the plaintiff sought clarification of the defence. having regard to O.17 r. 15, which is:

"The defendant must raise by his pleading all matters which show the action not to be maintainable."

The defence did not plead any matter which showed the action not to be maintainable.

Counsel must have found himself inhibited by the nature of the defence. Since the true facts were not pleaded, the defendant was forced to give equivocal evidence. He had not pleaded that his son was a bailee of the car, so he did not give this evidence. He was content to confuse the issue by explaining that three of his sons not only had authority to use the car but they also drove him on business and could also use the car for the family. But to rebut the *prima facie* evidence the defendant who alone knows the facts must give evidence of the true facts. In these days of crowded vehicular traffic, the owner of a motor-car is in possession of a lethal weapon. Where his car is involved in an accident the court expects to be assisted by a disclosure of the true facts. In this case the defendant's evidence did not rebut the *prima facie* case of agency.

I agree with the order proposed by Persaud, J.A., including the amount of damages.

CUMMINGS, J.A. This is an appeal from a judgment of George, J. in the High Court in an action for negligence resulting from a collision of the appellant's (plaintiffs) and respondent's (defendant's) motor-cars Nos. PN 904 and PL 799 respectively on the 14th November, 1965, at Coverden, East Bank Demerara. The learned trial judge found that the driver of car PL 799 was negligent but that the plaintiff had not established that he was the servant or agent of the defendant and accordingly dismissed the plaintiff's claim with costs.

Counsel for the appellant repeated in this court his submission before the learned trial judge that where ownership is found there is a rebuttable presumption that the driver is either the owner or his servant or agent. He relies on the well-known case of *Barnard v. Sully* (1931)47 T.L.R. 557 in which SCRUTTON, L.J., (SLESSER & GREER, LLJ. concurring) said:

"But, apart from authority the more usual fact was that the motorcar was driven by the owner, and therefore the fact of ownership was some evidence fit to go to the jury that at the material time the motorcar was being driven by the owner of it or by his servant or agent. But it was evidence which was liable to be rebutted by proof of the actual facts."

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In the course of his judgment the learned trial judge said: “I accept and believe the evidence led by the plaintiff as well as that led by the defendant.” On the issue now subject to review the defendant said:

“I am the defendant. I live at 24 Meadow Bank, East Bank Demerara. I own PL 799. I am not a driver. My children use the car. They can use it at any time. On the 14/11/65 I was at my farm at Soesdyke. I spent about three weeks at my farm from about the 1st to 21st November, 1965. I left my car at home. I did not use it on the 14/11/65. I did not know where it was on that day. I heard about the accident in which the car was involved afterwards.”

And under cross-examination:—

“I have never had a licence to drive. PL 799 is the first car which I have owned. I bought it in 1961. It was a new car. I did not employ a regularly paid chauffeur. If my sons were not available to drive I may pay someone to drive for an occasion, i.e., if I want to come down to Georgetown. Usually my sons drive the car. They drive it regularly. I had no objection to my sons using the car at any time. The car was for the use of my family. I have a wife and twelve children. Three of my children were licensed drivers in 1965. They are Dennis aged 24, Leslie aged 22, Winston aged 20 years. In November, 1965 all the children lived in my home at Meadow Bank.

I do not know what happened on the 14th November. I first knew that the car was involved in an accident when I first went back to Meadow Bank on the 21st November, 1965. My wife told me. I was told on the 14/11/65. My wife told me Leslie was driving. I did enquire from Leslie who admitted that he was driving the car on the 14/11/65.

My main household was, at Meadow Bank. My car PL 799 was bought for the benefit of the household. It was also used in the course of my business i.e. if I had to come to Georgetown to transact any business. The car has brought me from the chicken farm sometimes. Besides the chicken farm and my sloop I had no other business activities.”

Commenting on this evidence the learned trial judge said:

“However, one must examine the defendant’s evidence in order to see whether he has given sufficient information of user at the material time. He has given instances when he uses the car. These are to convey him from his farm to his home or to Georgetown in order to transact business and, I daresay, although no evidence has been led in this regard, whenever he desires to use it on some personal mission. The fact that he did not know where the car was or who was using it that Sunday is in my opinion sufficient evidence from which the inference can be drawn that he had not given any express instructions to anyone to use the motor-car on his business, whether personal or otherwise.

There is no evidence that his sons or anyone else had any implied authority to do or transact any business or use the car on his behalf, he having given the instances when it is so used. It was suggested that perhaps his son, Winston, the manager of the sloop, was on that day using the car to visit the defendant in order to discuss matters relating to the sloop. However, the defendant has said that none of his sons came to visit him on the 14th November. It, therefore, follows that although the car was proceeding away from Soesdyke and on the road in the direction of his home no one went to him at the farm with the car. And, although too much emphasis must not be placed on this fact, it must not be forgotten that day was a Sunday.

In addition to these facts the defendant's reason for purchasing the car mainly for the use of his family must not be overlooked. Indeed his sons appear to have *carte blanche* permission to use it.

I accordingly do not feel that there is any evidence on the whole of the case from which I can properly say that the driver of the motor-car was at the material time acting as the defendant's agent, that is, driving under the express or implied authority to drive on his behalf. (See *Hewitt v. Bonvin* [1940] 1 K.B. 188.) Nor do I feel that I can come to the conclusion that the driver was a servant whether *ad hoc* or otherwise, of the defendant i.e. that he was at the time of the accident acting under his order and consort in driving the vehicle."

I accordingly dismissed the action and awarded costs to the defendant."

In *Hewitt v. Bonvin* 161 L.T. p. 361 the Court of Appeal, reversing the judgment in the plaintiff's favour in the court below, said, per MAC KINNON, L.J. at p.361:

"As I see it, the plaintiff to make the father Bonvin liable, must establish –

- (1) that the son was employed to drive the car as his father's servant; and
- (2) that he was, when the accident happened driving the car for the father, and not merely for his own benefit and for his own concerns.

In my opinion the plaintiff did not establish either of these propositions. . ."

And per DU PARCQ, L.J. at p. 362:

"It is plain that the appellant's ownership of the car cannot of itself impose any liability on him. It has long been settled law that, where the owner of a carriage or other chattel confides it to another person who is not his servant or agent, he is not responsible merely by reason of his ownership for any damage which it may do in that other's hands: See

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the judgment of Littledale, J. in *Laugher v. Pointer* (5B. and C. 547 at pp. 561 to 563), where the distinction is drawn between the responsibility of the owner of movable property and that of the occupier of a house or land. This part of the judgment of Littledale, J. was expressly approved by the Court of Exchequer in *Quarman v. Burnett* 6M. and W. 499, per Parke, B. at 509, and see especially at pp. 510, 511). It is true that if a plaintiff proves that a vehicle was negligently driven and that the defendant was its owner, and the court is left without further information, it is legitimate to draw the inference that the negligent driver was either the owner himself or some servant or agent of his. *Barnard v. Sully* 47 Times L. Rep. 557. But in the present case all the facts were ascertained and the judge was not left to draw an inference from incomplete data.

If I am right as to the law, it follows that the learned judge's decision can be supported if, and only if, the evidence proved that the appellant's son was acting for and on behalf of the appellant. Unfortunately it is not clear that the learned judge applied his mind to this precise question. The judge has found that the son had permission to drive the car, or at least that his mother, who had authority to represent the appellant, knew that he was taking the car, and knew the purpose for which he was taking it. This finding is consistent with a mere loan or bailment of the car. If, however, this court had thought that on a fair view of the evidence agency was established, it would clearly have been right to dismiss the appeal. In my opinion agency was not proved."

In the instant case as in *Hewitt v. Bonvin* (supra), the court was not as in *Barnard v. Sully* without further information. There was ample information to justify the inferences drawn by the learned trial judge and his conclusion that the plaintiff had failed to establish the requirements as laid down in *Hewitt v. Bonvin*. Indeed, I am myself unable to draw any different inferences or arrive at any other conclusion. I am unaware of any rule of law which in circumstances such as those found, as matters of fact in this case, shifts the onus on to the defendant to say in the witness-box that his son was not at the material time his servant or agent. Moreover, it was open to the plaintiff to cross-examine the defendant on this issue and also to join the son, Leslie, whom the father said admitted that he was driving the car when it was involved in the accident.

In *Natram v. Bovell and Bovell*, PERSAUD, J. as he then was, said: "The view I hold in the instant case is that the plaintiff has failed to prove that the second defendant fell in either category. I am not unmindful of the fact that normally such facts as will lend support to a plaintiff's case in this regard, are usually within the knowledge of the defence only, and it is the easiest thing in the world for an owner to say that the driver was not his servant or agent. This, however does not absolve the plaintiff from the burden of proof."

The only differing circumstance in this case was that the owner had given permission for the specific journey, whereas here he had given a general permission to his son's to use the car whenever they wanted to do so. In my view that does not support the application of any different principle. See also *Hopkinson v. Lall* (1959) B.G.L.R. p. 175.

No new principle was decided in *Carberry v. Davies & Anor.*

I adopt with humility and respect, and apply as expressly in point, the remarks of DU PARCQ, L.J., in *Hewitt v. Bonvin* (supra):

“Ultimately the question is one of fact. The plaintiff has failed to show more than a bailment of the car by the appellant to the person responsible for driving it negligently. This is not enough to make the appellant liable.”

As I can see no reason whatever for disturbing the learned trial judge's perception and/or evaluation of the evidence, I would dismiss the appeal with costs.

Appeal allowed.

Solicitors:

Miss E. A. Luckhoo for the appellant.

J. A. Jorge for the respondent.

In the matter of DAVID ANDREW GRAHAM HUSBANDS, an infant.

[High Court — in Chambers (Crane, J.) January, 3, 5, 8, 12, May 11, 1968.]

Custody — Illegitimate child in custody and control of paternal grandmother — Application by mother for writ of habeas corpus ad subjiciendum — Factors to be considered — Infancy Ordinance, Cap. 39, secs. 14 & 16.

D.H. is an infant child, who is illegitimate. He was born in England. With the consent of his father and mother who were both undergoing courses of study there, custody was given to his paternal grandmother who it was known would be bringing him to Guyana. It had been expected that at the end of their studies the child's parents would marry, but this did not materialise. The mother eventually obtained a job in England as a typist, and in December, 1967 came to Guyana and tried to obtain custody of the child, whom she intended to take with her to England, from his grandmother. This failed, and she instituted the present proceedings.

HELD: (i) Under the Infancy Ordinance, Cap. 39, the mother of the infant is its guardian and entitled to custody;

In the matter of DAVID ANDREW GRAHAM HUSBANDS, an infant

(ii) in a case involving custody the principle must be borne that the welfare of the child is the first and paramount, though not the exclusive, consideration, and in considering the child's welfare, account must be taken of its moral, spiritual, social, educational, material and medical welfare

Application granted.

C. A. F. Hughes associated with *R. Fields* for the applicant.

J. C. Nurse for the respondent.

CRANE, J.: David Andrew Graham Husbands, was born of the body of the applicant Maureen Priscilla Husbands. The birth took place out of wedlock on the 26th March, 1963, at the Hackney Hospital in England.

This is an application by the mother for an order on the respondent, Mrs. Stella Gill (the paternal grandmother), of Lot 12 Costello House, La Penitence, East Bank Demerara, calling on her to show cause why a writ of *habeas corpus ad subjiciendum* should not go commanding the child's release, he now being in her possession in Guyana.

The facts and circumstances under which Mrs. Gill got possession of the child are revealed in both the affidavits in support of and the reply to the application and the *viva voce* evidence adduced. They arose in this way: Dennis Gill (the father) became attached to the applicant while they both resided in England pursuing courses of study there. So fond were they of each other that their attachment deepened into affection. This caused them to associate on the closest terms of intimacy and the result was the birth of David.

I think the evidence affords the fair conclusion that both father and mother expected to be married to each other when their studies were completed; they each worked to this end - the father at one of the Post Offices and the mother at Lyons & Co. in London. The child David was, however, in the way to the smooth accomplishment of their future plans; it was not convenient to keep him in England and this is where Mrs. Gill came into the picture. She too was in England in September 1964 and when requested readily agreed to take David to Guyana, it being more convenient for the mother that such a course should be taken until the mother required him back. Accordingly, with the consent of both son and prospective daughter-in-law, Mrs. Gill and David sailed for Guyana in the month of October, 1964.

The putative father, however, broke faith with the applicant; very shortly after the arrangement he failed to maintain correspondence with his mother or to make any enquiry about his child; he fell in love with another to whom he got married in 1966. The mother, on the other hand constantly wrote letters to Mrs. Gill all of which showed an anxious and sustained interest in David's welfare for she often sent such gifts and money as her slender means could afford.

Ever since David came to Guyana he has been continuously in the care of Mrs. Gill who administers to his every want. But trouble began with the arrival of the mother in Guyana on the 16th December, 1967.

Immediately upon her arrival, i.e., the very next day December 17, she went to Mrs. Gill's home to see David. She was well received. She and Mrs. Gill had lunch after which she tried to renew acquaintance with him as best she could. I say so, for David owing to the passage of time, as one may well expect, did not remember her; he did not take to her.

On December 26, she paid Mrs. Gill another visit but with the intention on this occasion of taking David away with her for all time. Fearing that Mrs. Gill would not be a willing party she did not consider it wise to reveal her intention because she had never before disclosed her plans to resume custody of David, although she had conceived them in England during 1967 when her domestic and financial situation there had improved. Now she had passed her exams; she was employed as a typist and in receipt of a higher salary and had moved into more suitable quarters. Here I think one might rightly conclude that she did not believe that Mrs. Gill would willingly part with David if she were told the truth, and that is why the applicant told a falsehood when she asked the grandmother to be allowed to take the child to see a relative. But Mrs. Gill became suspicious; she demanded to know what was behind it all, suggesting that she too should go along with David to the relative. Thus commenced a battle of wits between the two women neither of whom, it is apparent, was bent on trusting each other — the one to retain possession and the other to regain custody of the child on the 26th December. The mother said that when she attempted to take her child home, the grandmother locked him away in a room ordering her out of the house; on the other hand, when Mrs. Gill referred to this incident she said that the child was not willing to leave the house with its mother and therefore locked itself in the room refusing to come out; but I can hardly believe her that this was so.

These are the facts. What then is the legal approach to the matter? This is to be found in ss. 14, 16 and 21 of the Infancy Ordinance, cap. 39.

Ss. 14 and 16 read respectively as follows:

“The mother of an illegitimate infant shall be the guardian of that infant and shall be entitled to its custody but may be deprived by the Court of the guardianship or custody as in section 16 of this Ordinance provided.”

“The Court, on being satisfied that it is for the welfare of the infant, may remove from his office any testamentary guardian or any guardian appointed or acting by virtue of this Ordinance, and the Court, if it deems it to be for the welfare of the infant, may also appoint another guardian in place of the guardian so removed.”

Thus the law placing as it does guardianship of the infant and entitlement to its custody in its mother, I must approach this matter with the

In the matter of DAVID ANDREW GRAHAM HUSBANDS, an infant principle in mind that the welfare of the child David is my first and paramount, though not my exclusive consideration, and also those equitable principles which were explained by BOLLERS, J., (as he then was) in delivering the judgment of the Full Court in the case of *Halls v. Maltal* (1964) 6 W.I.R., 481 at p. 485., in which it is stated that:

“It follows therefore, that in respect of illegitimate children equity consulted the wishes of the relatives of the mother’s side in the same way as those in the putative father’s side were consulted, but in considering the welfare of the child which was of paramount consideration and which was the equitable rule to be applied, natural relationship was thus looked to with a view to the benefit of the child”.

In considering the child’s welfare therefore, I must do so on the widest possible basis. I must needs take into account a wide range of subjects, viz., its moral, spiritual, social, educational, material and medical welfare; but it will be useful to consider some of these together, and my approach to the matter will be to consider the respective merits of each party with regard to each of them and decide the contest on what I think is the best thing to do in the interests and in the welfare of the child.

I entertain no doubt at all that the grandmother is a thoroughly decent and respectable woman who has striven continuously to run the ideal Guyanese working class home in the working district of La Penitence on the East Bank, Demerara where she brings up her own two sons and two daughters all of whom have done remarkably well at school. Judging by the many letters in evidence which have passed between her and the mother, it is clear that Mrs. Gill is of strong religious persuasion which is certainly a commendable and admirable moral quality, but though by itself that can have no direct bearing on this matter, when taken together with her vocation as a kindergarten school teacher, I think she is amply qualified in respect of the first four criteria which I have mentioned above. I have no doubt too, that the grandmother and the child are sincerely attached and deeply fond of each other. What I have witnessed for myself in chambers attests to this fact.

On the material side too, the grandmother is well qualified; I would even say more qualified than the mother, though this is not the decisive test. She is apparently in a reasonably good financial position to take care of David, for in addition to an allowance of \$150 per month by her husband for domestic expenses she in her own right, is in receipt of an income of about \$100 per month from her kindergarten school and her hair-dressing business.

The applicant on the other hand is a typist employed at Messrs. Caprice Ltd., 3 New Burlington St., London, England where she earns a weekly salary of £14. She lives in a bed-sitting room by herself in London, while her parents live in the vicinity about two blocks away from her. If I were to permit her to take David back to England, it is her intention to let him live for the time being with her parents until such time as her father who is negotiating the purchase of a house succeeds in so doing, when she will go to live with

them. Meanwhile, the existing accommodation occupied by her parents consists of two rooms – a sitting-room and bedroom in a flat. Unfortunately, there is no evidence as to the size of the grandmother's accommodation to afford a basis for comparison on this aspect of the matter, just as there is no available evidence on the mother's side of her moral behaviour or religious upbringing to enable me to say what is better for David in those respects.

But it is alleged that the applicant's mother and father with whom she intends to leave the child *pro tern*, are separated and do not speak to each other, and that when Mrs. Gill had at one time paid them a visit she observed that Mr. Husbands ignored Mrs. Husbands' presence in their house. I must say however, there is no independent nor reliable evidence in this respect and I must ignore it, particularly as the applicant's witness, Winston Batson, who lives at 151 Woolstone Rd., Forrest Hill, S.E. 25, London, spoke about Mr. and Mrs. Husbands to whose home he is a frequent visitor. Mr. Batson's evidence went unchallenged when he described the accommodation in which they live and it is important that I should comment on the omission to cross-examine him on this very vital point of their domestic harmony since the mother's intention is to leave David with them for the time being. Cross-examination directed on the point would have been of considerable assistance to the court in enabling it to obtain a positive view of the moral character of the mother's parents rather than leaving it with only the vague suggestion of their unsuitability to assume care and control of the child. One must admit that if there were indeed any truth in the suggestion such a situation would necessarily have a profoundly adverse influence on a growing child. It is certainly a factor which, had it been established, would have weighed greatly in favour of the respondent's desire to retain possession of David.

On the point of educational and social welfare, the applicant has testified that free primary and secondary education is offered in England. I think no one can deny this very notorious fact that has conduced so greatly to the welfare state as exists in that country and I should think that David can be confidently assured of no more inferior facilities there in this respect than he afforded in his grandmother's kindergarten school.

It is said that the district of Hackney in England is unsuitable as being of inferior status to the La Penitence district; though I believe no useful purpose would be served by any such comparison for both are working class districts. There is no question of exchanging a Roland for an Oliver anyway.

There however remains for consideration the question of the medical welfare of David, a matter, I am forced to admit, which has caused me very anxious consideration. I have been assisted in this respect by the evidence of two eminent medical men. Dr. Ferdinand Sheo Sankar for the respondent, appeared quite conversant with the case history of the child who was continuously a patient of his from November 1964 to December 1967. Dr. Sankar told of David's suffering from bronchial asthma from the time he first saw him and opined that in David's case he would not advise a change from a warm to a cold climate. This advice has caused me to think a great deal

In the matter of DAVID ANDREW GRAHAM HUSBANDS, an infant especially as it is the consensus of medical opinion that environmental conditions conduce to this ailment and that a dusty, humid and grimy atmosphere would aggravate an asthmatic condition, such as conditions prevalent in England.

Dr. Frank Williams, an experienced pediatrician, gave evidence for the applicant. He is of the view that there is no confirmed medical opinion that climatic conditions play any decisive part in the causation or aggravation of the ailment and is positive that there is no advantage to be gained from the choice of living in a cold or hot climate, though he would admit that a grimy atmosphere would aggravate an asthmatic child's condition; he is however in agreement with Dr. Sankar that there are three factors which taken either singly or conjointly conduce to the malady viz., infection, allergy or emotional stress. Typical of the latter in the case of the child whose asthmatic condition only comes on before examinations. An allergic condition can be treated by drugs if the allergen is identified; so can the emotional cases; but he personally knows of no case where sufferers leave cold for warm climates; he has not even read of such a case, though he believes there was such a view prevalent some 50 years ago. It is to be noted that Dr. Williams's evidence is in direct contradiction to Dr. Sankar's in this respect, the latter's view being that persons who have asthma are always advised to seek warmer climate.

There can be no doubt that the mother knew that David was a sufferer from bronchitis for she admitted this fact in one of her earlier letters to the grandmother in which she confessed she had never sufficient time to see that he got his codliver oil regularly. But the crucial point is whether, after all which has been revealed about the history of the case, I should consider it to be in his best interest to remove him from Mrs. Gill's possession and return him to his mother's custody in England.

I have had the advantage of seeing David in court, of speaking to him and must say that he appeared to me a normal healthy and happy child in the pink of condition who can be expected to live anywhere in the world; although I admit the irrelevance of my opinion which is inexpert and formed only from the most superficial examination and could by no means be expected to supercede that given by an expert in whose medical care and treatment David has been entrusted for the past three and a half years. I observe, however, that Dr. Sankar has kept no record of the number of times he has seen and treated his patient; he does not say precisely what David's condition is at the present time, nor does he relate the child's present state of health to the time when he first examined him; he would however insist it would not be advisable in David's case to remove him from a warm to a cold climate because attacks of asthma would be more frequent there than locally.

I believe, however, that the proper approach to the question in the light of the difference of medical opinion on this point, is for me to determine, having accepted that David is indeed an asthmatic subject, and that asthma exists both in England and Guyana, whether his condition would be any the worse were I to agree that he should rejoin his mother in England. Dr. Sankar

has conceded that the treatment of asthma is more advanced in Britain than it is locally; he has admitted both the allergic and emotional cases can be prevented if the cause which occasioned the suffering is removed and, in the case of infection, if the appropriate drug is used. David's case, he also admitted, for aught that is known of it, may be any one of the three types of asthma mentioned; but it is unknown since there have been no laboratory tests conducted with a view to its ascertainment. In other words, what Dr. Sankar is admitting is that if there were a proper diagnosis in David's case, the particular type of asthma could well be detected and if either allergic or emotional could be prevented altogether.

Having considered then the conflict of medical testimony on the point of whether it is more conducive from a health standpoint to live with asthma in a cold or hot climate along with the admissions of Dr. Sankar, I have come to the conclusion there is no health risk involved were I to send him to join his mother in England. Moreover, Dr. Williams, thinks that children tend to out-grow the malady.

I have considered David's welfare from a wide variety of standpoints, and will observe that though it is the first and paramount consideration, it is not the only consideration. The word "paramount" does not mean "exclusive". The wishes of a mother against whose character nothing is known are always to be regarded, and though there is no lack of care and attention bestowed on David by his grandmother, nothing can replace those genuine feelings of a mother's love and affection for her own kit and kin. In this connection I would quote the oft-cited passage of WARRINGTON, L.J., just as PLOWMAN, J., cited it with approval, in *re. R (M) (an infant)* [1966] 3 All E.R., 58 at p. 64:

"The welfare of the child is no doubt the first and paramount consideration, but it is only one amongst several other considerations, the most important of which, it seems to me, is that the child should have an opportunity of winning the affection of its parent, and be brought for that purpose into intimate relation with the parent. The judge bore these matters in mind, and was therefore right in coming to the conclusion that the father was entitled to, and that it was for the welfare of the child that he should take over the duties and enjoy the actual privileges of a father".

If I may recapitulate for a moment: the original bargain between the mother and grandmother was that the child should be brought to Guyana and kept by the grandmother until the mother's situation changed when it would be handed back to her. Throughout its three years in Guyana there was continuous correspondence between mother and grandmother about the interests and welfare of the child. The mother sometimes sent gifts and money for its upkeep, while the father did not even care to enquire about it. In all correspondence, the grandmother acknowledged the mother's authority over her child knowing fully well she would have to give it up one day but has so fallen in love with it that she is not willing to face that inevitable day. Come what may, she would only be willing to give up David, she says, when he is old

In the matter of DAVID ANDREW GRAHAM HUSBANDS, an infant enough to exercise a discretion as to the person with whom he would like to stay, and would, if she is allowed to do so, be willing to adopt him as her own. David, of course, has not yet reached that age, and even when he does, I am sure he would opt for her rather than his mother whom he does not now know, nor from what I have seen in chambers wants to know. I find that the grandmother's claim that David should exercise the discretion she claims when he is of the age to do so is without legal or moral foundation; and I think it would be a fitting end to this judgment if I close with a quotation from a distinguished Irish Judge, FITZ GIBBON, L.J., in *Re. O'Hara* (1900) 2 I.R. 240, which has received the repeated approval of the English courts:

“Where a parent is of blameless life, and is able and willing to provide for the child's material and moral necessities . . . the court is, in my opinion, judicially bound to act on what is equally a law of nature and of society, and to hold (in the words of Lord ESHER in *R. v. Gyngall* (1893) 2 Q.B. 232 at p. 243), that ‘the best place for a child is with its parent.’” cited by EVE, J., in *re Thain, Thain v. Taylor* [1926] Ch. 676 at p. 682.

The grandmother is therefore ordered to give up possession of the child David to its mother forthwith.

I fix the costs of application to applicant \$200.00.

Application granted.

THE VILLAGE COUNCIL OF CRAIG VILLAGE DISTRICT
v.
THE LOCAL GOVERNMENT BOARD

[High Court (Fung-A-Fatt, J.) October 5, 1967, May 1968.]

Statutory Body — Local Government Board — Assuming responsibility for administration of a local authority — Whether such a decision is contrary to the intention and purpose of the statute — Whether the local authority should have been heard before the decision taken — Local Government Ord. Cap. 150, s. 19.

The defendants, the Local Government Board, purporting to act under s. 19 of the Local Government Ordinance, Cap. 150., took a decision to exercise and began exercising all the powers of the plaintiff local authority, within

the physical areas of their jurisdiction. There was no evidence of bad faith by the Board. The plaintiffs sought certain declarations, together with an injunction, which, in effect, challenged the legality of the Board's action.

HELD: (i) a decision by the Board to take over and exercise all the powers of a local authority would not create any such an absurdity as to warrant a court eschewing a construction which would lead to such a result;

(ii) the decision to be made by the Board under s. 19 of the Ordinance was purely administrative and it was unnecessary that the Board should have heard the Council before making it.

Action dismissed.

F. W. Ramsahoye for the plaintiffs.

M. Shahabuddeen, Solicitor General, for the defendants.

FUNG-A-FATT, J.: The plaintiffs claimed against the defendants the following:—

- (a) a declaration that the defendants' decision communicated to the chairman of the village council of the Craig Village District on the 6th April, 1967, to exercise all the powers of the Craig Village District in the purported exercise of powers granted by s. 19 of the Local Government Ordinance, Cap. 150, is unconstitutional illegal, void and of no effect;
- (b) a declaration that the defendants are not entitled to assume the government of the Craig Village District or the management of its financial and administrative business;
- (c) a declaration that the actual and continuing assumption of the administration of the affairs of the Craig Village District by the defendants acting by themselves or by delegates appointed by them is without lawful authority or excuse and is an abuse of the powers vested in the defendants by the Local Government Ordinance, Cap. 150;
- (d) an injunction restraining the defendants either by themselves and/or by their servants or agents or delegates from assuming or continuing the government and the management of the administrative and financial business of the said village district, from interfering with or obstructing the government and management of the administrative and financial business of the said village district by the plaintiffs and from interfering with or obstructing the performance of the duties of the village council of the said village district; and
- (e) such further or other relief as may be just.

The defendants in para. 8 of their statement of defence contended that the plaintiffs had no power in law to authorise the bringing of this action and para. 3 states:—

THE VILLAGE COUNCIL OF CRAIG VILLAGE DISTRICT

v.

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“that the defendants will contend that their decision to exercise all the powers of the plaintiffs with effect from the 6th April, 1967, was validly taken in pursuance of the provisions of s. 19 of the Local Government Ordinance, Cap. 150.”

The agreed facts of this case are as follows: –

The plaintiffs are a duly constituted local authority comprising a village council created in pursuance of the Local Government Ordinance, Cap. 150. The defendants are fully constituted under the provisions of the said Ordinance.

On the 6th day of April, 1967, purporting to act under powers conferred by s. 19 of the said Ordinance the defendants communicated to the plaintiffs their decision to exercise all the powers of the plaintiff local authority.

Since the date of the said communication and on the 7th April, 1967, the defendants have assumed the administration of the village to the exclusion of the plaintiff council who have not been permitted to take any part in the said administration or to exercise any power or perform any functions or duties. The plaintiffs are up to the present so excluded from the exercise of their powers and from carrying on any functions and duties under the Ordinance.

There was no inquiry of the defendants into the administration of the village by the plaintiffs before the decision above mentioned or at all and no charge in respect of their administration was made against them.

A meeting of some rate-payers of the village district was held on the 8th March, 1967 before the decision was taken and the Minister of Local Government attended but the members of the plaintiff council did not attend although they were aware that the Minister wished them to attend.

The defendants did not act upon their decision taken on the 17th March, 1967 that the Craig Village District should cease to be a village district and no order to that effect was made in pursuance of the provisions of s. 24 of the Ordinance, because, on the 31st March, 1967, the defendants decided not to implement that decision but instead to exercise all the powers of the plaintiffs under s. 19 of the Local Government Ordinance, Cap. 150.

No member of the plaintiffs' local authority has been removed from office and no disciplinary action has been taken against the local authority or any member or officer thereof in pursuance of the provisions of the Ord.

It was conceded by both counsel for the plaintiffs and the defendants that the main legal issue in this case was the interpretation and scope of s. 19 of the Ord., under which section the defendant Board assumed the administration of the village council.

S. 19 of Cap. 150 provides as follows:—

“The Board shall have and may exercise in any village or country district any or all the powers of a local authority whenever it appears to the Board expedient so to do, and may exercise any or all of those powers in any of those districts, whether there is or is not a local authority thereof.”

The marginal note to s. 19 reads as follows:—

“Power of the Board to act as local authority.”

S. 19 of Cap. 150 dates back as far as 1878 when it appeared as s. 22 of the Public Health Ordinance, No. 3 of 1878, which was an Ordinance to consolidate and amend the law relating to Public Health.

This Ordinance, No. 3 of 1878, was divided into several Parts, and Part III concerned local government administration. S. 22 of this Ordinance provides as follows:—

“The Central Board shall have and may exercise in any village or country district any or all of the powers of a local authority whenever it appears to the Central Board expedient to do so, and may exercise any or all of such powers in any such district and whether there is or is not a local authority of such district”.

On a careful examination of Ord. No. 3 of 1878, it will be seen that several sections of this Ordinance are now contained in the Local Government Ordinance, Cap. 150. Reference need only be made to ss. 141, 174, 208 and 212 of the 1878 Ord. which now appear as ss. 147, 111, 13(1) and 17 respectively of Cap. 150.

Counsel for the plaintiffs submitted that Ord. No. 3 of 1878 referred only to public health authorities and only enabled the Board to act in a matter of public health when the circumstances rendered it expedient for the Board so to do. Counsel referred to s. 4 of the 1878 Ord. which defined village district as a village sanitary district.

In 1907 the Local Government Ordinance, No. 13 of 1907, (Cap. 84 of the Laws of British Guiana (1930)) was passed “to consolidate and amend the law relating to Local Government and to Public Health and for other purposes connected therewith”. S. 345 of this Ord. expressly repealed the 1898 Ord. Although it contained more detailed provisions on consequential matters, the purpose and intent of Ord. 13 of 1907 remained the same as the 1878 Ord. It, however, described the central statutory body as the Local Government Board of British Guiana.

In 1934 the Public Health Ordinance, No. 15 of 1934, came into force and separated the “public health” section from the “local government” section, and introduced a new statutory body known as “The Central Board of Health”. Ord. No. 15 of 1934 now appears at Cap. 145 of the Laws of British Guiana (1953).

In 1945 the Local Government Ord., No. 14 of 1945, (Cap. 150 of the Laws of British Guiana, 1953), came into force as an Ordinance to consolidate

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and amend the enactments relating to Local Government. By s. 222(1) Cap. 84 of the Laws of British Guiana (1930) was repealed. This historical survey clearly shows that the defendant Board are the direct successors in office of “the Central Board of Health” created by Ordinance No. 3 of 1878, and that this Ordinance, No. 3 of 1878, referred not only to public health authorities but also to local government districts.

Counsel for the plaintiffs submitted that s. 19 of Cap. 150 does not contain the words “duties” and “functions” and therefore the defendant Board acting under it could only exercise any or all of “the powers” of a local authority and not the duties and functions.

Counsel defined a power as a capacity to do something, a duty as an obligation to do something, and a function as the performance of a duty.

Reference was made to ss. 3, 28 (7) (a), 62 (1), 84 (1) which contain the words, “powers, duties and functions” while ss. 85 (3), 6 (2), 45 and 19 only contain the word “powers” and counsel for the plaintiffs urged that “powers” are separate and distinct from “duties and functions”.

Learned counsel for the plaintiffs further submitted that a construction which would create absurdity or work an injustice should not be given to s. 19 and that such a situation would arise if powers are deemed to include duties and functions as the defendant Board and the plaintiff council could then exercise concurrent administration and management over the village district, since no section of Cap. 150 prevented the plaintiff Council from so doing.

Counsel further argued that the defendant Board cannot take a decision at a meeting to exercise all the powers of the plaintiff Council but must meet and decide each time it is found expedient to exercise a power of local authority. It was further contended on behalf of the plaintiffs that s. 19 must only be used when there is no local authority or when the members of the local authority are unwilling for some reason or the other to perform their powers.

It is my opinion that powers is an abbreviated expression for duties and functions and that ‘powers’ include duties and functions. I agree with the submission of the learned Solicitor General that powers are given to discharge duties. The marginal note to s. 19 clearly suggests that the Board cannot only exercise powers but can administer those powers as a local authority.

To my mind the decision to exercise all the powers of the local authority by the defendant Board under s. 19 would not create any chaos or absurdity, since, as soon as the Board took over the management of the Council, the exercise of powers by the Board superseded the exercise of powers by the Council and the exercise of powers by the Council fell in abeyance. I therefore did not agree with the submission of counsel for the plaintiffs that s. 19 allowed both the plaintiffs and the defendants to exercise dual administration over the village.

Learned counsel for the plaintiffs further contended that they should have been given a hearing before the Board took the decision to exercise the powers under s. 19 in conformity with the *audi alteram partem* rule which is one of the fundamental principles of natural justice.

In *Carltona Ltd. v. Commissioners of Works et al* [1943] 2 All E.R. 560. the appellants' factory was requisitioned by the Commissioner of Works under the provisions of reg. 51(1) of the Defence (General) Regulations, 1939. which read as follows:—

“A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm, for the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land.”

Lord GREENE, M.R. had this to say at pp. 563 and 564:—

“The last point that was taken was to this effect, that the circumstances were such that, if the requisitioning authorities had brought their minds to bear on the matter, they could not have possibly have come to the conclusion to which they did come. That argument is one which, in the absence of an allegation of bad faith – and I may say that there is no such allegation here – is not open to this court. It has been decided as clearly as anything can be decided, that, where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the Courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith. If it were not so, it would mean that the courts would be made responsible for carrying on the executive government of this country on these important matters. Parliament, which authorises this regulation, commits to the executive the discretion to decide and with that discretion if *bona fide* exercised no court can interfere. All that the Court can do is to see that the power which it is claimed is one which falls within the four corners of the powers given by the legislature and to see that the powers are exercised in good faith.”

In the *Board of Trustees of the Maradana Mosque v. Badiuddin Mahmud and another* [1967] A.C. 13 it was held (*inter alia*) that the first named respondent in failing to notify the appellants that any complaint was being made or of giving them an opportunity to meet the charge, had violated the rules of natural justice by which he was bound in exercising functions which were of a judicial or quasi judicial, and not merely administrative, character.

It would seem to me that no question of natural justice can arise when all the Ordinance required is that “it appeared to the board expedient so

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to do". The effect of s. 19 to my mind seems to exclude all judicial review on the ground that the Board's action is purely administrative.

In this case the plaintiffs have not suggested that the defendants' board acted in bad faith when they took over the administration of the village council under s. 19. It is clear that no charges were made against the councillors of the defendants' board and no dissolution of the council had taken place.

S. 70(1) of Cap. 150 makes provisions for the dissolution of a village council and reads as follows:—

“Where twelve registered voters of a village district, or the Board, represent to the Governor in Council that the further continuance in office of the village council is prejudicial to the welfare of the inhabitants of the village district, the Governor-in-Council may direct an inquiry to be made by a person appointed by the Governor, at which inquiry opportunity shall be given to the councillors and to the inhabitants to be heard in the matter of the representation, and the Governor-in-Council may after such inquiry, by order published in the Gazette, declare the village council to be dissolved.”

This section, as in the case of s. 71, specifically mentions the holding of an inquiry where opportunity is given to the councillors to be heard. S. 15 (1) also provides for due inquiry which implies a right to be heard.

S. 19 makes no such provision for an inquiry and a right to be heard, and it is my opinion that the duty to enquire and the right to be heard are restricted to cases where the legislature have specified grounds for the exercise of a discretion. The discretion of the defendant Board, to my mind, is not fettered and the Board need not supply the grounds under which they exercised their discretion under s. 19. I am of the opinion that the exercise of the Board's discretion under s. 19 cannot be reviewed by the Court and there is no evidence that there was bad faith on the defendants' part when they acted under s. 19 and took over the management of the village council.

For the foregoing reasons I dismissed the plaintiffs' claim and awarded taxed costs certified fit for counsel to the defendants. On the application by counsel for the plaintiffs I granted a stay of execution for six weeks.

Action dismissed.

Solicitors:

Sase Narain for the plaintiffs.

Alfred Sawh, Crown Solicitor for the defendants.

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[High Court (Bollers, C.J.) April 24, 25, 29, May 7, 8, June 3, 1968].

Master and servant — Deductions from wages placed into special fund — Plaintiff not to benefit from fund — Deduction authorised after threat — Whether legal — Labour Ordinance, Cap. 103, ss. 19 and 24.

The plaintiff is one of several unregistered stevedores who are employed on the water-front in the loading and unloading of cargo. There are four categories of workers engaged in such work, and in order of preference for employment were graded as registered stevedores, first and second preference stevedores and unregistered stevedores. The defendants are a corporate body whose members comprise the added defendants, who are all shipping agents. All stevedores who work or obtain employment are paid by the defendants from wages received from the respective agents for whom they had worked. With the agreement of the union representing registered stevedores, the defendants set up a Levy Stabilisation Fund, the object of which was to guarantee to registered stevedores a certain minimum weekly wages in the event that work was not available. The moneys for the fund came from deductions from the wages of registered stevedores and according to the plaintiff from those of the unregistered stevedores also, the latter being forced to make the contributions under threat of loss of employment opportunities. However, they received no benefits from the fund. The defendants on the other hand claimed that all the stevedores had agreed to the deductions for the purpose of establishing the Fund and in order to give the workers a reasonable premium for night work. The trial judge on this issue of fact believed the evidence led on behalf of the plaintiff, holding that the unregistered stevedores had not authorised the deductions.

HELD: (i) under the Labour Ordinance it is illegal to provide for deductions from wages of any sums save those permitted under s. 24, and any agreement to the contrary is void;

(ii) the deductions made were not for the purpose of paying a third party at the behest of the employee, but rather to pay some part of the workforce other than those in the plaintiff's category, in a given eventuality.

Judgment for plaintiff.

A. Chase with Hafiz Khan and Miss Doobay for the plaintiffs.

G. M. Farnum, Q.C., for all the defendants.

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BOLLERS, C.J.: In this action the plaintiff is a waterfront worker and is what is known as an unregistered stevedore or tagman. The added defendants are companies incorporated under the Companies Ordinance, Cap. 328, and are shipping agents, and carry on their business of shipping in Georgetown, Guyana. The defendants are a company incorporated and registered under the Companies Ordinance, Cap. 328, and the membership of the Association is comprised of certain shipping agents, to wit, the added defendants, and the allegation of the plaintiff is that the main function of the defendants is to fix the terms and conditions of employment and wages of waterfront workers who are employed by the membership companies, the shipping agents. In 1961, the Guyana Labour Union in consultation with the Shipping Association of Georgetown (the defendants) agreed on a scheme known as the Georgetown Port Labour Registration Scheme for providing the shipping companies with a labour force. Under the scheme there were roughly four (4) different types of stevedore workers. Firstly, the registered stevedore, secondly, the first-preference stevedore, thirdly, the second-preference stevedore and fourthly, the unregistered stevedore. The registered stevedore is taken on for work at what is known as a calling-on centre and this centre is controlled by a staff which is engaged by the Association. At the calling-on centre tariff sheets prepared by the director of the Shipping Association are made available and sold to the stevedores, which is a schedule of wages rates (daily basic premium and overtime) for waterfront workers and in which is set out the basic rates of pay for the various shifts upon which workers are called upon to work. It was admitted that these sheets accurately recorded what the Shipping Association agreed to and were the exact reproduction of the schedule to the agreements made between the Shipping Association and the Guyana Labour Union. The first-preference and second-preference stevedores are also called upon to present themselves at the calling-on centres for the purpose of securing employment. But in the case of the unregistered stevedore he is called upon merely to attend the calling-on centre in order to ascertain where there is a labour shortage, he then proceeds to the wharf where there is such a shortage and is there taken on to work by a 'Booker' who receives the necessary instructions from the calling-on centre. After the unregistered stevedore is taken on to work he is presented with a tag and at the conclusion of his period of labour he presents the tag to the firm for which he has worked and is given a payslip which he subsequently presents to the calling-on centre and is there paid by an employee of the Shipping Association. Paysheets are prepared by the respective employees of the membership companies, the added defendants, and these paysheets along with sums of money to cover the amounts are sent by cheque to the defendants, the Shipping Association, for payment of wages to the waterfront workers which will include both registered and unregistered steve-

dores and thus the wages due to the stevedores are paid directly to them by the defendants, the Shipping Association. Tagmen are not employed until registered and unregistered, first and second-preference stevedores have been fully engaged.

The defendants, the Shipping Association, were the body acting on behalf of its membership companies which made agreements with the Guyana Labour Union which was the union that purported to represent waterfront workers, and in 1960 after an agreement was entered into with the Guyana Labour Union, the defendants, the Shipping Association, created a fund which was known as the Levy Stabilisation Fund. The main benefit which was derived from this Fund in the years 1961 and 1962 was a guaranteed wage which meant that when there was no work or no sufficient work available, a registered stevedore would draw a guaranteed wage of \$19.00 per week. It was also thought by the unregistered stevedore that from this Fund the registered stevedore would derive sickness benefits and holidays with pay, i.e. annual leave pay but this belief was erroneous as the Fund did not provide for these benefits. Annual leave pay was subsidized by the member companies in proportion to the average of the category of the waterfront worker as obtained from the earnings record of such categories, that is to say, the total payroll was subject to the proportion subscribed by a member company to arrive at the percentage of leave pay which that company was called upon to fulfill. Sickness benefits were not included in the Levy Stabilisation Fund but a medical scheme was formed as a result of agreement between the defendants, the Shipping Association and the Labour Union whereby four per centum of the total night payroll for the two half shifts was paid to the Association for the establishment of a medical benefit fund from which registered workers benefited. The position remained, however, that the unregistered stevedore derived no benefit at all from the Levy Stabilisation Fund. In order to create this Fund, all the stevedores — registered or unregistered — received wages short of specific sums which were credited to the Levy Stabilisation Fund and eventually this measure led to agitation for the refund of these specific sums which had been credited to the Levy Stabilisation Fund and there were the inevitable stoppages of work and strikes, and, in December, 1961, the workers were refunded these sums less a small percentage of which their wages were short. In October, 1964 the rates of pay for a stevedore whether registered or unregistered were \$4.79 for the 4.00 p.m. to the 8.00 p.m. shift and for the 9.00 p.m. to the 1.00 a.m. shift it was \$5.59. In December, 1964, when the stevedores worked on these shifts they said they received in cash \$4.12 and \$4.81 respectively, in other words, their wages were reduced by 67c. and 78c. in respect of the two shifts for night work. These sums were credited to the Levy Stabilisation Fund from which the unregistered worker received no benefit whatever. There was a meeting of the registered stevedores who authorised the Union to accept what may be conveniently described as the new rates of pay whereas the unregistered workers objected strenuously to what they termed was a deduction from their wages. The defendants, however, claimed that there was no deduction from the wages but that the unregistered stevedore

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had signed a form in which he had agreed to accept a reduced rate of pay that is to say, a reduction by fourteen per centum which was the same rate of pay being paid to registered workers. The unregistered workers, however, maintained that they had not agreed to accept any reduced rate of pay, nor had they authorised the Union to agree on a reduced rate of pay on their behalf, and indeed they claimed they were forced by the Manager of the Shipping Association to sign the form in order to secure priority of employment. The defendants and added defendants made no contribution whatever to the Levy Stabilisation Fund.

The plaintiff now brings this action in which he avers in his statement of claim that the defendants, the Shipping Association of Georgetown had employed and/or purported to employ or held themselves out as employers of the plaintiff or were the recruiting and/or paying agents for the added defendants and that the sums of 67c. and 78c. respectively, were deducted, reduced or stopped from his wages by the defendants and the added defendants for the first and second half of the night shift periods, Mondays to Fridays, and initially the first half night period on Saturdays except public holidays a sum equivalent to fourteen per centum of his normal rates of pay from the period 7th October, 1965 up to the present time and to which reduction and/ or deduction and/or stoppage he never consented. He therefore claims in para. 16 of the statement of claim a relief:

- (a) A declaration that he is entitled to receive from the defendants and the added defendants the full rates of wages earned by and payable to him for the ordinary night shift 4.00 p.m. to 8.00 p.m. and 9.00 p.m. to 1.00 a.m. in money and not otherwise;
- (b) a declaration that the rate of wages effective 7th October, 1964 for the plaintiff as a stevedore for the ordinary night shifts 4.00 p.m. to 8.00 p.m. and 9.00 p.m. to 1.00 a.m. was \$4.79 and \$5.59 respectively;
- (c) a declaration that the system under which the defendant and/or added defendants purported to reduce and/or stop and/or deduct by fourteen per centum the plaintiff's wages payable for the ordinary night shifts, Monday to Fridays and the first half night shift period on Saturday, excluding public holidays, is illegal, null and void;
- (d) an order directing the defendants and added defendants to pay to the plaintiff all monies stopped, reduced, and/or deducted by them from his wages during the whole period of service with them from 1962 to the present time.

- (e) an injunction restraining the defendants and the added defendants from reducing, stopping and/or deducting from the plaintiffs wages payable for the periods set out in (b) above the sum of fourteen per centum or any other percentage or sum save as permitted by law;
- (f) such further and other order as the Court seems just;
- (g) costs.

The defendants and added defendants in their defence plead that the plaintiff was not employed or recruited by the Shipping Association and they say that the Shipping Association acted solely as the paymaster for the added defendants who supplied the necessary funds and instructions for the payment of stevedores employed by them, and they claimed that the plaintiff was paid in full without any deduction whatever for all the work performed by him at the rate prescribed by agreements between the defendant Association representing the added defendants and the Guyana Labour Union, the accredited representatives of waterfront workers. As a result of various interlocutory proceedings the parties have agreed as to the period of time and the number of nights on which the plaintiff worked on both shifts save and except 6 (six) nights which the plaintiff has abandoned, and an order was made by a judge in chambers that the defendants and added defendants do within fourteen days of the date of the order furnish to the plaintiff particulars of the agreements made between the Shipping Association and the Guyana Labour Union, and to particularise whether the agreements referred to were in writing and the dates of the agreements and the portions of the agreements on which the defendants and added defendants rely in this action, and on the failure to comply with the terms of the order, the defendants and added defendants should be precluded from giving evidence of these agreements at the trial of the action. This order was never complied with and thus the defendants and added defendants were unable to tender in evidence the agreements in writing on which they rely for showing that the plaintiff was paid his normal and agreed rate of pay without any deduction. In any event, it must be stressed that the evidence which is accepted is overwhelming that the Union did not represent the unregistered stevedore.

The witness Claude Braithwaite, a first-preference stevedore stated that at no time did the wages between registered stevedores, first-preference stevedores and unregistered stevedores differ, their wages have always been the same and that from the 7th October, 1964, the rates of pay for stevedores for the night shifts have been \$4.79 for the period 4.00 p.m. to 8.00 p.m. and \$5.59 from 9.00 p.m. to 1.00 a.m. for ordinary week days – Mondays to Fridays – and he was paid accordingly. Subsequently he received \$4.12 for the first half of the night shift and \$4.81 for the second half of the night shift. He spoke to the manager of the Shipping Association who informed him that the sums of 67c. and 78c. respectively were being deducted from the sums of \$4.79 and \$5.59 respectively and were being paid to the Levy Stabilisation Fund. The witness confirmed that in 1961 this practice had been carried on by

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the Shipping Association and after stoppages of work, the deductions were refunded to the workers and that after he signed the form (ex. A) in which it was stated that in consideration of priority for employment that the rates of pay for the two night shifts would be reduced by fourteen per centum, the same as for registered workers, the deductions started again. He was told by the manager that if he did not sign the form (ex. A) he would not be employed. He joined with other stevedores in writing a letter of protest to the Union and to the Trades Union Council in respect of these deductions which were credited to the Levy Stabilisation Fund. The evidence of this stevedore was that the rates of wages were fixed by the Shipping Association who controlled everything, and that it was an agent of the Shipping Association who gave out the stevedores' tariff sheets at the calling-on centres.

Cecil Stewart, another first-preference unregistered stevedore repeated what Braithwaite had said and stated that he was told by the manager of the Shipping Association that if he did not sign the form similar to ex. A he would have to seek employment elsewhere; and it was from the calling-on centre that he received the form.

Ivor Henry, a first-preference stevedore, supported what the two previous witnesses had said and stated that he did not know of any meeting being held by the stevedores to agree to the deduction.

Allen Jack, a registered stevedore, made it clear that as a registered worker he agreed that the deduction should be made and that as a member of the Union he attended a meeting of registered workers of the Union when the registered stevedores agreed that these deductions should be made as they would benefit from the Fund.

Webster Archer, a second-preference stevedore, confirmed that the unregistered stevedore received no benefit whatever from the Levy Stabilisation Fund.

Cyril Belgrave, the secretary of the waterfront branch of the Guyana Labour Union stated categorically that the money in the Levy Stabilisation Fund belonged to the workers and that it was kept by the Shipping Association and it was the member companies which sent the money to the Shipping Association. This witness also said that the Fund is under the control of the Georgetown Port Labour Committee, which committee consists of four (4) representatives of the Snipping Association and four (4) representatives of the Union and a chairman agreed to between both sides, and which receives general statements concerning the Levy Stabilisation Fund from the Shipping Association. The Port Labour Committee has, however, no more control of

the Levy Stabilisation Fund beyond receiving statements from the Shipping Association and reviewing the natural growth of the finances.

The plaintiff, an unregistered stevedore, maintained that after the deductions were made, he objected and was told by the manager of the Shipping Association that the Association had decided to “ ‘take out’ from everybody and he would either work or he could not work.” The principal witness for the defendants and added defendants, George Morgan, the secretary/manager industrial relations adviser to the Shipping Association, stated that the Levy Stabilisation Fund was set up by an agreement in May, 1960 between the Shipping Association and the Guyana Labour Union and it was the Georgetown Port Labour Committee in keeping with that agreement which controls the funds by way of deciding what amount should be paid to registered stevedores under the guaranteed pay system and this committee considered the amount lying to the credit of the Fund at every meeting. It was this committee which in 1962 through its administration had reduced the rates of guaranteed pay fixed by agreement as the Shipping Association had carried a guarantee of overdraft on the Fund. He however, conceded that it was agreed between the Shipping Association and the Union that the money in the Levy Stabilisation Fund belonged collectively to waterfront workers but because of the system of paying guaranteed wages any sums in the Fund could not be considered to be individually claimable. In 1961, however, when there was a payout from the Levy Stabilisation Fund to the stevedores it was assessed that 22.74 per centum of the Fund had been paid out in guaranteed wages, and this was taken into account in the payout to the waterfront workers in order to give them an individual payout from the funds, and after this payout took place, there being no money in the Fund, it was the Shipping Association which guaranteed overdrafts at the bank in order that guaranteed pay should continue. The Shipping Association then granted increases of twenty-five per centum and ninety-two per centum on the basic day rate of pay to preserve industrial peace and they thus refunded eight per centum of the overtime rates of pay and finally in August, 1962, a further decision was taken to reduce the premium from ninety-two per centum to eighty-six per centum and give fourteen per centum of the former overtime rate of pay to the credit of the Levy Stabilisation Fund. In December, 1967, by further decision ten per centum of the total night wage, that is to say, Mondays to Fridays, was credited by the employing company to the Levy Stabilisation Fund. This witness, however, admitted that the money to the credit of the Levy Stabilisation Fund is in an account at Barclays bank and that the name of the account is Shipping Association of Georgetown Waterfront Workers Wages Stabilisation Fund, and that the secretary and accountant of the Shipping Association sign for withdrawals from that account, and that the unregistered stevedores derive no benefit from the Fund, and that the Association is not responsible for the distribution of the tariff sheets at the calling-on centres. The sum total of his evidence was that the stevedores had agreed to take a reduced rate of pay for the purpose of

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establishing the Levy Stabilisation Fund and in order to give the worker a reasonable premium for night work. A premium for night work may be described as a sum in addition to the basic rate of pay for having to work during dark hours in bonds and in ships. I do not, however, accept the second purpose advanced by the witness Morgan as at one time in his evidence he had said that overtime rates of pay had been abolished after the 3rd March, 1961 and later he qualified this by saying that overtime in respect of the first shift 7.00 a.m. to 11.00 a.m., 12.00 noon to 4.00 p.m. is provided for, if workers worked both 11.00 a.m. and 12.00 noon making their hours more than eight then they would get overtime.

I was satisfied that there was no question of premium rates but that the rates of pay for the two halves of the night shift work included overtime rates of pay. The tariff sheet (ex. D) which was put in evidence by the defendants shows that overtime rates were paid for the night shifts.

I therefore accept the plaintiff's case that from October, 1964, the rates of pay for all stevedores registered and unregistered for the two halves of the night shift 4.00 p.m. to 8.00 p.m., 9.00 p.m. to 1.00 a.m. were \$4.79 and \$5.59 respectively and deductions of 67c. and 78c, respectively, were made from these basic rates of wages which were then credited to the Levy Stabilisation Fund from which the unregistered stevedore derived no benefit.

The defendants and added defendants have not produced any agreement made with the Guyana Labour Union in order to show that the workers agreed to receive reduced rates of pay so they have not discharged the burden of proof which is on them to establish their defence. In 1961 the defendants and added defendants seem to have recognised that the sums credited to the Levy Stabilisation Fund were deductions because these were refunded to the workers and in spite of the fact that the secretary manager of the Association sought to disguise the refund as a payout, what was in fact paid to each worker was the individual sum he had paid in, less a small percentage for expenses, and it was the registered stevedores who met and agreed that the deductions should continue. That this was a deduction from the basic rates of pay and not a reduction of wages is clear from the tariff sheet (ex. D) which shows \$4.79 and \$5.99 as the basic rate of pay for the 4.00 p.m. to 8.00 p.m. and 9.00 p.m. to 1.00 a.m. night shift respectively, and the asterisks in these two columns indicate that these amounts were to be reduced by the amount shown thereunder as due to be credited to the Levy Stabilisation Fund and in the category of stevedores those amounts are shown as 67c. for the first half shift and 78c. for the second half shift. It is significant too that the witness Jordan who was assistant secretary of the Shipping Association from 1957 to 1962 and secretary from 1962 to 1967

deposed that in 1961 when there was a payout to the waterfront workers it was decided to pay to the workers a sum equivalent to what would have been contributed by the employees for the periods they worked from the introduction of shift working to a date which had been agreed upon.

In relation to the tariff sheet (ex. C1) when speaking of the sums set out below the explanatory notes states that it was these deductions that were paid into the Levy Stabilisation Fund and that the figures appearing in the columns represented what would be paid to the workers less another set of figures shown under the explanatory note. There is also the overwhelming evidence by the workers that they were told by the manager of the Shipping Association that deductions were being made.

Having arrived at the conclusion that these sums were deductions from the plaintiff's wages the question arises whether the deductions were lawfully made. Counsel for the plaintiff has pointed out that ss. 19 and 20 of the Labour Ordinance, Cap. 103 are in *pari materia* with ss. 1, 2, 3 and 4 of the Truck Act, 1831 except that where the Labour Ordinance uses the term 'money' the Truck Act uses the words current coin of the realm and the definition of employee as contained in s. 16 of the Act means any person who being a labourer has entered into or work under a contract of service with an employer. The plaintiff is therefore an employee within the meaning of the part of the Ordinance, that is to say, Part V, and it is clear from the authorities that under the Ordinance it is illegal to provide for deductions from wages of sums alleged to be due to the employer, or indeed any sums at all save and except those sums permitted to be deducted under s. 24 of the Ordinance. If there is such an agreement to deduct such sums from the wages of the employee then under s. 19 such a contract is declared illegal, null and void. The object of the provisions of the Ordinance is that all wages in contracts of hiring of employees as defined in the Ordinance shall be paid in money and any payment not paid in money is void, and an employee may recover by action any of his wages not paid in cash. As BOWEN, L.J. said in the Court of Appeal in *Hewlett v. Allen* (1892) 2 Q.B. 662 at p. 666 "the statute insists in all but excepted cases on actual payment in coin. Payment in account will not do. Payment in goods will not do. Nothing is to discharge the wages debt except actual payment in current coin." In *Hewlett v. Allen*, a workman by the terms of her contract agreed in writing to become a member of the firm's sick and accident club, under the rules of which, a weekly sum was payable which was in fact deducted by her employers from her weekly wages. It was held by the House of Lords that within the meaning of ss. 3 and 4 of the Truck Act, 1831, the entire amount of the wages payable to the appellant had been actually paid to her in the current coin of the realm, and that she was not entitled to recover from the respondent the amount of the deductions. Lord HERSHELL at p. 389 of the report said that the payment by the employer to someone else at the instance of the workman, is a payment to the latter. In 1936, however, in the case of *Penman v. Fife Coal Co. Ltd.*, [1936] A.C. 45, Lord WRIGHT in his judgment distinguished the case of *Hewlett v. Allen* from the facts of the case he was then considering,

IVAN BENTICK

v.

SHIPPING ASSOCIATION OF GEORGETOWN, DEFENDANTS,
SANDBACH PARKER AND COMPANY LIMITED,
BOOKERS SHIPPING (DEMERARA) LIMITED, SPROSTONS
LIMITED, WIETING & RICHTER LIMITED, ADDED DEFENDANTS

when he stated “that decision (*Hewlett v. Allen*) is based on the fact that sums were paid on the worker’s mandate to a third party in order to discharge a debt of the worker due to that third party. The worker’s request to pay the third party on her behalf made, so it was held, the third party, the worker’s agent or hand, to receive the current coin. In the present case the respondents retained the sums . . . in order to pay a debt due, not to a third party, but to themselves and not due from the appellant, but due from another party namely his father.” This dictum of Lord WRIGHT appears to me to place the matter beyond dispute having found that the plaintiff did not authorise or assent to the deduction and that these sums were credited to the Levy Stabilisation Fund which was under the physical control of the defendants and from which the plaintiff derived no benefit. At any rate the deductions do not fall within those permitted by the Ordinance. The plaintiff is therefore entitled to the orders claimed in the relief sought under para. 16 of the amended statement of claim and I order accordingly. There will therefore be judgment for the plaintiff against both the defendants and added defendants with costs certified fit for counsel.

I grant a stay of execution for six (6) weeks on the application of counsel for the defendants and added defendants.

Judgment for plaintiff.

Solicitors:

D. Dial for the plaintiff.

H. W. De Freitas for the defendants.

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[In the Court of Appeal (Stoby, C., Luckhoo and Cummings, JJ.A.)
January 22, 23, June 6, 1968.]

Practice and procedure – Constitution – Fundamental rights provisions – No rules made as required for invoking jurisdiction of the High Court – Manner in which jurisdiction may be invoked – Constitution, art. 19., Supreme Court Ordinance, Cap. 7, s. 44(1), Rules of the High Court, O. 2.

Practice and procedure – No procedure provided for enforcing right – Application of common law – Whether common law to be applied is English or Roman-Dutch common law. Supreme Court Ordinance, Cap. 7, s. 44, Rules of the High Court, O. 2.

Practice and procedure – Remedy of injunction and compensation – Whether available against Crown by originating motion.

Constitutional law – Fundamental rights provisions – Whether declaratory of existing common law rights.

Constitutional law – Whether Constitution introduces new juristic approach and permits remedies hitherto not available.

During January 1965, the Government published in the Official Gazette a notice of intention to construct a road from Atkinson Field to Mc Kenzie. The route of the proposed road lay over a portion of land which was owned by the appellant at Soesdyke. In June 1966 the appellant's legal adviser wrote the appropriate Government official enquiring the measure of compensation payable for the loss of the portion of land. The official replied that the Compensation Committee's assessment of compensation would not be available until September 1966. On the 19th July her legal adviser again wrote saying that the road was about to be constructed and asked for a definite decision regarding compensation. However, as a result of information which he received, an originating motion was filed the next day in the High Court. The main relief in the motion was for an order restraining the Government, either by themselves or persons employed by them, from commencing or continuing the road building operations through the appellant's land until adequate compensation, in the sum of \$250,000.00 or such other sum as the court may consider just, was paid to the applicant in respect of the acquisition of the land by the Governor. In his reply the respondent denied that the appellant was entitled to compensation, asserted that the construction of the road was of national urgency and importance, and submitted that the procedure adopted by the appellant was unknown to the law of Guyana and a nullity.

When the motion came on for hearing the Solicitor-General on behalf of the respondent submitted *in limine* that the procedure by way of originating motion was not open to the appellant and that an action should

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have been instituted. The trial judge upheld the submission and dismissed the application. The appellant appealed.

HELD: (i) in the absence of any rules it was open to the appellant to institute proceedings to vindicate any breach or threatened breach of her fundamental rights by invoking the relevant rules of the common law;

(ii) that the appropriate common law to be applied was not the Roman-Dutch common law but rather the English common law;

(iii) (per Luckhoo and Cummings, J.J.A.) under the English common law an application to the court for any relief or remedy could be made by motion and accordingly the procedure used by the appellant was correct;

(iv) (per Stoby, C. and Luckhoo, J.A.) as the appellant could not by any other means have obtained any coercive remedies such as an injunction or an order for compensation, she could not obtain either of them by invoking the procedure of an originating motion, as there is no arbitrary right in the court to distribute remedies according to judicial whim or fancy without regard to the vital question whether the remedies are known to the law, and the Constitution did not change that position.

Appeal dismissed.

[Editorial Note: On a further appeal to the Judicial Committee the majority decision was reversed and the matter remitted to the High Court for a hearing on the merits.]

J.O. F. Haynes, Q.C., associated with *F. H. W. Ramsahoye* for the appellant.

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

STOBY, C: This appeal raises a point of some constitutional importance regarding the rights of a citizen to approach the court for the protection of his fundamental rights.

The appellant is the executrix of the estate of William Arnold Jaundoo, deceased. Her testator owned a piece of land at Plantation Soesdyke on the east bank of the Demerara River.

During the month of June 1965, the Government of Guyana published in the Official Gazette notice of intention to build a road from Atkinson to Mc Kenzie. This road was to be constructed over a portion of the appellant's land at Soesdyke. In June 1966 the appellant's legal adviser wrote the appropriate civil servant enquiring how much compensation would be payable for the loss of that portion of her land utilised as a road. The officer replied that the Compensation Committee's assessment of compensation was not available until September 1966. On the 19th July, 1966, the appellant's legal adviser wrote to say that the road was about to be constructed and asked for

a definite decision regarding compensation. As a result of information received an originating motion was filed the next day. The motion sought the following relief:

“(1) The Government of Guyana be restrained from commencing or continuing road building operations either by themselves or by persons employed by them for that purpose on the following described property, to wit:— ‘a piece of land, part of the northern portion of Plantation Soesdyke, situate on the east bank of the river Demerara in the county of Demerara and colony of British Guiana, the said northern portion of the said Plantation Soesdyke, having a facade of two hundred Rhymland roods by a mean depth of seven hundred and fifty Rhymland roods as laid down and defined on a diagram of said northern portion of said plantation made by John Peter Prass, Sworn Land Surveyor, dated the 19th day of July, 1884, and deposited in the Registrar’s Office of British Guiana, on the 10th day of February, 1885, the said piece of land having a facade of 44 (forty-four) roods running southward from the centre draining trench of said northern half of said plantation by the entire depth of said plantation, and on the buildings and erections that may be erected thereon the property of the transportee, save and except an area of land part of the said piece of land measuring 5 (five) roods in facade by 30 (thirty) roods in depth commencing from the south-western boundary (Demerara) and extending north 5 (five) roods in facade by a depth of approximately 30 (thirty) roods east to the western edge of the public road to be transported to Bennie Jhaman, and also save and except an area of land measuring 3 (three) roods in facade commencing from the south-western edge of the drainage trench adjoining the Demerara River, and extending 3 (three) roods south by the full depth of 750 (seven hundred and fifty) roods, to be transported to Anrup and Sookeah jointly the said area of land measuring 3 (three) roods, being however, subject to a right of drainage through the said drainage trench in favour of the other owners of the said piece of land having a facade of 44 (forty-four) roods except the said area of land measuring 5 (five) roods to be transported to Bennie Jhaman the said right of drainage to be exercised by the digging of drains not exceeding 6 (six) feet in width, and at intervals of not less than 100 (one hundred) roods, running south to north and north to south to and from the said drainage trench leading to the Demerara River . . .’

\$250,000.00 (two hundred and fifty thousand dollars) or such other sum as the court may consider just is paid to the applicant in respect of the compulsory acquisition by the Government of Guyana of part of the said property;

- (2) a survey to be undertaken on behalf of the applicant and the Government of Guyana jointly of crops growing on the said property and being part of the assets of the estate of the said

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WILLIAM ARNOLD JAUNDOO, deceased, with the right of the representatives of the applicant and the Government of Guyana to submit separate reports to the court;

- (3) payment be made by the Government of Guyana to the applicant promptly of such compensation as may be assessed by the court in respect of the compulsory acquisition of the said land;
- (4) such further or other orders and/or directions as the Court may make or give to enable the applicant to be properly paid adequate compensation in respect of that part of the aforesaid property being compulsorily acquired by the Government of Guyana and before any evidence of crops or other assets on the said property is destroyed by road building operations; and
- (5) the Government of Guyana do pay to the applicant her costs of this motion.”

The respondent in an affidavit in reply denied that the appellant was entitled to compensation but asserted that an *ex gratia* payment was being favourably considered. The respondent also said:—

“16. The construction of the road is a matter of national urgency and importance, and considerable public funds are involved. The lands of the deceased’s estate lie at the northern end of the road. This is the natural point of commencement of operations and the basis on which all plans have been made for construction of the road. It would be impracticable for construction to commence elsewhere. Construction was scheduled to commence on the 28th of July, 1966, and delay would involve grave damage to the implementation of the entire programme relating to the road with resulting prejudice to the economic development of the country and serious financial losses to the Government and its contractors.

“17. I am advised by counsel and verily believe that —

- (i) the procedure adopted by the plaintiff in moving this Honourable Court is unknown to the law of Guyana and a nullity;
- (ii) this Honourable Court is without jurisdiction to entertain the applicant’s purported motion or to grant any of the reliefs sought by her;
- (iii) the applicant is not entitled to any of the reliefs she seeks.”

When the motion came on for hearing the Solicitor-General submitted *in limine* that an originating motion was not the correct way to approach the court for the kind of redress sought even though the motion alleged a breach

of a fundamental right. He submitted that an action should have been instituted.

The Chief Justice agreed with the submission and dismissed the application, hence this appeal.

Counsel for the appellant submitted that the language of art. 19 of the Constitution permits an originating motion. Art. 19 is as follows:

“19. (1) Subject to the provisions of paragraph (6) of this article, if any person alleges that any of the provisions of arts. 4 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

- (2) The High Court shall have original jurisdiction –
 - (a) to hear and determine any application made by any person in pursuance of the preceding paragraph;
 - (b) to determine any question arising in the case of any person which is referred to it in pursuance of the next following paragraph,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of arts. 4 to 17 (inclusive) of this Constitution:

Provided that the High Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

(3) If in any proceedings in any court subordinate to the High Court any question arises as to the contravention of any of the provisions of arts. 4 to 17 (inclusive) of this Constitution, the person presiding in that court shall refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

(4) Where any question is referred to the High Court in pursuance of paragraph (3) of this article, the High Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal under this Constitution to the Court of Appeal or to Her Majesty in Council, in accordance with the decision of the Court of Appeal or, as the case may be, of Her Majesty in Council.

(5) Parliament may confer upon the High Court such powers in addition to those conferred by this article as may appear to Parliament to be necessary or desirable for the purpose of enabling the High Court

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more effectively to exercise the jurisdiction conferred upon it by this article.

(6) Parliament may make provision with respect to the practice and procedure –

- (a) of the High Court in relation to the jurisdiction and powers conferred upon it by or under this article;
- (b) of the High Court and the Court of Appeal in relation to appeals to the Court of Appeal from decisions of the High Court in the exercise of such jurisdiction;
- (c) of subordinate courts in relation to references to the High Court under paragraph (3) of this article;

including provision with respect to the time within which any application, reference or appeal shall or may be made or brought; and, subject to any provision so made, provision may be made with respect to the matters aforesaid by rules of court.”

It was stressed that “apply” includes the procedure by way of a motion; that “adequate means of redress” would imply an injunction and payment of money since the appellant would not obtain an injunction against the Crown by way of action, nor could she obtain payment of compensation. There were other submissions with which I will deal.

Before discussing the arguments advanced by the appellant’s counsel and those of the Solicitor-General, I think the true purpose of the provisions relating to fundamental rights must be understood, and certain elementary principles restated.

Before the advent of a written constitution the legislature of colonial British Guiana was supreme; true, its supremacy was not absolute in the sense in which the United Kingdom Parliament is absolute. A colonial government’s legislation was subject to the supervision of the Secretary of State who could withhold his assent if the proposed law infringed certain canons of justice or policy. But within the limits of these restrictions the legislature could introduce laws which were severe or even revolutionary. Colonial politicians accustomed through reading and association to the moderation of English politicians, and Guyanese lawyers trained in England and engrained in the common law of England which had spread its roots throughout the British Commonwealth, recognised the greatness of a system which protected the democratic rights of peoples. No attempt was ever made to alter or restrict the fundamental principles of British jurisprudence. Even when Roman-Dutch law was the common law of Guyana judges trained in British institutions were engrafting and introducing bit by bit the canons of English common law.

Thus it was that throughout the history of Guyana in a criminal trial every person charged with a criminal offence was presumed to be innocent

until he was proved guilty. The magistrate trying a criminal charge or the judge presiding over a trial by a jury who did not conform to this principle of the English common law was deemed to have violated so important a feature of a criminal trial that a conviction in the absence of such a direction was upset on appeal.

When internal self-government was introduced and when independence was achieved all those safeguards which had prevented colonial peoples from oppression were engrafted into the Constitution and called fundamental rights. By inserting them into the Constitution the result which flowed was that Parliament became subject to the Constitution. It was supreme and yet not supreme. Parliament can alter the Constitution in the manner prescribed by the Constitution, but until it is altered no legislation can be enacted which infringes a fundamental right. Returning to the illustration already given, should Parliament legislate to provide that in all criminal trials an accused is presumed to be guilty, the courts can strike down this legislation as being *ultra vires* the Constitution. Where, however, Parliament has enacted no such legislation, and a judge or magistrate conducts a criminal trial on the assumption that an accused is presumed guilty, it is not the State which has infringed a fundamental right but the functionary concerned who has ignored the common law of the land. In the first illustration where the State has legislated to override a fundamental right an application to the court to have the legislation declared invalid as a breach of art. 10(2)(a) is appropriate; in the second illustration an appeal is the proper course.

In the majority of emergent territories the framers of their respective constitutions placed great emphasis on the provisions contained therein for the protection of fundamental freedoms. Despite the insertion of articles protecting fundamental rights very little litigation has resulted therefrom, at least in the Caribbean. Although not responsible for the lack of litigation the decision of the Privy Council in the Jamaican case of *Director of Public Prosecution v. Nasralla* [1967] 2 All E.R. 161 has done much to clarify the position. Sub.-s. 8 of s. 26 of the Jamaican Constitution enacts –

“Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.”

The applicant, Nasrella, who had been indicted for murder, had been found not guilty of murder, but the jury were in disagreement as to the issue of manslaughter which had been left to them by the judge. He sought relief from the order of the judge that he stand trial on the issue of manslaughter at the next sitting of the circuit court, and relied on sub.-s. 8 of s. 20 of the Jamaican Constitution which provides –

“No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall

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again be tried for that offence or for any other offence of which he could have been convicted at the trial for that offence . . .”

In dealing with the protection afforded by the section, Lord DEVLIN at p. 165 of the report said –

“All the judges below have treated it (s. 20(8)) as declaring or intended to declare the common law on the subject. Their Lordships agree. It is unnecessary to resort to implication for this intendment, since the Constitution itself expressly ensures it. Whereas the general rule, as is to be expected in a Constitution and as is here embodied in s. 2, is that the provisions of the Constitution should prevail over other law, an exception is made in Cap. III. This chapter, as their Lordships have already noted, proceeds on the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed.”

Art. 18(1) (a), (b) and (c) of the Guyana Constitution is not dissimilar to s. 26 of the Jamaican Constitution, so it follows that the true purpose of the fundamental rights provisions is to preclude Parliament from legislating in derogation of these rights. The object was to enable the courts to declare legislation invalid. It was never intended that where no law has been enacted in defiance of fundamental rights, the normal process of the courts should be superseded.

I concede that the question with which this court is concerned is not whether there has been a breach of a fundamental right but whether the procedure adopted by the appellant in applying to the court by way of originating motion for an injunction against the Crown is a procedure made possible by virtue of the Constitution.

A summary of the appellant’s arguments is necessary. Counsel submitted that the appellant could not issue a writ because no coercive order by way of injunction or otherwise could be made against the Crown as the Queen cannot be coerced in her own courts. He said all that could be obtained was a declaratory judgment, but as coercive relief was required and as this could be obtained under art. 19 of the Constitution, an application was made under that article. It was further submitted that article 19 authorises the procedure by way of motion; that the Rules of the Supreme Court 1955, do not apply to fundamental rights and if they do, then under o. 2 he is entitled to come by way of motion under the common law.

So that this judgment can proceed on agreed premises, I must refer to the appellant's affidavit in support of the motion to show the nature of the relief asked by the applicant. Paras, 14, 15 and 17 of the appellant's affidavit state:

"14. I am advised by counsel and verily believe that the act of the Government of Guyana by compulsory acquisition and taking of possession of part of the property herein referred to without prompt payment of adequate compensation and causing the said land to be used by contractors acting for or on behalf of the Government or by the direction of the Government are respectively violations of the provisions of art. 18 of the Constitution of Guyana providing protection from deprivation of property. I am further advised by counsel that no other law permits the grant of an injunction or other coercive order against the Crown and that I have no other means of redress than that whereby I may make application to this Honourable Court pursuant to the provisions of art. 19 of the Constitution of Guyana.

15. The Government of Guyana intends to commence road building operations forthwith and unless restrained will enter the land and will destroy the growing crops thereon and will deprive me of possession thereof.

17. Wherefore I pray that in exercise of powers vested in this Honourable Court pursuant to art. 19 of the Constitution of Guyana and in pursuance of any other law grant the relief prayed in terms of the notice of motion herein."

The language of these paragraphs is clear and unambiguous; the remedy being sought is to restrain the Crown from commencing the building of a road. I stress this aspect because in the court below the application was dismissed on the ground that an originating motion was not the correct procedure in which to approach the court under art. 19. In this Court the appeal proceeded on a somewhat broader basis. Argument was addressed to us by both sides on the assumption that assuming the trial judge to be wrong in coming to the conclusion that a motion was an incorrect procedure, nevertheless the remedy asked for could not be granted by originating motion or at all. If correct, this argument disposes of the appeal.

No one questions the correctness of the statement that an injunction is not granted against the Crown; nor is it open to discussion to assert that where an injunction is the remedy sought in cases not involving fundamental rights, the established procedure of our courts is for a writ to be issued. Where the matter is one of urgency an *ex parte* originating summons is filed supported by an affidavit claiming an interim order by way of injunction. It is not unknown for the interim order to be made before the filing of the writ providing counsel undertakes to have the writ filed forthwith. The procedure after these preliminary steps is too well known to justify recording it here. What the appellant says is that the legal system of Guyana has by art. 19

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of the Constitution been divided into two; the relief under art. 19(2) is unlimited whereas the relief under our system of law in existence before Independence was dependent on the common law of England and on statute law, regulated by relevant rules of the Supreme Court. We were urged to begin with art. 3 as a necessary concomitant to understanding art. 19 which brings into operation the second dimension of our legal system.

Art. 3 is as follows:—

“Whereas every person in Guyana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely —

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation.

the following provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

The vital words, according to the submission, are “subject to such limitations of that protection as are contained in those provisions, . . . does not prejudice the rights and freedoms of others or the public interest”. I agree that art. 3 has a very important bearing on all the fundamental rights and freedoms enshrined in arts. 4 to 18. But by no canon of construction can it be said that art. 3 expressly or by implication operates to change or enlarge the common law of Guyana. All that art. 3 means is that despite the guarantee given under the Constitution for the inviolability of fundamental rights, circumstances may arise where the rights of an individual may have to be curtailed in the public interest. Because of art. 3 it was possible to introduce the National Security Act providing in certain cases for preventive detention. Art. 5, for example, is concerned with the protection of the rights to personal liberty; it contains clauses limiting those rights in certain cases. So what art. 3 means is that the only limitations on personal freedom are the limitations expressed in art. 5 itself. It is not possible to impose restrictions on personal freedom other than the restrictions permitted in art. 5.

The other limb upon which it was sought to project the idea that the Constitution had introduced into Guyana a juristic approach hitherto un-

known, was art. 19 which has already been recorded; but I will repeat some portions of it so that the argument will not lose cogency through the absence of sequence.

His Honour then proceeded to set out para. 1 and 2 of that article and he went on:—

The words requiring interpretation are without prejudice to any other action . . . may apply to the High Court for redress” in 19(1) and “Provided that the High Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law” in 19(2). I applaud the ingenuity of the submission but reject its validity. The fact that an injunction is not available does not mean that an applicant who applies for redress can obtain a remedy unknown to the law. The redress which the High Court can give to vindicate the fundamental rights of a person whose rights are being assailed must be legal redress. The High Court is not given power to legislate; the powers it is given to issue writs and give directions it considers appropriate are procedural powers to ensure that its legal decisions are carried out. A fundamental right is not a synonym for legal chaos; protection of the wronged is not accomplished by judicial hysteria.

During the argument frequent reference was made to the Indian Constitution in order to illustrate the way in which the Indian Supreme Court has brushed aside technicalities in order to safeguard a citizen’s fundamental rights. Art. 32 of the Constitution of India says:

“(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.”

The fundamental rights are stated in previous articles.

Referring to art. 32 Dr. AMBEDKAR in the Constituent Assembly said:—

“If I was asked to name the particular article in the Constitution as the most important without which this Constitution would be a nullity, I could not refer to any other article except this one. It is the very soul

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of the Constitution and the very heart of it . . . It is not that the Supreme Court is left to be invested with the power to issue these writs by a law to be made by the Legislature at its sweet will. The Constitution has invested the Supreme Court with these rights and these writs unless and until the Constitution itself is amended . . .”

BASU in his Commentary on the Constitution of India says at p. 267, vol. 2:—

“It is acknowledged on all hands that a declaration of individual rights would be an idle formality if there is no effective means to enforce them.”, and again at p. 267, vol. 2:—

“This clause gives a very wide jurisdiction to the Supreme Court for the enforcement of the Fundamental Rights. It not only empowers the Supreme Court to issue the writs of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* as they are known in England, but also enables the Supreme Court to devise directions, orders or writs analogous to the above, or to improve upon the above writs so as to avoid their technical deficiencies, if any, or to adapt them to Indian circumstances.”

The same writer says this at p. 289, vol. 1:—

“(In England) the efficacy of injunction as a remedy for obtaining judicial review of administrative action has been narrowed down in England by the principle that an injunction (unlike a declaratory action) is not available against the Crown either directly or by issuing it against its servants. Such relief has also been specifically excepted by the Crown Proceedings Act, 1947, (s. 21(1)). An injunction is not thus available against any Government department or agency. Its use is virtually restricted to local authorities, or statutory domestic tribunals, or public corporations.”

“In India, the remedy of perpetual injunction is governed by statute, the conditions being laid down in ss. 54–56 of the Specific Relief Act, 1877.

Its applicability against administrative action is restricted by the provision in s. 56(d) which corresponds to the English rule already seen. It says that —

‘An injunction cannot be granted to interfere with the public duties of any department of the Central Government or any State Government.’”

In order to appreciate the comments made above reference must be made to art. 1 of the Constitution of India. Art. 1(3) states:

“The territory of India shall comprise –

- (a) the territories of the States;
- (b) the Union territories specified in . . . the First Schedule;
- (c)”

There is no distinction in status between the States *inter se*. But the Union territories are subject to legislation by Parliament. Art. 226 of the Constitution of India is as follows:

“(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred on a High Court by clause (1) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of art. 32.”

This probably explains why an injunction was granted in *Kochunni v. State of Madras* (1959) S. C. R. 316, there being specific legislative powers to do so.

The argument for the appellant that art. 19(G) introduced what was termed another dimension to our legal system must be further examined in the light of the suggestion that because the article speaks of making such orders, issuing such writs as may be considered appropriate this language has in some way changed the nature of prerogative writs. A few illustrations will dispose of this heresy. *Mandamus* is usually addressed to an inferior court requiring it to do some particular thing which appertains to the Court’s function. It can also apply to other circumstances. Against a public officer acting in contravention of his public duty and so on. But where Parliament signifies its intention to enact a law which infringes on a citizen’s fundamental rights, *mandamus* will not issue to Parliament; after the law is passed *mandamus* may go to those public officers who have to enforce the law. Again, where a private individual seizes another’s property and refuses to pay adequate compensation, *mandamus* will not lie against the private individual as the writ does not apply to such a person.

What art. 19 means when it says the High Court may issue writs and give directions for the purpose of enforcing fundamental rights is that the prerogative writs may be adapted in a suitable case to ensure the carrying out of the court’s decision; the first requirement is to decide whether the writ is applicable then if it is, no technical rule will preclude its issue. An example of this is *Wazir Chand v. State of Himachal Pradesh* (1955) 1 S.C.R. 408. The police seized goods from the possession of a person without any

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authority of law in contravention of art. 31(1)(I). *Mandamus* is not used to decide a question of title but what the Court did was to issue *mandamus* directing the restoration of the property and leaving it to the parties to settle the question of title. The Court did not change the law; it did not arrogate to itself a function it never had; it used *mandamus* to restore the *status quo ante* without infringing the basic principles on which the writ is issued. The police were public officers to whom the writ is applicable but the decision would have been different in respect of a private person not purporting to act under a law.

Certiorari is the writ used to keep judicial and *quasi* judicial tribunals within the limits of their legal authority.

In *Luck v. Sharples* 1954 L.R.G.B 100 where a magistrate exceeded his jurisdiction and committed the applicant to prison, the High Court issued a writ of *habeas corpus* and later quashed the decision by *certiorari* even after the time for appealing had expired, because the magistrate had exceeded his jurisdiction. Had a High Court judge exceeded his jurisdiction and the time for appealing had passed, another High Court judge could not quash his decision by *certiorari*. No matter what fundamental right was involved the Court would not have the power to issue the writ of *certiorari* or to adapt it or to give directions. Art. 19 has not gone that far.

The judicial writ of prohibition issues out of a superior court to an inferior court to prevent the inferior court from usurping powers it does not have. In *Small v. Saul and Saul* (1965) 8 W.I.R. 351 the Caribbean Court of Appeal held that the High Court had no jurisdiction to maintain an action for damages arising out of s. 26(1) of the Rent Restrictions Ordinance, Cap. 186, such a claim being maintainable only in the magistrate's court. A judge who assumes jurisdiction in breach of the Ordinance cannot have a writ of prohibition issued against him. The alleged new dimension of law created by art. 19 is circumscribed by the historical realities of the common law. The development of the common law takes place by giving a modern interpretation to principles of law enunciated under circumstances unknown and undreamt of at the present time. The law of negligence, the law of agency, master and servant, the relations of the Crown and its servants, are all fruitful fields for courageous and intelligent improvement of some of the unsatisfactory features of the past. The court in exercising its fundamental rights jurisdiction can play a vital part in clamouring for a Crown Proceedings Act, can frame orders and issue practice directions relating to procedure, can interpret the fundamental rights in the light of its own country's problems but must draw the line at mutilating the prerogative writs bequeathed to us by the common law.

The observations I have made and the nature of the relief asked for by the appellant are sufficient to dispose of this appeal. However, considerable time was devoted to the respondent's submission that even if, which is

denied, there was a violation of art. 8 (G.), the question is whether procedure by originating notice of motion was the correct way of applying for redress under art. 19(1).

The Solicitor-General submitted that the Rules of the Supreme Court 1955 apply to applications made under art. 19 of the Constitution; that O. 2 of these Rules is: "Save and except where proceedings by way of petition or otherwise are prescribed or permitted by any Ordinance, by the common law of this Colony, by these Rules or by any Rules of Court, any person who seeks to enforce any legal rights against any other person or against any property shall do so by a proceeding to be called an action", and the words "common law of this Colony" means Roman-Dutch common law. I will discuss this submission. Art. 19(6) is:—

Parliament may make provision with respect to the practice and procedure —

- (a) of the High Court in relation to the jurisdiction and powers conferred upon it by or under this article;
- (b) of the High Court and the Court of Appeal in relation to appeals to the Court of Appeal from decisions of the High Court in the exercise of such jurisdiction;
- (c) of subordinate courts in relation to references to the High Court under paragraph (3) of this article;

including provision with respect to the time within which any application, reference or appeal shall or may be made or brought; and, subject to any provision so made, provision may be made with respect to the matters aforesaid by rules of court."

Parliament has not made any provision. Since this is so, counsel for the appellant contends that the article itself authorises the procedure by motion and we do not have to look for guidance to the Rules of Court. I disagree. The article authorises an application to the Court. But the procedure for applying to the Court is regulated by Rules of Court; the manner in which this came about is germane to the point under discussion. The Judicature Act of 1873 (U.K.) defined an action as "a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court." As a result of this and the 1875 Act, rules of court regulating the procedure in the High court were made. In 1893 there was enacted in the then Colony of British Guiana, a Supreme Court Ordinance. S. 51(1) of that Ordinance was: "The practice and procedure of the Court in its general civil jurisdiction shall be regulated by this Ordinance and by the Rules, and where no provision is made by this Ordinance, by the Rules, or by any other statute, the existing practice and procedure shall remain in force.", which is similar to s. 44(1) of the Supreme Court Ordinance, Cap. 7, enacted in 1915. S. 44(1)(a) provides:—

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“The practice and procedure of the Court –

- (a) in its general civil jurisdiction shall be regulated by this Ordinance and by rules of court, and where no provision is made by this Ordinance, by rules of court, or by any other statute, the existing practice and procedure shall remain in force;”

After the 1893 Ordinance was passed Rules of the Supreme Court 1893 were made. O. 1 r. 3 of the 1893 rules was “Any inhabitant of the colony acting in his own right, or in the right of another, who seeks to enforce a right to legal relief against some other person or against a *res*, as a plantation or a ship, shall do so by means of an action. An action shall be begun by filing a claim with the Registrar.” In *Winter v. Black* (1896) L.R.B.G. 22 the court held that as a result of this rule the only way to approach the court was by action and not by petition as was previously done in certain applications to the court. But in *Henriques v. Henriques* (1897) L.R.B.G. 101 the court held that *Winter v. Black* was wrongly decided, and despite O. 1 r. 3 of the 1893 rules relief could be obtained by petition. In the course of his decision ATKINSON, C.J. pointed out that from 1855 to 1893 (when the Supreme Court Ordinance was passed) the court’s procedure was regulated by a Manner of Proceeding Ordinance (No. 5 of 1855) and the practice and procedure recorded by Roman-Dutch writers. The learned Chief Justice also referred to the fact that Ord. 1 of 1897 had amended s. 51(1) of Ord. 7 of 1893 substituting therefor, the following:–

“The practice and procedure of the court in its general civil jurisdiction shall be regulated by this Ordinance and the Rules made thereunder, and in matters in respect of which no provision is made by the same, shall be regulated as far as may be by the practice and procedure followed in respect of the like matters in England under the Judicature Acts and the rules made thereunder in force for the time being, and where no such procedure is applicable, then by the practice and procedure which was followed at the date of the coming into operation of this ordinance.”

He then concluded that the Rules of Court 1893, and in particular O. 1 r. 3, were controlled and limited by all the provisions of the Ordinance (7 of 1893) and the procedure by way of petition was still valid.

The next step is that Rules of Court were made in 1900. O. 2 r. 1 uses the same language of O. 1 r. 3 of the 1893 rules. In 1910, O. 2 of the 1900 rules was amended to read thus:–

“1. Save and except where proceeding by way of petition or otherwise is prescribed or permitted by any Ordinance or Rules of Court or by the common law of this colony, any person who seeks to enforce any legal right against any other person or against property shall do so by a proceeding to be called an action.”

So the Solicitor-General contends that having regard to the history of our rules and the decision in *Henriques v. Henriques* (*supra*), the reference to the common law in the 1910 rules was to Roman-Dutch common law and nothing has taken place to give the same words a different meaning in the 1955 rules. The relevant 1955 rule is O. 2; exactly the same as in 1910 where, as I have shown, the common law of the Colony meant Roman-Dutch common law.

But indeed, a great deal has taken place. On the 1st January, 1917, the Civil Law of British Guiana Ordinance came into force. The common law of the Colony became the common law of England. The Judiciary was not unaffected by this change. While before 1917 the judges of British Guiana were not only trained in the Roman-Dutch law, but steeped in its traditions, later judges sought to engraft on what remained of Roman-Dutch law the principles of English common law and the procedure of English Courts as regulated by existing English rules of court. In 1932 Mr. Justice Savory was appointed from Trinidad. He immediately saw the weakness of the 1900 Rules in relation to the law as it had to be interpreted, and the unsatisfactory nature of a petition for certain applications in chambers. He resolutely set himself to amend the 1900 Rules. O. 41 was introduced providing for business in Chambers; the English rules were used as a model and provision made for summonses and motions.

When the 1900 rules as amended in 1910, 1916, 1920, 1925, 1932, 1947, 1948 and 1954 were completely revoked by the 1955 rules, the rule making authority of 1955 retained the language of O. 2 of the 1910 Rules in O. 2 of the 1955 Rules. In 1910 the common law of the Colony was Roman-Dutch, in 1955 the common law of the Colony was English. Even so, the Solicitor-General urges, the true meaning of O. 2 of the 1955 Rules is not so easily ascertained. He adverts to s. 44(1) of Cap. 7 and recalls that the section deals with the practice and procedure of the Court and stipulates for the following of existing practice and procedure where the rules are silent. Existing procedure in 1915 when Cap. 7 was enacted was Roman-Dutch. I see no difficulty in rejecting the viewpoint. S. 44(1) Cap. 7 is specifically concerned about those areas of our law untouched by rules of court. O. 2 of the 1955 Rules permits proceedings to be taken other than by action if among other things the common law of England permits it, consequently there is no need to enquire about the 1915 existing procedure. S. 44(1) of Cap. 7 probably provides for those areas of our law unknown to the English common law, for example, opposition actions, parate execution, and so on where no rules are applicable, and as no English common law could apply, the procedure to be followed would be the procedure existing in 1915. O. 1 r. 3 applying the English rules where the 1955 Rules are silent, is also relevant. See my own decision in *Coghlan v. Vieira* (1958) L.R.B.G. 108 at pp. 118–120.

The analysis I have undertaken does not conclude the topic as to whether a motion is the proper way to approach the court under art. 19. In *re Meister, Lucius and Bruning Limited* [1914] W.N. 390, WARRING-

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TON, J. said that he had no doubt that where an Act of Parliament said that an application might be made to the court that application might be made by motion. In the common law courts before the passing of the Judicature Act the only mode by which the court was approached otherwise than by the issue of a writ was by a motion. In the High Court of Chancery it was quite true that the summary mode of proceeding was usually by petition, but his lordship saw no reason, and he had spoken to all the judges of the Chancery Division except one whom he had not been able to see, and also to the Master of the Rolls, and they all agreed with him that in such a case as the present, where the act merely provided for an application and did not say in what form that application was to be made as a matter of procedure it might be made in any way in which the court could be approached. There was no question about it that the court could be, and frequently was, approached by originating motion.

Or. 5 r. 5 of the 1962 Rules of the Supreme Court (U.K.) nullified that decision by providing that "proceedings may be begun by petition or motion if, but only if, by these Rules or by or under any Act the proceedings in question are required or authorised to be so begun".

If, as I think it does, O. 2 of the 1955 Rules (G.) means that motions are permissible in Guyana in those cases where motions were permitted at common law, then O. 5 r. 5 1962 (U.K.) does not affect the point in *Collymore and Abraham v. The Attorney General of Trinidad* (1967) 12 W.I.R 5, the applicants moved the court by motion to have the Industrial Stabilisation Act 1965 (T.) declared invalid. No objection to the procedure was taken.

I have come to the conclusion that under art. 19 an originating motion can be filed –

- (a) where Parliament has enacted legislation which the applicant claims is *ultra vires* the Constitution;
- (b) where the applicant desires one of the prerogative writs.

On the other hand an action is the proper way of obtaining an injunction if such a remedy is available. Where Parliament has violated no constitutional provision an individual, who claims that the Crown has deprived him of a fundamental right although the Crown is not acting under an invalid law, must proceed by way of a declaratory action. A declaration cannot be made on motion except where a specific law is attacked in order to have it struck down.

I should add that analogies drawn from the Constitution of India must be carefully examined not only because of art. 226 (I.) already referred to, but by virtue of the fact that rules of their Supreme Court have authorised the procedure of bringing a petition to have all issues of fundamental rights settled.

In a conflict between the citizen and the Crown, the courts can do no more than decide the issues in the same way as an issue between citizen and citizen is decided, that is, according to the prevailing law.

I would dismiss the appeal. I would also have ordered each party to bear its own costs here and in the court below, but in view of the judgment of LUCKHOO, J.A., whose decision I have had the opportunity of reading, I agree that costs should be as proposed by him.

ADDENDUM: The day after the judgments was delivered in this appeal, counsel for the appellant submitted the case of *Carlic v. The Queen and Minister of Manpower and Immigration* (1968) 65 D.L.R. 633. This was a case where an Act of Parliament authorised the appropriate functionary to deport persons from Canada. Canadian citizens and persons domiciled in Canada for 5 years could not be deported. A deportation order was made against Carlic. He brought an action, not a motion, against the Queen and the Minister claiming an injunction restraining his deportation on the ground he was domiciled in Canada for 5 years. The Crown filed a motion claiming that an injunction could not be granted against the Queen. The court in refusing to strike out the action observed that if Carlic's contention was correct, then if an injunction was granted against the Queen and the Minister and the officer responsible for deportation, it was the Minister and the appropriate officer who would have to refrain from acting on the deportation order.

The appellant did not file an action for a declaration that compensation was payable under the Public Lands Acquisition Ordinance Cap. 179.

LUCKHOO, J.A.: Under a Development Programme for Guyana the construction of a stretch of road for 47 miles to link Atkinson Field with the bauxite town of Mackenzie was approved by the Legislature. This operation involved the utilisation of lands of the deceased, William Arnold Jaundoo, as the commencement point for that road, and construction operations were due to commence on the 28th July, 1966.

The Government of Guyana, without admitting legal liability to pay compensation, was not averse to the principle of so doing and for this purpose a Committee was appointed. The Permanent Secretary of the Ministry of Works and Hydraulics, on the 11th July, 1966, by letter informed the appellant's legal representative "that the Compensation Committee's assessment of compensation due to the estate of W. A. Jaundoo, deceased, will not be available before September 1966 (subject to ratification by the Cabinet before payment is effected)."

This the appellant did not find satisfactory. She was anxious, on advice received, to have the question of compensation dealt with before the property was used. She thought that compensation should be in the vicinity of \$250,000, on the assumption that the road would pass through a sandpit

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and so deprive the estate of a valuable source of revenue; and wanted this question to be settled as well as that relating to the quantity of crops on the land at the time.

The Chief Engineer, Philip Anderson Allsopp, attached to the above Ministry, did not know whether the proposed road would pass through that sandpit. He challenged the applicant's estimate of the value of the sandpit and the quantity of crops on the land, and considered her demand irreconcilable with the fact that for estate duty purposes the entire estate was valued on 30th October, 1965, in the gross sum of \$85,707.22, while the whole of the deceased's property through which the road was to pass was placed at \$40,000. Steps were being taken, he said, to the knowledge of the appellant, to compensate the estate on an *ex gratia* basis for any crops which on an examination may be found likely to be lost through the construction of the road.

But the appellant was firm in her desire to prevent any attempt to use the land as contemplated by the Ministry of Works and Hydraulics without the conclusion of satisfactory arrangements with her as to the payment of compensation etc. When this prospect seemed unattainable, she sought the intervention of the Court to stop a likely contravention of her rights under the Constitution of Guyana, which came into force on the 26th May, 1966 (and which will be subsequently referred to as "the Constitution").

This was opposed on grounds which will be stated later; and the irrelevant consideration was put forward that any delay would involve grave damage to the implementation of the entire road programme with resulting prejudice to the economic development of the country and serious financial loss to the Government and its contractors.

When the matter came before the Court on 28th July, 1966 (the day on which operations were due to commence), Bollers, C.J., had before him an originating motion supported by affidavit, with notice to the Attorney General who opposed the motion, also supported by affidavit.

The attack on the motion consisted of the following objections, namely, that the procedure adopted in moving the Court was unknown to the law of Guyana and a nullity; that the Court was without jurisdiction to entertain the motion or to grant any of the reliefs sought; and that there was no entitlement to any of those reliefs.

The reliefs sought in the motion were:

- (1) That the Government of Guyana be restrained from commencing or continuing road-building operations either by themselves or by persons employed by them for that purpose on the property in question unless the payment of adequate compensation in the sum of \$250,000 or such other sum as the Court may consider just, is paid to the appellant.

- (2) That payment be made by the Government of Guyana to the appellant promptly of such compensation as may be assessed by the Court because of the acquisition of that land, and
- (3) That an Order be made for a survey to be undertaken on behalf of the applicant and the Government of Guyana, jointly, of crops growing on the said property, with the right of the representatives of the applicant and the Government of Guyana to submit separate reports to the Court.

The Solicitor General, for the Attorney General, without prejudice to any further points that may be raised by him, submitted that the application by way of notice of originating motion was in the circumstances not the correct procedure by which the applicant could approach the court for redress for breach of fundamental rights under art. 19 of the Constitution of Guyana. He urged that it was clear that the application had been made under art. 19 in respect of a breach of a fundamental right or rights, as is provided for in art. 8, and that as a result thereof the Rules of the Supreme Court, 1955, of Guyana, were applicable, in which case those rules did not provide for an application by way of originating motion, but laid down that the procedure should be by way of an action to be commenced by a writ of summons.

This submission found favour with the Court, and the application was dismissed.

In the course of replying to this successful presentation, Dr. Ramsahoye argued that if proceedings were commenced by writ of summons, no coercive order by way of an injunction or otherwise could be made against the Crown because the Queen cannot be coerced in her own courts, and that all the applicant could get if an action was brought was a declaratory judgment against the Crown by way of the Dyson procedure. He further submitted that if any coercive relief was to be obtained against the Crown, it would have to be obtained under art. 19(2) of the Constitution. He stressed that it could never have been contemplated that a procedure by way of writ of summons for a declaratory judgment could protect fundamental rights, because in an action only a bare declaration could be made, and no order to assess or pay compensation could be made against the Crown. This argument even found its way in the appellant's affidavit supporting her motion when she swore:

“I am advised by counsel that no other law permits the grant of an injunction or other coercive order against the Crown and that I have no other means of redress than that whereby I may make application to this honourable Court pursuant to the provisions of art. 19 of the Constitution of Guyana.”

The learned Chief Justice, however, was only willing to pronounce upon the correctness of the procedure adopted and not upon the jurisdiction of the High Court to grant coercive relief against the Crown, and left that question severely alone when he said:

“Without presuming to enquire into the submission of counsel for the appellant that on a writ no coercive order by way of an injunc-

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tion or otherwise can be made against the Crown because the Queen, cannot be coerced in her own Courts and that all the individual can obtain is a declaratory judgment against the Crown, I am of the view that the procedure adopted by way of notice of originating motion must be justified by the Rules of the Supreme Court, and the applicant must show affirmatively that such proceedings are within his competence. This the applicant has failed to do, and I therefore cannot entertain the application.”

In this appeal the court was asked for an order directing that the land ought not to be taken unless compensation is assessed and paid to the appellant by the Government of Guyana in respect of the land sought to be acquired by them . . . together with all such orders and directions and the grant of such writs as will guarantee for the appellant the rights conferred by art. 8 of the Constitution; for it was argued on behalf of the appellant (and equally contested by the Solicitor General in opposition) that there was jurisdiction for the learned Chief Justice to have made the restraining orders requested in the application and grant “coercive remedies against the Crown” under art. 19.

I, therefore, feel justified in considering not only the question whether the High Court erred in holding that an application could not be made by originating notice of motion for relief under art. 19 but the further question whether an injunction or other coercive order could be made against the Crown under art. 19 of the Constitution.

I will first deal with the procedural question before considering that of jurisdiction.

One normally resorts to the Rules of the Supreme Court, 1955, for guidance when any issue of procedure arises in the High Court except, of course, there are other rules applicable, which is not so in this case. No argument raised convinces me to the contrary. In fact, I find it obligatory so to do, and so immediate resort must be had to that rule dealing with the commencement of proceedings, that is, O.2. It is as follows:

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

The learned Chief Justice, after analysing this rule, did not find justification under it for the procedure adopted, and so was left with the conclusion that the proceedings had to be by way of action, which under O. 3 r. 1 had to be “commenced by a writ of summons”. He proceeded then to hold:

- (1) That the application by way of notice of originating motion was wholly misconceived, was neither prescribed nor permitted by any statute or rule of court, or by the Rules of the Supreme Court, or at common law, and altogether unauthorised, and that the applicant was not entitled to apply by that means for the redress claimed.
- (2) That an injunction will generally be granted only after a writ of summons has been issued, and where the substantial object of the plaintiff is to obtain an injunction he should endorse his writ with a claim therefor. That it was only in cases where the Court would grant an interim order in the nature of an injunction that the application may be made on summons to a judge in chambers or on motion – and, unless *ex parte*, would be made on notice and the notice must be intitled ‘in that action’. (Referring to Halsbury’s Laws of England, 3rd Ed., Vol. 21, at pp. 410 – 414).

What must now be determined is: Are these conclusions sound and maintainable when reliefs under art. 19, including the substantive remedy of injunction, are sought by originating motion for the alleged breach of a fundamental right in the deprivation of property? This right is protected amongst a number of constitutional rights guaranteed in the Constitution in the protection of fundamental rights and freedoms of the individual within art. 4 to 17. At art. 8 it is proclaimed as follows:

“(1) No property of any description shall be compulsorily taken possession of and no interest in or 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 possession is made by a written law –

- (a) requiring the prompt payment of adequate compensation; and
- (b) giving to any person claiming such compensation a right of access, either directly or by way of appeal, for the determination of his interest in or right over the property and the amount of compensation, to the High Court.”

When there is a failure to comply with this article, and others of the like, be it on the part of Government or otherwise, that contravention creates a legal right to apply for a legal remedy to protect, safeguard, and enforce, what must be sacred to the subject and ought to be within the competence of the Constitution to guarantee.

Within the confines of art. 19 lies the responsibility for this most exacting task. It confers on the High Court original jurisdiction “to hear and to determine any application made by any person” who alleges a contravention or likely contravention thereof, and gives power to the court to make “such

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orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement” of this right.

Parliament, although bequeathed that power by the Constitution, has yet to make provision with respect to the practice and procedure pertaining to the enforcement of the protective provisions of art. 19; neither have rules of court been made with that end in view. If I may take the liberty and opportunity of commenting, it would seem that the task of fulfilling in some measure this obligation should not be left unattended for too long.

Now for an examination of O.2 on the procedural aspect. If that Order is to be authority for the procedure adopted by way of originating motion, then such a procedure must be “prescribed or permitted” by the common law of this country. When this Order came into force, the common law of this country (subject to specific reservations) was the common law of England and was so since 1917 when section 3(b) of the Civil Law Ordinance, Cap. 2, provided that:

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

No doubt it was this importation of such a substantial portion of the English common law as part of our laws which inspired the recognition and acceptance of proceedings prescribed by the common law, for certain remedies, or permitted to be used, as a way of procedure. Two distinct concepts here emerge, viz. the sanction of procedure which is fixed or laid down by the common law because of the subject-matter of the proceedings and the other, when the subject-matter is immaterial; but the authority for use arises from the nature of the proceedings and the circumstances in which it is taken.

William Tidd in his admirable book on the Practices of Courts of King’s Bench and Common Pleas, vol. 1 (1828) refers to that elegant writer on the Law and Constitution of England, WYNNE, who in his *Eunon, Dial.*, vol. 2, art. 26, recorded in the distant past, said even of those days,

“The application to a court is called a motion, and the Order made by a court on any motion when drawn into form by any officer is called a rule.”

Motions were not necessarily connected with any suit. There were motions such as to set aside an annuity, to deliver up securities to be cancelled, to strike an attorney off the roll for misconduct, etc. The object of a motion was to seek for a rule or order which was either granted or refused, and, if granted, was either made a rule absolute in the first instance or only to

show cause or, as it is commonly called, a rule *nisi*, that is, unless cause be shown to the contrary which is afterwards on a subsequent motion, it is either made absolute or discharged.

The common law prescribed that motions should be used when seeking rules for the grant of prerogative writs, as it also permitted motions to be used in making applications under statutes where there is no set procedure.

A case which prominently illustrates how the common law sanctioned the employment of motion in certain circumstances, is that of *Re Meister, Lucius and Bruning, Ltd.*, [1914] 31. T.L.R. 28. There, s. 3 of the Trading with the Enemy Act, 1914, provided "that the Board of Trade may apply to the High Court for the appointment of a controller of the firm or company and the High Court shall have power to appoint such a controller etc."

The first question which arose was how and in what manner the application ought to be made. The application was at first made by petition, but, on the question being raised, WARRINGTON, J., said:

"The present application is made by petition as it had been suggested to the Board of Trade that in as much as the application is made to the Chancery Division and in as much as according to the old practice of the High Court all Chancery summary applications not in suit were usually, if not universally, made by petition *ex abundante cautela*, it would be safer to proceed by petition. But it is obvious that there are many cases which may arise in which the procedure by petition, which is somewhat cumbersome and which involves some considerable delay would be an inappropriate and inconvenient mode of proceeding and accordingly I have been asked to say what, in my opinion, is the procedure which may be adopted under the provisions of this Act if the Board of Trade should in any particular case be advised not to proceed by petition. I have no doubt myself that where an Act of Parliament says that an application may be made to the court, that application may be made by motion. In the common law courts, before the passing of the Judicature Act, the only mode by which the court was approached otherwise than by the issue of a writ was by a motion. In the High Court of Chancery it is quite true that the summary mode of proceeding was usually by petition, but I see no reason – and I have spoken to all my brothers in this division except one, I think, whom I have not been able to see, and also the Master of the Rolls – and they all agree with me that in such a case as the present where the Act merely provides for an application and does not say in what form that application is to be made, as a matter of procedure it may be made in any way in which the court can be approached. Now there is no question about it that the court can be and frequently is approached by originating motion."

I am satisfied that what has been said by WARRINGTON, J., constitutes well-established practice of common law where the use of motions was sanctioned because it was a desirable form of procedure, which provided

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a convenient and expeditious way of approaching the court where such applications were required to be made.

The *Meister* case was approved in *Pierre v. Mbanefo et al*, (1965) 7 W.I.R. 433. The appellant in that case caused an originating summons to be issued in respect of some alleged contravention of rights which he claimed to have under the Constitution of Trinidad and Tobago. A judge in Chambers dismissed it on the ground that he was not entitled to proceed by way of originating summons for the redress claimed. This decision was upheld by the Trinidad Court of Appeal. The value of the decision here lies not so much in the condemnation of the procedure adopted, but in the affirmation that the application should have been made by way of originating motion.

S. 6(1) and (2) of the Trinidad and Tobago Constitution corresponds very closely and in some respects is identical to our art. 19(1)(a) and (b) dealing with the enforcement of protective provisions. The right to apply to the High Court in its original jurisdiction for redress is granted in equal terms, with nothing to indicate the way of approach to the court. WOODING, C J., at p. 436 said:

“In this case the appellant made it abundantly clear both in his originating summons and in his submission before us that he is claiming redress under s. 6(1) of the Constitution . . . So far as material, it reads as follows:

“. . . That if any person alleges that any of the provisions of the foregoing section . . . of this Constitution has been, is being, or is likely to be contravened in relation to him then . . . that person may apply to the High Court for redress.”

It will, however, be observed that the subsection does not prescribe the means by which a claimant for redress should apply, it simply says that he may apply to the High Court. How then was it contemplated that the application should be made? A like question arose in *Re Meister, Lucius & Bruning, Ltd.*, in which the Board of Trade applied by petition to the High Court in England for the appointment of a controller of a company in circumstances predicated by s. 3 of the Trading with the Enemy Act, 1914. That section was no more speaking than ours on the mode of applying which it had in mind.”

After referring to the passage already quoted from WARRINGTON, J.’s judgment, on his general observations and the practice to be adopted, the learned Chief Justice proceeded:

“It will be observed that Warrington, J., did not refer in any manner expressly to the procedure by way of originating summons, and that he intimated that the application might be made in any way in which the court may be approached. Accordingly although *Re Meister*

is authority for what is now the usual procedure by way of originating motion . . . it does not necessarily rule out as incompetent or impermissible the procedure by way of originating summons, but, as we said earlier, the express sanction of a statute or a rule of court is essential if proceedings are commenced in the High Court by summons."

BOLLERS, C.J., in not following that case thought that the attention of the learned judges there was never drawn to the new English O. 5. He said further:

"We here are not aware of the Rules of the Supreme Court, Trinidad. The result of this case may, therefore, be misleading, and I disregard it."

The judges of the Trinidad Court of Appeal did have the new English O. 5 before them, as the report itself shows, but, in any event, whether they did or did not, those rules had nothing to do with the established principle which was being affirmed, as the practice of common law in utilising motions for movement to the courts. Rules of Court are not static; they are always being subjected to the buffets of change. Although O. 5 r. 5 in 1962 may have changed the scope of the use of motions in England previously obtaining, it certainly cannot nor did affect or change the rule of practice at common-law. Well established rules at common-law are of an enduring character; and, their permanency is not easily dislodged. The English common law practice of originating motion was found to be pertinent for use in Trinidad in the context of their Constitution as, indeed, it appears to me, to be most appropriate, in this country, for ours. Rules of Court may supersede the common-law, but they cannot and do not pretend to alter the substance of what the common-law settles, at practice or otherwise.

When BOLLERS, C.J., held that originating motion did not fall within any of the excepted categories of O.2, he concluded that the mode of procedure under the order was by action to be commenced by writ of summons. With the greatest respect, I cannot comprehend how the true purpose of making applications under art. 19 could be served by commencing such proceedings by writ of summons.

That article was in effect establishing a new jurisdiction in a different sphere of legal movement; its set purpose will never be appreciated until the limitation appearing in the proviso to art. 19(2) sets in relief and underscores its dominant features. It provides:

"That the High Court shall not exercise its powers under this paragraph, if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."

It would then appear that manifest requisites within the framework of this special original jurisdiction, would be easy and ready access to the courts; swift, adequate and imperative remedies to applicants deserving of such grants; due observance of the necessity to avoid delays where urgency is

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written over the face of the application; and an unremitting zeal to preserve the letter and spirit of what was intended to be protected.

An action appears to me to be the very antithesis of the procedure here contemplated. It would be ill-tuned to serve the real needs of art. 19, if it is not incongruous, cumbersome and inconvenient.

If and when a court is satisfied that adequate means of redress are available under any other law, it will decline to use its powers when summarily approached, and leave the applicant to seek his remedy in the ordinary way. Until then, it would be a strange and repellent doctrine to say that approaches to the court under that article should be by action in the normal way.

I have already referred to s. 6 of the Constitution of Trinidad & Tobago (similar to art. 19). In an application under that section Learie Collymore and John Abraham applied for redress under provisions of that Constitution which guarantee certain freedoms. The Attorney General was named as respondent. The applicants sought a declaration from the High Court of Trinidad that the Industrial Stabilisation Act, 1965, was *ultra vires* the Constitution and therefore null and void and of no effect. They did so under the facility of s. 6.

Sir HUGH WOODING, C.J., in the course of his judgment in the Court of Appeal said that the applicants were entitled to proceed under that section for the declaration which was sought, and held that the Supreme Court as the guardian of the Constitution was not only competent, but under a right and duty to make binding declarations, if and whenever warranted, that an Act of Parliament was *ultra vires* and therefore void, because it infringed rights and freedoms recognised and declared under the Constitution.

What was very significant in that case was that the application was made by moving the court for that declaration.

I am in no doubt that if a declaration was desired in the instant case the court could similarly have been moved under the facility of art. 19 of the Constitution, subject to the enforcement of the limitation under art. 19 (2) if warranted under the circumstances.

It has been said that judges have a power necessarily inherent in all courts to make rules for the regulation of their practice, and that the adoption of analogous practices or even the resort to moulding forms of procedures may be justified. But it is not necessary to consider these aspects in view of the opinion I have expressed that a form and method of procedure not only existed at common law; but was preserved and remained in force; and was called into service by O. 2 of our rules; and was so used in this case.

To say that a claim for an injunction will generally be granted only after a writ of summons has been issued, as the learned Chief Justice did after reference to 32 Halsbury's Laws, pp. 410 – 414, is to state what is in-

disputable under ordinary law; but which is infeasible under art. 19 of the Constitution (subject to the proviso).

The essential stamp of that original jurisdiction predicates an application for an action; a motion for a writ; and ready redress for fundamental rights, unavailable at "other law", according to actually known remedies, or those added by Parliament.

Injunctions, as remedies, serve this jurisdiction equally well in the manner contemplated by art. 19 of the Constitution as it does at ordinary law through the process of action commenced by writ. That article would certainly lose its momentum and vitality if it were to be geared to the slower machinery of "other law" unless time is not of the essence of the procedure.

If one were to test this matter in another way, the same result would ensue. It cannot be questioned that the prerogative writs are available as remedies under art. 19. They were indeed extraordinary and extensive in their scope and efficacy. But no one will think of making an application for one of these writs by action because in their nature and concept historically they arose in a different way. The common law regarded the Sovereign as the source or fountain of justice and the remedial processes of these prerogative writs were from the earliest times issued from the Court of Queen's Bench only upon cause shown, as distinct from the original or judicial writs which commenced suits between party and party and which issued as of course. If any of these prerogative writs be required, whether in defence of the freedom of the subject or to compel some person to do some act in justification of the applicant's rights, the court would have to be moved in the accepted way known to law. It would be unthinkable to harness such requests to an action.

I am fully satisfied that the learned Chief Justice was in error in dismissing the application because it was commenced by originating motion. The procedure was correctly conceived; was permitted by our Rule of Court as a way of practice at common law and was wholly authorised.

If that was the only question for decision, then the motion must be remitted for hearing on its merits, but the High Court's jurisdiction to grant coercive remedies, unanswered as it is, must now receive scrutiny.

In considering this aspect, I will not forget that the court is the custodian and guardian of the Constitution, seeking as it must at all times to prevent encroachment on or violation of the liege's rights, to the depths of its power, be it against Government, or, Legislature.

It was the argument of the Solicitor General that, as against the Government, the appellant could only proceed by action for a declaratory judgment which would be acknowledged and respected. He further contended that as the Roads Ordinance under which the land was to be used had not provided for compensation (and was saved by art. 18), only an *ex gratia* payment could be expected.

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Before considering the question of the jurisdiction to grant the remedies asked for, I hope I may be pardoned for attempting to look briefly at what is open to a subject who alleges that he is aggrieved, as in the circumstances of this case and wishes to stand on his rights.

Under s. 46(2) of the Supreme Court Ordinance, Cap. 7,

“All claims against the Government of the Colony which are of the same nature as claims which may be preferred against the Crown in England by petition, manifestation, or plea of right, may, with the consent of the Governor, be brought in the court, in a suit instituted by the claimant as plaintiff against the Attorney General as defendant, or any other officer authorised by law, or from time to time designated for that purpose by the Governor.”

Under s. 47(1) the fiat of the Governor is required before the claim “shall be prosecuted in the Court”.

It must be borne in mind that a petition of right, unlike a petition addressed to the grace and favour of the Sovereign, is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained. It follows that a petition of right which complains of a tortious act done by the Crown or by a public servant by the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress. But the subject may not be without remedy when illegal acts are committed by a Minister or officer of the Crown who may be responsible in law for their tortious acts done to a fellow subject. (See *Feather v. The Queen*, (1865) 6 B. & S. at p. 296).

The subject, then, under the ordinary law faces two problems: (1) he must obtain a fiat in those matters under s. 46(2) of Cap. 7; (2) he cannot sue in tort. The first is of no real practical significance. The fiat is to ensure that the Crown is not harassed by a frivolous claim, and will be granted as a matter of invariable grace by the Crown whenever there is a shadow of claim. The latter, in prohibiting any advance to the courts where tortious acts are under complaint, may create a serious hardship on the subject. This unsatisfactory situation was remedied in England by the Crown Proceedings Act, 1947, which in effect assimilated proceedings against the Crown to ordinary litigation between citizens. In the trend of today's enlightenment it may not be amiss for me to say that perhaps the time is more than ripe for similar legislation to be introduced in this country so that the subject may not feel the disadvantages of his legal position (particularly in the field of tort) against the Crown which has really been allowed to survive for much too long.

The principle of the immunity of the Crown from proceedings in tort has been described as a “startling principle unique among civilised people”. (See Allen's Law and Order, p. 256). In England after a Committee set up by

the Lord Chancellor had reported in 1927 that the Crown should be made "liable for any wrongful act done, or any neglect or default committed, by an officer of the Crown in the same manner and to the same extent as that in and to which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed, by his agent", it was the pointed denunciation which came from the courts which led nearly twenty years afterwards to the Crown Proceedings Act in 1947. Many years ago an abortive attempt was made in this country to introduce this measure. Perhaps Parliament may now be more receptive.

However, where constitutional rights are infringed by tortious acts remedies would exist under art. 19 as the Constitution recognises contraventions, however occurring, subject only to limitations accepted by the Constitution itself.

When one looks at art. 8(1), it is forbidden to compulsorily take property except all of the following conditions are fulfilled:

- (1) the taking is authorised under a written law,
- (2) that law provides for the prompt payment of adequate compensation; and
- (3) also provides for a right of access to the High Court for determination of the owner's interest in the land and the amount of compensation which should be paid.

The Roads Ordinance makes no provision for (2) and (3) and so the right to take or use the land has not been fully met by the requirements of that article; but that Ordinance, argues the Solicitor General is saved by art. 18(1) of the Constitution and nothing contained in or done under the authority of that law shall be held to be inconsistent with or in contravention of any provision of articles 1 to 15, inclusive.

I would only wish to comment that it does not follow that because the Roads Ordinance makes no provision for compensation, that this means that no compensation is payable (this apart from any constitutional issue).

That classic and much quoted passage in the speech of Lord WARINGTON of Clyffe in *Colonial Sugar Refining Co., Ltd. v. Melbourne Harbour Trust Commissioners*, [1927] A.C. 343 at p. 359, draws attention to

"the well-known principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms."

A clear intention that there is no liability to pay compensation does not appear in that Ordinance. In the negative state of that Ordinance an inference ought not to be drawn to frustrate fundamental rights which are guaranteed by the Constitution.

If the appellant's constitutional rights then have been contravened, what are her remedies?

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Injunction apart, the prerogative writs loom readily afore where ordinary legal remedies are inapplicable or inadequate. Mandamus, as the writ of the most extensive remedial nature, requiring a person to do something which appertains to his office, in the nature of a public duty, would naturally command most attention. It will issue to the end that justice may be done, in cases where there is a specific legal right, and no specific legal remedy for enforcing that right. It aims at producing a convenient, beneficial and effectual mode of redress. It may even issue to Government officials in their capacity as public officers exercising executive duties which affected the rights of private persons. This order, then, must be counted of great value in the service of constitutional remedies. Together with the restraining order of an injunction – if they legally fit' into the facts and circumstances – there could be no better means of protecting and enforcing the constitutional rights of the subject, but the key-note will be: Who is to be restrained? Who is to be commanded to do what is required to provide the remedy? These are anxious and vital questions to be answered when making the application.

If a court could be persuaded that a public officer is sufficiently required to discharge a duty in law to the applicant under circumstances in which this writ will issue, there can be little doubt as to its efficacy and desirability.

Two recent cases will illustrate the lengths to which mandamus could be taken, and its potential as a remedy. In *Padfield & Others v. Minister of Fisheries & Food and Others*, (Times, 15th February, 1968):

“To get the Minister to take action under the Agricultural Marketing Act, 1958, the appellants approached him and met Ministry officials on April 30, 1964. The outcome was unsatisfactory to them, and on January 4, 1965, their solicitors made a formal complaint to the Minister and asked that it be referred to the committee of investigation, the nature of the complaint being that the Board's acts and omissions were (a) contrary to the proper and reasonable interests of the south-eastern and other producers near large liquid markets, and (b) were not in the public interest.

To that the Minister's private secretary replied by letter in March and May, 1965, stating *inter alia*, that in the Minister's view the complaint was unsuitable for investigation because it raised wide issues going beyond the immediate concern of the appellants; that the issue was of a kind which should be resolved through arrangements available to producers and the Board within the scheme; that under the Act the Minister had unfettered discretion to decide whether or not to refer a particular complaint to the committee of investigation, and that in reaching his decision he had in mind the normal democratic machinery of the scheme in which all registered producers participated and which governed the Board's operations.

The appellants thereupon applied for an order of mandamus commanding the Minister to refer the complaint to the committee of investigation.

At issue were the nature and extent of the Minister's duty under section 19 (3) (b) in deciding whether to refer to the committee a complaint as to the operation of any scheme made by persons adversely affected by it.

It was implicit in the argument for the Minister that there were only two possible interpretations to the statutory provision: either he must refer every complaint or he had an unfettered discretion to refuse to refer in any case. His Lordship did not think that was right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, which had to be determined by construing the Act as a whole; and construction was always a matter of law for the court".

"Then it was said that the Minister owed no duty to producers in any particular region, and reference was made to the 'status of the milk marketing scheme as an instrument for the self-government of the industry' and to the Minister 'assuming an inappropriate degree of responsibility'. But the Act imposed on the Minister a responsibility whenever there was a relevant and substantial complaint that the Board were acting against the public interest.

His Lordship could find nothing in the Act to limit that responsibility or justify the statement that the Minister owed no duty to producers in a particular region. If the Board acted contrary to what both the committee and the Minister held to be the public interest, the Minister had a duty to act, and a complaint that the Board had so acted imposed a duty on him to have it investigated.

As to the reason that if the committee upheld the complaint the Minister would be expected to make a statutory order to give effect to the committee's recommendations, if that meant that the Minister could refuse to refer a complaint because if he did so he might find himself in an embarrassing situation, that would plainly be a bad reason.

It was argued that the Minister was not bound to give any reasons for refusing to refer a complaint to the committee, in which case his decision could not be questioned, and that it would be unfortunate if giving reasons put him in a worse position. His Lordship did not agree that a decision could not be questioned if no reasons were given. If it was the Minister's duty not to act so as to frustrate the policy and objects of the Act, and it appeared that that had been the effect of the refusal, the court must be entitled to act."

The House of Lords by a majority held that an order of mandamus should issue to the Minister of Agriculture requiring him to consider a complaint by the minority of milk producers against the working of the Milk

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Marketing Board Scheme and to refer the complaint to the committee for investigation, in exercise of the discretion conferred on him by s. 19 of the Agricultural Marketing Act, 1958.

In *R. v. Metropolitan Police Commissioner Ex Parte Blackburn*. [1968] 1 All E.R. 763, a mandamus was sought against the Commissioner of Police to reverse a policy decision given in a confidential instruction. It was held that the present instance was one in which the court would have interfered in appropriate proceedings, but for the fact that the applicant had obtained, by reason of the undertaking given to the court, the substance of the relief that he sought, that is, that the confidential instruction would be revoked.

It was the duty of the Commissioner to enforce the law. The court would interfere in respect of a policy decision amounting to a failure of duty to enforce the law of the land.

DAVIES, L.J., at p. 777 said:

“In particular, it would follow that the Commissioner would be under no duty (if he followed his confidential instructions) to prosecute any one for breaches of the Gaming Acts, no matter how flagrantly or persistently they were defied. Can that be right? Is our much vaunted legal system in truth so anaemic that, in the last resort, it would be powerless against those who, having been appointed to enforce it, merely cocked a snook at it?”

But, it is not alleged in this motion that the Attorney General was under any statutory duty to discharge any particular obligation. He was brought into the picture for no other reason than that as Attorney General he was the most suitable officer to represent the Government. Now coercive orders are desired against a person wholly innocent of the facts presented, which, if made, could lead to attachment, if disobeyed.

Does the court then have jurisdiction to do so?

Mr. Haynes repeated the argument of Dr. Ramsahoye before the learned Chief Justice – that the coercive remedies sought must be available against the State, otherwise fundamental rights would be valueless. He submitted that art. 19 gave special relief and provided a special remedy. That the special remedy he required here was to prevent the Crown from oppressing the subject by using his land without payment of prompt or agreed compensation.

The common law, in the development of the prerogative writ of mandamus, never went as far as to say that it could be invoked against the Crown. As no court can compel the Sovereign to perform any duty no order of mandamus would be to the Crown. Lord DENMAN said in *R. v. Powell*, (1841) 1 Q.B. 352 at p. 361:

“That there can be no mandamus to the Sovereign, there can be no doubt, both because there would be an incongruity in the Queen commanding herself to do an act and also because disobedience to the writ of mandamus is to be enforced by attachment.”

(See also *R. v. Treasury Lords Commissioners* (1872) L.R. 7 Q.B. at p. 394 – per COCKBURN, C.J.)

For like reasons also, an injunction cannot be granted against the Crown.

In *Raleigh v. Goschen*, (1897) 1 Ch. 973:

“The plaintiffs commenced an action against the Lords of the Admiralty with the object of establishing as against them that they were not entitled to enter upon, or acquire by way of compulsory purchase, certain land, the property of the plaintiffs, for the purpose of erecting thereon a training college for naval cadets, and claiming damages for alleged trespass and an injunction to restrain further trespass:

Held, that though the plaintiffs could sue any of the defendants individually for trespasses committed or threatened by them, they could not sue them as an official body, and that as the action was a claim against the defendants in their official capacity, it was misconceived and would not lie; leave to amend by suing the defendants in their individual capacity, and by adding as defendants the persons who had actually trespassed on the land, was also refused, and the action was dismissed with costs.”

It should be observed that in the pleadings in that case the defendants were treated as an official body – that is to say, as a body representing the Crown or Government, or as responsible for the acts of all officials or persons acting or purporting to act on behalf of the Crown, or the Government, or of the Admiralty.

In England even under the Crown Proceedings Act, 1947, which did so much to extend the common law rights of the subject against the Crown, the injunction is not permitted to be issued against the Crown.

Neither common law nor statute law sanctions the grant of the remedies of mandamus or injunction against the Crown. Does that power then lie under art. 19?

Orders, writs and directions there referred to could only be, and mean, what is recognised, accepted and practised and enforced by the law as we know it. In these separate categories of orders, writs and directions, the sanction of the law must prevail. There is no arbitrary right to distribute remedies according to any judicial whim or fancy without regard for the vital question, as to whether those remedies are known to law.

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It is perhaps consoling, however, to reflect that the reservoir of judicial power under art. 19 is not at its maximum level. What is there available may well be insufficient to truly dispense justice and fully meet the needs and requirements of the Constitution if its high ideals are to be preserved. This, nevertheless, does not create a licence for the assumption of power neither given to, nor possessed, by the courts.

The Constitution itself acknowledges that there may be a deficiency in the supply of existing judicial power which ought to be augmented or supplemented to meet the exigencies of situations.

Under art. 19(5) it is provided that –

“Parliament may confer upon the High Court such powers in addition to those conferred by this article as may appear to Parliament to be necessary or desirable for the purpose of enabling the High Court more effectively to exercise the jurisdiction conferred upon it by this article.”

Any such additional powers may in time give to the courts powers to devise, fashion or invent writs in the nature of prerogative writs or to issue processes against the Government etc., or to enlarge the scope of existing remedies. The greater the judicial power the more effective will be the safeguard of constitutional rights, but until Parliament in its wisdom chooses so to do, rights may be there but remedies may be wanting.

Although a court may declare or assess damages against the Government under the law as it now stands, the element of coercive force is lacking. The State in effect is the judge in its own cause and cannot exercise constraint against itself.

The Attorney General cannot be restrained or compelled to act in terms of the remedies sought.

The ingenuity of approach in other ways may achieve similar results, but that will be for counsel to explore.

When applications are made, great care ought to be taken to ensure that what is asked for is within the competence of the court to grant.

The Constitution does not authorise the use of writs, orders or directions unknown to law, or, if known, to be used in a manner unauthorised by law.

I must therefore hold that there is no jurisdiction in the High Court to grant the remedy of injunction or other coercive remedy against the Government through the Attorney General, which was clearly what was asked for, and which counsel at first instance and on appeal said he wanted.

In the result: I would dismiss the appeal for want of jurisdiction, and, on the motion for the High Court to grant the remedy of injunction or other

coercive remedy against the Government of Guyana, I hold, nonetheless, that the application was properly brought by way of originating motion and that the learned Chief Justice was in error in ruling that this procedure was wrong.

The appellant will be entitled to half of her costs in the court below certified fit for counsel, and each party will bear its own costs in this court.

CUMMINGS, J.A.: This is an appeal from a judgment of the Chief Justice of the High Court dismissing an application by way of originating motion to that court for the following orders, that:

- (1) The Government of Guyana be restrained from commencing or continuing road building operations either by themselves or by persons employed by them for that purpose on a piece of land, part of the northern portion of Plantation Soesdyke, Demerara River, the property of the applicant (appellant), unless and until adequate compensation in the sum of \$250,000.00 (two hundred and fifty thousand dollars) or such other sum as the court may consider just is paid to the applicant in respect of the compulsory acquisition by the Government of Guyana of part of the said property.
- (2) A survey be undertaken on behalf of the applicant and the Government of Guyana jointly of crops growing on the said property and being part of the assets of the estate of the said WILLIAM ARNOLD JAUNDOO, deceased, with the right of the representatives of the applicant and the Government of Guyana to submit separate reports to the court.
- (3) Payment be made by the Government of Guyana to the applicant promptly of such compensation as may be assessed by the court in respect of the compulsory acquisition of the said land.
- (4) Such further or other orders and/or directions as the court may make or give to enable the applicant to be promptly paid adequate compensation in respect of that part of the aforesaid property being compulsorily acquired by the Government of Guyana and before any evidence of crops or other assets on the said property is destroyed by road building operations.
- (5) The Government of Guyana do pay to the applicant her costs of this motion.

The motion is intituled as follows:

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“IN THE HIGH COURT OF THE SUPREME COURT OF
JUDICATURE
(CIVIL JURISDICTION)

In the matter of an application by Olive Casey Jaundoo, in her capacity as Executrix of the Estate of William Arnold Jaundoo, deceased, Probate whereof was granted by the High Court on the 17th day of November, 1965, and numbered 613,

– and –

In the matter of Articles 8 and 19 of the Constitution of Guyana,

– and –

In the matter of the Rules of court, 1955.”

In her affidavit filed in support of the motion the appellant (applicant) set out facts which she claimed amount to violations of her fundamental rights by the Government of Guyana and/or its servants and/or agents. She further swore that she had been advised and verily believed that she had no means of redress other than to invoke the powers of the High Court in pursuance of art. 19 of the Constitution of Guyana.

Affidavits in answer and in reply to the answer were filed and served upon the appellant (applicant) and respondent (respondent), respectively, between the 21st and 27th July, 1966, and the matter came on for hearing on the 28th July, 1966.

At the hearing the respondent objected *in limine* that the proceedings were misconceived and should have been by writ of summons in accordance with O. 3 r. 1 of the Rules of the Supreme Court, 1955, which were adapted to the High Court by virtue of the provisions of the Guyana Independence (Adaptation and Modification of Laws) (Judicature) Order, 1966.

The learned Chief Justice in the course of his judgment upholding the objection said:

“Without presuming to enquire into the submission of counsel for the applicant that on a writ no coercive order by way of an injunction or otherwise can be made against the Crown because the Queen cannot be coerced in her own courts and all that the individual can obtain is a declaratory judgment against the Crown,. I am of the view that the procedure adopted by way of notice of originating motion must be justified by the Rules of the Supreme Court and the applicant

must show affirmatively that such proceedings are within his competence. This the applicant has failed to do and I therefore cannot entertain the application. I have reached the conclusion that the application by way of notice of originating motion is wholly misconceived and is neither prescribed nor permitted by any statute or rule of court or by the Rules of the Supreme Court or at common law and altogether unauthorised, and that the applicant is not entitled to apply to this court by that means for the redress claimed and accordingly the motion must be dismissed with costs to the respondents fit for counsel."

The appellant appeals on numerous grounds but these can all be conveniently summarised into two questions for answer by this court:

- (i) does art. 19 of the Constitution of Guyana – hereinafter in this judgment referred to as "The Constitution" – confer a new jurisdiction in the High Court with respect to the enforcement of fundamental rights?
- (ii) if so, what procedure did the Legislature contemplate for the invocation of the exercise of this new jurisdiction by the High Court?

It should be observed at the outset that all that this court is now called upon to consider are those two questions. Nothing else was argued before the learned trial Judge and no other point now arises for the consideration of this court.

Counsel for the appellant submitted that –

- (a) art. 19 confers a new jurisdiction on the High Court for the enforcement of fundamental rights and expressly provides for this purpose a special procedure for the invocation of the court's exercise of this jurisdiction. The complaining citizen must "apply" to the court. Not only does that language permit of procedure by motion, but it effected that it was imperative to do so in the circumstances, as the proper mode of application to the Court where no statute or rule lays down the procedure is by way of motion;
- (b) the entire context of art. 19 imports that procedure should not be the way of writ of summons, at any rate where the party violating or threatening the violation is the Government;
- (c) the Rules of Court, 1955, were not applicable, but even if they were, O. 2 not only permitted application by way of motion but rendered adoption of this procedure imperative.

The Solicitor General, on behalf of the respondent, contends:

(a) From time to time the Legislature creates new rights and new legislation but enforcement of these always falls to be exercised by the court within its normal jurisdiction and within its normal practice and procedure.

O. 2 of the Rules of the Supreme Court, 1955, provides:

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

O. 3 r. 1 provides:

“Every action shall be commenced by a writ of summons, to be issued out of the Registry, which shall be indorsed with a statement of the nature of the claim made or of the relief or remedy required in the action.”

Consequently, these proceedings should have been commenced by writ of summons.

(b) The reference in O. 2 to “the common law of the colony” is not an implied reference to the common law of England but rather to the original common law of British Guiana, that is the Roman-Dutch law which was in force in this country when this provision was first introduced in identical terms by O. 2 of the Rules of Court, 1910, which amended the Rules of Court, 1900; and consequently the rulemaking body *ipso facto* intended a reference to that law. So that, in the alternative, if proceedings were not to be commenced by writ of summons recourse should be had to some form of Roman-Dutch procedure.

(c) If the Rules of the Supreme Court, 1955, are inapplicable, then the matter is not at large; the court must refer to the basic law governing the Supreme Court and its practice and procedure as set out in s. 44(1)(a) of the Supreme Court Ordinance, Cap. 7, which provides that “where no provision is made by this Ordinance, by Rules of Court or by any other statute, the existing practice and procedure shall remain in force.” This section was in the original Ordinance of 12th March, 1915, and was consequently expressly saved by s. 3 of the Civil Law Ordinance, Cap. 2, which provided as follows:

“From and after the date aforesaid save as provided by any Act of the Imperial Parliament now or hereafter applying to the Colony, or by any order of Her Majesty in Council, or by this Ordinance, or by any other Ordinance of the Legislative Council now or at any time hereafter in force, or by any order of the Governor in Council made in pursuance of any statute, or of any other lawful authority.

(A) The law of the Colony . . . shall cease to be Roman-Dutch law, and as regards all matters arising and all rights acquired or accru-

ing after the date aforesaid, the Roman-Dutch law shall cease to apply to the Colony.”

Hence the procedure to be adopted with respect to this application should be Roman-Dutch.

The answers to the question – mentioned and referred to earlier herein – raised for the consideration of the court in this appeal must depend upon the construction to be put upon the provisions of the Constitution dealing with the fundamental rights.

The general rules adopted for construing a written Constitution embodied in a statute are the same as for construing any other statute or other written document – per GRIFFITH, C.J., in *Tasmania v. Commonwealth*, [1904] 1 C.L.R. 329 at pp. 338, 339.

In *Salkeld v. Johnson*, (1848) 2 Ex. 256, a case sent by the Lord Chancellor to the judges of the Court of Exchequer for their opinion, Chief Baron POLLOCK, delivering the opinion of the court (Barons Parke, Anderson and Platt concurring) said at p. 272:

“This question depends upon the construction of this Act, which unfortunately has been so penned as to give rise to a remarkable difference of opinion among the judges . . . We propose to construe the Act, according to the legal rules for the interpretation of statutes, principally by the words of the statute itself, which we are to read in their ordinary sense, and only to modify or alter so far as it may be necessary to avoid some manifest absurdity or incongruity, but no further. It is proper also to consider (1) the state of the law which it proposes or purports to alter; (2) the mischief which existed, and which it was intended to remedy; and (3) the nature of the remedy provided, and then to look at the statutes *in pari materia* as a means of explaining this statute. These are the proper modes of ascertaining the intention of the legislature.”

With great respect and humility, I adopt these pronouncements as accurate statements of the law and now proceed accordingly.

Chapter II of the Constitution deals with the “Protection of Fundamental Rights and Freedom of the Individual”. They are declared in art. 3 and protected by art. 4 –15. Art. 16 provides for time of war and emergency. Art. 17 provides for reference to a tribunal in cases of detention referred to in art. 16(2) Art. 18 saves existing laws and disciplinary laws, and art. 19 provides as follows:

“(1) Subject to the provisions of para. (6) of this article, if any person alleges that any of the provisions of arts. 4 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the

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same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

- (2) The High Court shall have original jurisdiction –
 - (a) to hear and determine any application made by any person in pursuance of the preceding paragraph;
 - (b) to determine any question arising in the case of any person which is referred to it in pursuance of the next following paragraph,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of arts. 4 to 17 (inclusive) of this Constitution:

Provided that the High Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.”

The language used describes the rights as fundamental. What, then, is the nature of this right called “fundamental right”? First of all, a legal right is one which is enforceable in the courts of law. It is protected and enforced by the ordinary law of the land. A fundamental right, however, is one which is expressly protected and guaranteed by the written organic law of a State; that is, the Constitution. It is termed “fundamental” because, unlike an ordinary right which may be changed by the Legislature in its ordinary powers of legislation, it cannot, because it is guaranteed by the Constitution, be altered by any process other than that required for amending the Constitution itself. Nor can it be suspended or abridged except in the manner laid down in the Constitution itself.

The existence of such a guarantee precludes any organ of the State – executive, legislative or judicial – from acting in contravention of such rights, and any purported State act which is repugnant to them must be void. The Constitution being the supreme organic law of the land, the powers of all the organs of Government are limited by its provisions.

There could be no justification for such a classification of these rights if they can be overridden by the Legislature and so become ineffective. In order to vest them with reality and meaning, there must then be some authority under the Constitution empowered to pronounce a law or other State act invalid where it contravenes or violates any of them directly or indirectly; and to make effective without delay, orders for the prevention of their violation or immediate restoration where they have been actually violated. In my view, that authority, under the Constitution of the U.S.A., India and Guyana, is the court. Without an authority so empowered, the declarations and protective provisions under reference would be “like unto a

tale told by an idiot, full of sound and fury signifying nothing” – *brutum fulmen*. It is really the enforceability of the constitutional guarantee that gives life and meaning to the right. Professor Dicey’s comment that the prerogative writs “are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty” is indeed germane to the topic. Consequently, the extraordinary nature of the right must be paramount in the process of the construction of art. 19 which deals with the nature of the remedy intended.

While it is true that prior to the coming into force of the Constitution of Guyana, the courts in Guyana, like those in England, had full power to protect the individual against executive tyranny through the prerogative writs of *mandamus*, *certiorari*, *prohibition* and *quo warranto* – as Lord ATKIN succinctly put it in delivering the opinion of the Judicial Committee of the Privy Council in *Eshugbayin v. Government of Nigeria*, [1931] L.J.R. p. 152 at p. 157.

“. . . No member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice.” –

They were powerless against legislative aggression upon individual rights. In short, there were no fundamental rights binding on Parliament.

In *Lee v. Bude Co.*, (1870) L.R. 6 C.P. 577 at p. 582, WILLES, J., stated the law as follows:

“Acts of Parliament are laws’ of the land and we do not sit as a Court of Appeal from Parliament . . . If any act of Parliament has been obtained improperly, it is for the Legislature to correct it by repealing it, but so long as it exists as law the courts are bound to obey it.”

And in *Leversidge v. Anderson*, [1942] A.C. p. 246, Lord WRIGHT said in his speech in the House of Lords:

“All the courts today, and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law . . . It is in Burke’s words ‘a regulated freedom’. . . In the constitution of this country there are no guaranteed or absolute civil rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has evolved.”

It was therefore the sagacity of Parliament itself, at the back of which lies what is often called the political genius of the English people – that which enables them to hold the “just balance between power and liberty” which protected individual liberty against the inroads of the omnipotent Parliament.

In Guyana (then British Guiana) the Legislature had since 1928 power to make laws for the “peace, order and good government of the Colony”, but His Majesty expressly reserved to himself and his heirs and successors

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“their undoubted right and authority to confirm, disallow or with the advice of his or their Privy Council to revoke or amend any such laws, and to make, enact and establish, from time to time with the advice of his or their Privy Council, all such laws as may to him or them appear necessary for the peace, order and good government of the Colony.” This had the effect of safeguarding against legislative inroads upon the freedom of the individual contrary to the concepts known to and accepted by the British Parliament. In other words, it was an indirect projection of that ability to hold the “just balance between power and liberty” into the Colonial Legislature.

Although the British Guiana (Constitution) Order in Council, 1953, purported to confer a form of self-government on the territory, the same royal reservations and powers of disallowance were therein preserved. These were further preserved by virtue of the provisions of the British Guiana (Constitution) (Temporary Provisions) Orders-in-Council, 1953, and 1956.

In legislating for a fully self-governing territory, however, Parliament enacted through the machinery of Her Majesty’s Order-in-Council, styled the Guyana Independence Order, 1966, the Constitution of Guyana, which by art. 72 conferred upon the Parliament of Guyana power, subject to the provisions of the Constitution, to make laws for the peace, order and good government of Guyana; and abrogated Her Majesty’s powers of reservation, revocation and disallowance of the enactments of the Guyana Parliament, substituting therefor the assent of the Governor-General on behalf of Her Majesty. This assent, however, was to be in accord with the advice of the Cabinet or a minister acting under the general authority of the Cabinet. Thus, with the coming into force of the Constitution of Guyana, the British “political sagacity” to which Lord WRIGHT referred, would no longer project upon the enactments of the Parliament of Guyana.

Such, then, was the state of the law with regard to individual rights in Guyana upon the attainment of Independence.

History has revealed only too well the danger of unlimited power over individual rights and liberties.

In the American case of *Citizens’ Savings & Loan Association v. Topeka*, (1874) 20 Wall 655, Mr. Justice MILLER said at p. 662:

“It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognised no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power is after all but a despotism. It is true it is a despotism of the majority if you choose to call it so, but it is none the less despotism.”

And Mr. Justice JACKSON said in *Board of Education v. Barrette*. (1943) 319 U.S. 624:

“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . and to establish them as legal principles to be applied by the Courts. One’s right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to the vote; they depend on the outcome of no elections.”

In *Fletcher v. Peck*, (1810) 6 Cr. 87, the Court observed that –

“It is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment, and that the people of the United States in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed.”

The British Parliament, even if not actually aware of these American judicial pronouncements, must be deemed to have been, and in any event must also be presumed to have appreciated the state of the existing law in Guyana and the consequent necessity for the avoidance of the possibility of a despotism. In other words, the mischief and defect for which the existing law would not have provided after the withdrawal of the reserved powers was a realistic safeguard for the avoidance of legislative inroads on the freedom of the individual.

“What,” then, “was the remedy the Parliament had resolved and appointed to cure this disease of the commonwealth?” In this case it was to prevent, not to cure.

On December 10, 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights and proclaimed it as

“a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Members States themselves and among the peoples of territories under their jurisdiction.”

Then followed the articles which are faithfully adumbrated *mutatis mutandis* in Cap. II of the Constitution of Guyana. It is not without significance that art. 8 of the Declaration provided that –

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by Law.

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Great Britain was a signatory to this declaration.

In Burns Philip & Co. v. Nelson & Robertson, [1958] 1 Lloyd's Rep. 342, it was held by the High Court of Australia that where a particular enactment was ambiguous, it was permissible to refer to an international Convention.

Small wonder, then, that the remedy, the British Parliament resolved to avoid the possibility of the disease, was the enshrinement of a Bill of Rights in the Constitution of Guyana, buttressed, as it is, by an enforcement provisions which is itself relegated to the position of a fundamental right; for art. 19, like the other arts, in cap. II of the Constitution, is entrenched and cannot be altered except in accordance with the provisions of art. 73(3) (b) which provides as follows:

(3) A bill to alter any of the following provisions of this Constitution, that is to say –

(b) Cap. II . . . shall not be submitted to the Governor-General for his assent unless the Bill, not less than two nor more than six months after its passage through the National Assembly, has, in such manner as Parliament may prescribe, been submitted to the vote of the electors qualified to vote in an election and has been approved by a majority of the electors who vote on the Bill.

Provided that if the Bill does not alter any of the provisions mentioned in subparagraph (a) of this paragraph and is supported at the final voting in the Assembly by the votes of not less than two-thirds of all the elected members of the Assembly it shall not be necessary to submit the Bill to the vote of the electors.”

Nor should it be forgotten that the Constitution in its final form had received the consensus of the Government of Guyana before promulgation.

With that background in mind a detailed analysis of art. 19 is now indicated. The art. gives to the citizen a right to apply to the High Court for redress if there is in relation to him a contravention, actual or threatened, of a fundamental right. This is without prejudice to any other action lawfully available in respect of the same matter. In other words, although the ordinary remedy hitherto known by law is available to him, he may now resort to this extraordinary one. What would be extraordinary about this remedy if the Legislature intended that the aggrieved party should file an ordinary action by way of a writ of summons? As discussed earlier in this judgment, rights now declared as fundamental rights are not new to the Guyanese, but as in England they were only protected against executive action and the avoidance of inroads against legislative invasion was left to the good sense of the Legislature subject to the royal powers of reservation, revocation and disallowance. Now these latter are to be left to the good sense of the Guyanese people but subject to this new safeguard – remedies in the nature of the prerogative

writs for the curb of executive violation were now to appear with regard to legislative violation by virtue of the Court's new jurisdiction to make "such orders", give "such directions" as it "may consider appropriate for the purpose of the enforcement of any of the provisions" relating to fundamental rights.

Clearly such a power could not be effectively exercised by the lengthy procedure which inevitably resulted from recourse to an ordinary civil action.

The British Parliament in promulgating the Constitution of Guyana must have contemplated the immediate alerting of the Court to a threatened or actual violation of a fundamental right and the Court's immediate reaction, "now, whoever or whatever you are, show cause why!" In other words, the immediate issue of something in the nature of an order *nisi* returnable within the time contemplated by the Court to be reasonable, having regard to the nature of the threatened or actual violation. The entire context of art. 19 makes it clear that Parliament was consciously conferring a new jurisdiction on the High Court but realised that express rules did not exist for the exercise of this power – indeed, art. 19(6) enacts that –

"Parliament may make provision with respect to the practice and procedure –

- (a) of the High Court in relation to the jurisdiction and powers conferred upon it by or under this Article;
- (b) of the High Court and the Court of Appeal in relation to appeals to the Court of Appeal from decisions of the High Court in the exercise of such jurisdiction;
- (c) of subordinate courts in relation to references to the High Court under paragraph (3) of this article;

including provision with respect to the time within which any application, reference or appeal shall or may be made or brought; and, subject to any provision so made, provision may be made with respect to the matters aforesaid by rules of Court."

Moreover, art. 92(1) (b) enacts:

"(1) An appeal to the Court of Appeal shall lie as of right from decisions of the High Court in the following cases, that is to say –

- (b) final decisions given in exercise of the jurisdiction conferred on the High Court by art. 19 of this Constitution (which relates to the enforcement of fundamental rights and freedoms); and

When, therefore, consideration is given to the whole scheme of the legislation set out in the Constitution with respect to fundamental rights, it is clear that both the right and the remedy transcend the sphere of ordinary existing substantive and adjective law.

Bearing in mind that it must be speedy and effective, what, then, is the procedure to be adopted for the invocation of the Court's aid in the face of threatened or actual violation of a fundamental right?

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In Jowitt's Dictionary, "application" is defined as "a motion to a Court or Judge."

Tidd in his work on "*The Practice of the Courts of King's Bench and Common Pleas in Personal Actions and Ejectment*" at p. 478 states:

"The usual modes of applying to the Court are by motion or petition. A motion is an application to the Court, by counsel in the King's Bench, or a sergeant in the Common Pleas, for a rule or order; which is either granted or refused, and if granted, is either a rule absolute in the first instance, or only to show cause, or as it is commonly called, a rule *nisi*, that is, unless cause be shown to the contrary, which is afterwards on a subsequent motion made absolute or discharged. To use the words of an elegant writer on the constitution of England, 'The application to a Court by counsel is called a motion; and the order made by a Court on any motion when drawn into form by the officer is called a rule.' But besides the rules which are moved for in Court there are others made out by the officers as a matter of course, or drawn up on a motion paper signed by a counsel or sergeant."

In *Re Meister, Lucius & Bruning Ltd.*, [1914] 31 L.T. p. 28, WAR-RINGTON, J., said:

"I have no doubt myself that where an Act of Parliament says that an application may be made to the Court that application may be made by motion. In the Common Law Courts before the passing of the Judicature Act the only mode by which the Court was approached otherwise than by the issue of a writ was by a motion. In the High Court of Chancery it is quite true that the summary mode of proceeding was usually by petition, but I see no reason and I have spoken to all my brothers of this division except one, I think, whom I have not been able to see, and also the Master of the Rolls, and they all agree with me that in such a case as the present when the Act merely provides for an application and does not say in what form that application is to be made in any way in which the Court can be approached. Now there is no question about it that the Court can be, and frequently is, approached by originating motion."

Assuming that the Rules of Court, 1955, did apply, it is now quite clear from the discussion earlier in this judgment that the Legislature did not contemplate that an action was to be brought by way of writ of summons for the vindication of a fundamental right – actual or threatened; consequently it would be O 2 that would apply. Perhaps one example is sufficient to illustrate the state of the law between the period of the 1900 Rules of Court and the enactment of the 1955 Rules, and will no doubt assist in ascertainment of the intention of the rule-making body in this regard. In *Lewis v. Williams*, 19th April, 1909, General Jurisdiction, BERKLEY, J., in dealing

with points of procedure with regard to a specially endorsed writ, relied on the judgments of Lord COLERIDGE, C.J., in *Bikers v. Spaigat*, 22 Q.B. p. 7; COCKBURN, C.J., in *Walker v. Hicks*, 47 L.J. Q.B. p. 27: *The Annual Practice*, 1909 and *Bullen & Leak*, 5th ed., p. 82 – clearly indicating that it was to the English Rules for the administration of the English common law that our courts turned for guidance. Moreover, the Civil Law Ordinance of 1916 introduced the common law of England as the common law of this Country. Accordingly the Legislative history of O. 2, the state of the law at the time of its enactment, the presumption against inconvenience and absurdity renders untenable the Solicitor General's submission that the expression "common law of the Country" in O. 2 referred to the Roman-Dutch common law. In my view it clearly referred in that context to the common law of England.

The term "existing practice and procedure" in s. 44 (1) (a) of Cap. 7 received judicial interpretation in the case of *Coglan v. Vieira*, (1958) L.R.B.G. p. 108. That was an application for an order *nisi* for the prerogative writ of mandamus. By virtue of the introduction of the English common law into the Courts of British Guiana, the court had jurisdiction to make such an order. No local rule existed as to the practice and procedure and the English statute law had abrogated the common law prerogative writ and substituted an order in the nature of mandamus, for the obtaining of which new rules of practice and procedure had been set up. It was not, therefore, competent to invoke an English rule in accordance with O. 1 r. 3 of the 1955 Rules.

STOBY, J. (as he then was) had this to say at p. 120:

"I have said before that I do not agree with the proposition that O. 1 r. 3 is *ultra vires*. The fact that s. 44(1) of the Supreme Court Ordinance, Cap. 7, says that where no provision is made by Cap. 7 or rules of court or by any other statute, the existing practice and procedure shall remain in force, is no ground for saying that a rule of court cannot make the English Rules applicable. When the English rules become applicable provision is made and s. 44 no longer applies. But when the English rules are not applicable and when there is no local rule, then the existing practice and procedure become important. In *Cameron v. Chester* (supra) DUKE, J., ag., said this:

'As Sir Anthony DE FREITAS, C.J., delivering the judgment of the Full Court, said in *Fernandes v. da Silva*, (1927) L.R.B.G. 87,92:

"The jurisdiction of a Court may be exercised although no appropriate rules of procedure have been made."

'In *A.G. (Ontario) v. Dauly*, [1924] A.C. 1011, it was held by the Privy Council that there is power in a colonial Supreme Court (as in the High Court in England) to issue an order of mandamus to an inferior court, and that although no rules had been made regulating the method in which that power was to be exercised, that did not

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prevent the court from making full use of its powers. Where no rules 'of procedure have been prescribed, the judge will adopt whatever procedure is convenient and will give such directions as justice and commonsense alike call for."

Consequently, the procedure by motion to the court for the appropriate order, direction and/or writ is not only dictated by the language used, logic, commonsense and convenience, but is also supported by authority.

In delivering the opinion of the Judicial Committee of the Privy Council in *Webb v. Outrim*, [1906] A.C. p. 81, a case dealing with the Australian Constitution, the Earl of HALSBURY said at p. 88:

"No one could speak lightly of the authority of such a judge as Marshall, C.J., and, dealing with the same subject matter as that which that most learned and logical lawyer applied his observations, his judgment might well be accepted as conclusive. But as GRIFFITH, C.J., himself points out, 'we are not bound by the decisions of the Supreme Court of the United States' though, as the same learned judge says, further on in the same case, *D'Emden v. Pedder*, those decisions may be regarded as 'a most welcome aid and assistance.' "

and at p. 89:

"It is quite true, as observed by GRIFFITH, C.J., in the above-mentioned case of *D'Emden v. Pedder*, that: 'When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them.'"

I now refer to arts. 13, 32 and 226 of The Constitution of India and to the judicial interpretation put upon them by the Supreme Court of India:

"13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause, shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires –

(a) 'law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

- (b) 'laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

In *Gopalan v. State of Madras*, (1950) S.C.R. 88, KANIA, C.J., at p. 100 observed:

"The inclusion of art. 13(1) and (2) in the Constitution appears to be a matter of abundant caution. Even in their absence, if any of the fundamental rights was infringed by any legislative enactment, the Court has always the power to declare the enactment, to the extent it transgresses the limits, invalid. The existence of art. 13(1) and (2) in the Constitution therefore is not material for the decision of the question what fundamental right is given and to what extent it is permitted to be abridged by the Constitution itself."

In Guyana although articles similar to 13(1) and (2) do not appear in the Constitution, it has been held that the position with respect to art. 13(2) is the same. (vide *Lilleyman et al v. Attorney General*, [1964] L.R.B.G. p. 15.)

Arts. 32 and 226 of The Constitution of India provide the right to constitutional remedies for the actual or threatened violation of fundamental rights in the following terms:

"32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus* prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

and,

"226.(1) Notwithstanding anything in art. 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*,

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mandamus, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(1 A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(2) The power conferred on a High Court by clause (1) or clause (1A) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of art. 32.”

In *Gopalan's* case (*supra*). SHASTRI, J., said:

“ . . . the insertion of a declaration of Fundamental Rights in the forefront of the Constitution coupled with an express prohibition against legislative interference with these rights (Art. 13) and the provision of a constitutional sanction for the enforcement of such prohibition by means of a judicial review (Art. 32) is . . . a clear and emphatic indication that these rights are to be paramount to ordinary State-made laws.”

The words “in the nature of are pregnant with meaning. The Courts are not limited to the prerogative writs themselves.

On this article MUKERJEA, J., in *Chiranjit Lal v. Union of India*, S.C.J. 869, at p. 900, observed:

“Art. 32 gives us very wide discretion in the matter of framing our writs to suit the exigencies of particular cases, and the application of the petitioner cannot be thrown out simply on the ground that the proper writ has not been prayed for.”

And SHASTRI, J., (as he then was) in *Romesh Thappar v. State of Madras*, (1950) S.C.R. 594, at p. 596 et seq. said:

“That Article does not merely confer power on this Court, as Art. 226, does on the High Courts, to issue certain writs for the enforcement of the rights conferred by Part III or for any other purpose, as part of its general jurisdiction. In that case it would have been more appropriately placed among Arts. 131 to 139 which define that jurisdiction. Art. 32 provides a ‘guaranteed’ remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right by being included in Part III.

This Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility

so laid upon it, refuse to entertain applications seeking protection against infringements of such rights.”

In *State of Madras v. V. G. Row*, (1952) S.C.R. 597, his Lordship (SHASTRI, C.J.) in the same strain, observed at p. 605:

“Before proceeding to consider this question, we think it right to point out what is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution. If, then, the Courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader’s spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the ‘fundamental rights’, as to which this Court has been assigned the role of a sentinel on the *qui vive*.”

In *Dwarka v. I.T.O.*, (1966) S.C. 81, at p. 84:

“Art. 226 is couched in comprehensive phraseology and it *ex facie* confers a wide power on the High Court to reach injustice wherever it is found. A wide language in describing the nature of the power, the purposes for which and the person or authority against whom it can be exercised was designedly used by the Constitution. The High Court can issue writs in the nature of prerogative writs as understood in England, but the scope of those writs also is widened by the use of expression ‘nature’, which expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. The High Courts are enabled to mould the reliefs to meet the peculiar and complicated requirements of this country. To equate the scope of the power of the High Court under Art. 226 with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a Unitary form of Government to a vast country like India functioning under a federal structure. Such a construction would defeat the purpose of the article itself. But this does not mean that the High Courts can function arbitrarily under this article. There are some limitations implicit in the article and others may be evolved to direct the article through defined channels.”

In *T. C. Basappa v. T. Nagappa & Anor.*, (1954) S.C.R. at p. 250, MUKHERJEA, J., said at p. 255:

“As is well known, the issue of the prerogative writs, within which *certiorari* is included, had their origin in England in the King’s prerogative power of superintendence over the due observance of law by his officials and Tribunals. The writ of *certiorari* is so named because in its original form it required that the King should be ‘certified of the proceedings to be investigated and the object was to secure by the authority of a superior Court, that the jurisdiction of the inferior

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Tribunal should be properly exercised. These principles were transplanted to other parts of the King's dominions. In India, during the British days, the three chartered High Courts of Calcutta, Bombay and Madras were alone competent to issue writs and that too within specified limits and the power was not exercisable by the other High Courts at all. 'In that situation' as this Court observed in *Election Commission, India v. Saka Venkata Subba Rao*, (1953) S.C.R. 1144 at 1150, 'the makers of the Constitution having decided to provide for certain basic safeguards for the people in the new set up, which they called fundamental rights, evidently thought it necessary to provide also a quick and inexpensive remedy for the enforcement of such rights and, finding that the prerogative writs, which the Courts in England had developed and used whenever urgent necessity demanded immediate and decisive interposition, were peculiarly suited for the purpose, they conferred, in the States' sphere, new and wide powers on the High Courts of issuing directions, orders, or writs primarily for the enforcement of fundamental rights, the power to issue such directions 'for any other purpose' being also included with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of King's Bench in England.'

The language used in arts. 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or directions including writs in the nature of *habeas corpus*, *mandamus*, *quo warranto*, prohibition and *certiorari* as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well. In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed in particular cases by English Judges. We can make an order or issue a writ in the nature of *certiorari* in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

I am not unmindful that there are some differences in the wording of the Constitution of India but the effect produced is the same as that of the Guyana Constitution. Consequently I invoke, with great respect and humility, the aid of these judicial interpretations by the Indian Supreme Court of these provisions of the Indian Constitution which are *in pari materia* with the fundamental rights provisions of the Guyana Constitution. The effect of this, coupled with the results of the application herein of the other rules of construction to the interpretation of art. 19, lead to the inevitable conclusion that:

(a) Art. 19 conferred a new and extraordinary jurisdiction on the High Court of Guyana.

(b) The proper method of application to the Court for the exercise of this jurisdiction is by motion praying the issue of “such order”, “such writs”, “such directions” as the Court “may consider appropriate for the purpose of enforcing or securing the enforcement of this extraordinary right; and it is incumbent upon the Court so to do regardless of whether or not the applicant indicated in his prayer what form of writ, direction or order he desired.

Although full argument was not heard upon this aspect of the matter, there is, in my view, sufficient highly persuasive authority to establish beyond any doubt the view that the Courts have jurisdiction to order that the appropriate authority under the Roads Ordinance be joined as a defendant and restrained from continuation of the said works until compensation shall have been assessed in accordance with the provisions of the Public Lands Acquisition Ordinance, Cap. 179 – vide *Carlic v. The Queen and Minister of Manpower and Immigration*, (1968) 65 D.L.R. p. 633, and *Westminster Bank Ltd. v. Beverley Borough Council & Anor.*, reported in *The Times Newspaper* of 1st March, 1968, at p. 13.

The Court, however, although having jurisdiction, must, in exercising it, consider whether it is just and convenient to grant the injunction, and whether in the circumstances that is the appropriate remedy. There can be no doubt that the speedy implementation of Government’s road-building policy, as adumbrated in its road programme, is of paramount importance to the country’s economic development, and that the court, in exercising this jurisdiction, must take cognizance of this. But the works having been completed, the question of an injunction is now only of academic importance.

Government’s policy necessitated, and the Roads Ordinance justified, the acquisition of the appellant’s property. Government, therefore, had every right to take the property. But then the citizen has every right to seek the enforcement of his constitutional right to compensation therefor. The machinery for this purpose is provided by The Public Lands Acquisition Ordinance, Cap. 179. Were this matter to be dealt with on its merits, the court has jurisdiction to make an appropriate order – I emphasize that I consider it unnecessary to decide this point now – which may well be a direction for the joinder of the proper authority under the Roads Ordinance as a defendant in these proceedings and the issue of an order calling upon him to show cause why a writ of mandamus or an order in the nature of mandamus should not issue upon him to have the citizen’s compensation assessed in accordance with the provisions of the Public Lands Acquisition Ordinance, Cap. 179 and paid to the appellant. This court could also have made such an order were the merits of the matter before it.

No doubt art. 19 of the Constitution casts upon the Court a heavy responsibility and a difficult task, but this does not justify judicial abdication. “Fear must not lend wings to our feet.”

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I would allow this appeal, set aside the judgment of the learned trial Judge, order that the appellant should have her costs both here and in the Court below, and remit the matter to the learned trial Judge for hearing on its merits.

Appeal dismissed.

ALEXANDER DANIELS v. BABRA DANIELS

[High Court (Crane, J.) December 12, 1967, January 6, 1968.]

Procedure — Undefended divorce — Decree nisi — Summons by wife to set aside — Alleged trick by husband — Whether wife is a person permitted to make application to set aside decree — Matrimonial Causes Ordinance, Cap. 166, s. 12(1).

On October 2, 1967, the petitioner obtained a decree nisi in an undefended divorce suit. There was no appearance by the wife, respondent. She claimed, in a summon to set aside the decree, that she had omitted to defend the suit by what turned out to be a trick by her husband. More particularly, she stated that a few days before June 12, 1967, the date when the citation and petition were served, he had persuaded her to resume cohabitation, and after the petition had been served, he had instructed her to inform her lawyer that they had resolve their differences. She did so and about July 9, 1967 the conjugal state was resumed and sexual relations recommenced. It was not until October 18, that she learnt that a decree *nisi* had been pronounced, and she accordingly took out a summons to set it aside.

HELD: (i) there is no distinction between an application to set aside a decree *nisi* and one calling upon a petitioner to show cause why the decree should not be made absolute;

(ii) under s. 12(1) of the Matrimonial Causes Ordinance, Cap. 166, the respondent was not a person entitled to apply to show cause, and, therefore, she could not apply to have the decree set aside;

(iii) her proper course was to give the information at her disposal to the Attorney General, as the Queen's Proctor, for him to take such action as he considered appropriate.

Summons dismissed.

R. H. Mc Kay, for the applicant.

B. C. De Santos for the respondent.

CRANE, J.: On October 2, 1967, the husband obtained a decree *nisi* of dissolution against the wife in an undefended suit. The wife, though duly served with the citation and petition, did not appear to defend.

This is the wife's application by way of summons for the following orders: that the decree *nisi* be set aside; that she be at liberty to file an entry of appearance and an answer to the petition; that she be granted her costs and such further or other relief as may be just.

The main ground on which her application rests as revealed in her affidavit in support is that there was condonation following on which there was a resumption of cohabitation. This was brought about, she says, by a ruse on her husband's part in the following manner: she had been persuaded by him a few days before June 21, 1967, the date the citation and petition were served on her, to resume cohabitation with him at 147 Garnett Street, Kitty, and instructed by him to inform her lawyer not to proceed any further and to discontinue proceedings, as differences between them had been resolved. Accordingly, on or about July 9, 1967, the conjugal state was resumed and sexual relations recommenced. This state of affairs continued until October 18, 1967, when she left him having heard that a decree *nisi* had been pronounced against her on October 2, 1967 in proceedings which he had led her to believe were abandoned. She is now desirous of entering an appearance and filing an answer and, in the circumstances, prays that the decree *nisi* be set aside.

The husband strongly denies there was a resumption of cohabitation as alleged, or that he ever instructed his wife not to proceed further in defence of the petition; although he admits his wife did return to the matrimonial home, he however insists that she performed no matrimonial chores nor slept in the same room with him when she returned. He brands the allegations contained in her affidavit in support false and malicious and designed to embarrass and cause him unnecessary expense. In paras. 8 and 9 of his affidavit in reply he avers that this summons is misconceived both as to jurisdiction and for reasons of non-compliance with procedural requirements of Cap. 166, and the related rules.

Having given this matter some thought I must perforce agree that the objections raised by the husband are weighty and must prevail; and that I have no jurisdiction to entertain this application.

I accept as a correct statement of the law to be applied in a matter of this sort that which is contained in 12 HALSBURY'S LAW, 3rd edn. p. 414 para. 922.

SHOWING CAUSE: After a decree *nisi* of dissolution or nullity of marriage has been pronounced, and before the decree is made absolute, the Queen's Proctor, or any member of the public, but not a party who has failed *or who has not defended*, may show cause why the decree should not be made absolute, by reason of the decree having been obtained by collusion, or *by reason of material facts* not having been brought before the Court.

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“The object of the interval between decree nisi and decree absolute is not to provide a test of morality for the petitioner, but to enable the Queen’s Proctor to make inquiries as to the bona fides of the Petitioner’s case.”

The case of *Squires v. Squires* [1959] 2 All E.R. 85 which follows a long line of authority beginning with *Stoate v. Stoate* (1861) 2 S.W.&T.R. 384, is in many respects like the present, save that the application was brought by the husband instead of the wife and appearance had been entered, whereas in the instant case the wife has not; but in my opinion, it makes no difference. In that case, the wife in July 1958 obtained in an undefended suit a decree *nisi* on the ground of the husband’s cruelty. In October 1958, the husband applied to the court to rescind the decree *nisi* on the ground that since the decree the parties had for a while resumed cohabitation and that there had been an effective reconciliation. The application was made in reliance on s. 12(2) of the Matrimonial Causes Act, 1950 (U.K.) under which “any person” may show cause why a decree *nisi* should not be made absolute. An objection by the wife that the court had no jurisdiction to hear the summons was sustained since the words “any person” in s. 12(2) did not include the husband who was a party to the suit. A party to the suit cannot intervene to prevent a decree *nisi* being made absolute. This can only be done by the Attorney General or a member of the public who is aware of facts which would militate against the decree being made absolute, and who is actuated in the pursuit of justice in the public interest. The factor of the public and interest of the public in the ascertainment of the truth in the proper administration of justice is overriding.

S. 12(2) of the Matrimonial Causes Act, 1950 (U.K.) is in substance our s. 12(1) Matrimonial Causes Ordinance, Cap. 166 (G), and the phrase “any person” therein must necessarily be given the same restricted interpretation as in the Act of 1950.

It has, however, been contended on behalf of the wife that a distinction must be drawn in a case where the applicant seeks to show cause against a decree being made absolute, and a case where she is asking the court to set aside the decree; and it is stressed that the above rule only applies where he shows cause. I believe however, this is merely a distinction without a difference, for in either case what is really being sought is an order that the court should rescind or annul the decree *nisi* which, as the authorities show, cannot be done by a party to the suit.

I must agree with the objection of counsel for the petitioner that the correct procedure has not been observed.

What clearly ought to have been done by the applicant in this matter was for her to have given the information of what she has sworn to in her affidavit to the Attorney General; he is the Queen’s Proctor in matrimonial causes, and it should have been left to him to take such proceedings under s. 12 (4) of the Matrimonial Causes Ordinance, Cap. 166 as he thought fit, bearing in mind, as the extract from Halsbury’s Laws of England (above) shows, that the real

object of the interim period of six weeks is for the Attorney General to make enquiries into the petitioner's case. That sub-s. reads:

“At any time during the progress of the cause or before the decree is made absolute, *anyone* may give information to the Attorney General of any matter material to the due decision of the cause, who may thereupon take the steps he deems necessary or expedient.”

Unlike the phrase “any person” in s. 12 (1), the word “anyone” in s. 12 (4) Matrimonial Causes Ordinance, Cap. 166, is of wider import; it is not restricted in meaning and does not preclude parties to the cause from giving information to the Attorney General on any material matter within their knowledge. Sub-s. 12(4) is interpolated in the section to serve the cause of justice. In *Squires v. Squires* (above) it was the husband who reported the allegation of condonation to the Queen's Proctor so that he should step in the proceedings in that capacity or show cause why the decree *nisi* should not be made absolute which is what the wife should have done in this case.

For the above reasons I must rule that it is now too late for the wife to enter an appearance and file an answer. These proceedings are misconceived and the orders sought are consequently refused.

Summons dismissed.

Solicitors:

A. Vanier for the petitioner.

Miss H. D. Eleazer for the respondent.

AILEEN SAMUELS v. JAMES LEONARD MCKOY

[High Court (Khan, J.) November 18, December 14, 1967, January 7, 1968.]

Gift — Purchase of building by father in name of infant — Purchase price consisting of proceeds from sale of another building owned by infant together with further sums advanced by father — Tenancy of land on which building situate registered in infant's name — Whether gift complete.

Advancement — Father purchased property in child's name — Received income during his life time and paid outgoings — Whether presumption of advancement rebutted.

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Advancement — Purchase of building in name of child — Portion later rented to child's husband — Whether sufficient evidence to rebut presumption of advancement.

The plaintiff instituted proceedings against her father during his lifetime for a declaration that she was the owner of a building which had been purchased in her name while an infant and that she is the tenant of the land on which the building is situate. During the course of the proceedings her father died and the defendant was substituted. The building had been purchased in the plaintiff's name by her father, partly with the proceeds from the sale of another building which had been owned by the plaintiff and partly with money contributed by him.

After the purchase the plaintiff was registered with the owners of the land as the tenant of a lease of the portion on which the building was situate. The plaintiff lived there with her parents until her marriage. Six years later she returned to live in the house together with her husband and children. They occupied a portion of it for which the husband paid a monthly rental. Some two years later he ceased paying, claiming that the house belonged to the plaintiff. About three years after, the deceased successfully instituted proceedings in the magistrate's court for possession. The husband failed to comply and was ejected. Soon after the plaintiff filed the present action. The deceased counter-claimed seeking a declaration that he was the owner of the house.

HELD: (i) by accepting the receipt for the purchase of the building in the plaintiff's name and causing her to be registered as the lessee, the deceased had made a complete gift;

(ii) where a father purchased property in the name of a child, a presumption arises that he intends to make a gift to the child and there is a presumption of advancement;

(iii) such a presumption may exist notwithstanding that the father actually received the income from the property during his lifetime;

(iv) there was no credible evidence of any act or declaration prior to or contemporaneously with the purchase which could be said to negative or rebut the presumption;

(v) the subsequent act of ejectment of the plaintiff's husband could not change the nature of the original transaction.

*Declaration granted.
Counterclaim dismissed.*

C. V. Wight for the plaintiff.

M. C. Young and *S. Persaud* for the defendant.

KHAN, J.: The plaintiff is the daughter of the defendant, Edward Mc Koy, who died on the 25th June, 1967 — 16 months after the filing of this action. The defendant's wife, Albertha Mc Koy, predeceased him in 1959. During her lifetime a close friend of the family gave to the plaintiff, then a child, a cottage situate at Middle Road, La Penitence, East Bank,

Demerara. Subsequently, the cottage was sold and the proceeds of the sale held for the plaintiff.

In 1945 the defendant purchased a cottage in the name of the plaintiff and obtained the following receipt: —

"F.I.B. La Penitence
E. B. Demerara
1st October 1945.

Received from Ilene Mc Koy the sum of \$275.00 (two hundred and seventy-five dollars) for the purchase of a cottage situated at field 19 Beds 11 and 12, Pln. La Penitence in full payment, the same being my property at the time of sale.

Josiah Gibson Rodney

Witness

Algernon Ross

Dimension of house 24' x 12' gal-
lery or portico unfinished
7x8

(9 cents stamp)

The plaintiff's maiden name is Ilene Mc Koy (now spelt Aileen). At the time of the purchase the plaintiff was 15 years old.

The Central Housing & Planning Department owned the land on which the house or cottage stood, and the plaintiff was duly registered as the tenant of the lease. According to the Housing Department Officer, Mr. Miranda, the house was recorded as owned by the plaintiff, Aileen Mc Koy. The rent of the land is \$ 11.52 per month and this was always paid in the name of the plaintiff. In 1961 the survey plans of the area noted the lessee and owner of the house to be Aileen Mc Koy. In 1952 the plaintiff married George Samuels and went to live with him at Agricola, East Bank, Demerara, later at Albouystown and finally in 1958 with the defendant in the said house.

The plaintiff claims she never paid rent to her father but her husband had paid for the room he occupied because their marital relationship was somewhat strained. Later her father and husband quarrelled and although she lived in the same house with her husband they did not live as man and wife. In 1960 her husband refused to pay the father rent claiming the house was plaintiffs. In 1963 the defendant sued the husband for possession and he consented to an order to deliver up possession of the room he occupied. Her husband did not remove and was ejected. The plaintiff maintained that she never paid her father any rent to live there with her 5 children. Since 1964, however, her relationship with the defendant became strained and they were not on good terms. The court observed that the possession case was filed in December, 1963. The ejectment warrant was to issue on 8th June, 1965.

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The plaintiff and her husband left the premises in 1965 and filed the present action on 23rd February, 1966, claiming –

- (a) a declaration that the plaintiff is the owner of a one-flat wooden building situate at lot No. 2 Field No. 19 Beds Nos. 11 and 12, La Penitence Middle Road, East Bank, Demerara, on land leased from the Central Housing and Planning Authority, Georgetown, Demerara;
- (b) a declaration that the plaintiff is the tenant of the said tract of land to wit Lot. No. 2 Field No. 19 Beds Nos. 11 & 12, La Penitence Middle Road, East Bank, Demerara, occupied under a monthly tenancy from the Central Housing and Planning Authority, Georgetown, Demerara, the owners thereof;
- (c) a declaration that the plaintiff is entitled to possession of the aforesaid house and land.

On the 17th October, 1966, the defendant through his solicitor, Mr. Vibert Lampkin, filed a defence and counterclaim to the above claim. In para. 2 the defendant stated that he had bought during his wife's lifetime a house for \$ 64 and sold it later for \$ 64.

In para. 3 he stated that in 1945 he purchased the property in dispute in the plaintiff's name without any intention of making her a gift of the said property or constituting himself a trustee. After the plaintiff got married she left the house but returned in 1958, with her husband who lived as a tenant at \$9.50 per month; that in December, 1963, the plaintiff and her husband ceased to pay rent and an order of possession was obtained against them and they were ejected. The defendant counterclaimed for a declaration that he is the owner of the said house.

The record of proceedings in the possession case was tendered and these show that possession was granted by consent on the ground of repairs on the 22nd January, 1964, by His Worship, Mr. Jairam. The ejectment application was heard on the 3rd June, 1965, by His Worship, Mr. F. C. John, who ordered ejectment to issue on the 8th June, 1965. An appeal was filed on the 5th June, 1965. This was later abandoned.

The defendant collected the rent and paid the outgoings. He also kept the property in repairs. After the death of the defendant, his son, James Mc Koy, also called Leonard Mc Koy, executor of defendant's estate, was substituted for the deceased defendant. At the hearing James Mc Koy stated that at the time when his deceased father bought the house in dispute there were two tenants and his father received the rent. James was then 12 years old. Since the defendant's death the house is occupied by a younger sister who pays a rent to James as executor.

Although the deceased did not mention the house in dispute in his will, the executor declared it as the deceased's property. James made his father's will and he explained why the house was not included. James has been a lawyer's clerk for the past 15 years.

In support of the defence, one Ignatius Mc Koy was called. He stated that the deceased was his brother. The plaintiff is his niece. He knew of the purchase in question. In his own words he stated *inter alia*:—

“After the sale was finished and the receipt signed, we went to the house to tell the tenants of the new owner. I then went home with my brother to his house. He then told his wife and children including the plaintiff that he bought the house for his children in case he should die they would have a shelter. Those were his words. I knew the house was bought in the plaintiff’s name. His wife was alive so he bought it in her name to give him luck as he worked in the Diamond Fields. One of the tenants offered my brother to buy it, but he said that he wanted it for his children.”

On mature consideration of all the evidence adduced, having observed the demeanour of the witnesses I find that a house was given to the plaintiff as stated by her when she was a child and this was subsequently sold and the proceeds held for her. It does appear that the defendant added to this amount and purchased the house now in dispute. I find that since the purchase the defendant managed it as if it were his own. He paid the land rent and carried out the necessary repairs. He also collected rents from the parts he did not occupy. I believe that at the time of the purchase he did intend it to take the place of the gift of original cottage which was given to the plaintiff when a child, by the family friend. After the plaintiff got married and her relationship with the defendant subsequently became strained the defendant decided to change his mind, the more so, since his circumstances had changed and the plaintiff’s husband was laying claim to the house on behalf of his wife. The situation was further exacerbated by the ejectment proceedings. The result is the filing of this action.

The witness Ignatius Mc Koy was unimpressive. He impressed me as a witness of convenience and I reject his evidence as fictitious and utterly untrue.

Defendant’s counsel commented on the custody of the receipt (Ex. “C”) but it is not unusual for such a receipt to be found in the custody of the defendant. He was parent and guardian of the infant. Indeed, one would expect him to be the custodian of all valuable documents and securities of the infant. It is not unusual also in such circumstances for a father to collect the rents and pay the outgoings in respect of his child’s property. The fact that he managed the property as his own after a complete gift of it was made to the infant does not in my judgment entitle him to change his mind and revoke the gift.

In 21 HALSBURY’S LAWS. 3rd ed., p. 159, it is stated, *inter alia*:—

“A gift *inter vivos* to an infant cannot afterwards be revoked. There is a presumption in favour of the validity of a gift by a parent to a child if it is complete.”

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The purchase of the house in question in the name of the plaintiff followed by the recording of the tenancy of the land in her name made the gift complete. The defendant stood in a fiduciary relation to the plaintiff and such a transaction must be construed favourably to the plaintiff who was a child of the defendant: *vide* 21 HALSBURY'S LAWS, 3rd ed., p. 201, para. 446.

Moreover, where a father purchased realty or personal estate in the name of a child alone the father is intended to make a gift to the child. There is a presumption of advancement: A presumption that a gift was intended may exist notwithstanding that the defendant has actually received the income during his lifetime and made leases of the property – *vide Mumma v. Mumma* 2 Vern. 19. *Taylor v. Taylor* 1 ATK, 386. *Hepworth v. Hepworth* L.R. 11 Eq. 10, p. 12.

In *Shepherd v. Cartwright*, [1954] 3 All E.R., p. 649, where a father invested money in securities in his son's name (unknown to the son) and received the dividends under a power of attorney during his lifetime, it was held that this was an advancement.

In the course of his judgment Viscount SIMONDS stated *inter alia* –

“I do not hesitate to say that the only conclusion which I can form about the deceased's original intention is that he meant provision be then made for his children to be for their permanent advancement. He may well have changed his mind at a later date, but it was too late. He may have thought that, having made an absolute gift, he could yet revoke it! This is something that no one will ever know. The presumption which the law makes is not to be thus rebutted. If it were my duty to speculate on these matters my final question would be, why the deceased should have put these several parcels of shares in six different companies into the names of his wife and 3 children unless he meant to make provision for them, and since learned counsel have not been able to suggest any, much less any plausible, reason why he should have done so, I shall conclude that the intention which the law imputes to him was in fact his intention.”

It is the suggestion of the defence in this case that the defendant bought the house in the name of the plaintiff to give him 'luck'. This in my judgment is not plausible much less reasonable. The evidence of Ignatius Mc Koy was intended to show that the defendant made a contemporaneous declaration to rebut the presumption of advancement, *vide Warren v. Gurney & anor* [1944] 2 All E.R., 472; but this witness has not impressed me as a witness of truth. His evidence is an after thought. Having considered his evidence and having observed his demeanour in the witness-box I am convinced that he is a witness of convenience and I reject his evidence as utterly untrue.

Apart from Ignatius Mc Koy's evidence there is no act or declaration before or at the time of the purchase or so immediately after it (as to constitute a part of the transaction) to show a contrary intention. Subsequent acts and declarations are only admissible as evidence against the party who did or made them and not in the defendant's favour — *vide Snell's Principles of Equity* 22nd ed., p. 122 and *Shepherd v. Cartwright (supra)*. I do not consider the ejectment case in favour of the defendant, as this was subsequent to defendant's decision to revoke the gift.

In the instant case the defendant was the father and guardian of his infant daughter. It was his duty to manage her affairs. Although it is admitted that he took the rents and paid the outgoings and kept the property in repairs, these acts do not in my judgment rebut the presumption of advancement. The fact that the plaintiff did not demand the property after she attained her majority in the light of all the circumstances ought to be regarded as good manners and filial reverence. After their relationship became strained, good manners and reverence gave way to anger and bitterness and the plaintiff sought legal advice. It is my considered judgment that the presumption of advancement is not rebutted. In the result the plaintiff is entitled to the orders prayed for in para. 7 (a), (b) and (c). I, accordingly, order that the defendant give up possession on the 1st August, 1968. The counterclaim is dismissed.

This being a family dispute each party will bear his own costs.

Declaration granted.

Counterclaim dismissed.

Solicitors:

M. A. A. Mc Doom for the plaintiff.

B. P. Bernard for the defendant.

GILLETTE v. RAI AND PETER TAYLOR AND COMPANY LIMITED

[Court of Appeal (Stoby, C, Persaud and Cummings JJ. A.) June 12. 1968.]

Practice and Procedure – Request for hearing – When matter ripe for hearing

–

Effect of interlocutory proceedings – Rules of the High Court. O. 32 rr. 1.3 (2), 8 and 9.

On the 3rd February 1964 the appellant filed a writ of summons against the respondents. On the 11th February an entry of appearance was filed on behalf of the first respondent and on the 3rd March an entry of appearance was filed on behalf of the second respondent. On the 6th March as a result of an extension of time, the appellant filed and delivered his statement of claim. No defence was filed by either respondent within the time limited by the Rules, and on the 13th April 1964, acting in accordance with O. 25 r. 15, the appellant served notices on the respondents calling upon them to remedy their default within fourteen days. On the 23rd April 1964, the second respondent filed a summons to strike out parts of the statement of claim. A similar course of action was taken by the first respondent.

There were a series of adjournments of these summonses and it was not until the 22nd October 1965 that a decision was given in which they were both dismissed. The respondents appealed to the Full Court. The arguments on appeal were heard on various dates in February, March and May 1966; and eventually on the 22nd July and the respondents' appeals were dismissed. They then obtained an extension of time within which to file their defences, and these were filed on the 6th September and 15th October 1966, respectively. The appellant filed his request for hearing on the 30th November 1966.

When the action came on for hearing, the defendants took an objection *in limine* that, by virtue of O. 32 r. 9 (1) (a), the action should be deemed abandoned and incapable of being revived, as the request for hearing had

been filed more than one year from the last proceeding had or the filing of the last document. The judge upheld this submission and struck out the action. The plaintiff appealed to the Court of Appeal.

HELD: (per Stoby, C.) O. 32 r. 9 cannot be read in isolation from the other rules of the order, and under rr. 1 and 3 (2), a request for hearing cannot be filed until a matter becomes ripe for hearing, and the action could not become ripe for hearing so long as the interlocutory proceedings to have certain paragraphs of the statement of claim struck out, remained pending;

(per Persaud, J.A.) even if O. 36 r. 9 (1) (a) is read in isolation, having regard to the course which the summonses took, every hearing would have been a proceeding within the rule, and whenever the matters were heard, there was a 'proceeding had.' It was not incumbent upon the appellant, during the currency of the interlocutory proceedings, to apply to the judge for an order that the action was ripe for hearing.

Appeal allowed.

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

F. Ramprashad, Q.C., for the first respondent.

A. S. Manraj for the second respondent.

STOBY, C: On the 3rd February, 1964, the appellant, Gordon S. Gillette, filed a writ of summons against the respondents who were then the defendants in the case. On the 11th February, 1964, an entry of appearance was filed on behalf of the first defendant, and on the 3rd March, 1964, an entry of appearance was filed on behalf of the second defendant. On the 6th March, 1964, an application for an extension of time, to enable the plaintiff to file and deliver his statement of claim, was made, and this being granted, the plaintiff filed his statement of claim. On the 13th April, 1964, no defence having been filed by the defendants, notices in writing were served on them calling on them to remedy the default within fourteen days. This was in accordance with O.25, r. 15 under which a request for final judgment could not be filed without following the procedure adopted by the appellant. On the 23rd April, 1964, a summons was filed on the part of the second-named defendant for an order that certain paragraphs in the statement of claim be struck out, and a summons was also filed on behalf of the first-named defendant for an order that certain paragraphs in the statement of claim be struck out.

There were a series of adjournments, and it was not until the 22nd October, 1965, that a judge gave a decision with regard to the applications which had been made to strike out certain paragraphs in the statement of claim. There was an appeal from that decision, which came on for hearing before the Full Court on various dates in February, March and May, 1966. The Full Court gave its decision on the 22nd July, 1966, dismissing the defendants' appeal and affirming the trial judge's decision in which he had refused to strike out the paragraphs for which application had been made.

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An extension of time was granted to the defendants to file their defences, and eventually the matter came on for hearing before a judge of the Supreme Court. On the matter coming on for hearing, an objection *in limine* was taken by the defendants that the matter should be deemed abandoned and incapable of being revived as a result of O.32, r. 9 (1) (a) which says:

“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;”

It was submitted that since the writ was filed on the 3rd February, 1964, and the summons to strike out certain portions of the statement of claim was filed on the 24th April, 1964, then despite the adjournments caused by the inability of a judge to hear the applications due to pressure of work and despite the fact that a final decision was not given until July 1966 after which the defendants filed defences, no proceeding had been taken until long after the 24th April, 1965, and therefore O.32 r. 9 (1) (a) applied and the matter was abandoned and incapable of being revived.

The judge agreed with that submission and struck out the plaintiff's case, and it is from that decision that the plaintiff has appealed.

Counsel for the appellant has based his appeal on three grounds, but I propose to deal only with his second submission and leave it to my brothers to deal with the other limbs of his submission.

The second limb of counsel for the appellant's submission is, that failure to take any proceeding implies an omission to do something which the party was under a duty to do or was required to do. As interlocutory proceedings were pending he could not file a request for the hearing of an action which could not be heard. I think that in order to appreciate fully the whole of O. 32 of the Rules of the Supreme Court it is necessary to go back a little in point of time. O. 32 r. 5 (1) of the 1900 Rules was:

“If any action which has become ripe for hearing shall not, on the request of either party, be entered in the Hearing List within six months after it shall so have become ripe, the same shall be deemed deserted, and shall not be capable of being further proceeded in to any effect until an order of revivor has been made by the court, which order the court may grant upon the application of any party.”

And O.32 r. 5 (2) was:

“If no order of revivor be applied for within a further period of six months, or if such order shall have been made, but the action has not, on the request of either party, been entered on the Hearing List within six months from the date of the order of revivor, or if in any action whatever there has been no proceeding for one year from the last proceeding had, the action shall be deemed altogether abandoned, and incapable of being revived. An action which has been thus abandoned shall be of no effect in interrupting prescription.”

That rule lasted for fifty five years.

When the 1955 Rules came to be drafted, the framers must have realised that there was an inherent weakness in O. 32 r. 5 (1) and (2) of the 1900 Rules. Although the obvious intention was to prevent actions being wilfully or negligently delayed, and the remedy was to have an action deemed deserted if it was not entered on the hearing list within six months after the action became ripe for hearing, there were no comprehensive provisions stipulating how and when an action became ripe for hearing. The draftsmen of the 1955 Rules set about to remedy the defect in the 1900 Rules, and what was done was to introduce O. 32 r. 1 (1) which states:

“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.”

Then follows r. 3 (1) (a), (b) and (c) –

“3 (1) Subject as hereinafter provided a cause or matter shall be ripe for hearing when –

- (a) the defendant is in default of appearance or has failed to deliver a defence and the plaintiff has complied with the provisions of O.11 or O. 25 as the case may be;
- (b) the pleadings have been closed by the delivery of a reply or if no reply has been delivered after the time for delivery of a reply has expired;
- (c) an order has been made under O. 12 or under any other order giving directions as to the trial of the cause or matter.’

If we pause there we see that the order, read in conjunction with O. 25, takes care of every possible situation. It deems a matter ripe for hearing when certain things have taken place. Even in the illustration given by counsel for one of the defendants, viz. that a plaintiff might file a writ and do nothing more and that O. 32 r. 3 would not apply, one finds that provision is made for such a situation. O. 25 r. 1 provides:

“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

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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 of 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.”

In the illustration given the force of counsel for the appellant’s submission is self evident. There is an obligation on the part of a plaintiff to file a statement of claim and by O. 25 power on the part of the defendant to move for dismissal of the action.

What is being considered in this appeal is whether O. 32 r. 9 (1) (a) can apply when a plaintiff has complied with the rules except that he failed to apply for hearing while the interlocutory proceedings were pending.

So the vital requirement is to find out when a matter is ripe for hearing and when that is determined O. 32 r. 8 comes into operation. R. 8 (1) states:

“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.”

It is evident that a request for hearing cannot be filed until a cause or matter is ripe for hearing and a cause or matter cannot be deemed deserted unless no request for hearing has been filed within six months and six weeks after the matter is ripe for hearing. (see O. 32 rr. 1(1), 3(1)(a), (b), (c) and 8(1)).

It was submitted however, that O. 32 r. 9 must be read in isolation and should be interpreted without reference to the other portions of O.32. R. 9 (1) (a) is as follows:

“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;”

I do not agree that rule 9 takes no cognisance of the other rules of O. 32. The proceeding or document envisaged in rule 9 (1) (a) is one which a party to the cause or matter is required to take by the rules of court so that the action can become ripe for hearing. In the present case the appellant filed his statement of claim and the respondents filed interlocutory proceedings. There was no proceeding or document which he could properly take or file. He could not apply for hearing of the action as O. 32 r. 3(2) provides that –

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

The respondents contended that the appellant should have applied by way of summons to a judge asking him to order that the action was ripe for hearing. There was no such obligation on the appellant. The rule is very clear – the cause or matter shall not be ripe for hearing unless the court or a judge otherwise orders and the fact is that a court or judge has not so ordered.

Reference has been made to two local cases which it is said lend support for the respondents' argument that it is obligatory on the part of a party to proceedings to take some action even though interlocutory proceedings are pending. One of the cases referred to was *Cunningham v. Lee* (1960) L.R.B.G. 69. The particular reference is at p. 71. In that case the learned judge did use language which would seem to lend support to the respondents' argument. This court will always differ from any judgment or any obiter of the judge who gave that decision with hesitation. In my view the decision in that case depended on its own peculiar facts.

In *Cunningham v. Lee*, the plaintiff, who claimed ownership of certain immovable property, sought an order for an interlocutory injunction, until the determination of the case, restraining the defendant from passing a transport of the property in dispute to other parties. Having applied for an interlocutory injunction, he refrained from filing a statement of claim. But there was nothing to prevent him from filing a statement of claim because in his statement of claim he would have had to ask for an injunction, which was the relief he desired. The nature of the interlocutory proceedings did not prevent him from filing his statement of claim and that is the point which the learned judge made and which was the reason for his deciding that in *Cunningham v. Lee* the action failed under O. 9 r. 1(1) because no step had been taken in the action for over a year. The judge was pointing out that there was nothing to prevent the plaintiff filing his statement of claim and thereby keeping the action alive. If that was not the basis of the decision, if the basis of the decision was his obiter, that it was necessary to preserve an action by applying under O. 32 r.3 (2) to keep the action alive, then I, for one, must differ from that obiter and refuse to follow it.

The other case to which reference was made was the *Daily Chronicle Ltd. v. Munroe* (1960) L.R.B.G. 267, in which a judge of the High Court had ordered that a specially endorsed writ should be continued without further pleadings. He gave leave to defend without pleadings and no further documents were filed or step taken until after six months. When the action came on for hearing, it was held that under O.32 r. 8 the action was deserted because no proceedings had been taken for six months after the order giving leave to defend.

This case does not support the contention of the respondent that O. 32 r. 9 must be read in isolation. This is what the learned judge said:

“The provisions of this rule (O. 32 r. 8) rendered this action deserted on the 16th May, 1958. Any proceedings taken thereafter would be a nullity unless an order of the court was obtained or unless there was a

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consent and request signed by all the parties and filed. No order of court was obtained by the plaintiffs nor was any consent sought of the defendant. The action was therefore deserted," (and these are the important words), "and, at that stage, had moved into the category of actions on the way to abandonment".

So the first step is desertion if the action has become ripe for hearing and no action has been taken for six months. Then after desertion and no action taken for another six months, abandonment. In this case before us, the question of desertion could not arise because of O. 32 r. 3(2), and on the facts of this case the question of abandonment could never arise.

For these reasons, I would allow the appeal. With the consent of the parties no order will be made regarding costs.

PERSAUD, J.A.: I agree with the learned Chancellor that the appeal ought to be allowed, but without disagreeing with the reasons which he has advanced, I would approach the matter on the basis on which Mr. Ramprashad, counsel for the first-named respondent, wishes us to do, and that is, to attempt to interpret O. 32, r. 9 of the Rules of the Supreme Court, 1955 de hors the rest of the Order. Before doing so, I consider it necessary to examine very briefly the other rules of O. 32 which I consider relevant.

In the first instance, a cause or matter becomes ripe for hearing under r. 3(1), that is, where the defendant is in default of appearance or has failed to deliver a defence and the plaintiff has complied with the provisions of O. 11; or, where the pleadings have been closed by the delivery of a reply; or, where no reply has been delivered, if the time for delivery has expired; or, lastly, where an order has been made under O. 12 or under any other order giving directions as to the trial of the cause or matter.

When a cause or matter has become ripe for hearing under r. 3(1), then under r. 1(1) it shall be the duty of the plaintiff or other party to file a request for hearing within six weeks thereafter. If the plaintiff or other party fails to do so, then under r. 2 the defendant may file such a request and may apply to the court or judge to dismiss the cause or matter for want of prosecution.

When one examines r. 8, and this is the rule which deals with a matter becoming deserted, one finds this: that if no request for hearing has been filed within six months – and this, in my view, presupposes the matter is ripe for hearing – then the action shall be deemed deserted, and when the action has been deemed deserted, no further proceedings may be taken therein unless and until an order for revivor has been made by a court or a judge on the application of any party or a consent

to revivor and a request for hearing signed by all the parties thereto have been filed.

As I said, I will approach the matter as though r. 9 is a separate rule in the sense that it must be interpreted, not as the learned Chancellor has done, but as Mr. Ramprashad would wish us to do. Perhaps I had better at this stage dispose of *Cunningham v. Lee* (1960) L.R.B.G. 69, which has been cited to us and which has also been referred to by the learned Chancellor. There is a statement by the judge in that case at p. 71 which would appear to support the contention that r. 9 is really a stage further than the stage provided for by r. 8, and that statement is this:

“Having regard to the provisions of O. 32 r. 3(1), it seems clear that the matter has never become ripe for hearing. In such circumstances hearing of the action could not be requested under O. 32 r. 1, and for that reason the matter could not be deemed deserted under O. 32 r. 8”. (And this is the passage which I would underline) “That being so the matter could not be deemed altogether abandoned and incapable of being revived by virtue of the provisions of para. (b) or of para. (c) of O. 32 r. 9 (1)”.

My view of that statement is that it was obiter, but that apart is not binding on this court.

It is submitted before us that some meaning must be given to the words which appear in r. 9(1)(a), that is, the words “proceeding had”, and I would attempt to do so.

First of all, I wish to refer to O. 32 r. 5(2) of the 1900 Rules of Court, and to compare the words used in that rule with the words used in O. 32 r. 9(1) (a) of the 1955 Rules. The 1900 Rule provides as follows:

“If no order of revivor be applied for within a further period of six months, or if such order shall have been made, but the action has not, on the request of either party, been entered on the Hearing List within six months from the date of the order of revivor, or if in any action whatever there has been no proceeding for one year from the last proceeding had, the action shall be deemed altogether abandoned, and incapable of being revived”.

And the 1955 Rule reads:

- “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”.

I find merit in the contention of Mr. Haynes that one must give meaning, much wider meaning, to the words “proceeding had” than the

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words “filing of the last document”. It seems that when the 1955 Rules came to be drafted, the draftsmen must have had in mind some act other than the filing of a document. In the 1966 Annual Practice, where the new version of this rule appears as O. 3 r. 6, the expression “since the last proceeding” refers to interlocutory proceedings before final judgment. It therefore seems to me – and this is my judgment – that the interlocutory proceedings which were taken out in this action would be a proceeding within the meaning of r. 9(1) (a) of our rules.

A brief summary of certain events in this matter would, in my opinion, indicate that the matter was still alive when the request for hearing was filed. The summons was filed on the 23rd April, 1964, and the hearing commenced on the 20th February, 1965, and was continued on the 26th July of the same year. For some reason which is not apparent from the record, the hearing was then commenced before another judge on the 11th September, 1965, continued on the 18th September and 29th September, 1965, and the decision was given on the 22nd October, 1965. The order was entered on the 12th November, 1965. There was an appeal to the Full Court and the Full Court’s decision was delivered on the 22nd July, 1966. In my view, every hearing would have been a proceeding within the meaning of r. 9(1) (a), and whenever the matter was heard, then there was a “proceeding had”.

The next event after the 22nd July, 1966, was that the defence of both defendants in this matter was filed on the 6th September and 15th October, 1966, respectively, and, lastly, request for hearing was filed on the 30th November, 1966. I would hold, having regard to the course which the hearing of the summons took, that there was a “proceeding had” on each occasion, and the matter was very much alive when the request for hearing was filed. To hold otherwise would, it seems to me, lead to the situation in which the main action has long departed, leaving the subsidiary issue still alive, and yet to be determined. This strikes me as not having been contemplated by those who advocate that the main action has long since expired. I cannot accept that this situation would be tolerated by the Rules of Court.

There is one other matter to which I would like to make reference, and that is, that while I agree that r. 9(1)(a) may very well contemplate a situation where a matter becomes ripe for hearing but no further action is taken for a period of one year, it seems to me also that it does not exclude the case where a matter does not become ripe for some reason or another, but the time expires, in which case also the cause or matter shall be deemed altogether abandoned and incapable of being revived.

For the reasons which I have attempted to give, I would hold that this appeal ought to be allowed.

Appeal allowed.

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[High Court, (George, J.,) October 12, 1967, June 25, 1968.]

Barrister — Non-contentious business — Application for probate — Exchange of correspondence in relation to money due to estate — Collecting money on behalf of estate — Whether performing work of solicitor — Legal Practitioners' Ordinance, Cap. 30, s. 46.

Principal and agent — Barrister and clerk — Power of clerk to sign letters of demand on behalf of barrister — Fraud by clerk — Whether barrister liable — Extent of actual or ostensible authority of clerk.

Estoppel — Barrister and client — Non-contentious business — Application for probate — Extent of authority — Whether client estopped from denying that barrister acting for him to collection of money on behalf of estate.

The plaintiff engaged the services of a barrister-at-law to make application for probate of the estate of Ellen Kadir, deceased. Among the assets of the estate was a policy of life insurance with the defendant company. The barrister wrote the company enquiring what amount had become due on the policy for the purposes of declaring it as part of the estate. A certificate of the amount due was sent to the barrister. After probate was obtained, the defendant company was requested, by letter written on the barrister's letterhead, to pay the amount due on the policy. The letter was written in the first person but was signed by the barrister's clerk on his behalf. Thereafter several letters passed between the company and the barrister's chambers, all those emanating from the latter being signed by the clerk. In one of them it was expressly stated that the barrister had been authorised by the executor to collect all money due to the estate. Eventually, after satisfying themselves about the death and the grant of probate, the company sent a cheque to the barrister's chambers. Subsequently, the barrister's clerk pleaded guilty to the offence of causing the sum stated in the cheque to be paid by virtue of a forged instrument.

At the trial neither party called the barrister as a witness.

HELD: (1) a barrister is by virtue of s. 46 of the Legal Practitioners Ordinance, Cap. 30, empowered to act in non-contentious matters including applications for probate and to receive money due to his client;

(ii) if he chooses so to act he is either practising as a solicitor or acting in a manner analogous to that of practising as a solicitor;

(iii) from the evidence the clerk was at all times in the position of a managing clerk to a solicitor, or alternatively that of agent to his principal, and was acting within the scope of his actual or ostensible authority when he wrote the letters to, and received the cheque from, the defendant company;

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(iv) the instructions to draw and file, and the actual drawing and filing of documents in support of an application for probate constitute a separate and distinct retainer from that to collect monies due to an estate;

(v) the letters and other documents emanating from the barrister's chambers are not sufficient evidence on which to found the company's contention for an estoppel.

Judgment for the plaintiff.

[Editorial Note: On appeal to the Court of Appeal it was by consent agreed that the barrister who acted for the plaintiff be joined as a defendant and that the matter be remitted to the High Court for trial *de novo*.]

GEORGE, J.: In this action the plaintiff in his capacity as executor of the estate of Ellen Kadir, claims the sum of \$2,200.00 as representing an amount due owing and payable by the defendant company to him in his capacity as such under a policy of life insurance in respect of the life of the deceased, whose name in the policy is stated to be Miriam. The defendant company in its defence pleads that a cheque for a sum of \$2,219.00, made payable to the plaintiff, had been sent to Mr. H. W. Shah, the barrister-at-law who had applied for and extracted probate in respect of the estate of the deceased.

In support of this contention counsel for the defendant company tendered a cheque for \$2,219.00, (ex. F13) payable to the plaintiff. This cheque has been cashed. The plaintiff denies that the name Habil Kadir endorsed on it was written by him; and in this regard the defendant company lead evidence to show that one Harkissoon had pleaded guilty to causing the sum mentioned in the cheque to be paid by virtue of a forged instrument. Besides the cheque, the defendant company tendered several letters which passed between Mr. Shah and his clerk on the one hand, and the company on the other. The correspondence commenced with a letter from Mr. Shah to the defendant company dated the 5th August 1964. This letter, to which I shall again make reference, reads as follows:—

“Sir,

Re: Policy No. 27266 – Ellen or M. Kadir

The holder of the above policy died on the 27th day of July 1964.

On behalf of the executor I am kindly asking that you forward to my chambers the amount due on the said policy so that I can declare same for estate duty purpose. (sic)

Thanking for your kind co-operation.

Yours faithfully,
(sgd.) W. H. Shah.”

In its letter of reply the defendant company enclosed a certificate of the amount due under the policy. Thereafter, between the 24th August and the 15th December 1964 eleven letters passed between the company and one Harkissoon, who was at all material times clerk to Mr. Shah. Of these letters seven came from Harkissoon, purporting to emanate from Mr. Shah’s chambers and to be written on his behalf. They were all written in the first person and typed on Shah’s letterhead. The first of these letters which is dated the 24th August 1964 requested the company to pay their cheque for the amount due, to Mr. Shah’s chambers so that it may be delivered to the plaintiff, his client.

The defendant company in its reply, dated the 27th August 1964 and addressed to Mr. Shah, advised that payment would only be made after they had seen the probate. On the 29th August 1964 Harkissoon again wrote to the company requesting that a claim form be sent in order that he could get the executor to sign and return the same to the company. On the 11th September the company complied with this request and receipt of the claim form was acknowledged by Harkissoon in a letter dated the 15th September 1964. On the 19th September, Harkissoon sent another letter to the company returning the claim form duly signed and again requesting that the company’s cheque be made out in favour of the estate for the amount owing and be sent to Mr. Shah’s chambers. He followed up this letter by another dated the 28th September 1964 in which he requested early payment of the claim. In the penultimate paragraph of this letter he reminded the company that Mr. Shah was duly authorised by the executor of the estate to collect all monies payable in connection with it. On the 2nd October the company informed Mr. Shah that the claim would only be admitted on submission to its office, of the death certificate, the insurance policy and the deceased’s birth certificate. This was followed by a letter signed by Harkissoon dated

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the 10th December 1964 in which he enclosed the insurance policy, a medical certificate of death, and the probate of the estate. In this letter he requested that all return mail be posted to Mr. Shah's chambers. Then on the 15th December 1964 came the letter from the company in which the cheque was enclosed. It was in relation to this cheque, ex. F13, that Harkissoon was on the 17th December 1965 charged with causing the sum of \$2,219.00 to be paid between the 21st and 22nd of December 1964 to one Ronald Jaipersaud by virtue of a forged instrument, the forgery being with regard to the endorsement.

On the 15th March 1965 Mr. Shah wrote the defendant company in his capacity as barrister-at-law acting as solicitor to the estate of the deceased. He enquired whether the original probate and the insurance policy had been tendered to the company for payment and asked if payment had been effected and, if so, whether by way of cash or a cheque and whether by post or in person. The company replied by letter dated the 17th March in which was enclosed a copy of its letter of the 15th December 1964. It does not appear that Mr. Shah replied to this letter but on the 14th July Mr. M. Poonai, barrister-at-law, whom, it would appear, the plaintiff had then retained, wrote to the company. In his letter, Mr. Poonai pointed out that the plaintiff never authorised Mr. Shah to receive the money due under the insurance policy. He also adverted attention to the fact that his client had instructed him that a cheque had been issued by the company for the amount due and stated that this was done without his authority. He further stated that the cheque, if cashed, had been paid on a forged instrument as the plaintiff had not endorsed it. This letter was forwarded by the defendant company to their legal advisers who replied on the 5th August 1965 and in effect repudiated any liability by the company to the plaintiff.

The plaintiff, who impressed me as a very shifty witness, denies that Mr. Shah's authority extended to include the collections of any debts or other moneys owing to the estate. According to him Mr. Shah was employed solely for the purpose of obtaining probate. Unfortunately, neither of the parties called Mr. Shah as a witness, thus depriving the court of the benefit of his testimony on the vital question of the extent of his authority. I am, therefore, left with the uncontradicted evidence of the plaintiff in this regard. He also denied signing the cheque or the claim form and his denial is supported by the report of the handwriting expert. After very careful and anxious consideration of this aspect of the matter, including a personal examination of the documents, the plaintiff's proven handwriting, and the report and evidence under cross-examination of the handwriting expert, I have come to the conclusion that the signature "Habil Kadir" on the cheque and claim form were not written by the plaintiff.

Nevertheless, counsel for the defendant company submits that the implication of the correspondence which passed between the company and Mr. Shah and his clerk is such that the plaintiff is estopped from denying that he did not authorise Mr. Shah to act as his agent for the purpose of receiving the proceeds of the insurance policy.

In the view which I take, I do not propose to deal with the manner of payment. I, therefore, go on to consider whether Mr. Shah is in law bound by the letters written by his clerk, even if he did not authorise him to write them. In embarking on this inquiry it would be of assistance to examine the extent of a barrister's powers to act for a client for the purposes of writing and forwarding letters concerning moneys owing to the latter, and giving a discharge for the receipt of such moneys. In this regard consideration must be given to the proviso to s. 45 and to s. 46 of the Legal Practitioners Ordinance, Cap. 30. The former is part of a group of sections under the subhead 'Contentious Business' in Part III of the Ordinance, which deals with the respective functions of a barrister and a solicitor in contentious business. The section empowers a barrister to act for a client in any matter of a legal nature without the intervention of a solicitor, up to the time when it has been decided that litigation between the client and any other person will ensue. It is now settled that contentious business can include work done before a writ has been issued. In *re a Solicitor* [1955] 2 All E.R. 283 it was held at p. 286, per DENNING L.J. that "where work done before writ is such that if the case went to trial it would properly be allowed as against the other party in a party and party taxation then it is contentious business, even though a writ is not in fact issued". It is this type of work, which would include such acts as the taking of statements from witnesses and advising the client without the intervention of a solicitor, duties normally performed by a solicitor, that the proviso to s. 45 contemplates. Assuming that the correspondence between Harkissoon and the defendant company was in relation to a "matter of a legal nature," I do not think that it would have been allowed in a party and party bill if the company had refused payment and the matter litigated. It is, therefore, to s. 46 of the Ordinance which deals with matters of non-contentious nature that I must direct my attention. Under this section a barrister is permitted "to act alone in all *legal business* of a non-contentious nature not otherwise provided in (the) Ordinance or any other Ordinance or rule". Such legal business includes the drawing and filing of documents under the provisions of the Estate Duty Ordinance and the Deceased Persons' Estates Administration Ordinance as well as all business relating to the transfer of property. I construe the words "legal business" to mean business connected with the profession of the law, business in which a legal practitioner is employed, because he is qualified to practice the legal profession, or in which he would not have been employed if he had not been so qualified, or if the relation of legal practitioner and client had not subsisted between him and his employer. The examples of non-contentious business set out in the section are not exhaustive. In my opinion such business includes the exchange of

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correspondence with a view to collecting moneys due to the estate of a deceased person where there subsists a relationship of legal practitioner and client by virtue of the former being engaged to draw and file the documents required under the Ordinances referred to above. All the above acts, are usually performed by a solicitor in England and but for s. 46 could not properly be done by a banister in Guyana.

A barrister, in my opinion, when acting under the provisions of s. 46, is, not clothed with that immunity from negligence which public policy demands that he be accorded when engaged in matters of a contentious nature. *Rondel v. Worsley* [1967] 3 All E.R. 993. If he chooses to act in non-contentious matters he would, then, be either practising as a solicitor or acting in circumstances analogous to that of practising as a solicitor. In coming to this conclusion I am not unmindful of the fact that nowhere in the section are the words “practise as a solicitor” used. Some support for this view can, however, be drawn from an analysis of s. 45. This section although expressly providing that a barrister may not “practise as a solicitor” in matter under s. 43(2) of the Ordinance, goes on in its proviso to permit him to undertake certain legal business before a decision that litigation should ensue is taken. As I have already pointed out such work can include that which is usually done by a solicitor. Indeed the implication of the proviso is to this effect, although the words “practise as a solicitor” are not specifically used. But even if I am wrong and a barrister engaged in such matters is not acting as a solicitor or by analogy, he must be in the position of an agent to his client, the principal, and would, in any event, be liable for any fraud committed by him against that client, *Swinfen v. Lord Chelmsford* 1 F & F 619.

What then is the position if the fraud is committed by his clerk? Harkissoon appears to have had very wide authority as clerk to Mr. Shah. He, it was, who uplifted the probate from the registry of the then Supreme Court, and the extent of his authority can readily be determined by an examination of Mr. Shah’s letter to the defendant company dated the 12th March, 1965. Nowhere in this letter has it been denied that he did not possess the general authority to write the letters referred to above, nor, indeed, to receive on Shah’s behalf the money due to the estate of Ellen Kadir under the policy of insurance. His position for this purpose, I feel, may be equated to that of a solicitor’s managing clerk. In this regard Sir WILFRED GREENE M.R. in *Uxbridge Building Society v. Pickard* [1939] 2 All E.R. 344 at p. 347 had this to say –

“The managing clerk put in charge of that office, as he was, was unquestionably given in fact full authority to conduct the business of a solicitor’s office on behalf of, and in the name of his principal. That authority would cover not merely acting for clients

but also carrying through all transactions which would normally be carried through by a solicitor, namely, completing of conveyancing business with third parties, dealing with clients, and obtaining from such parties upon completion of the transaction, of sums of money and giving receipts therefor. With regard to that part of the office activities there is no question of the relationship of solicitor and client between the solicitor and the third party It seems to me that it must extend to cases where the authority which the clerk purports to exercise and which, upon the face of it, has been given to him, is one which involves leading third parties to change their positions on the faith that the business which brings them into contact with the firm is genuine business”.

The Master of the Rolls went on to say at p. 348:—

“When a person is put in that position, his actual authority and his ostensible authority are, in one sense, the same because the ostensible authority of a solicitor’s clerk put in such a position coincides with the actual authority which he is given. The ostensible authority, however, may go a little further for it is not within his actual authority to commit a fraud. Nevertheless, it is within his ostensible authority to perform the acts of the class I have mentioned. So long as he is acting within the scope of that class of act his employer is bound whether the clerk is acting for his own purposes or for those of his employer.”

But the legal position would be the same even if Harkisson were not in the position of a managing clerk.

In *Re Eyre, Palmer v. Evans* 1 C.B. (NS) 151 it was alleged that Eyre, a solicitor, had obtained from the defendant an excessive sum of money by way of costs upon an untrue assertion that judgment had been signed and execution issued. The court found that Eyre was not personally cognisant of the matter but that there was improper conduct on the part of someone in Eyre’s office in extorting from the defendant the excessive sum. Eyre was ordered to refund the amount in excess because —

- (a) the extortion was done by a person for whose act he was responsible, and,
- (b) he (the solicitor) had received the money.

Nor would the result in that case have been different if the solicitor had not received the money. See *Dunkley v. Farris* (1851) 11 C.B. 457 and *Lloyd v. Grace Smith & Co.* [1911 – 1913] All E.R. (Rep.) 51. In the latter case it was held that a solicitor is liable for fraud committed by his managing clerk in the course of his employment and not outside the scope of his authority, whether or not the solicitor benefitted from the fraud.

Although specifically dealing with a solicitor and his clerk all the above decisions are based on the ordinary principles of master and servant.

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In the light of Mr. Shah's letter of the 15th March 1965 and the decisions referred to above I hold the view that Harkisson was acting within the scope of his actual or ostensible authority when he wrote the letters to the defendant company. His acts in this regard and the subsequent receipt of the cheque and the disposition of its proceeds are those of his principal.

The next question is whether the plaintiff is estopped from denying that Shah was acting for him during the material period. The answer would depend upon whether the evidence discloses that he expressly or impliedly held out the latter to the defendant company as his agent for the purposes of receiving moneys due to the estate or specifically under the policy.

The facts from which counsel for the defendant company has urged me to draw this conclusion are –

- (a) the letter signed by Mr. Shah dated the 5th August, 1964,
- (b) the drawing and filing of the required documents under the provisions of the Estate Duty Ordinance and the Deceased Persons' Estates Administration Ordinance, and,
- (c) the forwarding to the defendant company of the policy, the probate, and the death certificate of Ellen Kadir.

With regard to (a), the contents of which I have already set out, it is submitted that what Mr. Shah was requesting was payment of the amount due under the policy. Even if this were so, a contention which I do not accept, it does not follow that Shah did have the authority from the plaintiff, as the named executor, to make such a request. This aside, however, I construe the letter, inelegantly as it is written, to be merely a request for information as to the amount due so that it may be included in the statement of the assets and liabilities of the estate.

In so far as (b) is concerned, I am of the opinion that the instructions to draw and file and the actual drawing and filing of the required documents for the purposes of the statutes referred to, constitute a separate and distinct retainer from that to collect monies due to an estate. In fact, unless an agreement has been made to the contrary (see O. 60 r. 2 of the Rules of the High Court as inserted by the High Court (Amendment) Rules 1960)) the remuneration for the performance of the former services are fixed (O. 60 r. 6(b) and Part 11 of Schedule Z) and does not include any charges for the collection of moneys.

With regard to (c) it is my view that the fact that the documents referred to emanated from Mr. Shah's chambers and were forwarded by his clerk is not sufficient evidence on which to found the company's contention for an estoppel. Nor do I think that taken together the circumstances

lead to this conclusion. In *Mac Fisheries Ltd. v. Harrison* [1924] 93 L.J. K.B. 811 the facts were as follows: The defendant was the tenant and licensee of a public house. He agreed with a third person, a Mrs. Squires, and the owner of the public house that the former should become a tenant in his place and this was done; but, contrary to the Licensing (Consolidation) Act, 1910, the licence was not transferred, and the defendant's name remained painted over the doorway of the public house. The plaintiffs not knowing that the defendant was the licensee supplied goods at the public house to the new tenant. He afterwards discovered that the defendant was the licensee and sued him for the price of the goods. It was held that, despite the fact that the new tenant occupied a position which could only be lawfully occupied by the defendant, whatever misrepresentations he had made to people in general, those representations did not reach the plaintiffs or induce them to act to their detriment, as they did not know that he was the licensee when they supplied the goods. The decision in this case may be contrasted with that in the unreported case of *Betts v. Harrison* (1924) to which reference is made in the judgment. In this latter case Betts had seen the defendant's name painted over the doorway of the public house before he supplied goods to Mrs. Squires, the new tenant. The Licensing (Consolidation) Act 1910 only permitted the licence holder and his servant or agent to sell liquor on a licensed premises. It was accordingly held that it was not unreasonable for a person dealing with someone selling on the premises, to assume that there was no breach of the statute, and that the person so selling was the servant or agent of the person whose name was painted over the doorway as being the licence holder. In the result the defendant was held estopped from denying that Mrs. Squires was his servant or agent and, therefore liable to pay for the goods supplied. In the present case there is no such compelling reason for the conclusion that the plaintiff represented Shah to be his agent for the purpose of receiving moneys due to the estate.

The case of *King v. Smith* [1900] 2 Ch. 425 is a good illustration of the court's approach to the question of holding out. The facts were as follows: Two trustees advanced money on reality. The defendant, one of the trustees, paid the money to a solicitor, who produced to him the mortgage deed executed by the plaintiff, King as mortgagor. The deed which contained the usual receipt clause for money in the body of it, was handed over by the solicitor to the defendant who retained it. The plaintiff who was a man of limited education and had employed the solicitor from time to time in relation to his property, and had implicit confidence in him, had signed the deed on his advice, but did not know that it was a mortgage and had not instructed the solicitor to obtain a mortgage. The solicitor misappropriated the money and absconded. On discovery of the fraud the plaintiff brought an action against the trustees to set aside the mortgage. The defendants relied on s. 56 of the Conveyancing Act, 1881, (England) which provided that where a solicitor produced a deed, having in the body of it or endorsed thereon a receipt for consideration, the deed, being

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executed or endorsed by the person entitled to give a receipt for it, is to be deemed sufficient authority to the person liable to pay without the solicitor producing any separate or other authority in that regard from the person who executed or signed the deed or receipt. FAREWELL J. in dismissing the claim pointed out, at p. 431 that apart from the section the solicitor would have had no authority to receive the money. He further stated –

“but the Act of Parliament was passed in the interests, I suppose, of the public at large, and for the convenience of business, giving statutory authority to a solicitor who produces a deed to receive the consideration” (in the circumstances mentioned in the section”).

The position, before the above legislation, was expressed by Lord CHELMSFORD, L.C. in *Viney v. Chaplin* 44 E.R. 1071 at p. 1075 as follows:

“It may I think be considered as established that the possession of the executed conveyance, with the signed receipt for the consideration money endorsed, is not in itself an authority to the solicitor of the vendor to receive the purchase-money”.

In *Jared v. Walke* [1902] 18 T.L.R. 569 certain property was conveyed to the plaintiff as security for an advance, the mortgage deed being prepared by the plaintiff’s solicitor who kept the deeds and received interest from the mortgagor on behalf of the plaintiff. The solicitor was in the habit of making investments for the plaintiff on mortgage, purchase or otherwise, and of keeping the various deeds in his possession. Without the plaintiff’s knowledge or authority, he gave notice to the mortgagor calling in the principal money due under the mortgage, and the mortgagor repaid the money to him upon seeing a deed of reconveyance purporting to be signed by the plaintiff and the title deeds of the property. The plaintiff’s signature on the reconveyance was a forgery and the plaintiff never received the money nor did he know that it had been paid off. In finding for the plaintiff BYRNE J. said at p. 570 –

“Possession of title deeds by a solicitor was not in itself a sufficient justification for payment to him of the principal; there was in this case an authority to receive interest as well, but an authority to receive interest even coupled with possession of the deeds was not sufficient to justify an inference that the solicitor was entitled to receive the principal.”

Indeed from the above authorities it is doubtful whether, even if I had found that the claim form had been in fact signed by the plaintiff, this by itself would have been sufficient to entitle the defendant company to succeed. In the result I am constrained to the view, unfortunate as it may be, that the defendant company has failed to prove that the cheque was sent to one who was the plaintiffs agent at the material time. There will therefore be judgment for the plaintiff in the sum of \$2,219.00 with costs to be taxed.

Judgment for plaintiff.

Solicitors:

R. N. Tiwari for the plaintiff.

D. P. Bernard for the Defendant.

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[In the Court of Appeal (Luckhoo, Persaud, Cummings, JJ.A.)
June 4, 28, 1968].

Evidence — Child — Competence to be sworn — Nature and obligation of the oath — Evidence Ordinance Cap. 25, S. 71.

At the trial of the appellant on an indictment for robbery with violence and rape the only evidence against him came from a child who was then over fifteen years old. The trial judge treated her as a child and held a *voir dire* in the presence of the jury. In his discretion he concluded at the end of the *voir dire* that she was competent to be sworn.

HELD: (i) irrespective of age the court has a right to have a *voir dire* if there is reason to believe that the capacity for being sworn does not exist;

(ii) before swearing a child of tender years, the court must be satisfied that the child feels the binding obligation of the oath, i.e. a belief in a Creator and the power possessed by the Creator to mete out punishment for misdeeds of falsehood;

(iii) having regard to what the answers on the *voir dire* revealed and to the fact that the trial judge had the benefit of seeing the demeanour of the child, it could not be said that he exercised his discretion wrongly;

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(iv) having concluded that the child should be sworn, a trial judge should avoid inviting the jury to determine in their deliberations whether the child appreciated the nature and obligation of the oath;

(v) the competence of a witness to be sworn is a preliminary question to be determined by the judge and the reason why the evidence is given in the presence of the jury is because it is important that they hear the answers and see the demeanour of the child so as to assist them in determining the trustworthiness of the evidence.

Appeal dismissed.

LUCKHOO, J.A.: In daylight on the 11th September, 1967, Florence Vallidum was robbed with violence and raped. She identified the appellant as her assailant at an identification parade and in her clear testimony on oath had no doubt that he was the person involved. There was no corroboration of her sworn testimony. The appellant was charged and convicted on each of two separate counts of an indictment for robbery with violence and rape, for which on the former he was sentenced to seven years' imprisonment and nine strokes, and on the latter to seven years' imprisonment; sentences to run concurrently.

Only one of his grounds of appeal to this court merits consideration, viz. that which questions whether it was competent for Florence Vallidum to be sworn as a witness. If this be well-founded, it must inevitably lead to the quashing of both convictions; for her evidence, unsworn, would, in law, have required corroboration, of which there was none; and, improperly sworn, would have been given a greater value than it was entitled to have, with consequential prejudice to the appellant.

Vallidum in her evidence at the trial on the 11th January, 1968, gave her age as 14 years, and the date of her birth as the 13th June, 1952. The trial judge treated her as a child for the purpose of ascertaining under s. 71 of the Evidence Ordinance, Cap. 25, whether she was "ignorant of the nature and obligation of an oath", before deciding to swear her or not. In exercising his discretion to pronounce on her competency, he asked the following questions, and received the answers here set out:

QUESTIONS	ANSWERS
How old are you?	I am 14 years old.
What school do you attend?	I attend the Indian Trust College.
In what form are you?	I am in second form up to today.

QUESTIONS

ANSWERS

How long have you been attending Indian Trust College?	For three months.
Have you taken any exams?	No.
What primary school did you attend?	I attend Campbellville Government Primary school.
How long did you attend Campbellville Government School?	I attend Campbellville Government School for 8 years.
Do you go to Church?	Yes I do.
What Church?	St. Theresa Catholic Church.
Do you know about God?	Yes I do.
Do you know what it is to tell a lie?	Yes sir.
Do you know what will happen to you if you tell a lie?	Yes sir.
Is it a good thing or a bad thing to tell a lie?	A bad thing.
Do you know about sin?	Yes Sir.
If you were to tell a lie is it a sin or not?	It is a sin.
If you were to tell a lie do you know what will happen to you?	Yes, I would be punished because it is a sin. God will punish me.

After which, Crown counsel declined to ask any questions, and counsel for the accused also said that he did not wish to ask any questions of the witness. The court ruled (and noted) "that the witness is of competent understanding and understands the nature and obligation of the oath and is capable of giving sworn evidence". She was then sworn.

Counsel for the appellant now argues that the examination of the child was inadequate. He cited and relied upon the cases of *Ramsankar v. The Queen*, (1955) L.R.B.G. p.74, and *R. v. Dent*, 71 LP. 511, and contends that the above answers did not show that the girl was aware of the nature and obligation of the oath; that to speak falsely on oath would be a violation of the moral law; and that it did not appear that she recognised that it was more serious to tell a lie when on oath than when not on oath.

Mr. Gonsalves-Sabola, for the Crown, contended that the answers given by the girl at the *voir dire* amply justified the reception of her evidence on oath, but, in the alternative, asked the court to consider whether it was at all necessary for a *voir dire* to be undertaken by the trial Judge, in view of her

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evidence that she was born on a date which made her more than 14 years, in fact 15½ years. On the authority of *Jagdharry v. Adams*, (1964) 6 W.I.R. p. 208, he argues, she was no longer a child for the purposes of fulfilling the requirements of s. 71 of the Evidence Ordinance.

On this point, the evidence is not clear as to the true age of the child, so that it does not seem to be a case for decision as to what the presumptive age for competency should be. It may well be that *Jagdharry v. Adams* has been correctly decided, but I do not pronounce upon that. In any event, the court has a right to have a *voir dire* if there is reason to believe that the capacity for being sworn does not exist, irrespective of the age of the witness. See *R. v. Autrobus*, (1947) 2 D.L.R. at p. 59.

The judges for over a century, before swearing children of tender years, particularly directed their attention to the person's notion of eternity, or of a future state of rewards and punishments in which a Supreme Being will reward or punish them according to their deserts. The child must feel the binding obligation of an oath, perhaps arising from some course of religious instruction or education. The child's intelligence will have to be tested; so also its understanding of the duty of speaking the truth generally, and in relation to the evidence about to be given; and there must be an appreciation of consequences which will come from false testimony, of a kind which will inhibit falsehood and encourage truthfulness. As, for example, the belief in a creator, a hereafter, and the power of the creator to mete out punishment for misdeeds of falsehood. Supernatural sanctions of this kind give such added value to testimony that the law formerly made it essential to the competency of every witness that he should know and accept the religious obligation of an oath; the Christian, Mohamedan and Hindu each according to his own religious code; different in form, perhaps, but serving the same purpose in binding the conscience of the believer to his faith, so that mortals in the exercise of functions of judgment may hope for some responsible reaction to truth. Statute, however, later allowed for a solemn affirmation in certain circumstances.

The law places no reliance on testimony not given on oath or affirmation. Sufficient care ought always to be taken, then to ensure that a child before being sworn measures up to the required capacity.

At common law an infant could not under any circumstances be admitted to give evidence except on oath. No precise age is fixed by law within which children are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. In practice it is not unusual to receive the testimony of children of eight or nine years of age, sometimes less, when they demonstrate that capacity of understanding and sufficient reverence for the duty of speaking the truth on oath. So much depends upon the good sense and discretion of the trial judge in determining whether the child is possessed of what will render him a competent witness. In *R. v. Brasier*, (1779) 1 Leach p. 199, the judges there said:

“There is no precise or fixed rule as to the time within which infants are excluded from giving evidence, but their admissibility depends upon the sense and reason they entertain and the danger and impiety of falsehood which is to be collected from their answers to questions propounded by the Court.”

It is not so much what the court asks, but what the answers reveal. It may well be that a judge may not ask a single question in the *voir dire* relating specifically to the nature of an oath, but answers given may show that the child has not only a sufficient notion of religious or moral duties, but faith in the power of the divinity to punish any disregard thereof, which will amount to an understanding of the necessity for speaking the truth on oath, and the consequences which will follow from not doing so. The question really is: Is the child's mind sufficiently prepared to receive the oath to speak the truth before God?

In the instant case it must be observed that the individual is not of the tender years of an infant which would require that stringency in examination when the intelligence is relatively under-developed and the understanding naturally of a low level. The child in this case turned out to be a member of the Red Cross organisation and has a somewhat reassuring background. Before she was sworn, it was ascertained that she had attended Campbellville Government School for eight years; was at the time actually at school at the Indian Trust College, and, most important, was in the habit of going to church at St. Theareas's Catholic Church, all of which were factors to be reckoned in the judicial assessment as to her competency; but more directly pertinent, she knew about God; what it was to tell a lie; that it was a bad thing to do so; she knew about sin; that it was a sin to tell a lie; that if she were to tell a lie she would be punished; because it is a sin, God will punish her.

The depth of understanding, maturity and philosophy of faith here demonstrated, go far above and beyond the limited reaction of the child in *Ramsankar's* case, who was only able to comprehend and answer one question, viz.: “If you do not speak the truth in school, what will happen?” To which the answer was given: “Me go get lick.” When asked the question upon being called to give evidence, “If you do not speak the truth, what will happen?” there was no answer, and the trial judge noted, “Witness is mute.” The same question was again repeated, and again the witness gave no answer and remained mute. Obviously, the child's understanding and appreciation of the consequences of falsehood was confined solely to corporal punishment in a classroom for a lie to her teacher – a matter exclusively pertaining to this life, where if the falsehood was undiscovered by the teacher there would be no punishment. The Court of Criminal Appeal was, in my view, right in finding on this examination that the child knew that she *ought* to speak the truth (at least in school) but that it was not “of such a kind as to enable the judge reasonably to come to the conclusion that the child was aware of the nature and obligation of an oath”. This was particularly mani-

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fest when the child was called as a witness and failed to answer the question twice put: "If you do not speak the truth what will happen?"

This complete lack of comprehension in not being able to appreciate the consequences of speaking falsely when giving evidence must necessarily lead to the conclusion that the child did not "recognise that it is more serious to tell a lie when on oath than when not on oath" as the Court of Appeal pronounced. In other words, the child there did not have the capacity of assimilating the solemn duty of speaking the truth; apparently there was no religious education from which to draw; no knowledge of a creator having cognizance of and condemning false statements to the damnation of the utterer. An oath could be of no significance whatever to a mind so conditioned, and it was right to rule that she ought not to have been sworn.

In *Dent's* case the child was not at school for two years. She knew it would be wrong to tell a lie to her teacher, but she did not think it "more wrong" to tell a lie after kissing "the Book" than telling a lie to her teacher. She purported to know what taking an oath was, but she could give no answer to the following questions: "What is taking an oath? Swearing on the book? Do you know what that means? Supposing that you kissed the Book and then told a lie after that, what would happen? Do you know? Do you know anything about that?" Silence to all these questions eloquently illustrated the deficiency of her understanding and unfitness to be sworn.

Like the witness in *Ramsankar's* case, her limitations did not permit her to comprehend that falsehoods in evidence at a trial would result in punishment from the Almighty, for that would be a sin. Florence Vallidum was not similarly handicapped; her test revealed otherwise.

In *Reg. v. Holmes*, (1861) 2 F. & F., 788, a child was raped. She was only six years old, but knew it was a bad thing to tell a lie. When the trial judge was about to receive her evidence, counsel commented that it was laid down in the books of authority that the witness must understand the nature and obligation of an oath.

His lordship thought that was a complicated question which nine out of ten children could not answer and, instead, asked: "Do you say your prayers?" To which the witness answered, "Yes". Then followed the question: "What becomes of a person who tells lies?" Witness: "If he tells lies he will go to the wicked fire." His Lordship proceeded to admit the evidence.

It may well be, however, that instances of the kind illustrated by Dickens, in his "Bleak House", do occur where some impatience is evidenced by functionaries in deciding whether to accept the testimony of children or not. There "Jo", a little orphan crossing-sweeper appearing before a coroner to give evidence, knew little more than – A broom is a broom, and "It's wicked to tell a lie". He believed that if he told a lie in his evidence, after he was dead "it'll be something very bad to punish him, and sarve him right – and so he'll tell the truth." This was sufficient for a juryman to ask that he be heard, but the coroner maintained:

“We can’t take that in a court of justice, Gentlemen. It’s terrible depravity.”

But other judicial discretion may not so summarily reject “Jo’s” testimony after due consideration of the reasons why he felt impelled to speak the truth. At least he could not be far removed from the point of acceptance, and the “depravity” might not now appear to be as “terrible” as the coroner then thought, for “Jo’s” conscience seemed to be fully apprised of the damnation which would face him after death, which he accepted would “sarve him right” if he dared to tell a lie to the gentlemen.

In *R. v. White*, I Leach, at p. 317, the court, after defining an oath, proceeded to say:

“and therefore a person who has no idea of the sanctions which this appeal to heaven creates, ought not to be sworn as a witness in any Court of Justice.”

In my view, if a child called to give evidence in a court of law has fixed in mind that very high moral notion that it would not only be wrong to tell a lie, but a sin to do so, a sin which would not be approved by the God in whom belief is cherished; that that God would know of that sin brought about by the lie told in evidence, and that that God himself would mete out punishment – such a person would, when actually sworn to tell the truth, know, understand and appreciate the nature and consequences of that oath; and after this it would be for those who have to judge to say how far the danger and impiety of falsehood has been avoided in the face of the belief in punishment by God therefor.

In this case I do not entertain any doubt that the reception of the evidence of the child-witness on oath was justified. Her intelligence and actual mental capacity, her sense and reason of the danger and impiety of falsehood, and her concept of its consequences were sufficiently tested to enable the judge to exercise his discretion properly.

There is one remaining matter which calls for an observation. The learned trial judge in his summing-up told the jury that although he came to the conclusion that she was of competent understanding, and appreciated the nature and obligation of the oath as a result of which she was sworn, yet it was open to them to reflect on the questions which he had asked her, and if they thought that she was not of competent understanding, and did not appreciate the nature and obligation of the oath, then her evidence would be of the kind which would in law require corroboration of which there was none, and the verdict in that case would have to be not guilty.

The question whether a witness is competent is a preliminary question to be determined by the judge and not by the jury. (See *R. v. Reynolds* [1950] 1 K.B. 606).

The reason why the evidence of the child must be given in the presence of the jury is because although the duty of deciding whether the child may be

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sworn or not lies on the judge and is not a matter for the jury, it is most important that the jury should hear the answers which the child gives and see her demeanour when she is questioned by the court, for that assists them to determine the trustworthiness of the evidence, and the weight to be attached to it. But it is equally important that it should be borne in mind that the responsibility of assessing the competency of a child to give evidence upon oath is the judge's exclusively, and to invite the jury to make a finding of fact on such an issue may have the effect of confusing them, and should be avoided.

In this case, the jury must have been favourably impressed with Vallidum's evidence, otherwise they would not have returned a verdict of guilty on her evidence as it stood alone, having regard to the directions they received from the judge on the caution to be exercised before acceptance.

In conclusion: If one were to ask the question – what would as a general rule admit a person to be sworn as a witness? – what was said by WILLES, L.C.J., in *Omichund v. Barker*, 125 E.R. 1310, may best answer the question:

“Nothing but the belief in a God and that He will reward and punish us according to our deserts, is necessary to qualify a man to take an oath.”

In *Braddon v. Speke*, (1684) 9 St. Tr. 1127 at pp. 1148-9, a boy of thirteen years was allowed to give evidence on oath. He was asked: “Do you know what an oath is?” He said, “No.” When asked, “What if you should swear to a lie? If you should call God to witness a he, what would become of you then?” the answer was, “I should go to hell fire.”

On the answers given by Florence Vallidum, she could not have answered the above question in any other way than “God will punish me for that lie which is a sin!”

Implicit in the answers collected at the *voir dire* was the recognition of the necessity of speaking the truth in the way in which the taking of an oath would require. This is an inference which falls readily from her answers. It must have appeared to the trial judge, as it does to me, that she was willing to bind her soul with the bond of the oath. In effect she showed an appreciation of the essence of an oath.

In a New Abridgment of the Law by Matthew Bacon, vol. III, 7th ed., at p. 202, under the caption “Who may be a witness”, it is stated that:

“All persons may be witnesses who appear to have sufficient discretion, and who from their principles must be presumed to have a right sense of the sanctity of an oath, and of the obligations it lays them under to depose the whole truth, and nothing but the truth; therefore infants, aliens, villains, bondsmen, etc., may be witnesses.”

Apart from the answers given by the child, the trial judge, in the exercise of his discretion to ascertain competency had the benefit of observing and assessing her demeanour. The assurance and assistance to be derived from

this opportunity could further enhance the value and import of the answers given. In concluding that she understood the nature and obligation of the oath he must have taken her demeanour into account; that demeanour must have been sufficiently favourable to propel him to that conclusion.

A Court of Appeal will not disturb the exercise of a discretion on law except it be without a sufficiency of material or in a wrong manner. On the evidence, collected with the opportunity to behold the manner and appearance of its presentation, this court cannot say that discretion was improperly exercised.

For the reasons given, I can find no merit in the argument presented by counsel on behalf of the appellant. I would therefore order that the appeal be dismissed, and the conviction and sentences be affirmed.

PERSAUD, J.A.: For the reasons given by LUCKHOO, J.A., I also would dismiss this appeal, and affirm the convictions and sentences.

CUMMINGS, J.A.: I concur.

Appeal dismissed.

MARGARET ROBERTS v. MABEL LUNCHEON

[In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Bollers, C J. and George, J.)
December 1 and 15, 1967, June 1968]

Landlord and Tenant — Closing order — Effect on contract of tenancy — Whether contract void for illegality.

The respondent, landlord, had filed a claim for rent due for the period 1st March to 31st October 1966. A closing order dated the 9th May 1966, had been made by the Georgetown Town Council which directed that the premises cease to be inhabited after the 31st August, 1966. The appellant, tenant, appealed against the judgment on the ground, *inter alia*, that on receipt of the closing order, the contract of letting became void for illegality and the landlord was not entitled to recover any rent.

HELD: (i) when a landlord receives a closing order and takes no action to have the tenant evicted, he is knowingly suffering or permitting the tenant to inhabit the premises concerned, after the effective date of the order, contrary to reg. 17 of the Georgetown Building Construction (Public Health Provisions) Regulations, Cap. 152;

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(ii) in such circumstances, to permit the landlord to recover rent after the effective date would amount to a condoning of the offence;

(iii) reg. 17, by necessary implication, prohibits the use for human habitation, after the effective date, any premises to which a closing order applies;

(iv) the onus is on the landlord if he desired to recover rent after the effective date, to prove that he has taken steps to recover possession;

(v) a landlord cannot be compelled to answer whether or not he has received a closing order as an affirmative answer may tend to incriminate him;

(vi) as there was no other evidence of the receipt of a closing order by the landlord there could be no finding of the commission of a criminal offence and therefore a breach of the implied prohibition.

Appeal dismissed.

C. V. Wight for the appellant.

F. L. Brotherson for the respondent.

JUDGMENT OF THE COURT.: This appeal arose out of the decision of a magistrate for the Georgetown Judicial District in which he gave judgment for the respondent (landlord) against the appellant (tenant) in the sum of \$56.00 with costs of \$7.30, on a claim for rent due, owing and payable by the latter to the former for the period 1st March, 1966, to 31st October, 1966, at \$7.00 per month. The claim had been for rent due for the period 1st February to 31st October, 1966, but at the trial the respondent admitted receipt of one month's rent.

Before us counsel for the appellant argued grounds 1(b), 2 and 3. In so far as grounds 1(b) and 2 are concerned the gravamen of his argument was to the effect that as a closing order, dated the 9th May, 1966, deeming the premises, the subject matter of the letting, unfit for human habitation, had been made by the Mayor and Town Council of Georgetown, the contract of letting in relation to the premises had become void for illegality. A closing order in respect of the premises purporting to be signed by the town clerk of the Georgetown Town Council and dated the 9th May, 1966, and which had been served on the appellant was admitted in evidence. This order was made pursuant to powers in that regard given to the Georgetown Town Council by regs. 15 and 16 of the Georgetown Building Construction (Public Health Provisions) Regulations, Cap. 152, and directed that the premises should cease to be inhabited after the 31st August, 1966. Thereafter, according to reg. 17 "every person who shall inhabit such building or any part thereof or knowingly suffer or permit the same to be inhabited shall be guilty of an offence against (the) Regulations". By reg. 23 the penalty for any such offence is a fine not exceeding fifty dollars.

Until the effective date of the closing order, i.e. the 31st August, 1966, there can be little doubt that the appellant's obligation to pay the rent due subsisted. In coming to this conclusion we are not unmindful of the fact that by virtue of s. 44(1) of the Landlord and Tenant Ordinance, Cap. 185. there is implied in every contract of letting a condition that the house is at the commencement of the tenancy, and an undertaking that it will be kept by the landlord during the tenancy, in repair and in all respects reasonably fit for human habitation. We, however, adopt as a correct statement of the law the view expressed by SCRUTTON, J., in *Hart v. Rogers* [1916] 1 K.B. 646, to the effect that although a landlord may be under an obligation to keep premises in repair, his failure to do so is no answer to a claim for rent but only gives a right to a cross action for damages. In *Cross v. Piggott* [1922] 69 D.L.R. 107, MATHERS, C.J.K.B., after a review of the authorities accurately and succinctly set out the legal position as regards the obligation of a tenant to pay the rent when due. He had this to say at pp. 109-110:

“The principle deducible from the authorities appears to be that, after the tenant has gone into possession, his obligation to pay rent does not depend on the performance by the lessor of any collateral obligation assumed by him and that nothing short of something done by the landlord which amounts to an eviction of the tenant will discharge the latter from his obligation to pay rent.”

The decision in the case of *Popular Catering Association Ltd. v. Romagnoli* [1937] 1 All E.R. 167, is to the same effect.

We do not think that a declaration, albeit, from a body vested with the power to do so, that the premises are unfit for human habitation, amounts to an eviction of the tenant and we therefore hold that she was obliged to pay rent owing, at least up to the period ending 31st August, 1966. Any loss which the tenant may have suffered as a result of the condition of the building could have been recovered under the provisions of s. 44(3) of the Landlord and Tenant Ordinance.

After the 31st August, 1966, the question to be resolved is one of a quite different complexion. As we have already pointed out, after the effective date of a closing order sanctions are imposed on anyone who inhabits or knowingly suffers or permits the building to be inhabited. As we understand Mr. Wight's contention, although we do not think that it was fully articulated, the necessary implication of reg. 17 is to prohibit the creation or continuance of any contractual relationship between the landlord and the tenant, because of the fact that the premises have been declared unfit for human habitation. But for the reasons which we have already given this contention looms only after the 31st August, 1966.

We are of the opinion that, if a landlord and tenant are both in receipt of closing orders in respect of premises rented to the latter, and the former

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takes no steps to have the tenant evicted then he is “knowingly suffering or permitting” the tenant to inhabit them after the effective date of the order: (see *Berton v. Alliance Economic Investments Co. Ltd.*, [1922] 1 K.B. 742); for there can be little room for argument that if the proper steps are taken, a court of summary jurisdiction would do otherwise than grant possession to the landlord. (See *Atkin v. Rose* [1923] 1 Ch. 522.)

To permit a landlord on whom a closing order has been served to recover rent falling due after the effective date of the order and despite his failure to take any steps to recover possession of the premises, would in our opinion be flying in the teeth of reg.17 and in effect to condone the commission of a criminal offence. For we are of the opinion, and this is supported by the case of *Atkin v. Rose* (*supra*), that the failure on the part of the landlord to take steps to recover possession of the building would amount to the commission of an offence under the regulation.

It is now quite settled that if legislation expressly or by necessary implication prohibits the making of a contract, the law will not help the plaintiff. In *Archbalds (Freightage) Ltd. v. Spanglett* [1961] 1 Q.B. 374 at p. 384, PEARCE, L.J. had this to say:

“If a contract is expressly or by necessary implication forbidden by statute, or if it is *ex facie* illegal, or if both parties know that though *ex facie* legal it can only be performed by illegality or is intended to be performed illegally, the law will not help the plaintiffs in any way that is a direct or indirect enforcement of rights under the contract. And for this purpose both parties are presumed to know the law.”

We are of the opinion that by necessary implication reg. 17 prohibits the use of any premises, referred to in an order, for human habitation, and this must necessarily mean an implied prohibition against any contract in relation to such user, by a landlord who has been served with such an order after the effective date mentioned therein.

In the circumstances of the present case the prohibition would be against the continued existence of a contractual relationship thus debarring the landlord from suing for rent due. This prohibition would, however, depend on proof of the receipt by the landlord of the closing order and of his failure to take any action to recover possession of the premises. With regard to the latter, there is no evidence on record to show that the respondent has taken any such action. We are of the opinion, that the onus is on her to lead such evidence if she is to satisfy the court that she is not committing a breach of reg. 17 after the effective date of the order. But the receipt of the order by her is of equal importance, for it can hardly be argued that, she could be guilty of knowingly suffering or permitting the occupation of the building, the prohibition against which she is unaware of. If no such order has been served on her then the position in law as regard rent due would be that set out in the cases of *Hart v. Rogers* (*supra*) and *Cross v. Piggot* (*supra*) and *Popular Catering Association Ltd. v. Ramagoli* [1937] 1A11 E.R. 167.

In the present case there is no evidence of the receipt by the landlord of a notice under regs. 15 and 16. When counsel for the appellant sought to illicit an admission of this fact from the respondent, the latter claimed privilege, presumably on the ground that to answer the question would tend to criminate her. The learned magistrate ruled, and we think rightly, that she could not be compelled to answer the question. In *R. v. Slaney* (1832) 5 C and p. 213, Lord TENTERDEN, C.J., had this to say on the question of privilege:

“You cannot only compel a witness to answer that which will criminate him, or that which tends to criminate him, and the reason is this, that the party would go from one question to another, and though no question might be asked, the answer of which would directly criminate the witness, yet they would get enough from him whereon to found a charge against him.”

Counsel for the appellant must have recognised the correctness of the learned magistrate’s ruling, for although he challenged it in his grounds of appeal (see ground 1(a)), his arguments before us did not touch on this point. In our opinion, the appellant could, by other means, have proved the service of the order on the respondent but, she contended herself with tendering the one received by her. In the absence of evidence of the receipt of an order by the respondent it is not for us to presume this. Therefore, we are left with no evidence from which we can properly say that there was on the part of the respondent a ‘knowingly suffering or permitting’ the building to be inhabited. Accordingly, there is no evidence from which to draw the conclusion that there exists a prohibition, vis-a-vis the landlord, against a continuation of the contractual relationship. In the result we feel that the respondent was entitled to sue for rent due even after the effective date contained in the order to the appellant.

With regard to ground 3, counsel for the appellant drew attention to s. 19(1) of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16. This section reads as follows:

“If on the day of hearing or any adjournment of the court or cause, the plaintiff does not appear or sufficiently excuse his absence, the cause shall be struck out; and if he appears but does not make proof of his claim to the satisfaction of the court, the magistrate may nonsuit him or give judgment for the defendant; and in either case, where the defendant appears and does not admit the claim, the magistrate may award the defendant, in addition to costs, a further sum, not exceeding five dollars, by way of compensation for his trouble and attendance, which the magistrate in his discretion thinks just. That sum shall be recoverable from the plaintiff in like manner as any debt adjudged under this Ordinance; and no action shall be brought in respect of the same cause of action until the sum and costs have been paid.”

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The only evidence as to the payment of costs awarded in previous litigation was given by the respondent and this was inconclusive. Her evidence was as follows:

“I failed before for the said amount and the defendant paid \$7.00 on account. I had not paid the costs of \$5.50 granted by the court and so I had to withdraw the matter to refile the present case. They owe on costs.”

Before us Mr. Wight admitted that he received two sums of \$5.50 from the respondent which represented costs awarded by the magistrate to the appellant in two previous suits between her and the respondent, but contended that a third sum had been awarded to the appellant. We examined the case jackets relating to all the suits filed by the respondent against the appellant. There were in fact three previous complaints filed but only in respect of two of them were costs awarded to the appellant and from Mr. Wight's admission these were paid. In the result this ground of appeal loses its validity.

For the foregoing reasons we dismissed the appeal, affirmed the judgment of the magistrate and awarded costs to the appellant in the sum of \$28.00.

Appeal dismissed.

In the matter of an application for an order of certiorari,
DANRAJ v. JAIRAM

[High Court, IN CHAMBERS (Van Sertima, J.) July 5, 1968.]

Landlord and tenant — Application for ejectment — Granted more than seven years after order for possession — Whether valid — Landlord and Tenant Ordinance, Cap. 185, s. 36 — Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, s. 46(1) (a) and (c).

On the 14th January, 1960, the respondent, landlord, obtained an order for possession of certain building land on which the applicant had erected a house. The effective date of the order was the 1st December 1960. The applicant failed to comply with the order and on the 8th February, 1962 an order for ejectment was granted, but its issue was stayed until the 30th April 1962. The applicant gave notice of appeal but did not pursue the appeal. On the 28th August 1962 he made application, to the magistrate who had granted the order for ejectment, to have it revoked. The magistrate revoked the order and refused to issue the ejectment warrant. An application

by the respondent to the Full Court for an order of mandamus under s. 37 of the Summary Jurisdiction (Appeals) Act was refused, and his subsequent appeal to the Court of Appeal, dismissed.

On the 12th July 1966 the respondent applied for a new writ of ejectment, pursuant to the order for possession which had been made on the 14th January 1960. After arguments and several adjournments the application was granted on the 11th May 1967.

The applicant then filed the present proceedings in which he challenges the jurisdiction of the magistrate to make the order.

HELD: (i) the words "hearing and determination of the action for possession — — —" in s. 46(1) (f) of the Landlord and Tenant Ordinance, Cap. 185, when read in conjunction with s. 36 of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, made the four year limitation period, within which execution must issue, applicable to an order for possession, subject to the exercise by the magistrate of his powers under para. (e) of s.46(1);

(ii) s. 12 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, does not apply to applications for mandamus under sec. 37 of that Ordinance; accordingly when the respondent had applied to the Full Court challenging the order of the magistrate setting aside the order for ejectment it did not act as a stay of the order for possession;

(iii) an order for possession under s. 46(1) (e) of the Landlord and Tenant Ordinance, Cap. 185, differs from other kinds of orders which a magistrate is empowered to make. Under it a magistrate has power to keep an order for possession in abeyance for an indefinite period, as the sub-section gives him the power to review his original order from time to time according to the exigencies of the individual case;

(iv) each such review is a fresh adjudication and the limitation period under s. 36 of the Summary Jurisdiction (Petty Debt) Ordinance will begin to run afresh from the date of each such adjudication;

(v) as the last adjudication was on the 24th August, 1962, the next application by the respondent, being on the 12th July 1966, was within the four year period, and the fact that it was not disposed of until the 11th May 1967 cannot militate against the respondent's interests.

Quaere whether the Rent Restriction Ordinance, Cap. 186, applies to a tenancy at will.

Order nisi discharged.

VAN SERTIMA, J.: This is an application for an order of *certiorari* by Danraj resulting from an order of ejectment made by the Magistrate of the Essequibo Judicial District in respect of certain building land owned by the respondent at Enterprise, Leguan.

It is essential to set out briefly the history of the litigation between these parties before embarking on a consideration of the legal arguments put forward before me. On the respondent's land there is a house that

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Danraj claims is owned by his wife Bephia. Evidently, this house was originally owned by Danraj but sold by him to her. His affidavit in support does not disclose the date of the sale. Be that as it may, Danraj maintains that he is not a tenant of the respondent (a) because he is not the owner of the house and (b) on the ground that he had been in undisturbed possession of the house spot for more than twenty years last past, *nec vi, nec clam, nec precario*, paying no rent to Jairam or to Gangadeen, his predecessor in title.

On the 14th January, 1960, an order for the possession was made against the applicant by the then magistrate of the Essequibo Judicial District. Possession was ordered to be delivered on or before 1st December, 1960. On the 8th February, 1962, an application for ejectment to issue was made before and granted by another magistrate of the Judicial District but stayed until 30th April, 1962. Danraj gave notice of appeal but did not pursue it.

An application was made before the same magistrate by Danraj on 24th August, 1962. The Magistrate revoked his previous order for ejectment and refused to issue the ejectment warrant.

An application was made to the Full Court of Appeal for an order of mandamus under s. 37 of the Summary Jurisdiction (Appeals) Ordinance but the order absolute was refused. On further appeal to the Guyana Court of Appeal the appeal was dismissed.

On the 12th July, 1966, Jairam, the landlord, made application for the issue of a warrant of ejectment against Danraj, pursuant to the order made on the 14th January, 1960. This application was heard and finally disposed of, after arguments, on the 11th May, 1967, when an order was made for the issue of the warrant of ejectment to issue forthwith.

It is against this last-mentioned order that these proceedings have been brought. Copies of the order *nisi* were served on the respondent, the learned magistrate and the wife of the applicant, Bephia. They were all represented before me by counsel.

It was the contention of the applicant that the learned magistrate had no power to make an order for the issue of a warrant of ejectment pursuant to the order of possession made on the 14th January, 1960, because the latter order was discharged by virtue of the provisions of s. 36 of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16. The provision states: –

“Every judgment and every execution in the Court shall respectively be deemed to be discharged at the end of four years after the date of the judgment.”

Further developing his arguments learned counsel for the applicant stated that it is by virtue of the provisions of s. 46(1) (a) and (f) of the Landlord and Tenant Ordinance, Cap. 185, that s. 36 of the Summary Jurisdiction (Petty Debt) Ordinance (above) is made applicable to the proceedings for possession. That provision deals with the recovery of possession after termination or determination of tenancy where the tenancy is at rate of rental not

exceeding \$1,200.00 a year. Para. (a) of s. 46(1) gives the landlord or his agent the right to file an action against a former tenant or occupier for possession under the Summary Jurisdiction (Petty Debt) Ordinance. Para. (f) of the same sub-section states:

“(f) the law, practice and procedure under the Summary Jurisdiction (Petty Debt) Ordinance and the Summary Jurisdiction (Civil Procedure) Rules, or any amendment thereof, shall apply to the plaint, the issue of the summons and the hearing and determination of the action for the recovery of possession under this section.”

Reference was also made to the provisions of para. (e) of s. 46(1) (above) which states:

“(e) at the time of the making or the giving of any judgment or order for the recovery of possession of any land or buildings, or of any application for the ejectment of a former tenant or occupier, the Court may adjourn the hearing of the action, or stay or suspend execution on the order or judgment, or postpone the date of possession for any period subject to such conditions (if any) in regard to payment by the former tenant or occupier of arrears of rent, mesne profits and otherwise as the court thinks fit.”

I have deliberately set out the provisions of para. (e) after those of para. (f) of s. 46(1) because I may consider it advisable later to make a passing reference to the provisions of ss. 16 and 26 of the Rent Restriction Ordinance, Cap. 186. Both of those provisions were passed in 1947 as amendments to the then Principal Ordinance (enacted in 1941). The Landlord and Tenant Ordinance was also passed in 1947. S. 16 bears the marginal note, “Restriction to right to possession” and s. 26 has as its marginal note, “Procedure”.

It was urged on behalf of the applicant that the matter had been resolved by the magistrate and his judgment given in 1960. There was no appeal from the order for possession, originally fixed for the 1st December, 1960. It was contended that the provisions of s. 12 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, which provide for the suspension of execution of judgments where an appeal has been made and the provisions for the giving of notice and the lodging of security have been complied with, had no application in the present matter.

It was further argued on behalf of the applicant that the procedure for an order mandamus under s. 37 of the Ordinance was not in the nature of an appeal as contemplated by the other provisions of the Ordinance. In support of this proposition, the summons sets out certain suggestions that were made to the applicant, namely, that the Guyana Court of Appeal had stated that the landlord (Jairam) should either apply for a re-hearing or apply for an extension for time to appeal against the judgment of the magistrate. Neither of the two matters was substantiated before me and I consider it advisable to disregard them. In any event, I doubt that, even if sub-

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stantiated, either suggestion would have been material to the determination of the issue before me. At the best, such suggestions would have been by way of *obiter dicta*.

The gravamen of the arguments on behalf of the applicant remain that by virtue of s. 36 of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, and the incorporation of its provisions by s. 46(1) (f) of the Landlord and Tenant Ordinance, Cap. 185, there remained no judgment, that is to say no order or judgment for possession in favour of the landlord/respondent upon which the magistrate could have made an order for the issue of a warrant of ejectment. In the circumstances the applicant contends that as a matter of law, the magistrate's order for ejectment amounted to a nullity, and, accordingly, should be set aside.

On behalf of the respondent it was argued that there were two questions involved. Firstly, whether s. 36 of the Summary Jurisdiction (Petty Debt) Ordinance applies to an order for possession, and, secondly, whether, having regard to the proceedings that had taken place since that order was made, there was a final order of the magistrate from which date the period under s. 36 could be said to run.

Learned counsel for the respondent urged that the operative phrase of s. 46(1) (f) of the Landlord and Tenant Ordinance, so far as the present matter is concerned, is "the hearing and determination of the action for possession under this section." The contention is that the words quoted mean the law and procedure relating to the actual hearing up to the stage of judgment, but has nothing to do with the question of execution of the judgment. The execution of a judgment, for possession it was argued, is the order for the issue of a warrant of ejectment. It was suggested, therefore that the provisions of s. 46(1) (f) were not intended to extend to the execution of the order for possession, i.e. the issue of the warrant of ejectment. Even if I were to accept this argument, and I must admit that it appears to be quite sound, the difficulty would still exist that s. 36 of Cap. 16 would on the basis of the same argument, still apply to the judgment, which is the order for possession which the applicant contends was made over four years ago.

To overcome this difficulty learned counsel for the respondent argued that the word 'judgment' must of necessity mean final judgment. It was argued further that there was not a final judgment until the Court of Appeal finally disposed of the proceedings taken after the magistrate had made that order. In effect the period of limitation cannot begin to run until the order or judgment was truly final.

As stated earlier it was contended on behalf of the applicant that there having been no appeal, in the strict sense of the word, against the judgment, the judgment became final when no steps were taken to appeal. It is therefore necessary to consider this proposition.

The question that has to be determined is whether an application under s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, is in the nature of an appeal so as to invoke the provisions of s. 12 of that Ordinance.

Section 3 of that Ordinance states:

“3. Unless the contrary is in any case expressly provided by Ordinance, anyone dissatisfied with a decision of a magistrate may appeal therefrom to the Court in the manner and subject to the conditions hereinafter mentioned.”

The Court means the Full Court of the High Court of the Supreme Court. ‘Decision’ means any final adjudication of a magistrate in a cause or matter before him and includes a nonsuit, dismissal, judgment, conviction, order, or other determination of the cause or matter.

The wording of s. 12 of the Ordinance (Cap. 17) requires that the execution of the decision under appeal should be suspended when there has been compliance with secs. 4 and 5 of the Ordinance. It is self-evident, therefore, that in order for there to be an appeal there must be an adjudication. Furthermore, it is a matter of the Court’s record that the reason for the dismissal of the application under s. 37 which had been brought by the respondent was that there had been an adjudication by the former magistrate. Put another way, in those matters where mandamus would properly apply no question would arise of the application of s. 36 of the Summary Jurisdiction (Petty Debt) Ordinance, because there would have been a refusal to adjudicate and, accordingly, no judgment to be discharged. It is for a like reason that the Legislature had no reason to extend the terms of s. 12 to applications under ss. 36 and 37 of the Summary Jurisdiction (Appeals) Ordinance. To have done so would have been both illogical and inconsistent with the legal principles involved. I am of the opinion that if there were to be any suspension of the judgment, it cannot be by reason of the provisions of s. 12 of the Summary Jurisdiction (Appeals) Ordinance.

It remains finally for me to refer to the provisions of s. 46(1) (e) of the Landlord and Tenant Ordinance, Cap. 185, and to determine whether an order for possession is in any way different from other orders of a magistrate. Under this provision the magistrate has in my opinion power to keep the order for possession in abeyance so to speak for an indefinite period. In that way he can apparently at least in theory, defeat the provisions of s. 36 of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16. I say ‘apparently’ because when the matter is examined closely in reality he does not really defeat the provisions of that section by the power to suspend making the order for ejection. What the Legislature has given him is the power to review his original order from time to time according to the exigencies of each individual case. In my opinion each review is however a fresh adjudication made on the application of one of the parties, invariably the landlord and a renewal of his possession order. The period required under section 36 (above) would begin to run from the date of each fresh adjudication.

I cannot personally see how any other interpretation could be given having regard to the wide scope that the section gives the magistrate. The fact that it is unlikely that an order for possession would be kept in abeyance for over four years is irrelevant. At the same time, I cannot imagine that the

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legislature could have intended that if a matter did last longer than four years that the order for possession would be discharged by operation of law although still *sub judice*.

In the present case, the last adjudication was on the 24th August, 1962. The respondent, however, made his next application on the 12th July, 1966. I am of the opinion that from the date of that application the matter became once more *sub judice* and the period of limitation under s. 36 of the Summary Jurisdiction (Petty Debt) Ordinance could not be operative against the respondent. The fact that the application was not disposed of until 11th May, 1967, could hardly militate against his interests, in as much as the delay in disposing of the matter could hardly be attributed to him.

I had been minded to give consideration to the question of whether the provisions of the Rent Restriction Ordinance, Cap. 186, would apply to the present matter, in spite of the fact that the premises are the subject-matter of a tenancy at will. I can find nothing in that Ordinance to preclude its application to tenancies at will. It is not necessary to consider the point because the relevant provisions at s. 16(2) and 26 of the Rent Restriction Ordinance would lead to the same result as under the Landlord and Tenant Ordinance.

Having regard to the foregoing I am of the opinion that the order made on the 14th January, 1960, was kept alive by the adjudication on the 24th August, 1962, at which date period of limitation under s. 36 (above) would have begun to run. The learned magistrate, accordingly, had authority and power to entertain the application under consideration and to make the order he did. I have no alternative but to discharge the order *nisi* made by me on the 2nd September, 1967, with taxed costs to the respondent fit for counsel. I make no order for costs in favour of the magistrate.

Stay of execution granted for six weeks.

Order nisi discharged.

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[Court of Appeal (Luckhoo, C. (ag.), Bollers, C.J., Cummings, J A.)
March 13, 14, 29, 30, 31, April 3, 1967, September 4, 1968].

Immovable property — Ownership in common — Power of High Court to order partition — Whether one owner can prescribe against another — Civil Law of Guyana Ordinance, Cap. 2, ss. 2(3), 3 (B) & (D) — Title to Land (Prescription and Limitation) Ordinance, Cap 184, s.3.

During 1909 the respondent's mother, the then owner of the east half of lot 39 Norton Street, erected a north and south fence purporting physically to divide the half lot into two equal portions. She then sold an undivided half part or share of her holding, and the purchaser, under an agreement between them, went into exclusive occupation of the portion of land west of the erected fence. The respondent, who was then living on the land with her mother, obtained exclusive possession of the area east of the fence during 1911 and transport of the latter's undivided share during 1959.

From 1911 she and the successive title holders of the other undivided portion, culminating with the appellant who became owner in 1947 had physically occupied the respective portions as demarcated by the fence. However, despite the intention in 1909, the fence which was erected did not effect a division of the half lot, into two equal parts. This was not discovered until the year 1956 when, with the consent of the respondent, the appellant caused a survey to be carried out. It would appear that the parties had agreed to effect any adjustment which may have become necessary as a result. The survey showed that from a point about midway along the 1909 fence there was a gradual veering westward into the appellant's land, and at the northern end it was some one to one and one half feet west of what should have been the middle line. As a result of the appellant's subsequent actions the respondent filed an action for trespass in respect of the disputed portion of land. She also sought an injunction. Her claim was based on long and exclusive user for over forty years. The appellant founded his defence on the original agreement of 1909 as well as the understanding on which the 1956 survey was undertaken. He also counter-claimed for a division of the half lot in accordance with the survey.

The trial judge gave judgment for the respondent based on her long and exclusive occupation and dismissed the counterclaim holding that the High Court had no jurisdiction to direct a partition of immovable property which is owned by co-owners.

HELD: (i) the High Court was possessed of jurisdiction to make an order for partition, (per Luckhoo, C. ag. and Bollers C.J.) by virtue of the equitable jurisdiction conferred on the court under s.3 (B) of the Civil Law of Guyana Ordinance, Cap. 2, (per Cummings, J.A.) by virtue of the preservation of the Roman-Dutch law of partition by virtue s. 2(3) of the said Ordinance;

(ii) as the land in question was situate within the limits of the city of Georgetown, any such order for partition must, by virtue of the provisions of s. 127 of the Georgetown Town Council Ordinance, Cap. 152, be subject to the approval of the Georgetown Town Council; and

(iii) a co-owner can only prescribe against his fellow owner if he can prove that there was an ouster for the statutory period, and in the present case there was no evidence of any deliberate defiance by the respondent of her co-owners' title on which evidence of ouster could be based, as the circumstances indicated that in 1909 the agreement was to erect a fence to divide the half lot into two equal portions, and the parties and their

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predecessors had occupied on that understanding; and further the agreement for the survey made between the parties in 1956 was indicative of then-knowledge, contemplation and belief as to the nature of their physical occupation and that of their predecessors.

Appeal allowed.

F. H. W. Ramsahoye, M. Akai with him, for appellant.

B. S. Rai for respondent.

LUCKHOO, C. (ag.) I have read the judgment of Cummings, J.A., in which the facts of this appeal are fully set out. I shall, therefore, only allude to such as may be necessary for the approach to the point of view which I would wish to state.

A fence running from north to south was erected around the year 1909 on the east half of lot 39, Norton Street, Newburg District, Georgetown, with the object of dividing that land into two equal portions to allow of separate occupation of the land to the east and west of that half lot.

When a survey of this land by Sworn Land Surveyor Rahaman was made in 1956, it was discovered that the fence did not fulfil the original expectation of providing a true mathematical half, but lay at the most 18 inches west of the mathematical midline at the northern boundary. It began to deviate from about halfway gradually and almost imperceptibly as it went in a northerly direction to that boundary. A subsequent survey in 1960 by Sworn Land Surveyor Rutherford confirmed the Rahaman survey.

In 1956 the actual occupants were Lucy Walker (the respondent) in possession of the eastern quarter and Denis Li (the appellant) in possession of the western quarter. The appellant and the respondent acquired transport in the years 1947 and 1959 respectively of an undivided half part or share of and in the east half of the said lot No. 39.

In June 1965 the respondent sued the appellant for damages for trespass on her premises at east half lot 39 and for an injunction restraining him from repeating the said trespass.

In her statement of claim she alleged that for over 40 years prior to the institution of her action and up to the present time, she had been in sole and undisturbed possession of a specific portion of land in the eastern section of the east half of lot No. 39, which portion was demarcated by a paling running throughout the length of the said lot in a north to south direction, and that the appellant and his predecessors in title had for the past 40 years occupied exclusively a specific portion in the western section of the said east half lot No. 39, demarcated as above.

The appellant in his defence said that the occupation by the respondent and himself and their respective predecessors in title was by consent and agreement at all material times and that the survey in 1956 was made with

the prior approval of the respondent, after which it turned out that she had occupied .008 of an acre more than he. It was further alleged that prior to the said survey they had both agreed that the palings should be placed in accordance with a mathematical division of the land into halves which the survey was intended to mark, but that when the result of the survey became known the respondent retracted and refused to honour this previous promise to sub-divide and enable separate titles to be taken by the parties for equal portions of the land.

And in his counterclaim, he sought a division of the said property so as to enable him to have transport of the west half of the east half of lot 39 in accordance with such plan or any other plan and upon such terms and conditions as the Court may consider just.

PERSAUD, J., in finding for the respondent, held:

- (1) That the right to partition was not available in British Guiana because it was originally a right appertaining to immovable property in England and although it came to be administered by the Court of Chancery, it could not on this account be regarded as an equitable doctrine within the meaning of s. 3(B) of the Civil Law of British Guiana Ordinance, Cap. 2: and
- (2) That in any event the respondent was in exclusive possession of the land in question long enough to avail herself of the plea of prescription in answer to the appellant's claim.

Now in this appeal it is mainly contended:

- (a) That the High Court erred in holding that it had no equitable jurisdiction to order a partition of the land in question.
- (b) That because of the consensual occupation in two parts of the jointly owned property, in the circumstances of the case prescription could not run in favour of one joint owner against the other in respect of the portions so occupied.
- (c) That one of two co-owners could not prescribe against the other co-owner while they were both in possession of the jointly owned land.

The first question which I propose to examine is: Did the High Court have jurisdiction to order a partition of that land?

From the 1st of January, 1917, the Civil Law Ordinance came into force promulgating a change of legal system. The Roman-Dutch law under which partition was undoubtedly an available remedy, was abolished; and the specific reservations there made omitted any reference to partition. The common law of England was to be the law of this country including there-

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with the doctrines of equity as then administered or at any time thereafter administered by courts of justice in England, and the Supreme Court was to administer the doctrines of equity in the same manner as the High Court of Justice in England administered them at the date aforesaid or at any time thereafter. (See s.3 (b) of Cap. 2). But the English common law of real property was not to apply; instead, it was that of personal property “as far as possible”. If this right of partition is not to disappear from our laws it must be found in some statutory provision, or be capable of inclusion under the caption of a ‘doctrine of equity’ or be permitted admission under the saving provision of s. 2 subsection (3) of the Civil law ordinance, Cap. 2, which seeks in a certain way to give effect to Roman-Dutch law rule or procedure “to the extent the Supreme Court deems advisable in the interests of equity if that Court is so advised.”

Under statute the right to partition is recognised only to a limited extent. Under the District Lands Partition and Re-allotment Ordinance, Cap. 173, lands could be partitioned, but this Ordinance does not apply to lands in Georgetown as s. 2 defines “district” as a village, country or rural district, declared under the Local Government Ordinance. This failure to qualify for the enjoyment of this right under this Ordinance sends one to the only other Ordinance dealing with partition, that is, the District Lands Partition and Re-allotment (Special Procedure) Ordinance, Cap. 174. Here again, provision for partitioning is made in relation to certain specified areas, which do not include the area in question, and, further, the machinery of this Ordinance cannot be invoked as of right by an owner, so that no aid is to be had from the statute law of this country.

There must be some appreciation of the history of partition in England to determine whether it could gain acceptance into our laws as an “equitable doctrine” through the enactment of the Civil Law Ordinance.

Partition is understood as a division between co-owners (whether coparceners, joint tenants, or tenants in common) of lands, etc., the effect of such division being that the joint ownership is terminated and the shares of the parties vested in them in severalty. This may be effected in such ways as by agreement between the parties; or it may be compelled against the wish of some of the co-owners by means of an action for partition.

All co-owners alike could agree amongst themselves to a partition of the estate in which they were jointly interested; but by the common law the right to compel partition was confined to parceners. However, the right to a writ of partition was by, 31 Henry VIII c.1, extended to joint tenants and tenants in common of any estate or estates of inheritance, and a further statute, 32 Henry VIII c. 32 s. 1, provided that joint-tenants and tenants in common for lives or years should be compellable to make partition.

There was clearly a time when common law and equity exercised concurrent jurisdiction in suits of partition. That, in Chancery, was carried out by a commission addressed to commissioners, and not, as at law, by writ addressed to the sheriff.

ELDON, L.C., in 1810 said in *Agar v. Fairfax*, 34 E.R. 206 at p. 213:

“This court issues the commission, not under the authority of any act of parliament; but on account of the extreme difficulty, attending the process of partition at law (see this subject considered by Mr. Fonblanque, 1 Treat. Eq. 18); where the plaintiff must prove his title, as he declares; and also the titles of the defendants; and judgment is given for partition according to the respective titles, so proved. That is attended with so much difficulty, that by analogy to the jurisdiction of a court of equity in the case of Dower, a partition may be obtained by bill.”

Then in *Manners v. Charlesworth*. (1833) 39 E.R. 706 at p. 707. BROUGHAM, L.C., said:

“A considerable obscurity hangs over many parts of this subject of commission of partition both as to the origin of the jurisdiction after the statute of Henry 8, and as to the principles which govern its exercise. Lord Eldon appears to have felt its obscurity in *Watson v. Duke of Northumberland* (11 Ves. Jun. 153). There is no trace of the proceeding. I believe, in this court before the 40 Eliz.; and it was of rare and uncertain use as late as the beginning of the reign of Charles I.”

In *Calmady v. Calmady*, (1795) 30 E.R. 780 at p. 781. LOUGHBOROUGH, L. C., said:

“If the party has a right to refuse to have the estate divided, it would be very difficult to find a principle to bring that case into this court. A party choosing to have a partition has the law open to him: there is no equity for it: but the jurisdiction of this court obtained upon a principle of convenience. It is not for the court to say, one party shall not hold his part of the estate as he pleases: but another person has also the same right to enjoy his part as he pleases, and therefore to have the estate divided. The law has provided, that one shall not defeat the right of the other to the divided estate. Then the only question is, whether the legal mode of proceeding is so convenient as the means this court affords to settle the interests between them with perfect fairness and equality. It is evident, the commission is much more convenient than the writ: the valuation of the proportions is much more considered: the interests of all the parties are much better attended to; and it is a work carried on for the common benefit of both.”

On these authorities it may be doubted whether equity had its own teachings and principles of relief, which could be described as “a doctrine of equity”, or whether its concern and devotion was not merely to the procedural aspect of principles which existed at common law.

The common law courts certainly did not possess the enterprise and enlightenment of the courts of equity in the exercise of jurisdiction in such matters. The inadequacy and inconvenience of the remedies available at com-

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mon law only served to stimulate the court of Chancery in exercising this jurisdiction with greater competence and realism. Mr. Rai, counsel for the respondent, argued from this that when the court of Chancery was entertaining suits of partition it did so by virtue of a jurisdiction primarily established by the common law, and equity's utility in this sphere was of a secondary nature designed to relieve the rigours and cumbersome approach of the common law by channelling its process to act on the conscience of the parties in accordance with rules of equity. Its jurisdiction was, therefore, truly remedial in scope and could not be said to have originated there. Consequently it would be wrong to describe it as an equitable doctrine to gain recognition and acceptance through the Civil Law Ordinance.

If Mr. Rai's argument is correct, then the right to partition was removed when the Civil Law Ordinance was installed, and a noticeable gap created (unless it could be introduced through s. 2 sub.-s. (3) of Cap. 2 as a rule of Roman-Dutch law in the interest of equity).

The trial Judge was similarly minded when he said:

“Partition was originally a right appertaining to immovable property and even though it came to be administered by the Court of Chancery it did not lose its inherent quality and it cannot in my judgment be regarded as an equitable doctrine. This distinction may be regarded as a technical one, but it is a real one based on the interpretation of the sections of Cap. 2 and cannot be discarded on the ground of inconvenience of the parties.”

If the learned trial Judge had found himself able to regard partition as an equitable doctrine, then no doubt he would have proceeded to find that the High Court had jurisdiction to make such an order.

The crucial question, which I must now examine in the first place, is: Could a claim for a partition be classified to bring it within the category of an equitable doctrine?

There are two sources of authorities which appear to confound what was said in the cases *Agard v. Fairfax* (supra) and *Calmady v. Calmady* (supra), and the arguments of Mr. Rai.

In 21 Halsbury's Laws, (1st ed.) at p. 834, fn. (v), reference is made to cases where the court of Chancery at a very early time assumed jurisdiction to decree partition. In *Selden Society Publications*, vol. X, p. 129, there is record of a petition in 1432-1433, to Stafford, Chancellor of England, asking for partition in a case where no remedy at law was available; cases even earlier are mentioned in (1311) Year-Book, Maynard vol. 1, page 133; (1341) Y.B. 15 ed. (Rolls Series 1, p. 132).

Story in his *Commentaries on Equity Jurisprudence*, 3rd ed., explores the matter further and in a penetrating analysis throws considerable light to aid in ascertaining the true position. It seems that a Mr. Hargrave once spoke of equity jurisdiction in relation to partition “as if it were not only new, but a clear usurpation” from the common law courts. This observation was

severely criticised by Story who contends that the equity jurisdiction was really an independent one. He mentions that Lord Loughborough, on one occasion, said that there was no original jurisdiction in Chancery in partition, which was a proceeding at common law. (See *Mundy v. Mundy*, 2 Ves. Jun. 123). On another occasion Lord Loughborough said, "A party, choosing to have a partition, has the law open to him; there is no equity for it. But the jurisdiction of this court (of Chancery) obtained upon a principle of convenience." (See *Calmady v. Calmady*, supra). Commenting at p. 276, Story says:

"It is not a jurisdiction founded at all in mere convenience; but in the judicial incompetence in the courts of common law to furnish a plain, complete and adequate remedy for such cases; for the writ of partitioning at the common law was a real action, a cumbrous, oppressive and highly technical form of procedure finally abolished by statute 3 & 4 Will. 4, c. 27, s. 36. After that date the jurisdiction of the Court of Chancery became exclusive . . . The true expression of the doctrine should have been, that courts of equity interfere in cases of such a complication of titles, because the remedy at law is inadequate and imperfect without the aid of a court of equity to promote a discovery, or to remove obstructions to the right, or to grant some other equitable redress."

At p. 277 (ibid) Storey refers to *Whaley v. Dawson*, 2 Sch. and Lefr. 371, at p. 372, where Lord REDESDALE said:

"Partition at law and in equity are different things. The first operates by the judgment of a court of law, and delivering up possession in pursuance of it; which concludes all the parties to it. Partition in equity proceeds upon conveyances to be executed by the parties; and, if the parties be not competent to execute the conveyances, the partition cannot be effectually had."

After which he (Storey) proceeds at pp. 277-278 (ibid.):

"There was also another distinct ground upon which the jurisdiction of courts of equity was maintainable, as it constituted a part of its appropriate and peculiar remedial justice. It is, that courts of equity were not restrained as courts of law were, to a mere partition or allotment of the lands and other real estate between the parties, according to their respective interests in the same and having regard to the true value thereof; but courts of equity might, with a view to the more convenient and perfect partition or allotment of the premises, decree a pecuniary compensation to one of the parties for owelty or equality of partition, so as to prevent any injustice or unavoidable inequality. This a court of common law was not at liberty to do; for when a partition was awarded by such a court, the exigency of the writ was, that the sheriff should cause, by a jury of twelve men, a partition to be made of the premises between the parties, regard being had to the true value thereof; without any authority to make compensation for any

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inequality in any other manner. This was in itself a sufficient ground of equity jurisdiction.”

“It is upon some or all of these grounds, the necessity of a discovery of titles, the inadequacy of the remedy at law, the difficulty of making the appropriate and indispensable compensatory adjustments, the peculiar remedial processes of courts of equity, and their ability to clear away all immediate instructions against complete justice, that these courts have assumed a general concurrent jurisdiction with courts of law in all cases of partition. So that, it is not now deemed necessary to state, in the bill, any peculiar ground of equitable interference. And, unless I am greatly misled in my judgment, this review of the true sources and objects of this concurrent jurisdiction demonstrates, in the most satisfactory manner, how ill-founded the animadversions to Mr. Hargrave (already cited) are, upon the exercise of this jurisdiction. But the most conclusive proof in its favour is, that, wherever it exists, it has almost entirely superseded any resort to courts of law to obtain a partition. In making partition, however, courts of equity generally follow the analogies of the law; and will decree in such cases, as the courts of law recognise as fit for their interference. But courts of equity are not therefore to be understood as limiting their jurisdiction in partition to cases cognizable or relievable at law; for there is no doubt, that they may interfere in cases where a partition would not be at law; as, for instance, in the case where an equitable title is set up or where the estate to be divided is incorporeal.”

It appears from the foregoing that equity had ordered partition long before the enactment of the statutes of Henry VIII, and in cases other than those dealt with by the statutes, and the common law, and although at one time the Chancery jurisdiction was concurrent with that at common law its outlook was independent, some of its concepts original, and its approach distinctly equitable in character.

I am of the view, therefore, that equity had so much to its credit in accumulating and sustaining principles relating to the suit of partition that it would be ungracious, if not unrealistic, not to acknowledge the body of its achievements as constituting an equitable doctrine of partition.

What it was about to do was done without subverting the common law, with the motive of aiding in the advance towards the realisation of the ideals of justice.

If in strict comprehension I am incorrect in thinking of equity’s participation in the field of partition as constituting “a doctrine”, then I shall look at s. 3(B) of cap. 2 to see whether “doctrine of equity” can be given a wider meaning judicially so as to embrace an order for partition as an equitable relief.

In *British Colonial Film Exchange Ltd. v. S. S. de Freitas*, 1938 L.R.B.G. at p. 38, VERITY, J., as he then was, said:

“What is introduced into this colony by s. 3(B) of the Ordinance. Cap. 7, is the whole system of equitable jurisprudence as administered by courts of justice in England, its doctrines, rules, methods, remedies and reliefs. It must, however, be borne in mind that equity as now administered in England in no case seeks to override the specific provisions of statute, and that the exercise of equity jurisprudence within this colony is a necessity subject to such restrictions as may be imposed upon it by statute either directly or indirectly by reason of some difference in the statute law of the colony which renders its exercise in certain cases improper or impossible.”

I now find myself in full agreement with this view, and would stress the importance of the language so carefully chosen in making it explicit, that the interpretation given was to be (and I repeat again) “subject to such restrictions as may be imposed upon it by statute either directly or indirectly by reason of some difference in the statute law of the colony which renders its exercise in certain cases improper or impossible.”

I do not find that the grant of partition here as a remedy because of its equitable origin conflicts with the operation of any statute either directly or indirectly or in any way renders its exercise improper or impossible.

It is true that s. 3(D) of Cap. 2 says that there should be one common law for both immovable and movable property and that all questions relating to immovable property within the colony . . . “shall be adjudged, determined, construed and enforced as far as possible according to the principles of the common law of England applicable to personal property.” But the words “as far as possible” cannot be ignored. They seem to recognise the possible inadequacy of the principles of the common law of England relating to personal property to be responsible and effectual for the adjudication of all issues relating to immovable property, and imply the necessity required to have recourse to the interpretation of VERITY, J., given to s. 3(B) in the above cited case.

S. 3(D) of Cap. 2 then does not in my opinion have the effect of excluding the application of the doctrines of equity to immovable property, but again the qualification further exemplified by VERITY, J., in that case would have to be observed so that the application of equity in relation to immovable property in this country would not be allowed to operate so as to make effective here “the English law of real property or any incident attached in England exclusively to land tenure or estate in England”. Subject to this, as VERITY, J., said (and already referred to) s. 3(B) of Cap. 2 introduced into British Guiana “the whole system of equitable jurisprudence as administered in courts of justice in England, its doctrines, rules, methods, remedies and reliefs.”

Partition could safely be considered, in character, as a remedy moulded by equity and given that pride of position which it now occupies in England to solve situations under the direction of statute in the court of Chancery. (At first the Partition Act, 1868, now the Law of Property Act, 1925).

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Its application as an equitable remedy in this country would not in my view operate to create any equitable interests in land, or to make effective the English law of real property or any incident attached exclusively to land tenure or estate in England. It is not a remedy which is peculiar to the English law of real property, but is fundamental to any system of modern law, being really based upon the equitable need for a fair division of land in cases of concurrent ownership.

In *History of English Law*, by Pollock and Maitland, vol. 2, 2nd ed., vol. 2, at p. 246, the learned author says:

“In a modern system of law and in many a system that is by no means modern, every one of the co-owners may in general insist on a partition either of the land itself or it may be of the money that can be obtained by a sale of it.”

On simple grounds of justice equity recognised the need for partitioning and in accordance with its tenets granted a remedy where one was not otherwise available. The common law of personal property in England, is expected to meet the needs of the common law of real property in this country not absolutely, but, “as far as possible”. These words themselves recognise that such a body of law may not be able to give of the relief and remedy required for immovable property in every instance. The object of making equitable doctrines available in the way provided obviously would supplement shortcomings and avoid gaps. In this case I do not find any reference to the law of personal property helpful in supplying a remedy for the redress required; but equitable relief through the panacea of partition appears most to be desired. It can do what the parties originally on their own set out to do, and more; it can do so by means of conveyance. Can there then be any legitimate reason for ignoring the opportunity for such benefits?

It is to be observed that in *Gunpath v. Brush*, [1919] L.R.B.G. 122, DALTON, C.J. (ag.) expressed the view that s. 3(D) possibly excluded the operation of the English law relating to partition, but apart from the fact that his observations were obiter, he did not address his mind to the circumstances mentioned above. However, in *Barriero v. de Freitas* [1924] L.R.B.G. 96, DOUGLAS, J., ordered the sale of land held in undivided shares. It is true that he was not without thought of the Roman-Dutch law in this regard, but he also spoke of the inherent powers of the court; and these powers could presumably flow from the court’s equitable jurisdiction.

I would hold further in the circumstances of this case that the remedy of partition as known at equity in England is made available through s. 3(B) of Cap. 2, as laid down by VERITY, J

Now is there another avenue through s. 2(3) of Cap. 2 to allow the Court the licence to introduce partition as a rule of Roman-Dutch law in the circumstances of this case, as is thought to be permissible by Cummings,

J.A.? With great respect for his views, I cannot agree. That section reads as follows:

“(3) Nothing in this Ordinance contained shall be held to deprive any person of any right of ownership, or other right, title, or interest in any property, movable or immovable, or of any other right required before the date aforesaid; and where in any matter whatsoever any right is founded upon a rule or custom of Roman-Dutch law or procedure for which there is no equivalent in the English common law, or where the English common law in the opinion of the Supreme Court is not applicable owing to any special local conditions for which no provision is made by this or any other Ordinance, effect may be given to the Roman-Dutch rule or procedure to the extent the Supreme Court deems advisable in the interests of equity if that Court is so advised.”

STOBY, C., said of that section in *Singh v. Mortimer*, (1966) 10 W.I.R. 65 at p. 75:

“The second part of the subsection . . . is subdivided into two parts (a) where a right is founded upon a rule or custom of Roman-Dutch law or procedure. This, I think, is applicable to individual cases not to the general law of the country; and (b) where the English common law is not applicable owing to special local conditions for which no provision is made in Cap. 2 or any other Ordinance, then effect may be given to the Roman-Dutch rule or procedure.”

In *Krisnath v. Clements*[1921] L.R.B.G. 189, the question was whether as between illegitimate brothers born before 1917 the survivors were by virtue of the old law entitled to succeed on the intestacy of one of them occurring after 1917. MAJOR, C.J., in the lower court (1920 L.R.B.G. 199) upheld the claim, and on appeal was followed by THOMAS, C.J., but LUCIE-SMITH, P., expressed doubt and BERKELEY, J., said at p. 193:

“Further, in my opinion there is nothing in the latter part of the said section (s. 2(3) of Cap. 2) which warrants the court in finding in favour of the two brothers. The right is founded upon the rule or customs of Roman-Dutch law which has been expressly annulled by the Ordinance.”

In re *Barclay* [1924] L.R.B.G. 80 at p. 84, MAJOR, C.J., himself later agreed with this view, stating: “The Ordinance only affects rights acquired before this date.” See also *re Attioola*, (action No. 1907 of 1964 Demerara) decided by LUCKHOO, C.J., on 10th of June, 1965. The position is that in 1917 the law was being changed and all that s. 2(3) of Cap. 2 did (as the marginal note indicates) was to provide for the transition in cases in which rights had been acquired before the change, but which subsequently might otherwise be unenforceable because of the absence in the English common law (which would include the doctrines of equity) or any equivalent to the rule or custom of the Roman-Dutch law or procedure upon which the

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rights were originally founded. Where parties have acquired their rights after 1917 it cannot be said that such rights are founded upon a rule or custom of Roman-Dutch law or procedure since that law has been abolished in its entirety except to the extent to which it has been specifically saved by proviso (B) of s. 3 of Cap. 2, which retains particular areas of the Roman-Dutch law on a permanent basis.

It cannot be said that this subsection is easy of elucidation. Dalton in his Civil Law of British Guiana, 1921, was of this view. At p. 6 he said:

“The subsection from here to the end does not lend itself to any useful comment.”

That was in reference to the portion which reads:

“Where the English common law in the opinion of the Supreme Court is not applicable owing to any special local conditions for which no provision is made by this or any other ordinance effect may be given to the Roman-Dutch rule or procedure to the extent the Supreme Court deems advisable in the interest of equity if that court is so advised.”

On a reading of this, before partition as a Roman-Dutch rule could be given effect to, two aspects must be satisfied:

- (a) the English common law must be found to be inapplicable, and
- (b) to be so because of “special local conditions” for which no provision is made under Ordinance.

With respect to (a), inasmuch as English common law includes the doctrine of equity, which, if I am right includes partition, then its acceptance *via* this stratum bars the way for recognition which only exists when English common law is found to be inapplicable.

Even if the English law relating to partition is inapplicable, can it be said in order to satisfy (b) that its inapplicability is due to any “special local condition”? The answer must obviously be that if indeed it is inapplicable it must be because the law of this country has failed to decree that it should be applicable, and the deficiency would then arise from the omission to do so, and not because of “any special local conditions”. The idea of partition is common to most legal systems. It is not rooted in, nor has it acquired any peculiar feature from, any special local conditions.

In the interpretation of this subsection what the West Indian Court of Appeal had to say in *Din v. Boodhoo and Tetry* [1944] L.R.B.G. 219 at p. 223, must not be forgotten, when it expressed the view that care must be taken not to interpret the subsection in a way which “would make the exemption so wide as to defeat the main object of the Ordinance, namely, the abrogation of the Roman-Dutch Law, and . . . a construction which would lead to this, if possible, ought to be avoided.”

This admonition is all the more to be heeded having regard to the clear and specific language of section 3(A) of Cap. 2 which provides that the

Roman-Dutch Law relating to . . . movable or personal property, immovable or real property and chattels real, and all matters relating to any of the aforesaid subjects, and the law of the Colony relating to all other matters whatsoever, whether *ejusdem generis* with the foregoing or not, shall cease to be Roman-Dutch law, and as regards all matters arising and all rights acquired or accruing after the date aforesaid, the Roman-Dutch law shall cease to apply to the Colony.”

Whatever the true meaning of the second part of s. 2(3) is, its operation must be limited to cases in which it is necessary to have recourse to the old law for the purpose of saving rights acquired before the abrogation of that law. To give it any wider meaning would be to frustrate the main purpose of the Ordinance which, as precisely announced in s. 3(A), was to abrogate that law as regards, *inter alia*, movable and immovable property and “all matters arising and all rights acquired or accruing after the date of abrogation.

In the instant case there is not visible the vestige of any rights which may have vested before the transition from Roman-Dutch law. The case does not fall between the stools of acquired Roman-Dutch law rights and inappropriate English common law remedies for those rights. I must therefore decline to accept and adopt the remedy of partition on this basis.

One further question remains to be determined in relation to the grant of partition as asked for. Could it be made having regard to the provisions of s. 127 of the Georgetown Town Council Ordinance, Cap. 152, which prohibits the subdivision of lands in the city in portions less than half lots, except with the consent of the Town Council. A court naturally would not violate a statutory provision of this kind, but there is nothing to prevent the court from making an order for the physical partitioning of the land subject to the consent of the town council being duly obtained. In *Patel v. Premabhai*, (1954) A.C. 35 at p. 48, in respect of a similar prohibition, the Privy Council said:

“But (the land) is not divided merely because an order for a partition is made; there is nothing to prohibit the making of such an order. What is forbidden is the carrying out of the order by actual partition unless and until the approval of the Board set up by the Ordinance has been obtained . . . all that is forbidden is the actual division of the land or the carrying out of the decree for partition without the consent of the Board. The making of the decree is not prohibited, and as such a decree might have been made (though it would not be implemented by actual division of the property) a direction for sale of the property is permissible under the terms of the Act of 1868.

For these reasons the Board restored the judgment of VAUGHN, C.J., (Fiji) who had said at p. 37: “I see no reason why the court should not make an order directing partition and at the same time suspend the operations of the order until satisfied that the requirements of the Ordinance had been

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complied with.” Reference may also be made to *Yassin v. Egerton*, (1959) L.R.B.G. 197. In that case there was an agreement of sale relating to a piece of land in Georgetown which was less than a half lot. WYLE, J., with whom ARCHER and LEWIS, JJ., agreed, held that the purchaser was entitled to transport subject to the consent of the Town Council having been first obtained, and in the event of such consent being refused he was entitled to a lease for 999 years. An order for partition could then be made, but subject to the consent of the Town Council being obtained in fulfilment of the necessary statutory requirement.

I will now proceed to consider how far the respondent has succeeded, if at all, in prescribing against the appellant in respect of that land east of the fence, which she occupied with her mother from 1909 and alone from 1911; and in what way this would affect any order for partition.

The trial judge found that when the respondent had obtained title in 1959, she and her predecessors in title were occupying in accordance with the division caused by the fence at least from 1909, and she alone from 1911, and that each co-owner occupied, with the knowledge and consent of the other, a portion exclusive of the other, and there was no question of either co-owner seeking to enforce any rights over the other’s occupation. He examined the cases of re *Downer* (1919) L.R.B.G. 165, In re *Petition of Broodhagen et al* (unreported), and *In Re Petition of Benjamin*, (1931 – 1937) L.R.B.G. 168, in support of the proposition of prescription by co-owners in certain circumstances; and observed that in cases like *Barry v. Mendonca* (1923) L.R.B.G. 106, and *Seugobin v. Walrond* [1959] L.R.B.G. 45, unlike the instant case, there was no exclusive possession.

I only find it necessary to make the following observations:

Title from use and time takes its substance from the authority of the law.

S. 3 of the Title of Land (Prescription and Limitation) Ordinance, Cap. 184, reads as follows:

“Title to land (including land of the Crown or of the Colony) or to any undivided or other interest therein may be acquired by sole and undisturbed possession, user or enjoyment for thirty years, if such possession, user or enjoyment is established to the satisfaction of the court and was not taken or enjoyed by fraud or by some consent or agreement expressly made or given for that purpose.”

(The proviso which follows is of no application in the instant case).

The acquisition of title by prescription primarily depends upon the quality of the occupation, and the circumstances in which it takes place.

If the circumstances of the particular case satisfactorily yield the answer that the occupation (i) was of a kind which showed sole and undisturbed possession, user and enjoyment deliberately, adversely and exclusively exercised, (ii) was for at least thirty years, (iii) was without fraud, and (iv) was not the result of some consent, or agreement expressly made or given to allow of such

occupation without adverse consequences, then prescription could arise through occupation of this description, even in the case of one co-owner against another co-owner.

I agree with what VAN SERTIMA, J. said in *Re Benjamin* (supra) at p. 169 (as far as it goes): "That one or more co-owners can acquire by prescription title to the undivided shares of another co-owner *out of possession* for the prescribed period."

The words "*out of possession*" bring into play the idea of ouster or dis-possession which Blackstone in his Commentaries defines as:

"a wrong or injury that carries with it the amotion of possession; for thereby the wrongdoer gets into the actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy in order to gain possession and damages for the injury sustained."

(See 3 B1. Com. 167 cited in 3 Stroud's Judicial Dictionary, 3rd ed. at p. 2043).

In *Murray v. Hall*, (1849) 7 C.B. 441 and *Jacobs v. Seward*, (1872) L.R. 5 H.L., it was held that one co-owner of land can only bring an action against the other if he has been actually ousted or dispossessed of the land. Each co-owner is entitled to possession of the whole land, so that if one turns the other off the land or part of it, it is a trespass. In the instant case there is no evidence of an ouster, that is to say, a deliberate defiance by the respondent of the other co-owner's title to the land. Furthermore, the circumstances of the case would indicate that when the fence was run in 1909, the intention was that each co-owner should possess the mathematical half of the land in question, in which case, the possession of the respondent and her predecessors in title to the portion of land occupied by her, was referable to a lawful title. Her possession could not then be said to be adverse to the other co-owner. "Possession is never considered adverse if it can be referred to a lawful title." (Per WOOD, V. C, in *Thomas v. Thomas*, (1855) 25 L.J. Ch. 159,161.

For a proper understanding in this case of the nature of the occupation of the specific portion of lands by the parties, certain relevant circumstances must be examined.

When a fence was erected in 1909 it was undoubtedly to partition the land to provide for separate occupations in undivided terrain. It was significant that it was erected before the respondent's mother sold it that very year to one Gilkes. Gilkes then had the western portion and the respondent and her mother the eastern. Here at once the parties were giving their respective consents to limit their occupation of undivided land by confining it to designated sectors. Gilkes' interest was equal to that of Walker's, so that in the division which took place it was to be expected that each would use and enjoy one-half of the land, and that by consent of the parties the fence was erected to serve and meet this requirement.

What could almost be taken for granted was specifically expressed by the respondent in her evidence when she said:

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“My mother put the fence to separate the two portions of land. I understood the land was being divided into half by the paling. I never noticed that the paling went out of line gradually.”

The agreed division of the land in two equal parts was undoubtedly a prerequisite and condition fundamental to occupation which had as its object a voluntary partition. Each party was to have one-half (in accordance with his share); and each party was in effect saying to the other, two things – (a) “I will consent and agree to confine myself to one portion only, and renounce, and relinquish, whatever rights I may have through my undivided share or interest, provided and only if the area allotted to me represents a *true* half of the whole.” And (b) “I will consent and agree to your occupation of the other portion and give up all my rights in that behalf, provided you do not have or hold an area in excess of your one-half entitlement.” Each one possessed with the consent and agreement of the other, on the basis that each had or was to have one-half, no more, no less.

Could prescription then arise through occupation of this description when the co-owners were unprepared to yield their rights of co-ownership except the object of agreed partition had materialised? Was not the user and enjoyment of the specific portions of land at all times to be dependent upon, and subject to such occupation being in accord with a true division?

When the appellant, in that year, was trying to obtain separate title to the land he occupied, a survey was required to have his quarter lot (to which he was entitled) demarcated on a plan. The agreement of the parties to this survey vividly illustrates the underlying concept of occupation from its inception in 1909, viz. that each party was to occupy a quarter lot. It was the appellant’s evidence that it was agreed prior to the survey that if the survey revealed that one party or the other was in occupation of more than his one-half, any such portion would have to be “surrendered” to the other. What could be more explicit of the understanding and arrangement which existed originally?

It is true that the trial Judge made no finding on this evidence, and that it was denied by the respondent. But the circumstances point to the probability of its truthfulness. When the survey was being made the respondent made no objection whatever. The survey took place with her knowledge in such a way as to indicate that she had given her consent and approval. This must have been because of the agreement reached with the appellant. By her conduct she concurred in the survey which was made with the object of dividing the land in two. It was only after the discovery that she was in possession of some land for the appellant that a show of protest was made, by a letter sent to the Commissioner of Lands and Mines some few days after the survey. The importance of the agreement between the appellant and respondent prior to the survey lies not in the formulation of a legally binding agreement upon which any partition suit could be founded, but as evidence demonstrating the state of mind of the parties, their knowledge, contemplation, understanding and belief, directly (particularly as concerning the respondent, a party at the

inception), or through predecessors in title (more applicable to the appellant). Each was prepared to give up or surrender whatever small portion of land he or she may unwittingly have been found to have, if the paling was not on the true mid-line, because each always intended to occupy no more than what was his rightful share, and each always understood and expected to get from the other any portion which that other may have belonging to him or her as the case may be. The history of the original arrangement; the way it was honoured over the years; the further agreement prior to the survey; the fact that the respondent herself checked the Rahaman survey in 1960, through Rutherford, and found it to be correct, are all significant matters.

Prescription could not occur in this case under s. 3 of Cap. 184 because of the consent and agreement which operated since 1909, to bar and baulk any process of prescription in relation to use and enjoyment, if such party did not have his proper quantum of land.

Had the fence not been faultily laid, but was truly on the mid-line, then each co-owner in 1956 would have been able to say to the other: "You dare not come on to my portion, despite our undivided title because I have exclusively occupied adversely to you for over 30 years exactly what we had bargained for, and you have been ousted."

In my opinion prescription, in the circumstances of this case, could not begin to crystallize in favour of either party because the condition attached to occupation had not been met.

If the parties or either of them had desired or requested a sale, then it would have been competent for the Court to make such a grant under the Immovable Property (Sale of Interests) Ordinance, Cap. 187 in view of the provisions of s. 3, which is as follows:

"Where immovable property is owned in undivided shares any owner may, by action, request the Court to direct a sale of the property and a distribution of the proceeds thereof between or among the parties interested".

and s. 4 which provides:

"If the party or parties interested individually or collectively, to the extent of one moiety or upwards in the property to which the action relates, request the Court to direct a sale of the property and a distribution of the proceeds, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly and give all necessary or proper consequential directions."

In the instant case, however, the appellant's counterclaim did not ask for a sale but for a physical division of the property, so that in my view this Court ought not to order a sale.

In conclusion, I hold:

- (a) That the remedy of partition, because of its history at the hands of equity, could properly be admitted as a doctrine of equity,

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under the Civil Law of British Guiana Ordinance, or, within the extended meaning of “doctrines of Equity” as laid down by VERITY, J. in *British Colonial Film Exchange Ltd. v. de Freitas* (supra), and so is available as a remedy in the circumstances of this case.

- (b) That it was not competent in the circumstances of this case for the respondent to prescribe that portion of the land which she possessed, because the parties had consented and agreed not to recognise any occupation which did not provide an equal apportionment of land in place of their equal undivided interests. There was therefore no question of an ouster by one co-owner as against the other.
- (c) That the appellant and the respondent are entitled to one-half division of the said half lot of land, and to a partition thereof, so that each may have title of his or her rightful half; the appellant of the western half and the respondent of the eastern half.

I would therefore in the circumstances allow the appeal in so far as the counterclaim for a division of the property is concerned, and vary the order of the learned trial Judge to include an order for partition on either of the two surveys already made, after which the Registrar is to advertise for and on behalf of the parties or either of them transport in accordance with the particular plan. The operation of this order is to be suspended until there has been approval of the Town Council, in accordance with the requirements of the Town Council Ordinance, for the transporting of a quarter lot. There will be liberty to either party to apply to this Court. Both parties will bear their own costs in the court below, but the respondent must pay the costs of the appellant in this Court.

BOLLERS, C.J.: I concur.

CUMMINGS, J.A.: The respondent is the owner by transport No. 660 of 1959 of one undivided half of and in the E½ of Lot No. 39 (thirty-nine) in the Newburg District, Werk-en-Rust Ward, Georgetown, Demerara.

She occupied the eastern portion of the half lot in accordance with a dividing fence running north to south across the half lot. At the northern end of the fence within the portion occupied by her, the respondent had erected a gate swung on concrete columns. In June 1965 she sent one Mohammed to replace one of these columns which was in disrepair. The appellant objected on the ground that the land on which the column was to be put was his. During an altercation the appellant is alleged to have assaulted Mohammed. This incident gave rise to civil actions in the High Court by the respondent and Mohammed against the appellant for trespass and assault, respectively. In the action brought by the respondent, the appellant counter-claimed for a division of the property and necessary ancillary relief. Upon the actions coming on for hearing, they were, by consent, taken together.

The learned trial Judge found as a fact that the first-named respondent's father, Henry Peters, who at one time owned the east half of lot 39, died in 1896 leaving her mother, other children and herself in occupation of a house on the eastern portion of the half lot. In 1909 respondent's mother divided the half lot into two portions by erecting a north to south fence and then sold one half of her interest to one Gilkes. After the sale both vendor and purchaser occupied exclusively in accordance with the fence; that is to say, the respondent's predecessors in title and, subsequently, the respondent occupied exclusively that portion of the half lot east of the fence and the appellant's predecessors and, subsequently, himself, exclusively, that portion west of the fence.

In 1956 one Rahaman, a Sworn Land Surveyor, conducted, at the instance of the appellant, a survey dividing the half-lot into mathematical quarter lots, thus revealing that the fence at the northern boundary was 11 inches west of the true dividing line and merged into the latter at a distance of approximately 25 feet from the southern boundary. The circumstances surrounding this survey are narrated by the appellant in his evidence as follows:

"Early in 1956 I had completed plans to purchase a piece of land on East Bank, Demerara, to go in for farming. To do so I had to raise some money. I tried to raise it with the Demerara Life. The loan was turned down because I did not have full and separate title to the land I occupied.

"I made several appeals to Mrs. Walker and she finally agreed to go through with the division of the land provided I stood the cost of survey and surrender a strip of land which she believed I had for her. I told her that this was acceptable to me, if the survey proved this to be so, but I would expect her to surrender that strip if it was found that she was occupying it.

"I employed Rahaman, Mrs. Walker agreed to this. Rahaman did the survey for both of us. Rahaman's paal fell on the land occupied by Mrs. Walker, about 12 inches in, which meant she had 12 inches more on the Norton Street side. Mrs. Walker did not take this and did not keep her word."

The respondent in her evidence denies this. She says:

"I did not ask Rahaman to survey for me, nor was any other heir of Peters occupying the premises at the time. My brother died about 9 or 10 years ago, while my sister died about 45 years ago. No notice of intended survey was served upon me. I told Rahaman that I was not notified by Li about the survey, and I was going to protest. I wrote the Commissioner of Lands and Mines after I had spoken to a Mr. Spence who was an officer of the Lands and Mines Department. This is a copy of the letter. (Tendered, no objection, marked 'F'). I took the letter in myself.

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“I did not agree with the defendant that the survey should be done by Rahaman. Li and I did not have any discussion about shifting the paling. Nor did I have any such agreement with any other owner, previous to Li.”

The letter to which she referred is in the following terms:

“39 Norton Street,
Newburg, Georgetown.
27th April, 1956.

The Commissioner of Lands and Mines, Georgetown.

Sir,

Mr. Dennis Li, who resides on W½ of E½ lot 39, Norton Street, Newburg, Georgetown, and myself are the joint owners of the east half of lot 39, Norton Street, Newburg, Georgetown. I am in occupation of the east half of the said east half of lot 39, and Mr. Li occupies the west half of the said east half lot 39.

On Monday the 23rd April, 1956, Mr. Li caused a survey of the W½ of the said E½ lot 39 Newburg to be made without serving any notice on me and I object to the said survey being made. The survey was made by Mr. M. K. Rahaman.

I shall be glad if you will investigate this matter.

Yours truly,
(Sgd.) LUCY WALKER.

The following note appears on Rahaman’s plan, (Ex. “B”).

“The survey was started on 23rd April, 1956, and completed on the same day. Messrs. Lucy Walker for Heirs of Peters, May Gravesande for K. N. A. Parris, L. Sears for R. Sears and Mary Gonsalves attended the survey. No objections were raised.”

In 1960 one Jerrick RUTHERFORD at the instance of the respondent, conducted another survey. The result was identical. The respondent, nevertheless, continued to occupy according to the fence.

The learned trial judge found that:

- (a) the respondent (plaintiff) was in possession of the disputed strip at the material time;
- (b) the respondent and her predecessors in title had been in undisturbed adverse possession for the prescribed period and was entitled to a declaration of title for the disputed strip; and
- (c) the court had no jurisdiction to order partition.

Accordingly he gave judgment for the respondent with costs and dismissed the appellant’s counterclaim with costs.

From this judgment the appellant now appeals. The questions for determination by this court are:

- (1) what is the effect of the appellant's evidence about the conditions under which the Rahaman survey was undertaken, if that evidence is accepted;
- (2) can one co-owner obtain a prescriptive title as against another of a specific portion of the common property;
- (3) has the High Court jurisdiction to order partition of undivided interests.

Although the circumstances of the Rahaman survey were pleaded and the evidence of the plaintiff and the defendant conflicted, the learned trial judge made no specific finding on this particular issue; nor has he expressed a general preference for the evidence of either party or that of their respective witnesses. It seems that he found that the evidence he considered material was undisputed, and that he decided the case on that. What is the duty of an appellate court in such circumstances? ISAACS, J., in the High Court of Australia on appeal from the Supreme Court of Western Australia in *Scott and Anor. v. Pauly*, (1917) 24 C.L.R. 274, said at p. 278:

“. . . it is impossible to lay down an iron rule that whether the testimony of a witness is credible or incredible is always a matter for the primary tribunal alone, and sacrosanct territory on appeal.

“In *Dearman v. Dearman* the duty of an appellate court, was summed up as gathered from decisions of authority. Material available to the primary judge, and unavailable to the appellate court, may be either essential, or non-essential, to the ultimate decision. It may, if non-essential, be nevertheless so important that without it no conclusion adverse to the primary decision can safely be arrived at; or it may, in the opinion of the ultimate tribunal, be clearly out-weighted by the other circumstances of the case. This was explained in *Dearman v. Dearman*. It must never be forgotten that as it is the function and duty of the Court of Appeal to decide the matter for itself so far as it can, it must, in every case, judge how far the absence of the unrecorded material affects the question before it.

“In *Dearman v. Dearman* reference was made to the case of *The Glannibanta* where BAGGALLAY, J.A., delivered the judgment of the Court. After referring to *The Julia* and *The Alice*, he said: ‘Now we feel, as strongly as did the Lords of the Privy Council in the cases of a Judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on question of fact as on questions of law, to demand the decision of the Court of

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Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect.' It should be added that 'due allowance' may go so far as to prevent the court from altering the primary judgment.

"In *Khoo Sit Hoh v. Lim Thean Tong*, the Privy Council, speaking by Lord ROBSON, say: 'Of course, it may be that in deciding between witnesses he' (that is, the judge) 'has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony.' So that there is no cast-iron rule 'long hesitation' is not the same as 'absolute refusal.' Long hesitation means very careful and cautious examination and consideration before arriving at a conclusion. The Privy Council, in accord with the Court of Appeal, emphasise the importance of giving due weight to the circumstance that the primary judge has had the great advantage of seeing and hearing the witnesses, and therefore is in a better position to judge of their credibility; they say that is a circumstance that should always be borne in mind, and, where relevant, must cause the Court of Appeal to 'hesitate long' before reversing the primary decision; but they assume that, nevertheless, the case may be one where the other circumstances are sufficiently potent, and the probabilities are sufficiently cogent, to lead the Court to the conclusion that justice demands of it the reversal or modification of the judgment appealed against. Any Court of Appeal which does not so weigh the matter out for itself, and assign its relative importance to the *advantage possessed by the primary tribunal would so far abdicate its functions and deprive the suitor of the right which the law gives him. That would convert a rule of guidance observed in order to prevent injustice into a mere shibboleth destroying its own purpose.*"

With respect, I adopt that as a correct statement of the law and need only observe that it becomes more especially incumbent upon the court to make a finding of fact on an aspect of the evidence which must have an important bearing on the result of the case where the learned trial judge appears not to have done so.

I now proceed accordingly.

The appellant said he decided to raise money on his interest in the property and realised that he would have to have a title defined to the satisfaction of the insurance company with which he was negotiating. A survey

would have resulted in both parties having to their benefit well defined and separate titles; he discussed the matter with the respondent who agreed to the survey. They had both realised that the division by the fence although purporting to be an equal one was not in fact so and they agreed to accept and abide by the surveyor's decision provided the appellant would pay for the survey. This is an inherently probable story and is supported to a certain extent by the notation *ante litem motam* on Rahaman's plan. Accordingly I so find.

I now turn to the law applicable. The parties are co-owners. In what circumstances can one co-owner obtain a prescriptive title to a portion of the common property?

S. 3 of the Title to Land (Prescription and Limitation) Ordinance, Cap. 184, provides as follows:

“Title to land (including land of the Crown or of the Colony) or to any undivided or other interest therein may be acquired by sole and undisturbed possession, user or enjoyment for thirty years; if such possession, user or enjoyment is established to the satisfaction of the Court and was not taken or enjoyed by fraud or by some consent or agreement expressly made or given for that purpose:

“Provided that except in the case of land of the Crown or of the Colony, such title may be acquired by sole and undisturbed possession, user or enjoyment for not less than twelve years, if the Court is satisfied that the right of every other person to recover the land or interest has expired or been barred and the title of every such person thereto has been extinguished.”

First of all, then, what system of law applies to co-ownership in British Guiana after the coming into force of the Civil Law Ordinance, 1917? This is a question of the construction to be placed on the Civil Law Ordinance of 1916, now Cap. 2, hereinafter in this judgment referred to as “the Ordinance.” The relevant sections are:

“2(3) Nothing in this Ordinance contained shall be held to deprive any person of any right of ownership, or other right, title, or interest in any property, movable or immovable or of any other right acquired before the date aforesaid; and where in any matter whatsoever any right is founded upon a rule or custom of Roman-Dutch law or procedure for which there is no equivalent in the English common law or where the English common law in the opinion of the Supreme Court is not applicable owing to any special local conditions for which no provision is made by this or any other Ordinance, effect may be given to the Roman-Dutch rule or procedure to the extent the Supreme Court deems advisable in the interests of equity if that Court is so advised.”

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“3. (a) The law of the Colony relating . . . movable or personal property, immovable or real property and chattels real, and all matters relating to any of the aforesaid subjects, and the law of the Colony relating to all other matters whatsoever, whether *ejusdem generis* with the foregoing or not, shall cease to be Roman-Dutch law, and as regards all matters arising and all rights acquired or accruing after the date aforesaid, the Roman-Dutch law shall cease to apply to the Colony;

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

(c) The English common law of real property shall not apply to immovable property in the Colony;

(d) There shall be as heretofore one common law for both immovable and movable property, and all questions relating to immovable property within the Colony and to movable property subject to the law of the Colony shall be adjudged, determined, construed, and enforced, as far as possible, according to the principles of the common law of England applicable to personal property:

Provided that —

(a) immovable property may be held as heretofore in full ownership, which shall be the only ownership of immovable property recognised by the common law and shall not be subject to any rule of succession by primogeniture or preference of males to females or to any other incident attached to land tenure or to estates in land in England and not attached to personal property in England.”

In *Gunpath v. Brush & Ors.*, (1919) L.R.B.G., 122, when the question of the partition of a subplot held in co-ownership in Rose Hall village arose, DALTON, J., said at p. 123:

“The defence is that the claim disclosed no cause of action, and that the partitioning of lands held in co-ownership is governed by the provisions of Ordinance 13 of 1914, (The District Lands Partition Ordinance), with which plaintiff has not complied. Before any evidence was taken, argument was heard as to the law. Plaintiffs counsel contended that the law applicable had not been changed by the Civil law Ordinance, 1916, and the Partition Ordinance referred to did not apply. He cited the case of *Jardim v. Ribeiro* (L. J. Dec. 31st, 1906) which he urged set out the law on the subject of the partition of lands held in

joint ownership as it exists today. At the time that case was decided I agree that the action (*actio communi dividundo*) for a partition in a case such as this would lie . . .

“But since that case was decided the common law of the colony has been altered, and, further an Ordinance has been passed to provide for ‘the partitioning of district lands amongst the joint proprietors thereof (Ordinance 13 of 1914) . . .

“Having come to this decision, it fortunately is not necessary to consider the change in the common law. I say fortunately, for it is a matter bristling with difficulties. Counsel assumed that there had been no change but produced no argument to support that assumption. Lest it should be thought that I agreed with him it is only necessary to cite s. 3(4) of the Civil Law Ordinance, 1917, which enacts that ‘there shall be as heretofore one common law for both immovable and movable property and all questions relating to immovable property within the colony and to movable property subject to the law of the colony shall be adjudged, determined, construed, and enforced, as far as possible according to the principles of the common law of England applicable to personal property.’ In the absence of any statutory enactment dealing with the matter the section would certainly appear to include questions arising on the partitioning of immovable property. The English common law of real property in respect of co-partners and with its provision for effecting partition by writ *de partitione facienda* is expressly excluded by the foregoing sub-section of this section, but the very term ‘partition’ in law only applies to land and hereditaments or right and interest therein.

“Possibly s. 2(3) of the Ordinance dealing with the saving of existing rights might be appealed to, but I should have great difficulty in holding that a right to obtain partition of immovable property held in joint ownership came within the terms ‘any right of ownership or any other right, title or interest in any property movable or immovable or of any other right acquired before the date of this Ordinance.’ The effect of such an interpretation would in effect mean a state of chaos in the law of the colony. No help can therefore in my opinion be obtained from that sub-section.”

It will be observed that the last two paragraphs of that judgment are *obiter*.

In *Barry v. Mendonca et al*, [1923] L.R.B.G. p. 107, DOUGLAS, J., after reciting some of the rights of co-owners, faced the difficulty and came to a positive conclusion at p. 108 where he stated:

“ . . . in Roman-Dutch law as administered in this colony up to the 31st December, 1916, a co-proprietor had no right to put up a house or fence in a portion of the common property without permission. That such a system of co-ownership still exists is recognised

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by Ordinance No. 13 of 1914 and its amending Ordinance No. 12 of 1920. I am of opinion that the Civil Law Ordinance has not altered the rights or remedies of such co-owners and that s. 2(3) of Ordinance No. 15 of 1916 is applicable.”

In *Barreiro v. de Freitas*, (1924) L.R.B.G. 96, where the question of the division of property of divorcees married in community of goods arose, the same judge had this to say at p. 99:

“We have no order providing for the sale of ‘real’ property answering to o. LI of the English rules, and as the English common law of real property shall ‘not apply to immovable property in the Colony’ (s. 3(3) of the Civil Law of British Guiana Ordinance, 1916), I have to be guided by the powers of sale inherent in judges of the Supreme Court when it is necessary and expedient that immovable property should be disposed of, and, on the Roman-Dutch law for the division of property in community. In Van Leeuwen’s Commentaries, Vol. II, p. 233, the learned author says ‘the final partition and division of property likewise takes place in portions and equal shares . . . or where the shares are equal to the one who bids the most, and he who thus obtains it must pay what he promised in ready money. But if it be not convenient for the one to purchase the property, or to take the use thereof as aforesaid, he is not in law obliged to take the property, or to allow the other to obtain the same at the low price which it may suit him to give or take it at but by auction to the highest bidder.”

In *Seugobin v. Walrond*, (1959) L.R.B.G. 45, JAILAL, J., at p. 46 cited with approval the statement of DOUGLAS, J., in *Barry v. Mendonca*, referred to earlier in this judgment, and applied it to the facts of the case.

In *Weeks v. Heyligar*, (1964) No. 1102 Demerara (unreported), LUCKHOO, C.J., had this to say in the course of his judgment:

“Counsel for the plaintiff prefers an order for a sale by private treaty with a reserve price fixed at \$1,000 and has referred to the case of *Barreiro v. de Freitas*, (1924) L.R.B.G. 96, where DOUGLAS, J., held that the judges of the Supreme Court of this Colony have an inherent jurisdiction to order the sale of immovable property in this Colony when it is considered necessary that such property should be disposed of.

“The passage in the judgment of DOUGLAS, J., in *Barreiro v. de Freitas* relating to the powers of sale inherent in judges of the Supreme Court did not as worded suggest that such powers are limited to cases involving undivided interests in immovable property, though the case under consideration by DOUGLAS, J., did in fact relate to undivided interests in immovable property.

“It is interesting to observe that the learned author of *Duke on Immovable Property* published in the year before the judgment in *Barreiro v. de Freitas* in dealing with the remedy of partition expressed

the view (at p. 60) that the Supreme Court could order a sale of land in lieu of partition and that this power applied to land in the whole of the Colony. The decision in *Barreiro v. de Freitas* has stood for over 40 years and as I am not convinced that it is wrong I think that I should follow it in an appropriate case.”

In *Krisnath & Anor. v. Clements*, (1920) L.R.B.G. 199, Sir Charles MAJOR, C.J., in considering the effect of the sub-section under reference said at p. 204:

“There remain two points of argument to be considered. The first is as to the representation of Mohipat and his brother’s right of succession to his estate upon his intestacy. If any authority be needed for the statement that brothers and sisters by the same mother are entitled to succeed each other on intestacy, although they are illegitimate, it is to be found in *Mogamat v. The Master*, (8 S.C. 259). And the succession is as of right. Although, therefore, Mohipat died in 1918, his brother’s right existed before the passing of The Civil Law Ordinance, 1916, and is a ‘right, title or interest in immovable property’ expressly preserved to them by the third sub-section of the second section of the Ordinance.”

On appeal to the West Indian Court of Appeal, (1921) L.R.B.G. 189, THOMAS, C.J., said at p. 191:

“By authority of *Mogamat Jesseim and Others v. The Master and another*, 8 S.C. (Cape of Good Hope), 259, Mohipat’s share would pass to his brother, the respondent. That was the old law of the colony. It has been argued that that has been changed by The Civil Law of British Guiana, 1916, Ordinance No. 15. By s. 2, sub-section 3 of that Ordinance a saving clause has been provided to protect existing rights. That sub-section only states specifically that nothing in the Ordinance shall be held to deprive any person of any right of ownership or other title or interest in any property movable or immovable or any other right acquired before the date of the Ordinance but gives the Supreme Court wide powers in the interest of equity. Reading the one part of that sub-section with the other I am satisfied that this is a matter in which those powers might properly be exercised.”

But LUCIE-SMITH, P., doubted this and BARCLAY, J., expressed a contrary opinion. MAJOR, C.J., in the later case of *In re Barclay Petition of Stull* recanted from his earlier view. See also *Mohamed Din. v. Tetric*, (1944) L.R.B.G. 214, where the West Indian Court of Appeal, speaking through BLACKALL, P., said at p. 222:

“In support of his argument that the appellant is entitled to the full benefit of every right acquired by any of his predecessors in title, Mr. Woolford submitted that when the appellant’s predecessor in title became the owner of Lot 25A in 1909 he *ipso facto* acquired the right to use the dam on the south side of Lot 24 for the purpose of ingress

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and egress to and from lot 25A, and since this right was acquired before 1st January, 1917, the provisions of Ch. 7 s. 2(3) are applicable thereto. From this he argued that when the appellant obtained title to lot 25A he became entitled, not only to the right of way, but also to the benefit of Ch.7,s.2(3).

“We are unable to assent to this contention. In our view a person who seeks to avail himself of the exemption given by the sub-section must show that the right he claims was acquired before the prescribed date by himself and not by any other person. The interpretation sought to put on the sub-section would make the exemption so wide as to defeat the main object of the Ordinance, viz. the abrogation of Roman-Dutch law and, as already mentioned a construction which would lead to this is, if possible, to be avoided. It is significant, in this connection, that in s. 4(2) of the Ordinance the words ‘has accrued to him or to some person through whom he claims’ were used in order to effect the inclusion of predecessors in title. Had the Legislature intended the amplification contended for by the appellant they would expect to find a similar expression in s. 2(3), but it contains nothing of the kind.”

Although this statement of the law may be accurate *vis-a-vis*, the particular type of right which was under consideration in that case, it is in my view too wide and general a proposition when regard is had to the other provisions of the section, viz.

“and where in any matter whatsoever any right is founded upon a rule or custom of Roman-Dutch law or procedure for which there is no equivalent in the English common law, or where the English common law in the opinion of the Supreme Court is not applicable owing to any special local conditions for which no provision is made by this or any other Ordinance, effect may be given to the Roman-Dutch rule or procedure to the extent the Supreme Court deems advisable in the interests of equity if that Court is so advised.”

It is merely *obiter* as regards other types of rights. Consequently, I respectfully disagree with it and consider that the inherent nature and incidents of each particular right must be considered in the application of the provisions of the Ordinance.

In my view, s. 2(3) enumerates the following rights:

- (1) rights of ownership in property both movable and immovable which are comprised of the following bundle of rights described by jurists as incidental rights:
 - (a) the right to possession;
 - (b) the rights of user and enjoyment;
 - (c) the rights of consumption, destruction or alienation;
 - (d) the right to indeterminate duration of ownership;
 - (e) the right to the residuary character of ownership.

- (2) rights, other than ownership, in any movable or immovable property.
- (3) other rights acquired before January 1st. 1917.

Co-ownership is duplicate ownership, that is to say, two or more persons own the common property, and would therefore fall within the first category; but from its very nature certain incidents arise as between the owners. Two of these, namely, the right of the co-owner's heirs to succeed to their respective interests upon intestacy and the right of each co-owner to partition and/or sell by order of the court, are especially germane to the construction of the section under reference and therefore attract analysis.

In *Ceylon Theatres Ltd. v. Cinemas Ltd. and Others*, Privy Council Appeal No. 3 of 1967, the court, speaking through Lord WILBERFORCE, said:

“First rights of co-ownership under the Roman-Dutch law are regarded as quasi contractual. One of the obligations so imposed, or treated as accepted, by the co-owners is the obligation to allow a division of the property – *in communione nemo compellitur invitus detineri* Both by the Common Law, and under the successive pieces of legislation which has been passed in Ceylon concerning partition, partition may be effected by agreement or by decree of a competent Court. Partition when effected by judicial decree appears, according to the prevailing opinion, to be in the nature of an alienation by purchase, the alienees deriving their title from the decree of the Court . . . Thus the conception underlying judicial proceedings for partition or sale is that of dissolving the bond of common ownership by alienation of the co-owner's shares.”

Did the Legislature intend to abrogate such incidental rights without the substitution of some equivalent?

Having regard to the nature of the right, it is clear from the local cases cited that the majority of the judges who adjudicated on this topic from time to time, found the application of the English common law of personality impracticable, inconvenient and inequitable, having regard to local conditions and orientations.

Moreover, by the common law of England, coparceners alone had the right to compel partition. Coparcenary arose at common law in two cases, first where a person who was seised in fee simple died intestate leaving only female heirs; secondly, when a person seised of an entailed interest died leaving only female heirs. In each case females succeeded jointly to the estate and were called coparceners.

It was purely an incident of real property law; it had no application to personal property.

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Partition of tenancy in common and/or joint tenancy was statutory, and, in any event, as DOUGLAS, J., pointed out in *Barreiro v. de Freitas*, the concept of partition was in English law limited to land.

Therefore even if it were possible to apply the English common law of personal property to immovables in British Guiana and so to co-ownership after 1917, there would be no equivalent in that law for the right to partition undivided interests as they existed under the Roman-Dutch law. This would, in my view, be the type of right which would attract and be saved by that part of s. 2(3) of the Ordinance which gave the court a wide discretion.

It should be observed in passing that in *D'Aguiar v. Obermuller*, (1948) L.R.B.G. 68, where a purchaser bought at execution three undivided fourth shares of and in a parcel of land, in an action for possession against the previous owner who remained in occupation, it was contended that he had acquired prescriptive rights to the other undivided fourth, and he refused to deliver up possession on this ground. Worley, C. J., in the course of his judgment, held that the defendant's contention was fallacious as his occupation of the one-fourth share could never be adverse to himself as co-owner of the remaining three-fourths share or to the plaintiff/purchaser of those shares. In holding the action maintainable, the learned Chief Justice followed authorities under the Roman-Dutch law and English authorities on the common law of real property dealing with the incidents of co-ownership. No mention was made of the English law of personal property.

To hold that the Legislature intended that rights of co-ownership acquired prior to 1916 along with their incidents were saved; and that co-ownership established after 1916 would have different incidents, would result in the application of two different systems, simultaneously; creating an inconvenience which I find it difficult to impute to the Legislature. What possible benefit could accrue from such an interpretation? None whatever. On the contrary, it would have widely mischievous consequences.

Consequently, because of:

- (a) the impracticability of the application of the English common law of personality to the incidents of co-ownership as recognised by the Roman-Dutch Law;
- (b) the absence in the English common law of personal property of any equivalent procedure for the remedial incident of partition by the Court at the instance of any co-owner;
- (c) the concept of fairness and equality inherent in:
 - (i) the right of succession upon intestacy of the heirs of co-owners to their respective interests in the common property,
 - (ii) the right of any co-owner to seek from the Court an order for partition;

- (d) the presumption against inconvenience in the construction of a statute;
- (e) the long period of fifty years over which the Courts appear to have applied the interpretation I now seek to put upon the Ordinance,

I apply the more reasonable interpretation that the words of the sections under consideration permit; and hold that the Roman-Dutch concept of co-ownership, together with its incidents, which include the Court's jurisdiction to order partition and sale of the common property, was saved by s. 2(3) of the Civil Law Ordinance, Cap. 2. And now, how did this affect the question of prescription?

In re Downer, [1920] L.R.B.G. 166, DALTON, J., said:

“What is the nature of undivided ownership? Joint owners of land are entitled to make a reasonable use of all the land so held proportionate to the share of each therein. Each owner is entitled to access to the whole of the land, and to an interest in every square inch of it, proportionate to his share, and to everything upon it. If a joint owner sells his share of the joint property, as he may do without the consent of the other joint-owners, the purchaser steps into the position of the seller, in respect of his relations to the remaining joint owners. Is prescription which is based on continuous uninterrupted possession consistent with this? How can the petitioner say he is entitled by prescription to an undivided half of the lot in question when he admits that Fauset has also an undivided interest of the same lot? It seems to be entirely opposed to all the principles on which the idea of prescription is based. His possession of the property he claims is joint, not exclusive; it is not uninterrupted, since he admits that another has an interest as well as himself. His claim is not adverse to the true owner of part of the property, rather he admits that ownership.”

In Re Benjamin, (1931/37) L.R.B.G. 168, Van SERTIMA, J., distinguished this case and, in my view, correctly set out the circumstances in which one co-owner could prescribe against another, where he said:

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

“An examination of the following authorities seems to negative the universality of the proposition.”

After examining the authorities, he said at p. 171:

“To sum up, I have come to the conclusion that there are at least three sets of circumstances in which there can be granted title by prescription to an undivided interest in land, that is to say:

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1. Where one or more co-owners have been in exclusive possession for the required period of the share or shares of the other co-owner or co-owners.
2. Where the claimant is a purchaser of an undivided share from the true owner thereof who goes out of, while the purchaser goes into, possession thereof for the prescribed period.
3. Where the true owner of the whole being out of possession two or more persons take possession in the manner of co-owners, i.e. not adversely to each other but each enjoying the rights of a true co-owner, for the prescribed period. In this case the parties become entitled to the ownership of the whole and each, it follows, to title to his undivided share thereof."

In *Corea v. Appuhamy*, [1912] A.C. p. 230, in which the point arose, Lord MACNAGHTEN, delivering the judgment of the Privy Council, said at p. 236:

"Entering into possession and having a lawful title to enter he could not divest himself of that title by pretending that he had no title at all. His title must have inured for the benefit of his co-proprietors. The principle recognised by WOOD, V.C., in *Thomas v. Thomas*, holds good: 'Possession is never considered adverse if it can be referred to a lawful title.'

"The two learned Judges in the Court of Appeal did not adopt in its entirety the suggestion of the trial Judge. They both held that Iseris entered as 'sole heir' and that his title has been adverse ever since he entered. They held that he entered as 'sole heir', apparently because he had it in mind from the first to cheat his sisters. But is such a conclusion possible in law? His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster could bring about that result."

This statement was followed by the Privy Council in *Muttunayagam v. Brito*, [1918] A.C., 146. Lord DUNEDIN, delivering the judgment of the Board, said at p. 148:

"The learned district judge seemingly overlooked the case of *Corea v. Appuhamy*, (1911) (81 L.J. P.C. 151, 153); (1912) A.C. 230, 236), which the learned Judges of the Court of Appeal took as decisive of the question. In that case it was held by this Board that the possession of one co-parcener could not be held as adverse to the other co-parceners. Lord MACNAGHTEN, who delivered the judgment, cited the dictum of Vice Chancellor Page-Wood in *Thomas v. Thomas*, (1855) (25 L.J. Ch. 159, 161; 2K. & J. 79, 83): 'Possession is never considered adverse if it can be referred to a lawful title.' "

In *Simpson v. Omeru Lebbe*, 48 N.L.R. pt. 2 at p. 112, the Supreme Court of Ceylon held that as between co-owners separate possession on

grounds of convenience cannot be regarded as adverse possession for the purpose of establishing prescriptive title.

SOERTSZ, S.P.J., said:

“There is no documentary evidence of any division and in view of the fact that the defendant-appellant’s case involves the question of prescriptive title among co-owners, *very clear and strong evidence of an ouster and adverse possession is called for*. There is no such evidence. It is impossible for us to hold, on the evidence, that the learned trial Judge erred in taking the view that such separate possession of some lands as there were indications of was separate possession on grounds of convenience and not adverse possession. The plaintiff-respondent appears to have a grievance against the defendant-appellant and that it was very probably why he went in search of his vendor and bought these interests. But whatever his motives, his position in law is sound.”

From the authorities examined, it seems that the question of prescription among co-owners of undivided interests in land is regarded in the same light under both the English and Roman-Dutch systems.

While, therefore, in the instant case there may have been grounds under both systems for holding that the occupation of the respondent and her predecessors in title, was adverse to the appellant and his predecessors in title there is no positive evidence of an ouster. Even, however, if an ouster could be presumed from the surrounding circumstances, the effect of my finding of fact is that the respondent, for valuable consideration, waived, prior to the declaration she now seeks, whatever rights, if any, she may have acquired in the disputed strip. In other words, she conceded that her occupation of the strip for purposes of convenience was by a mistake which she was prepared to rectify upon a proper survey. She cannot now set up the claims she had expressly waived. Accordingly, I find that she is not now entitled to a prescriptive title for the disputed strip.

I return now to further consideration of the counterclaim for partition. Counsel for the appellant urged, in the alternative, that if s. 3(A) did abrogate the Court’s jurisdiction of partition and sale under the Roman-Dutch law, then the provisions in s. 3(B) of the Ordinance that

“the Supreme Court shall administer the doctrines of equity in the same manner as the High Court of Justice in England administers them at the date aforesaid or at any time hereafter,”

conferred upon the Court, in substitution therefor, the concurrent jurisdiction of partition and sale as administered by the High Court of Justice in England.

Storey in his “*Equity Jurisprudence*” says at s. 647:

“That the writ of partition is a very ancient course of proceeding at the Common Law is not doubted. But it by no means follows, that

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the Courts of Common Law had an exclusive jurisdiction over the subject of partition. The contrary may fairly be deemed to have been the case, from the notorious inadequacy of that writ to attain, in many cases, the purposes of justice.

“Until the Statute of 31st Henry VIII, ch. 32, no writ of partition lay at law for a joint tenant or tenant in common. And yet the grossest injustice might have arisen, if a Court Of Chancery could not, in such a case, have interposed, and granted relief, upon the analogy to the legal remedy.”

And at ss. 650-651:

“The true ground is far more correctly stated by Lord Redesdale, in his admirable Treatise on Pleadings in Equity. ‘In cases of partition of an estate,’ says he, ‘if the titles of the parties are in any degree complicated, the difficulties, which have occurred in proceeding at the Common Law, have led to applications to Courts of Equity for partitions, which are effected by first ascertaining the rights of the several persons interested; and then issuing a commission to make the partition required; and, upon the return of the commissioners, and confirmation of that return by the Court, the partition is finally completed by mutual conveyances of the allotments made to the several parties.’

“The ground, here stated, is of a complication of titles, as the true foundation of the jurisdiction. But it is not even here expressed with entire legal precision. However complicated the titles of the parties might be, still, if they could be thoroughly investigated at law, in the usual course of proceedings in the Common Law Courts, there would seem to be no sufficient reason for transferring the jurisdiction of such cases to the Courts of Equity. The true expression of the doctrine should have been, that Courts of Equity interfere in cases of such a complication of titles, because the remedy at law is inadequate and imperfect, without the aid of a Court of Equity to promote a discovery, or to remove obstructions to the right, or to grant some other equitable redress. Besides, the remedy in Courts of Equity, even in such cases is more perfect and extensive than at law; for, in Equity, conveyances are directed to be made by the parties in pursuance of the allotments of the Commissioners, which is a mode of redress of great importance, as a permanent muniment of title, and of which a Court of Law is, by its own structure, incapable.”

It is put this way by the learned editor of Wood Renton’s Encyclopaedia of The Laws of England at p. 367:

“*Concurrent Jurisdiction in Chancery.* The common-law writ proved to be a cumbrous and unsatisfactory method of procedure, and from an early period the Court of Chancery, in the exercise of its concurrent jurisdiction, entertained suits for partition, which was carried out by a commission addressed to commissioners, and not, as

at law, by writ addressed to the sheriff. The Court issues the commission, not under the authority of any Act of Parliament, but on account of the extreme difficulty attending the process of partition at law, where the plaintiff must prove his title as he declares, and also the titles of the defendants; and judgment is given for partition according to the respective titles so proved. That is attended by so much difficulty, that by analogy to the jurisdiction of a Court of Equity in the case of a dower, partition may be obtained by bill' (per Eldon, L.C., *Agar v. Fairfax*, (1810) 17 Ves. 533; 34 E.R. 206; Wh. & T. Leading Cases, vol. I p. 181; and see *Mundy v. Mundy*, (1793), 2 Ves. Jun. 122; 30 E.R. 554; *Calmady v. Calmady*. (1795), 2 Ves. Jun.568; 30 E.R.780)."

There is therefore every justification for the view that partition was a doctrine of equity administered by the High Court of Justice in England prior to, at the time of the passing of the Civil Law Ordinance, and at the present time.

The Court's jurisdiction with regard to its application to the law of immovable property in this Country, received judicial consideration in *British Colonial Film Exchange Ltd. v. de Freitas*, (1938) L.R.B.G. p. 35. VERITY, C.J., said at p. 39:

"Examination of the provisions of s. 3 of Cap. 7 in the light of a recognition of the true nature of the English system of equity and of the principles underlying the cases to which I have just referred leads me to the conclusion that the real effect of that section as it affects the issues involved in the present case may be stated to be that the doctrines of equity as administered by Courts of Justice in England are applicable in so far as they do not operate to make effective the English law of real property or any incident attached in England exclusively to land tenure or to estates in land.

"This interpretation which appears to me to be clear in view of the words of the section excludes the creation of equitable estates in land as has already been decided by the cases to which I have referred, but it recognises the principle of the application of the doctrines of equity to persons rather than to classes of property, and only excludes their application where it would involve the recognition and adoption of legal rules of land tenure of estates in land excluded from the Civil Law of the Colony, or of equitable rules analogous thereto."

With this I respectfully agree.

Consequently if, contrary to the view I have expressed earlier herein, s. 3(A) of the Ordinance abrogated the Court's jurisdiction of partition and sale under the Roman-Dutch law, then s. 3(B) thereof substituted therefor the concurrent equitable jurisdiction administered by the High Court of Justice in England.

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In the circumstances, I would allow the appeal with respect to the counterclaim for a division of the property and vary the order of the learned trial judge to include an order for partition and/or sale with liberty to either party to apply to the High Court or to this Court. Both parties will bear their own costs in the Court below, but the respondent must pay the costs of the appellant in this Court.

Appeal allowed.

ATTORNEY GENERAL v. FIEDTKOU

[High Court (Crane, J. February 13, March 1, 15, April 3, 4, 1967,
January 13, 1968].

Opposition — Non-payment of royalty on timber — Liability for payment proved — Amount to be paid not ascertained — Whether subject matter of opposition — Forest Ordinance, Cap. 240, ss 12 and 37, Forest Regulations, Cap. 240, regs. 22 — 25; Civil Law of Guyana Ordinance, Cap. 2, s. 3 (D) (b).

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On the 14th July 1954 and the 15th March 1956 the defendant and the Conservator of Forests had entered into two woodcutting leases in respect of two large tracts of Crown Lands. Each lease conferred on the defendant the exclusive right to cut and remove wood from the areas delineated, on the payment of prescribed royalties. Under cl. 9 of each lease the defendant was obliged to keep a complete record declaring all forest products cut and removed by him. It also fixed on him responsibility for ensuring the accuracy of the records and the payment of full royalty on all forest products taken by him.

On the 21st December 1963 the defendant advertised the passing of transport of certain immovable property to his son. The plaintiff entered an opposition, in which he claimed that the sum of \$17,468.80 had been due owing and payable to the Conservator as royalty for timber cut, removed, and sold, by the defendant between the 1st January and 31st December 1960.

At the trial evidence was led of the amount of royalty which the defendant had actually paid during the period; but several witnesses testified that they had purchased large quantities of timber from the defendant and his sons which had not been accounted for. The effect of the evidence was that the defendant had sold much larger quantities of logs than he had actually recorded as having been transported from the lands under lease. It was this excess on which the plaintiff alleged the royalty of \$17,468.80 was payable.

However, evidence was also led that royalty payable is based on the cubical content of the logs as determined under regs. 22 – 25 of the Forest Regulations. The method of calculation varied according to whether the logs were square or round. There was, however, no evidence of the type of logs which had been sold.

HELD:— the action by way of opposition was misconceived and the proper action should have been one for accounts, as no sum had been ascertained as royalties by any forestry officer before the opposition had been entered.

Action dismissed.

Doodnauth Singh, for the plaintiff.

F. Ramprasad, Q.C., for the defendant.

CRANE, J.: The right of opposition to transport of immovable property has never been statutorily defined; it has been left to develop empirically by the infusion of legal ideals of the profession into the judicial development of case law. This case furnishes yet another example of an attempt to determine whether a demand is liquidated or unliquidated, and so whether it may properly form the basis of an opposition action.

On July 14, 1954, the defendant leased from the Conservator of Forests 6,000 acres of Crown land in the upper region of the left bank of

the Demerara River at its junction with the Kumaparu creek (see lease Dem. No. 17 (Ex. "A")). It was a woodcutting lease in Crown forests and conferred on the lessee for a period of five years the exclusive right to cut and move wood from the area delineated on the payment of prescribed royalties.

Cl. 9 is foremost among the other clauses in this case; it obliges the defendant to keep complete records declaring all forest produce cut and removed by him; it also fixes on him responsibility for ensuring the accuracy of those records and that full royalty is paid on all forest produce taken by him. Indeed, so fundamental does the lessor consider these requirements that it is seen fit to insert a provision to the effect that failure on the part of the lessee to comply with them should be deemed a breach of contract, whether such failure was deliberate, or occasioned by mistake or negligence.

On March 15, 1956, the defendant obtained another woodcutting lease – see lease Dem. No. 48 (Ex. "B"). This is in another locality and extends from the mouth of the Waraburu creek of the Demerara river to the source of the Kushikabra creek; it is comprised of an area of 25,000 acres and is to endure for an initial period of three years with a right of renewal. In all other respects the clauses of both leases are drawn in substantially identical language, and are expressed to be made subject to the provisions of the Forests Ordinance, Cap. 240, and to any regulations made thereunder.

This case is the result of an alleged breach of those agreements of lease. It is not preferred in the common law form however, but by way of the opposition action, a relict of the Civil Law which has been saved by the Civil Law Ordinance, Cap. 2. It arose in this way:

On the 21st December, 1963, the defendant advertised in the Official Gazette with a view to passing transport of certain immovable property to his son David Fiedtkou. On 31st December, 1963, the plaintiff followed up by entering opposition to the passing thereof and in his notice and reasons of opposition claimed from the defendant the sum of \$ 17,468.80, being an amount due, owing and payable by the defendant to the Conservator of Forests as royalty on timber cut and or removed and sold by the defendant between January 1, 1959 and December, 31, 1960 (inclusive). The reasons for opposition conclude by challenging the competence of the proponent *to* transport the property without first paying the said debt.

The statement of claim also alleges that timber was cut and removed from the areas comprised in leases Nos. 17 and 48 abovementioned, and that the amount due had been demanded without result.

The statement of defence denies indebtedness in the sum claimed and admitting the defendant's entitlement to the wood-cutting leases in Crown forests, challenges the foundation of an opposition action as the appropriate form in which to prefer this claim. It is contended therein that the claim is not in respect of a liquidated sum, and, this being the case, the consequential declaration sought, that the action is just, legal and well founded, ought not to be granted.

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Mr. George Forbes, deputy Conservator of Forests, first gave evidence in support of the claim. He outlined the procedure to be followed by a lessee who holds under a wood-cutting lease in Crown forests stating that all logs must be removed when cut and accompanied to their destination by a removal permit. He referred to the obligation imposed by law on a lessee to keep records of all shipments of logs from his grant. Mr. Forbes was in fact reciting the relevant regs. (nos. 10 – 16) of the Forest Regulations, 1953. These are as follows:

CONVEYANCE OF FOREST PRODUCE

10. Any person who conveys forest produce from a Crown forest shall keep a record in such form and giving such particulars as the Conservator may direct of the species, type, measurements and quantities of the forest produce removed, together with the date of such removal, and shall produce such record for inspection on the demand of any forest officer.

11. No person shall evade or attempt to evade the payment of the correct royalty on any forest produce taken by him from any Crown forest under the provisions of these Regulations.

12. No person shall remove or cause to be removed from any Crown forest any forest produce unless a removal permit in the form specified in the Fourth Schedule to these Regulations has been first completed in respect of such forest produce.

13. (1) No person shall convey or cause to be conveyed any forest produce from a Crown forest along any waterway or public road unless the person in charge of such forest produce has in his possession a removal permit in respect of such forest produce duly completed.

(2) The person in charge of any forest produce being conveyed along any waterway or public road shall produce the removal permit for inspection upon the demand of any forest officer.

14. The person in charge of any forest produce being conveyed from any Crown forest shall as soon as possible produce the removal permit for inspection at the nearest police station or to a forest officer. The person in charge of such police station or the forest officer, as the case may be, shall, upon satisfying himself that the forest produce has been lawfully obtained and that the particulars are correctly entered, endorse the said permit and shall enter thereon the date and place of inspection.

15. No person shall sell or purchase any forest produce unless the removal permit in respect thereof has been duly endorsed as required by regulation 14 of these Regulations.

16. The person in charge of forest produce which has been removed from any Crown forest shall, within 24 hours of his arrival

at its destination, deliver the removal permit to a forest officer who shall satisfy himself that the particulars therein are true and correct and shall calculate the royalty payable thereon.”

Forbes then related how in 1960 on receipt of instructions from the Conservator of Forests investigations were conducted into the activities of the defendant with a view to determining the quantity of logs actually cut and sold by him from his grants in 1959 and 1960. This was done, he said, by comparing quantities appearing in the records of the department with quantities proved to be cut and sold by the defendant and his sons during the period under consideration which were not recorded, as they ought to have been, in the department of the Conservator of Forests. The result of the enquiry, he said, showed that the defendant and his sons were found to have sold more greenheart logs than had been actually recorded in the department as having been shipped from his wood-cutting leases. Investigations revealed that a grant total of 2,855 greenheart logs measuring 314,130 cu.ft. were sold during the period 1959/1960, while royalty receipts as recorded in the office were in respect of only 1,402 logs of a measurement of 95,770 cu.ft. making a difference of 1,453 logs totalling 218,360 cu.ft. on which royalty should have been collected. When this figure of 218,360 is multiplied by 8 cents which is the royalty charge per cu. ft. under the regulations, the estimated amount due is \$ 17,468.80, which is the amount claimed as a debt by the Attorney General on behalf of the Conservator of Forests.

I have set out hereunder for ease of reference, the plaintiff's statement of assessment of royalty due from the defendant on greenheart logs cut from his two leasehold sites. It is referred to in para. 5(a) of the statement of claim, and as the judgment proceeds, I shall review in the order in which they appear, commenting, if necessary, upon the evidence of the several witnesses who testified in respect of the various companies and concerns to which it is alleged he had sold logs. The following is the statement of assessment of royalty due from the defendant Fiedtkou:

STATEMENT OF ASSESSMENT OF
ROYALTY DUE BY A. P. FIEDTKOU
ON GREENHEART SHIPPED FROM LEASES DEM: 17 and 48

(a) Shipments	1959	No. of Logs.	cu. ft. Hoppus.
B.G. Rice Marketing Board		498	53,130
De Freitas Limited		208	26,098
Mt. Everard Lumber Co., Ltd.		25	1,656
Rahaman's Sawmill		111	11,114
TOTAL 1959-		842	91,998
Shipments	1960		
B.G. Rice Marketing Board		223	22,218
De Freitas Limited		773	96,313
Rahaman's Sawmill		37	4,174

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Toolsie Persaud Limited	157	19,186
Transport and Harbours Department	823	80,241
TOTAL 1960 –	2,013	222,132
Shipments Grand Total 1959 and 1960	2,855	314,130
(b) Less payments made for all Greenheart recorded for the years 1959 and 1960 (details attached to this statement).	1,402	95,770
(c) Amount of Greenheart shipped on which royalty is due.	1,453	218,360
(d) Royalty due on Greenheart shipped from Leases Dem: 17 and 48 @ 8 cents per cu. ft.		\$ 17,468.80

The Conservator informed the defendant of the result of the investigations by letter following which, there was a meeting at the Forestry Department. Present thereat were the Conservator, Mr. Forbes, the defendant and his sons and their legal adviser. At the meeting, the defendant explained that he, personally, worked one of the leases while his sons the other; that it was he who sold logs to the Transport and Harbours Department and Rice Marketing Board during 1959 and 1960, though he had no knowledge of any other logs sold to other sawmills and, in fact, he did not know what his sons did on the other leasehold interest. In passing, I think it is fitting to observe how impressed I was with the accuracy and reliability of Mr. Forbes' account of what was said at this meeting. This can be seen from the defendant's own version in a statement he made to the police (Ex. "T"), who at one time were also investigating the workings of his concessions. I will say more about the statement later. The defendant then invited the Conservator to assess payment of royalty on the number of logs in excess of the number recorded in his office and promised that he would settle the matter provided he was given a reasonable time within which to do so.

Both the register of removal of Permits Received (Ex. "D"), and the Forestry Department's cash-book (Ex. "E"), were produced in evidence with a view to showing that in 1959 and 1960 a total of 1,402 logs measuring 95,770 cu.ft. were recorded therein as having been produced by the defendant, but I will later show that the plaintiff has failed to do so satisfactorily.

Mr. Edward Rickford, the assistant Conservator of Forests, who gave this testimony actually visited the sites. He related how lease No. 48 was worked by the defendant, while No. 17 by his two sons Garvan and Alfonso who each worked a section or block which was the information the defendant gave to the Conservator at the meeting mentioned above. (It is provided in

the terms of the leases that each grant is to be divided into two blocks). The defendant, Rickford said, did not keep a production book in respect of lease No. 48 — he kept only slips of paper for April, May and July 1960 on which he recorded production for those months. These were checked and a detailed report made to the Conservator immediately after the inspection. Rickford also checked lease No: 17 and gave production figures for timber cut and brought out by each in the respective blocks of lease 17.

Next to testify was Arnold Dutchin, a senior clerk attached to the Guyana Rice Marketing Board. He produced evidence of eight instances of payments and receipts made by the British Guiana Rice Marketing Board to the defendant for the supply of 498 logs measuring 53,130 cu.ft., and 223 logs measuring 22,218 cu.ft. during the years 1959 and 1960 respectively, while Cecil Thomas, a former employee of the Board, related the system of supply, demand and payment for the logs and the part he played in the transactions.

In proof of the fact that the defendant also sold logs during the relevant period to De Freitas Ltd., the plaintiff called Alvro De Freitas, a director. He produced in evidence an undated letter which he identified as having been written by him to the Conservator of Forests (Ex. "U"). This letter is in the form of a statement concerning the purchase of greenheart logs by his firm from A.P. Fiedtkou on various dates between 1959 and 1960. It was written in response to a request from the Forestry Department for information on the quantity of logs the firm purchased from the defendant. The contents are from the books kept by the firm which are not now available, they having been destroyed in a fire on the premises, subsequently. Ex. "U" is undated, but was written well before this case was brought; it shows that a total of 208 logs measuring 26,098 cu.ft. were bought in 1959 and a total of 741 logs of a measurement of 92,654 cu.ft. not 96,313 as per statement of assessment, were purchased in 1960 from the defendant.

With respect to the furnishing of proof that the defendant sold logs to the Mount Everard Lumber Co. Ltd. in 1959, the plaintiff tendered the firm's log-book containing entries alleged to have been made by one Lewis, deceased. The log-book was produced by their clerk, Walter Mangru, whose business it is to deal with such log-books in the course of duty. Mangru knew the handwriting of the deceased, and, on this account, the book was admitted into evidence, but not with respect to its contents as affecting the defendant A.P. Fiedtkou, because cross-examination disclosed that the entries made by Lewis really concerned one M.J. Bacchus' account. It is for this reason that I believe the amount claimed for royalty in respect of this company has not been established and I will score it out.

Meer Rahaman the proprietor of Rahaman's Sawmills testified to the effect that he purchased timber from the defendant in 1959 and 1960; that in 1959 he purchased 111 logs measuring 11,114 cu.ft. and in 1960 he purchased 37 logs of a measurement of 4,174 cu.ft.

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George Ramsaroop, chief clerk of Toolsie Persaud Ltd. produced in proof that the defendant sold logs to his firm a statement of logs purchased prepared by him from his firm's log-book. He identified the defendant as one who sold logs to his firm. This statement is in evidence as Ex."R"; it shows that 157 logs measuring 19,186 cu.ft. were purchased from A.P. Fiedtkou in 1960.

The last item on the statement of assessment was testified to by Kenneth Rishton, sworn clerk of the Transport and Harbours Department. He tendered his log-book kept in the course of duty, (Ex. "P"); it contains a record totalling 829 logs of a measurement of 80,241 cu. ft. which were purchased from the defendant A.P. Fiedtkou during 1959/1960.

The defendant did not testify, but elected to rest his case on submissions of law which I have above recited from the pleadings. I will now deal with these.

No argument was addressed to the court on the point raised in the statement of defence that the plaintiff has not availed himself of the remedy provided for in a case of this kind. It is said that the appropriate remedy is seizure which the plaintiff did not exercise, but it is clear that in the instant case there could have been no seizure as alleged, since all logs on which royalty is claimed were already sold and delivered long ago to the concerns abovementioned; there was nothing left to be seized; although the lessor may have exercised this right reserved to him under clause 16 with respect to forest products remaining on the sites.

The next point which is the most important is that the claim cannot properly be based on opposition proceedings because the evidence reveals that the sum claimed is not in the nature of a liquidated demand. On this point counsel's contention which is tantamount to really one and the same thing is stated in two propositions:

(i) the debt on which the opposition is based must have been already ascertained at the date of notice of opposition, or latest, at the date of the writ; if the amount is not so ascertained a claim cannot be the subject of an opposition action; although he concedes, it can form the basis of an action on the contract at common law;

(ii) where a trial is necessary to determine the precise amount due, then the alleged debt cannot found an opposition unless it is also liquidated.

In support of these propositions counsel called in aid the following passage from Duke on the Law of Immovable Property in British Guiana, p. 17: "So that the right to oppose is confined (A) to persons having dominium in the res itself or some legal or equitable right therein, and, (B) to creditors having a liquidated demand or a claim of such a nature that it can properly be made the subject matter of a specially indorsed writ." Counsel cited the following authorities: *Da Silva v. Sookraj* (1942) L.R.B.G. 43; *Ferreira v. Cabral* (1923) L.R.B.G. 133; *Seeram Singh v. Dariau Singh*

(19.55) L.R.B.G. 62 and *Commr: I.R. v. R. A. Nicholson* (1962) L.R.B.G. 470, to all of which I have given adequate attention.

In the first place, mention must be made of the right reserved to plaintiff by s. 37 of Cap. 240 to sue either "at common law or otherwise" i.e., *ex contractu* or in any other cause of action known to the law of Guyana. Every lawyer knows that the opposition action is well established in our courts; the right of the plaintiff to prosecute an action for an "offence" in this respect is hereby safeguarded. There can be no doubt it seems, that if indeed the defendant has cut, removed and sold greenheart logs for which he has not paid royalty, he is in breach of the terms and conditions of his contracts and that he has committed an "offence" within the meaning of s. 19 of the Ordinance. I must therefore interpret s. 37 as preserving the right of the plaintiff to proceed by way of the opposition action in suits governed by the Forestry Ordinance, Cap. 240, or regulations made thereunder.

In the second place, it is necessary to determine whether it may be rightly said, as has been urged, that there has been no ascertained or liquid sum due as a debt at the time of the notice of opposition on December 31, 1963. If indeed, there has not been an ascertained or liquid debt at that stage, then I must acknowledge, in keeping with the true nature of the opposition action as expounded in Duke's (*op. cit.*) and elucidated in the above cited authorities, that the plaintiff is out of court.

The argument against the liquid nature of the debt claimed has been adduced chiefly because of the lack of evidence on the precise method used by the forest officer in calculating payment on the logs which he is by law required to adopt when measuring them. Of course, the defendant does not admit the sale of any logs to those persons and concerns which the evidence has supported; but his argument is, as I understand it, that even if he is found to have indeed sold logs to them, the amount due therefor has not been properly calculated and so ascertained as indeed a debt in an opposition action ought to be at the date of the notice of opposition.

When a forest officer measures logs for the purposes of royalty he must do so in accordance with regs. 22 to 25; the method of calculating cubical content for purposes of royalty differs according to the shape of the logs — whether they are round or square. In the case of round logs, it is found by multiplying the length of the log by the square of the quarter girth. Measurement of the girth is in this instance effected by string or tape under the bark at a point equidistant from the ends of the log. In the case of square logs, the method is by multiplying the length by the side with a rule or caliper at a point equidistant from the two ends of the log.

In emphasising in his point of the absence of any evidence on the precise method used, counsel refers to the evidence of Messrs. Rahaman and De Freitas; they said that for the purposes of payment or royalty the method of measuring the logs is the same; both said the method is based on string

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or tape measurement, although Mr. Forbes, and quite rightly I think, denied this was invariably the case. I say quite rightly because reg. 22(1)(2) show that the precise method to be employed is dependent on the shape of the log, and the string measurement which he admitted to be twenty percentum less than the caliper method, is restricted to solely round logs.

In my view, it has been clearly ascertained that the defendant sold quantities of greenheart logs in excess of the amount recorded in the forest office and, as I have pointed out, cl. 9 of his lease agreements obliges him to keep full and accurate records and to ensure that full royalty has been paid on all forest produce cut and removed by him from the grants. The evidence is that he kept no permanent records; as a matter of fact the only records found when inspection was paid to his grant – lease No. 48 in 1960, were comprised of three sheets of paper with figures of production in respect of only three months, while in the case of lease No. 17, only one of his sons kept a record and the other an unsatisfactory one at that. It seems to me very plain on his own admission in ex. T, to which I said I would revert, that the defendant conducted his business in a thoroughly slipshod manner and I can well believe Mr. Forbes' evidence concerning what was said by him at the meeting with the Conservator, viz., that it was he who sold the logs to the Transport and Harbours Department and Rice Marketing Board, but was unaware of any other sales of logs to sawmills and others and that he had very little knowledge of what his sons did on the other lease, and also that he would be quite willing to pay the amount due for the sale of logs over and above the number recorded in the Forestry Department if he were given time to do so.

In ex. T the defendant insisted that he paid all royalty in full to the forest officer by cash or cheque, but his admission that he kept no records declaring all forest produce cut and removed from his grant is a clear breach of cl. 9 of his agreements of lease. He has admitted supplying logs during the relevant time to the Rice Marketing Board and the Transport & Harbours department and to Rahaman's Sawmills while his sons Garvan and Allan supplied De Freitas Ltd., and Toolsie Persaud Ltd. He said his sons told him they paid royalty on logs supplied from his concessions under permits signed by him, and that all his shipments of logs were accompanied by permits given to tug captains, and that removal permit books concerning the relevant period were returned to the Forestry Department either through him or by forest officers. It must be observed, however, that no other persons save the defendant and the purchasers are in a position to know whether the logs sold had been round or square so that the precise method of calculation could have been ascertained. The absence of removal permits in the Forestry office records, or the production of the counterfoils by the defendant leads me to believe that shipments were never in fact accompanied by permits as ought to have been the case, but what alarms me is the suggestion that these responsible concerns can be said to have dealt with the logs without insuring that the law had been complied with. (see reg. 15).

It has been argued that were the plaintiff to succeed the probability exists that the defendant will then be called upon to pay double royalty, the suggestion being that he has already paid it to the forestry officer; but in truth, there can be no presumption merely from the fact of sale that the officer had duly calculated royalty and received payment before sale. If payment did in fact take place, then the defendant ought to have demanded a proper receipt from the officer who is empowered to endorse the fact of payment, if any, on the space provided in the removal permit and its counterfoil. (see the form in the 4th Schedule to Forests Regulations 1953). After delivery of the removal permits to the officer (reg. 16) the counterfoil should be in possession of the defendant who ought to produce it.

Both Rahaman and De Freitas who testified did not say royalty was in fact paid in respect of their purchases; indeed they could not; all they said amounted to no more than that royalty should have been paid when they purchased. In fact, De Freitas in *ex. U* says that he is unable to say whether the logs sold to his firm were removed with removal permits or if royalty had been paid, which is really an astonishing disclosure in view of the onus which reg. 15 places upon his firm to see that royalty has been paid before purchase. He, however, gave an undertaking to ensure in the future that removal permits have been lodged with the Forest Department and that royalty has been paid on all logs sawn at his mill, which seems to be an admission of neglect in observing this very important regulation.

According to regs. 16 and 24, removal permits must be delivered to a forest officer whose duty it is to calculate royalty payable thereon, and make a record of particulars concerning the logs. The regulations are however silent on whom is the responsibility of sending removal permits to the Forest Department. The defendant said in *ex. T* that he used to send them there either by himself or by the forest officer, but I should think the responsibility rests on the forestry officer to do so, since under reg. 16, it is directed that they are to be delivered up to him at the time he calculates royalty. If I am right, then it is in this manner that removal permits are received and are subsequently forwarded and entered in the Register of Removal Permits in the Forestry department – (*ex. D*). S. 12(2) of the Ordinance provides that:

“Royalty shall become payable on forest produce from crown forests and may lawfully be demanded as soon as such produce is cut, felled or otherwise severed from the ground.”

This section must be read in conjunction with reg. 16; there is no conflict between them. There is to be a calculation for the purposes of royalty under reg. 16 when the provisions thereunder and regs. 22 and 23 have been observed.

The liability for the payment of royalty to the Crown arises from the very moment logs are cut, felled or otherwise severed from the ground, though payment is deferred until calculation is made. Reg. 16 directs that

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calculation of it must be by a forestry officer who should employ the methods prescribed in regs. 22 and 23 which I have already referred to above. If this is not done by him the precise amount of royalty due cannot be said to have been determined regard being paid to the evidence that string method calculation results in a twenty per centum less log volume calculation than in the case of the caliper method. Of course, this does not mean that if a specified number of logs which are alleged to be of a certain number of cubic feet are shown to have been stealthily cut, removed and sold by a lessee in fraud of the Crown with intent to evade payment of royalty thereon, he cannot be made liable for payment in appropriate proceedings. The point is that the cubical content of the logs cannot be said to have been "calculated" ascertained or quantified unless it has been done in accordance with the provisions of the law, notwithstanding the evidence of the several purchasers who bought logs in breach of reg. 15.

Duke in his excellent treatise (*op. cit.*), Cap. VI, tracing the history of the law of opposition to transports, tells us that the Dutch jurist Matthaëus defined the right to oppose as existing in the Civil Law where the opposer had dominium in the res itself or some right, title, or interest therein. In Guyana, the extension of this right to simple contract creditors having a liquidated demand or claim capable of forming the subject-matter of a specially indorsed writ was the work of the Supreme Court Judges through the instrumentality of professional opinion and the necessities of businessmen. As time went on this extension became the established practice in the local courts, and the reported cases provide instructive illustrations which define and delimit the nature and scope of a liquidated claim. All the authorities without a single exception, show that if either from the statement of claim or from the evidence it is disclosed that an action is of such a nature that there is an obligation on a proponent to furnish accounts of his dealings and intromissions so that the amount in dispute cannot be made clear unless there is a resort to accounting, the claim is really and truly non-liquid in nature and cannot ground an opposition action. This principle has been illustrated in several cases, more particularly in *Ferreira v. Cabral* (supra), the facts of which briefly are as follows: the plaintiff brought an opposition action in his own right and on behalf of the other heirs and heir-esses and remaindermen under the last mutual will of Francis Ferreira, deceased, and Madelina Ferreira, deceased. He opposed transport of certain city lots by Antonio Ferreira Cabral, who was executor of Augustinho Ferreira to a legatee named under the will of the said Augustinho Ferreira. The grounds of opposition showed that Augustinho Ferreira had received \$3,000 from Mrs. Madelina Ferreira in her lifetime to invest on her behalf and that he still owed it to her estate, and that the plaintiffs had received the legitimate portion of their father's estate under the mutual will and were still entitled to the legitimate portion of their mother's which consisted of the same \$3,000. DEANE, C.J., in delivering the judgment of the West Indian Court of Appeal stated at p. 134, as follows:

“No action in opposition can succeed which is not founded on a liquidated claim, so that if the opposer has to ask for an account to be taken in order to establish what is due to him he cannot successfully oppose. Inasmuch therefore as the plaintiffs in the case allege that the \$3,000 was given to Augustinho Ferreira by their mother to invest, it is clear that an account would have first to be taken to find out whether in the course of investment the capital sum had been increased or decreased before they could found their action. This has not been done and the first ground for opposition therefore fails.”

The point which is emphasised in *Ferreira v. Cabral* is that there could be no cause of action until an account was first taken to determine the exact sum which was due, notwithstanding some amount or other might be due. In short, though there was liability on the estate of Augustinho Ferreira, deceased, to repay the \$3,000, there being no quantification of the precise sum due, there was no foundation for an opposition action.

Therefore, on the true construction of cl. 9 of the agreements of lease, the obligation imposed on the lessee to keep complete records of all forest produce cut and removed by him, his responsibility for ensuring the accuracy of such records and that he has paid full royalty cannot relieve the lessor of his burden of proving that a specific and ascertained sum was due from him as a debt at the time demand was made. The responsibility imposed by the clause on the lessee in this form of action is limited to showing that he paid royalty in full on a liability which the lessor has made clear to him, not otherwise, notwithstanding some sum not precisely ascertained may be due from him for payment of royalty in another cause of action.

Cl. 16 provides for the event of a lessee failing to observe any terms and conditions of his agreements of lease. Therein is a provision for the right of the lessor to fix in his absolute discretion a penalty not exceeding \$500 as the circumstances may, in the lessor's opinion warrant, and in the event of its not being paid within three months of demand for it to be deemed a liquidated demand and a debt due to the Colony. Had the lessor claimed under cl. 16, there can be no doubt his would have been a proper one to sustain an opposition action. But this clause has obviously set too low a limit in view of the amount which he claims to be due, and this is no doubt the reason why he has not made use of it.

The evidence of Mr. Rickford has already been referred to above. On checking ex. F which he claims to have made up from the department's Register of Removal Permits Received (ex. D) and cash-book, I find there are inaccuracies. In ex. D, there are only fourteen entries concerning the defendant, whereas ex. E contains merely twenty-five. Yet, ex. F which purports to represent a breakdown statement supposed to contain all records concerning the defendant and his son Garvan Fiedtkou in the department, contains only thirty-five entries, some of which I cannot even relate to the same books; although I have been able to find one entry in ex. D relating

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to a removal permit – No. 35435 dated 21st June, 1960 regarding 72 mora logs which has not been included in ex. F. How in the face of all these inexactitudes can it be said there has been a liquidated demand on the defendant sufficient to form the subject of a specially endorsed writ in these circumstances?

It seems to me that unless there has been a calculation by the forestry officer which quantifies the sum due from the defendant as royalty, no specific sum can be said to be due from him which can properly form the basis of an opposition action, albeit there may be liability on him to render an account under another form of action. As I have observed above, though the opposition action is undoubtedly preserved by s. 37 of the Forests Ordinance, Cap. 240, this is true only when there has been a liquid sum calculated in accordance with law. It must always be remembered that an opposition action operates as an injunction to the passing of a transport, and there is no doubt that it was this fact in mind that motivated the judges in their cautious approach to the development of this form of action when they permitted the extension of the right to oppose to simple contract creditors by insisting on only strictly liquid claims as the basis of preferring the action — an extension which provides a striking example of the judicial power of granting new remedies to meet the exigencies of a situation.

Pleadings must always be precise in an opposition action, whether it be a right, title or interest in the dominium of the res which is claimed or a simple contract debt, and it was in this context that I observed in the case of *Demerara Bauxite Co. Ltd. v. Lilian De Clou* (1965) (Full Court, dated 18th September, 1965), that, “it is at all times highly desirable to encourage pleading with certainty and particularity. The moreso is this the case in an opposition action” where disastrous consequences can ensue to commerce if the remedy is extended beyond its proper confines; it remains for the judges who first granted the extension of the right to oppose to ensure that it is not so extended.

No doubt the result of a case such as this where liability on the facts is so patent will be truly astonishing to a lawyer bred and brought up on the principles of the common law of England where the forms of action have long since 1873 been given a well-deserved burial; particularly, when O. 17, r. 4 of our rules of the Supreme Court which is modelled on O.XIX r. 4 (U.K.) abrogated that grossly inequitable maxim of the Middle Ages – *ubi remedium ibi jus*. By r. 4 the only form now required is that, “every pleading shall contain, and contain only a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be . . .” In *Oakley v. Lyster* [1931] 1 K.B. 148 at p. 151, SCRUTTON, L.J., contrasts the present position with that prevailing in England some centuries ago:

“Four or five hundred years ago if a person wanted justice from the King’s Court he had to obtain a particular form of writ, and, if he chose the wrong one, his claim was not maintainable whatever the

facts might be. Before the Common Law Procedure Act and the Judicature Act much the same thing happened. The plaintiff had to express his claim in a way that was legally accurate, and if he did not, a demurrer put an end to the action. Great injustice was thereby done. *Now, the Courts find out the facts, and having done so, endeavour to give the right legal judgment on those facts.*"

When however, the lawyer gets acquainted with our system of jurisprudence he will learn that the above is not generally true with us because the right of opposition to transport is a concept alien to the common law of England, a relict of the former Roman Dutch Law which we have preserved., (see s. 3(D)(b) Civil Law Ordinance Cap. 2); he will learn that it was never "buried" in the same sense that the forms of action at common law were said to be by Maitland in his oft-cited aphorism (see *Forms of Action*, p. 296), but that there are since 1917 in Guyana, to use Ashburner's pithy metaphor, two well-defined streams of jurisprudence running in the same channel like Law and Equity, which never mingle their waters.

Therefore, even though an undoubted right may exist, the maxim *ubi jus ibi remedium* is not altogether true with us for substantive law at least so far as the opposition action is concerned, is secreted in the interstices of procedure, and independent causes of action may not be joined with it. This aspect of the matter was stressed in no uncertain manner by VERITY, C.J., in *Da Silva v. Sukhraj* (1942) L.R.B.G., 158, 161, in which, after considering r. 9(1) of the Supreme Court (Deeds Registry) Rules, 1921 in relation to the provisions of O. 16, r. 1, of the Rules of the Supreme Court 1955, the learned judge expressed himself in language the alliterative force of which clearly emphasises the true nature and effect of this form of action thus:

"... what was in the past described by statute as an 'opposition suit' is a form of action by means of which an opponent may secure a special form of relief in respect of a special cause of action by special provision prescribed by special rule. . . The special procedure in opposition involves summary interference with the right of an owner of immovable property to alienate the same at will and the special form of action prescribed is to enable the Court to determine without necessity for the consideration of further issues the justice or otherwise of the opposition."

In short, there is everything special about the opposition action to give it a status and distinctive characteristic of its own in our system. But if VERITY, C.J., would on the pleadings deny a joinder of independent causes of action with an opposition, *a fortiori*, in keeping with both principle and authority, I would deny an extension to the grant of relief in a case where, though liability for accounting and payment have been clearly established on the facts, quantum has not been determined in accordance with law.

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The point of whether a debt which arises from an alleged breach of the conditions of two agreements of lease expressed to ensure for periods of three and five years can properly be relegated to the category of a simple contract debt was not canvassed at the Bar. I believe it may well have been, but will express no opinion on it.

In my opinion the plaintiff is out of court. I agree with counsel for the defendant that the action is misconceived, and must be dismissed with costs.

Action dismissed.

Solicitors:

Crown Solicitor for the plaintiff.

L. Persaud for the defendant.

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[Court of Appeal (Luckhoo, C. (ag.) Persaud, J.A., Crane, J.A., (ag.)
July 30, August 9, 1968]

Evidence — Statement taken from accused during investigations into offence — No reasonable ground for suspecting that he had committed any offence — No arrest contemplated — Statement taken a paraphrase of what accused said — Whether admissible — Judges Rules.

Evidence — Confession — Made to police after suggestion by the step-father of accused that he had better tell the police the truth — Whether step-father or police person in authority — Whether suggestion by step-father amounted to inducement—Evidence — Confession — Alleged inducement — Proper direction to the jury.

The appellant, the deceased, and five others, all aged between seven and one half and seventeen years, were minding some cows in a pasture during the morning of the 17th August 1967. Some of the animals trespassed on a neighbouring rice field. The appellant, the deceased, and another left to round them up. The two former left the latter at a certain point and proceeded onward. Some time later the appellant returned alone, and when asked by the other about the deceased's whereabouts, replied that he did not know. A search proved futile, and it was not until the following day that his corpse was discovered floating in a trench. The post-mortem report disclosed that he died from asphyxia due to strangulation.

In the presence of his step-father the appellant was questioned by Sgt. Moses, at the police station, with a view to determining whether he knew anything of the death of the deceased. No arrest was contemplated. The appellant made two written statements, within twenty minutes of each other, both of which were recorded by the sergeant, and signed

by him in the presence of his step-father. The first statement was not under caution, and was in standard English. Besides narrating the facts already stated, the appellant said that, as they were returning with the strays, the deceased climbed up on a koker, fell down and struck his head on some boards below, and was seriously hurt. He further explained, that he did not go to the deceased's assistance for fear that it would be said that he had pushed him from the koker. The second statement was under caution, and in the vernacular. The appellant admitted that he struck the deceased with a stick and caused him to fall into the trench.

Both statements were challenged as being obtained by inducements and, therefore, not free and voluntary. It was during the *voir dire* that it came out that the first statement was a paraphrase; and, as regards the second statement, that it was made after the appellant's step-father had questioned him and stated that he did not believe what he had said in the first statement. It was then that the step-father counselled the appellant that he had better tell the police the truth. As a result the second statement was made.

The trial judge admitted both statements and eventually the appellant was found guilty of manslaughter. The main contention in this appeal was that the trial judge erred when he admitted the statements.

HELD: (i) as regards the first statement:

(a) there is no contravention of the Judges' Rules if an investigating police officer paraphrases what, someone from whom he is seeking information, conveys to him;

(b) if it is subsequently decided to charge that person the admission of the paraphrased document must be left to the good judicial sense and discretion of the trial judge, and in so exercising his discretion the judge must take into account principles of unfairness to the accused person;

(c) it was not necessary to administer a caution to the appellant because there was not at that stage, any reasonable ground for concluding that the accused had committed any offence;

(ii) as regards the second statement, while the sergeant of police was a person in authority the appellant's step-father was not;

(iii) the trial judge erred when he required the jury consider whether the accused's step-father was a person in authority, without explaining to them those persons who are regarded in law as persons in authority:

(iv) this error was not fatal as the words spoken by the appellant's step-father were quite capable of being construed as a normal exhortation to the appellant to speak the truth rather than an inducement importing a threat or promise; they seemed to be a moral exhortation which would not vitiate the trial;

(v) the question of voluntariness of the statement and, therefore, its admissibility, is for the judge, and the trial judge erred when he directed the jury to disregard the statement if they found that it was not voluntary;

(vi) the involuntariness or otherwise of a statement, which has been admitted into evidence by a trial judge after a *voir dire*, is a factor to be taken into consideration by the jury in determining what weight they should give to the statement;

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(vii) the above misdirection was not fatal as, in the circumstances of the case, it was not prejudicial to the appellant but rather was too favourable to him.

Appeal dismissed.

Mr. D. O. Boston for the appellant.

Mr. J. C. Gonsalves-Sabola, Assistant Director of Public Prosecutions, for the Crown.

The judgment of the court was delivered by Crane, J.A. (ag.):

CRANE, J.A. (ag.): At the conclusion of the day's hearing on the 30th July, last, this appeal was dismissed. We then intimated to learned counsel our intention of recording our judgment in writing at an early date, having considered that the importance of the legal points involved merited such a course.

The accused, Edwin Arjune, aged 15 years, was indicted at the Demerara Assizes for the murder of Doodpersaud, called Reuben Ramanand, aged 7½ years. By a majority of 10:2 the jury returned their verdict for the lesser offence of manslaughter, and he was ordered to be detained at the Essequibo Boys' School for a period of two years.

The facts which led up to and culminated in the tragic event may be stated in short compass: On the morning of August 17, 1967, the accused, the deceased and about five other boys – all cow-minders – whose ages ranged from 17 to 7½ years, went to a place called White Koker at Newlands on the East Coast of Demerara, three miles west of the Cane Grove public road, for the purpose of depasturing their cattle.

As the morning wore on, some of these animals trespassed on neighbouring rice fields. The accused invited the deceased and another boy called Naro to help him round up the strays, and with this expressed intention these three boys left the others on White Koker dam. They walked for some distance until they arrived at a bridge near to the rice fields. The accused and the deceased proceeded alone in a northerly direction towards the rice fields leaving Naro on the bridge to await their return. Naro, however, did not see them return and he went back to White Koker dam to join the other boys. The accused was thus the last person in whose company the deceased was proved to be before his death.

Some time later that day Naro turned up alone at White Koker followed later by the accused. The accused was asked by the others for the deceased, but he replied that he did not know where he was. An extensive search for the deceased by his companions, including the accused, the parents of the deceased and others on the day of his disappearance proved futile, and it was not until the following day that his corpse was discovered floating face downwards in White Koker trench.

The post-mortem examination which was carried out by Dr. Balwant Singh on August 21, 1967, fixed the cause of death as asphyxia by strangulation. Internal examination revealed that the trachea and lungs were congested and showed no signs of muddy particles; that there was haemorrhage in the muscles of the neck around the trachea, and that the liver, kidneys and spleen were normal. Without doubt, this evidence as to the cause of death must have helped the Jury considerably in arriving at their verdict, in view of the circumstantial nature of the case, by eliminating the possibility of one cause of death, that is, that death by drowning must have occurred in the circumstances.

The external examination revealed superficial abrasions on the front of the lower part of the chest; on the front of the right knee and back of the right elbow; there was a contusion on the front of the upper part of the right thigh; also three superficial linear lacerations on the right and left side of the neck in line with the ear. So that while the effect of the internal examination eliminated drowning as the cause of death, the external examination positively established it as asphyxia by manual strangulation.

As may be expected, the accused being shown to be the last person in the company of the deceased, he was questioned by the police with a view to determining whether he knew anything of the death of the deceased. The interrogation was conducted by Sgt. Moses at the Mahaica police station on August 19, in the presence of Ramanooj, the step-father of the accused, and police constable London, in the course of which two statements were made. The first was signed and acknowledged by the accused in the presence of Ramanooj and London after it was written by Sgt. Moses at his request. It was not taken under caution because, as Moses explained, there was no reason to suspect the accused's involvement in the deceased's death at that time, and understandably so, since there was no autopsy revealing the cause of death until August 21.

It was the objections taken by the defence to this and a subsequent caution statement taken from the accused some twenty minutes after the first, and to alleged misdirections and non-directions of the trial judge that constituted the main grounds of this appeal.

Originally on record were four grounds of appeal, while a fifth was added on request and with leave of the court at the hearing. Grounds two to four, however, having been abandoned, it will be sufficient if we relate only the substance of those on which the arguments addressed to us were directed.

In the first ground there was complaint that the trial judge misdirected himself when he ruled that both first and second statements were admissible in evidence. Both were ruled admissible after trial, in the absence of the jury, of issues raised on the *voir dire*.

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The fifth ground alleged error of law in that (i) the learned judge failed to direct the jury on the legal basis on which he did find the first and second statements were voluntarily made or whether they were the statements of the accused at all; (ii) the learned judge wrongly withdrew the defences of self-defence, accident or misadventure from the jury. It will be readily seen that grounds 1 and 5(i) are inextricably linked, for whereas the former alleges misdirection in law resulting in the wrongful reception of documentary evidence, the latter alleges a non-direction on the basis on which the judge found such documentary evidence to have been voluntarily made.

On the trial of the issue of the admissibility of the first statement, Sgt. Moses related how he interviewed the accused at the Mahaica station, explaining that his arrest was not contemplated at the time and that his reason for not administering a caution was due to the lack of any evidence which afforded reasonable grounds for suspecting the accused's complicity in an offence. He insisted that the first statement was a voluntary one in the sense that it was not induced by promises or by the use of threats, or the doing of violence to the accused. Cross-examination, however, disclosed that it was in effect literally a paraphrase of what the accused told him, for Moses admitted that whatever the accused related to him in broken English was transformed into proper English by the use of alternative words though the same sense was preserved. But when the language and expressions used in the first are compared with those in the second statement under caution, which had, in accordance with r. 4(d) of the Judges' Rules, to be taken down in the exact words spoken by the accused, and also with the unsworn statement he subsequently gave from the dock in his defence, no one can have the slightest doubt that the accused is a youth of somewhat poor education.

One of the questions for us to answer is whether the judge was right in admitting the first statement as a paraphrase of what the accused said to the police officer, Sgt. Moses. It is in this regard that one of the objections raised to its admissibility before the trial judge was stated to be that the statement was elicited in a manner so manifestly unfair to the accused that the judge ought not to have received it in evidence. Here, we should point out that in respect of statements taken from one other than an accused person who is in custody, there is no contravention of the Judge's Rules if an investigating officer sees fit to paraphrase what someone from whom he is seeking information is conveying to him, particularly if he is not a suspect, but merely someone from whom he is seeking information which he hopes will assist in his investigations. At that point of time he has no intention of proceeding against the person being interrogated and the paraphrase cannot be employed to his prejudice; at that time he has no intention of giving it in evidence. Any difficulty there can be must always arise subsequently, e.g. when it is considered necessary to arrest and charge the person and it is sought to use the paraphrase in evidence against him. There can be no hard

and fast rule laid down regarding the admissibility of paraphrases; their admission must necessarily be left to the good sense and discretion of the trial judge who must exercise it in a judicial manner when he has considered all the relevant circumstances. Some very relevant matters which it is incumbent on a judge to take into account when deciding the discretionary principle of unfairness to the accused which is not susceptible of precise definition, are to be found in the observations of Lord MC DERMOTT, C.J., in the Irish case of *R. v. Murphy* [1965] N.I. 138, at p. 149.

“. . . it must be judged of in the light of all the material facts and findings and all the surrounding circumstances. The position of the accused, the nature of the investigation, and the gravity or otherwise of the suspected offence may all be relevant. That is not to say that the standard of fairness must bear some sort of inverse proportion to the extent to which the public interest may be involved but different offences may pose different problems for the police and justify different methods”.

(See also *King v. Reginam*) [1968] 2 All E.R. 610, at p. 617. It is clear that Sgt. Moses must have been fully aware of this latitude which the taking of statements not under caution allows him when, in answer to a question put to him by the jury in that regard, he replied that he usually paraphrases uncautioned statements into good English.

It is otherwise, however, in the case of caution statements which must always be taken in conformity with the Judges' Rules, rule 4(d) of which directs that “whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matter; he shall not prompt him”.

Another objection to the first statement was that its admission in evidence contravened r. 2 of the Judges' Rules in that it was taken without caution. Such a complaint must necessarily have as its foundation, if there is to be any merit in it, that the police officer did in fact have sufficient grounds for suspecting that the person he is interrogating had committed an offence. It will therefore be necessary to examine the first statement and evidence to see if at any time during the conduct of the interrogation the investigating officer ought reasonably to have suspected the commission of an offence. When, however, the first statement is examined, it will readily be seen that it contains nothing really prejudicial to the accused. The only addition it contains to the narrative of facts which we have set out above, is that after returning with the strays, the deceased climbed up on a koker and fell down striking himself on some boards below; that he was seriously hurt and bruised, and that the accused explained that his reason for not going to the assistance of his fallen comrade was because of his fear that it would be said that he had pushed him down from the koker. Thoroughly unconvincing as this explanation undoubtedly is, it seems to us that there

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was no reasonable ground for Sgt. Moses to conclude there was an offence committed by the accused who, at that stage, had merely denied killing the deceased or having had any knowledge of how he got into the trench where the body was found.

We have been urged to say that the learned judge erred in admitting the first statement in evidence after the trial of the issue when he ruled it to have been given voluntarily. Admittedly, he gave no reason for so ruling, but it seems to stand to reason that he must have exercised a judicial discretion in deciding whether to admit or reject it since it is on record that he did listen to evidence and arguments on both sides before deciding that the scale had tilted in favour of its probative value as against any potential prejudice its admission could have wrought against the accused.

We think, however, that the crux of the matter arises with respect to the second statement, i.e. that made under caution. This, unlike the first statement, is a clear confession in the vernacular of the accused of his involvement in the death of the deceased, for he is alleged to have confessed therein that he struck the deceased with a stick and caused him to fall into the trench. It was taken some 20 minutes after the first and is said to have been directly prompted by an inducement to the accused by Ramanooj, his step-father, who, having witnessed the making of the first statement, and having questioned the accused as to why he did not go to the assistance of the deceased when he fell from the koker and why he had not reported what happened to the relatives of the deceased, told him in no uncertain manner that he did not believe one word of what he said in that first statement. Thereupon he counselled him to speak the truth by saying, "Boy, what you told the police could not be true. You had better tell the police the truth".

It was pressed on us that it having been affirmatively proved that these words were addressed to the accused by his step-father, Ramanooj, in the presence of Sgt. Moses, they had the effect of operating as an inducement to the accused to make the offending confessional statement. We must say, however, that we entertain no doubt at all that those words are not in the nature of hearsay, as has been contended, for they constitute the testimony of a prosecution witness, Assistant Superintendent Bryant Bacchus, concerning words which Sgt. Moses told him, Ramanooj had addressed to the accused immediately after the first statement was signed. Bacchus further said that Moses spoke in the presence and hearing of both Ramanooj and the accused; clearly, then, each had full opportunity of denying them; moreover, Sgt. Moses who testified at the *voir dire* immediately after Superintendent Bacchus did not deny he had so told Bacchus.

The rules relating to the admission in evidence of extra-judicial confessions are well-settled. They are to the effect that in order for confessions to be receivable they must be free and voluntary. The prosecution must prove this to be so, viz. that the accused was induced neither by promises of favour, threats or coercion held out by or in the presence of a person

in authority to make the confession; it is not admissible otherwise. Any suggestion that it would be made better or worse for an accused if he does or does not confess would have an exclusionary effect on the confession for it would thereby import a promise or threat. The inducement must also refer to a temporal benefit; it must be distinguished from a mere moral exhortation which the cases show does not vitiate it. See *R. v. Wild*, (1835) 1 Mood. C.C. 452, where the words, "I hope you will tell me the truth in the presence of the Almighty" were held not to have had a vitiating effect.

Just as he did in the case of the first statement, the judge gave no reason for his decision to admit the second in evidence. He merely ruled that there was no inducement by a person in authority and that it had been voluntarily made. Our approach must be the same as when we considered the question of the admissibility of the first statement. We must endeavour to see whether from the summing-up the judge brought to bear a judicial mind on the question. Having referred to the words complained of, the trial judge said at p. 100 of the record:

"Well, here, members of the jury, counsel for the accused is saying that this was a promise; that this was an inducement by the father of the accused to speak the truth and that it was because of this inducement the accused made the statement. Well, it is a question for you. You may very well ask yourselves if Ramanooj was a person in authority. You are the sole judges of the facts".

From the above passage it seems quite clear to us that in leaving to the jury the question of whether the words spoken by Ramanooj were in fact to be regarded as an inducement, the judge was not in error. He quite properly left them a matter which was within their sphere of duty to be decided as a question of fact. Nevertheless, we believe he clearly went wrong in asking them to consider as a fact whether Ramanooj was a person in authority, without explaining to them those persons who are regarded in law as persons in authority; and in not asking them to consider, if they found Ramanooj was not indeed such a person, whether the prosecution had proved that Sgr. Moses, in whose presence the words are alleged to have been spoken, had not dissociated himself from them. It was a non-direction which was not fatal, however, because we are unanimously of the view that the words to which objection is taken are quite capable of being construed as a normal exhortation by Ramanooj to the accused to speak the truth, rather than an inducement importing a threat or promise.

The cases are not at all consistent with each other as to what amounts to an illegal inducement to confess. The matter would really appear to be rather a question of circumstances than of words, regard being had particularly to the position and authority of the person using the words, and it is for this reason, it is suggested, inconsistency in the cases exists.

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It seems obvious, however, that Ramanooj was shocked to hear so little in the accused's statement about his knowledge of the death of the deceased; he all but told him he was a liar, and considering all the circumstances in which the words are alleged to have been uttered by him in their context, and the fact that he, Ramanooj, was not a person in authority in law, though Sgt. Moses who was present was, it is clear that all Ramanooj meant to convey to the accused was that: "it is better to tell the truth than to tell a lie". This seems to us a mere moral exhortation which did not vitiate the confession.

It is the duty of the trial judge, in the first place, to make up his mind whether the words are capable of amounting to an inducement; if he decides they do not and admits the statement in evidence on the *voir dire*, the matter does not rest there, he must direct the jury to consider whether the words do in fact amount to an inducement; and if they do so amount, whether in fact the prosecution has affirmatively proved that the appellant's mind had not been affected by such inducement. (See *Patrick Joseph Cleary*, 48 Cr. App. R. 116). The question is entirely one of what weight and value ought the jury to attribute to the statement in the circumstances. The effect of a judge's ruling immediately after the trial of the issue is strictly on the question of the admissibility of the statement; he is not concerned at that stage with the truth of its contents; its truth is not then a relevant consideration; the judge's enquiry is restricted merely to determine whether the statement was freely and voluntarily made. In the case under review, however, the trial judge did not keep within the confines of his function, for, it is to be noted, that, on more than one occasion he invited the jury to consider as a fact whether the statement was a voluntary one and to discard it entirely from their minds if they should consider it was not so given. In effect, they were being invited by him to consider a matter which was already concluded by his decision and one which is solely within his sphere of duty to perform — the question of the admissibility of documentary evidence. At p. 91 of the record he directed them as follows:

"Again, members of the jury, I repeat that whether this statement was a voluntary statement or not is a question for you, the jury. If you come to the conclusion that you are not sure that it is a voluntary one you must reject it and discard it from your minds. Do not consider it at all. If, however, you come to the conclusion that the Crown has proved conclusively to you that it is a free and voluntary statement, and you will bear in mind that the onus lies upon the Crown to prove that to you, then you will go on and ask yourselves what weight should be attached to the contents of that statement".

And at p. 95 thus:

“ . . . I again told you that it was your duty as judges of the facts to determine whether or not this statement was a free and voluntary statement. I am again telling you that this is your function although I ruled that this statement is admissible you must examine the evidence especially the cross-examination by counsel for the accused, and see what conclusion you will come to as regards the admissibility or otherwise of this statement”.

We would point out, however, that a direction to a jury that they should consider the voluntariness of the statement and exclude it entirely from their consideration if they were not satisfied about it, is now an anachronism, and although such direction is not, strictly speaking, prejudicial to the accused, it is liable to work an injustice, as will be shown below, by depriving them of the opportunity of giving due and meritorious consideration to any other feature of the statement, despite the fact that they may not think it had been voluntarily given.

It is important to bear in mind that the decision of the court of Criminal Appeal in *R. v. Bass*, [1953] 1 All E.R. 1964, from which the trial judge obviously adopted the direction he gave, has now been over-ruled in that respect by their Lordships of the Privy Council. (See *Chan Wai-Keung v. Reg.* [1967] 1 All E.R. 948, at p. 953; also *R. v. Ovenell*, [1968] 1 All E.R. 933.

The clear result of these recent decisions is to emphasize the importance of maintaining a clear division of functions between judge and jury with regard to the admissibility of extra-judicial confessional statements in evidence. Analysis in these recently decided cases has, however, laid bare the defectiveness of such a direction. It is a misdirection, though not one fatal to the conviction, to tell a jury, as has the learned judge in the instant case, to reject the confession in its entirety if they do not feel sure that it was freely and voluntarily made. This is so because “voluntariness is a test of admissibility and not an absolute test of the truth of a statement”. To illustrate this proposition: a confession may be voluntary and yet to act upon it may be quite unsafe, for it may have no probative value at all. On the other hand, although a statement may not be a voluntary one, yet, according to the circumstances, the jury may well feel quite disposed to act upon it; but it is certain they cannot so feel were they told by the trial judge that they should discard it entirely if they think it was not made voluntarily.

An alternative way in which to express it is, if the confession was induced by some hope or advantage held out to the maker of the statement, it does not follow that the confession must necessarily be untruthful. Of course, one induced by hope of a temporal benefit or advantage is more likely to be true than one induced by fear or coercion; and the method by which a confession was obtained may have an important bearing on its trustworthiness; it all depends on the nature of the inducement. But whatever the inducement, a jury ought not to be deprived of

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the benefit of considering the weight and value, if any, of an involuntary confessional statement, especially if it has been amply corroborated.

It, therefore, seems clear to us that the most that may be said against the direction of the learned judge is that it leaned too much in favour of the accused. If such a direction were indeed correct, it would give the green light to a jury to discard from the pale of their considerations as worthy of any weight or value at all any confessional statement whatever which the judge has already admitted, notwithstanding it might be of inestimable assistance to them otherwise so long as they see fit to deem it involuntary; it would empower the jury to reopen what has already been decided by the judge and thereby to infringe a cardinal rule of evidence, viz. that the admissibility of evidence is strictly for the judge to rule on. No one can say how much in the past the ruling in *R. v. Bass* (above) has influenced the minds of jurymen from their natural inclinations; perhaps they have never really heeded the warning judges formerly considered their duty to give them on the requirement of proof beyond reasonable doubt that a confessional statement has been voluntarily given as a condition precedent to their attributing to it any weight or value. (See *R. v. Burgess*, [1968] 2 All E.R. 54, at p. 55; but it is confidently submitted that now that the error in the direction in *Bass*' case has been exposed, the cause of justice has been unquestionably served thereby.

Now, to answer the appellant's objections posed by the joint effect of grounds 1 and 5(i) of the instant appeal. We must say that it is quite clear to us that though the learned judge erred in the directions he gave with respect to the course they should adopt if they found the statements were not voluntary, those directions were not in any way prejudicial to the accused, rather, as we have shown, they were too favourable to him. By their verdict the jury, in view of the directions they received, clearly showed that they considered the statements were voluntarily made; they did not discard them; in fact, they acted on them and returned a verdict of manslaughter accordingly, which we think thoroughly justifiable from the evidence.

The complaint that the learned judge wrongly withdrew the defences of self-defence, accident or misadventure from the jury was misconceived and not pursued; and quite rightly, we think.

The appeal was therefore dismissed.

Appeal dismissed.

REGINA v. AHMAD HUSSEIN, KENNETH SINGH AND
KUM PERSAUD

[Court of Appeal (Luckhoo, C. (ag.) Persaud, J.A. and Crane, J.A. (ag.),
August 13, 15, 1968]

Evidence — Prejudicial statement implying the commission of other serious offences — Direction of trial judge.

Evidence — Members of the Police Force — Whether any presumption of regularity in course of official duties.

Practice and Procedure — Failure of accused person to give evidence on oath — Right of trial judge to make comments — Circumstances in which they may be made.

During the course of their trial evidence was led that when the second and third appellants were arrested, some members of a crowd which had gathered, made allegations to the effect that they had been responsible for several incidents of break and enter. This allegation was later repeated at the police station to which the appellants had been taken for investigations.

The only evidence against the appellants consisted of written confessions which each of them had made to the police. The confessions were objected to as being inadmissible on the ground that they were forced to sign them out of fear, resulting from force, which was used against their person. The trial judge ruled the statements admissible. Before the jury the appellants made allegations by way of cross-examination that they were beaten and coerced into signing their respective statements. None of the appellants gave evidence on oath.

In his summing-up, the trial judge, although emphasising that the burden of proof rested throughout the trial on the Crown, on more than one occasion, commented on the failure of the appellants to lead evidence on oath, and in one passage told the jury that there is a rebuttable presumption that the police would act with some degree of propriety and regularity in the course of their official duties.

HELD: (i) when looked at as a whole the trial judge had adequately warned the jury to disregard the allegations which suggested the commission of other offences;

(ii) there is no presumption of propriety on the part of the police, whether rebuttable or otherwise, for it has been said repeatedly by courts that the acts and evidence of the police are to be regarded with same scrutiny as any other witness;

(iii) it is improper to make a charge against the police, as distinct from cross-examining as to credit, if it is not intended that the prisoner should give evidence in support of the charge; and it is competent for the judge to comment on such a failure on the part of the defence,

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provided he makes it clear to the jury that the prisoner in declining to give evidence is exercising a right, and that the onus of proof rests on the Crown.

Appeal dismissed.

Mr. A. S. Manraj for the appellants.

Mr. G. Persaud for the respondent.

PERSAUD, J.A.: The three appellants were convicted for the offence of burglary, contrary to s. 233 of the Criminal Law (Offences) Ordinance, Cap. 10, and each sentenced to 7 years' imprisonment. It was alleged that they had broken and entered the home of one Eddie Juan at Eccles, during the night of the 31st December, 1967, and stolen a quantity of articles therein, the property of Mr. and Mrs. Juan.

The evidence is that the Juans and their children had secured the home and left at about 11 p.m. for a drive – presumably they were celebrating the arrival of the New Year in a modest manner. Upon their return home at 1 a.m., it was discovered that the front door was open, a window bolt had been wrenched, and several items of property missing; the drawers showed signs of having been ransacked, and articles of clothing strewn on the floor.

On the 27th January, 1968, the accused were arrested. Numbers two and three were found hiding under a stairway of a house at Eccles, where there was a crowd of persons, some of whom were making allegations to the effect that the two appellants were responsible for several incidents of breaking at Eccles. This allegation was later repeated in the presence of the appellants at the Providence police station where they had been taken for purpose of investigations. It was the case for the prosecution that the numbers two and three appellants denied these allegations, and offered to make statements, whereupon they were cautioned, and they made statements incriminating themselves with the offence charged. The number three appellant was served with copies of these statements, and he too, it was alleged, made a self-incriminating statement.

The Crown's case was hinged exclusively on the statements, all of which were challenged at the trial on the ground that they were not the statements of the appellants, but that they (the appellants) were forced to sign them out of fear resulting from force used against their person. So that it was important for the jury to consider the statements, and to decide what weight (if any) they merited, the trial judge having ruled that they were admissible in evidence. In assessing the weight of the statements, the jury were entitled to take into account all the circumstances relating to the taking of the statements.

Counsel took three points before the court:

The first was that the evidence relating to the allegations that were made by members of the crowd, particularly on the second occasion at the police station, ought not to have been received, in that it was so prejudicial to the appellants as to render it inadmissible.

The complaint is that, this evidence having been heard by the jury, might have led them to believe that the numbers two and three appellants were in the habit of committing offences of this type. In giving the jury his directions the judge made a statement which I can best describe as rather curious. After admonishing the jury not to pay regard in arriving at a verdict to the allegations which had been made, he said:

“If, in your way of thinking that has no bearing in this case and you are disposed to find whether or not these allegations are true you will rid from your minds the allegations as given in evidence and solicited by the two counsel for the accused”.

From this, it would appear that in spite of the warning which he had already given, he was still leaving it open to the jury to find whether the allegations of other offences were true or not.

It seems to us that but for the fact that he made it quite clear once more to the jury immediately after that they must disregard this evidence, when he told them:

“You will rid from your minds all these allegations made by the persons at the station on the night when the two accused went there and only consider the evidence in relation to this particular indictment, bearing in mind, that as far as the particular indictment is concerned the three accused persons are presumed to be innocent until the Crown to your satisfaction to the extent that you feel sure has proved the guilt of each accused,”

it might well have been the case that the earlier statement would have amounted to a vital misdirection resulting in the convictions being quashed.

The second and more substantial point is that the judge, in the course of his summing-up made several references to the fact that the accused did not give evidence upon oath to refute the statements which the Crown was alleging they had made, and there was, as a result of the language used by the judge, an undercurrent of a mandatory injunction to the jury to prefer the sworn testimony of the police to the unsworn statements of the accused.

Counsel has cited several instances, where, he says the judge went out of his way to make this observation, and has argued that not only should he not have done so, but that the repetition alone did irreparable harm to the appellants' case.

Counsel also cited a passage from the summing-up which reads thus:

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“We normally presume that our police would act with some degree of propriety and regularity in the course of their official duties. This is a presumption of regularity which is acceptable as a legal principle but it is rebuttable presumption”.

This is, in our opinion, unfortunate, as there is no such presumption rebuttable or otherwise; least of all, can it be said that such a presumption has gained legal sanction. Perhaps what the judge meant to convey to the jury was that where acts are performed by public officers such as members of the Police Force, one would hope that they are done with propriety and regularity; but the language used seems to repose a certain amount of sanctity in the acts of policemen. This is certainly not the case, for it has been repeatedly said by the courts that the acts and evidence of policemen are to be regarded with the same scrutiny as any other witness.

However, the judge soon after went on to tell the jury that if they found that the policemen had beaten them (the appellants), then they must reject that (presumably the statements); and that they should not flinch from making such a decision if they found that is what they should do.

While commenting on the failure of the appellants to lead sworn testimony, having themselves made allegations by way of cross-examination that they were beaten and coerced into signing statements which were not theirs in fact, the judge told the jury over and over again that there was no burden cast on the appellants to prove anything; that the burden of proof was on the Crown, and that if they wished, they could make unsworn statements from the dock, as in fact they did, and they were entitled to do so.

The right of a judge to make comments regarding the failure of an accused person to give evidence from the witness-box is a rule which does not now admit of dispute. But, there are certain limitations to be placed upon such a right. For example in *Kops v. R.* (1894) 10 T.L.R., a case from Australia, Lord HERSCHELL, sitting in the Privy Council and giving his attention to the submission that the judge had no right to comment on the prisoner's failure to give evidence upon oath, said:

“There might no doubt be cases in which it would not be expedient or calculated to further the ends of justice, which undoubtedly does regard the interests of the prisoner as much as the interests of the Crown, who were prosecuting, to call attention to the fact that the prisoner had not tendered himself as a witness, it being open to him either to tender himself or not as he pleased. But, on the other hand, there were cases in which it appeared to their Lordships that such comments might be both legitimate and necessary”.

In *R. v. Bathurst* [1968] 1 All E.R. 1175 the English Court of Appeal expressed itself thus: —

“. . . this court feels strongly that while it may be there are cases in which an accused ought to go into the witness box, albeit his plea is one of diminished responsibility, yet the cases when comment on his failure to do so can properly be made must be very rare”.

There is no quarrel with this statement, but it must be related to the facts of that case. The accused was charged for murder and the defence was one of diminished responsibility under s. 2(1) of the Homicide Act, 1957. The very defence, therefore, would have made it inadvisable to put the prisoner in the witness-box; and so it would seem an unfair comment for the judge to have said that the prisoner ought to have given evidence. As Lord PARKER said (*ibid*) at p. 1178:

“One has only to recall one’s own experience at the Bar that almost in every case counsel defending a prisoner raising this defence would prevent him, if he could, from going into the witness-box; and I think the experience of all practising barristers today would be the same. The accused may well be suffering from delusions, he may be on the border of insanity; it would be the last thing that any counsel would do to allow his client to go into the witness box, and in those cases at any rate any comment on his failure to do so would be clearly unfair. The court, is prepared to concede, however, that there may be cases where an accused ought to go into the box, and where his failure to do so may be commented on, albeit the plea is one of diminished responsibility. There might be a case where the prosecution, by cross-examining the psychiatrist called for the defence, indicate that they were challenging some particular point, and a point which could only be spoken to by the accused as opposed to some relations, friends, or the like, and in such a case, probably a very rare case, some comment might be justified”.

In *R. v. Gerard* [1948] 32 Cr. A.R. 132, where the prisoner upon being accosted by a police officer, and when cautioned, said in answer to the caution: “What I have to say I will say in court”, the judge commented to the effect that if the prisoner were innocent it was somewhat curious that he had made that statement when he had not yet been charged. On appeal, and in answer to counsel’s submission that the comment amounted to a misdirection, HUMPHREYS, J. 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”

But where a comment in a summing-up on the prisoner’s silence when arrested and cautioned by the police amounts to an invitation to the jury to form an adverse view of the prisoner from the fact of his silence, such comment amounts to a misdirection. [*R. v. Davis* [1959] 43 C.A.R. 215].

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It will be seen that heretofore we have dealt with cases relating to the judge's comment on the failure of the prisoner to say something upon being investigated before the trial.

In *R. v. O'Neill and Ackers* [1950] 34 Cr. A.R. 108, as in the instant case, the prisoners made statements to the police which were tantamount to confessions, but it was suggested to the police officers in cross-examination by defending counsel that these statements had been extracted from the applicants by threats and physical violence on the part of the police. Neither of the applicants was called to give evidence.

In the course of the judgment Lord GODDARD, C.J., said (*ibid*) at p. 110:

“However, what the court desires to call attention to is this: having suggested this in cross-examination to the police, and having repeated the suggestion before the jury, counsel did not call his client to support what he had been instructed to say, and the court has no hesitation in saying that that is not the proper practice. It is one thing to cross-examine a witness about credit, in which case one is bound by the answer of the witness. It is quite wrong and improper conduct on the part of counsel to make a charge against the police or against any other witness by way of defence – because, of course, it would have been a defence if the statements which were the principal evidence against the applicants had been extracted from them by improper means – if he does not intend to call his client to give evidence to support the charge.

In this case, a violent attack was made on the police. It was suggested that they had done improper things, and indeed, Ackers repeats that suggestion in his notice of appeal. The applicants had the opportunity of going into the box at the trial and explaining and supporting what they had instructed their counsel to say. They did not dare to go into the box, and, therefore, counsel, who knew that they were not going into the box, ought not to have made these suggestions against the police. It is one thing to cross-examine properly and temperately with regard to credit, though it is very dangerous to do so unless you have material on which to cross-examine, and with which you can confront the witness. It is, however, entirely wrong to make such suggestions as were made in this case, namely that the police beat the prisoners until they made confessions, and then, when there is the chance for the prisoners to substantiate what has been said by going into the box, for counsel not to call them. The court hopes that notice will be taken of this, and that counsel will refrain, if they do not intend to call their clients, from making charges which, if true, form a

defence but which, if there is nothing to support them, ought not to be pursued”.

This court also wishes to echo the sentiments expressed by the learned Chief Justice, and hopes that heed is taken.

It seems to me to follow that if it is improper for counsel to make a charge against the police — as distinct from cross-examining as to credit — if he does not intend to call the prisoner to give evidence in support of this charge, it is competent for the judge to comment on this failure on the part of the defence, provided he makes it clear to the jury that the prisoner in declining to give evidence is exercising a right, and that the onus of proof rests on the Crown throughout the trial.

In spite of the fact that there appear certain unsatisfactory passages in his charge to the jury, the judge made it clear where the onus of proof lay.

In *Charles James v. R.* (1959) L.R.B.G. 31, the prisoner attacked several of the prosecution witnesses by suggesting to them that they were framing him, but he himself did not give evidence on oath. The judge commented on this in this manner:—

“Has it occurred to you, gentlemen, that the accused has not gone into the witness-box? Let me explain the law to you. When the case for the prosecution is closed, the judge tells the accused he is entitled to do one of three things: he need not say anything at all, because the Crown have to prove the case against him; he could stay where he is in the dock and make a statement in which case no one could question him; or he could go into the witness-box in which case he could be cross-examined.

Now the judge seldom comments on the fact that an accused person does not go into the witness-box, because if you give a person a choice of three things and he adopts one, you don't comment on his doing what he is entitled to do. But the judge is in some cases entitled to make that comment – to comment on the fact that an accused person has not gone into the witness-box. The judge is the only person entitled to do that. It must be a fair comment. The reason why I have made that comment is that here you have witness after witness attacked – Ogle you have been told is an arch conspirator, a liar, a man who has framed him; Ogle was subjected to over an hour's cross-examination so was Sharma and so was Babb and no one has had the opportunity of asking the accused one question!”

The court of Criminal Appeal in a majority judgment drew attention to the fact that the judge had a discretion whether he shall comment on the fact that a prisoner has not given evidence, but held that the com-

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merit was in no way unfair to the appellant, and refused to interfere with the exercise of the trial judge's discretion.

Having examined the summing-up in some detail, we have arrived at the conclusion that this submission, which at first appeared attractive, must also fail.

The third and last submission was that the judge did not adequately put the defence to the jury in view of the allegation of the defence that the statements were not voluntary.

Learned counsel has conceded that the judge discussed the principles which the jury must bear in mind when they came to consider the defence, but he complains that the facts of the defence were not put.

The judge told the jury what the defence was, viz., a denial of the statements in which it was recorded the prisoners' participation in the crime. He also told them what should be their verdict should they not find that the statements were voluntary, and that the weight of the statements was a question for them. In our view this was adequate in the circumstances of this case. This ground also fails.

The appeals are dismissed, and the convictions and sentences affirmed.

Appeal dismissed.

NORA WILLIAMS v. SEDIAL PERSAUD

[Court of Appeal, Luckhoo, C. (ag.) Persaud, J.A., Crane, J.A. (ag.)
August 6, 22, 1968]

Contract — Summons by appellant to have respondent adjudged putative father of her child — Request by respondent to settle matter — Promise to pay fixed sum per month — Agreement reciting sum and that appellant undertook to take no action for its recovery so long as amount paid — Whether sufficient consideration.

On the 9th October 1964 the appellant gave birth to a child, of whom she alleged that the respondent was the father. On her application a summons was issued and served on the respondent requiring him to attend court on the 1st April 1965. On that day he denied paternity, and the matter was adjourned to the 29th April. Neither party appeared on that date, as the respondent had asked her “to settle the matter” and

promised to give her \$10.00 per month “for the child”. The magistrate struck out the summons.

On the 6th May 1965, the parties enter into a written agreement purporting to record what they had orally agreed to. In the agreement the respondent undertook to pay to the appellant on or before the twentieth of each month a sum of \$10.00 per month “from the month of May 1965 to assist her to maintain one of her children”. The appellant, in turn, pledged and agreed that “as long as this amount is paid to her she will not proceed by way of court for its recovery”. However, nowhere in agreement was it stated that it was because of the oral agreement that the parties did not appear at court on the 29th April.

Despite frequent demands by the appellant, no money was paid by the respondent under the agreement, and in April 1966, she instituted proceedings in the magistrate’s court for \$110.00, representing payments for eleven months under the agreement. The defence was a denial of the indebtedness and in the alternative a plea that the agreement was void and/or illegal and/or unenforceable. Only the appellant gave evidence. The magistrate dismissed the claim and on appeal the Full Court upheld his decision. On further appeal to the Court of Appeal:

HELD: (i) an agreement between a mother and putative father of her child for its support in consideration for a forbearing to continue affiliation proceedings is recognised by the law, as valid and enforceable;

(ii) the fact that no consideration was expressly stated in the agreement is no bar to a successful suit, if there is evidence of a collateral oral agreement which embodies consideration;

(iii) collateral agreement apart, there is nothing to prevent the court from looking at the history of the transaction which led to the making of the document for the purpose of determining whether there is consideration;

(iv) from the evidence the appellant refrained from attending court on the 29th April, to proceed with her cause because of the respondent’s promise, and this constituted sufficient consideration;

(v) the fact that her forbearance preceded the agreement did not constitute it a part consideration.

Appeal allowed.

S. E. Brotherson for the appellant.

F. W. H. Ramsahoye for the respondent.

LUCKHOO, C. (ag.): The appellant, a single woman (whom I shall refer to as ‘the promisee’), gave birth to a bastard child “Seenauth” on the 9th October, 1964. She alleged that the respondent (whom I shall refer to as ‘the promisor’), was the father of that child, and made application on oath on the 4th March, 1965, for a summons to be served on him to appear before the magistrate to answer her complaint (he having contributed to the support of the said child within twelve months next after birth) as provided for under s. 3 of the Bastardy Ordinance, Cap. 40.

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The promisor was duly summoned to appear before the magistrate touching the premises on the 1st April, 1965, when paternity was denied and the matter was put down for the 29th April, 1965.

The promisee did not attend court on the 29th April, 1965, as she ought to have done, for the reason that the promisor had asked her "to settle the matter", and promised to give her \$10 per month "for the child". When the matter was called up before the magistrate on that day, both parties were absent, no doubt in compliance with the oral agreement reached, and the matter was struck out by the magistrate.

On the 6th May, 1965, both parties entered into an agreement in writing which purported to record what was orally agreed upon.

That agreement showed that the promisor had agreed to pay to the promisee "the sum of ten dollars per month commencing from the month of May 1965 to assist her to maintain one of her children". Further, it was stipulated that "this amount must be paid on or before the 20th day of each month" and the promisee specifically agreed to accept the said sum from the promisor and further agreed and pledged "that as long as this amount is paid to her she will not proceed by way of court for its recovery". But it was not there stated that the non-appearance of the parties at court on the 29th April was because of an oral agreement to contribute a specified sum for the support of the child.

The promisor paid no money under this written agreement despite demands made by the promisee, who, consequently, in April 1966 sued him for \$110 under that agreement being the sum due for the months of June, 1965 to March, 1966, 11 months at \$10 per month.

The defence on this claim before the magistrate was a general denial of indebtedness. In the alternative it was said that if an agreement was entered into as alleged "such agreement is void and/or illegal and/or unenforceable".

The promisee gave evidence in the course of which she tendered the agreement (Ex. "A"), and, by consent, a certified copy of the case jacket in the bastardy proceedings accompanied by her application on oath (Ex. "B"). She testified that "the child mentioned in Ex. "B" is the child mentioned in Ex. 'A' ". Under cross-examination she denied the suggestion put to her that the agreement (Ex. "A") was made because the promisor was "sorry" for her as she had nine children to maintain. She also denied another suggestion that she had summoned the promisor "as he had some worth".

Her simple and straightforward evidence remained unchallenged, as the promisor led no evidence, and no objection was taken to any of the evidence which she had led.

The magistrate dismissed the claim for reasons, which I find nebulous and almost incomprehensible.

On appeal to the Full Court, it was contended on behalf of the promisee that the written agreement (Ex. "A") "was a binding enforceable contract," and for the promisor that the document did not disclose any consideration; and if it did, such consideration was past consideration.

The Full Court merely said, in a written decision, and without any attempt at analysis:—

- (a) "That the plaintiff was apparently misled, or, ill-advised to enter into the purported agreement (Ex. "A") and that that document did not protect or preserve her interests as she seemed to have conceived them. Nevertheless, she had sued on that agreement and her claim must succeed or fail on that agreement".
- (b) "That there was no consideration in the circumstances of this case and as disclosed on the purported agreement (Ex. "A") so as to make it a valid enforceable agreement, and while we sympathise with the appellant we must, nevertheless, find that the claim as before the court on the basis of the purported agreement is not sustainable in law".

No reasons were given, nor was any authority referred to in support of the conclusions fully set out above.

In the defence taken before the magistrate no particulars were given as to why it was said that the agreement was void and/or illegal and/or unenforceable; but the magistrate noted counsel's submission as follows:

"Forbearance to sue on a quasi-criminal matter is no proper consideration.

(see *Cheshire and Fifoot* on Contracts 5th Ed. p. 283)".

I will take it then that counsel was probably endeavouring to advance the argument that proceedings under the Bastardy Ordinance were designed for the protection of the public, and that any contract which had as its object the hindrance of any process provided under that law, would be tainted with illegality, and, be implicitly prohibited by the Ordinance itself, and become void, of no legal effect, and unenforceable.

A contract is illegal where the subject matter of the promise is illegal, or where the consideration or any part of it is illegal (See *Herman v. Jeuchner* 15 Q.B.D. 561 C.A., at p. 563, per BRETT, M.R.). Can this be said of a promise by the promisor that if the promisee were to forbear from proceeding with her affiliation case against him, he would contribute to the maintenance of the child "Seenauth" in the way provided for under the agreement?

In *Jennings v. Brown* (1842) 9 M. & W. p. 496, the reputed father of an illegitimate child promised to pay the mother an annuity if she

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would maintain the child and keep secret their connection. In one of the letters which he wrote to her he said:—

“Thus, then, as long as your future conduct is correct, and the situation you have been placed in remains a secret, my allowance to you of £60 a year will be paid with punctuality; but I must remind you, were it to become known, the allowance of a magistrate would be 4s. 6d. or 5s. per week, which is £13 per annum. Under these circumstances, I should recommend you to consider me your friend, and place that confidence in me which you never had reason to doubt”.

During his lifetime he paid the promised annuity but on his death his executors, not feeling themselves justified in paying the annuity without the sanction of a court of law, refused to pay it, which resulted in the bringing of an action. It was argued that the undertaking was invalid for want of consideration and could not be enforced either at law or in equity.

PARKE, B. pointed out that the woman had supported the child and that was a good consideration and that it was a matter of bargain that she was to take care of the child and exonerate the father.

It was held by the court that the father might have had the child affiliated on him, and the consideration must be understood to be for ordinary provision, and that was a sufficient consideration.

A similar conclusion was reached in *Linnegar v. Hodd* 136 E.R. p. 948. There – the father of an illegitimate child promised the mother, that, if she would abstain from affiliating the child, he would pay her 2s. 6d. per week for its maintenance. The mother did so abstain, and suffered the time limited by the statute for obtaining an order of affiliation to expire:— Held, that the promise bound the father, and that *indebitatus assumpsit* lay, the consideration having been executed.

WILDE, C.J. said at p. 949:

“The plaintiff, it appears, was about to apply to the magistrates to compel the defendant to maintain her child, when she was met by the defendant, who promised to pay her 2s. 6d. a week for the child’s maintenance, if she would forbear to go. She did accordingly forbear to go before the magistrates, and the time has now passed within which she could apply for an order of affiliation. The plaintiff, therefore, has performed her part of the contract; and all that remains for the defendant to do, is, to pay the money. The case seems to me to resolve itself into a promise on the defendant’s part, that, if the plaintiff would keep the child, he would pay her 2s. 6d. weekly towards its support. The contract being performed on the one side, and nothing but the payment of the money remaining to be done on the other side, I think the plaintiff was at liberty to resort to the general form of declaration she has adopted. The case of *Jennings v. Brown* goes a long way

towards this conclusion: and I know of no authority the other way. The real objection has been properly presented, viz. whether this declaration is so framed as to meet the facts of this case. I think it is; and, consequently, that there is no ground for disturbing the verdict”.

and V. WILLIAMS, J. said:

“I am of the same opinion. The evidence amounts to this the defendant promised, that, if the plaintiff would abstain from going before the magistrates to affiliate the child, and would maintain it herself, he would reimburse her to the extent of 2s. 6d. per week. I think the declaration was sufficient, and the verdict justified by the evidence”.

See also *Smith v. Roche* (1859) 6 C.B. (N.S.) 223.

I can find nothing to indicate that the law disapproves of a contract where the mother of an illegitimate child bargains with the putative father for its support in consideration for forbearing to continue affiliation proceedings against him, when to proceed may well produce a disappointing result, whereas to accept the offer of maintenance may result in some assurance of support, perhaps well beyond the limited time allowed by the Bastardy Ordinance.

The above cases clearly demonstrate that it is permissive to enter into a binding contract of the kind illustrated, and so the objection as to the illegality of the consideration cannot be indulged.

Perhaps it may now be appropriate to consider the argument of counsel for the promisor that as the suit concerned a written agreement, consideration must expressly appear on the agreement or arise from it by necessary implication, and cannot be deduced wholly or in part from oral evidence dehors the agreement. He argues that if an oral agreement exists with the element of consideration suit must be made on that oral agreement alone.

This contention appears to me to be quite unsound.

In Morgan v. Griffith (1871) L.R. 6 Ex. p. 70, oral evidence was admitted to prove a collateral oral agreement as to matter on which the document was silent, and which was separate from it and not inconsistent with its terms.

The plaintiff had taken a lease of land from the defendant, reserving to the latter the sporting rights. Evidence was admitted of a collateral oral agreement by which the defendant promised to destroy the rabbits if the plaintiff would sign the lease, which was silent on the point.

KELLY, C.B. said:

“I think the verbal agreement was entirely collateral to the lease, and was founded on a good consideration. The plaintiff,

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unless the promise to destroy the rabbits had been given, would not have signed the lease, and a Court of Equity would not have compelled him to do so, or only on terms of the defendant performing his undertaking”.

(See also *Erskine v. Adeane* (1873) L.R. 8 Ch. App. 756).

It must, however, be appreciated that collateral contracts must be proved strictly, and that not only the terms of such contracts, but the existence of an *animus contrahendi* on the part of all the parties to them must be shown (Per Lord MOULTON in *Heilbut v. Buckleton* [1913] A.C. 30).

In the instant case there was clearly an oral agreement which preceded the written agreement, and it was part of that oral agreement that the mother would not go to court for the hearing of the bastardy proceedings in return for which there was the promisor’s promise to pay \$10 per month for the child. This evidence stood uncontradicted and unchallenged, and received some measure of confirmation from the magistrate’s endorsement on the case jacket, that the case was struck out for non-appearance of the parties.

Apart from any collateral oral agreement embodying any element of consideration, there is nothing to prevent a court from looking at the history of the transaction which led to the making of the document sued on for the purpose of determining the existence or non-existence of consideration for the making of that document. In *Crears v. Hunter* (1887) 19 Q.B.D. p. 341, it was contended for the defendant who had signed a promissory note that there was no consideration for the giving of the note, as it was the result of a pre-existing debt of the father, and, in the absence of any promise to forbear, could not be a consideration for a guarantee of such debt by the defendant. This argument was rejected. Lord ESHER, M.R. pointed out at p. 344 that the note on the face of it did not indicate that there was to be any forbearance to sue, but stressed the necessity of looking to see “what was the substance of the transaction contemplated in the minds of the parties? Was not the understanding obviously that, if the plaintiff would forbear to sue the father, the defendant would become liable on the note?” Similarly in this case was it not the understanding that if the promisee did not go to court and so caused the proceedings which she had commenced to be relinquished, that the promisor would contribute towards the child’s support?

In *Oldershaw v. King* 2 H. & N. 399, 17, ERLE, J. made it plain that in looking at a document one also has to look at the circumstances under which it was written to understand the contemplation of the parties.

To revert to *Crears v. Hunter* (*supra*), Lord ESHER went on to say –

“It was argued that the request to forbear must be express. But it seems to me that the question whether the request is express or is to be inferred from the circumstances is a mere question of evidence.

If a request is to be implied from the circumstances, it is the same as if there were an express request. The question is, therefore, whether there was sufficient evidence in this case to entitle the jury to infer that the understanding between the plaintiff and defendant was that, if the plaintiff would give time to the father, the defendant would make himself responsible. I am of opinion that there was evidence to go to the jury that what the parties really understood in their minds was that, if the plaintiff would give the defendant's father time to turn round, the defendant would guarantee the payment of the principal in the end and in the meantime interest at the rate of 5 per cent. per annum half-yearly. I not only think that there was evidence of such an understanding, but I entirely agree with the inference drawn by the jury. I cannot see any other reasonable explanation of the transaction than that the understanding was as I have said".

Now the time has come to examine the question whether the agreement was *nudum pactum ex quo non oritur actio*. If the promisor made his promise gratuitously, as a moral obligation, or out of a mere sentiment of gratitude or honour prompting a return for benefits received, then there would be no consideration at all. But if on the evidence led there could be found some act or forbearance on the part of the promisee, or the promise thereof given by her as the price for which the promisor's promise to pay her \$10 per month was bought, then the promise thus given by him for that value is enforceable. In other words the promisor here must tender his promise as an inducement to the promisee to secure the specified act, forbearance or promise, as the case may be, and if she so responds then he is legally bound by his promise to pay.

Whether that element of bargain so essential as a constituent of consideration is to be found in this case, is a question of interpretation of the acts and words of the parties and what the agreement reveals.

When the promisee took bastardy proceedings, her only object could have been to seek to establish paternity to gain maintenance for her bastard child; but this she virtually abandoned. Why? It was suggested to her in cross-examination that she "withdrew" because she had "no case" against him. This she expressly denied; and positively asserted (without contradiction) the reason which was responsible for her deliberate absence at court, with the consequences suffered, when she said –

"I did not come to court as he had asked me to settle the matter. He said he is (sic) going to give me \$10 per month for the child".

Does this forbearance to appear to proceed with her cause, which she indulged to her detriment, when her complaint was struck out, constitute legal executed consideration for the written agreement (Ex. "A") made about one week afterwards? Or, is it in the nature of past consideration, of which the law takes no account, and places no value upon?

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The difficulty of distinguishing in practice between executed and past consideration was appreciated by the courts as early as the second half of the sixteenth century. Judges were required in a long and subtle line of cases which followed to consider the position where the plaintiff had performed services for the defendant without any agreement for remuneration and the defendant had subsequently promised to pay for them. They decided that assumpsit would lie if, but only if, the services were originally performed at the defendant's request. The law was settled in this sense in 1615 in the case of *Lampleigh v. Brathwait* (1615) Hob. 105:—

“It was agreed that a mere voluntary courtesy will not have a consideration to uphold an Assumpsit. But if that courtesy were moved by a suit or request of the party that gives the Assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before”.

The previous request and the subsequent promise were thus to be treated as part of the same transaction when it could be implied that both parties must have assumed throughout their negotiations that the services were ultimately to be paid for. (See Cheshire and Fifoot on Contracts, 6th Ed. pp. 62 and 63).

In the instant case when the oral request was made “to settle”, the amount to be paid for so doing was expressly stated, viz. the payment of \$10 per month for the child, which was subsequently incorporated in the written agreement. The original stipulation then, with the agreement to pay, establishes beyond doubt the true nature of the consideration. Even if there had been no mention of payment when the oral request was made, it would still have been possible to link that request with the written agreement to pay on the authority of *in re Casey's Patents* (1892) 1 Ch. 104. In the words of BOWEN, L.J. at pp. 115-116:—

“The fact of a past service raises an implication that at the time it was rendered it was to be paid for, and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated as an admission which evidences or is a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered”.

The contention then that no means nor remedy is afforded by law to compel the performance of this agreement because it was made without consideration, must fail. There was valuable consideration, consideration executed in the mother's forbearance for the promisor's promise. (See *re Cuthbert* [1936] 1 All E.R. p. 342).

Further, it may well be that executory consideration exists in the agreement itself, without looking at any other evidence, that is, in return for the promisor's agreement to pay \$10 per month for the child the promisee agreed and pledged —

“that as long as this amount is paid to her she will not proceed by way of court for its recovery”.

I do not, however, propose to examine this aspect in view of my firm conviction that executed consideration already appears, except to say that it is clear that the parties intended to create legal obligations, and on the whole there can be no room for bad faith or chicanery.

The appeal is allowed.

The decision of the Full Court is set aside.

There will be judgment for the appellant against the respondent in the sum of \$110 with costs in the Magistrate’s Court, the Full Court and in this court.

PERSAUD, J.A., I concur.

CRANE, J.A. (ag.), I concur.

Appeal allowed.

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[Court of Appeal (Luckhoo, C. (ag.) Persaud, J.A., Crane, J.A. (ag.)
August 15, September 9, 1968.]

Workmen's Compensation — Reference by the Commissioner of Labour to a medical referee — Failure to forward a copy of medical certificate issued by employers' medical practitioner — Effect on reference — Workmen's Compensation Ordinance, Cap. 111, s. 43(1).

Workmen's Compensation — Agreement by workman to submit himself to medical practitioner designated by employer — Whether contrary to public policy — Workmen's Compensation Ordinance, Cap. 111, s. 41(1).

On the 14th August 1964, the respondent was injured in an accident which arose out of and in the course of his employment with the appellants. He was examined by a doctor two days later and admitted to the New Amsterdam Hospital. His injury necessitated his encasement in plaster of paris for some days during which time he was examined by several doctors. He was discharged on the 19th September 1964, but continued to receive clinical treatment from the hospital doctor until the 23rd June 1965.

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It would appear however, that the respondent ignored the appellants several calls to attend their dispensary regularly for treatment; and on the 3rd April 1965 they ceased paying him the periodic sums which he had been receiving by way of compensation. Written notification to this effect was later sent to the appellant. By way of reply the respondent's legal adviser stated that his clients had received a notice from the Commissioner of Labour appointing Dr. Da Costa as medical referee and expressed his willingness to be treated and examined by Dr. Da Costa. The reference to Dr. Da Costa by the Commissioner was made pursuant to his powers under s. 43(1) of the Workmen's Compensation Ordinance. No copy of any report of the medical practitioner who had examined him was given to the respondent.

The doctor examined the respondent and reported that he discovered no signs of disability or fracture. He expressed the opinion that he was malingering.

HELD: (i) the failure to furnish the respondent with a copy of the medical report of the doctor who had been treating him made the reference, by the Commissioner of Labour invalid;

(ii) the letter indicating the respondent's agreement to submit himself to examination and treatment by the doctor did not infringe any principles of public policy as contemplated by s. 41 the Workmen's Compensation Ordinance;

(iii) the Full Court erred in disregarding the doctor's findings which led them to reverse the decision of the learned magistrate.

Appeal allowed.

G. M. Farnum, Q.C., with *M. Churaman* for the appellants.

R. Rawana with *D.C. Jagan* for the respondent.

CRANE, J.A.: (ag.) On January 11, 1968, the Full Court allowed the appeal of the respondent workman, Lilboy Seetaram, from the award of a magistrate in respect of compensation for accidental injuries received by him on August 14, 1964, in the course of employment as a cane-cutter with the appellant employers, Messrs. Bookers Demerara Sugar Estates, Ltd.

Seetaram claimed compensation on the basis of 100% permanent total incapacity, that is to say, either in the sum of \$4,320.00, or weekly payments for five years, or until his disability ceased, whichever period was the shorter.

The appellants made him periodic payments of \$17.50 per week from the date of his injury to March 20, 1965, but formally ceased them on April 3, 1965. The magistrate made an award of \$147.00 with costs based on \$17.50 per week from the date of injury to May 18, 1965,

on which date the workman was examined by a medical practitioner agreed upon between him and his employers. The figure of \$147.00 represented the difference between the payments awarded to and those actually received by the workman.

The decision of the Full Court was in effect to increase the award by altering the basis on which the magistrate established it. That court ordered the appellants to recommence payment of the weekly periodic sum of \$17.50 for a period of five years from April 3, 1965, or until his incapacity should cease, whichever was sooner. It is in respect of this increase that the employers have now appealed to this court, alleging in para. 3, eleven grounds of appeal, which counsel for the employers has frankly admitted have overlapped to such an extent as to constitute in substance only two grounds of appeal.

Adverting to the fact that an appeal from the Full Court to this court is entertained on a point of law only, it will be appropriate at this stage to set out the background of facts against which the points of law raised may be considered. Briefly, they are as found by the Full Court on appeal: that Seetaram slipped and injured his back while fetching a bundle of sugar-cane in the course of employment on the 14th August, 1964; that he was examined by a doctor and admitted a patient in the Public Hospital, New Amsterdam, where he remained until September 19, 1964; and that the injury necessitated his encasement in plaster-of-paris for some days, during which time he was examined by several doctors, including Dr. Goswami, the Resident Surgeon of that hospital. Dr. Goswami in fact examined him on August 16, 1964, two days after the accident. He found tenderness over the lower lumbar spine, particularly over the fourth and fifth vertebrae, and also over the left sacroiliac region; movement of the patient's spine was restricted by pain. X-rays revealed the possibility of compression fracture of the fourth lumbar vertebrae and evidence of some degenerative changes in the spine.

After the respondent's discharge, he continued to receive clinical treatment from Dr. Goswami who saw him for the last time on June 23, 1965, when he still complained of pain in the injured and other areas. A mild kyphosis was diagnosed and all movement of the back was restricted and painful. The posterior spinal muscles were in spasm and it was Dr. Goswami's view that the respondent's injuries were consistent with the condition of his back at the time, and that the fracture thereof was caused by a fall. In his opinion the condition of Seetaram was aggravated by the injuries which he sustained in the accident. The doctor then expressed the view that the workman would be unable to perform his work as a cane-cutter since he had a temporary partial disability the duration of which it was not possible to say. It is of some interest to observe that Dr. Goswami's report covers a period of some 10½ months during which time he examined the workman when he attended practical clinics after discharge from hospital.

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Seetaram, however, had apparently ignored his employers' call to attend their estate dispensary regularly for treatment, as he was required to do after his discharge from hospital on September 20, 1964. This was the complaint of their personnel manager who had occasion to reprove the workman twice in 1964 for such neglect, and again on April 3, 1965, when he unsuccessfully requested him to submit himself for examination by the estate's Medical Officer on that very day. It was on the workman's refusal to comply that the employers ceased periodic payments intimating this formally by letter to him some 19 days after the refusal. This letter, after drawing his attention to the fact that the employers had always agreed to make periodic payments from the date of his injury, and to the fact that all their employees are provided with free medical attention, went on to accuse him of wilfully refusing to submit himself for medical examination and treatment with the object of prolonging unnecessarily his temporary incapacity and to perpetuate periodic payments. It also reminded him that the company's personnel manager had drawn his attention to the relevant legislation on the matter of his refusal. To this letter the workman's legal adviser replied (ex. "B") in the following terms:

"Sir,

Your letter of the 22nd April, 1965, to my client Lilboy Seetaram of No. 19 Village, Corentyne, was handed to me with instructions to reply to same.

I wish to refer you to s. 17(5) of the Workmen's Compensation Ordinance, Cap. 111, and to inform you that my client is willing to be examined by your medical practitioner in the presence of his own medical practitioner on any date between the hours of 3 p.m. and 6 p.m.

My client has also received a notice from the Commissioner of Labour appointing Dr. A. B. da Costa, the Medical Referee, to examine him on a date to be fixed. My client is also willing to be examined by Dr. da Costa and to be treated by him if necessary.

I suggest therefore that if my client will be examined by Dr. da Costa as Medical Referee, there is no need to be examined by your medical practitioner.

I hope to hear from you again".

The reference in para. 3 of the letter above to the appointment of Dr. A. B. da Costa by the Commissioner of Labour as Medical Referee was in purported compliance with s. 43(1) of the Workmen's Compensation Ordinance, Cap. 111. This fact was stated in the Commissioner's letter of appointment dated April 8, 1965, to Dr. da Costa. The doctor's mandate therein was in clear and precise terms, viz. (a) to examine

and report on the condition and fitness for work of Seetaram, and (b) to determine whether or to what extent his incapacity was due to accident, as recorded on a medical report (which accompanied the letter). The medical report referred to in (b) above is Dr. Goswami's dated January 27, 1965, which Dr. Appadu, the estate medical officer had obtained because he did not examine the workman himself. It appears to me quite clear that it was this report which the Commissioner of Labour acted on at the instance of the employers and used as the authority for appointing Dr. da Costa as Medical Referee under s. 43(1) of the Ordinance, which is in the following terms:

“Where a workman has submitted himself for examination by a medical practitioner, or has been examined by a medical practitioner selected by himself, and the employer or the workman, as the case may be, has within six days after such examination furnished the other with a copy of the report of that practitioner as to the workman's condition, then, in the event of no agreement being come to between the employer and the workman as to the workman's condition or fitness for employment, the Commissioner of Labour, on application being made to him by one or both parties, may refer the matter to a medical referee”.

The da Costa report complied with the statutory form as required: It stated that clinical and X-ray examinations of the workman did not at the time, that is, on May 18, 1965, reveal any permanent signs of disability or fracture, and expressed the opinion that the workman was a malingerer since the incapacity under which he once laboured had ceased.

The Full Court, however, found that on the strict construction of s. 43(1), the appointment of Dr. da Costa was invalidly made by the Commissioner, for the reason that there was non-compliance with its terms in that the employers had failed to furnish the workman with a copy of Dr. Goswami's report to which reference has already been made. The Full Court followed and applied the decision of *Hill v. Ladyshore Coal Co.*, [1936] 3 All E.R. 299, the purport of which is that there must be strict observance of the requirements of s. 12(3) of the Workmen's Compensation Act, 1925 (U.K.) which cannot be waived by the workman; though the Full Court went further and, it is suggested, erroneously, when it expressed the opinion that the legislation involved a matter of public policy. But before dealing with this question, I will advert to ground ten of the appeal which counsel for the appellant sought and obtained leave to argue first.

It was strenuously contended before us that the Full Court erred when it did not find that the workman had refused to be examined by the estate's medical officer; it was said that the evidence supported such a finding which it was important to make since it affected, as I understand the argument, the legality of the award of periodic payments. There ought to have been a specific finding in this respect, so runs the contention,

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because the employers had been complaining all along that the workman had wilfully refused to submit himself to treatment or examination by the estate's medical officer, and that the relevant legislation to which his attention had been alerted is clear and specific on the point, that is to say, his right to compensation is suspended if indeed he has wilfully refused to be medically examined.

The relevant sections of the Workmen's Compensation Ordinance, Cap. 111, on which counsel grounded this contention are as follows:

"17. (1) Where a workman has given notice of an accident or where an accident has occurred in respect of which the necessity of giving notice under this Ordinance is dispensed with, he shall, if so required by the employer, submit himself for examination by a medical practitioner provided and paid by the employer.

(2) The workman shall, when required, attend upon that medical practitioner at the time and place notified to the workman by the employer, provided such time and place is reasonable.

(4) If the workman refuses or wilfully neglects to submit himself to such examination, or in any way wilfully obstructs or unnecessarily delays such examination, his right to compensation and to take or prosecute any proceedings under this Ordinance in relation to compensation, shall be suspended until such examination has taken place.

"18. Any workman receiving periodic payments under this Ordinance shall, if so required by the employer, from time to time but at reasonable intervals, submit himself for examination by a medical practitioner provided and paid by the employer and the provisions of s. 17 shall apply to any such examination.

"19. Where under this Ordinance a right to compensation is suspended no compensation shall be payable in respect of the period of suspension".

It is very plain, however, that this question whether the respondent wilfully abstained from presenting himself for treatment and medical examination, as he was required by his employers to do, was one of the issues of which the learned magistrate was seized. Admittedly, he did not in so many words say he found no wilful abstention from medical treatment or examination on the part of the workman, but what he did say was that after a careful examination of the oral and documentary evidence he was satisfied that the workman had established a claim against his employers for injuries received by him in the course of employment. It seems to me that by so stating the magistrate had by necessary implication made a finding against wilful refusal by the workman

to submit himself for medical examination, and therefore gave periodic payments to the 18th May, 1965, instead of only to the 3rd April, 1965, when the employers ended them. This is some indication that he did not agree there was a wilful abstention justifying cessation of periodic payments from April 3. Therefore I need not stop to bother about the objections raised and cases cited on behalf of the workman in the argument adduced on this ground, viz. that it is a point of law not raised before the Full Court and therefore one which the appellants cannot properly raise in this court. The plain fact of the matter is, that the point of the workman's wilful refusal to submit himself to medical examination was fully canvassed before the magistrate who, as the record shows, heard arguments on it and was asked so to find. From these circumstances it would appear that he must necessarily have decided against the employers on that issue when he allowed the claim for compensation.

With parity of reasoning I will adopt the approach of the Court of Appeal of England when a kindred objection was made in the case of *Tendler v. Sproule*, [1947] 1 All E.R. 193 at p. 195. There, the judge made an order for possession of a dwelling-house against a tenant who was in breach of a covenant not to use the demised premises for trade or business purposes. When it was suggested that he did not apply his mind to the question of whether it was reasonable to make the order for possession because his written decision was silent on the point, MORTON, L.J., in the Court of Appeal answered the objection in this way:

“It was at one time suggested that he had not applied his mind to the question of reasonableness at all, but we are informed by counsel for the landlord, who appeared in the court below, that the judge said he considered it reasonable to make an order, although that does not appear in his written judgment. Apart from that, when evidence is led which is directed to the question of reasonableness, and when the judge gives a decision giving possession to the landlord, this court will always assume that he has applied his mind to the question of reasonableness before giving his decision”.

In like manner I will assume that the magistrate had applied his mind to the matter of wilful abstention from medical examination. The fact that the employers were not the appellants before the Full Court and did not see fit to contest the decision on that issue in that court by appeal or cross-appeal does not, I am inclined to think, preclude them from litigating that question in this court before which they now appear as appellants.

I will now pass on to what counsel for the appellant has referred to as the second question which he asserted is involved in grounds 2 to 9 of the grounds of appeal, on which the Full Court based its decision

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to exclude Dr. da Costa's evidence, viz. whether the workman could waive his right to a strict compliance with s. 43(1) of the Ordinance which has been enacted for his own benefit and protection. This was the question which the Full Court posed for determination after having decided that the employers' neglect to serve the workman with a copy of Dr. Goswami's report was a non-compliance with that section which rendered the Commissioner's appointment of Dr. da Costa as medical referee nugatory. There can be no dispute that there was such noncompliance, but the point at issue is whether the court was justified in applying the ratio of *Hill v. Ladyshore Coal Co.*, [1936] 3 All E.R. 299, a decision on s. 12(3) of the Workmen's Compensation Act, 1925 (U.K.), the text of which is in almost identical language with s. 12(3) of our Workmen's Compensation Ordinance, Cap. 111, with the same strictness of interpretation to s. 43(1) of Cap. 111 under which da Costa's appointment was made. For the determination of this point, it will be necessary to consider ss. 12(3) and 43(1) together and to attempt an analysis of the *Ladyshore case* with reference to them. S. 43(1) has already been set out above so I will set out s. 12(3) immediately hereunder:

"12. Any employer shall not be entitled otherwise than in pursuance of an agreement to end or diminish a periodic payment except in the following cases:

(3) where the medical practitioner who has examined the workman under s. 17 of this Ordinance or, in his absence, any other medical practitioner has certified that the workman has wholly recovered, or that the incapacity is no longer due in whole or in part to the accident (see amendment for insertion) and a copy of the certificate (which shall set out the grounds of the opinion of the medical practitioner) together with notice of the intention of the employer from the date of the service of the notice to end the periodic payment, or to diminish it by such amount as is stated in the notice has been served by the employer upon the workman:

Provided that –

(i) In the last mentioned case, if before the expiration of ten clear days from the date of the service of the notice, the workman sends to the employer the report of a duly qualified medical practitioner (which report shall set out the ground of his opinion) disagreeing with the certificate so served by the employer, the periodic payment shall not be ended or diminished except in accordance with such report, or if and so far as the employer disputes such report except in accordance with the certificate given by a medical referee in pursuance of s. 43 of this Ordinance;

In the *Ladyshore* case, a collier was injured while working and a big toe was amputated in consequence. After paying full compensation for a time and then part compensation, the employers proceeded under the Workmen's Compensation Act, 1925, s. 12, and gave notice of termination of payments. A copy of the medical adviser's certificate as to workman's condition supplied with the notice contained nothing that was not in the original certificate, but omitted various matters included therein. The medical referee certified the workman as fully recovered and payments were terminated. Renewed trouble appeared at the seat of the amputation, shortly afterwards, and the workman applied for and obtained an award of compensation from the County Court. The employers appealed on the ground that the medical referee's decision was conclusive and binding, and the County Court had no jurisdiction to inquire into the matter. A preliminary objection against the appeal was taken on the ground that the omissions in the copy of the medical certificate, served on the workman, were contrary to the express terms of s. 12(3), and that it and all subsequent proceedings based on it were a nullity: The Court of Appeal held that the omissions in the copy of the certificate of the employer's doctor were contrary to the express provisions of the Workmen's Compensation Act, 1925, s. 12(3), and all subsequent proceedings based upon it were invalid and a nullity. The appeal was therefore dismissed.

It will readily be seen in both sections that there is the requirement that the employer should send the workman a copy of a certificate embodying grounds of medical opinion in the one case, and a copy of the medical report on the workman's condition in the other. To my mind, the effect of a non-compliance with the provisions of the respective sections has a totally different effect in the one case than in the other, in the light of *Ladyshore's case*, even though the certificate and copy of the report are identical documents. Under s. 12(3) it is to render all proceedings subsequent to the termination of the weekly payments altogether invalid because it is absolutely essential that the workman should have had before him a true and complete copy of the medical certificate and not a paraphrase of it so as to enable him to make up his mind on whether he would agree or disagree to exercise his right to serve a counter-certificate on his employer under the proviso to that section. Thus, in the *Ladyshore case*, when the parties subsequently agreed to the appointment of a medical referee, the inherent invalidity of the certificate had the effect of rendering such agreement to appoint a medical referee likewise invalid. The medical referee in fact had never acquired jurisdiction to adjudicate in the matter at all; thus, when he certified that the workman had wholly recovered, the right to periodic payment was determined by the employers without sufficient material on which he could have properly adjudicated. When it is considered that his findings on medical matters are final and conclusive if he is acting within jurisdiction – see *Burgoyne v. Rose Bridge Colliery Co. Ltd.*, [1936] 1 All E.R. 743 – there is no doubt about the soundness of the decision of the *Ladyshore's case* which vitiates his appointment

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on a referral to him for adjudication on a matter which may result in the cessation of periodic payments, i.e. one which concerns the right of the workman to compensation.

But non-compliance under s. 43(1) by failure of the employer to furnish the workman with a copy of the report of the medical practitioner as to his condition does not, in my view, have the same vitiating effect as under s. 12(3); the right to be furnished with a report is a matter of procedure, and so may be waived by the workman or employers, as the case may be. The purport of s. 43(1) is that one or the other of the parties must furnish his report after the workman has submitted himself for medical examination within six days thereafter. S. 12(3) does not of itself give any right to refer a case to a medical referee; it merely utilizes the machinery provided by s. 43(1) for that purpose. In the *Ladyshore case* (above) at pp. 306 and 307 see in this regard the observations of SCOTT, L.J., on s. 19(2) (U.K.) on which our s. 43(1) is modelled. It is plain that the reason for this is to allow the party receiving the report to study it in the light of the medical findings, and to permit the possibility of an agreement or settlement between them on the workman's condition or fitness for employment. If they agree, then all is well; if they do not, it is only then that the Commissioner of Labour may, on a reference made by one or both of them, appoint a medical referee to adjudicate in the matter. Before the Commissioner of Labour can properly submit a case to the medical referee under s. 43(1), there must have been (a) medical examination under ss. 17 or 18, or an examination by a medical practitioner selected by the workman; (b) a copy of the report of the medical practitioner furnished to the other party within six days of the examination; and (c) a failure of the parties to agree as to the workman's condition or fitness for employment. As I have said, there can be no dispute that the workman received no report as to his condition; there can, therefore, be no dispute that the Commissioner's reference to Dr. da Costa was invalid.

It appears to me that service of a copy of the report under s. 43(1) just as a certificate under s. 12(3) is a condition precedent to the appointment of the medical referee. This notwithstanding, is the subsequent agreement of the parties to waive the statutory report and to appoint Dr. da Costa a valid one? I think that it is. I look at it this way: Had the employers furnished the workman with a copy of the report, then it is clear from the tenor of s. 43(1) that it was open to both himself and employers to make whatever agreement they considered necessary concerning his condition or fitness for employment. Such agreement could have included the appointment of da Costa, or any other doctor for that matter, with a stipulation that examination by him was to be final and conclusive. Now, when the workman had learned from the Commissioner

of the doctor's appointment, he must be presumed to have become aware of its invalidity from that time since he had received no medical report which his employers were obliged to send him before the Commissioner could legally make the appointment. But I can see no reason why the law should restrain him from making an agreement with his employers to have Dr. da Costa examine him after the invalidity of the Commissioner's appointment was realised. But whether the parties knew of the validity or not, the effect of ex. "B" is that it constitutes an offer by the workman, which his employers accepted, to have Dr. da Costa conduct the examination. The fact of the matter was, that the doctor was no longer being appointed to conduct the examination on the strength of the Commissioner's reference under s. 43(1), but by virtue of an agreement made between the parties instead. That there was intended to be finality and conclusiveness of the report of this examination cannot be in doubt for the workman expressed the desire that there need be no examination by his employer's doctor if Dr. da Costa examined him. Although, as I have already said, I believe the reference by the Commissioner is bad for non-compliance, yet the invalid appointment was overcome by the *ex post facto* agreement of the parties. Although his certificate was bad in law, yet Dr. da Costa testified orally in court. This fact appears not to have attracted the attention of the Full Court, for in the judgment are to be found several statements to the effect that as the Workmen's Compensation Ordinance contains a provision against the right to contract out of it, the agreement was invalid on the ground of public policy which was involved; e.g. that court said:

"The principle then must be that a private individual cannot waive a matter in which the public have an interest or where in attempting to waive the non-observance of a provision of a Statute there may be an infringement of a public right or public policy If the Act involves a matter of public policy then there can be no waiver by the individual. In the case of the Workmen's Compensation Ordinance it is clear that the policy or scheme of the statute is the protection of the workman who is injured in an accident which arises out of and in the course of his employment; and by virtue of s. 41 of the Ordinance it is not possible to contract out of the Ordinance and any such contract will be deemed null and void. Such legislation must therefore involve a matter of public policy and must have been intended to have an extensive operation. When, therefore, public policy requires the observance of the provisions of a statute it cannot be waived by an individual and the maxim *privatorum conventio juri publico non derogat* applies".

Unfortunately, it was not stated what head of public policy was infringed, but it is obvious that the Full Court was seated astride a difficult and "unruly horse". The court was not addressed on that aspect of the matter; nowhere on record is this to be seen. The court had therefore taken it on itself, without construing the legislation, to say that such existed.

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It is, however, thought that it may have misdirected itself from the text of *Maxwell on the Interpretation of Statutes*, 11th ed., pp. 375 – 376, which it quoted as follows:

“Another maxim which sanctions the non-observance of statutory provisions is that *cuilibet licet renuntiare juri pro se introductor*. Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy. Where in an Act there is no express prohibition against contracting out of it, it is necessary to consider whether the Act is one which is intended to deal with private rights only, or whether it is an Act which is intended, as a matter of public policy, to have a more extensive operation”.

No doubt the Legislature has prohibited certain types of contract. The Truck Acts have limited the freedom of employers and workmen to make such bargains as they think fit by prohibiting in general payment of wages otherwise than in cash. Factory Acts have limited hours of work and conditions of employment. But in each case the particular piece of legislation has to be construed to ascertain whether in fact public policy exists, and this is what I understand the quotation from Maxwell, *op. cit.*, to mean. In each case it has to be ascertained whether there has been legislative intervention into the sphere of the freedom of contract bearing in mind that the movement of society has been steadily from an age dominated by *laissez-faire* into the present collectivist era. It was in the former period, when JESSEL, M.R., wrote a timely word of warning to judges on public policy in *Printing and Numerical Registering Co. v. Sampson*, (1875) L.R. 19 Eq. 462, at p. 465:

“It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider – that you are not lightly to be interfered with this freedom of contract”.

Likewise, Lord HALSBURY once doubted whether any court could invent a new head of public policy considering that the rule “does not leave at large to each tribunal to find that a particular contract is against public policy”. (See *Fender v. St. John-Mildmay*, [1902] A.C. at p. 491).

Thus, when the Full Court committed itself to the pursuit of vague generalisations on infringement of public policy, it appears to me it was speculating in a sphere calculated to lead to uncertainty and error in the determination of legal rights when that category has long ago been closed and is now governed by precedent. It is respectfully submitted that it has put too wide a construction upon s. 43 (1) by considering that it is not at all possible to contract out of it, because that section is only really restrictive in two respects. This is to be noted from the enactment itself: "Any provision in a contract of employment existing at the commencement of this Ordinance, or thereafter entered into, whereby a workman or his dependents relinquish any right to compensation under this Ordinance or to damages independently of this Ordinance whether for the workman or for any dependant shall be null and void".

I take this to mean that the right to compensation under the Ordinance cannot be bargained away, it is a status-obligation imposed by the law quite independently of the wills of the parties. It is in this respect, I believe, the Full Court meant it would be obnoxious to public policy to relinquish that right by agreement between workman and employer, e.g. for them to confer jurisdiction on a medical referee to adjudicate not merely on an invalid certificate as in the *Ladyshore case*, but without any certificate at all being furnished the workman, as in the instant case. That is the kind of mischief which contracting out is designed to prevent. An invalid medical certificate on which a medical referee adjudicates can assuredly influence the continuance of the periodic payment, i.e. the right to compensation, notwithstanding such referee was appointed to adjudicate on it with the consent of both parties. However, it is said "the rights of workmen in regard to compensation for accidents have become a matter not of contract but of status". Any such agreement would contravene the law and become void. (See Prof. Dicey's *Law and Opinion in England*, at p. 283).

On the other hand, while failure to furnish the statutory report under s. 43(1) will invalidate the medical referee's appointment under that section, it cannot, in my opinion, invalidate an agreement that is quite independent of an invalid reference, even though the effect of that agreement is to submit the matter to the same medical practitioner and to abide by his decision. Much unlike in the *Ladyshore case*, there was no consent for the referee to exceed his jurisdiction by adjudicating on an invalid certificate in a matter which clearly affected the right to compensation. In the case under review, the workman had a right on receipt of a copy of the report to appoint a medical practitioner of his own and to put up a counter-report, and, if he so desired in case of no agreement being come to between himself and employer, to refer the matter to the Commissioner of Labour in order for a medical referee to be appointed. The matter, however, was improperly referred to the medical referee and the crucial question is: Could the workman

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have properly waived the requirement of his receipt of the copy of the report to which s. 43(1) entitled him before agreeing with his employers to appoint a medical practitioner to examine him and reach a final conclusion on the matter? To put the question in another way: Was the agreement to have Dr. da Costa appointed, thus waiving the requirement of the copy of the report, a matter in which the workman relinquished his right to compensation? For myself I do not think so. Before the agreement with his employers he ought to have had a copy of the report; but that report was entirely for his own and no one else's benefit. In my view, the agreement to appoint Dr. da Costa could not contravene any status-obligation because the law imposes none under s. 43(1), but has left the parties free thereunder to determine their wishes in the sphere of contract. It would have been quite lawful for the parties to have appointed da Costa if the report had been served on the workman, for under s. 43(1) the law permits "agreement" between them just as it does in s. 34(2)(ii) to arrive at the workman's condition and fitness; this would include the matter of the appointment of a medical practitioner. This is why I believe the matter of the furnishing of the copy of the report was only procedural and could be waived by the workman.

For the foregoing reasons, it seems to me that the Full Court erred when it failed to consider the matter in the light of the oral testimony given by Dr. da Costa to whose appointment as medical referee the parties had agreed. In my view the undoubted invalidity in his appointment under s. 43(1) had been overcome subsequently by their mutual agreement to have him as medical examiner and to abide by his decision as final and conclusive. For certain, on the workman's part it was quite clearly expressed that should Dr. da Costa examine him there would be no need for his employers to provide a medical practitioner of their own. It seems to me this expression of confidence in the doctor puts beyond doubt any question of the finality of his examination.

For my part, I would set aside the judgment of the Full Court and restore the decision of the learned magistrate, with costs here and in the Full Court.

Luckhoo, C. (ag.): I concur.

Persaud, J. A.: I agree.

Appeal allowed.

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[In the Court of Appeal (Luckhoo, C. (ag.), Persaud, J.A., Crane, J.A. (ag.),
September 17, October 8, 1968.]

Statute law — Judicial discretion in the magistrate — How it should be exercised — Power of appellate court to substitute its own view — Workmen's Compensation Ord., Cap. 111, s. 34(2)(1).

The appellant had sustained an injury to her wrist from an accident which arose out of and in the course of her employment with the respondents. She received periodic payments until the 2nd September 1964 when she was pronounced medically fit for normal work. On the 19th January, 1965, she consulted a medical doctor who, after examining x-ray photographs which had been taken the previous day, determined that she was still suffering from a disability. However, another medical doctor who examined the appellant on the 12th August, 1965, as well as fresh x-ray photographs which he had requested supported the case of the employer that she was fit for work.

In the face of this divergence of medical testimony counsel for the respondents invited the magistrate to refer the appellant to a medical referee under s. 34(2)(1), of the Workmen's Compensation Ordinance. The request evoked no response from the magistrate, who proceeded to give judgment in favour of the appellant based on an acceptance of the evidence of the doctor who had examined her on the 19th January, 1965.

On appeal to the Full Court it was held that the magistrate's approach was obviously conjecture and it was pointed out that he had given no reasons for believing one doctor rather than the other.

On further appeal to the Court of Appeal:

HELD: (i) the exercise of a judicial discretion must be in accordance with common sense and justice;

(ii) an appellate court would only substitute its own views as to the manner in which the discretion should have been exercised, if some substantial reason exists for so doing, and it must manifestly appear that the intervention is to be desired from a necessity to do so in the interests of justice;

(iii) the magistrate was in breach of his duty, when he denied the respondents the opportunity of a reference to a medical referee when the circumstances created and demanded the necessity for its grant.

Appeal dismissed.

B. O. Adams, Q.C., D. Jagan with him, for the appellant.

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

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LUCKHOO, C. (ag.): This appeal raises a point of some considerable importance. In a claim for compensation under the Workmen's Compensation Ordinance, Cap. 111, a marked divergence in the medical testimony arose: the conflict was violent and irreconcilable; the predicament of the magistrate unenviable. Counsel for the employer, at the close of his case, attracted the magistrate's attention to s. 34(2)(1) of the Workmen's Compensation Ordinance, which is as follows:

"The court may, subject to regulations made under this Ordinance, submit to a medical referee for report any matter of a medical character which seems material to any question arising from him in the course of the proceedings before him."

But this evoked no response from the magistrate who immediately proceeded to award judgment in favour of the workman without resorting to the help available through the above provision.

The medical conflict came about in this way: The workman (appellant), whilst in the employ of the respondents as a water-fetcher on the 3rd September, 1963, suffered a fracture of the scaphoid bone in her right wrist. The respondents made periodic payments to her from the 3rd September, 1963, to 2nd September, 1964, when they ceased further payments, as their medical opinion pronounced her fit for normal work. This she subsequently disputed and claimed compensation for permanent partial incapacity.

Mr. H. Hugh, F.R.C.S., on whose evidence she relied, first saw her on the 19th January, 1965, and found her wrist "still very painful" with "crepitus on movement". He considered that condition chronic and incurable and assessed permanent partial disability at 50%, taking into account her work as a fetcher of water and consequent loss of earning capacity. He was able to have the advantage of an x-ray taken at St. Joseph's Hospital on the 18th January, 1965, and from that determined that the scaphoid bone in her wrist was fractured. Further, he saw there was a change in the quality of the structure of the scaphoid and of the adjoining bones. At that time he was aware of the appellant's medical history and was told by her that she was discharged as fit for work by Dr. Stracey on the 2nd September, 1964. Mr. Hugh last saw her on the 13th February, 1966, and it was his view that physiotherapy treatment would have no effect on a scaphoid fracture.

Mr. M. E. Alli, F.R.C.S., on the other hand, supported the case for the employers. He first saw the appellant on the 12th August, 1965, at the request of the Man Power Citizens' Association, a trade union which asked him to examine her and issue a certificate in respect of any disability. She complained to him of pain in her right wrist in the same way as she had done to Mr. Hugh, and gave her medical history. He was aware that she was previously examined by a doctor at the public hospital, and that x-ray at that time showed she had a fracture of the scaphoid bone; that she was treated with

plaster-of-paris and courses of physiotherapy. When he saw her on the 12th August, 1965, he found no physical abnormality but still caused X-rays to be taken of her wrist. These he checked and from them he said that her fracture was completely united. He testified further that she had excellent functions of her hand, and was of the view that she could perform her normal duties and had suffered no permanent partial disability. He said, "If there was any x-ray abnormality I would have noted it at the time I checked the x-rays. I would not agree with the opinion that the scaphoid bone seldom heals."

Under cross-examination, he said he knew that Dr. Stracey, who was then Senior Surgeon at the public hospital, had examined the appellant on 21st November, 1963, and had given her a course of physiotherapy treatment and discharged her as fit on 13th February, 1964; that the said doctor had examined the appellant on 30th April, 1964, when she complained of pain and swelling, and gave her another course of physiotherapy treatment and discharged her for the second time on the 20th August, 1964; and that the said doctor examined her again on the 1st April, 1965, and gave her further physiotherapy treatment; also that Dr. Bender saw her on 9th August, 1965, and found her fit and discharged her "for the third time".

The appellant in her evidence confirmed that Dr. Stracey had discharged her on the 13th February, 1964, and said that he told her that she had regained excellent functions of the hand, but she did not feel better and returned to Dr. Stracey on the 13th April, 1964, as her hand was swollen and paining her severely. Dr. Stracey treated her and gave her a further course of physiotherapy and strapped her wrist and discharged her on 20th August, 1964, as being fit for work. However, she still continued to suffer pains and her hand "again started to swell". She went back to Dr. Stracey on 1st April, 1965, and he ordered another course of physiotherapy treatment. When she returned to him on 20th April, 1965, he was not available and she saw another doctor, who recommended a leather strap for her wrist. Her hand did not get better and on 9th August, 1965, she saw Dr. Bender who did not examine her but discharged her.

At the close of the case for the respondents, counsel said to the magistrate: "This is a case where there is a conflict of medical evidence," and "it seems to be a proper case for a medical referee under s. 34(2)(1) of the Workmen's Compensation Ordinance." However, the magistrate proceeded to give judgment there and then for the appellant for \$1,128.36 for periodic payments from 2nd September, 1964, to 13th February, 1966 (on the basis of monthly payments of \$65.08) and for the further sum of \$2,160.00, being 50% permanent partial disability.

The respondents then appealed to the Full Court on a number of grounds, one of which was, that "The magistrate having found that there was conflicting medical testimony, failed to exercise, in a judicial manner, his discretion under s. 34(2)(1) of the Ordinance to submit the matter to a medical referee."

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The Full Court, in a written decision, considered that “it was only just and proper for the magistrate to have resolved the conflict of medical opinion by reference to a medical referee, rather than conjecture – the magistrate being a layman in such medical matters.” That Court went on to say, “The learned magistrate’s approach was obviously conjecture, for it is significant that he gave no reason why he accepted the evidence of Mr. Hugh and rejected the evidence of Mr. Alli.”

In the result, the finding was, that the learned magistrate did not properly exercise his judicial discretion when he failed and/or refused to refer the matter to a medical referee on the application of counsel for the respondents in the court below at the close of their case, and as this was a fit and proper case for such a reference, the appeal was allowed; the order of the magistrate set aside; and it was directed that the matter be remitted to the magistrate for reference to a medical referee under s. 34(2)(1) of the Ordinance, and, on receipt of his certificate, to determine and adjudicate on the matter according to law.

From that order an appeal is brought to this court. It was here contended that —

- (a) The magistrate had considered all the evidence led, had accepted the evidence of the appellant and that of Mr. Hugh in preference to the evidence of Mr. Alli, and he was entitled to do so.
- (b) The Full Court erred in law and exceeded its powers in directing the magistrate to submit the case to a medical referee, thus wrongly depriving the magistrate of his discretion and/or improperly interfering with the exercise of his discretion in the matter.
- (c) The Full Court had placed a wrong construction on s. 32(2) of the Workmen’s Compensation Ordinance in relation to the duties, functions and discretion of the magistrate.

The determination of these questions would require an examination of the nature of the power bestowed on the magistrate under the particular section; whether in law he ought to have exercised that power on the evidence before him; and whether a failure or omission so to do could be corrected as was done by the Full Court.

The magistrate’s power “to submit to a medical referee” is governed by three considerations: (a) He must assess the matter to be of a medical character, (b) It must be material to a question arising before him in the proceedings, (c) In his judgment, the matter should be so referred.

The words of the section in their natural meaning are of a permissive and enabling nature, calling for the exercise of a judicial discretion after the prerequisites at (a) and (b) will have been satisfied.

Counsel for the appellant then argued that the discretion being in the magistrate, it was wrong for the Full Court to substitute their own for his, as it was within his province to prefer Mr. Hugh's evidence, and believe the appellant that at all material times she suffered pain and was not fit for work; in law this was sufficient for a determination of the issue, with judgment for his client.

At once, therefore, the way in which the magistrate's discretion should be exercised must first be understood and appreciated.

WILLIAM LAMBARD, a master of Chancery, in 1592, published in 1581 his *Eirenarcha*, or of the office of Justices of the Peace, which was for long the standard work on the subject, in which he advised justices that:

"no way better shall the discretion of a Justice of the Peace appear than if he (remembering that he is *lex loquens*) do contain himself within the lists of the law, and (being soberly wise) do not use his own discretion, but only where both the law permitteth, and the present case requireth it".

Then COKE in *Rooke's* case, (1598) 5 Co. Rep. 99b at 100a, expanded on Lambard's notion. The Commissioners of Sewers were there given, by their commission, authority "to do according to their discretion", yet (as COKE said):

"their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, *talis discretio discretionem confundit*."

It was put in another way when he said that discretion is

"to discern by the right line of law and not by the crooked cord of private opinion, which the vulgar call discretion." (see Co. Litt. 277b).

In a case dealing with the suspension of a councillor, *Estwick v. City of London*, (1647) Style 42 at p. 43, it was laid down by the King's Bench that:

"wheresoever a commissioner or other person hath power given to do a thing at his discretion, it is to be understood of sound discretion, and according to law, and that this court hath power to redress things otherwise done by them."

Lord MANSFIELD, in the next century, brought his powerful influence to bear on this concept in two cases which vividly exemplify the rule.

In *R. v. Askew*, (1768) 4 Bun. 2186 at 2189, a case involving the determination by the College of Physicians as to competence to practise medicine, he said:

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“There can be as little doubt, that the college are obliged, in conformity to the trust and confidence placed in them by the Crown and the public, to admit to all that are fit; and to reject all that are unfit. For under the reason and spirit and true construction of this charter and this Act of Parliament, no person ought to be suffered to practise physic, but such only as have skill and ability, and have diligently applied themselves to the study, and are well grounded in the knowledge of it: and, on the other hand, all persons who are so qualified, and have bestowed their time and money and labour, in the proper studies that tend to such qualifications, have a right to be admitted to exercise and practise their profession. And the public have also a right to the assistance of such a person, who has by his labour and studies rendered himself capable of serving the public by giving them proper advice and directions.

It is true, that the judgment and discretion of determining upon this skill, ability, learning, and sufficiency to exercise and practice this profession is trusted to the College of Physicians; and this Court will not take it from them, nor interrupt them in the due and proper exercise of it. But their conduct in the exercise of this trust thus committed to them ought to be fair, candid, and unprejudiced; not arbitrary, capricious, or biassed; much less warped by resentment, or personal dislike.”

And in *Rex v. John Wilkes*, (1770) 4 Burr. 2528 at 2539, in similar vein he reiterated:

“But discretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour. It must not be arbitrary, vague and fanciful, but legal and regular.

In the next century after this, Lord HALSBURY, L.C., in *Sharp v. Wakefield*, (1891) A.C. 173 at p. 179, adopted much of Lord MANSFIELD’S language pertaining to the exercise of a judicial discretion when he said that it must be

“according to the rules of reason and justice, not according to private opinion, according to law and not humour”,

and that

“it is to be not arbitrary, vague and fanciful, but legal and regular.”

These dicta and decisions of the courts demonstrate that even where a discretionary power is *prima facie* unfettered, it must be exercised subject to the implied limitations set by the common law in terms of the above settled principles. In reality judicial discretion is not “complete”, “absolute” or “arbitrary” as it may be in certain cases of administrative discretions; but

the latitude or liberty in its exercise could be subject to review if there be non-conformity with these well-settled principles.

BOWEN, L.J., in the case of *Gardner v. Jay*, 29 Ch. D., 50 at p. 58, said:

“That discretion like all other judicial discretions must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it, it will be reviewed; but still it is a discretion and for my own part I think that when a tribunal is invested by Act of Parliament, or by rules with a discretion, without any indication in the Act or rules of the grounds on which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion would run, for if the Act or rules did not fetter the discretion of the judge, why should the court do so?”

That same judge, however, went on to say in *Knowles v. Roberts*. (1888) 38 Ch. at p. 271 that where a power is given to a judge to be exercised for a particular object, it becomes the duty of the judge to exercise the power in a fit case.

That means then that an appellate court is only to substitute its own view as to how the discretion should have been exercised if some substantial reason exists for so doing.

It must manifestly appear that the intervention is to be desired from a necessity to do so in the interests of justice. (see *In re Martin* 20 Ch. D. 365.)

It often happens that the failure to exercise the discretion judicially arises from – (a) an outright refusal to consider the necessity for its exercise, or (b) some misdirection in point of law, or (c) taking into account some wholly irrelevant or extraneous matter or (d) wholly omitting to take into account a relevant consideration.

The scope of review may be conditioned by a variety of factors, but above everything else, it is as a rule determined by the cogency of the particular circumstances of the case when related to the object of the power and the way it should be exercised under those circumstances.

In *Julius v. Bishop of Oxford*, (1880) 5 AC. 214, Lord PENZANCE said at p. 229:

“The words ‘it shall be lawful’ are distinctly words of permission only – they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing; and the true question is, not whether they mean something different, but whether, regard being had to the person so enabled, to the subject-matter, to the general objects of the statute, and to the person, or class of persons for whose benefit the power may be intended to have been conferred, they do or do not create a duty in the person on whom it is conferred, to exercise it.”

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The burden will be on those who contend that an obligation exists to exercise the power to show something in the circumstances of the case which creates the obligation.

What is there then in the circumstances of this case which makes it plain that there should have been reference to a medical referee?

The magistrate was obviously in a dilemma. Both experts had used the same medium of having x-rays taken to determine whether the fracture had been resolved or not. Both gave different conclusions when one would have expected some measure of consistency after an appeal to the same source of information of x-ray pictures.

At the time Mr. Hugh was consulted, I will assume that there was some degree of uncertainty as to whether the appellant was fit to be discharged. On his assessment, based no doubt chiefly on the reading of the x-ray picture which he saw, there was still an existing fracture of the scaphoid bone of such a nature, according to his evidence, which was incapable of uniting, which would be incurable and for all time produce a degree of permanent incapacity. It passes strange then that in the matter of a few months afterwards another medical opinion was given to the contrary, and this was also based on the reading of another x-ray picture taken for that purpose, which showed the non-existence of a fracture and gave rise to an opinion wholly different from that of Mr. Hugh. Surely a further effort was required to solve this disturbing conflict? Why should one endure this mysterious uncertainty when the opportunity exists for verification one way or another?

I find it difficult to comprehend why the magistrate neglected to adopt the obvious solution. The situation cried aloud for clarification. It was not that Mr. Hugh had used an x-ray upon which to base his conclusion, and Mr. Alli had not. They both had a peep through photography at the seat of the trouble. There was either a mistake of some kind, or some carelessness in approaching the truth. When the court has the means at its disposal of further investigation to unravel this tangle, it is not only necessary, but it is of duty bound to avail itself of this advantage.

It is precisely to meet a predicament of this kind that the Ordinance has provided for reference to a medical referee. The opportunity should have been seized, not shunned. Appellate courts must be ever watchful to see that where a judicial duty fairly arises, it ought not capriciously or arbitrarily to be by-passed under the guise of the exercise of a discretion.

In Padfield & Others v. Minister of Agriculture, Fisheries and Foods and Others, [1968] 1 All E.R. 694, the Minister exercised his discretion under the Agricultural Marketing Act 1958, in a particular way. He refused to refer a complaint for investigation by a committee and claimed that that discretion was unfettered. Undoubtedly he did have some measure of discretion, but did that empower him to do whatever he wished? Lord REID at p. 699 approached the matter in this way:

“It is implicit in the argument for the Minister that there are only two possible interpretations of this provision – either he must refer every complaint or he has an unfettered discretion to retire to refer in any case. I do not think that that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole, and construction is always a matter of law for the Court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.

Then Lord PEARCE at p. 714 had this to say about the Minister’s responsibility:

“It is quite clear from the Act of 1958 in question that the Minister is intended to have some duty in the matter. It is conceded that he must properly consider the complaint. He cannot throw it unread into the waste paper basket. He cannot simply say (albeit honestly) ‘I think that in general the investigation of complaints has a disruptive effect on the scheme and leads to more trouble than (on balance) it is worth; I shall therefore never refer anything to the committee of investigation’. To allow him to do so would be to give him power to set aside for his period as Minister the obvious intention of Parliament, namely that an independent committee set up for the purpose should investigate grievances and that their report should be available to Parliament. This was clearly never intended by the Act of 1958. Nor was it intended that he could silently thwart its intention by failing to carry out its purposes.”

And at p. 715:

“It was for the Minister to use his discretion to promote Parliament’s intention. If the court had doubt as to whether the appellants’ complaint was frivolous or repetitive, or not genuine, or not substantial, or unsuitable for investigation or more apt for arbitration, it would not interfere. Nothing which has been said in this case, however, leads one to doubt that it is a complaint of some substance which should properly be investigated by the independent committee with a view to pronouncing on the weight of the complaint and the public interest involved.”

Lord HODGSON at p. 710 then remarked, on the necessity of the Minister to direct himself properly on the exercise of his discretion, as follows:

“If the Minister has a complete discretion under the Act of 1958, as in my opinion he has, the only question remaining is whether he has exercised it lawfully. It is on this issue that much difference of judicial opinion has emerged although there is no divergence of opinion on the

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relevant law. As Lord DENNING, M.R., said, citing Lord GREENE, M.R., in *Associated Provincial Picture Houses. Ltd. v. Wednesbury Corpn.*,

“a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider.”

And Lord UPJOHN, at pp. 718 and 719, proceeded to consider whether the Minister did so or not when he said:

“I turn to his (the Minister’s) second letter . . . which as far as relevant was in these terms:

You will appreciate that under the Agricultural Marketing Act, 1958, the Minister has unfettered discretion to decide whether or not to refer a particular complaint to the committee of investigation. In reaching his decision he has had in mind the normal democratic machinery of the milk marketing scheme, in which all registered producers participate and which governs the operations of the board.’

This introduces the idea, much pressed on your lordships in argument, that he had an ‘unfettered’ discretion in this matter; this, it was argued, means that provided the Minister considered the complaint *bona fide* that was an end to the matter. Here let it be said at once, he and his advisers have obviously given a *bona fide* and painstaking consideration to the complaints addressed to him; the question is whether the consideration given was sufficient in law.

My lords, I believe that the introduction of the adjective ‘unfettered’ and its reliance thereon as an answer to the appellants’ claim is one of the fundamental matters confounding the Minister’s attitude, *bona fide* though it be. First, the adjective nowhere appears in s. 19, it is an unauthorised gloss by the Minister. Secondly, even if the section did contain that adjective, I doubt if it could make any difference in law to his powers, save to emphasise what he has already, namely that acting lawfully he has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing, to unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully, and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion on the Minister rather than by the use of objectives.

The second sentence of this letter again only shows what I have earlier pointed out, that the Minister has failed to understand that it may be his duty to intervene where there is a serious complaint that the 'democratic machinery' of the board is producing unfairness among its members.

Those are the reasons relied on by the Minister for refusing a reference. Summing up the matter shortly, in my opinion every reason given shows that the Minister has failed to understand the object and scope of s. 19 and of his functions and duties thereunder, which he has misinterpreted and so misdirected himself in law.

"If he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and directing a prerogative order to issue accordingly."

Humbly, I agree with the dicta set out above.

Superior courts are appropriate organs for reviewing the merits of the exercise of a discretion where the circumstances taken in relation to the statutory provisions tend to cast a duty upon the repository of that discretion.

The principle that judicial discretion must be exercised "according to law" is indeed deeply entrenched in the common law, as has already been pointed out, and whilst courts generally will refrain from merely asserting their own discretion for that of an authority in which that discretion is confided, nevertheless the right is maintained to determine what is "lawful", and whether the exercise, in the circumstances, was manifestly against sound and fundamental principles.

In this case the magistrate in breach of his duties denied the respondents the opportunity of a reference to a medical referee when the circumstances created and demanded the necessity for its grant. He arbitrarily and capriciously withheld what could have been of assistance in determining whether or not the shadow was not mistaken for the substance, 'colourable glosses' for just conclusions, and wrong for right. Rules of reason and justice were not observed. He was not guided by a sound discretion.

Wherever and whenever possible, no available means should be spared to ensure that truth is not trifled with, and that whatever the result, it comes from fair, candid and unprejudiced evidence.

The state of the evidence did not permit of that discernment. The magistrate will, obviously, be, with the aid of evidence from a medical referee, in a better position to make up his mind instead of guessing as to which x-ray revelation was true or not. It was within the competence of the Full Court to remit the case back to him with the directions given. S. 28 of the Appeals Ordinance, Cap. 17, gives to that court power to –

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- (a) affirm, modify, amend, or reverse, either in whole or in part, the decision, sentence, or any order made by the magistrate with reference to the cause, or may enter any judgment or make any order which the magistrate ought to have made; or
- (b) refer the cause to the magistrate with directions to re-hear and determine it or otherwise to deal with it as the court thinks just; or
- (c) make any other order for disposal of the case which justice requires:

The appeal will therefore be dismissed and the decision of the Full Court is affirmed.

Appeal dismissed.

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[Court of Appeal (Stoby, C., Luckhoo and Persaud, JJ.A.)
March 6, 9, 1967, March 12, June 11, 14, October 11, 1968.]

Contract of sale in writing — Immovable property — Description of property imperfect — Possession — Whether extrinsic evidence can be taken into account — Mutual mistake — Action of the parties — Rectification and specific performance.

Practice and Procedure — Counterclaim — Amendment by Court of Appeal.

In 1962 the appellant became the owner of Plan. Zorg-en-Vliet, Essequibo. The land was occupied by tenants who cultivated rice. The appellant offered to sell their respective holding to the tenants, by means of written contracts with a promise to pass the several transports after a survey had been had. Among the tenants was the respondent, who was then in occupation of seven and one half acres of land which her son and nephew cultivated. The appellant's husband and attorney who had dealt with the tenants, offered to sell this plot of land to the respondent provided she agreed to buy in addition, an adjacent portion of uncultivated land. She agreed and the purchase price of the whole area was settled at \$4,300.00

The land was situate between the holding of one Chunilall on the west and one Bispat on the east, but the original seven and one half actes was contiguous to that occupied by the latter. In the subsequent written agreement

the land which the respondent purchased was described as comprising eleven beds of rice lands and sand reefs measuring approximately eleven acres and situate immediately east of the eleven beds occupied by Chunilall”.

The appellant employed a surveyor who divided the land and made a plan. In the plan, Chunilall’s holding, which was marked ‘P’, consisted on 12.121 acres. Immediately east is a block marked ‘O’ comprising 2.1 acres and east of that and adjoining each other came the respondents holding marked ‘N’ and Bispat’s marked ‘M’. The respondent occupied the whole of block ‘N’.

Differences arose between the parties, and in April 1964 the appellant filed an action against the respondent for damages for breach of contract and possession of the land, which he described as being approximately eleven acres immediately east of Chunilall’s. At the trial he amended his claim to seek an order for specific performance. The respondent counterclaimed seeking a rectification of the written agreement to enable the eleven acres of land to be properly described as being immediately west of Bispat’s holding. She also sought specific performance of the agreement as rectified.

HELD: (i) the description by beds was imprecise and imperfect and extrinsic evidence was admissible to explain the latent ambiguity;

(ii) the acts of the parties both before and after the agreement could be used to clarify any ambiguity and signify their true intention;

(iii) the true intention of the parties related to an area of land similar to that occupied by Chunilall i.e. eleven beds comprising 12.121 acres but adjoining the land occupied by Bispat;

(iv) accordingly, although the counterclaim sought specific performance of the agreement to sell eleven acres adjoining Bispat’s holding the court would amend it to read 12.121 acres.

Order of trial judge varied.

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

F. H. W. Ramsahoye for respondent.

LUCKHOO, J A.: When in 1962 Hemwantie Singh (afterwards referred to as the “Vendor”) became the owner of Pln. Zorg-en-Vliet. Esse-qui-bo. the estate was under rice cultivation, with the tenants of the previous owner occupying holdings in lands which were undivided.

She, through her husband and duly constituted attorney. Ramnaraine Singh (afterwards referred to as the “Attorney”), gave those tenants the opportunity of purchasing those holdings under written agreements, with the promise of having transport in due course. But first, a survey of the lands was necessary, then a plan would have to be made and receive the required statutory approval of the Central Board of Health, after which, upon deposit in the Deeds Registry, the course would be clear for the passing of transport.

Before the Vendor’s acquisition, Bhagoutie and Ramnaraine, two young persons, the son and nephew, respectively, of the respondent Deokie (afterwards referred to as the “Purchaser”), shared in the family’s occupation of

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one of these holdings comprising about 7½ acres, the goodwill of which had been purchased from the wife of the previous owner for \$700. This was situate immediately west of land which one Bispat occupied in 1963 (which will be referred to as “Bispat’s land”). The “Attorney” approached the “Purchaser” and gave her the opportunity of acquiring that plot of about 7½ acres, provided she took, in addition, an adjacent portion of uncultivated land described as “bush land”. The “Purchaser”, wanting to retain the whole of the 7½ acres, agreed to purchase the additional land to ensure that the cultivated portion did not become lost to her and/or her family. The purchase price was finally fixed at \$4,300, and the land sold was to be of the same area as a portion occupied by one Chunilall, whose holding consisted of 11 beds of approximately 11 acres.

About two weeks after the negotiation for this sale, an agreement was entered into on the 7th June, 1962. The “Purchaser” paid the sum of \$400 on account of the purchase price, took possession under the agreement, and expected to have her title, as provided therein, by December 1962.

The task for the survey was entrusted to Sheik Shan Insanally, a Sworn Land Surveyor. He carried out this survey as from the 26th June, 1962, and subdivided the whole estate into blocks lettered A to Z, from the public road in a westerly direction to the extremity of the estate, all of which appear on his plan dated 5th July, 1962. That same year the plan was deposited in the Lands and Mines Department, and after the Central Board of Health had duly approved of it, was deposited in the Deeds Registry on the 6th March, 1963.

The “Vendor”, as from that time, could have passed transport of any divided portion of that property as it appeared on the plan, if she was in a position to pay off her indebtedness to the British Guiana Credit Corporation which held a mortgage over the estate. Apparently she was not in a position to do so, and a foreclosure took place in September, 1963. But after liquidation of this indebtedness in October 1963, the “Vendor” then became free to transport her lands. By this time, however, the parties had assumed unfriendly attitudes towards each other, and recourse to litigation became inevitable. This was commenced by the “Vendor” on 30th April, 1964, when she sued the “Purchaser” for damages for breach of contract, forfeiture of the deposit of \$400 and “possession of the tract of approximately 11 acres referred to in the agreement, possession whereof was given to the defendant”.

At trial the claim was amended to ask for the remedy of specific performance of the agreement (if it still subsisted) so that the “Purchaser” should be compelled to take transport of the land in question described under the agreement as:

“A piece or parcel of land situated at Zorg-en-Vliet, Essequibo, comprising of 11 beds of ricelands and sand-reefs, measuring approximately 11 acres and situate immediately east of the 11 beds bought and occupied by Chunilall east of the cross navigation canal running

across the said Plantation Zorg-en-Vliet to the south on the Essequibo Coast, part of the frontlands of Plantation Annandale, Essequibo.”

One would normally have expected to find that piece of land described as above delineated on the plan which was made with the object of setting out purchases under agreements. But no area is demarked corresponding to or in any way fitting in with the above description. There is to be seen Chunilall's holding of an area of 12.121 acres marked “P”; immediately east of this is a block marked “O” of approximately 2.1 acres; immediately east of “O” is a block marked “N” of 12.121 acres (this will attract a great deal of attention later); and still further east of “N” appears Bispat's land which is marked “M”.

Plot “N” therefore appears next to Bispat's land consisting of a cultivated portion of 7½ acres immediately to the west of that land and an uncultivated portion further west, totalling 12.121 acres.

After the survey was made and the paals were placed, the “Purchaser” was satisfied that the area represented by “N” on the plan was what she had bought. In pursuance of the agreement she occupied, possessed and planted that area. But although the “Vendor” for so long allowed her so to do without murmur, counsel contended that “N” was not the land which was sold, because the description of the land under the agreement pertains to a certain portion of land immediately east of Chunilall's, therefore (it is argued) there must be a re-survey in accordance with the exact terms of the agreement to ascertain an area which would provide for 11 beds of approximately 11 acres immediately east of Chunilall's land; and that the Court should order the “Purchaser” to accept specific performance of this.

Counsel for the “Purchaser” countered with an amendment under which he asked that there should be:

- (a) a rectification of the agreement of the 7th June, 1962, to enable the 11 acres of land agreed to be purchased by the defendant from the plaintiff and commencing from the western boundary of Block ‘M’ on the said plan by Insanally and extending westwards, to be properly described therein;
- (b) specific performance of the agreement as amended;
- (c) an order compelling the plaintiff to execute a proper survey of 11 acres of land actually agreed to be purchased by the defendant from the plaintiff.

This rectification, as could be seen, would also involve a re-survey.

The learned trial Judge, in his decision, found that when negotiations took place the “Purchaser” was in occupation of 7½ acres of land, which area commenced immediately west of an area of land occupied by Bispat, and that Bagoutie and Ramnaraine were cultivating this land. Further, that the “Attorney” only agreed to sell her that 7½ acres of cultivated land provided

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she also purchased the 3½ acres of abandoned or bush land which included a sand-reef. To this she agreed and the bargain was struck.

The plaintiff's claim was dismissed with costs; judgment was entered for the defendant on her counterclaim with costs, and the relief sought in paragraphs (a), (b) and (c) (referred to above) was granted.

In this Court it was argued on behalf of the appellant that:

- (a) the finding of fact that the prior oral agreement between the plaintiff and the defendant was for the sale of an area of land approximately 11 acres measured from immediately west of the land occupied by Bispat, was unreasonable and cannot be supported, having regard to the evidence;
- (b) the finding that when the parties signed the written agreement of 7th June, 1962, the plaintiff's attorney intended to sell approximately 11 acres of land immediately west of Bispat's land, was unreasonable and cannot be supported, having regard to the evidence;
- (c) the finding that there was a common mutual mistake of fact in the minds of the plaintiff and the defendant when the said agreement was signed was unreasonable and cannot be supported, having regard to the evidence.

It was argued further that the trial Judge, on the evidence, ought to have found:

- (a) that the written agreement of the 7th June, 1962, was valid and represented the true intention of the parties;
- (b) that the plaintiff was entitled to specific performance thereof and to the other relief sought in her statement of claim.

Counsel also contended:

- (c) that the learned trial Judge erred in law when he ordered rectification on the defence of the agreement of the 7th June, 1962, as there was not proof, as is required by law, of such mutual mistake in the description of the property as would justify any rectification, with a consequent order for specific performance thereof.
- (d) if there was any mistake at all, it was unilateral only and so he ought to have rescinded the written agreement and made such equitable orders as the justice of the case required.

The focal point in the controversies which revolve around the arguments must be centred and rooted in the description of the property under the written agreement (to be referred to as "the agreement"). It is to be noticed that both parties ask for and want specific performance, but of what land? Is it to be (a) of a quantum (not yet surveyed) east of Chunilall's block "P", for which the "Vendor" contends? Or, (b) of a quantum (not yet surveyed) west of Bispat's block "M", as the "Purchaser" in her counterclaim

for rectification seeks? Or, (c) Could it be, on the evidence, of a quantum already surveyed as block "N", west of Bispat's land?

Since the description of the property is embodied in the agreement, one must be careful not to use extrinsic evidence of any kind to contradict, vary, add to or subtract from the terms of the document; for when the parties have deliberately put their agreement into writing, a presumption arises that they intended to form a full and final settlement of their intentions and one which "should be placed beyond the reach of future controversy, bad faith, or treacherous memory". (See Phipson on Evidence, 10th Ed., p. 720, para. 1782). But there are a number of exceptions to what may at first appear from this to create an exclusive memorial in the form of an agreement. I will only deal with such as may in one way or another be relevant for the purpose of deciding the issues in this case.

Of initial significance is Bacon's maxim, Reg. 23: "*Ambiguitas verborum latens verificationis suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur,*" from which, it would be seen, that a latent ambiguity in the words of a written instrument may be explained by evidence; for it arose on evidence extrinsic to the instrument, and it may therefore be removed by other similar evidence. (See *Riverwear Companies v. Adamson*, [1877] 2 A.C. 764).

And in *MacDonald v. Longbottom*, 1 E.L. & E.L. 977, when the purchaser agreed to buy of the vendor certain wool which was described as "your wool", the right of the vendor to bring evidence as to the quality and quantity of the wool was disputed, but the Court held that the evidence was admissible.

BLACKBURN, J., in *Burges v. Wickham*, 3 B. & S. 669, showed the value of extrinsic evidence in such cases when he said:

"It is always permitted to give extrinsic evidence to apply a written contract, and show what was the subject-matter to which it refers. When the stipulations in the contract are expressed in terms which are to be understood, as logicians say, not *simpliciter*, *sed secundum quid*, the extent and the obligation cast upon the party may vary greatly according to what the parol evidence shows the subject-matter to be; but this does not contradict or vary the contract. For example, in a demise of a house with a covenant to keep it in tenantable repair it is legitimate to inquire whether the house be an old one in St. Giles's or a new palace in Grosvenor-Square, for the purpose of ascertaining whether the tenant has complied with his covenant; for that which would be repair in a house of the one class is not so when applied to a house of the other. (See *Payne v. Haine*).

"In these cases you legitimately inquire what is the subject-matter of the contract, and then the terms of the stipulation are to be understood, not *simpliciter*, but *secundum quid*."

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Also it will be necessary to observe that there are cases where supplementary or collateral terms are admitted in certain circumstances in evidence to complete what is in writing where all its terms have not been recorded, but in such cases evidence of the supplementary terms are admitted, not to vary, but to complete the written contract. Any stipulation so omitted must not contradict the terms of the agreement. As, for example a verbal assurance that the drains of a house were in good order given as a condition for the completion of a lease was held to be a collateral warranty which might be proved by parol. (See *De Lassalle v. Guildford*, [1901] 2 K.B. 215 C.A.) .

Further, there are cases where it is permissible to allow parol evidence to explain phrases in contracts, whether commercial or agricultural etc., subject to known customs, for, as was said in *Brown v. Byrne*, 3 E. & B. 716:

“Words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. In such cases the evidence neither adds to, nor qualifies, nor contradicts the written contract; it only ascertains it by expounding the language.”

And so in *Smith v. Wilson*, 3 B. & Ad. 728, parol evidence was admitted to prove a local custom that when a covenant for the lease of a rabbit warren provided that 10,000 rabbits would be left on the warren, 1,000 meant 1,200.

Lastly, where a contract has been reduced into writing in pursuance of a previous agreement, and the writing, owing to a mistake common to both parties erroneously expressed their intention, equity will rectify the written instrument in accordance with their true intent, after parol evidence of the prior agreement. (See *Earl Beauchamp v. Winn*, L.R. 6 H.L. at p. 232, and *Murray v. Parker*, 19 Beav. 305).

It may now be opportune to look at the description of the property in question in the agreement to see to what extent the extrinsic evidence in the case could properly be utilised and with what effect on the basis of the legal principles set out above. According to the written word, the land was to be of “11 beds of ricelands and sand-reef measuring approximately 11 acres”. Its situation was to be “immediately east of 11 beds bought and occupied by Chunilall east of the cross navigation canal running across the said plantation Zorg-En-Vliet”. What was there meant by “11 beds” would require some extrinsic evidence to reveal, bearing in mind that it was to be “11 beds” of approximately 11 acres, Its meaning does not arise *simpliciter* and must be derived from evidence which would provide its true meaning and remove any doubtful import.

One then has to look at the evidence to see how this particular form of description came to be employed.

The land which Chunilall occupied was ‘a field’ according to the terminology on sugar estates, in that it fell between two cross trenches. It was known that that ‘field’ actually consisted of 11 beds which were there to be counted. Each bed was thought to be of approximately one acre. So that

Chunilall's land could properly be said to have "11 beds of approximately 11 acres". The land immediately east of Chunilall's was also another 'field', falling as it did between two cross trenches; but there were no beds to be counted as the previous owner, Paloo Singh, had bulldozed it, so that reference to the area of Chunilall's 11 beds was to determine the size of the "Purchaser's" land. When the "Attorney" described the land sold to the "Purchaser" in the way he did, he thought that Chunilall's field and that east of it were of the same size. This would mean that the latter would extend from Chunilall's eastern boundary in an easterly direction right through to Bispat's western boundary as a field, and so for all practical purposes, on that assumption, it would be immaterial whether the description had been worded to designate the land as being east of Chunilall's or west of Bispat's.

But comes the difficulty. That 'field' turned out to be 15 beds of nearly 15 acres — substantially more land than was contemplated in the agreement. Clearly the "Purchaser" cannot expect to have 15 beds when she bargained for only 11. Ought she then to have the equivalent of 11 beds measured immediately east of Chunilall's when to do so would deprive her of about two acres of the land which her family had possessed and cultivated and for which she directly negotiated prior to the agreement? Or, should it be measured from west of Bispat's land, in which case she would not lose any of the land for which she had really bargained?

Counsel for the "Vendor" has stressed that on a strict construction of the written agreement, the 11 beds must be measured immediately east of Chunilall, as any other construction would be inconsistent with and in contradiction of the way of description. Counsel for the "Purchaser", on the other hand, argues that what the parties intended would not permit of such a construction, as the bargain accepted by the learned Chief Justice was for the purchase of the 7½ acres of cultivated land west of Bispat's, together with additional land further west to comprise 11 beds. He contended, further, that at the time of the making of the agreement the expression "immediately east of the 11 beds bought and occupied by Chunilall" had no particular significance, because the parties thought that the whole field was 11 beds.

On the legal aspects already examined, it is clear to me that the agreement cannot be judged in isolation, but of necessity must be construed with the available body of extrinsic evidence. Only a comprehensive probe could ascertain whether the parties had at any time an actual common intention so that it could be said that they were in full agreement to satisfy the basic element of a contract. If so, what was that intention? And, was it by mutual mistake so imperfectly set out in that agreement as to require rectification? Or could effect still be given to what is recorded, in the light of the extrinsic evidence, without the necessity for rectification?

In this investigation what was said and written by the parties, then-behaviour, actions and conduct would clarify ambiguities and signify their true intentions. What they did might speak volumes to show what they meant,

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in much the same way as Lord SUGDEN in a general sense said in *Attorney General v. Drummond*, (1842) 1 Dr. & War. 353.

“Tell me what you have done under such a deed and I will tell you what that deed means.”

I shall then first proceed to look at what the parties did on realising that the land did not extend the whole width of the field from Chunilall to Bispat, in an effort to determine the true reading of the agreement, in the face of the false assumption made.

As soon as the “Attorney” discovered that the field in question had nearly 15 acres, he turned to a survey of Chunilall’s 11 beds to find its area which was 12.121 acres. This, according to the agreement, would be the quantum of the “Purchaser’s” entitlement. On this ascertainment, he proceeded to survey an area of this equivalent immediately west of Bispat, marked “N” on the plan. Possession of this block “N” was then given to the “Purchaser” undoubtedly as her allotment under the agreement, after which she cleared an area of bush to allow for an expansion of rice cultivation from 7½ to 12 acres. Not only is this disclosed by the evidence, but the “Vendor’s” own statement of claim (para. 11) lends confirmation when it is there said:

“Since the signing of this agreement, the defendant has cultivated crops of paddy of 12½ (twelve and a half) acres which he (sic) has reaped and disposed of to his (sic) own benefit.”

The fact that the occupation and user of this land, block “N”, was with the consent of the “Vendor” must be an indication of some value that this was the subject-matter of the sale. Would the “Vendor” in the circumstances have given possession of something which was not sold? And, would the “Purchaser” have occupied something which was not bought?

In *Vandiemien’s Land Co. v. Marine Board of Cable Cape* (an appeal to the Privy Council from the Supreme Court of Tasmania), the respondents were sued for a trespass by their agents on the foreshore. The appellants claimed that they were entitled thereto under a Crown grant in 1848 conveying to them lands of which, prior to the grant, they had taken possession, and on which they had expended money; and the Judge directed the jury that evidence of acts of user antecedent to the grant was inadmissible. Held: That the appellants were entitled to a new trial as acts of user before the grant led up to and explained what was afterwards granted, and was cogent evidence of what was intended to pass thereby. The Earl of HALSBURY, L.C., said in the course of the judgment:

“It is quite true that if the language of the grant itself were absolutely plain and unambiguous, no amount of user would prevail against the plain meaning of the words. (See *North-Eastern Railway Co. v. Hastings*, [1906] A.C. 260). It is, however, impossible to contend that the language of this instrument can be so represented. The language is very wide, . . . when these are circumstances under which the grant is actually made – why is it not evidence, and cogent evi-

dence, when the taking possession of the particular pieces of land is proved and the continuance in possession before and after the grant is proved? The time when and the circumstances under which an instrument is made, supply the best and surest mode of expounding it, and when the obvious intention is to give a title to what has been taken and retained before the actual grant, it is manifest that what has been so taken and retained is cogent evidence of what has been granted. When evidence of this character has been practically withdrawn from the jury, it is impossible to allow the verdict thus obtained to stand.”

“All circumstances which can tend to show the intentions of the parties, whether before or after the conclusion of the deed itself may be relevant, and in this case their lordships think are very relevant to the question in debate.”

And in *Booth v. Ratte*, (1890) 15 A.C. 188 at p. 192, Sir RICHARD COUCH pronounced upon the utility of possession in explanation of the paper writing when he said:

“This is not a case of a stranger taking possession of part of the two chains. The plaintiff moored the wharf to the bank where he thought fit by virtue of his purchase, and had possession. The expression ‘along the water’s edge’ may either signify the line which separates the land from the water, or a water space of greater or less width constituting the margin of the river. The description in the conveyance is capable of being explained by possession, and it appears to their lordships that the possession which in this case has followed upon the conveyance is sufficient to give the plaintiff a good *prima facie* title to the whole of the two chains as against Prevost.”

If a fair inference may arise from the fact of possession and user that the parties were in full agreement that block “N” was the land contemplated by the agreement, such an inference becomes almost irresistible on examination of a letter of date 20th April, 1963, sent by the “Vendor’s” solicitor to the “Purchaser”, and one of the 23rd January, 1963, sent by the “Attorney” to the “Purchaser’s” husband. In the first mentioned letter the solicitor wrote:

“Mr. Ramnaraine Singh, the attorney of Hemwantie Singh . . . has consulted Mr. B. O. Adams, Q.C., and myself re agreement of sale made on the 7th day of June, 1962, between Hemwantie Singh, by her duly constituted attorney Ramnaraine Singh, and yourself. You have failed to comply with the following paragraphs of the said agreement.” (Here follows those paragraphs as to the payment of transport and surveying fees etc.) “Please regard this agreement as being null and void, and you are required to give up possession of the 11 beds as described in the abovementioned agreement within seven days.”

This letter is specific. The language used must therefore receive close inspection. The “Purchaser” had been given possession of land under the agreement, which the “Vendor” wanted back; that land had to be, and was

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surveyed, to provide for 11 beds, which is shown as block “N”. Block “N” is the only area of 11 beds; it is to the west of Bispat and not east of Chunilall. There was no survey, no occupation of any “11 beds” east of Chunilall. The “11 beds” in the letter, then, could only apply to block “N” and no other land. In the letter the “11 beds” is said to be “as described in the agreement”. This, in my opinion, pinpoints block “N” as that land. In the “Attorney’s” letter sent after the survey was done and the plan made, he wanted the agreement for the purpose of “11 beds of rice lands of about 11 acres” to be carried out. This again could only have been in relation to block “N”. Throughout, the spontaneous reaction of both parties had taken for granted what represents the 11 beds. It seems to spring from the interpretation of the agreement in this sense: The land sold is described as being east of Chunilall’s. That was because it was thought to be a field which would go from Chunilall to Bispat, and so include all the cultivated land which induced the purchase; but as it did not, the measurement must be from west of Bispat so as to include that which was essential to the bargain.”

The agreement was drafted by a layman and did not specify what should happen if the land turned out to be less than a field; it was silent on the point, and incomplete. The answer could only come from what the parties had determined. By their conduct they treated the form of description, which was based on a wrong belief, as inapplicable, and supplemented the incomplete description by making use of their mutual understanding of what should have been written if enough thought had been employed to do justice to the true terms of what they had agreed upon.

TYNDALL, C.J., in *Miller v. Travers*, (1832) 8 Bing. 244, at p. 248, said of incomplete descriptions, that where the “description is imperfect or inaccurate . . . parol evidence is admissible to show what estate was intended to pass and who was the devisee intended to take; provided there is sufficient indication of an intention appearing on the fact of the will to justify the application of the evidence.”

In my view, in the instant case, it could well be said that the uncertainty which arose was not due so much to mis-description, as to a wrong assumption which the parties corrected in the way they wanted. They had assented, or by their conduct would be deemed to have assented, to the same thing, in the same sense. Neither party was ever misled nor mis-apprehended the situation. Both had a *consensus ad idem*. So that in reality the uncertainty could be said to have arisen from an incomplete and insufficient description in the agreement which the parties on their own fulfilled.

It is significant that it was only at the trial that the Attorney sought refuge in such an interpretation of the agreement as would eliminate block “N” as the land intended to be conveyed and instead require a survey to be made of 11 beds of 12.121 acres east of Chunilall’s land. He did so by trying to make out that Balmakund, the “Purchaser’s” husband, had expressed a desire to purchase lot “O” and that when blocks “N” and “O” were being

surveyed, it was he. Balmakund, who had shown the surveyor where to divide that field so as to provide for two separate blocks.

Insanally, the surveyor, however deposed that it was the "Attorney" who gave him instructions as to the divisions to be made in each instance when he surveyed the blocks from A to Z.

It would indeed have been a remarkable coincidence if Balmakund was able in a haphazard moment to point to a part of the land which he wanted to have separated from the other and then subsequently discover that one portion by sheer accident turned out to be exactly 12.121 acres, which was what the "Purchaser" was supposed to be given.

The trial Judge, in considering this aspect, found that Balmakund was not the agent for the "Purchaser" to make any arrangement for the purchase of Lot "O". In my view, even if Balmakund was such an agent, the "Attorney's" evidence on this point ought not to be given any credit whatsoever, since it is wholly out of accord and inconsistent with the words which flowed from his pen when he wrote two letters to Balmakund. In his first of the 9th September, 1962, after block "N" was actually possessed by the "Purchaser", he said:

". . . please come with Ramkarran to pay off for the survey fees at Zorg-en-Vliet. Also be ready to pass your transport right away."

Transport obviously was to be in accord with that survey, and no other. There was not a single word in this letter either as to the arrangements for the purchase of block "O"; nor the naming of any price for the same. How could there have been a reference suggesting the passing of transport "right away" without the discussion as to price for the purchase of block "O" if block "O" was to be included in the transport?

The transport here could only have been for block "N". There was never, remotely or otherwise, any hint of any transaction concerning block "O". The explanation was an obvious concoction to meet the cogent evidence of a survey deliberately undertaken to show where the 11 beds should be.

The next letter of the 23rd January, 1963, to Balmakund is in further confirmation of the "Purchaser's" case and confounds the "Vendor's" untenable position. It reads as follows:

"We made an agreement of sale on the 7th June, 1962, for the purchase of eleven beds of rice lands of about eleven acres at Zorg-en-Vliet, Essequibo, for \$4,300.00. You paid on deposit \$400.00 and the sum of \$ 1,000 was to have been paid in December 1962 when transport was to have been advertised and passed.

"You failed to carry out your second part of the agreement and I will draw your attention to paragraph 10 of your agreement. You have not even paid me interest for the 1st – 6 months you occupy the lands

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of your balance of \$3,900.00 as per your agreement under paragraph 3B.

I will ask you in very friendly manner to please remedy your defects and let us carry on in the same friendly spirit we started.”

Here again, it will be readily observed that there was no mention of any addition to the quantum of land, originally purchased. It was as it was in June the previous year — “11 beds of about 11 acres” for the purchase price of \$4,300.00. The irresistible inference to be drawn from this letter was that only block “N” was being occupied, for which the balance of purchase price due was \$3,900, and that the only complaints which were being raised related to the time for the passing of transport and the payment of interest due on the one and only contract mentioned, viz. that of the 7th June, 1962. This interest was in respect of the balance of purchase price for 11 beds then occupied, and no other land.

What the “Attorney” wrote then is far from helpful to the particular construction of the agreement pressed on the “Vendor’s” behalf at the trial.

Now it is time to look at the “Purchaser’s” counterclaim. It will be remembered that counsel for the “Purchaser” in his amended defence and counterclaim asked for a rectification of the written agreement so as to enable the “Purchaser” to have 11 acres of land west of Bispat after a proper survey. This led to the learned Chief Justice making an order for specific performance of the following:

“A piece or parcel of land situated at Plantation Zorg-en-Vliet on the west sea coast in the County of Essequibo comprising eleven acres commencing from the boundary of Block “M” cultivated by one Bispat and extending westwards and now shown on a plan of Plantation Zorg-en-Vliet by S.S.R. Insanally, Sworn Land Surveyor, dated the 5th day of July, 1962, and deposited in the Deeds Registry on the 6th day of March, 1963.”

At that time a survey was already made and a plan was in existence; the “Purchaser” was satisfied with the paals of the survey which led to that plan, and block “N” was indubitably accepted as the “Purchaser’s” entitlement. I am therefore wholly unable to appreciate what prompted an application for rectification in diminution of the “Purchaser’s” specific allotment. It has certainly produced a disastrous result for the “Purchaser”. Instead of a conveyance of the equivalent of 11 beds stated in the agreement and shown on the plan as 12.121 acres, she has been given no more than 11 acres, as requested on her behalf; but this is not all. A new survey with all that it entails would have to be made so as to amend the plan to show exactly 11 acres west of Bispat’s land for that 12.121 acres, the extent of the 11 beds bargained for. In reality, it was not in rectification but in derogation, if not distortion, of the true agreement established and existing between the parties.

In my humble view a realistic rectification of the agreement would be of a kind which would embody the following:

- (a) a rectification of the agreement of the 7th June, 1962, to identify the 11 beds therein described as block "N" on the said plan by Insanally;
- (b) specific performance of the agreement as amended at (a).

This will then give effect to what the parties really intended and actually acted upon.

Does the necessity to reform and rectify the agreement arise when the parties themselves have given effect to and virtually executed the material part of the agreement which would otherwise have been in need of rectification?

In *Steele v. Haddock and others*, 156 E.R. 597, in trover for goods, the defendant was allowed to plead, with other pleas, the following equitable defence: that the plaintiff was the owner of certain chemical works: that the goods in question were stock-in-trade and materials on the premises; that the defendants agreed to purchase the chemical works from the plaintiff; and the goods in question were to be included in the property sold: that certain brokers were employed to make the contract, and that they made it by bought-and-sold notes; and, by mistake of the brokers, the notes were so worded as not to include the stock-in-trade and materials, which were intended to be included by both the plaintiff and the defendants; and that the plaintiff is unjustly availing himself of what was a mere mistake in the wording of the notes.

PARKE, B. at p. 598 said:

"We have already held, that the relief must be absolute and unconditional relief would be granted. It seems to me, that there would be no use in reforming the agreement, when it is wholly executed, and nothing remains to be done by either party."

(See also *Rambottom v. Gosden*, [1812] 1 V. & B. p. 165.)

It may well be that the survey and transfer of block "N" was a sufficient execution on the agreement to avoid the necessity for rectification; but the other point of view must be also regarded.

The "Vendor" in her evidence said:

"I am prepared to transport to Deokie what ever land she bought under the agreement. If the Court orders me to do that I shall do that."

The learned Chief Justice has found:

"It is evident that there was a true agreement reached between the parties sometime before the 7th of June, 1962, that what was to be sold and purchased was 11 beds or ? acres of land west of the land occupied by Bispat, and there was *consensus ad idem* between the parties on the subject-matter of the agreement."

Although the description employed in the agreement does not fit in with this finding, one begins to wonder whether it really becomes necessary

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to amend the agreement when the parties themselves gave that meaning to the agreement by not only proceeding to put it into effect by executing and processing a survey accordingly, but by actually putting the “Purchaser” in possession with an intention common to both. Nevertheless, I shall still consider whether the requisite conditions are satisfied for making available this remedy of rectification. There can be no doubt that this is so because –

- (a) there was full and final agreement prior to the execution of the agreement in writing;
- (b) there was clear and unambiguous evidence that the term of the agreement that the land was to be east of Chunilall did not accurately record the true intention of the parties at the time; (see *Fredensen v. Rothschild* [1941] 1 All E.R. 430);
- (c) the intention of the parties expressed in their prior oral agreement continued unchanged up to the time of the execution of the written agreement (see *Fowler v. Fowler* [1859] 4.De G.&J. 250);
- (d) there was a literal disparity between the terms of the two transactions, namely, that understood orally and that recorded in writing; and
- (e) no question arose of any mere inner misapprehension (see *Fredrick C. Rose. London [Ltd.] v. William H. Pim (Jnr.) and Co. Ltd.*, [1953] 2 Q.B.450).

Under these circumstances in law there can be a correction of any erroneous expression of the written word by what the oral word established. And although there may be no necessity so to do, I shall still amend the counterclaim for rectification to identify the land sold under the agreement as block “N” in Insanally’s said plan for the purpose of granting the order for specific performance which both parties desire.

I can find no evidence, or no sufficient evidence, to suggest that there was any unilateral mistake. The above finding of the learned Chief Justice is inconsistent with any unilateral mistake. It is true that he went on to consider the legal position on the basis of unilateral mistake when he said:

“If I am wrong in my finding that there was a mutual mistake in this case, then it may be that there was a unilateral mistake on the part of the defendant.”

But this becomes purely academic as there is no foundation whatever on the whole evidence to support or justify any possible view “of a unilateral mistake on the part of the defendant”.

I do not therefore feel obliged to concern myself with this aspect of the matter.

On the learned Chief Justice’s own finding, and the irresistible conclusions to be had from the evidence, he ought to have made an order for the “Vendor” to convey block “N” to the “Purchaser”; but he was no doubt

moved by the "Purchaser's" ill-conceived amendment, and ordered a conveyance with the consequence of a re-survey, when the plan acceptable to both was already passed by the Central Board of Health and duly deposited in the Register of Deeds according to law. (see sec. 135 of the Public Health Ordinance, Cap. 145). The order of the Chief Justice in effect substitutes a term never contemplated by the parties for that which was performed beyond all reasonable doubt, and irrefragably demonstrated.

The parties should be made to have the benefit of what they contracted for. To give effect to this would require a variation of the order of the learned Chief Justice who should have granted specific performance of the contract for the sale of "11 beds" (block "N") and not 11 acres.

I must therefore vary the order of the learned Chief Justice and order:

- (a) that the "Vendor" do specifically perform the agreement of sale dated the 7th day of June, 1962, by transporting to the "Purchaser" all that piece or parcel of land situate at Plantation Zorg-en-Vliet on the west sea coast in the County of Essequibo known as block "N" and comprising an area of 12.121 acres as shown and described on a plan of Plantation Zorg-en-Vliet by S. S. R. Insanally, Sworn Land Surveyor, dated the 5th day of July, 1962, and deposited in the Deeds Registry on the 6th day of March, 1963, within six (6) weeks from the date hereof, and upon failure of the "Vendor" to do so the Registrar of Deeds is hereby authorised to transport the said property to the "Purchaser", subject to the payment to the "Vendor" of the sum of \$3,900 (three thousand nine hundred dollars), being the balance of the purchase price together with interest on this sum at the rate of 12% per annum from the date of the agreement; provided that if the "Purchaser" requires of the "Vendor" a mortgage on the property for the sum of \$2,900 (two thousand nine hundred dollars), then the "Vendor" is ordered to have that sum secured by a mortgage on the said property in her favour in accordance with the terms set out in the said agreement, in which event on the passing of transport the "Purchaser" will pay to the "Vendor" \$1,000 (One thousand dollars) as therein provided, with interest at 12% from the signing of the agreement.
- (b) the counterclaim for rectification will be amended to show that the land in the agreement has been identified as block "N" on the said plan of Insanally, for which specific performance is ordered as above;
- (c) there will be liberty to apply;

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- (d) each party will bear her own costs in this Court and in the Court below.

The reason for this order as to costs is this: Whilst the appellant in this Court was justified in complaining of the order made in the Court below, she was not entitled to the relief sought; and in the Court below neither party deserved to have what each asked for.

Order of High Court varied.

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[In the Court of Appeal (Stoby, C, Luckhoo and Persaud, JJ.A.)
March 20, May 20, October 11, 1968.]

Evidence — Perception and evaluation — Principles on which an appellate court would intervene.

The appellant was severely burnt when his foot came into contact with an exposed high voltage electrical wire. He was hospitalised and treated by the doctors two of whom eventually pronounced him as having fully recovered. The third doctor concluded that he had suffered a ten per centum permanent partial disability to his foot and a fifty per centum permanent partial disability to his brain. The magistrate accepted this evidence and awarded the appropriate measure of compensation to the appellant. On appeal to the Full Court the decision was varied and the compensation for brain damage set aside.

HELD: what Full Court had to consider was not so much a conflict of facts as of conclusions based on given facts and where the point in dispute is the proper inference to be drawn from proved facts, an appellate court is generally in as good a position to evaluate the evidence as the court of trial.

Appeal dismissed.

A. Chase associated with Miss S. Doobay for the appellant.

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

LUCKHOO, J.A.: The appellant, an electrician apprentice, whilst in the employment of the respondents as a rigger running electric wires at Albion on the 4th February, 1965, had the misfortune of having his foot come into contact with an exposed wire of 440 volts. He sustained severe burns to that foot and the necessity for medical treatment became somewhat prolonged because of the resulting disturbance of an ulcer, followed by

necrosis of a bone in the ankle. At first he was nearly three months at the New Amsterdam Hospital; then Dr. Subryan took care of him until January 1966; after which he was sent to St. Joseph's Mercy Hospital for an operation to remove that piece of bone which had become unhealthy.

On his discharge from that hospital on the 6th February, 1966, he continued to receive outdoor treatment until seen again by Dr. Subryan in April 1966, who discharged him on the 18th April, 1966, as being fit for work,

But, he did not resume work, because of pains to his left foot, which carried scars from the burns. Then for the first time, he consulted Mr. H.C. Hugh, a Fellow of the Royal College of Surgeons – that was on the 21st April, 1966.

This was followed by a claim for compensation based on an alleged ten per centum permanent partial incapacity from the injury to his foot, and fifty per centum permanent partial incapacity for alleged damage to his brain tissue.

The magistrate accepted his claim and awarded compensation in the total sum of \$3,282.20. The employers were dissatisfied with this decision and appealed to the Full Court, which varied the magistrate's order. The award relating to incapacity arising from damage to the brain was set aside.

This Court is now being asked to restore that part of the magistrate's decision denied by the Full Court.

The magistrate had before him the evidence of three medical opinions in deciding the question of incapacity: that of Mr. Hugh, a witness for the appellant, and Mr. George, also a Fellow of the Royal College of Surgeons, and Dr. Subryan, witnesses for the respondents.

That the injury was caused by the accident to the workman's foot was not an issue, but whether any incapacity existed after the 18th April, 1966, was disputed, also whether any injury was ever caused to his brain so as to give rise to any permanent partial incapacity.

Mr. Hugh in his actual examination on the 21st April, 1966, found:—

- (1) A healed scar on the outer side of the left knee.
- (2) A large depressed scar incompletely healed in the middle and outer side of the left leg. Much muscles and soft tissue missing at the side of the burn owing to tubular necrosis.
- (3) A partly healed scar and on the outer side of the left ankle with keloid formation and adhesions to underlying structures.
- (4) Palpation showed the absence of the left lower half of the fibula bone presumably lost owing to the necrosis of the bone as a result of the burns.

He was given a history by the workman of the accident and of headaches experienced since the accident. In his opinion the headaches were likely to be permanent owing to "damage to the brain tissue from the electric charge",

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and would cause permanent partial disability affecting the workman's earning capacity as a porter to the extent of 50 per centum.

Quite naturally, he thought that whatever brain damage there was would depend on the severity of the shock and the amount which passed through the brain. He related that most of the electric energy takes the shortest way to get out of the body, and that he would expect the headaches to come on within a month after the accident. Significantly, however, the headaches did not come on until nearly three months after the accident.

Dr. C. R. Subryan had treated the appellant for the first time on 21st April, 1965 (presumably after he left the New Amsterdam Hospital), for an ulcer which manifested itself on the injured leg. He next saw the appellant on 28th April, 1965. This was the occasion when the first complaint of ahead-ache was made, for which he was given aspirin, codeine and phenacetin and some vitamin tablets. The next and only other occasion of a similar complaint to this doctor was on the 7th May, 1965; but as the headache was "mild" the treatment was "reduced" and Dr. Subryan attributed these headaches to general worry and depression as the patient had not been working for some time. He said that from the 7th May, 1965, until the appellant was discharged as fit for work on the 19th April, 1966, no other complaint was made to him of any headaches. He thought that if the headaches were the result of damage to the brain, he would expect these to be continuous if the damage remained uncured. Before he discharged the appellant he put him on light work for 14 days in order to rehabilitate his muscles by exercise, and when he discharged him he was satisfied that he was fit for his usual work. He ascertained that the pupillary and muscular reflexes were normal.

In his opinion the central nervous system could only be affected if the charge was received on the head or backbone and the current passed through the body; in this case the current did not pass through the body. His examination of the pupillary reflexes was to ascertain if there was any gross damage to the brain.

He also thought that if the electric shock and burning resulted in the disturbance of the central nervous system, the headaches would be immediate if he is conscious or as soon after he recovered consciousness, and not several months after; and that if there was any injury to the central nervous system his test would have revealed that.

Mr. John George, senior surgeon of St. Joseph's Mercy Hospital, operated on the appellant on the 28th January, 1966. He removed four to five inches of bone from about the level of the ankle joint, and discharged him on the 26th February, but the wound was not completely healed then. On the 15th April he saw him again when the wound was healed and advised that he be put for normal duties. His opinion was that the removal of that portion of the tibia would cause no functional disability, and he would be

able to use his leg in the normal way. The appellant only once complained to him of headaches and that was on the 24th January when he referred him to Dr. Roy, the eye specialist, who did not find anything wrong with his eyes. He did not think that the appellant was suffering from any brain injury and there was no injury to the central nervous system as far as he knew.

The magistrate treated Mr. George's evidence as evidence which was chiefly concerned with surgical treatment to the appellant and held that both Dr. Subryan and Mr. George had concentrated on getting the ulcer healed and treated the headaches as secondary. He did not consider the evidence of these two doctors as "satisfactory". Having examined the evidence as a whole, he believed and accepted the evidence of the workman and that of Mr. Hugh, and found that there was "a preponderance" in favour of the workman and awarded him compensation.

The respondents then appealed to the Full Court on the ground "That the decision was one which the Magistrate viewing the evidence reasonably could not properly make." This ground of appeal is found in the Workmen's Compensation Ordinance, Cap. 111, s. 40(1)(b).

When the Workmen's Compensation came into being in 1934 it made provision for an appeal to the Full Court only where a question of law was involved. However, in 1952 an additional ground was made available to enable a dissatisfied party to make challenge where –

"the decision was one which the magistrate viewing the evidence reasonably could not properly make."

In thus extending the scope of appeal, a noteworthy advance was made beyond what prevailed in England where only a question of law was appealable.

The arguments of counsel for the appellant before this Court in terms of its jurisdiction would be limited to matters of law only, and were offered in this way:

- (a) The Full Court erred in law in proceeding to consider the weight of the evidence before the magistrate, and in the manner of so doing, failed to consider that it was one thing to assess weight, and another to say that the decision was one, which, on a reasonable view of the evidence, could not be properly made.
- (b) The Full Court erred in law in reversing a finding of fact of the magistrate, it being one which a magistrate viewing the evidence reasonably could properly make.

In my opinion the result of these arguments would depend on the answers derived from the simple question –

Did the Full Court in its decision arbitrarily assess the weight to be given to evidence which was before the magistrate without justly considering whether the magistrate could, with reason, properly so have decided?

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To begin from the beginning: before a decision is reached, evidence has to be considered. The weight to be attached to that evidence depends largely on rules of common sense, and the factors which are taken into consideration in eliciting the truth vary in each case with the circumstances.

As was said in *R. v. Madahub Chunder* 1874 21 W.R.Cr. 13 at p. 19 (Ind.) per BIRCH, J.:

“For weighing evidence and drawing inferences from it there can be no canon. Each presents its own peculiarity and in each commonsense and shrewdness must be brought to bear upon the facts solicited.”

The Full Court then in the exercise of its own jurisdiction must weigh the evidence when considering whether a decision was reasonable and properly made. This is inevitable; but legal principles govern the way in which weight is to be given to evidence. For example, where a question is essentially one of credibility, as a rule weight ought not to be given to what is rejected; whilst if it be one of inference, freedom and scope exists to call in aid, reason and logic to determine whether the original conclusion should be maintained or varied or rejected. The weight to be attached to evidence involves an examination of its texture and nature to see where it leads. When various aspects of evidence are subjected to this test, and a conclusion reached on the whole evidence, one is able to speak of the “weight of evidence” producing the determinate conclusion, a conclusion which may or may not be justified depending on the view taken of the several constituent elements of the evidence, and what weight is attached to each.

When the Full Court has to decide whether a decision is reasonable and proper on the evidence, it may be necessary to evaluate the evidence to determine whether it was given weight which it did not, could not, or ought not to have; but this must be done in accord with and not contrary to legal principles.

Where there is no evidence to support a particular conclusion, or there is a mere scintilla of evidence of no consequence, then the Full Court will be left with no option but to reverse the finding. In the other extremity, if there is an out and out question of fact essentially wrapped up in credibility, where to see and hear the witness is the gist of the whole matter, then the Full Court which has not enjoyed this opportunity and has been denied a decided advantage, ought not to disturb the finding of fact of the original tribunal. This is so because the language, demeanour, manner, hesitation, inflection of expression, etc., speaks volumes and cannot be reproduced in the printed page. But if it should be possible still to say, despite the fullest allowances, through not having seen or heard the witnesses, that the decision is wrong, unsound and untenable, then assessment based merely on credibility must be relaxed upon confrontation with reason, and correction must take the place of any blind or unreasoning opinion.

Lord HALSBURY said in *Metropolitan Railway Company v. Wright* (1886)11 A.C. at p. 155:

“The judge of first instance is not the possessor of infallibility and like other tribunals there may be occasions when he goes wrong on a question of fact.”

and Lord WRIGHT in *Powell v. Streatham Manor Nursing Home* [1935] A.C. at p. 266 pointed out that the Court of Appeal “must in order to reverse not merely entertain doubts whether the decision below is right but be convinced that it is wrong”.

So that if the appellate mind be satisfied that there are glaring improbabilities about the story accepted, or some specific misunderstanding or disregard of material facts, etc., it will be its duty to correct such erroneous conclusions.

But it must guard against any tendency or temptation to set aside a verdict merely because its own inclination leans towards a different conclusion. The evidence must, as Lord FITZGERALD put it in *Metropolitan Railway Company v. Wright* (supra at p. 155), so preponderate against the verdict “as to show that it was unreasonable and unjust.”

It goes without saying then that the decision whether to reverse conclusions of fact reached by the original court, or not, must naturally be affected by the nature and circumstances of the case under consideration.

In the instant case the Full Court was no doubt mindful of what Lord WRIGHT, with his usual clarity said in *Watt v. Thomas* [1947] 1 All E.R. at p. 584:

“It not infrequently happens that a preference for A.’s evidence over the contrasted evidence of B. is due to inferences from other conclusions reached in the judge’s mind rather than from an unfavourable view of B.’s veracity as such. In such cases it is legitimate for an appellate tribunal to examine the grounds of these other conclusions and the inferences drawn from them, if the materials admit of this, and, if the appellate tribunal is convinced that these inferences are erroneous and that the rejection of B.’s evidence was due to the error, it will be justified in taking a different view of the value of B.’s evidence.”

And in *Benmax v. Austin Motor Co. Ltd.* [1955] 2 W.L.R. 418, Viscount SIMONDS warned against -

“the failure to distinguish between the finding of a specific fact and a finding of a fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts.”

He illustrated that a judge sitting without a jury in a negligence case first finds the facts and then draws from them the inference of fact whether or not the defendant has been negligent. In other words, whilst an appellate court will be reluctant to reject a finding of specific fact which may be founded on the

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credibility of a witness, it will not hesitate to form an independent opinion concerning the proper inference from the specific fact.

And so Lord REID in that same case said:

“In cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion.”

This was supported by Lord MORTON of Henryton, Lord TUCKER, and Lord SOMERVELL of Harrow, and so the matter authoritatively rests.

On the above principles it will now be necessary to examine whether the Full Court on a reconsideration of the material which was before the magistrate could say that he is satisfactorily made out to have been wrong; that he accepted that which was of a speculative and inconclusive nature in preference for that more rooted in reason, bearing in mind that it was for the workman to furnish sufficient proof that the high voltage electricity shock which came to his body through his foot caused such major damage to his brain, as to cause that degree of permanent partial incapacity.

There was no available means of positively identifying any damage to the brain. Reliance had to be placed on clinical tests and there were no symptoms from which any clear-cut conclusions could be drawn. The incidence of headaches complained of, was the factor, from which, Mr. Hugh, in the light of the history of the case, inferred that the alleged injury to the brain existed. Was this enough to evoke an opinion of sufficient strength in requisite proof of the appellants' case?

It is significant that the workman first complained of headaches nearly three months after his accident, that was after he left the New Amsterdam hospital where he had been a patient for that time. In his own evidence he said:

“When I was in hospital I did not get headaches.”

But his witness, Mr. Hugh, said:

“I would expect the headache . . . to come on within a month.”

It then becomes difficult to associate the first headache, experienced nearly three months afterwards, with injury to the brain – when it is to be expected that if the brain was injured headaches would come on within one month.

Consideration must also be given to the further evidence of Mr. Hugh that:

“I have no evidence of the point of entry of the current and no evidence where it left the body. Most of the electric energy takes the shortest way to get out.”

When it is remembered that the injury was to the foot and not anywhere in the region of the head, this evidence does not aid in the inference which he seeks to draw.

Was there then a sufficient basis upon which the magistrate could with reason accept his conclusion that, as a fact, damage to the brain had taken place, which would give rise to fifty per centum permanent partial incapacity?

As was pointed out in the decision of the Full Court. Mr. Hugh only saw the appellant two or three times, and that was about one year after Dr. Subryan saw him. And whereas Dr. Subryan conducted tests for ascertaining whether there was gross damage to the brain and central nervous system by examining pupillary and muscular reflexes, it does not appear that Mr. Hugh conducted any such examination, which admittedly was very important and ought to have been done.

The negative results of Dr. Subryan's clinical tests then remain unchallenged and the Full Court felt that it was quite insufficient for Mr. Hugh to relate the existence of headaches in the patient to damage “solely to the brain”.

In the case it was not so much a clash on facts, as a conflict of conclusions. The belief or disbelief in the witnesses did not then become basic; the gravamen was the testing of the underlying foundation upon which the opinion rested, to determine the weight of those opinions.

If the personality of the expert witnesses was an essential element in the decision, there being a conflict of evidence of fact (as distinct from opinion), an appellate court ought not, save in the clearest cases, to set aside the decision of the adjudicator who has seen and heard the witnesses (See *Flower v. Ebb, Wale Steel Iron and Coal Co.* [1936] A.C. 206 at p. 220.

The Full Court felt, however, that having regard to the tests made by Dr. Subryan and the opportunity for observation which he had much earlier in point of time, and for a longer period, the value of his evidence was too lightly discounted; while Mr. Hugh, who had to depend upon what was told to him and what he saw on the foot alone, did not provide sufficient assurance for his conclusion without having to conjecture.

It was within the province of the Full Court to take this view, if a violent inference is drawn by a magistrate in coming to a conclusion. If, to use the words of Viscount DUNEDIN in *Mckinnon v. Miller* [1909] S.C. 373. his view was “based upon such want of evidence, or such disregard of evidence that . . . it was a view to which no reasonable man had fairly a right to come”, the Full Court, although the question be one of fact, would be en-

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titled to correct his judgment. This Court would not be justified then, in disturbing their decision.

It must be noted that the ten per centum incapacity which Mr. Hugh pronounced in relation to the leg was allowed to stand and quite rightly so as Mr. Hugh saw and examined the leg and could sufficiently assess incapacity on a basis which would leave no room for conjecture; and the magistrate clearly then could with reason have preferred this opinion to the others.

This Court has no choice in concluding that the Full Court did not violate any principles of law in reversing in part the decision of the magistrate. What was there done was well within the category of the ground of appeal taken. This Court can only interfere where a question of law arises, which is well founded. To ask for a restoration of the magistrate's finding, without the existence of some legal basis for so doing, is to ask for the exercise of jurisdiction in the area of facts, which this Court does not possess. This Court is only to decide whether the Full Court acted within the ambit of its legal authority.

The appeal is therefore dismissed and the decision of the Full Court affirmed with costs to the respondents.

STOBY, C: I concur.

PERSAUD, J.A.: I concur.

Appeal dismissed.

R. v. GULLIVER JERRICK

[In the Court of Appeal (Stoby, C, Luckhoo and Cummings, JJ.A.)
July 5, October 11, 1968.]

Criminal law — Burglary and Larceny in a dwelling house charged in one count — Whether bad for duplicity — Criminal Law (Offences) Ordinance, Cap. 10. ss. 187 and 233.

Criminal law — Practice and Procedure — Burglary and Larceny — Juror seriously ill — Continuation of trial with eleven jurors — Whether proper — Criminal Law (Procedure) Ordinance, Cap. 11, ss. 34,171(3).

The appellant was charged in one count for the offence of burglary and larceny in a dwelling house. The punishment for these offences are separately provided for in ss. 233 and 187 of the Criminal Law (Offences) Ordinance, Cap. 10. During the course of the trial it was reported that one of the jurors had fallen seriously ill. Both counsel for the Crown and the accused expressed no objection to the absent juror being excused, and he was thereupon excused by the trial judge. The appellant was convicted.

HELD: (i) although burglary and larceny in a dwelling house are two offences a count which charges both offences is not bad for duplicity;

(ii) it is not sufficient for counsel on behalf of an accused to consent to the continuation of his trial with less than the full complement of jurors. It is the judge's duty to obtain the consent of the accused.

Appeal allowed. New trial ordered.

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

J. Gonsalves-Sabola associated with G. A. Pompey, for the respondent.

STOBY, C: The appellant was indicted and convicted for burglary and larceny contrary to ss. 233 and 187 of the Criminal Law (Offences) Ordinance, Cap. 10.

The evidence in the case was quite simple. On the night of the 20th April, 1967, a Mrs. Rachel Collins retired to bed about 9.45 p.m. During the night she was disturbed by sounds in her bedroom and saw two men, one rifling the dressing-case and the other searching a suitcase. She recognised one of the men. She made an alarm but the men escaped before the arrival of assistance. The police were contacted and after about two weeks one man was arrested. He was placed on an identification parade and identified by Mrs. Collins.

Several matters have been raised on appeal but we only propose to make reference to two of the points.

It was submitted that the indictment was bad in law for duplicity in that in one count it invalidly charged the offence of larceny in a dwelling-house contrary to s. 187 and the offence of burglary contrary to s. 233.

Counsel contended that the specimen form in Archbold's Criminal Pleading, Evidence and Practice, 32nd ed., was not applicable to the law as it is today. Burglary and larceny were, he said, common law offences and in charging burglary and larceny in one indictment the prosecution was charging one offence. Nowadays, he argued, each offence is a statutory offence and each should be charged in a separate count.

We were referred to the case of *R. v. Nicholls* (1960) 2 All E.R. 449 where the appellant was indicted on one count for warehouse breaking contrary to s. 26(1) and s. 27(2) of the Larceny Act 1916. He was found guilty of warehouse breaking. On appeal it was held that the indictment was bad for duplicity. S. 26 of the Larceny Act 1916 reads

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“Every person who – (1) breaks and enters any . . . warehouse . . . and commits any felony therein . . . shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding fourteen years.”

and s. 27 reads –

“Every person who with intent to commit any felony therein . . . (2) breaks and enters any . . . warehouse . . . shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding seven years.”

BYRNE, J. who delivered the judgment of the court said –

“These sections, s. 26 and s. 27, are separate and distinct sections of the Larceny Act, 1916, and it seems to this court that it is obviously a case of duplicity.”

Counsel contended that the present case was indistinguishable from *R. v. Nicholls*. I do not agree. On an indictment charging an offence contrary to s. 26 of the Larceny Act 1916 (U.K.) the accused cannot be convicted of stealing alone whereas on an indictment for burglary contrary to s. 233 of the Criminal Law (Offences) Ordinance, Cap. 10, an accused can be convicted of stealing in a dwelling-house contrary to s. 187, Cap. 10. The distinction will more readily appear when dealing with the submission hereunder.

The submission that when an indictment charged burglary and larceny at common law one offence was being charged is not supported by the old writers. HALE, P.C. 559 states –

“If the indictment be, *quod domum mansionalem J.S. felonice & burglariter fregit & intravit, & ad tunc & ibidem* certain goods of J.S. *felonice & burglariter furatus fuit, cepit & asportavit*. the indictment compriseth two offences, *viz.*, burglary and felony, and therefore he may be acquitted of burglary, if the case be so, upon the evidence, and found guilty only of the felony, and then he shall have his clergy.”

Chitty’s Criminal Law, Vol. 3, p. 1114 accepts this as a correct statement of the law, for he says –

“When the indictment states a burglarious entry, and an actual felony afterwards, it contains two charges which may be served by the verdict – the burglary and the felony; and, if the former should not be proved, the defendant might yet be found guilty of the latter, 1 Hale, 559. But, on such an indictment, if the stealing itself were left unproved, and the burglarious entry with intent to steal were shewn, the defendant must be entirely acquitted; because the actual felony being done away, no other intent, independent from it appears on the record, 2 Leach, 708. Lord HALE, therefore, advises that the indictment should charge a burglarious entry with intent to steal; and then an actual burglarious stealing, as if no intent had been previously alleged; on which, if the theft be unsupported, the defendant may still be con-

victed on his evil intention, 1 Hale, 560; and see form, Cro. C.C. 7th ed. 233, 8th ed. 87. Post, 1115. 2 East P.C. 513 to 520.”

In East P.C. 516 this passage occurs:—

“Therefore says Lord HALE, the better way is to charge the prisoner with breaking, etc. with intent feloniously and burglariously to steal the goods, etc. therein, and to add also the particular felony: and then, though he be acquitted of the felony, the indictment stands good against him as for a simple burglary.”

The decided cases in the seventeenth century and the eighteenth century supply the reason for joining burglary and stealing in one count of the indictment.

At common law burglary was defined as a breaking and entering the house of another, in the night, with intent to commit a felony, whether such intent be executed or not.

Whether there was a breaking and entering was often a matter of considerable doubt. The severity of the law in the seventeenth century sometimes caused the judges to use their ingenuity in order to exercise a degree of leniency and on other occasions for the purpose of inflicting the harsh penalties demanded in that age. In 1672 there was a case in which a thief entered a dwelling-house in the night-time through the outer door being left open or by an open window; while in the house he unlocked an inner door with intent to commit a felony. He was found guilty of burglary. In 1786 in *Johnson's* case the prisoner entered at a back door of the house of William Hughes which had been left open by the family; and afterwards broke open an inner door and stole goods out of the room. All the judges ruled that these facts constituted burglary. (See *Rex v. Johnson*, Mich. T. 1786).

Inevitably, cases arose in which it was doubtful whether a breaking inside of a house after entry by means of an open door was burglary or not. In order to remove doubts the statute of 12 Ann. c. 7 was enacted. This Act said —

“that if any person shall enter into the mansion or dwelling-house of another by day or by night, without breaking the same, with an intent to commit felony; or being in such house shall commit any felony; and shall in the night-time break the said house to get out of the same; such person is and shall be adjudged to be guilty of burglary, and shall be ousted of the benefit of clergy in the same manner as if such person had broke and entered the said house in the night-time, with an intent to commit felony there.”

One of the ingredients of burglary which frequently needed the interpretation of the courts was the intent. The breaking and entering in the night must be with the intent to commit some felony therein whether the felonious intention was carried out or not. Cases arose in which there was a breaking and entering but the felony which was committed was not the felony

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intended. In order to prove the felony, the practice sprung up of stating in the indictment the felony committed as this was *strong prima facie* evidence of the felony intended. In 1796 a point of some importance was decided. In *R. v. Vandercome and Abbott*, the indictment was for burglary and stealing goods; no goods were stolen but the burglary was with intent to steal. Lord HOLT, C.J. directed an acquittal. (see East P.C. 514.) They were then indicted for breaking and entering the same dwelling-house at the same time with intent to steal. Their plea of *autrefois acquit* was rejected. BULLER, J., in delivering the opinion of the judges said that “on the part of the prisoners it was contended, that as the dwelling-house mentioned in the two indictments, and the time mentioned in each when the offence was committed, were the same, therefore the offence was the same and the acquittal on the former indictment a bar to the present. The first indictment was for breaking and entering the house and stealing the goods: if it were proved on that indictment that the prisoners broke and entered the house with intent to steal the goods, but had not stolen them (which are the facts contained in the present indictment), they could not have been convicted on that indictment by such evidence. They have not then been tried, nor were their lives ever in jeopardy for this offence, which is for breaking the house with intent to steal the goods. For these reasons the judges are unanimously of opinion that the plea is bad; that there must be judgment for the Crown on the demurrer; and that the prisoners must take their trial upon the indictment now depending.”

This case, therefore, decided that breaking and entering with intent to steal was one offence and breaking and entering and stealing another offence.

The question which remains for consideration is whether the Criminal Law (Offences) Act, s. 187, Cap. 10, which creates the offence of larceny in a dwelling-house of goods over twenty-five dollars precludes larceny being joined with burglary in one count. It does not. It has been shown that at common law in order to remove doubts the 12 Ann. C. 7 was passed. Stealing in a dwelling-house was then a statutory offence. It was created in order to avoid an accused charged with burglary and stealing being acquitted if the stealing was proved and the burglary not proved. The case of *William Hungerford* at Bristol Assizes in 1790 was a case where Hungerford was charged with breaking and entering and stealing. He was found not guilty of the burglary but guilty of stealing in the dwelling-house. Sentence of death was pronounced but execution was respited until the opinion of the judges could be obtained. Later on the judges directed that the verdict was legally correct but thought that the proper way for the jury to return the verdict was not guilty of breaking and entering but guilty of larceny only.

Thus it will be seen that for over two hundred and fifty years burglary and larceny were joined in one indictment and it was always possible to convict of the larceny alone. In addition s. 102, Cap. 11 provides –

“Every count shall be deemed divisible; and if the commission of the offence charged, as is described in the enactment creating the offence, or as charged in the count, includes the commission of any

other offence, the accused person may be convicted of any offence so included which is proved, although the whole offence charged is not proved, or he may be convicted of an attempt to commit any offence so included.”

This section is statutory authority for a jury being entitled to convict of larceny in a dwelling-house where the full offence of burglary is charged and not proved. There is really no necessity to mention s. 187, Cap. 10, in the indictment at all where an accused is charged with burglary with intent to commit a felony and stealing. A judge should, if the evidence so warrants, explain to the jury that they might acquit of the breaking and entering and find the accused guilty of the larceny provided the ingredients of s. 187 are proved.

In my opinion the following passage in Archbold’s is a correct statement of the law:—

“The defendant ought not to be charged with having committed two or more offences in any one count of the indictment. An exception to this rule is to be found in indictments for burglary in which it is usual to charge the defendant with having broken and entered the house with intent to commit a felony and also with having committed the felony intended.”

From the above it is evident that at common law breaking and entering with intent to steal, and breaking and entering and stealing were two offences and not, as submitted, one offence.

The other ground of appeal is that the trial was improperly continued with eleven (11) jurors.

The trial began on the morning of the 17th October, 1967. It was adjourned at 11.30 a.m. until 1 p.m. On the resumption, counsel for the Crown informed the judge that one of the jurors was not feeling well and asked to be excused. The judge asked whether it was a trivial or serious indisposition. Crown counsel replied that it appeared to be quite serious and requested that the juror be excused for the duration of the trial. He drew the judge’s attention to s. 34, Cap. 11. Counsel for the appellant said he had no objection to the request. The judge thereupon excused the juror in accordance with s. 34, Cap. 11, and the trial proceeded with eleven jurors. S. 34, Cap. 11 provides -

“In every case the jury shall consist twelve persons:

Provided that where in the course of a trial any juror dies or is discharged by the Court as being through illness incapable of continuing to act or for any other reason, the jury shall nevertheless, so long as the number of the jurors is not reduced below ten, be considered as remaining for all the purposes of that trial properly constituted, and the trial shall proceed and a verdict may be given accordingly.

Unfortunately this is not the only section dealing with the discharge of a juror. S. 171 (3) is as follows:

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“If one or more of the jurors, before they begin to consider their verdict, becomes or become, in the opinion of the Court, incapable of continuing to perform his or their duty, the Court may either discharge the jury and direct a new jury to be empanelled during the same sitting of the Court, or may postpone the trial, or may, in its discretion and with the consent of counsel for the Crown and of the accused person, in any case other than that of a capital offence, proceed with the remaining jurors and take their verdict, which shall have the same effect as the verdict of the whole number.”

It is admitted that the consent of the accused was not obtained but counsel for the Crown relying on *R. v. Browne* (1962) 46 C.A.R. 314 submits that counsel’s consent was enough.

S. 15 of the Criminal Justice Act 1925 (U.K.) is –

“Where in the course of a criminal trial any member of the jury dies or is discharged by the Court as being through illness incapable of continuing to act or for any other reason, the jury shall nevertheless, subject to assent being given in writing by or on behalf of both the prosecutor and the accused and so long as the number of its members is not reduced below ten, be considered as remaining for all the purposes of that trial properly constituted, and the trial shall proceed and a verdict may be given accordingly.”

In *Browne* the trial commenced with twelve jurors but on the third day a juror did not turn up. After some discussion in court in the presence of the prisoner his counsel informed the judge that he and counsel for the Crown consented to proceedings with eleven jurors and they had signed a certificate to that effect. The trial then proceeded. The prisoner was convicted and one of his grounds of appeal was that he had not consented to being tried by eleven jurors. In the appeal the Lord Chief Justice said:–

“The second point taken is that under s. 15 while the written document, the certificate, may be signed on behalf of the prisoner, that is, by his counsel, yet the only person who can consent before the signature is put to the document is the prisoner himself, and that here it is admitted that the prisoner was never consulted. It is said, on the other hand, by the prosecution that any criminal cause is exactly the same as any civil suit and that it has been held time and time again that counsel has absolute authority as to the conduct of a case, an authority which would certainly cover consent to going on with eleven jurors. This court is not prepared, at any rate in this case, to lay down that the same principle applies in criminal cases as in civil suits. The court feels that in a criminal case the position is somewhat different. Thus, only the prisoner himself can plead; only the prisoner can assent to other offences being taken into consideration, and there are many instances in which counsel cannot act without express consent. So far, however, as s. 15 is concerned, it is expressly stated that counsel is entitled to sign the certificate. Accordingly, the court is entitled to presume that

counsel's action in doing so is with the consent of the prisoner. No doubt if the prisoner then says: "I have given no consent", the court will not accept the certificate and will refuse to go on with the eleven jurors. But here the court had no objection from the prisoner and, what is more, no objection when the prisoner must fully have realised what was occurring."

It will be observed that s. 171 (3) The Criminal Law (Procedure) Ordinance Cap. 11, is different in a material particular from s. 15 of the Criminal Justice Act 1925 (U.K.). Whereas in England counsel can sign the written consent on behalf of the accused, in Guyana the consent of the accused is imperative; where the written consent is signed it is open to the court to presume, as in *Browne's* case, that the consent could be implied. *Browne's* case did not decide that in a criminal case the position of counsel is the same as in a civil case. The fact that only the prisoner himself can plead shows that counsel cannot always act on behalf of his client. Nor can it be said that the accused's consent must be implied as the decision took place in his presence because anyone who has had experience of criminal trials in Georgetown knows that most prisoners do not always appreciate what is said in Court. The judge's duty was to obtain the accused's consent and as he did not do so we quashed the conviction and ordered a new trial.

Appeal allowed. New trial ordered.

THE COMMISSIONER OF INLAND REVENUE v. SERGIUS SELINO
DE FREITAS, and MARIA BELLA DE FREITAS

[Court of Appeal (Stoby, C., Luckhoo and Persaud, JJ.A.)
February 12, 13; October 17, 1968]

Estate Duty — Limited liability company — Extensive and overriding powers vested in governing director — Emoluments fixed at a percentage of company's profits — Whether aliquot portion of company's assets should form part of governing director's estate — Estate Duty Ordinance, Cap. 301, s. 9.

Company — Effect of incorporation — Companies Ordinance, Cap. 328.

In 1924 the Charlestown Sawmills Ltd. was incorporated as a private company with a share capital of \$400,000: consisting of 4,000 shares at \$100: each with the object of acquiring as a going concern the business of timber merchants and sawmillers then being carried on by the testator, Sylvestre Simao de Freitas, and three of his children. Each of them was allotted 750 fully paid up shares. S.S. De Freitas was named in the articles of association as governing director until his death, lunacy or resignation or

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in the event of his ceasing to hold 500 shares, and his remuneration was fixed at 32 per centum of the profits of the business. In addition he was empowered to exercise all the powers of the company as well as those of the other directors including that of placing limitations on the latter's powers.

In 1947 the testator sold certain property to the Charlestown Sawmills Ltd. for \$122,414 of which \$22,000 was paid to four of his sons who used it to purchase 220 shares, and by the end of 1949, by means of transfers from him and other acquisitions, the shares of these sons were increased to 213 each to three of them and 212 to the fourth. In addition, by then all the remaining shares in the company had been allocated to other members of the deceased's family.

Meanwhile in October 1949 another private family company S. S. de Freitas Ltd. was incorporated with a nominal share capital of \$300,000. The subscribers were the deceased and one of his sons who took up 500 and 50 shares, respectively, at \$100: per share. Among its objects were the purchase or acquisition of all the property of the deceased and certain others and the payments for the same in cash and or shares. The articles of association gave to the testator the same vast powers as those of the Charlestown Sawmills Ltd. Under an agreement, made and entered into in December 1949 between the Charlestown Sawmills Ltd. the testator and several members of his family as vendors and S. S. de Freitas Ltd. as purchasers, there was a sale of certain properties owned by the former to the latter. There was also a re-allocation of the shares held in the Charlestown Sawmills Ltd. and the creation or reservation of separate life interest in three properties, one of them being in favour of the testator. It was also specifically provided that the sale of the 500 shares which he then held in the Charlestown Sawmills Ltd. was not to take effect until his death, and he was permitted during his life time to hold in his own name such shares as would enable him to remain a director in the several companies in which they were held and to receive all sums payable by way of director's fees. The agreed purchase price for the assets of the vendors was fixed at \$320,000.00 of which \$300,000.00 was to be satisfied by the allocation of 3,000 shares to the vendors at \$100: per share. The testator's allocation was 840 shares.

He died in 1963. The respondents, as executors of his estate, submitted a statement of his assets showing the value of his estate to be \$86,823.04. The appellant, however, rejected this statement and determined the value to be \$398,721.22. In doing so he included as part of the assets thirty-two per centum of the assets of the Charlestown Sawmills Ltd., the entire assets of the S. S. de Freitas Ltd. and the value of an insurance policy. A judge of the Supreme Court held that the appellant was wrong to include the two former as part of the deceased's estate but upheld his inclusion of the insurance policy. The appellant appealed.

HELD: (i) neither the vast powers given to the appellant under the articles of association of both Charlestown Sawmills Ltd. and S. S. de Freitas Ltd., nor the fact that the testator's remuneration had been fixed at thirty-two per centum of the profits of the former could in the absence of legisla-

tion, detract from the general rule of law that a company is a separate entity from its shares holder, and accordingly the Commissioner erred in his determination that 32 per centum of the assets of the former company or those of the latter fell to be considered as part of the testators' estate.;

(ii) notwithstanding that under the agreement of 1949 the testator received the full consideration for the transfer *inter alias* of the 500 shares which he had then held in the Charlestown Sawmills Ltd., the fact that he was permitted to keep the shares in his name until his death left him in the position of being competent to dispose of them under s. 9(1)(a) of the Estate Duty Ordinance, and accordingly the property formed part of the assets of his estate;

(iii) *quaere*, whether the property which the deceased had transferred or agreed to transfer to S. S. de Freitas Ltd. subject to a life interest in his favour did not fall within the provisions of s. 9(1)(d) of the Estate Duty Ordinance, Cap. and so became amenable to estate duty.

Appeal allowed in part.

Doodnauth Singh for the appellant.

J. A. King associated with *John Stafford* for the respondents.

PERSAUD, J.A.: On August 7, 1924, the Charlestown Sawmills, Limited – a limited liability company – was incorporated under the provisions of the Companies Ordinance Cap. 328, (then Cap. 178) with a share capital of \$400,000: made up of 4,000 shares of \$100 each. The object of the company was to acquire and take over as a going concern and carry on the business of timber merchants and sawmill proprietors then being carried on by Maria Theresa de Freitas, Eduardo Marciello Gonsalves, Olga Vera Gonsalves and Sylvestre Simao de Freitas at lots 10 and 11 Water Street, Georgetown, and known as the Charlestown Sawmills. The last-named person was the father and head of the family, and his estate now forms the subject matter of this appeal. He died testate on December 21, 1963, and will be referred to in this judgment as the testator.

Upon the formation of the company, each of the persons mentioned above was allotted 750 fully paid-up shares. The articles of association named the deceased governing director until death, or until he resigned the office, or became a lunatic, or ceased to hold 500 shares, and fixed his remuneration at a sum equivalent to 32 per centum of the net profits derived from the business. It was also provided that whilst he retained that office, he should have authority “to exercise all the powers of the company and all the powers, authorities and discretions by those presents expressed to be vested in the directors generally, and all other directors, if any, for the time being of the company shall be under his control, and shall be bound to conform to his directions in regard to the company’s business.” He was given the power to define, limit and restrict his powers, and those of the other directors, to fix his and their remuneration and duties, to remove any director howsoever appointed, and to convene a general meeting at any time.

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The effect of these very wide powers will be dealt with later in this judgment. At this stage it will be more convenient to pass on to an agreement entered into in 1947 between the Charlestown Sawmills Ltd. and the testator. That agreement itself is not in evidence but certain particulars of it are incorporated in a later agreement.

By the 1947 agreement, the testator sold to the company certain properties for the sum of \$ 122,414 of which the sum of \$22,000 was paid to the testator's four sons who in turn utilised that sum for the purchase of 220 shares in the company. In addition the testator transferred 390 shares of \$100 each to the said sons, so that they each ended up by owning 122 shares. Presumably, later they acquired more shares – whether by gift or otherwise is not apparent – for on December 28, 1949, they each owned 213 shares, with the exception of one son who owned 212 shares. On that date the testator still held 500 shares in the Charlestown Sawmills, Ltd., in his own name. It would appear also that up to that date, there was an allocation of the rest of the shares to other members of the family, bringing the total allocated to 4,000, which meant an allocation of all the shares in the company. Again, it is not apparent from the record whether these were by way of gifts, or otherwise.

On October 27, 1949, the company of S. S. de Freitas, Ltd. was incorporated, the subscribers being the testator to the extent of 500 shares, and one of his sons, Celso Lima de Freitas, to the extent of 50 shares. The capital of this company was stated as \$300,000 divided into 3,000 shares of \$100 each.

Among the objects for which de Freitas Ltd. was established was one “to purchase or otherwise acquire from Sylvestre Simao de Freitas (the deceased) and others the whole or any part of his movable and immovable property in British Guiana or elsewhere and to pay for the same either in cash or in shares or partly in cash and partly in shares and with a view thereto to enter into and carry into effect any agreement for the purchase or acquisition thereof.”

In this company also, the testator was named governing director for life, and was vested with the government and control of the company. Five other directors were also appointed; they were all sons of the testator, and are referred to as the “fourth vendors” in the agreement entered into on December 28, 1949, and to which reference will be made later on in this judgment. The testator was, as in the case of the Charlestown Sawmills Ltd., given vast powers of control both in the management of the company's business, and in the control of the other directors, including defining, limiting and restricting the powers of such directors, and fixing and determining their remuneration and duties, as well as fixing his own remuneration.

The articles of association go on to give the testator in his capacity of governing director, certain overriding powers, including convening a general meeting, and revoking any decision of the other directors.

No doubt, in pursuance of the object of the de Freitas Co. Ltd (quoted above), an agreement was entered into on December 28, 1949, between the testator, the Charlestown Sawmills Ltd., and several members of his family as vendors, and S. S. de Freitas Ltd., as the purchasers. This agreement is rather a complicated document, and requires careful reading. I feel that the skill of the draftsman should not go unrecognised and uncommended.

Under the 1949 agreement, there is a sale of certain properties by the vendors to de Freitas & Co. Ltd. for the sum of \$320,000; there is a re-allocation of the shares held in Charlestown Sawmills Ltd., and there is the creation of a life interest in one property in favour of the testator, and a similar interest in another property in favour of one Luiza de Souza, and still in a third property in favour of one Maria Bella de Freitas. It is specifically provided that the sale of 500 shares which the testator then held in the Charlestown Sawmills Ltd. shall not take effect until the death of the testator, and further that the testator shall be permitted during his life-time to hold in his own name such of the shares set out in one of the schedules of the agreement as will enable him to remain as a director of the several companies in which the said shares were held, and that he shall be entitled to all sums payable to him as director of the said companies. The agreed purchase price to be paid by de Freitas Ltd. the vendors was \$320,000. Of this amount \$300,000 was to be satisfied by the allocation of 3,000 shares by de Freitas Ltd. in its capital to the testator (840 shares), and 10 other persons (216 shares each), and \$20,000 was to be paid in cash to 10 persons (\$2,000 each) – all parties to the agreement.

The testator died in 1963, and estate duty was assessed by the appellant in the sum of \$398,721.22, while the respondents, who are the testator's executors, submitted returns showing that the value of the estate was only \$86,823.04. The appellant included as part of the estate 32 per centum of the assets of Charlestown Sawmills, Ltd., the entire assets of de Freitas Ltd., and the value of an insurance policy. The judge, from whose decision this appeal has been brought, held that the appellant was wrong to include 32 per centum of the assets of Charlestown Sawmills Ltd., that he was also wrong to take in any of the assets of de Freitas Ltd., but right to include the value of the insurance policy. The Commissioner now appeals against the first two findings of the judge, but there is no cross-appeal as regards the third finding. This appeal, therefore, concerns the first two findings.

Counsel for the appellant submits that by virtue of article 5 of the articles of association of Charlestown Sawmills Ltd., which permitted the directors to allot or otherwise dispose of shares in their discretion, and as a result of the vastly overriding powers which the testator enjoyed, he was in the same position as if the company had not been formed; that as no divi-

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dends had been paid, it can with truth be said that the donees of the shares in the company have not enjoyed the profits accruing from their shares to the exclusion of the donor, the testator; and that the real nature of the transaction should be looked at, rather than the legal position. If regard were had to the real nature of the transaction, argues counsel, then it will be seen that the testator was, by virtue of the various powers and rights vested in him by the memorandum and articles of association, in no different position had the company not been incorporated, that is to say, he had complete control of its assets and activities notwithstanding there were other directors; and that if the strict legal position were to be accepted, then the Revenue Department would be unable to collect its revenue. It was also submitted that the shares which were allotted both in the Charlestown Sawmills, Ltd., and de Freitas Ltd. to members of the testator's family were in the nature of gifts.

We are unable to accept the proposition dealing with the inability of the Revenue Department to collect its revenue, for not only is this court required to be guided by legal principles irrespective of the consequences, but also it is an accepted rule in the interpretation of taxing laws that unless the particular statute makes the citizen clearly exigible to tax, no court allows its decisions to be coloured by considerations concerning the loss to revenue.

A gift *inter vivos*, whether by way of transfer, delivery or otherwise, would be liable to estate duty 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 such gift must have been *bona fide* made three (five since 1967) years before the death of the deceased [s. 9(1)(b) of the Estate Duty Ordinance, Cap. 301].

When Charlestown Sawmills, Ltd., was incorporated in 1924, the subscribers were allocated shares in exchange for value, and the 1949 agreement which shows further allocation to other persons was outside the prescribed period. So that the gifts of 390 shares - if they were gifts - took place outside of the prescribed period, and, to fall within the ambit of s. 9, possession and enjoyment must not have been assumed immediately by the donees and thenceforward retained to the entire exclusion of the donor. We do not agree, therefore, that shares which were allocated either in 1924, or in 1949, are caught by s. 9 of the Ordinance.

There are two basic principles of company law which must be borne in mind when a matter such as this comes up for consideration, viz. (i) that a company (even what is described as a 'one-man' company) is a legal persona distinct from its shareholders; and (ii) that a share in a company is a legal entity distinct from the assets it represents. These two facts, coupled with the extreme flexibility of company law as regards the rights of shareholders and directors have enabled persons, under the 'cloak' of companies, to create

interest analogous, to those which exist under ordinary settlements and *inter vivos* dispositions, without attracting liability to duty under the ordinary Estate Duty law. (Dymond's Death Duties, 14th ed. at p. 447).

In order to fill the lacuna in the law, the Finance Act, 1930, was enacted in England, and later the Finance Act, 1940, the intention of which is that estate duty should be charged on a fraction of a company's assets corresponding with the benefits which the deceased had enjoyed, or might have enjoyed because of his relationship with the company. The act is intended to cover every case where, through any channel, however long and devious, the resources of the company have been formed or fed to any extent out of the resources of the deceased.

No such legislation exists in Guyana, and it may be that such legislation is long overdue in the interest of the protection of the revenue.

Counsel for the appellant would have this court take a different line from that taken in *Salomon v. Salomon*, [1895-9] All E.R. Rep. 33], and commended to us the words of Lord TOMLIN in *Munro v. Commissioner of Stamp Duties*, [1934] 103 L.J.R. at p. 22, to the effect that it is the substance of the transactions which must be ascertained. *Munroe's* case was the converse of the instant case, for Lord Tomlin went on to say: ". . . and if when so ascertained the substance does not fall within the words of the statute, it cannot be brought within them merely because the forms employed did not give true effect to the substance". But what is to my mind most important is the very next sentence of Lord TOMLIN'S judgment – "It is not always sufficiently appreciated that it is for the taxing authority to bring each case within the Taxing Act, and that the subject ought not to be taxed upon refinements, or otherwise then by clear words." That case was concerned with certain gifts of land by a father who carried on the business of a grazier, to his children with whom he carried on a business in partnership. The transfers of the several portions of land were then subject to the agreement for partnership on the understanding that any member of the family could withdraw from the partnership and work his property with his own stock. It was held that the donee in each case had assumed *bona fide* possession and enjoyment of the gift, and retained it to the exclusion of the donor, and therefore the gifts were not exigible to death duty as part of the estate of the father.

It is well settled that a company is a legal entity separate and apart from the shareholders, and must be treated like any other independent person with rights and liabilities appropriate to itself. A company is not the agent of the shareholders to carry on their business for them, nor is it the trustee for them of their property.

In *Salomon v. Salomon*, a case which we have been urged not to follow as it is not binding on this court – it is a decision of the House of Lords – the appellant, who had for some 30 years prior to 1892 carried on a business as a leather merchant, formed a limited company to carry on the business. The subscribers to the memorandum of association were the appellant, his wife

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and daughter, and four sons. The nominal capital of the company was £ 40,000 divided into £ 1 shares; 20,007 shares were issued of which the appellant held 20,001, the other signatories to the memorandum holding one each. The appellant's business was sold to the company for £38,782 of which £16,000 was to be paid in cash or debentures, and at the first meeting of the directors, who consisted of the appellant and two of his sons, it was resolved to pay the appellant £ 6,000 in cash and £10,000 in debentures. These debentures were later mortgaged to secure an advance to one Broderip of £5,000, but eventually they were cancelled, and £10,000 fresh debentures were issued to Broderip. A winding-up order was later made when it was discovered that the company was indebted to unsecured creditors other than the appellant to the amount of £7,773. The liquidator sought to recover this sum from the appellant, and the court of first instance held that the company was entitled to be indemnified by the appellant.

This decision was affirmed by the Court of Appeal, but on further appeal to the House of Lords, that decision was reversed. Lord HALSBURY, L.C., said (at p. 35) –

“I will, for the sake of argument, assume the proposition that the Court of Appeal lays down, that the formation of the company was a mere scheme to enable Aron Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself, and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.”

Again, in *Inland Revenue Commissioners v. Sansom*, [1921] 90 L.J.R. 627, a timber merchant sold his business to a private company in which he held all the shares but one. No dividends were ever paid, but during the war large profits were made, out of which the company made loans within their powers to the timber merchant, without interest or security. The Crown claimed super-tax on the loans as forming part of his income. The Special Commissioners found that the company was a properly constituted legal entity and that the loans were genuine loans and not distributions of profit, and held that they were not therefore liable to super-tax. It was held that the Commissioners having properly considered all the relevant facts, their decision could not be disturbed.

It is impossible to deny the validity of the incorporation of Charles-town Sawmills, Ltd., and of the transactions entered into between the testator, and the other members of his family, on the one hand, and the com-

party on the other, and no attack has been leveled either against the incorporation of de Freitas, Ltd., or the 1947 agreement.

Art. 19 of the articles of association of the Charlestown Sawmills, Ltd., fixed the remuneration of the testator for such time as he remained governing director (and he was appointed by the said Articles to that post until he resigned, or died, or became a lunatic, or ceased to hold at least 500 shares) at a sum equivalent to 32 per centum on the net profits. There is no escaping the conclusion that the testator had the exclusive control of the activities of the company. There is no doubt also, that this object was set out to be achieved by him and the other directors. But in spite of all this, there is nothing in the absence of legislation to detract from the general rule of law that a company is a separate entity from its shareholders. Would there have been a difference if instead of prescribing that the testator should be paid 1/3 of the profits of the company, it had been provided that he should be paid a fixed remuneration for his services as governing director? None, in my view. I can find no merit in the contention of the appellant.

In my view, there is no justification, therefore, for including in the testator's estate 32 per centum of the assets of Charlestown Sawmills, Ltd., as he could not be said to have owned any of the assets of the company when it is borne in mind that a company is a separate legal entity. Further, it is legally permissible for the articles of a private company to provide that a governing director may fix his and other directors' remuneration. For these reasons, therefore, I would affirm the judge's decision to the effect that the Commissioner was wrong to include as part of the testator's estate, 32 per centum of the assets of the Charlestown Sawmills, Ltd. There is no legal basis for this.

But I do not agree that the 500 shares in the Charlestown Sawmills, Ltd., which the testator held at the time of the 1949 agreement, and which was part of his property being transferred to de Freitas Ltd., should be excluded from his estate for estate duty purposes. It was specifically provided that the sale of those shares shall not take effect until the death of the testator.

It is clear that under the agreement, the testator had received total consideration from de Freitas, Ltd., for the purchase of these shares, but I am unable to accept that the word "sale" in the agreement can be equated to mean "transfer". I cannot conceive that the solicitors concerned with the preparation of the agreement intended this to be so, or that it could be due to inadvertence. Rather, it seems to me that because of the fact that persons were precluded by the articles of association of de Freitas, Ltd., from holding shares on trust, it was necessary, if the testator was to retain his authority over the affairs of the Charlestown Sawmills, Ltd., that he should hold the 500 shares in his own name, and beneficially. In other words, the ownership of these shares was not affected by the agreement during the lifetime of the testator, but only upon his death was the sale to de Freitas, Ltd., to take place.

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Now from these shares to be made liable to estate duty, they must fall within the ambit of s. 9 of the Estate Duty Ordinance. It is noteworthy that the Ordinance does not use the language used in the Finance Act, 1894, viz. "property which passes on the death of such person". The language used in our Estate Duty Ordinance is "property of which the deceased is competent to dispose", [s. 9(1)(a)]. In my opinion "competent to dispose" must mean legally competent to dispose, and would describe property which a testator owns beneficially. The Finance Act, 1894, defines "competent to dispose" as follows:

"A person shall be deemed competent to dispose of property if he has such an estate or interest therein . . . as would, if he were *sui juris*, enable him to dispose of the property . . ."

In my opinion, if the testator held these shares in his own name and beneficially, i.e. not on trust (and I so find), then he was competent to dispose of them. De Freitas, Ltd. might, if he had disposed of them, have had a legal remedy against the testator, but this is in my view, irrelevant to his competency to dispose of them. I therefore find that the 500 shares which the testator held in Charlestown Sawmills, Ltd., should properly be included as part of his estate for purposes of the computation of estate duty.

I now pass to deal with de Freitas, Ltd. Counsel contends that the total assets of this company should be included in the testator's estate. This I am unable to accept for the reasons already given in relation to the Charlestown Sawmills, Ltd. There is no doubt that the testator enjoyed equally wide (perhaps wider) powers in de Freitas, Ltd. as he did in the Charlestown Sawmills, Ltd., but the legal position is no different.

This appeal was argued in February of this year, but upon decision being reserved, the court felt that it would like to obtain some further assistance from counsel not only on the question whether the 500 Charlestown Sawmills, Ltd. shares were caught by s. 9 of the Ordinance, but also whether that section affected, and if so to what extent, certain other shares which the testator held in other companies, but which, although sold to de Freitas, Ltd., he was permitted under the agreement to hold and to receive dividends thereon. Similar argument was also invited as regards certain life interests which were created out of certain properties by the said agreement in favour of the testator, and that of other members of his family. These interests were created out of three properties – one belonging to the Charlestown Sawmills, Ltd., and the others belonging to the testator.

Counsel for the respondents took the point that this appeal, concerning as it does, the aggregation and assessment of the entire estate, and not on individual items thereof, this court cannot properly entertain arguments now relating to certain items of property of that estate, particularly so as the parties may wish to have some time to consider their respective positions in regard to those items.

I am of the opinion that if the Commissioner taxes an entire estate, there appears to be no valid reason why a reviewing body – be it a judge in chambers or this court – cannot, while disagreeing with the Commissioner's opinion, direct him that only certain items of property may properly be included in an estate. In any event, the items of property with which we are concerned were in fact set out separately in the agreement, and it is not possible to complain of lack of opportunity to consider these items separately when this is precisely the reason why we invited counsel to address us anew.

It will be necessary, however, for me to refer to certain items of property, the subject-matter of the 1949 agreement with a view to ascertaining whether those items can be regarded as part of the testator's estate.

It should be borne in mind that the testator, the Charlestown Sawmills, Ltd., and the other vendors all owned property in their own rights which they agreed to sell to de Freitas, Ltd, under the 1949 agreement, and it was out of some of those properties that certain reservations were created. I refer to items 2 to 5 of Part II of the third schedule to the 1949 agreement, i.e. certain shares which the testator owned, and which, although they purported to have been sold, he was allowed to retain in his own name in order to retain his directorship in the respective companies; it was also agreed that he should retain all sums paid to him as director of the said companies. I also wish to refer to the life interest which the agreement created in the testator's favour out of a property owned by him but sold to de Freitas, Ltd., under the agreement, and the life interest in favour of Maria Bella de Freitas out of a property which had been sold to Charlestown Sawmills, Ltd., under the 1947 agreement, but was bought by de Freitas, Ltd. under the later agreement; as well as the life interest in favour of Luiza de Souza in a property owned by the testator, but sold to de Freitas, Ltd. Both these life interests were not to take effect until after the death of the testator.

But before dealing with these items, I wish to reiterate that it is plain that unless the Commissioner can bring his claim for estate duty within the provisions of s. 9 of the Ordinance, he must fail notwithstanding the fact that the object of the series of the transactions were quite transparent, i.e., the avoidance of the payment of estate duty. To contend that the entire assets of de Freitas, Ltd., are to be included in the testator's estate is to ignore the agreement of sale; it is equally without merit to argue that the shares in that company or part of them were gifts by the testator to the shareholders.

One of the points on which we invited additional arguments was whether the items of property listed in 2 to 5 of Part II of the third schedule to the agreement and the life interests created thereunder, were caught by s. 9(1)(d) and the proviso thereto.

S. 9(1)(d) of Cap. 301 provides as follows:

“Estate duty shall, subject to the deductions hereinafter mentioned, be payable in respect of –

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- (d) property passing under any past or future disposition made by the deceased verbally, or by any instrument not taking effect as a will, whereby an interest in that property or the proceeds of sale thereof for life or any other period determinable by reference to death is reserved, or by contract or otherwise secured, either expressly or by implication to the disponent, . . .”

And the proviso reads as follows:

“Provided that the provision contained in paragraph (c) or (d) of this subsection shall not apply to any property disposed of *bona fide* by the deceased for full valuable consideration, but the consideration obtained therefor shall be subject to the same liability in respect of duty as that to which the property so disposed of was subject, and if the consideration consists wholly or in part of any benefit or of any periodic payment which terminates on the death of the deceased, estate duty shall be payable on the value of that benefit or periodic payment, according to its value as if calculated at the time it was created or provided.”

It seems to us that the shares in Part II of the schedule, and the life interests may very well be caught by s. 9(1)(d) and the proviso, but we would not express an opinion on this matter now, preferring to await a further investigation into this aspect.

Counsel has informed us that one of the properties from which a life interest had been carved was in fact transported without an annotation of that interest being made on the transport. This rises a new possibility. It may be that the life interests were not perfected, and we are unaware of the rate of the shares listed in Part II of the third schedule. This being the position, as we have already indicated, we would prefer not to decide this point now.

The result is that this appeal will succeed only in part in that while we agree with the learned judge that the Commissioner was wrong to include 32 per centum of the assets of the Charlestown Sawmills, Ltd. as part of the testator’s estate, we are of the opinion for the reasons given, that the 500 shares which the testator retained under the agreement should be included.

Like the judge, we are of the view that the Commissioner was wrong to aggregate the assets of de Freitas, Ltd. as forming part of the testator’s estate.

If the Commissioner wishes, he may cause an investigation into the factual position of the shares in the third schedule, and of the life interest, and take such steps as regards those items of property as he may be advised.

The order for costs in the court below will stand, and the respondents should have three-quarters of their taxed costs of this appeal.

LUCKHOO, J.A.: I agree.

Appeal allowed in part.

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[Court of Appeal (Stoby. C. Persaud and Cummings. JJ.A.)
June 6, 19, October 17, 1968]

Damages — Personal injury claim — Factors to be taken into account in assessing quantum — Circumstances in which appellate court would intervene to adjust assessment of trial judge.

The first appellant was sitting on the carrier of a bicycle which was being ridden by the second appellant when it was involved in an accident with a motor car driven by the respondent. The first appellant suffered injury to her left pelvis and hip joint, a fracture of the pubic bone and separation of the symphysis pubic. She was hospitalised for 2½ days. The result of her injuries was marked osteo-arthritis change in the left hip and a narrowing of the pelvic brim. She also suffers from pain whenever she moved the limb and it was diagnosed that there could be some adverse effects on her later on in child-bearing. Her permanent partial disability was assessed at twenty-five per centum. The trial judge awarded her a sum of \$3,500.00 as general damages.

The second appellant sustained a fractured left shoulder and bruises about his body. His injuries were not considered so serious as to require hospitalisation and he suffered no loss of earnings. He had been awarded \$250.00 as general damage.

HELD: (i) The assessment of damages would depend in each case on its peculiar circumstances, but efforts should be made to achieve some uniformity in awards having regard to awards made to others in a near locality and taking into account such factors as social economic and industrial conditions;

(ii) the fact that an appellate court may not have made the same award as the trial judge is not sufficient justification for amending his assessment, and in order to do so the court should be convinced that the trial judge had ruled upon some wrong principle of law or that the amount was so excessively high or low as to make the judgment an entirely erroneous estimate of the damages.

Appeal of first appellant allowed, damages increased to \$7,000.00.

Appeal of second appellant dismissed.

R. Mc Kay for the appellants.

C. L. Luckhoo, S.C. for the respondent.

PERSAUD, J.A.: The sole question which has been raised in this appeal is whether the damages which were awarded to the appellants by the trial judge ought to be increased.

At the time of the accident which involved a bicycle ridden by the appellant Subryan and a motor car driven by the respondent, the appellant

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Yarde was employed as a stenographer in a solicitor's office, while the appellant Subryan was employed as a Class I Clerk attached to the Official Receiver's Office in Georgetown. At the time of the accident the first appellant was sitting on a carrier at the back of a lady's bicycle being ridden by the second appellant. Both appellants suffered injuries; the first appellant more severely so, necessitating her being admitted a patient in the public hospital where she remained for seven weeks.

In this appeal the ground taken is to the effect that the award of general damages was wholly inadequate and was a wholly erroneous estimate of the damage sustained. The judge awarded the first appellant \$3,500 as general damages and he assessed the second appellant's general damages at \$250.

The principles upon which an appellate court will review and vary awards made in running down cases have been stated repeatedly in cases both in the United Kingdom and in the Caribbean, including Guyana. For example, in *Flint v. Lovell*, [1934] All E.R. Rep. 200 at 202 GREER, L.J., said:

“. . . I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they thought if they had tried the case in the first instance they would have given a lesser sum.

“To justify reversing the trial judge on the question of the amount of damages, it will be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled.”

In *Davies v. Powell Duffryn*, [1942] 1 All E.R. 657, Lord MACMILLAN said at p. 664:

“No doubt an appellate court is always reluctant to interfere with a finding of a trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages. Such a finding differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. No doubt this statement is truer in respect of some cases than in others . . . At the other end of the scale would come damages for pain and suffering or wrongs such as slander. These latter cases are almost entirely matter of impression and of commonsense and are only subject to review in very special cases.”

After drawing attention to the difference which obtains between cases tried with a jury and those without, Lord MACMILLAN continued:

“Where, however, the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is

generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages.”

Lord MAC MILLAN attracted attention to the difficulty in laying down any precise rule to cover all cases of this sort, but commended as a good general rule the dictum of GREER, L.J., in *Flint v. Lovell* referred to above.

The English courts, while recognising the difficulty of assessing damages in this type of case for the reason that each case must depend upon its own peculiar circumstances, also strove towards the establishment of a certain degree of uniformity in cases where a particular type of injury may occur. In *Bird v. Cocking and Sons, Ltd.*, [1951] 2 T.L.R. 1260, BIRKETT, L.J. said:

“The assessment of damages in cases of personal injuries is, perhaps, one of the most difficult tasks which a judge has to perform and certainly the task is no lighter when the appellate court is asked to reconsider the assessment made by a judge in the court below. The task is so difficult because elements which must be considered in forming the assessment in any given case vary so infinitely from other cases that there can be no fixed and unalterable standard for assessing the amounts for those particular elements. Although there is no fixed and unalterable standard the courts have been making these assessments over many years, and I think that they do form some guide to the kind of figure which is appropriate to the facts of any particular case, it being for the judge, or for the appellate court if they are reviewing the matter, to consider the special facts in each case . . . The only thing that can be done is to show how other cases may be a guide, and when, therefore, a particular matter comes for review one of the questions is, how does this accord with the general run of assessments made over the years in comparable cases?”

In *Rushton v. National Coal Board*, [1953] 1 All E.R. 314, SINGLETON, L.J., accepting the dictum of BIRKETT, L.J., in *Bird v. Cocking & Sons, Ltd.* (supra) said at p. 316:

“It is impossible to standardize damages, but it is the duty of this court to see that, so far as possible, the same general principles are followed and the same approach is ensured for all litigants who have suffered personal injuries and for all defendants in a case of this kind. More than that, the court cannot do.”

Now to a much more recent case – a decision of the Privy Council where that court sought to clarify the general principles heretofore enunciated, introducing the concept of awards made not only in cases which are comparable but to cases occurring in the same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions exist. I refer to *Singh v. Toong Fong Omnibus Co. Ltd.*, [1964] 3 All E.R. 925 where Lord MORRIS of BORTH-Y-GEST said at p. 927:

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“It need hardly be emphasized that caution has to be exercised when paying heed to the figures of award in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before any comparison between the awards in the respective cases can fairly or profitably be made. If however it is shown that cases bear a reasonable measure of similarity then it will be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized, or that there should be an attempt at rigid classification. It is but to recognise that, since in a court of law compensation for physical injury can only be assessed and fixed in monetary terms, the best that courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion. As far as possible it is desirable that two litigants whose claims correspond should receive similar treatment, just as it is desirable that they should both receive fair treatment. Those whom they sue are no less entitled.”

Thus, it will be seen that the English courts have accepted the principle that while assessment of damages is a difficult matter and must depend in every case on the peculiar circumstances of that case, yet efforts must be made to achieve some degree of uniformity in awards made in respect of injuries of a particular type, and that while doing so courts must have regard to awards made by other courts in near locality and also to social, economic and industrial conditions.

Therefore, it will be necessary to give consideration to awards of damages made from time to time by the courts in Guyana.

Before giving consideration to those cases, perhaps it will not be amiss to point out that in *Booker Bros. and Co. Ltd. v. Blakett*, (1943) L.R.B.G. 350, the West Indian Court of Appeal accepted the rule of law that in a question of damages in order to justify disturbing an assessment the appeal court should be convinced either that the trial judge ruled upon some wrong principle of law or that the amount was so extremely high as to make it in the judgment of that court an entirely erroneous estimate of the damages, and that even if that court might not have made such an award, that circumstance alone would not necessarily justify that court in amending the judge's award. There have been a number of cases in this country where awards have been made and an attempt will be made in this judgment to review those cases shortly and to draw attention to the awards made.

In *Manraj v. Morgan*, (1964) L.R.B.G. 96, the plaintiff who was 47 to 48 years of age, a married man with four children and in good mental and physical health, who earned approximately \$200 per month, suffered severe damage to his brain with a resulting change in personality from which there was no hope of recovery. CUMMINGS, J., awarded \$12,000 as compen-

sation for loss of earnings, \$11,000 as compensation for the fact that the plaintiff could never again be himself, and \$1,110 as compensation for pain and suffering.

In *Stafford v. Persaud*, (No. 2324 of 1964 – Demerara), where the plaintiff suffered a multiple cerebral concussion, two lacerated wounds to the scalp, a compound fracture of the middle third shaft of the right femur, contusion in the area of *the* left elbow joint and contusion in the right lower leg with a crack fracture of the right fibula, KHAN, J., awarded general damages in the sum of \$2,500.

In *Figueira v. Sterling Products Ltd.* (No. 212 of 1965 – Demerara), the plaintiff suffered from multiple fractures of the pelvis with wide separation of the symphysis pubis, one of the fractures traversing the left hip joint, and with extra peritoneal rupture of the bladder. The result of these injuries was that the plaintiff walked with a limp for some time and there was a limitation of the flexion of the hip joint. The doctor's report fixed the plaintiff's incapacity as being permanent partial to the extent of 30 per centum. Sitting in the first instance, I awarded general damages to the extent of \$3,000.

In *Daniels v. Gurwah* (No. 296 of 1966 – Berbice), the plaintiff who was a dispensing chemist and physiotherapist, suffered a comminuted fracture of the lower pole of the right patella, a tear of the capsule of the knee joint extending laterally, and haemarthrosis, which is blood in the joints. His resulting disability was fixed at 5 per centum permanent partial. KHAN, J., awarded \$3,000 general damages.

In *Evan Wong v. Cheddie* (No. 2385 of 1962 – Demerara), the plaintiff, a girl 20 years of age, was severely injured in an accident as a result of which she was hospitalised for 227 days. Apart from permanent scars to her face, chest and thigh, the girth of her left thigh was less and of a different shape because of the wasting of the thigh muscles. In addition, her left lower limb was shortened by one inch, resulting in backache, and her disability was classified as 20 per centum permanent. CRANE, J. awarded \$25,000 as general damages.

In the instant case, the medical evidence was to the effect that X-ray photographs taken of the first appellant's injuries indicated marked osteoarthritic changes in the left hip joint and narrowing of the pelvic brim. There was union of the fracture of the pubic bone and separation of the symphysis pubic. There was a fracture of the left acetabulum of the left hip joint which was not united. The doctor expressed the opinion that these injuries were responsible for the pain and the limp of which the first appellant complained when walking. The doctor also deposed to the fact that the shape of the pelvic of the rami has been altered which in turn would have some effect on her later on in child-bearing, and he expressed the opinion that an operation should decrease the limp to some extent and the pain completely. The doctor also said that he found the first appellant to be suffering from arthritis which is an incapacitating disease and that in her then condition she would suffer pain in sitting, walking and climbing stairs; in fact, she would suffer pain in

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anything that involves the movement of limb, and he fixed her disability at 25 per centum permanent partial. On this evidence the judge awarded \$3,500 as general damages.

I now wish to return to a number of English cases where awards were made in respect of similar injuries, but before doing so it is well to observe that in *Ramsawak v. Carnarvon*, (1960) 2 W.I.R. 426, the Federal Supreme Court accepted the submission that damages in Trinidad are not on as high a scale as in England. It can therefore be argued with some justification that that principle would also apply to damages awarded in the courts of this territory.

In *Cornilliac v. St. Louis*, (1964) 7 W.I.R., p. 491 WOODING, C.J., in Court of Appeal of Trinidad and Tobago set down the several considerations which a judge of first instance is required to bear in mind when making an assessment of general damages for personal injuries suffered in matters of this kind. These are the matters referred to by the learned Chief Justice: (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering which had to be endured; (iv) the loss of amenities suffered; (v) the extent to which, consequentially, the appellant's pecuniary prospects have been materially affected. We are of the opinion that WOODING, C.J.'s approach is the correct one and ought to be followed in cases of this nature.

In *Quest v. Edwards & Smith*, (referred to in Kemp and Kemp on Damage, Vol. I, at p. 415) a young married woman suffered a fracture of the pelvis and tears to the bladder and urethra. She made a good recovery and it was unlikely that she would suffer anything more than occasional discomfort in the future. Child-bearing would not be affected. The Court of Appeal increased the award of general damages to £800.

In *Wallace v. Freeman Heating Co.* (opt. cit.) a woman suffered fractures of the pelvis resulting in some permanent displacement. This caused her pain particularly after doing heavy work about the house and she might have had to undergo a further operation. The Court of Appeal increased the general damages to £250.

In *Hizett v. B.T.C.* (referred to in Munkman on Damages, 3rd ed., p. 199), a girl of 18 years of age who was a shop assistant suffered serious distortion of the pelvis which would necessitate a major operation in case of childbirth. She also suffered injuries to the chest and leg, scarring of the thigh, skin-grafting and the risk of osteo-arthritis of the spine. General damages of £4,500 were awarded.

In *Harvey v. Fowler* (opt. cit. p. 200), a girl 18 years of age suffered a multiple fracture of the pelvis which might have affected her prospects of marriage and child-bearing. She also had a continuing injury of the urinary system, backache and depression. General damages were fixed at £2,100.

Having regard to the dictum of WOODING, C.J., in *Cornilliac v. St. Louis*, (supra), using the above awards as a guide, and bearing in mind the general principles which obtain in cases of this kind – principles which have come to be accepted both by the English courts and these courts – we are of the opinion that the award of general damages was inadequate having regard to the severe injuries which the first appellant suffered. When it is borne in mind that she suffers a partial disability of 25 per centum which is regarded as permanent, and when regard is had to the nature of the injuries which have already been referred to, we feel that an award of \$7,000 would be adequate in this case. The judgment of the court, therefore, so far as the first appellant is concerned, is that the award of the judge of first instance should be varied to increase the general damages to \$7,000. She should have her costs of this appeal.

The second appellant suffered far less injuries than his friend. He sustained a fractured left shoulder and bruises about his body and his injuries were not regarded as serious enough to warrant hospitalisation. He was required to carry his left hand in a sling for some time. He seems content with the award of special damages, but questions the award of general damages which were to the extent of \$250. As I have already indicated, he was a clerk attached to the Official Receiver's Officer and suffered no loss of earnings. We feel that in the circumstances his award was adequate and would dismiss his appeal by affirming the judge's order so far as he is concerned. He must pay a quarter of the respondent's costs of this appeal.

STOBY, C: I agree. I am authorised by CUMMINGS, J.A. to say that he agrees with the order proposed.

Appeal of first appellant allowed; appeal of second appellant dismissed.

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[In the Court of Appeal (Luckhoo, C. (ag.), Persaud, J.A., Crane, J.A. (ag.),
September 19, October 28.]

Practice and Procedure — Jurisdiction of judge of High Court to amend or vary his own judgment or order — Limits of jurisdiction — High Court Ordinance, Cap. 7 s.26, Court of Appeal Rules O. II r. 3.

On the 8th June 1968, a judge of the High Court dismissed the appellant's action on an issue which did not go to the merit of the case, after refusing an application for two amendments to the statement of claim. On the morning of the 17th June counsel for both parties were in the judge's chambers and he told them that he was of the view that he had erred in his

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decision of the 8th and proposed that he should recall that decision. Counsel for the appellant expressed doubt as to the judge's power to recall his decision and intimated that he had already settled grounds of appeal. Thereupon the trial judge intimated that he proposed to grant one of the two amendments which had been sought on the 8th June. He adjourned the matter to the 28th June. On the very afternoon of the 17th June, counsel for the appellant filed his appeal to the Court of Appeal.

On the 28th June counsel met in the chambers of the judge where the appellant's legal adviser informed the judge that he had no instructions to appear and reminded him that an appeal was pending. The judge then dismissed the action for want of prosecution.

The appellant filed a motion before the Court of Appeal which sought –

- (a) an order directing whether or not the notice of appeal of the 17th June is valid and effective;
- (b) whether or not the proceedings on the 28th June in chambers are a nullity and ineffective;
- (c) alternatively, in the event of the proceeding on the 28th June being held to be properly included the record of an appeal, an order that the appellant be granted an extension of time for appealing against that order.

HELD: (i) a judge of the High Court has the power to modify or rescind his order if in his view the interests of justice so require;

(ii) this power is exercisable by the judge up to the point that the order has been drawn up, perfected and entered;

(iii) the power is not only exercisable in pursuance of an application by one of the parties but can be exercised by the trial judge on his own initiative;

(iv) a judge can amend his order at any time and even after it is entered – if it contains therein some manifest omission or clerical error;

(v) other than in the above circumstances a judge is precluded from amending his order, if any of the parties having conduct of the suit either (a) draws up and lodges a draft copy of the judgment or order within fourteen days of the date when it was pronounced or made or (b) after he has given notice of appeal;

(vi) the proceedings of the 28th June 1968 may properly be included in the record of appeal.

*Extension of four weeks granted to file
notice of appeal.*

J. A. King, for the appellant.

B. S. Rai for the respondent.

CRANE, J.A. (ag.): A point of principle of much importance arises on this motion. It may be stated in this way: What are the limits to the juris-

diction of a judge of the High Court in relation to the power which he undoubtedly has of recalling and varying his own judgment or order after he has once pronounced it?

On the 8th June, 1968, a judge of the High Court made an order dismissing the plaintiff's action with costs to be taxed certified fit for counsel. The dismissal, according to the affidavit of John Stafford, barrister-at-law, in support of the motion, was not in consequence of a hearing on the merits, but flowed from the refusal by the judge to grant two amendments sought by plaintiff to the writ which he thought disclosed no cause of action. An appeal was accordingly filed on the afternoon of June 17, 1968, against the order of the judge who had been so informed by Mr. Stafford on the morning of that day in chambers, where Mr. Rai, counsel for the defendant, was also present at the judge's invitation. There, the judge expressed the view that he had erred in his decision of June 8, since he considered that he ought to have taken evidence in the matter. He then proposed to both counsel that he should recall his decision of that date. This course was questioned by Mr. Stafford who doubted whether the judge had that power, particularly as he, counsel, had already settled his grounds of appeal. Thereupon, the judge after intimating that he now proposed to grant only one of the two amendments formerly sought to the writ and to award the defendant one-half of his taxed costs of the amendment, adjourned the matter to June 28.

On June 28 both counsel met again in chambers. There, Mr. Stafford informed the judge that he had no instructions to appear and reminded him that an appeal was now pending against his decision of June 8. The judge then again dismissed the action, on this occasion stating his reason that he had done so – “for want of prosecution with costs to the defendant to be taxed”. The position then is that from that time there were two orders of dismissal for which two different reasons were assigned in relation to one and the same action – one on the 8th and the other on the 28th of June, 1968. There was, however, only one notice of appeal, viz. that of June 17, 1968, consequent on the dismissal of the action on June 8.

It is this curious situation which has given rise to this motion which seeks, firstly, an order directing whether or not the notice of appeal of the 17th June, 1968, against the judge's order of dismissal on June 8 is valid and effective when the plaintiff's action was dismissed with costs; secondly, whether or not the proceedings of the 28th June, 1968, in chambers, which followed those of the 8th June are a nullity and ineffective, and ought not to be struck from the record of appeal.

An alternative order is sought in the event of the proceedings in chambers of June 28, 1968, being held to be properly included in the record of appeal; it is that an extension of time be granted to appeal therefrom in that event with consequential orders as to the laying over of the usual four copies of the record, and that this court directs that such further proceedings be included in the record of appeal without the necessity to file and serve a further notice.

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There is no doubt that the Court of Appeal has the power to give directions incidental to an appeal so long as these do not involve the decision Of it; and also the power to make interim orders to prevent prejudice to the claims of the parties pending the appeal. It seems clear that in the light of the uncontroverted facts revealed in the affidavit of counsel and the further affidavit of solicitor for the appellant that this motion is properly brought. [See The Annual Practice, 1961, o. 58, r. 13(4) sub.-r. 1 at p. 1698].

Counsel for the plaintiff/appellant, in support of his arguments, claim that he has been put in a quandary. He does not know, he says, whether, now that he has come to settle the record of appeal, there ought to be inserted the first or second order of the trial judge or both, i.e. the order of June 8 or June 28, or from which order he ought to appeal, and it is in these circumstances that he has approached this court. Counsel contends that what has taken place is that the learned judge has arrogated to himself appellate functions when he recalled and varied his decision of June 8 and adjudicated afresh, and respectfully submitted that the judge was without his jurisdiction when he so acted. This is clearly so, counsel argues, in the light of the provisions of the Federal Supreme Court (Appeals) Ordinance, 1958, No. 19 of 1958, s. 9 (7), Part II, Civil Appeals, which read:

“9(7) The jurisdiction to hear appeals vested in the Federal Supreme Court under the provisions of this Part of this Ordinance shall be to the exclusion of the jurisdiction of any other court.

“Provided that a judge of the Supreme Court may hear and determine such applications incidental to the appeal and not involving the decision thereof as may be prescribed by rules of court; but an order made on any such application may be discharged or varied by the Federal Supreme Court.”

Counsel’s citation of s. 9(7) above is in support of his contention that the judge has exercised appellate functions in the matter; but when the position in England is looked at as a guide, we see from the Judicature Act of 1873 (see ss. 16, 17, 18 and 19), which re-organised and established for the better administration of justice in England, the system of procedure and the hierarchy of authority in the courts, that the jurisdiction hitherto exercised by the judges, particularly of the old Court of Chancery, to re-hear his own or another judge’s order has been transferred by that Act to the Court of Appeal. S. 16 and 19 of the Act of 1873 provide as follows:

“16. The High Court of Justice shall be a superior court of record, and, subject as in this Act mentioned, there shall be transferred to and vested in the said High Court of Justice the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by,” (among other courts) “the High Court of Chancery as a common law court as well as a Court of Equity . . .”

“19. The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as

hereinafter mentioned, of Her Majesty's High Court of Justice, or of any of the judges or judge thereof . . .”

But this Act notwithstanding, it is from the body of case law which has developed since the passing of that Act to the present day in explanation of it that we must look for assistance; and from all the authorities without a single exception since then, there is discerned the principle that it is quite open to a judge of the High Court to review and reconsider his decision right up to the point when the order has been drawn up, perfected and entered, and this is so even beyond that point, as we shall see, in certain clearly defined circumstances. Every court has an inherent jurisdiction to vary, modify or extend its own orders if, in its view, the purposes of justice require that it should do so. It certainly can do so if there is some clerical mistake, or some error in his judgment or order arising from an accidental slip of the judge or omission under the slip rule. (see o. 26 r. 11). Lord PENZANCE, in explaining the nature of this jurisdiction, which is not appellate, and that it extends beyond any order of Court, in his speech in *Lawrie v. Lees*, (1881) 7 A.C. 19, at pp. 34-35 spoke as follows:

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

The position, it is submitted, is no different in Guyana; for the original jurisdiction which is conferred on our judges by s. 26 of the Supreme Court Ordinance, Cap. 7, includes – “all proceedings in an action subsequent to the hearing or trial and down to and including the final judgment or order, except any proceedings on appeal, shall so far as it is practicable and convenient, be had and taken before the judge before whom the trial and hearing took place.” But the decided cases on the subject must be looked at to see how these original powers were interpreted, quite apart from what was enacted in the Federal Supreme Court (Appeals) Ordinance, s. 9(7) (above), and the Judicature Act, 1873. This is what I believe Lord PENZANCE meant; for while the purpose and intendment of both statutes was to confer appellate jurisdiction on their respective Courts of Appeal over the judgments and orders of their High Courts of Justice, neither of them denuded the latter of their inherent powers in their original jurisdiction. S. 26 of Cap. 7 provides as follows:

“26. (1) Subject to any statutory provisions, every action and proceeding and all business arising therefrom shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single judge, and all proceedings in an action subsequent to the hearing or trial and down to and including the final judgment or order, except any proceedings on appeal, shall, so far as it is practicable and con-

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venient, be had and taken before the judge before whom the trial or hearing took place.

(2) For the purpose of those proceedings a single judge shall be vested with and may exercise the whole of the original jurisdiction of the court.

(3) A single judge may, subject to rules of court, exercise in court or in chambers all or any part of the jurisdiction vested in the court.”

There was, however, cited before us, evidently to emphasize the contrary, the decision of *In re Risca Coal & Iron Co. ex parte Hookey*, (1862) 4 De G.F. & J. 456, on which much reliance is placed in support of the contention that the above principle does not hold’ good in Guyana. This is so, it is urged, because were a judge free to recall, alter or vary his decision after pronouncement, it would militate against the principle of the finality of judgments and orders, and would operate to render nugatory, uncertain and ineffective the entire appellate procedure as directed by o. II r. 3 of the Federal Supreme Court (Appeals from Guyana) Rules, 1959. R. 3(1)(2), so far as material, provides as follows:

“3(1) Subject to the provisions of this rule, no appeal shall be brought after the expiration of six weeks from the date of judgment delivered or order made against which the appeal is brought. . .

(2) An appeal shall be deemed to have been brought when the notice of appeal has been filed with the Deputy Registrar.”

Counsel’s argument is to the effect that since the above rule says that “no appeal shall be brought after the expiration of six weeks from the date of judgment delivered or order made . . .”, it means that in Guyana a judge must necessarily *be functus officio* from the date he pronounces judgment or makes his order, because time for appealing runs from that date, and were he considered free to alter or vary such decision by making another pronouncement subsequently, there would be uncertainty as to the date when time for appealing takes effect.

It is further argued that the result would be the same as that envisaged by Lord Chancellor WESTBURY in the *Risca Coal Co.* case (above), when he was considering the policy of certain provisions of an appeal statute concerned with computing the time allowed for appealing. In his decision the Lord Chancellor was contrasting two clearly defined situations, and was confronted with this problem, viz., should time for appealing run from the pronouncement of the decision, or from the ministerial act of the making of the order by a court official, i.e., the time when it is drawn up and entered by that official? He was asked to construe the word “made” as equivalent to “orally pronounced” in appeal provisions, the intent in the wording of which is evidently not opposed to ours above, and after referring to the “inconvenient uncertainty” and confusion which would result from a disjunctive construction of those words, rightly held, it is respectfully submitted, that

the time at which an order is “made” is when the order was pronounced and not when it is in fact drawn up, because the ideal situation is for an order to be made “immediately upon pronouncement”, although this is not always practicable.

In commenting on the above decision, it may be of some moment to observe, in the first place, that the *Risca Coal Co.* decision was made before the Judicature Act referred to above; and, in the second place, that it is not concerned with a situation such as we are here confronted with, viz., the competency of a judge to recall and vary his own decision; so that whatever may be its value by way of analogy to the instant case, it is no authority for the proposition that a judge is not competent to recall, alter, vary or review his decision between the time when he actually pronounces it and when the court official has actually entered the order. I think that counsel has merely cited the case with a view to emphasizing one of the uncertainties which he anticipates will follow from judicial recall, namely, uncertainty in the application of appellate procedure, and it is for this reason it is cited against the view he contends ought not to be allowed.

We must, however, look to the decisions following the Judicature Acts to see how the courts have approached this difficult and delicate matter of judicial recall and review of decisions and orders which, it will be readily conceded, cannot be justified save in the interests of justice. This is the principle to be deduced from a consideration of all the reported cases on the subject since that time.

Judicial recall of decisions is first observed after the Judicature Act in *re Australian Direct Steam Navigation Co.*, (1876) 3 Ch. D. 661. In this case, which is also called *Miller's* case, JESSELL, M.R., re-opened a case after giving an oral judgment, considered other material to which his attention had not been directed before, and gave judgment afresh afterwards. Three years later in his judgment in *re St. Nazaire Co.*, (1879) 12 Ch. D. 88, at p. 91, he explained his action thus:

“In *Miller's* case no order had been drawn up. A judge can always re-consider his decision until the order has been drawn up.”

A review of all the important authorities the last century since *Miller's* case will show that the view of JESSELL, M.R., has been consistently followed. (see *In re Roberts*, (1887) W.N. 231; also *In re Suffield & Watts ex parte Brown*, (1888) per FRY, L.J., at p. 697); and at the turn of the present century WARRINGTON, J., in *re Thomas*, [1911] 2 Ch. 389, at pp. 395 – 6, continuing in the same vein said:

“What is it that renders an order finally effective so that there is no longer any possibility of going back from it? It seems to me that it is the passing and entering of the order. It is the everyday practice that, until an order is passed and entered, the matter can be brought before the judge, and if a mistake has been made it can be put right.”

And at p. 396:

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“I think that is the correct way of dealing with the matter for the reason that, until the order is finally passed and entered, it leaves open an opportunity of reviewing and re-considering what has been done.”

Again, in *Millensted v. Grosvenor House (Park Lane) Ltd.*, [1937] 1 All E.R. 736, where a judge had orally pronounced an award of £50 damages and costs on the High Court scale in a personal injuries action, and it was then disclosed that £20 had been paid into court, judgment was then given for £50 and County Court costs. On a further application made next day for costs on the High Court scale, the judge reconsidering the matter, said he thought his award of the previous day excessive and ordered judgment to be entered for £35 and costs on the County Court scale. The plaintiff appealed on the ground that once the judge had been informed money had been paid into court, he had no jurisdiction to hear the matter further. The Court of Appeal, however, held, firstly, that once the knowledge that the payment in could not reasonably cause any miscarriage of justice, the judge could have exercised his discretion and proceeded with the case, and, secondly, that a judge is always at liberty to alter his oral judgment at any time before it is formally drawn up and entered.

Then came the case of *re Harrison's Settlement*, [1955] 1 All E.R. 185, which has served greatly to throw further light on the matter in recent times. In this case an application was made to the Chancery Division of the High Court for approval of a scheme varying the trusts of a settlement on behalf of infants and unborn and unascertained persons. Following a decision of the Court of Appeal in a similar case, ROXBURGH, J., in chambers made an order approving the scheme. Before the order was perfected, the House of Lords reversed the decision of the Court of Appeal and held that the Court had no jurisdiction to make an order sanctioning variations in trusts in such cases. ROXBURGH, J., thereupon recalled his order, adjourned the case into court for further argument, and there dismissed the summons. The Court of Appeal held that he was entitled to recall an order made on his own initiative, whether the order was originally made in chambers or in open court, and notwithstanding any consequential inequality in relation to other similar orders already perfected, it was right that he should recall his order in the circumstances of the case.

The decision in *re Harrison's Settlement* corrected three erroneous impressions which formerly held sway: the first, for which counsel in support of this motion strives, contending, as we have seen, to be supported by the wording of o. 4 r. 3(1)(2) of above, is, that in general an order is made once and for all, at least in Guyana, at the time when it is orally pronounced and is incapable of being discharged or varied otherwise than on appeal. To this contention, however, the reply of ROXBURGH, J., at first instance in *re Harrison's Settlement*, with which I respectfully agree, seems unanswerable. “This power to recall an unperfected order,” says the learned judge, “is not appellable in its nature but exists because the jurisdiction which the parties have invoked is still continuing.” [See [1954] 2 All E.R. 453 of p. 457.]

The second submission is in the alternative to the first: that assuming a judge does have the power to discharge or vary an order between oral pronouncement and entry, he ought to do so only on the application of one or other of the parties but not of his own volition. No distinction, however, is to be drawn between the case where a judge varies or discharges on his own initiative because he has discovered some vitiating factor through his own industry or even by chance subsequently, and the case where an application is made to vary or discharge by one or other of the parties. This is so because whether discovery is by the judge or by any of the parties, what is sought after is right and justice.

The third submission is a variant and by way of exception to the first. It is: that the power of recalling, varying and/or discharging an order pronounced orally at any time before it is perfected by entry, ought to be limited to cases of manifest omission comparable to those in which an order can be corrected after entry under o. 26 r. 11 of the Rules of the High Court, 1955.

The whole exercise is considered to be in the interest of justice, and it is thought, and quite rightly too, that unless there is a *locus poenitentiae*, or opportunity afforded the judge for correcting errors and re-considering the case in the light of other material not brought before him, justice cannot always be done. A judge can therefore recall *suo motu* when the justice of the case requires him so to act. For example, in *re Harrison's Settlement*, there being no opposition to the approval of the schemes varying the trusts of the two settlements, nobody was therefore interested in having the judge recall his order in the light of the subsequent decision of the House of Lords in *Chapman v. Chapman*, [1954] 1 All E.R. 798, which was clearly to the effect that he was without jurisdiction to vary the trusts as he had done. Therefore, the result would have been truly astonishing if it were held that ROXBURGH, J., had no power to recall his order, for injustice would have been done to infants, unborn persons, and persons who were not parties to the proceedings would have been affected as that decision shows.

A judge's power to "review and consider", as seen from the decision of the Court of Appeal in *re Harrison's Settlement*, is therefore considerably wide; it is as wide as the interest of justice demand, but so long as he acts within jurisdiction, his recall cannot be disturbed, and "anyone who acts on it beforehand must take such risk as there is that it will not be drawn in the form in which it was heard to be pronounced"; for although it dates from the date of its pronouncement, in theory it is not perfected until it is drawn up, passed and entered. This would appear to be astounding to the reader; but that being the position, *the* question arises as to what course ought a litigant to take so as to bind the judge to his original pronouncement. To ensure this end, he may adopt either one of two courses, depending upon how urgent is his desire to obtain a final judgment or order. If he is "the party having the conduct of the suit or the carriage of the order", r. 2(1) – (4) empowers him to draw up and lodge a draft copy of the judg-

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merit or order with the Registrar within 14 days from the date when it was pronounced or made. Alternatively, if he is desirous of appealing, his obvious course is to give a proper notice of appeal as early as possible after the decision is pronounced.

Such a course would immediately bring to an end the judge's power of recall by terminating his jurisdiction and invoking that of the Court of Appeal, a superior court of record, even though the judge's order may not have been perfected, drawn up, passed and entered. It is in this instance that the joint effect of o. II, r. 3(2) of the Federal Supreme Court Rules, 1959. and s. 9(7) of Ordinance, No. 19 of 1958, becomes apparent. The jurisdiction of the Guyana Court of Appeal will then be attracted by notice of appeal duly filed and then the provisions of Part II of that Ordinance relating to civil appeals will become operative and "shall be to the exclusion of the jurisdiction of any other court", but unless that course is taken or the order is perfected, drawn up and entered, a judge will always be free to change his decision, not arbitrarily or capriciously, of course, but where the justice of the case warrants it: and it is to be expected after the parties have been heard.

There is only one reported decision in the local reports dealing with this question. It is the decision of the Full Court in *re Hanooman, Hanooman v. Alli* [1965] 8 W.I.R. 103, which reversed the decision of a single judge of the former Supreme Court who held that he had the power to vary his own order by substitution. In that case a summons had been taken out by the Registrar seeking clarification of the order of court which had been already drawn up and entered. I was the judge in that case, and the Full Court held that I was wrong to have so done. The recent decision of *re Harrison's Settlement* (above), however, was not cited to the Full Court which seemed to think, contrary to *Harrison's* case, that it was not possible to vary a previous judgment by substitution, and that power to amend was limited to the slip rule; but that notwithstanding, I think they came to the right conclusion because the order which had been varied had already been drawn up and entered. The only means by which an order already so passed and entered can be properly set aside is, (i) under the slip rule (see o. 26 r. 11 of the Rules of the High Court, 1955; or (ii) if the judgment as drawn up does not correctly state what was actually decided and intended to be decided. [See *Ainsworth v. Wilding*, (1896) 1 L.R. Ch. D. 673, 678.] When, therefore, it was decided subsequently to alter the appellant's liability from a representative to a personal capacity, the Full Court quite rightly maintained that this could not be done.

In the light of the foregoing, I would hold that the notice of appeal of June 17, 1968, against the judge's order of June 8, is invalid and ineffective and that if the appellant wishes to appeal in this matter he must do so in respect of the order of June 28, 1968.

Before concluding, I consider it impelling to say from the circumstances revealed in this case, that though the learned judge did have the right to rescind and vary his previous order, he ought to have been very slow to do so

after counsel's verbal intimation that an appeal was contemplated and that grounds in respect thereof had already been settled. Unless justice demanded the rescission of his previous order (on this aspect I refrain from comment, not being fully informed), he ought to have stayed his hand.

I would, therefore, issue the following directions on the alternative limb of the order sought: (a) that the proceedings in chambers of June 28, 1968. may quite properly be included in any record of Appeal; (b) that the appellant be and is hereby granted an extension of time of four weeks from date within which to file notice of appeal against the order of June 28, 1968.

The costs of this application to be costs in the cause.

Extension of four weeks granted.

LUCKHOO, C. I concur.

PERSAUD, J. A. I concur.

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[In the Court of Appeal (Luckhoo, C. (ag.), Persaud, J.A., Crane, J.A. (ag.))
October 25, November 15, 1968.]

Appeal — Practice and procedure — Plaintiff involving third party — Appeal against decisions of magistrate, one being in favour of third party — Only one sum lodged as security to prosecute both appeals and as security for costs — Effect on appeals.

The first respondent filed a claim, under the Workmen's Compensation Ordinance, against the appellants in respect of the death of her husband, and the appellants obtained leave to join the second respondent as a third party. Judgment was given in favour of the first respondent, and the third party proceeding against the second respondent, dismissed. The appellants appealed against both decisions but only lodged one sum of \$3.00 as security to prosecute the appeals and one sum of \$25.00 as security for the payment of costs. The Full Court dismissed both appeals on the ground of the insufficiency of the securities lodged, although the appellants had sought leave to abandon their appeal against the second respondent.

HELD: (i) the decisions of the magistrate in favour of the respondents were separate and an appeal against any one of them required the lodging of

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two sums, viz. \$3.00 as security to prosecute each appeal and \$25.00 as security for costs in each appeal;

(ii) although a notice of appeal is ineffective if an appellant fails to lodge the \$3.00 required as security to prosecute his appeal within the prescribed time, s. 5 empowers the Full Court to grant an enlargement; and although the Court of Appeal is, by virtue of s. 14 of the Summary Jurisdiction (Appeals) (Amendment) Ordinance, 1955, possessed of similar power, it will only be disposed to exercise that power when a proper application had been made to the Full Court;

(iii) as the appellant had lodged the sums as for the security to prosecute and for costs, which were sufficient for one appeal, he could abandon his appeal in respect of one of the two decisions, and the securities *ex necessitate* would attach to the only appeal which remained before the Court.

Leave granted to prosecute appeal against the first respondent which is remitted to Full Court for hearing.

J. A. King for the appellants.

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

C. J. B. Harris for the second respondent.

PERSAUD, J.A.: On the 22nd January, 1966, one Seigfried Paul was engaged with others in shifting a scaffold in order to enable electricians to work at the premises of the appellants. While so engaged, Paul suffered from electric shocks as a result of portions of the scaffold coming into contact with exposed electric wires, and he died. His work on the premises of the appellants was being supervised by the respondent Abrams.

Arising out of this accident, the first appellant Gwendoline Paul brought a claim under the Workman Compensation Ordinance seeking compensation for herself as the widow of the deceased workman and for her infant child, Denese. The appellants, in addition to filing an answer, also filed a notice of claim of indemnity in which they alleged that they had hired the respondent Abrams as a contractor to erect and dismantle the scaffold, and that the deceased workman was hired by Abrams independently, and was not under their direction or control.

They accordingly sought and obtained leave of the court on January 16, 1967, to join Abrams as a third party in these proceedings. As was to be expected, the third party denied that he was an independent contractor, and pleaded that he was employed by the appellants as a foreman to overlook the work of the other workmen including the deceased, all of whom had been employed by the appellants.

This was the nature of the pleadings when the application came to be heard by the magistrate who held that the deceased workman was an em-

ployee of the appellants, that he died as a result of an accident arising out of his employment, and accordingly awarded judgment in favour of the first respondent in the sum of \$4,770: calculated on the basis of a wage of \$3.50 per day, and costs. The magistrate also made an order dismissing the case against Abrams.

The magistrate's decision was given on December 9, 1967, and on that same day the appellants gave oral notice of appeal, as they were entitled to do under s. 4(1)(a) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17.

It is clear from the magistrate's case jacket and from the rubric on the notice of appeal, that it was the intention of the appellants to appeal against the entire decision of the magistrate, that is to say, both the awards made in favour of the first-named respondent, and the order of dismissal made in favour of the third party Abrams. Purporting to comply with s. 5 of the Ordinance which provides for the giving of security, they lodged one sum of \$3.00 and one sum of \$25.00:

Section 5(1), (2) and (3) provide as follows—

“(1) The appellant shall, when he gives or lodges notice of appeal other than in criminal cause or matter, deposit with the clerk the sum of three dollars as security for the due prosecution of the appeal in accordance with the provisions of this Ordinance and the rules, and if the appellant fails to make this deposit the notice of appeal shall be of no effect.

(2) If the appellant duly prosecutes his appeal, including appearance at the hearing thereof in person or by counsel, he shall be entitled to a refund of the sum of three dollars aforesaid whatever may be the result of the appeal; otherwise it shall be forfeited as a court fee.

(3) The appellant shall further within fourteen days after the decision appealed against is pronounced give security to the extent of twenty-five dollars for the payment of any costs awarded against him by the Court and for the due and faithful performance of the judgment or order of the Court.”

Upon the matter being called in the Full Court of Appeal, the fact of the deposit of one sum of \$3.00 and one sum of \$25.00 was attracted to the attention of that Court, and counsel for the respondents then took the point that as there were two respondents to the appeal, there had been a non-compliance with s. 5 in that insufficient security had been lodged, the submission being that for every respondent a sum of \$3. and a sum of \$.25. ought to have been lodged.

Counsel for the appellants then sought to abandon his appeal as it affected the respondent Paul. The Full Court, however, held that it was not competent for him to do so, expressing the view that it was impossible to say in respect of which appeal the security had been lodged as only one notice of appeal had been filed and served notwithstanding that there were two

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respondents and two separate decisions. After referring to *Ogle Company Ltd. v. Hackett and others* (1963) L.R.B.G. 264 and *Bovel v. Jasoda* (1950) L.R.B.G. 151, the Full Court dismissed the appeal with costs to each respondent, holding that by virtue of the provisions of s. 16(1) of the Ordinance, the appeals must be deemed to have been abandoned.

The appeal now before this Court is to test the rectitude of the Full Court's decision.

Counsel for the appellants submits before us that regardless of the number of appellants and respondents involved in a civil appeal only one sum of \$3. and one of \$25. are required to be deposited, and after attracting our attention to a number of cases in which this point has arisen, argued that none of those cases is authority against a situation such as this, that is to say, where there is only one plaintiff and one case jacket.

Reference was also made to s. 14 of Cap. 17 as re-enacted by the Summary Jurisdiction (Appeals) (Amendment) Ordinance, 1955 (No. 29), and the submission was that if this Court is against the appellants on the first submission, then it should exercise its discretion which is vested in it by virtue of s. 14 to extend the time within which to lodge the additional security.

In the further alternative, counsel wishes, as he did in the Full Court, to abandon the appeal in respect of Abrams, and seek leave to proceed against Paul alone.

So that there are three aspects to be considered. Firstly, the adequacy of the security lodged, secondly (assuming that we hold that the security is insufficient), whether it is legally permissible to extend the time for the lodgment of the security under s. 14 of the Ordinance, and thirdly, if we find against the first two propositions, whether we would acquiesce in the application for leave to withdraw against one respondent, and grant leave to proceed with the appeal as it affects the other respondent.

So far as the adequacy of the security is concerned, it is accepted that there are cases on both sides of the line. We would refer to those cases briefly, and then examine the legislation before coming to a conclusion of our own.

In *Hotchkiss v. Willis* (1908) A.J.S.C.B.G. a preliminary objection was taken to the hearing of the appeal on the ground that only \$10 had been lodged to abide the cost of the appeal in which there was more than one respondent. S. 16 of the Magistrate's Decisions (Appeals) Ord., 1893, provided that the appellant may lodge "the amount awarded by the decision and the amount of costs including the sum of ten dollars to abide the costs of the appeal". LUCIE-SMITH, C.J. (ag.) held that there was one appeal, and only one sum of \$10 need be lodged. No doubt the learned Chief Justice held this view because of the fact that that case concerned a single criminal

complaint in which the respondents were charged with the unlawful possession of balata.

In 1920 in *Malouf v. Atallah* (1920) L.R.B.G. 162, two suits were taken together by consent before a magistrate. The appellant was plaintiff in one, and defendant in the other, and the respondent was in the reverse position. In the first case the respondent was discharged, and in the second the appellant was convicted. The appellant appealed in both matters. One deposit of \$10. had been made to abide costs, and in answer to a submission that two sums of \$10: ought to have been deposited, DALTON, C J. (ag.) said that the magistrate had given one decision covering the two complaints, and ruled that the deposit was adequate.

It appeared that when notice of appeal was given in the magistrate's court in *Malouf v. Atallah* (supra) the magistrate, in the presence of counsel for both sides fixed the amount to be secured, and this included the sum of \$10. The learned Chief Justice held that in those circumstances, it was not open to the respondent having previously consented to the amount to be lodged, to object on appeal to the insufficiency of the deposit. He went on to say, however, that he was prepared to hold, having read the documents, that in the absence of the respondent's consent, the security given was, under the circumstances, sufficient to comply with the law.

Our observations on the judgment in *Malouf v. Atallah* would be this. We are not aware of the circumstances referred to by the Chief Justice. But however that may be, he could hardly have decided otherwise when the parties by their counsel consented to the amount of deposit. Presumably, as the Chief Justice remarked, the parties regarded the whole matter as one decision covering two complaints.

The case heavily relied upon the appellants is *Alexander v. Das and Glasgow* (1938) L.R.B.G. 206. In that case, a claim for workman's compensation, there were several appellants and two respondents, and the question was whether the deposit of one sum of \$25. was a sufficient compliance with s. 5 of the Ordinance. VERITY, C.J. (ag.) sitting with LANGLEY, J. in the Full Court held that it was. That court expressed the opinion that there was nothing in the Ordinance which would permit the words "the appellant" to mean "each and every appellant", or the words "any costs" to mean "the costs of each and every respondent" and that "the intention of the existing statute is not to secure the respondent against loss but to put the appellant under penalty in a fixed sum to obey the order of the court and so preclude or at least discourage the bringing of frivolous appeals by irresponsible persons". That conclusion was based on the fact that the predecessor of s. 5 of the Summary Jurisdiction (Appeals) Ordinance Cap. 17, viz. s. 16 of the Magistrates' Decisions (Appeals) Ordinance, 1893 (No. 13) made provision for the lodging of security to include the original award, whereas s. 5 of Cap. 17 enables an appellant to lodge \$25.00 only irrespective of the amount involved in the judgment appealed against.

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In *Nelson v. Charles* (1941) L.R.B.G. 45, there were three complaints filed by the same complainant against three defendants, but arising out of the same incident, all three having been tried together by consent. On appeal, only one deposit was made in respect of all the matters. The Full Court, comprising of FRETZ and STUART, JJ., following *Malouf v. Atallah* (supra) and *Alexander v. Das and Glasgow* held that the words “the appellant shall” in s. 5(3) of Cap. 17 mean “each appellant shall”. In that case the two appellants were jointly charged and convicted, and upon appeal, one sum of \$25. was lodged on their behalf by counsel who appeared for both appellants. The reason given by the Full Court is that “if several appellants were jointly to give security for the sum of \$25. by way of a deposit of cash and later before the appeals came on for hearing one or more of them filed a notice of withdrawal of his or their appeals and the sum deposited were uplifted by the appellant who actually made the deposit, there would be no “security” left for the payment of any costs awarded against the remaining appellants”.

This view was adhered to in *Ogle Co. Ltd. v. Hackett et al* (1963) L.R.B.G. 264. In that case, separate actions had been commenced by the appellant against different defendants. In the magistrate’s court, the actions were consolidated for the purpose of the trial. Upon appeal the appellants lodged one set of security, and again the question arose as to whether the security was a sufficient compliance with the Ordinance. The Full Court held that it was not. In the course of its decision, that court reviewed the authorities, and expressed the opinion that VERITY, C.J., had gone wrong when he stated in his judgment (and I quote from the judgment of the Full Court):

“that it would appear to be clear that the intention of the statute was not to secure the respondent against loss but to put the appellant under penalty in a fixed sum to obey the order of the court and so discourage the bringing of frivolous appeals by irresponsible persons . . . The intention is clearly that the appellant should deposit the sum of money to secure the costs of the respondent in the event of the appeal being unsuccessful.”

This view of the Full Court is, in our opinion, supported by sub.-s. (4) of s. 5 which provides as follows:

“The security shall be by deposit of money with the clerk, or by a recognisance in form 2 entered into by the appellant, with or without a surety as the magistrate may direct.”

And the condition set out in form 2 gives the purpose for the necessity for entering into the recognisance and so too the deposit of the security. That condition is as follows:

“The condition of the within-written recognisance is such that if the within-bounden A.B. duly prosecutes an appeal which he has made

to the Full Court from the decision of the said magistrate's court, pronounced on the day of 19 , in a cause in which he, the said A.B., was complainant (or informant, or plaintiff), and C.D., of was defendant, and satisfies any judgment which may be pronounced against him by the said Full Court in respect of the said appeal, including the payment of all costs of the said appeal and otherwise, and in all other respects abides the result of the said appeal, then the said recognisance shall be void, but otherwise shall remain in full force."

A recognisance is defined in Burn's Justice of the Peace (30th ed.) as a "bond of record testifying the recognisor to owe a certain sum of money to some other". And the condition to be observed by an appellant who enters into a recognisance is not only that he prosecutes his appeal, but that he satisfies any judgment including the payment of all costs.

We, therefore, agree with the view expressed by the Full Court that the intention of the deposit is to secure the costs of the respondent.

In their judgment, the Full Court also referred to *Booth v. Appan* (O.G. 192.1909) – a decision not referred to before us – where there was a single complaint against four defendants which was dismissed. The complainant appealed, and entered into a single recognisance. BOVELL, C.J. held that although there was a single complaint, the offence created thereby was several in its own nature, the guilt or innocence of any person not being in any way affected by the guilt or innocence of any other person, and hence the decision of the magistrate was in legal effect a separate acquittal of each defendant. The learned Chief Justice held that in those circumstances the recognisance entered into was insufficient.

The court also cited *Sargeant v. Agard* (O.G. 14th May, 1910) and *Williams v. John* (1924) L.R.B.G. In the first case there were two appellants and one respondent, and only one sum was lodged, while in the second case, there were three appellants and five respondents, and only one appellant had entered into a recognisance to abide the costs of appeal which sum was not sufficient to satisfy all five respondents. In both cases, it was held that the security was insufficient.

The last case we wish to examine on this point is *Bovell v. Jasoda and Ors.* (1950) L.R.B.G. 151. There were three separate applications to the Liquor Licensing Board all opposed by the appellant. These applications were heard together for the sake of convenience. Upon appeal, the appellant lodged one sum as security for costs. BOLAND, C.J. (ag.) held that there was not a sufficient compliance with the ordinance. The learned Chief Justice, while declining to review the decision in *Alexander v. Das and Glasgow* held that each application was a separate and distinct cause or matter, and (what to us is the true ratio), that the decision in respect of each application is a separate decision. Said the judge (*ubi supra*, p. 153):

"There were in fact four decisions in respect of the four applications before the Board, and, if the appellant desired to exercise his right of appeal in respect of three of these decisions, it appears to us that he

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was required to give three separate notices of appeal and to pay the fees required by s. 5 of Cap. 16 (as it was then) in respect of each appeal.”

It seems to us therefore that where the judgment of a magistrate really involves separate decisions in view of the fact that there are more than two parties to the litigation, and where one such party wishes to appeal, he must lodge so many deposits as there are decisions he wishes to test. That this is so is apparent from the language used in s. 5(3) of the Ordinance. The appellant is required to “give security to the extent of twenty-five dollars for the payment of any costs awarded against him by the Court and for the due and faithful performance of the judgment or order of the court.” So that where there are two decisions (there being two respondents), an appellant may lose against both respondents, in which case, where he to have lodged only one deposit, one of the respondents would be without security. This cannot, we conceive, to be the situation contemplated by the Ordinance and, as we have already indicated, agree with the view expressed by the Full Court in the *Ogle Co.* case.

In the instant case, as we have already indicated, the magistrate rendered two decisions, and awarded two separate sets of costs. In these circumstances, and for the reasons given, we are of the view that the deposit of \$3 and \$25 was inadequate in that it did not comply with the Ordinance, and would affirm the Full Court’s decision in this regard.

The second submission is whether this court is empowered to enlarge the time within which to lodge additional security under s. 14 of the Ordinance. That section as repealed and re-enacted by the Summary Jurisdiction (Appeals) (Amendment) Ordinance, 1955 (No. 29) provides as follows:

“Notwithstanding the provisions of section sixteen of this Ordinance, any person who has failed to comply with any of the provisions of this Ordinance limiting the period of time within which, or prescribing the manner in which any act shall be performed, may apply to the Court for an extension of the period of time within which such act shall be performed or for leave to perform such act in the prescribed manner. . .”

And the court (meaning the Full Court) is empowered to grant an extension of time upon terms and conditions.

It does not now admit of dispute but that the Appeal Court also has the jurisdiction to grant an extension of time if this Court feels that the Full Court ought to have done so on a proper application being made to that Court. [See s. 13(3) of the Federal Supreme Court (Appeals) Ordinance 1958 (No. 19)]. But such an application not having been made as is required by s. 14 of the Summary Jurisdiction (Appeals) (Amendment) Ordinance, 1955, we do not feel disposed to grant an extension at this late stage, and rule that

in the circumstances, the appellants cannot now properly argue for an extension of time.

But, in view of the submissions which were made before us, it appears to us that we should not leave the question of an appellant's right to an extension of time without some elaboration, even though our views may not be necessary for this decision.

S. 5(1) of the Summary Jurisdiction (Appeals) Ord. provides that the notice of appeal shall be of no effect if the sum of \$3 is not lodged at the time when the notice is given. It would seem, therefore, that in the absence of express power, nothing can be done to revive the appeal in respect of which no deposit was made. (See *Ex parte Grafton Club*, 28 T.L.R. 473; *R. v. Glamorganshire JJ.* (1890) 24 Q.B.D. 675; *Paprika, Ltd. v. Board of Trade* (1944) 1 All E.R. 372).

During the arguments, reference was made to the provisions of sub.-s. (3) of s. 14 of the Ordinance which says that in exercising its discretion whether to grant or to refuse an application under that section, the Court shall have regard *inter alia* to the question whether *prima facie* the appeal sought to be brought had any merit, and we ventured the opinion that perhaps that subsection envisages an appeal already in being, and that since the failure to deposit the sum of \$3 upon giving notice of appeal in a civil matter renders the notice of appeal of no effect, there really was no matter before us in regard to which this Court would properly apply s. 14. To this, counsel has drawn attention to the wide language used in the statute, to wit, "with any of the provisions" of the Ordinance, "limiting the period of time within which, or prescribing the manner in which an act shall be performed . . ." This, he argues, does not limit the powers of the Court to grant an extension of time to do any act under the Ordinance, including the giving of security.

Counsel's argument seems to be supported by s. 14(6) of the Ordinance which provides:

"On the granting of an application under this section and on the applicant giving the security mentioned in s. 5 of this Ordinance within such time as the Court may fix, if he has not already done so, the execution of the appeal shall be suspended . . ."

We wish to lay stress upon the words "and on the applicant giving the security mentioned in s. 5" in the subsection. As s. 5 speaks of both the \$3 and the \$25 as security, it is difficult to resist the conclusion that, without any words of qualification, s. 14(6) must be taken to refer to both deposits. This being so, it would appear that the court has jurisdiction to grant an extension of time within which to deposit the sum of \$3 as is required by s. 5(1) of the Ordinance. Some support for this conclusion is to be found in the provisions of the original s. 14(1) and (2) of Cap. 17 (now repealed). These provided as follows:

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“(1) If anyone entitled to appeal is unavoidably prevented from so doing in the manner or within the time hereinbefore specified, he may apply to the Court for special leave to appeal. (2) On the application the Court may, if satisfied that the applicant was entitled to appeal and that he was unavoidably prevented from so doing as aforesaid, grant leave to appeal on any terms and conditions it thinks just.”

It is clear from these repealed provisions that a person entitled to appeal, but who has taken no steps under s. 5 in connection therewith, may apply to the court for special leave to appeal. And unless the repealing statute, that is, the Summary Jurisdiction (Appeals) (Amendment) Ord., 1955 (No. 29) either by express language or by clear implication beyond reasonable doubt, has abrogated that right, it must be taken that it has been preserved. Indeed, in the instant case, it is our view that that right has been enlarged by the repealing statute to include acts required to be done even after the launching of an appeal.

It is our opinion, then, that prior to 1955, a person entitled to appeal enjoyed the right only of applying for an extension of time within which to launch an appeal; now by virtue of the amendment, that right has been considerably enlarged, and an appellant may also now seek such an extension to do other acts, such acts being required to be done subsequent to the initiating of his appeal.

We turn now to the third submission. There is no doubt that the appellants have complied with the statute with respect to one respondent, but it is not possible to say which one. However, it is apparent that proper security not having been lodged in respect of both respondents as is required by the statute, and we having already ruled that it is not now competent for the appellants to be granted an extension of time within which to comply with the statute, we hold that the appeal as regards one respondent must fail. There is nothing, however, in our judgment, in the Ordinance to prevent an appellant from abandoning an appeal in respect of one respondent, and proceeding against another, and he ought to remain untrammelled in the exercise of his choice to proceed against one or the other. When, therefore, an appellant exercises his right to abandon one of two appeals in circumstances such as these, whatever security there was, must *ex necessitate* attach to the only appeal then remaining before the Court, as a result of such abandonment, the right to which is specifically provided for by s. 16(1) of the Ordinance, and which right an appellant can exercise at any stage of the appeal.

It is observed that none of the decisions to which we have been referred has decided to the contrary, for the reason that it does not appear that the argument in those cases took the line the appellants have taken in this case in that the question of an appellant being permitted to abandon an appeal as

against one respondent and prosecuting the appeal as against another in these circumstances was never canvassed. The appellants in this instance, as they did in the Full Court, are seeking leave to abandon the appeal against Abrams and to prosecute the appeal against the respondent Paul. We think they should be allowed to do so, but on the terms set out hereunder.

The appellants must pay the respondent Abrams his taxed costs in this Court, and in the Full Court as awarded by that Court.

So far as the other respondent Paul is concerned, the appellants are to be allowed to proceed with their appeal, and the Full Court is directed to hear and determine the matter on its merits. In this regard the decision of the Full Court is varied, but we feel that the appellants were themselves to blame for this situation, and they should pay that respondent's costs incurred in this appeal to be taxed.

Leave granted to prosecute appeal against first respondent.

R. v. RANDOLPH DeMENDONCA

[Court of Appeal, (Luckhoo, (ag.) Persaud, J.A., Crane, J.A. (ag.)
November 15, 27, 1968.]

Criminal law — Evidence — At trial witness could not identify appellant as intruder — Another witness gave evidence that such an identification made in presence of appellant — Whether admissible. Evidence — Accusation — Reaction amounting to a denial — Effect.

Early one morning a householder and his wife were awakened by the presence of an intruder in their house. He made his escape. Among property found missing were certain foreign currency notes which had been kept in a paper bag which bore the wife's handwriting. In addition the householder had written on one of the notes. Later that morning the appellant and his reputed wife were arrested, and on his person was found some foreign currency including the marked one. Also found was the paper bag on which the householder's wife had written. Both the appellant and his wife were charged.

In her evidence the householder's wife said she could not identify the intruder because he was masked. However a detective constable testified that in his presence and hearing she had positively identified the appellant at the police station as the person whom she had seen in her bedroom. He also said that the appellant on hearing the accusation threatened the woman.

In his review of the evidence the trial judge drew attention to the obvious conflict between the evidence of the householder's wife and the constable and invited them to resolve it.

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HELD: (i) in the interests of fairplay towards the accused, the trial judge should have excluded evidence of the nature referred to, where there is nothing in the evidence to indicate that the accused had admitted any part of the accusation;

(ii) even if he felt constrained to leave the constable's evidence to the jury he should have told them that the appellant's response amounted to a denial which rendered the accusation nugatory;

(iii) in view of the appellant's explanation that he had received the articles from his reputed wife and her confirmation of this, the court did not feel justified in applying the proviso as the jury had acquitted the latter.

Appeal allowed.

F. R. Wills for the appellant.

J. C. Gonsalves-Sabola for the Crown.

PERSAUD, J.A.: The appellant was charged together with his reputed wife for burglary and larceny, the particulars of the offence being that they broke and entered the dwelling-house of one Cyril Chand, and stole therein a quantity of jewellery, and money, the property of the householder Cyril Chand. The money included foreign notes – a Canadian dollar, an American dollar and a Dutch guilder and was kept in two paper money bags which bore the handwriting of Savitri Chand, the wife of Cyril Chand. One of the notes had also been written on by Cyril Chand.

A report was made to the police soon after the loss was discovered. On that same morning, the appellant and his reputed wife were seen on the ferry crossing from New Amsterdam to Rosignol. They were apprehended and on the person of the appellant was found some money, including the marked note, an American dollar, a Dutch guilder, and the two money paper bags which Savitri Chand claimed as the ones she had written on, and which were among the articles stolen.

The evidence given at the trial by the householders was that they were disturbed while asleep, and recognising that there was an intruder in their home, shouted for "thief, whereupon, the intruder, who was a man, made his escape. They made a check, and found the articles mentioned in the indictment missing, the clear inference being that the person who made his escape was the person who had committed the offence of burglary and larceny. Neither of them recognised the person who made his escape, although they were both sure that it was a man. In fact, in the course of her evidence Savitri Chand said:

"I was not in a position to recognise the person. He had a handkerchief tied around his neck."

The incident occurred around 2.30 a.m. on September 10, and later that same day Savitri Chand attended the Albion Police Station where she was able to identify both the marked note and the money bags, as being some of the things lost earlier that morning.

There is no evidence that Savitri Chand identified anyone on an identification parade, or indeed that an identification parade had been held. Yet Detective Constable Smith has averred that not only did she positively identify the property, but that when she went to the police station, the appellant and his reputed wife were sitting in the enquiries office, and upon seeing the appellant, Savitri Chand said to Smith in the presence of the appellant: "This is the same man I saw in my bedroom", whereupon the appellant "jumped up and said in a threatening manner, "Your husband is a businessman, be careful of what you are saying". This evidence, it is to be noted, was not given by Savitri Chand.

Exception has been taken both to the admissibility of this evidence and to the manner in which the judge dealt with the situation in his summing-up, the complaint being that the judge erred in misdirecting the jury as to its probative value.

The judge recognised that identity of the person or persons who committed the offence was an important (if not the important) aspect of the case, for he said:

"So that if you are not satisfied about the identity of the accused persons, or anyone of them, you will have to acquit. If you have any reasonable doubt as to the identity of the accused persons, or anyone of them, then again you must acquit. Well members of the jury, the Crown have not led evidence to say that these two people or anyone of them was seen breaking the home of Cyril Chand. They have not led evidence to show that the accused persons or anyone of them were found inside the home of Cyril Chand. The Crown seeks to prove the indictment by what in law is known as the doctrine of recent possession."

It is clear that the judge was directing the jury that there was no evidence of identification as indeed there was now and that they must decide the issue on the doctrine of recent possession the meaning of which he explained to them immediately afterwards in terms adequate for the purpose of this case.

Later on, however, the judge in reviewing the evidence for the Crown reminded the jury that Savitri Chand had said that she was not in a position to recognise the man who had gone into her house and then he went on to compare her evidence with that of constable Smith in these words:

"Yet you have the evidence of Smith who told you that when she went to the station she identified the number one accused as the person who she saw in her house. Well, there is a conflict in the evidence and this in my opinion is not a minor conflict because Savitri did not say that she recognised the number one accused at the station but it is for you to say what you make of the evidence."

Counsel for the appellant contends that instead of directing the jury to ignore Savitri's evidence on this score, as the authorities say he should, the

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judge was inviting the jury to resolve a conflict; in other words, he was inviting them to weigh the evidence of Savitri Chand's inability to recognise the man in her house against the evidence of Smith to the effect that she had identified the appellant at the station as that man, and to make a finding of fact, having resolved the conflict.

Counsel for the Crown replies that Smith's evidence was not challenged, nor did any contradictory evidence come from the appellant; that the evidence is *prima facie* admissible, the statement having been made in the appellant's presence. Counsel further submitted that in any event, it is an inescapable conclusion that in view of the nature of the evidence, a jury properly directed could have come to no other conclusion than the one they did.

A brief examination of some of the authorities would help to clarify the position as regards the admissibility of such evidence, and the manner in which it should be dealt with by the trial judge.

In *R. v. Christie* 10 C.A.R. 141 the accused was charged for indecently assaulting a boy. The boy gave evidence as to the act, and identified the prisoner as the person who had done it, but did not give any evidence as to a previous identification or to a statement made by him in the presence of the prisoner. A police constable, however, deposed that the mother of the boy had made a complaint to him (the constable) in the presence of several persons including the prisoner, whereupon the boy identified the prisoner as the person who had interfered with him. One of the questions which the House of Lords had to consider was the admissibility of the policeman's evidence. It was held that it was, even though two of the Law Lords expressed some doubt on the matter.

Referring to the boy's evidence, Lord ATKINSON said (at p. 155):

"If on another occasion he had, in the presence of others, identified him, then the evidence of these eye-witnesses is quite as much primary evidence of what acts took place in their presence as would be the boy's evidence on what he did, and what expressions accompanied his act. It would, I think, have been more regular and proper to have examined the boy himself as to what he did on the first occasion, but the omission to do so, while the by-standers were examined on the point, does not, I think violate the rule that the best evidence must be given. His evidence of what he did was no better, in that sense, than was their evidence of what they saw him do."

And Lord READING expressed the view that if the prosecution required the evidence, as part of the act of identification, it should have been given by the boy before the prosecution closed their case, as (at p. 164):

". . . it would be a dangerous extension of the law regulating the admissibility of evidence if your Lordships were to allow proof of statements made, narrating or describing the events constituting the offence, on the ground that they form part of or explain the act of identification,

more particularly when such evidence is not necessary to prove the act, and is not given by the person who made the statement.”

However, the Lord Chief Justice held that the evidence was admissible on the ground that it might well be that the prosecution wished to prove the conduct and demeanour of the prisoner when hearing the statement as a relevant fact in the particular case.

In our view the evidence was admissible as if in fact it was made, it was a statement made in the presence of the appellant upon an occasion on which he might reasonably be expected to make some observation, explanation or denial. But we would add a caveat to this ruling. And it is this. As was indicated in *Stirland's* case 30 C.A.R. 40 even though it may not be a proper use of counsel's discretion to raise no objection to the reception of inadmissible evidence during the trial in order to preserve a ground of objection for a possible appeal, and the failure of counsel may have a bearing on the question whether the prisoner was really prejudiced, yet the failure to object when the evidence was given does not necessarily cause the right to object on appeal to be forfeited.

But the fact that the evidence is admissible is not an end to the matter. The questions to be answered are firstly how should a judge deal with such evidence in his summing-up, and secondly, did the judge in the instant case comply with the legal requirements.

The question as to the manner in which a judge should deal with such evidence was dealt with at length in *R. v. Norton* (1910) 5 C.A.R. where PICKFORD, J., said (at p. 74):

“As a general rule, statements as to the facts of a case under investigation are not evidence unless made by witnesses in the ordinary way, but to this rule there are exceptions. One is that statements made in the presence of a prisoner upon an occasion on which he might reasonably be expected to make some observation, explanation, or denial, are admissible under certain circumstances.

We think it is not strictly accurate and may be misleading to say that they are admissible in evidence against the prisoner, as such an expression may seem to imply that they are evidence of the facts stated in them and must be considered upon the footing of other evidence. Such statements are, however, never evidence of the facts stated in them; they are admissible only as introductory to or explanation of the answer given to them by the person in whose presence they are made. Such answer may of course be given either by words or by conduct, e.g., by remaining silent on an occasion which demanded an answer. If the answers given amount to an admission of the statements or some part of them, they or that part become relevant as shewing what facts are admitted; if the answer be not such an admission, the statements are irrelevant to the matter under consideration, and should be disregarded.”

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And in *R. v. Christie* (supra), READING, L.C.J. in dealing with this question said (at p. 165):

“Nowadays, it is the constant practice for the judge who presides at the trial to indicate his opinion to counsel for the prosecution that evidence which, although admissible in law, has little value in its direct bearing upon the case, and indirectly might operate seriously to the prejudice of the accused, should not be given against him; and speaking generally, counsel accepts the suggestion, and does not press for the admission of the evidence unless he has good reason for it.

That there is danger that the accused may be indirectly prejudiced by the admission of such a statement as in this case is manifest; for, however carefully the judge may direct the jury, it is often difficult for them to exclude it altogether from their minds as evidence of the facts contained in the statement.

In general, such evidence can have little or no value in its direct bearing on the case unless the accused, upon hearing the statement, by conduct and demeanour, or by the answer made by him, or in certain circumstances by the refraining from an answer, acknowledged the truth of the statement either in whole or in part, or did or said something from which the jury could infer such an acknowledgement. For if he acknowledged its truth, he accepted it as his own statement of the facts. If the accused denied the truth of the statement when it was made, and there was nothing in his conduct and demeanour from which the jury, notwithstanding his denial, could infer that he acknowledged its truth in whole or in part, the practice of the judges has been to exclude it altogether.”

It seems to us, therefore, that a trial judge should, out of fairplay towards the accused, if for no other reason, exclude such evidence where there is nothing on the part of the accused, either words or conduct, to indicate that the latter had admitted any part of the accusation.

In the instant case, the judge not only did not exclude this evidence, but, as we have already pointed out, left it to the jury to resolve what he described as a conflict between the evidence of Savitri Chand and Constable Smith. This he should not have done in the manner in which he did, having regard to the authorities referred to. The judge omitted to remind the jury that Smith had said, when giving evidence of the alleged identification, that the appellant had used words which amounted to a denial of the accusation. If he felt impelled to leave Smith’s evidence of the allegation to the jury, then he should also have told them of the denial, and of its effect, which was to render the accusation nugatory. So that in either event, his directions fell short of what is legally required.

We would allow this appeal and quash the conviction, unless the proviso to s. 16(1) of the Federal Supreme Court (Appeals) Ordinance, 1958 can be

applied, that is to say, unless we are satisfied that no miscarriage of justice has actually occurred.

There is no doubt in our minds that there has been a misdirection, or rather, an omission to direct on an important issue on this case, and the question remains whether, this non-direction has resulted in a miscarriage of justice. A miscarriage of justice occurs “not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole of the facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty”. [See *R. v. Haddy* (1944) 29 C.A.R. at p. 190].

We are not satisfied that on a proper direction, the jury would inevitably have returned a verdict of guilty.

It could be argued with some degree of force that there was overwhelming evidence against the appellant in that found in his possession were articles positively identified by the owner, and the jury having convicted him, they must have rejected his explanation of his possession of those articles. But when it is remembered that his explanation was that the other prisoner had given him the articles to keep, and she herself had admitted this, and the jury acquitted her, the inconsistency of the verdict in convicting the appellant and acquitting the other prisoner becomes apparent.

We do not feel justified, therefore, in applying the proviso in these circumstances.

For the reasons we have given, the appeal would be allowed, and the conviction and sentence set aside.

Conviction and sentence set aside.

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[High Court, in Chambers, (Bollers, C.J.,) December 3, 4, 7, 1968.]

Constitutional law — Writ of summons — Endorsement seeking declaration that it would be unlawful for election to be held on basis of lists of elections compiled pursuant to the provision of the National Legisla-

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tion Act 1967 — Summons for interlocutory relief seeking order directing the second, third, fourth and fifth defendants, as constituting the Elections Commission, to assume the general direction and supervision of the preparation of a register of elections, to supervise the election for the National Assembly, and generally to act in accordance with the Constitution; and to restrain the sixth defendant, as Chief Elections Officer, from conducting, holding, or administering any election to the National Assembly based on the existing registered election, until the hearing and final determination of the action. — Whether interlocutory relief available.

Constitutional law — Jurisdiction of High Court over controverted elections — Whether a common law or special jurisdiction. Constitution, art. 7(1) (b).

Constitutional law — Meaning of election — When validity may be challenged and by what process — Constitution arts. 69 and 71, Representation of the People (Adaptation and Modification of Laws) Act, 1968, ss. 3 (1) and 4, House of Assembly (Validity of Election) Regulations 1964, reg. 3.

On the 4th November, 1968, a Proclamation by the Governor-General was published in an extraordinary issue of the Official Gazette. It declared the dissolution of Parliament on the following day and in pursuance of art. 67 of the Constitution appointed the 16th December on which elections to the National Assembly would be held.

On the 13th November, 1968 the three plaintiffs, who described themselves as citizens of Guyana and members of the United Force political party, filed a writ of summon against the six defendants of whom the second, third, fourth and fifth were the members of the Elections Commission appointed under art. 68 of the Constitution, and the sixth, the Chief Elections Officer. They sought a declaration that the provisions of several laws relating to the compilation of the list of electors, the registration of electors, the registration of overseas voters, and the amendments to arts. 67 & 70 of the Constitution, made or purporting to be made by the Representation of the People (Adaptation and Modification of Laws) Act 1968, were all *ultra vires*, illegal, and unconstitutional, and that it was unlawful for elections to be held under the Act. They also sought orders directing the second, third, fourth, fifth defendants, as the Elections Commission, to assume the general direction and supervision of the preparation of a register of electors and the administrative conduct of elections for the National Assembly, and to act in accordance with art. 69 1(a) & (b) of the Constitution, and, finally an injunction restraining the sixth defendant, the Chief Elections Officer from conducting, holding or administering any election to the National Assembly on the basis of the existing register of electors, or from accepting nominations or conducting, balloting or returning candidates as elected in any election to the Assembly.

On the 26th November the plaintiff filed a summons which was returnable for the 3rd December 1968 in which they sought certain interim reliefs, which were, in the main, similar in nature to those included in the endorsement of claim.

HELD:— (i) the Courts have never been vested with a common law jurisdiction to determine controverted elections, and the jurisdiction vested in the High Court under art. 71 was a peculiar one which, but for that provision, was exercisable only by the Legislature;

(ii) the power of the High Court in art. 71 (1) (b) to determine ‘whether . . . an election has been lawfully conducted’ is not confined in meaning to enquiring as to unlawful acts or omissions done in pursuance of a valid statute which is *intra vires* the Constitution but the provision contemplates an enquiry into the *vires* of the statute itself;

(iii) although an election begins with the issue of the Governor-General’s Proclamation, the language of the relevant provisions of the Constitution did not permit the grant of any interlocutory orders, as the challenge of an election can only be made after it has been concluded;

(iv) under reg. 3 of the House of Assembly (Validity of Election) Regulations 1964, No. 40, the determination of any question as to the validity of the election of any member of the House of Assembly can only be referred to High Court by means of an election petition.

(v) (*per incuriam*) the plaintiffs cannot sue the sixth defendant in his capacity as Chief Elections Officer and at the same time challenge his appointment because of the invalidity of the Act under which he was appointed.

(vi) (*per incuriam*) to grant an injunction against the sixth defendant who is a public officer, in his official capacity, would amount in effect to granting such a relief against the Crown which could not have been obtained in direct proceedings against the Crown.

Application refused.

On the 13th November, 1968, the plaintiffs, who describe themselves as citizens of Guyana, electors, and members of the United Force Party, called the ‘U.F.’, filed a writ of summons against the defendants, the first of whom is the Attorney General, and the second, third, fourth and fifth are members of the Elections Commission and constitute the Elections Commission duly appointed under art. 68 of the Constitution of Guyana, which was brought into force by virtue of the Guyana Independence Order, 1966, made under and by virtue of the Guyana Independence Act of 1966, and the sixth being the Chief Elections Officer, in which they claim in the endorsement of the writ, *inter alia*, the following declarations and orders:

That the National Registration Act, 1967, alternatively, those provisions of the Act relating to or concerning the compilation of lists of electors for elections to the National Assembly; the provisions of the National Registration (Residents) Regulations, 1967; the register of electors for

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elections to the National Assembly compiled pursuant to the National Registration Act, 1967, and the National Registration (Resident) Regulations, 1967, for the purpose of elections to the National Assembly; the register of overseas electors compiled pursuant to the National Registration Act, 1967, and the National Registration Regulations, 1968, for the purpose of elections to the National Assembly; the Representation of the People (Adaptation and Modification of Laws) Act, 1968; the amendments to art. 67 and 70 of the Constitution made or purporting to be made by the Representation of the People (Adaptation and Modification of Laws) Act, 1968, are all unlawful *ultra vires*. illegal, unconstitutional, and null and void, and that it is unlawful for any election to be held pursuant to the provisions of the Representation of the People (Adaptation and Modification of Laws) Act, 1968, and the Representation of the People (Adaptation and Modification of Laws) Regulations, 1968, on the basis of the lists of electors compiled pursuant to the provisions of the National Registration Act, 1967.

In the indorsement, orders are also sought directing the second, third, fourth and fifth-named defendants, as constituting the Elections Commission, to assume as the Elections Commission, the general direction and supervision of the preparation of a register of electors and the administrative conduct of elections for the National Assembly, an order directing the second, third, fourth and fifth-named defendants, as constituting the Elections Commission, to act in accordance with art. 69(1)(a) and (b) of the Constitution for the purpose of an election to the National Assembly; and, finally, an injunction restraining the sixth-named defendant, Butler, the Chief Elections Officer, from conducting, holding or administering any election to the National Assembly on the basis of the registers of electors compiled pursuant to the provisions of the National Registration Act, 1967, and from accepting nominations or conducting, balloting or returning candidates as elected in any election for the said Assembly. The second, third, fourth and fifth-named defendants are sued as members of the Elections Commission, and the sixth-named defendant is sued as the Chief Elections Officer.

In an extraordinary publication of the Official Gazette dated the 4th November, 1968, there was a Proclamation by Sir David James Gardiner Rose, Governor General and Commander-in-Chief of Guyana, acting in accordance with the advice of the Prime Minister and in accordance with and by virtue of art. 67 of the Constitution, in which it was stated that by Proclamation it was declared that Parliament shall be dissolved on the 5th November, 1968, and that His Excellency the Governor General, in pursuance of the said art. 67 did proceed to appoint the 16th December, 1968, as the day on which an election of the members of the National Assembly shall be held.

It will be seen that the aim and purpose of the plaintiffs' action is to obtain declarations that the Acts of Parliament and the Regulations made thereunder, by virtue of which the elections to the National Assembly are to be held on the appointed day, should be declared unconstitutional, illegal, null and void, and so result in the said elections being declared null and void, and indeed, to obtain an injunction restraining the Chief Elections Officer from holding any election to the National Assembly on the basis of registers of electors compiled pursuant to the legislation enacted by Parliament by virtue of which the elections to the National Assembly are conducted, administered and held.

On the 26th November, 1968, the plaintiffs filed a summons returnable for the 3rd December, 1968, in which an application was made for the following interlocutory orders:

1. an order directing the second, third, fourth and fifth-named defendants, as constituting the Elections Commission, to assume as the Elections Commission the general direction and supervision of the preparation of a register of electors and the general direction and supervision of the administrative conduct of elections for the National Assembly;
2. an order further directing the second, third, fourth and fifth-named defendants, as constituting the Elections Commission, to act in accordance with art. 69(1)(a) and (b) of the Constitution for the purpose of an election to the National Assembly constituted under the Constitution of the 26th May, 1966;
3. an injunction restraining the sixth-named defendant from conducting, holding or administering any election to the National Assembly on the basis of registers of electors compiled pursuant to the provisions of the said National Registration Act made or purporting to be made thereunder and from accepting nominations or conducting balloting or returning candidates as elected in any election for the said Assembly conducted with or by the use of such registers;

all until after the hearing and final determination of this action.

It will be seen that in paras. 1 and 2 of the summons, the plaintiffs seek a mandatory interlocutory injunction against the defendants, as constituting the Elections Commission, to assume as the Commission the general direction and supervision of a preparation of a register of electors and the administrative conduct of the elections for the National Assembly, that is, to compel the Commission to act in accordance with art. 69(1)(a) and (b) of the Constitution for the purpose of elections to the National Assembly, and in para. 3 is also sought a similar injunction restraining the Chief Elections Officer from holding any election to the National Assembly on the basis of registers of electors compiled pursuant to the provisions of the National Registration Act, and from accepting nominations or conducting balloting

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or returning candidates as elected in any election for the Assembly conducted with or by the use of such registers. The orders which are therefore sought in the summons, if obtained, must result in the appointed day of the elections being postponed and the elections not held on the day appointed by the Governor-General under the Proclamation published in the Official Gazette on the 4th November, 1968.

At the hearing of the summons, the Attorney General, who appeared on behalf of the Crown and the sixth-named defendant, with the concurrence and endorsement of counsel who appeared for the second and third defendants, took a preliminary objection which he considered of a fundamental nature affecting the jurisdiction of the court to entertain the proceedings, and which he submitted would dispose of the summons.

In his preliminary objection, the Attorney General raised two points:

- (1) the court has no jurisdiction to entertain the application since the question which it raises belongs to a class of questions which are placed by the Constitution of Guyana exclusively within the jurisdiction of the High Court exercising a special jurisdiction and, as such, are justiciable only after the election has been held;
- (2) having regard to art. 67 and the Proclamation issued by the Governor General on the 4th November, 1968 requiring the holding of the election on the 16th December, 1968, this court has no jurisdiction to grant an injunction by way of equitable relief in the manner sought in para. 3 of the summons, or indeed either of the other two orders sought in paras. 1 and 2 of the summons, which are ancillary to the main thrust of the application, and that is, to restrain the Chief Elections Officer from holding the elections.

On the first point, the Attorney General pointed to art. 71 of the Constitution of Guyana and submitted that in every conceivable sense that article created a special tribunal, having special, exclusive, restrictive jurisdiction in the determination of questions as to elections. It was an exclusionary and limited jurisdiction and a jurisdiction which must be exercised within the observance and confines of the limitation. He submitted that under art. 71, the Constitution is creating the High Court as a special tribunal and giving it an exclusive jurisdiction to determine questions as to elections, and in the same article power is given by the Constitution to Parliament to make provision with respect to the circumstances and manner in which and the conditions upon which the proceedings for the determination of those questions under the article may be instituted in the High Court and on appeal; and Parliament under sec. 4 of the Representation of the People (Adapta-

tion and Modification of Laws) Act, 1968, had brought into effect, as if enacted under para. 5 of art. 71 of the Constitution, the House of Assembly (Validity of Election) Regulations, No. 40 of 1964, which, by reg. 3, made provision for a reference for the determination of any question whether any person has been validly elected as a member of the House of Assembly to be by way of an election petition presented to the Court. Parliament had also under sec. 3(1) of the 1968 Act enacted that the Election Regulations, 1964, shall have effect as if enacted under para. 4 of art. 66 of the Constitution under which Parliament may make provision for (a) the registration of electors, (b) the manner in which lists of candidates shall be prepared and entered for an election etc., and generally for the conduct of the elections, and this had been done by the Election Regulations, No. 24 of 1964. In other words, there was an adaptation and modification of the House of Assembly (Validity of Election) Regulations, No. 40 of 1964 and of the Election Regulations, No. 24 of 1964.

The submission of the Attorney General is, therefore, that the proper procedure to be adopted for the determination of any question relating to the questions which arise under (a), (b), (c) and (d) of art. 71 – and we are here concerned with (b)(i) – should be by election petition under and by virtue of reg. 3 of the House of Assembly (Validity of Election) Regulations, No. 40 of 1964, as enacted under the 1968 Act in this special jurisdiction of the High Court as conferred upon it by art. 71 of the Constitution; and by virtue of the language used in art. 71 this procedure should be adopted after the holding of the election. He urged that in view of the historical development of the determination of controverted elections and the special nature of the jurisdiction which Parliament has by statute entrusted to the courts, the courts will always construe legislation of this kind vesting jurisdiction to deal with disputes as to elections with special circumspection, and in particular will only exercise its jurisdiction in accordance with the law which creates it. In particular, it will not seek to eke out a jurisdiction on which the statute dealing with the matter may be silent.

In support of this contention, he cited *Theberge v. Laundry* (1876-77) 2 AC. 102, and *Patterson v. Solomon* [1960] A.C. 579, both decisions of the Privy Council. The learned Attorney General has pointed out that the questions to be determined under art. 71, and by virtue of which the High Court shall have exclusive jurisdiction, are of four kinds – and we are concerned in this case with the questions which can be raised under (b)(i) – and he contends that the question here entrusted to the court is, whether an election has been lawfully conducted, that is to say, whether there is some general illegality either affecting the whole election or the election held in some particular place, or, in the absence of a general illegality, whether there has been some specific illegality, either an act or omission, which has affected the results of the election. His observation is, that in both cases the provision looks to a conclusion of the election and the enquiry is made at the end of the day. The enquiry must be therefore into the questions: (a) has the election been lawfully conducted? (b) has there been an unlawful act or omission which

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has affected the result? On these questions as to election, the Attorney General submits the jurisdiction conferred by art. 71 on the High Court is the only jurisdiction, and no other jurisdiction can be provided by statute since this would be inconsistent with the Constitution and, in fact, no other jurisdiction arises under the Constitution itself, as the only jurisdiction conferred on the High Court by the Constitution is the jurisdiction to enforce fundamental rights (see art. 19) and the jurisdiction under art. 71.

In respect of any illegalities that might exist or be committed prior to the election, the Attorney General submits that the word “election” appearing in art. 71(b)(i) must be construed in its wide sense, and means not merely the procedure that takes place on polling day, but is really the entire process of the election which commences, at least in the context of which the word is used in the article, from the moment of the issue of the Proclamation by the Governor General under art. 67 when a variety of acts involved in the election must take place – such as, certifying a voters’ Est, submission of candidates’ lists, announcement of polling places, appointment of returning officers, processing of proxies, arrangement for the count, etc. – all of these must be involved in the conduct of the election, and irregularities and illegalities in relation thereto can found a complaint under art. 71, but the complaint must be made after the election has been conducted and its results known. On this aspect of the matter, he submitted that the Indian case of *N. P. Ponnuswami v. Returning Officer, Namahkal Constituency, and others*, (1952) S.C.R. (India) 218 is directly in point.

Counsel for the plaintiffs, in reply to these submissions made by the Attorney General, while not conceding that any special jurisdiction was conferred on the High Court by the Constitution by virtue of art. 71, submitted that the High Court in its general jurisdiction at common law had jurisdiction to entertain these proceedings. He submitted that at common law the court does have jurisdiction to interpret the Constitution, and that a question of interpretation was being raised in these proceedings and those questions necessarily arose in view of the form of the action. Counsel pointed to art. 92(1)(a), which deals with appeals and which states that an appeal to the Court of Appeal shall lie as of right from decisions of the High Court in certain cases, that is to say, final decisions in any civil or criminal proceedings as questions on the interpretation of the Constitution, and submitted that it would follow that at common law the High Court would have jurisdiction in relation to any matter involving interpretation of the Constitution, otherwise there could be no appeal to the Court of Appeal in this matter.

Counsel then directed the Court’s attention to art. 69 of the Constitution under which the Elections Commission shall have such functions connected with or relating to the registration of electors, or the conduct of elec-

tions as are conferred upon it by or under the Constitution, or subject there-to any Act of Parliament, and, subject to the provisions of the Constitution, the Commission is charged with the duty of exercising general direction and supervision over the registration of electors and the administrative conduct of elections. He urged that the Representation of the People (Adaptation and Modification of Laws) Act, 1968, is a violation of art. 69, as it removes the control and duties of the Commission out of their hands and puts it into the hands of other persons. This, he submits, is, in effect, an alteration of the Constitution by a method not permitted. The court, is, therefore, being asked to interpret whether the 1968 Act, read with the Constitution, has the effect of amending the Constitution by taking away the power, duties and functions of the Elections Commission under art. 69. What is, therefore, being sought is not something under art. 71, and, in any event, art. 71 does not take away the right of a party to go to the court for a declaration, for under O.23 r. 3 of the Rules of the Supreme Court, a party can always obtain a declaratory order of the Court and the Court may make binding declarations of right.

The submission is, that if before an election something is wrong, in any system of justice a party must have a right to challenge it immediately, and not have to wait until more irreparable harm has been done. He submitted that in the *Ponnuswami* case (*supra*), the decision was based on quite different grounds, in that only one person was affected, whereas, in the present case, the whole electorate is being affected, in that the legislation, by virtue of which the elections are being held, is invalid and *ultra vires* the Constitution. Counsel cited the case of *Rai v. Browne and King* (1957) L.R.B.G. 124, where an application (made before the election) for an order of mandamus compelling the returning officer to prepare a proper list of the names of the several candidates who had been duly nominated for election as members of the Legislative Council to electoral district No. 6, was entertained but not granted by the Full Court of the Supreme Court. Counsel's point here is, that if there was no provision similar to art. 71 of the Constitution, then it must mean that the Court acted upon an original jurisdiction.

Finally, counsel submitted that the words "whether. . . an election has been lawfully conducted" appearing in art. 71(1)(b)(i) should be interpreted to mean that if any part or process of the election has not been lawfully conducted, the right of action arises immediately, and if the word "election" is to be construed in its wider sense as meaning the whole process of election, as soon as any part of the process is not lawfully conducted, the right of action arises.

In order to answer these submissions, I consider it necessary to reproduce in full art. 71 of the Guyana Constitution, and to refer to its historical background. Art. 71 reads as follows:

"(1) Subject to the provisions of this article, the High Court shall have exclusive jurisdiction to determine any question —

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- (a) regarding the qualification of any person to be elected as a member of the National Assembly;
 - (b) whether –
 - (i) either generally or in any particular place, an election has been lawfully conducted or the result thereof has been, or may have been, affected by any unlawful act or omission;
 - (ii) the seats in the Assembly has been lawfully allocated;
 - (iii) a seat in the Assembly has become vacant; or
 - (iv) any member of the Assembly is required under the provisions of article 61(3) of this Constitution, to cease to exercise any of his functions as a member thereof;
 - (c) regarding the filling of a vacant seat in the Assembly; or
 - (d) whether any person has been validly elected as Speaker of the Assembly from among persons who are not members thereof or, having been so elected, has vacated the office of Speaker.
- (2) Proceedings for the determination of any question referred to in the preceding paragraph may be instituted by any person including the Attorney-General) and, where such proceedings are instituted by a person other than the Attorney-General, the Attorney-General if he is not a party thereto may intervene and (if he intervenes) may appear or be represented therein.
- (3) An appeal shall lie to the Court of Appeal –
- (a) from the decision of a Judge of the High Court granting or refusing leave to institute proceedings for the determination of any question referred to in paragraph (1) of this article;
 - (b) from the determination by the High Court of any such question, or against any order of the High Court made in consequence of such determination.
- (4) No appeal shall lie from any decision of the Court of Appeal given in an appeal brought in accordance with the preceding paragraph.

- (5) Parliament may make provision with respect to –
- (a) the circumstances and manner in which and the conditions upon which proceedings for the determination of any question under this article may be instituted in the High Court and an appeal may be brought to the Court of Appeal under this section;
 - (b) the consequences of the determination of any question under this article and the powers of the High Court in relation to the determination of any such question, including (without prejudice to the generality of the foregoing power) provision empowering the High Court to order the holding of a fresh election throughout Guyana or a fresh ballot in any part thereof or the re-allocation of seats in whole or in part; and
 - (c) the practice and procedure of the High Court in relation to the jurisdiction and powers conferred upon it by or under this article, and of that court and the Court of Appeal in relation to appeals to the Court of Appeal under this article;
- and, subject to any provision so made, provision may be made with respect to the matters aforesaid by rules of court.”

On an analysis of the article in relation to the matters which concern us here, it is clear that the Constitution is here conferring an exclusive jurisdiction on the High Court to determine certain questions. These questions centre around the qualification of any person to be elected as a member of the National Assembly, whether generally or in any particular place, an election has been lawfully conducted or the result of an election affected, whether the seats in the Assembly have been lawfully allocated or a seat has become vacant or any member of the Assembly is required to cease to exercise any of his functions as a member, regarding the filling of a vacancy or whether any person has been validly elected as Speaker. In para. 2 of the article, power is given to any person, including the Attorney-General, to institute proceedings for the determination of any of those questions, and the Attorney-General is given the power also to intervene if he is not a party thereto, and if he intervenes, he may appear or be represented therein.

In para. 3, provision is made for an appeal to the Court of Appeal from the decision of a judge of the High Court granting or refusing leave to institute proceedings for the determination of any of those questions as referred to, and also from the actual determination by the High Court or any such question or against any order of the High Court made in consequence of such determination.

Para. 4 ensures that there is no further appeal from the decision of the Court of Appeal on any question relating to the determination of those matters already referred to.

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Under para. 5(a), the article gives power to Parliament to make provision with respect to the circumstances and manner in which and the conditions upon which proceedings for the determination of any of those questions referred to may be instituted in the High Court and an appeal may be brought to the Court of Appeal.

At this stage it may be pointed out that Parliament, by virtue of the Representation of the People (Adaptation and Modification of Laws) Act, 1968, which enacted and incorporated by reference the House of Assembly (Validity of Election) Regulations, 1964, by reg. 3, prescribed that the manner in which proceedings for the determination of these questions under art. 71 should be referred viz., by petition (hereinafter referred to as an election petition), and under reg. 4(1) an election petition may be presented by an elector or a candidate.

Under para. 5(b) of the article, Parliament is empowered to make, firstly, provisions as to the powers of the High Court in relation to the determination of the class of questions referred to in art. 71(1) and sought to be determined in the proceedings instituted under para. 5(a); in other words, what orders the court could make including an order to hold fresh elections throughout Guyana, or a fresh ballot in any part thereof, or the re-allocation of seats; secondly, provisions as to the consequences of such determination or order of the court.

Under para. 5(c), Parliament is empowered to make provisions as to the practice and procedure of the High Court, firstly, in relation to the jurisdiction of the court given in art. 71(1), and, secondly, in relation to the powers conferred upon it, and thirdly, of the jurisdiction and powers of the High Court and Court of Appeal in relation to appeals to the Court of Appeal made under the article.

In Erskine May's *Parliamentary Practice*, 17th ed., p. 184, the learned author points out that before the year 1770, controverted elections were tried and determined by the whole House of Commons as mere party questions upon which the strength by contending factions might be tested. In order to prevent, however, a perversion of justice, the House consented to submit the exercise of its privilege to a tribunal constituted by law which, though composed of its own members, should be appointed to secure impartiality and the administration of justice according to the laws of the land and under the sanction of oath. Subsequently, there was a system of selection by lot, of committees for the trial of election petitions. Partiality and incompetence, however, continued in the constitution of these committees, and in 1839 an Act was passed establishing a new system whereby the responsibility of individual members was increased. Eventually,

in 1866 the jurisdiction of the House in the trial of controverted elections was transferred by statute to the courts of law. Blackstone in his commentaries speaking of the unwritten or common law, distinguished that law into three kinds, the third category of which was "certain particular laws which by custom are adopted and used by some particular courts of pretty general and extensive jurisdiction". The history of the laws relating to controverted elections however, reveals that these were administered by the House of Commons in the exercise of its privilege and were not considered by the courts far less adopted until this jurisdiction was transferred by statute to them. It will thus be seen that from ancient times the courts exercised no common law jurisdiction in relation to election petitions, these being dealt with by Committees selected from the members of the House of Commons, and when the courts did commence to exercise jurisdiction in these matters, it was conferred on the courts by statute passed in the Legislature.

This position was recognised by the Privy Council in their judgment in *Theberge v. Laudry*, (supra), where the Lord Chancellor, Lord CAIRNS, in delivering the judgment of the court, referred to two Acts of Parliament passed by the Quebec Legislature, that is to say, the Quebec Controverted Elections Acts of 1872 and 1875, and stated that these Acts were peculiar in their character, and were not Acts constituting or providing for the decision of mere ordinary civil rights; these were Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular court of the Colony for the purpose of taking out with its own consent, of the Legislative Assembly and vesting in that court that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly, of deciding election petitions and determining the status of those who claimed to be members of the Legislative Assembly. The learned Lord Chancellor continued: "A jurisdiction of that kind is extremely special and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should, as soon as possible, become conclusive, and enable the Constitution of the Legislative Assembly to be distinctly and speedily known".

In *Theberge v. Laudry*, the petitioner, having been declared duly elected a member to represent an electoral district in the Legislative Assembly of the province of Quebec, his election was afterwards, on petition, declared null and void by judgment of the Superior Court, under the Quebec Controverted Elections Act, 1875, and he himself declared guilty of corrupt practices both personally and by his agents. Thereupon, he applied for special leave to appeal to Her Majesty in Council, but it was refused on the ground that the fair construction of the Act of 1875, and the Act of 1872 which preceded it, providing among other things that the judgment of the Superior Court "shall not be susceptible of appeal," was, that it was the intention of the Legislature to create a tribunal for the purpose of trying election petitions in a manner which should make

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its decision final for all purposes; and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative. On behalf of the petitioner, it was contended that the ninetieth section of the 1875 Act which stated, "such judgment shall not be susceptible of appeal", did not take away the prerogative of the Crown, and that the general rule was that the prerogative of the Crown could not be taken away except by a specific enactment, and that the section could be satisfied by holding that the intention of the Legislature was that there should be no appeal from a superior court to the Court of Queen's Bench in the colony, which was the kind of appeal that existed in civil cases in the colony, and therefore the prerogative of the Crown was not in any way affected.

The Lord Chancellor then made it clear that he was in no doubt whatever as to the general principle that the prerogative of the Crown could not be taken away except by express words, and that he and his colleagues would be prepared to hold that where the prerogative of the Crown has existed, precise words must be used to take away that prerogative. Their Lordships, however, without infringing this principle, had to consider with anxiety, whether in the scheme of this legislation it was ever intended to create a tribunal which should have as one of its incidents the liability to be reviewed by the Crown under its prerogative. In other words, what their Lordships had to consider was, not whether there were express words used in the Act of 1875 taking away the prerogative, but whether there ever was the intention of creating this tribunal with the ordinary incident of an appeal to the Crown.

Finally, the Lord Chancellor stated that it was the opinion of their Lordships that the ninetieth section was an enactment which clearly indicated the intention of the Legislature under the Act to create the tribunal for the purpose of trying election petitions in a manner which should make its decision final to all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative. The petition would therefore be dismissed.

The importance of this case is the principle established that where an Act of Parliament confers a new or peculiar jurisdiction upon a court, a jurisdiction of that kind is special and should be exercised in a way that should, as soon as possible, become conclusive and enable the constitution of the Legislative Assembly to be distinctly and speedily known.

In the Trinidad case of *Patterson v. Solomon* (*supra*) the appellant, who was a registered elector, sought an injunction to restrain the respondent, who was an elected member of the Legislative Council, a member of the Executive Council, and a Minister of Education, from claiming to be or in any way act-

ing as a holder of those offices on the ground that his seat in the Legislature had become vacant under the provisions of s. 38(3)(e) of the Order-in-Council, 1950, as amended, by reason of his having been a party to a contract with the Government for and on account of the public service. By s. 40 of the Trinidad & Tobago (Constitution) Order-in-Council, 1950, as amended by the Trinidad & Tobago (Constitution) (Amendment) Order-in-Council, 1956: "(i) all questions which may arise as to the right of any person . . . (ii) to be or remain an elected member of the Legislative Council; shall be 'referred to the Supreme Court of the Colony . . .'".

It was held that s. 40 of the Order-in-Council, as amended, contemplated a reference to the Supreme Court by the Legislative Council itself, and that the appellant could not competently maintain the proceedings in any form. The Privy Council in their judgment delivered by Viscount SIMMONDS, relied upon the decision in *Theberge v. Laudry*, and adapted the words of Lord CAIRNS, L.C., and their Lordships stated that they were of opinion that upon a fair construction of the Order-in-Council, it did not provide for the decision by the Supreme Court of mere ordinary civil rights, but created an entirely new jurisdiction in a particular court of the Colony for the purpose of taking out of the Legislative Council with its own consent and vesting in that court the very peculiar jurisdiction which had existed in the Council itself, of determining the status of those who claimed to be members of the Council. If so, it followed that the determination of that court is final and from it no appeal will lie. The appellant then sought to drop his claim so far as it related to membership of the Legislative and Executive Councils and confining it to seek to restrain the respondent from acting as Minister of Education, but the Privy Council held that the respondent was, until the contrary was determined, a member of the Legislative and Executive Council, and it was only if he ceased to be such a member, that he could no longer hold the office of Minister to which he had been appointed. Unless and until the fact of disqualification had been established in the only possible manner, it was not possible to argue its consequences.

In the course of his judgment, Viscount SIMMONDS said:

"If, as their Lordships hold, an appeal would not lie from a determination of the Supreme Court upon a reference under s. 40 of the Order-in-Council, equally, it cannot lie from a determination of that court upon the same subject-matter, otherwise than upon such reference. Their Lordships do not entertain any doubt upon the correctness of the decision of the Supreme Court that the appellant could not competently maintain the proceedings in any form. They only add that, if he could, no appeal would lie."

The Privy Council went further and held that even if there had been a proper reference under s. 40 and the Supreme Court had come to a determination, whatever form it might take, no appeal would lie to Her Majesty-in-Council.

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At this stage, it must be pointed out that under art. 71(3)(b), there is an appeal to the Court of Appeal from a decision of the High Court on the determination of any of the questions stated in the article, but under para. 4, no further appeal shall lie from any decision of the Court of Appeal in an appeal from the High Court on the determination of any of the questions. The reason for this must be, as established by the cases cited, that the Constitution, in conferring a special or peculiar jurisdiction on the High Court, is creating a tribunal and giving it an exclusive jurisdiction and, in the words of Lord CAIRNS, L.C., to try election petitions in a manner which should make its decision final for all purposes.

In art. 92, this is made plainly clear that whereas there is a right of appeal from decisions of the High Court to the Court of Appeal in respect of certain matters and a further right of appeal to Her Majesty-in-Council from any decision of the Court of Appeal in any such case, at para. 3 nothing in the two preceding paragraphs shall apply to the matters for which provision is made by art. 71 of the Constitution; therefore, in relation to the questions raised under art. 71 of the Constitution, the right of appeal stops at the Court of Appeal.

The question remains whether an interlocutory injunction can be obtained in these proceedings or, indeed, in any proceedings, and I accept the submission by the Attorney General, that on a fair construction of art. 71(1)(b), the language used does not permit of an interlocutory injunction being granted to permit the election being held on the appointed day. I accept his analysis of the relevant paragraph that the question which is entrusted to the court is, whether an election has been lawfully conducted. It is to be noted that the past tense is used and not the future tense, and it seems to me that if the framers of the Constitution intended that relief could be sought by way of an interlocutory injunction, the paragraph would have read "whether an election has been lawfully conducted or will be lawfully conducted."

I agree with the submission that the questions which the court has to consider under the paragraph are, whether there is some general illegality either affecting the whole election or the election held in some particular place, or, in the absence of a general illegality, whether there has been some specific illegality, being either an act or an omission which affects the result of the election. It seems to me that the word "election" is used in the paragraph in its wider sense to include the whole process of an election. (See 12 HALSBURY'S LAWS OF ENGLAND, 2nd ed., pp. 237-238, where it is stated that although the first formal step in every election is the issue of the writ, the election is considered, for some purposes, to begin at an earlier date.) It is a question of fact in each case when an election begins in such a way as

to make the parties concerned responsible for breaches of election law, the test being whether the contest is "reasonably imminent" Neither the issue of the writ nor the publication of the notice of election can be looked to as fixing the date when an election begins from this point of view. The election will usually begin earlier than the issue of the writ. It is clear, then, that for our purposes the election will at least' commence with the issue of the Proclamation of the Governor General under art. 67, and if any irregularities or illegalities are committed from this period of time in relation to the various matters involved in the election, as mentioned by the Attorney General, then these illegalities may form the basis for an election petition after the result of the election has been made known.

It seems to me that the argument of the Attorney General on this point is supported by the authority of the Indian case, that is, *Ponnuswami v. Returning Officer, Namahkal Constituency*, (*supra*). In that case, the appellant, who was a candidate for the election to the Legislative Assembly of the state of Madras, and whose nomination paper was rejected by the Returning Officer, applied to the High Court of Madras under art. 226 of the Constitution for a writ of *certiorari* to quash the order of the Returning Officer in rejecting his nomination paper and to direct the Returning Officer to include his name in the list of valid nominations to be published. It was held by the Full Court that in view of the provisions of art. 329(b) and s. 80 of the Representation of the People Act, 1951, the High Court had no jurisdiction to interfere with the order of the Returning Officer. Art. 329(b) of the Constitution of India provided that no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question, except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature. The Representation of the People Act, 1951, which made detailed provisions for election to the various Legislatures of the country, also contained a provision (s. 80) that no election shall be called in question except by an election petition presented in accordance with the provisions of the Act. It was further held that the word "election" has, by long usage in connection with the process of selection of proper representatives in democratic institutions, acquired both a wide and narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the results of the poll when there is polling, or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected, and it is in the wide sense that the word is used in Part XV of the Constitution in which art. 329(b) occurs.

FAZAL ALI, J., who delivered the judgment of the Court, stated:

"The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under art. 226 of the Constitution (the ordinary jurisdiction of the Courts having

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been expressly excluded) and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court . . . Article 329(b) was apparently enacted to prescribe the manner in which and the stage at which this ground and other grounds which may be raised under the law to call the election in question could be urged, I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner at any other stage and before any other Court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Art. 329(b) and in setting up a special tribunal.”

This learned judge went on to make the comment that any other meaning ascribed to words used in the article would lead to anomalies which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it. The judge then proceeded to examine the scheme of Part XV of the Constitution and the Representation of the People Act, 1951, and came down on the side that the scheme seemed to him to be that any matter which had the effect of vitiating an election should be brought up only at the appropriate stage before a special tribunal, and should not be brought up at an intermediate stage before any Court.

The Attorney General has been able to show that the scheme of Part 2 of Cap. 6 of the Constitution of Guyana, headed “Elections”, is very similar to Part XV of the Indian Constitution, which is also headed “Elections”, and I accept his submission on the authority of the cases cited that the whole scheme of Part 2 of Cap. 6 of the Constitution is directed towards the creation of a tribunal, that is, the High Court, on which is conferred a special or peculiar jurisdiction in relation to the questions to be determined under the said art. 71, and that on the authority of the Indian case, any matter arising therefrom which has the effect of vitiating an election, should be brought up only at the appropriate stage in an appropriate manner before the special tribunal, and should not be brought up at an intermediate stage before any Court.

I reject the submission of counsel for the plaintiffs, unsupported as it was by authority or analogy, that the court in its general jurisdiction at common law would have jurisdiction in these matters. I think that the history of this special jurisdiction, which has been conferred on the High Court by art. 71, indicates clearly that the court never had such a jurisdiction at common law, nor can it be said that the summons raises the specific question as to the interpretation of the Constitution. In any event, art. 92, to which counsel for the plaintiffs made reference, deals with the question of appeals and not with the jurisdiction of the High Court, and is specific in stating at para. 3 that nothing in the two preceding paragraphs shall apply to the matters for which provision is made by art. 71 of the Constitution. If the contention of counsel were sound, then it would lead to a negation by this paragraph of art. 92 of the Constitution, for it would mean that if the High Court entertained the application in the summons, there could be an appeal to the Full Court and then to the Court of Appeal in the usual way, and then a right of appeal to Her Majesty in Council from a decision of the Court of Appeal under art. 92(1)(c) of the Constitution, in which case there would be a contravention of art. 71(4), which provides that no appeal shall lie from any decision of the Court of Appeal given in an appeal brought in accordance with the preceding paragraph.

Mr. Jagan, who appeared for number four defendant and who conceived it his duty as an officer of the court to make certain submissions, contrary to the submissions made by the Attorney General, on the ground that if this matter were made the subject of an appeal, his client might be mulct in costs as he did not concur in the preliminary objection raised by the Attorney General, submitted that the wording of art. 71(1)(b) did not contemplate a situation where a party was urging that an Act of Parliament was illegal, null and void, and *ultra vires* the Constitution, as in this case, but was intended to cover cases where, as the result of an unlawful act or omission done in pursuance of an Act of Parliament presumed to be valid, made an election not lawfully conducted or affected the result thereof.

In other words, his contention was, that when the framers of the Constitution used the language as contained in art. 71(1)(b), that is, whether - "either generally or in any particular place an election has been lawfully conducted, or the result thereof has been or may have been affected by any unlawful act or omission", the intention was to exclude any Act of Parliament that might be invalid as *ultra vires* the Constitution, and to presume that the Act of Parliament was valid and that any unlawful act or omission done in pursuance of the valid Act would cause an election not to be lawfully conducted or affect or may have affected the result of the election. It follows, therefore, from the contention of counsel that the words "whether an election has been lawfully conducted" must be interpreted to mean only unlawful acts or omissions which spring from a valid Act of Parliament *intra vires* the Constitution.

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I cannot accept this submission as there is nothing in the language used to suggest that the words “lawfully conducted” must be confined to unlawful acts or omissions done in pursuance of a valid Act *intra vires* the Constitution. Surely if an Act of Parliament on which and by virtue of which an election is conducted is *ultra vires* the Constitution, then it cannot be said that the election has been lawfully conducted, for anything done under the invalid Act must be unlawful, null and void. As was stated by FAZAL ALI, J., in *Ponnuswami’s* case, any matter which has the effect of vitiating an election (and an Act of Parliament which is *ultra vires* the Constitution and on which acts are done for the purpose of holding an election must have the effect of vitiating an election) should be brought up at the appropriate stage and should not be brought up at an intermediate stage before any court.

In the result, I must accept the submission of the Attorney General on the first point as being sound, and refuse to entertain this application on the ground that this court has no jurisdiction since the questions raised in the summons pertain to a class of questions enunciated by art. 71 of the Constitution exclusively within a special jurisdiction of the court, and must be presented by way of an election petition after the result of the election has been made known. The case of *Rai v. Brown* can have no bearing on the matter, as that case was obviously decided *per incuriam* as no point as to jurisdiction was taken by counsel for the respondent to the application.

Having disposed of the summons on the point taken as to jurisdiction, it becomes unnecessary to go further, but as the other point was fully argued, I consider that I ought to deal with it.

I commence by stating that I concur that the language used in art. 67 reveals a clear unambiguous mandatory requirement, and it follows that not even an Act of Parliament can alter this requirement unless it took the form of a constitutional amendment. What the plaintiffs seek in the summons is the equitable remedy of injunction, and counsel for the plaintiffs urged that the plaintiffs were asking the court to make an order to violate the Proclamation made under art. 67, as they say that the day is not properly appointed, and the sixth defendant, the Chief Elections Officer, has not been properly appointed, on the ground that the Elections Commission is not properly functioning under art. 69(1)(a) and (b). The submission, as I understand it, is that the appointment of this officer is invalid because of the invalidity of the 1968 Act under which he was appointed, and even if he were properly appointed, he should not conduct elections on the basis of registers compiled under the 1968 Act as this function under art. 69(1)(a) should be under the supervision of the Elections Commission.

To answer this submission, it is only necessary to refer to the writ wherein it is stated that the sixth defendant is sued in his capacity as Chief Elections Officer. If it is admitted that the sixth defendant has been appointed . Chief Elections Officer, then the maxim applies *omnia praesumuntur legitime facta donee probatur in contrarium*: "All things are presumed legitimately done until the contrary is proved". There appears to be some confusion over the interpretation of art. 69, and perhaps it may be necessary for me to say, by way of *obiter dicta*, that the Constitution in this article lays it down that the Elections Commission shall have functions connected with or relating to the registration of electors or the conduct of elections as are conferred upon it by the Constitution or as conferred upon it by any Act of Parliament which, of course, must be subject to the provisions of the Constitution. As far as I am aware, the Constitution itself does not give the Commission power to set up any machinery to exercise its functions connected with or relating to the registration of electors or the conduct of elections. It is Parliament, under Regs. 24 of 1964 and 40 of 1964, which gives the Commission certain powers which they may use in the exercise of their functions. Under the Constitution, power is merely given to the Commission under art. 69(1)(a) to exercise general direction and supervision over the registration of electors and the administrative conduct of elections. It will be seen that the Elections Commission is merely charged with the duty of exercising general direction and supervision over the registration of electors and the administrative conduct of elections. In other words, the Commission itself is not charged with the duty of preparing the register of electors and the duty of administering the conduct of elections.

In art. 69(1)(b), following from paragraph (1)(a), in exercising that general direction and supervision, as expressed in (a), the Commission is given the power to issue instructions and to take action as appears to it necessary or expedient to ensure impartiality, fairness and compliance with the provisions of the Constitution or of any Act of Parliament, on the part of persons exercising powers or performing duties connected with or relating to the matters aforesaid. In para. (2) of the said article, the language used therein is prefaced by the significant statement "notwithstanding anything to the contrary in this Constitution", and then the Commission is empowered, if it is satisfied that the holding of an election on the day appointed under art. 67 would be attended, either generally or in a particular area, by danger or serious hardship, it may after consultation with the Prime Minister and Leader of the Opposition, by notice published in the Gazette — (a) postpone the holding of election, fixing another day for the election in the notice, or (b) postpone the voting in any particular area stated in the notice to another day specified in the notice.

The Commission itself, therefore, has an overriding power, that is to say, the power to override art. 67 in the event of circumstances arising which would cause the election of the day appointed to be attended by danger or

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serious hardship, either generally or in a particular area, and after consultation with the Prime Minister and the Leader of the Opposition, to exercise a discretion in postponing the date of the election. That discretion, according to the authorities, must of course be exercised judicially.

Counsel for the plaintiffs has submitted that the holding of the election on the day appointed would cause hardship because the election would be unfair because of the invalidity of the 1968 Act, and therefore an injunction in terms of the summons should be granted. With due respect to counsel, I cannot agree with this submission as it appears to me the maxim *expressio unius personae vel rei, est exclusio alterius* must apply. The expression “fairness” having been used in para. (1)(b) when hardship is mentioned in para. (2), it must mean that the expression “fairness” is excluded in respect of the language used in that paragraph. I understand the word “hardship” to be used in para. (2) to mean some untoward or unexpected event of some magnitude, an illustration of this being that if there is a national disaster or serious outbreak of any epidemic and voters are unable to exercise their vote, all of which might affect the result of the election, then the Commission in those circumstances can take the necessary action, as they are enabled to do under para. (2). If there is unfairness in the sense that there is an invalid Act of Parliament pertaining to the registration of electors or the administrative conduct of elections, then the Commission could take the necessary action under (1)(b).

It is important to emphasise that under para. (2) the word “election” is used in its narrow sense, that is, the actual polling day, and the Elections Commission can only act under that paragraph if it is satisfied that the holding of the election on the appointed day would be attended by danger or serious hardship. At any rate, it is a preposterous proposition to suggest that equity would grant an injunction directing a statutory body such as the Elections Commission, to exercise its discretion in a certain way.

As far as the sixth-named defendant is concerned, under art. 125 “public officer” means the holder of any public office, and includes any person appointed to act in any such office. “Public office” means an office of emolument in the public service. The “public service” means the service of the Crown in a civil capacity in respect of the Government of Guyana. This defendant is, therefore, in the service of the Crown and an officer of the Crown. He is sued in his official capacity and legislation similar to the Crown Proceedings Act, 1947, being unknown in this country, the authorities are clear that an injunction cannot be obtained against an officer of the Crown in his official capacity if the effect of granting the injunction would be to give any relief against the Crown, which could not have been obtained in proceeding against the Crown, as the Queen cannot be coerced in her own courts.

(see 11 Halsbury's Laws, 3rd ed., p. 16, para. 25, and 21, Halsbury's Laws, 3rd ed., p. 351, para 737, and *Abrams v. The Anglican School* (1960) L.R.B.G. 79).

I have reached the conclusion, therefore, that this application is misconceived and the Court, on the first point, has no jurisdiction to entertain it.

In a judgment delivered on 2nd October, 1968, in the case of *Mohamed Sahib v. The Commissioner for Registration, Colombo*, the Privy Council stressed that a court must take notice of a limitation of its jurisdiction, and relied on the dictum of DIPLOCK, L.J., in *Snell v. Unity Finance Co. Ltd.* [1964] 2 Q.B. 203., referring the to case of *Smith v. Baker & Sons*:

“That case was not concerned with points of law which went to either of those matters which it is the duty of the court to take even if neither party does, that is, points of law which go to the jurisdiction of the court ... it is a clear rule of public policy, that such points should be taken by the court irrespective of the wishes of the parties; and if not taken by the judge at trial, should be taken of its own initiative by an appellate court.”

Under the Constitution of Guyana, if an injunction were granted in terms of the summons, it would be a negation of art. 67 of the Constitution, the function of the Governor-General exercised under this article not having been challenged. The relief sought in the summons is equitable, but one must always bear in mind that equity follows the law, and where the statute law is direct and governs the case with all its circumstances, a court of equity is as much bound by it as a court of law. (STOREY'S COMMENTARIES, p. 34). Art. 2 of the Constitution lays it down that the Constitution is the supreme law of Guyana, and if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void.

The learned author of MODERN EQUITY by Hanbury, 8th ed., at p. 582, states that sometimes a statute lays down explicitly that a thing “shall at all events be done”. This command shields the person to whom the order is directed, for any liability for damage done to other persons by disobedience to it. It is a *reductio ad absurdum* to suppose it left in the power of the person who had the cause of complaint to obtain an injunction, and so prevent the doing of that which the Legislature intended to be done at all events.

On these principles, then, the court would have no jurisdiction in equity to grant an injunction.

In conclusion, I would refer to the judgment of the *Indian* case and endorse the view therein expressed, that having regard to the important functions which the Legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule, and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may

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not be unduly retarded or protracted. I hold that the preliminary objection taken by the Attorney General is sound, and I would decline jurisdiction.

The application is refused with costs to the defendants in any event to be certified fit for two counsel.

Application refused.

Solicitors:

Crown Solicitor for the Crown and the sixth defendant.

Miss Ena Luckhoo for the second defendant.

Mr. D. O'Connor for the plaintiffs.

Mr. M. E. Clarke for the third defendant.

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[In the Full Court on appeal from the Magistrate's Court for the West
Demerara Judicial District (Bollers, C.J., and Khan, J.)
January 19, 1968.]

Workmen's Compensation — Accident arising out of and in course of employment — Divergent views of medical specialists as to recovery of workman — Omission of magistrate to refer to medical referee — Effect — Workmen's Compensation Ordinance Cap. 111 s. 34.

On the 3rd September, 1963 the respondent fractured her hand as a result of an accident while in the appellants' employ. She received medical and physiotherapeutic treatment and was pronounced fit on the 13th February, 1964. She complained of continued pain and swelling in the hand and a further course of physiotherapy was ordered by the medical doctor, who in August again pronounced her fit. In April 1965, she again returned to the doctor with the same complaint, and further physiotherapy was administered. In the meanwhile on the 16th January she had consulted another doctor who eventually concluded that her condition had become chronic and that she had suffered a fifty per centum permanent partial disability. In August, 1965 she was examined by another doctor who concluded that she was not suffering from any physical abnormality.

The magistrate concluded that she was fifty per centum permanently partially disabled.

HELD: in view of the magistrate's failure to give any reasons for his conclusion and having regard to the conflict in the medical testimony, his omission to refer the matter to a medical referee, amounted to a failure to exercise judicially, the discretion vested in him under s. 34 of the Workmen's Compensation Ordinance, Cap. 111.

Appeal allowed. Matter remitted for reference to a medical referee.

[Editorial Note: On further appeal to the Court of Appeal the decision of the Full Court was affirmed, (*vide* p. 420 *infra*).

G. M. Farnum, Q.C., for the appellants.

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

JUDGMENT OF THE COURT: This is an appeal against a decision of a Magistrate of the West Demerara Judicial District who made an award of compensation in favour of the respondent (the workman) under the provisions of the Workmen's Compensation Ordinance, Cap. 111, in respect of an injury to her right wrist sustained on the 3rd September, 1963, when she went to dip water in a trench and fell on her right wrist in an accident which arose out of and in the course of her employment by the appellants (the employers) as a water fetcher.

The respondent's monthly earnings at the time of the accident was \$65.08 and she received compensation in the form of periodic payments in the sum of \$414.80 covering a period from the 3rd September, 1963, up to 3rd September, 1964. The appellants admitted that there was an accident which arose out of and in the course of her employment.

The evidence which was led in the Magistrate's Court disclosed that the respondent, on the day in question, while working with the appellants as a fetcher of water at Pln. Versailles, Pouderoyen Section, went to dip water in a trench and fell on her right wrist and injured it. The hand became swollen and painful. She was sent to the dispenser at Pln. Versailles who treated the hand with lotion. On the following day she was referred to the estate doctor, a Dr. Gunn, who ordered an X-ray and later placed the hand in plaster of paris. On the 21st November, 1963, the respondent was referred to Dr. Stracey, a surgeon specialist at the P.H.G., who examined the hand and ordered another X-ray. As a result the respondent's hand was again placed in plaster of paris and on the 16th January, 1964, a course of physiotherapy treatment was ordered. On the 13th February, 1964, the respondent was discharged by Dr. Stracey and informed that she had regained excellent function of the hand. The hand continued to pain her and on the 13th April, 1964, the respondent returned to Dr. Stracey with a complaint that the hand was swollen and extremely painful. Dr. Stracey treated the hand and ordered a further course of physiotherapy after which

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he strapped her wrist and discharged her on the 20th August, 1964, as being fit for work. The respondent's hand again started to swell and the pain continued. She returned to Dr. Stracey on the 1st April, 1965, who ordered another course of physiotherapy treatment. On the 29th April, 1965, the respondent was seen by another doctor as Dr. Stracey was not available and he ordered a leather strap for the respondent's wrist. It is the respondent's evidence that her hand did not improve and on the 9th August, 1965, she saw Dr. Bender who did not examine her and discharged her.

On the 19th January, 1965, the respondent was examined by Dr. Hugh and sent for an X-ray at the Mercy Hospital. Dr. Hugh's evidence was that he found that the respondent suffered much pain on movement of her wrist and on the application of pressure thereto. He then recommended the applicant for three months' leave for temporary disability. The X-ray revealed that a small bone in the respondent's wrist known as the scaphoid was fractured. There was a change in the quality of the structure of the scaphoid and the adjoining bones. On the 13th February, 1966, when Dr. Hugh re-examined the respondent, he found that her right wrist was still very painful and produced crepitus on movement. At this stage he considered that the condition of the respondent's wrist was chronic and incurable and he assessed the case at 50% permanent partial disability taking into account her work as a fetcher of water and consequent loss of earning capacity. It was this doctor's firm opinion that the condition of the respondent's wrist was due to a fracture of the bone of the wrist and he proceeded to make his assessment on this basis about two years, five and a half months after the date of the accident.

Dr. M. Alli, Senior Surgeon Specialist at the Public Hospital Georgetown, who also gave evidence on behalf of the respondent, stated that he had seen the respondent at the request of the M.P.C.A. on 12th August, 1965, and she complained to him of pain in her right wrist, he examined the wrist and found no physical abnormality, he caused X-rays to be taken of the respondent's wrist which revealed that the respondent's fracture was completely united. The respondent showed excellent function of the hand, and he was of the view that the respondent could perform her duties and suffered no permanent partial disability and disagreed with the opinion expressed by Dr. Hugh that the scaphoid bones seldom healed. Under cross-examination, it was revealed from the evidence of this doctor that Dr. Stracey, after the patient had undergone a course of physiotherapy treatment, had discharged the respondent as fit for work on the 13th February, 1964, on the 20th August, 1964, and in April, 1965, and finally Dr. Bender had discharged her on the 9th August, 1965, as being fit for work.

On this evidence the magistrate found inter alia that the respondent's pain and incapacity were due to the accident and as a result she was 50% permanently incapacitated. He therefore entered judgment in favour of the respondent in the sum of \$2,160 plus a further sum as periodic payment with costs.

In his memorandum of reasons, the learned magistrate stated as follows: –

“I believed and accepted the evidence of the applicant and after consideration of all the medical history of the applicant in relation to her injury and the conflicting testimony of Dr. Hugh and Mr. Emram Alli, I accepted and relied on the evidence of Dr. Hugh with regard to his findings, when he examined the applicant that the said applicant had a 50% permanent partial disability having regard to the applicant’s employment and loss of earning capacity.”

The appellants (employers) now appeal to this court on the ground that a question of law is involved, because the learned magistrate, having found that there was conflicting medical testimony, failed to exercise in a judicial manner his discretion under s. 34(2) of the Ordinance to submit the matter to a medical referee.

S. 34(2) (i) and (ii) read as follows:–

“(2)(i) The Court may, subject to regulations made under this Ordinance, submit to a medical referee for report any matter of a medical character which seems material to any question arising before him in the course of the proceedings before him.

“(ii) When the court has decided to refer a matter to a medical referee by virtue of the provisions of para, (i) of this subsection the court shall fix the time within which the parties may come to an agreement as to the choice of a medical referee and failing such agreement, the court shall refer the matter to a medical referee chosen by the court.”

Our interpretation of this subsection is that the magistrate has a discretion which he must exercise judicially to refer the matter to a medical referee which is of a medical character which seems material to any question arising before him. In our view there was such a conflict of medical testimony in the evidence before the court, as Dr. Hugh on the one hand was saying that on the 13th February, 1966, the workman was suffering from a 50% permanent partial disability, whereas on the other Dr. Alli, a surgeon, just as highly qualified as Dr. Hugh, was saying that on the 12th August, 1965, he found no physical abnormality in the wrist and the workman had suffered no permanent partial disability, and the further evidence which emerged that Dr. Stracey who had treated the respondent over a period of one year and five months had discharged her fit for work. In this situation we consider that it was only just and proper for the magistrate to have resolved the conflict of medical opinion by reference to a medical referee, rather than conjecture – the magistrate being a layman in such medical matters. The learned magistrate’s approach was obviously conjecture for it is significant that he gave no reason why he accepted the evidence of Dr. Hugh and rejected the evidence of Dr. Alli. It appears to us that he could find none and indeed none appears on the record as Dr. Alli had specifically examined the respondent at a time subsequent to the examination by Dr. Hugh at the

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request of her trade union when at that time there appeared to be a conflict of medical opinion.

We are not unaware of the authorities on this vexed question (see the unreported cases of *Bookers Central Properties Ltd. v. Smith, Sir Lindsay Parkinson & Co. Ltd. v. Bissoon Nauth*, both of which were decided in 1960) and finally *Demerara Company Ltd. v. Ramroop* (No. 14 of 1966 Demerara) where in the particular circumstances the Full Court held that the magistrate did not err in not referring the matter to a medical referee. In the latter case, however, where there was a conflict of medical opinion, the workman's doctor had been assisted by an x-ray whereas the employers' doctor did not have the benefit of an x-ray and the court expressed the view that it could not be said that the magistrate had erred on a point of law when he did not make a reference to a medical referee under the provisions of s. 34, sub. s. 2, of the Ordinance. It must be stressed, however, that in all these cases there was evidence of some circumstance from which it could reasonably be said that the opinion of one doctor was preferable to the contrary opinion expressed by the other doctor.

In the result, we are of the view that the learned magistrate did not properly exercise his judicial discretion when he failed and/or refused to refer the matter to a medical referee on the application of counsel for the appellants (employers) in the court below at the close of the employers' case. This being a fit and proper case for such a reference, the conflict of medical opinion being of such a nature that only a medical expert would be able to appreciate and assess.

For these reasons the appeal is allowed and the order of the magistrate set aside. The matter is remitted to the magistrate with directions to refer same to a medical referee under s. 34(2)(i) of the Workmen's Compensation Ordinance, cap. 111, and on receipt of the certificate of the said medical referee to determine and adjudicate on the matter according to law.

The appellants will have their costs fixed at \$29.08.

Appeal allowed.

REGINA v. RAGWIN

[In the High Court (Khan, J.) December 11, 1968.]

Criminal Law — Confession — Circumstances in which admissible.

The accused, aged 19 years, was indicted for the murder of his stepfather. He objected to the admissibility of a written confession to the police. The grounds of his objection were, (a) that a promise had been held out to him and that he had been the victim of police violence, (b) there were a violations of the Judges' Rules, and (c) the statement had not been made by him. After the prosecution and the accused had lead evidence on the issue, counsel on behalf of the Crown submitted that from the whole of the evidence, the accused was alleging that he did not make the statement, and that any such question was for the jury to decide. He also submitted that the trial judge was not empowered to consider any breach of the Judges' Rules, in view of the accused's action in disowning the authorship of the statement.

HELD: (i) despite the fact that the accused had denied the making of the statement, an issue which is for the jury to decide, the Crown was putting forward the confession as free and voluntary and it is a condition precedent to its admissibility that it must be proved to be voluntary in the sense that it was not obtained by inducements or threats,

(ii) the burden is on the prosecution to prove that the statement was not obtained in an unfair manner:

(iii) the fact that the accused raised the issue as to whether or not the statement was his, does not absolve the prosecution from the burden of proving its voluntariness;

(iv) a statement obtained in breach of the Judges' Rules is not inadmissible as a matter of law, but may be rejected in the Judge's discretion;

(v) the evidence of the prosecution disclosed that there were certain non-compliances with the Judges' Rules and in view of this, together with the accused's youth and limited education, the circumstances surrounding the taking of the statement may well tend to render its reception unfair to the accused.

Statement not admitted into evidence.

R. A. Hector for the Crown.

Bhairo Prasad for the accused.

Editor's note: This decision foreshadowed that in the *State v. Gobin and Griffith* 23 W.I.R. 256 which was decided by a bench of five judges.

KHAN, J.: On the 13th May, 1968, acting detective Fitzroy Duff saw the accused at Springlands Police Station. He told the accused that the body of Robert Samaroo, his step-father, was found in a yard at No. 72 Village, Corentyne, with wounds about his face and head and that bloodstains and footprints were seen in the house which the deceased and the accused occupied and that he (Duff) suspected that the accused had killed the deceased. Duff said that he cautioned the accused who elected to make a statement and requested that he, Duff, take it down. Duff took down the statement, read it over to the accused and then asked him to sign it, but the accused said he could not read or write. According to Duff the accused put his mark by placing his right thumb print in the presence of assistant superintendent Alexander and detective corporal 5404 Thompson.

At the trial Duff sought to tender the statement and at this stage counsel for the accused objected to its admissibility on three grounds, firstly, that it was not free and voluntary as a promise or hope was held out to the accused and violence was meted out to the accused; secondly, there was a violation or breach of the Judges' Rules and, thirdly, the accused was not the maker of the statement.

His Honour intimated to counsel that ground (3) was a matter for the jury to determine. The preliminary issue as to grounds (1) and (2) was tried.

Continuing his evidence Duff stated in detail the circumstances surrounding the taking of the statement. In the course of his evidence under cross-examination it was disclosed that the first time the accused was asked to sign the statement paper was after the whole statement was concluded and at that stage the accused's thumb print was affixed at the three parts of the state-

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ment, namely, under the caution; under the consent for Duff to write the statement, and at the foot of the statement paper.

The accused was the only other witness who testified in this preliminary issue. He denied being cautioned at any stage whatsoever; denied that Alexander and Thompson were ever present and denied that he made the statement. He stated that he could write his name and read a little, and at the magistrate's court he signed his name on 'the statement of the accused form' before the magistrate at the conclusion of the preliminary investigations. The accused also stated that Duff told him several times, and I quote:

"You got to tell me who kill you step-daddy or else all ah you neck goh brack."

and before the statement was written by Duff, he (Duff), told him:

"Talk and seh you kill you step-daddy and if you say that, your mother and brother would be free, and you young, deh will not charge you."

The accused said he refused to say that, and Duff saying he had no time began to write the statement in question. The accused refused to sign it and Duff held him by the neck, hard at the back, and held his right thumb and placed it on a pad and then on the paper three times and then pushed him into the lock-ups. The accused said he complained of pains on the neck and was sent to Dr. Luck who rubbed his neck with ointment and gave him tablets. Dr. Luck gave a report to the policemen who had taken him. The accused denied that he made the statement as written. He, however, admitted that most of what was written in the statement he had told Duff earlier. He denied all the incriminating parts of the statement.

Briefly that was the evidence on the preliminary issue.

Counsel for the accused submitted *inter alia*, that there was a clear breach of the Judges' Rules in that it was conceded that Duff did not ask the accused to sign the caution and/or the consent before taking the alleged statement down.

In support of his contention he cited Archbold (36th ed.) paras. 1119 1120.

On the other hand, counsel for the Crown submitted that the whole of the evidence in the preliminary issue disclosed that the accused was saying he did not make the statement and not that he made the statement because of threats or inducement or fear, and it was therefore a matter not for the judge but for the jury to determine. Counsel relied firmly on the case of *Herrera and Dookeran v. R.* (1968) 11 W.I.R. 1. The Crown further submitted that the judge was not empowered to consider the breach of any of the Judges' Rules, or the question as to whether the statement was free and voluntary in the light of the claim of the accused that the statement was not his. The accused, he submitted, was not entitled to say in the same breath, so to speak, that the statement was not free and voluntary and that he did not

make it. The judge has not got to consider the question whether the statement was free and voluntary in the circumstances. The Crown urged that the matter was one exclusively for the jury and not for the judge.

From Duff's evidence it is common ground that the statement which is sought to be tendered is a confession – a confession of crime. The law, as I understand it, is that a confession is only admissible against the party making it if it was voluntary, that is, provided it was not made in consequence of an unlawful inducement or threat of a temporal nature held out or made by a person in authority.

Here, the Crown is seeking to tender the statement as a free and voluntary statement made by the accused. I repeat, that this is only admissible against the party making it if it is free and voluntary and the onus of proving this is on the party who is seeking to tender same, i.e. the Crown. It is not a triable issue until properly raised.

The principle of law was stated by Lord PARKER, C.J., in *Callis v. Gunn*, [1963], 3 All E.R., 677 at p. 680, thus:–

“No statement is admissible unless it is shown by the prosecution not to have been obtained in an oppressive manner and to have been voluntary in the sense that it has not been obtained by threats or inducements.”

Even though a confession was voluntary within the above principle the judge has a discretion to reject it if he considers that it was obtained in circumstances which would render its reception unfair to the accused.

The Judges' Rules of 1964, which were adopted by Guyana in 1965, are expressly stated to be subject to the principle under which confessions are inadmissible as a matter of law if they are not voluntary. Confessions obtained in breach of the Judges' Rules are liable to be rejected at the judge's discretion. The statement sought to be tendered in this case is a confession. When considering the admissibility of a confession it is necessary to bear in mind, firstly, the possibility that it may be inadmissible as a matter of law because it was not voluntary; secondly, the possibility that it may have been obtained by a breach of the Judges' Rules and therefore though voluntary, liable to be rejected at the judge's discretion, and thirdly, that it is liable to rejection at discretion because it was obtained in some other circumstances which would render its reception unfair to the accused. These are the possible areas the statement must pass before it is admitted. The first is a matter of law. Is the confession statement in question free and voluntary? In this regard I agree with the contention of counsel for the Crown that the accused having denied making the statement he cannot say in the same breath that it is not free and voluntary because he is saying he never made it and that is indeed a matter for the jury to determine whether he made it or not. But notwithstanding the contention of the accused the Crown is putting forward the confession statement as a free and voluntary statement of the accused and therefore it is a condition precedent to the admissibility of the

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confession that it was voluntary in the sense as stated by Lord PARKER, C.J. – (supra).

The prosecution is not relieved from showing also that it was not obtained in an oppressive manner. The fact that the issue whether the accused made the statement or not was raised does not in my judgment derogate from the general principle.

The third issue raised does not relate to admissibility at all but rather to its acceptability as being genuine. This is undoubtedly a matter for the jury and not for the judge. The question of admissibility precedes acceptability and that is exactly what the erudite and distinguished Chief Justice of Trinidad and Tobago, Sir Hugh WOODING, made pellucidly clear in his judgment in *Herrera and Dookeran v. R.* (supra).

The fact that the accused person raises the issue as to whether the statement was his or not does not in my judgment relieve the prosecution who is seeking to tender a confession against a party making it as a voluntary confession from the duty of showing that it was free and voluntary. It is only admissible if it is voluntary, (*vide* Cross on Evidence, 3rd ed., at p. 445.)

This is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary in the sense that it has not been obtained from him by fear, or prejudice, or hope of advantage, exercised or held out by a person in authority or by oppression, (*vide* Archbold 36th ed., para. 1121.)

“The above principle is overriding and applicable to all cases.

Within that principle the Judges’ Rules are put forward as a guide to police officers conducting investigations. Non-conformity with these rules may, (not must) render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.”

Statements in breach of the Judges’ Rules are not inadmissible as a matter of law although they may be rejected in the judge’s discretion and that is what counsel for the accused is seeking now. It is undisputed (except here by Crown counsel) that the judge has a discretion to reject confessions which were obtained unfairly, even though they were voluntary and obtained without a breach of the Rules. (*vide* Cross on Evidence, 3rd ed., p. 452).

Was there a breach of the Judges’ Rules? It is conceded by the Crown that the manner in which the statement was taken was not in strict conformity with the Judges’ Rules as set out in Archbold’s 36th ed., para. 1719. Duff did not ask the accused to sign the statement of caution after it was allegedly made. Duff accepted the offer to write the accused’s alleged statement but did not ask the accused to sign at the foot of the statement.

These omissions are clear breaches of the Judges’ Rules and bearing in mind the accused is a young person of 19 years, with very limited education, the gravity of the charge, the nature of the confession and the circumstances surrounding the taking of the statement may very well tend to render the

reception unfair to the accused. The rule as to the caution was intended to protect an accused from incriminating himself. Its adherence or breach of the Rules may result in a conviction or acquittal as the case may be.

It is therefore incumbent on the judge to consider the effect of the breach complained of and exercise his discretion as to whether or not he will admit the statement despite the contravention of the Rules.

I must emphasise the adherence to the Judges' Rules is a condition precedent to the admissibility of a statement, more so a confession.

The English practice which I respect and adhere to ensures that the utmost care is taken before a confession is placed before a jury, and this is particularly important because in many cases to admit a confession is virtually to ensure the conviction of the accused.

ROSKILL, J., in *R. v. List* [1965] 3 All E.R., 710 at 712, declared *inter alia*:—

“A trial judge always has an overriding duty in every case to secure a fair trial.”

In *Myers v. D.P.P.* [1965] A.C., 1001 at p. 1024 Lord REID said *inter alia*:—

“It is true that a judge has a discretion to exclude legally admissible evidence if justice so requires, but it is a very different thing to say that he has a discretion to admit legally inadmissible evidence.”

It is my view that the statement in this case is not proved to be legally inadmissible, but was certainly obtained in violation of the Judges' Rules in such circumstances which would render its reception unfair to the accused. In these circumstances the statement sought to be tendered by the Crown ought not to be received in fairness to the accused and I so rule.

Statement not admitted in evidence.

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[In the Full Court, on appeal from a Judge in Chambers (Bollers, C.J., Jhappan and George, JJ.) Sept. 27, Oct. 4, 12, Dec. 30, 1968.].

Execution — Judgment in magistrate's court — Petition by appellant to High Court to levy on respondent's immovable property — Immovable property, a lease for twenty-five years with building situate thereon — Assigned to Sugar Industry Labour Welfare Fund Committee as security for loan — Housing of Labour Workers and Sugar Estates Ordinance

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Cap. 183, s. 4 – Time for repayment expired – Whether such property available for execution.

The appellant, who had obtained five judgments in the magistrate's court, filed a petition in the High Court for leave to levy execution against the respondent's immovable property under s. 49 of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16. The immovable property consisted of a lease for 25 years in respect of lot 79 Tain Settlement, Corentyne, together with the building situated thereon; but under s. 4(1) of the Labour Workers on Sugar Estates Ordinance, Cap. 183, the respondent's right, title and interest in the lease and the house had been assigned to the Sugar Industry Labour Welfare Fund Committee by virtue of a loan which he had obtained from the Committee.

HELD: (i) s. 4(1) of Labour Workers on Sugar Estates Ordinance seeks to create an exception to proviso (b) to s. 3D of the Civil Law of Guyana Ordinance, Cap. 2, in that while under the latter provision the legal title remains in the mortgagor, under the former it in effect, is passed to the lender, i.e., the Committee;

(ii) sub-s. 1 of s. 4 creates the type of mortgage known to the common law of England and so long as payment is effected within the specified time, the assignment would come to an end automatically without any further act either on the part of the debtor or the Committee;

(iii) under sub-s. 1 of s. 4, the respondent cannot be said to be the owner of the property assigned, subject to a statutory charge or lien;

(iv) if the debtor fails to repay the loan within the time specified, the Committee would become the absolute owner of the property, subject to the filing of proceedings to recover the loan. Until the proceedings are heard the mortgagor has a right to redeem the property by paying whatever amounts may be outstanding by way of principal and interest and costs of the proceedings. In other words, he would have an equity of redemption in the property or a right analogous thereto and therefore an equitable estate or interest in the property.

(v) under s. 49 of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, the petitioner is required to satisfy the court that the judgment-debtor is the owner of immovable property; and an equity of redemption, or a right analogous thereto, is not sufficient proof of ownership, as owner of property in the section means legal owner.

Petition refused.

F.H. W. Ramsahoye for the appellant.

G.M. Farnum, Q.C., for respondent.

JUDGMENT OF THE COURT: This is an appeal from a decision of CHUNG, J., dismissing an application by the appellant (petitioner) for a writ of execution against the immovable property of the respondent. The appellant, who had obtained five judgments against the respondent in the

magistrates' court, made his petition to the court pursuant to s. 49 of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16. s. 49(1) reads as follows.—

“If no movable property of the party against whom execution has been issued can, with reasonable diligence, be found, or if that property is insufficient to satisfy the judgment, and the party is the owner of any immovable property, the party prosecuting the judgment may apply, by petition to a judge of the (High Court) for a writ against that immovable property; and on his satisfying the judge by an affidavit of the bailiff or otherwise, to the effect aforesaid, he shall be entitled to the writ.”

It is admitted that the respondent is a “labour worker” within the definition of that expression contained in s. 2 of the Housing of Labour Workers on Sugar Estates Ordinance, Cap. 183; and that the property sought to be taken into execution by the appellant consists of whatever interest the former may have in a lease for twenty-five years executed in his favour, in respect of lot: 79 Tain Settlement, Corentyne, together with the house he constructed thereon. Under the provisions of s. 4 of the Ordinance, the respondent had been granted a loan from the Sugar Industry Labour Welfare Fund for the purpose of erecting the building and accordingly his right, title and interest in both the lease and building, by operation of law, became assigned to the Fund. So important is sub.-s. 1 of this section in the search for a solution to the problems posed by this appeal that *it is* desirable to set it out *in extenso*. It reads as follows:

“Notwithstanding the provisions of any Ordinance to the contrary, where any loan has been made by the Committee from the Fund to a labour worker for the purpose of enabling such worker to erect and own a house on an approved site, the labour worker shall sign a promissory note and a receipt, and such receipt shall have the effect as an assignment to the Committee of the labour worker's right, title and interest in the house and land as security for the repayment to the Committee of the loan.”

Counsel for the appellant contends that one of three results flow from this subsection, viz: —

- (a) the worker remains owner of the property subject to a statutory charge or lien in favour of the Committee,
- (b) he has a reversionary interest contingent upon the repayment of the loan when it comes home, or
- (c) he has a conditional right *in re*.

Accordingly, he goes on, the labour worker has such an interest in the property as may be levied upon and taken into execution.

Before examining the above postulates in detail we feel that certain general observations on s. 4(1) would not be inappropriate. What this section has sought to do is to create an exception to proviso (b) to section 3(D) of

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the Civil Law of Guyana Ordinance, Cap. 2. This proviso preserves the Roman-Dutch law arid practice relating to conventional mortgages or hypothecs of movable and immovable property. In effect, therefore, as regards immovable property which is mortgaged, the mortgagor passes and executes a deed which is registered, thereby consenting that a willing and voluntary condemnation should be decreed and adjudged in the event of his failure to comply with any condition contained in the deed. He does not, however, convey the legal estate to the mortgagee. Even a sentence of foreclosure does not have this effect. See *Mendonca v. Gonsalves* (1883) 26th May (unreported). S. 4 of Cap. 183, on the other hand, creates, in our opinion,, the type of mortgage known to the common law of England. Under the common law, a mortgage is a conveyance of land, or an assignment of a chattel or of a chose in action, for the payment of a debt or the discharge of some other obligation for which it is given, the security being redeemable on the payment or discharge of such debt or obligation. Such a mortgage consists of two things. It is a personal contract for a debt and an state pledged as security for the debt. (See *Quarrell v. Beckford* (1816) 1 Madd 269 *per* PLUMER, V.C. at p.278.)

As under the English common law, s. 4 transfers to the creditor all the debtor's right, title and interest in the latter's property until the loan is repaid. In this type of mortgage, the deed specifies the date of repayment. On that date the mortgagor has a legal right, on the payment of what is due, to recover the mortgaged property. See *Crickmore v. Freeston* (1870) 40 L.J. (Ch.) 137. No provision has been made in s. 4 of Cap. 183 for any date of repayment but we assume that this would be provided for in the promissory note or receipt required to be signed by the debtor or in some collateral contract. Unfortunately, the records before us do not in any way assist in this regard, but we apprehend that so long as the labour worker complies with the requirement for repayment of the loan, the necessary implication of the section must be that, on its repayment, the assignment comes to an end without any further act on either his part or that of the Committee. Indeed, we are of the view that even if the terms of repayment are on an instalment basis, the labour worker who has not fully paid off the loan, and who has committed no breach by failing to pay the instalments when due, has preserved inviolate his legal right to an automatic redemption when the loan becomes fully paid up. But except for the limited purposes adverted to later in this judgment we cannot agree with the first submission of counsel for the appellant that the labour worker remains the owner subject only to a statutory charge or lien. To so find would be flying in the teeth of s. 4 of Cap. 183.

We now proceed to examine the second submission of counsel for the appellant. At common law, if a mortgagor fails to repay the loan on the appointed date, the mortgagee becomes the absolute owner of the property subject to his filing a foreclosure action. Equity, however, allowed the mortgagor a right to redeem the property after that date and until a foreclosure suit is heard, on his payment of the principal and interest due. This

right is the well known English concept of the equity of redemption and is based on the principle that every loan implies a debt and the creditor should not obtain any advantage by his security beyond his principal, interest and the costs of any suit filed. By the same process of reasoning we feel that if a labour worker fails to repay the loan granted to him under s. 4, he still has a right to redeem the property, that is, obtain its automatic transfer back to him on the same terms and conditions as prevailed in England before 1926.

Having regard to para. 8 of the petition, para. 6 of the affidavit of the Secretary/Manager of the Sugar Industry Labour Welfare Fund Committee and para. 7 of the respondent's affidavit, it would appear that the time fixed for the repayment of the loan granted to the respondent has long expired. Equity, however, preserves to him the right to redeem on payment of the outstanding amount of the principal and interest:

We accordingly agree with the judgment of DATE, J., in the unreported case of *in re* the Estate of Ramlakhan. deceased, (Action No. 667 of 1958 (Demerara)), that a labour worker has an equity of redemption in the property assigned or a right so analogous to an equity of redemption as to be considered as such and not a contingent interest. Under English law the person entitled to the equity of redemption was considered the owner of the land, to the extent that he could devise or grant it, for the equity of redemption was considered an equitable estate or interest in the land. (See *Gasborne v. Scarfe*, 1 Atk. 603.) This was also the position with personalty which was mortgaged. The respondent, in our opinion is for all practical purposes in the same position as his English counterpart before 1926.

The next question to be resolved is whether this equitable interest or estate which the respondent possesses can be levied upon. As has already been pointed out under s. 49(1) of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, among the conditions concerning which the judge is required to satisfy himself, is that the judgment-debtor is the owner of immovable property. Does the equity of redemption in the respondent entitle the appellant to say that he is the owner of the immovable property for the purposes of execution? We think not. In *Ori v. Phuljaria* 1917 L.R.B.G. 123, this Court held that, where a judgment-debtor only had a *jus ad rem* in immovable property, a levy against such property was illegal and, together with its subsequent sale at execution, must be set aside. In *Mangia v. Safayan et al.* [1917] L.R.B.G. 58, Sir Charles MAJOR, C.J., held that where a person was the holder by transport but he really was a trustee for a judgment-debtor, the latter had only a *jus ad rem* which could not be taken in execution at the instance of his judgment-creditor under a writ of *fiери facias*. Nor was the legal position changed by the introduction in 1917 of the Civil Law of Guyana Ordinance, Cap. 2, for the same principle was enunciated in *Gangadia v. Barracot* [1919] L.R.B.G. 216.

In deciding the above cases the Court acted on the assumption that the relevant provisions relating to executions were contained in O. 36, rr. 32 and 41 of the Rules of the Supreme Court, 1900. These rules read as follows:

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In the event of the movable property taken in execution being in the Marshal’s opinion insufficient, then the Marshal shall forthwith, and without waiting for the sale of the movable property levy on the immovable property of the judgment-debtor”

“41. The Marshal shall sell by auction to the highest bidder the immovable property so levied on after advertisement, signed by the Registrar, of the sale being published in the Gazette for three consecutive Saturdays.”

Proof that immovable property was in fact that of the judgment-debtor was sometimes difficult and by the Rules of Court 1910, a change was made to provide that possession of a judgment-debtor for any period not being less than five years should be deemed *prima facie* evidence of title. (See O. 36 r. 40 of the Rules of Court 1910). In addition, and of much more significance, the 1910 Rules extended the meaning of the words “property movable and immovable” contained in O. 36 r. 3 of the 1900 Rules to include *jura ad rem*. However, because of abuse, the former provision was later repealed.

Duke in his *Treatise on the Law of Immovable Property in British Guiana*, in reference to the authorities referred to above, observed that they “show that the holder of the legal title can oppose a sale at execution of land which the judgment-debtor has only an equitable interest. And also where the legal interest is in the judgment-debtor nobody has any right to oppose, the reason being that title to land is not transferable in (Guyana) except by transport , and that the judgment-debtor had only a *jus ad rem* therein.”

His observations were based on an assumption of the correctness of the decisions; and but for the extended definition of movable and immovable property to include *jura ad rem* we would agree with the decisions and his observations.

The Rules of the Supreme Court 1955 maintained the extended meaning of property, for by O. 36 r. 8(1) and (2) a judgment for the recovery by or payment to any person of money may be enforced by a writ of sale of “property movable and immovable” which latter expression was defined to include, *inter alia*, *jura ad rem*.

In the absence of a similar extended definition in section 49 of the Summary Jurisdiction (Petty Debt) Ordinance, we are satisfied that the words “owner of immovable property” can only be construed to mean legal owner. As has already been pointed out the right, title and interest of the labour worker including his right to possession had been assigned to the Committee. He accordingly can have in law no legal ownership for the purposes of execution.

In passing, it may be of some interest to refer to the English case of *Rogers v. Kennay* (1864) 9 Q.B.D. 592. There it was held that under a writ of *feri facias*, the sheriff cannot seize the goods of a judgment-debtor which the

latter has deposited as security for a debt. In that case, PATTERSON, J., made reference to the case of *Legg v. Evans and Wheelton*, M. & W. 36, and had this to say:

“Parke B, said that “any person having a right to the possession of goods may bring trover in respect of the conversion of them and allege them to be his property” and lien as an immediate right to possession was held to constitute such a property.”

For the several foregoing reasons we are of the opinion that the appellant has not proved that the respondent is the owner of immovable property on which he can levy execution. The appeal is accordingly dismissed with costs to the respondent to be taxed.

Appeal allowed.

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[Court of Appeal (Stoby, C, Luckhoo and Cummings, JJ.A)

May 15, December 31, 1968.]

Evidence — Civil proceedings — Hostile witness — Previous inconsistent statement admitted into evidence — Denial of contents — Weight and evidential value of such a statement — Evidence Ordinance, Cap 25, ss. 90 and 91.

The respondent had sued the appellant for failure to honour two contracts of fire insurance, one in respect of a building and the other the furniture situate therein, which had been destroyed by fire. The company's defence was that the respondent had forfeited any benefits under the contract because the fire had been occasioned by her wilful act of procurement or with her connivance. In support of this defence they led evidence of several circumstances which pointed to grave suspicion that the respondent and her husband, who was also her agent and had some financial interest in the property, were acting in complicity with the actual perpetrator of the fire.

The appellant sought to augment this body of circumstantial evidence by calling as a witness, an employee of the respondent and her husband. Both the employee and the husband had been charged with arson of the building and the former was found guilty and sentenced to a term of imprisonment. During the police investigations he had given a statement of his direct partici-

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pation in the crime and how he had come to commit it. However, when called by the appellant, he denied setting fire to the building and repudiated the contents of the statement. Proof was given of the circumstances under which it was given and eventually the trial judge deemed the witness hostile and counsel cross-examined him on the statement.

In his decision the trial judge ruled that while the statement could be used to contradict the witness, its contents were not evidence of the facts stated therein. He also concluded that the other evidence fell short of proof of a conspiracy between the employee and the respondent and her husband. On appeal.

HELD: (i) the effect of ss. 90 and 91 of the Evidence Ordinance is to make admissible in civil matters the contents of a statement made by a witness provided the conditions in the sections have been complied with;

(ii) on the issue of the weight which should be given to such a statement, this would depend on the particular circumstances of the case;

(iii) a court should hesitate to accept the contents of such a statement except confirmatory aspects appear from the circumstances;

(iv) in the present case the other evidence, including the respondent conduct, was sufficient from which to conclude that she knew what was about to be done as regards the building and furniture.

Appeal allowed.

J. A. King for the appellants.

M. Poonai for the respondent.

STOBY, C.: This Court allowed this appeal on the 15th May, 1968, in an oral judgment. We now set down our reasons for so doing.

The appellants, an insurance company, insured the respondent against loss or damage by fire as follows, namely –

- (1) \$6,000 on “one two-storey building (partly concrete) situate on the east half of lot No. 38 or lot No. 70, Sussex Street, Charles-town, Georgetown, Demerara” (Policy No. D. 60797);
- (2) \$3,000 on furniture and other goods in the said building (Policy No. D. 60480).

On the 7th February, 1965, the respondent suffered loss by fire to that building, and to articles of furniture, etc., therein, but the appellants refused to pay any sum on either of the two policies of insurance. An action was brought against them in respect of each policy, and by consent of the parties both matters were heard together, involving as they did, common issues for trial.

Only one issue stood for determination at the conclusion of the trial, that is, whether benefits under both policies were not forfeited because the fire was occasioned by the wilful act or procurement, or with the connivance, of the respondent. There was an express condition to this effect in each policy, and the appellants pleaded that the claims were fraudulent; and that the fire “happened by the procurement or wilful act or by the means or connivance of the insured” through the agency of one Oscar Boston.

The learned trial judge did not consider that this plea was sufficiently established and awarded the sum of \$6,000 on the policy which covered loss to the building, and \$1,850 on that relating to loss of furniture, etc., together with costs of both actions.

On appeal two questions arise for our determination:

- (a) Whether the decision was not against the weight of evidence and was such that the learned trial Judge viewing the circumstances reasonably could not properly have so decided.
- (b) Whether the trial Judge rightly considered the legal effect of the admission of the statement of Oscar Boston in evidence having regard to the provisions of s. 90 and s. 91 of the Evidence Ordinance, Cap. 25, and whether he gave to the contents of that statement the weight deserved in the circumstances of the case.

On the facts, three persons play important roles in the circumstances which have led to this appeal, namely, Eunice Raufman, whom I shall refer to as “the wife”; Mohamed Raufman, “the husband”; and Oscar Boston, “the servant”. All three shared a part of the accommodation provided by the insured building, which will be referred to as “the property”, before it was almost completely destroyed by fire in the very early hours of the morning of Sunday, 7th February, 1965. The lower fiat of the property consisted of a grocery, parlour, apartments, etc. The servant occupied a room in that sector, while the husband, the wife, and their children occupied the whole of the upper flat. The property was acquired in the name of the wife in 1961 for \$12,000, but only \$2,000 was paid in cash from the savings of both husband and wife, and the vendor, one Leon, referred to as the mortgagee, secure the payment of the balance of \$10,000 by giving a mortgage in that sum. Both husband and wife also contributed towards the payment of mortgage interest. The husband often acted on behalf of the wife in dealing with the appellants. He signed applications on her behalf, paid the premiums on the policies and transacted all her business with the appellants. The trial judge considered him to be the agent for his wife.

The husband also carried on a barber shop, and a mattress factory, which the wife described as a ‘joint venture’ by herself and husband. Indeed, it would appear they owned the property jointly, or at least the husband had some financial interest in it. Apart from his contributions, in a letter of 13th January, 1964, which he signed on behalf of his wife, it is significant that he included himself in writing: “We made enquiry . . . We would like to apply

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for a mortgage right now . . . We want to extend our policy . . .". This letter, which had the wife's approval, apart from revealing a joint association in approaching the appellants, also indicated that they wanted a mortgage 'right now', as the mortgagee wanted 'to quit' the country. In addition to asking for the grant of a 'substantial mortgage' from the appellants in that letter, a request was also made for a further policy of insurance. The latter was granted in the sum of \$6,000 (the policy sued on), but the 'substantial mortgage', requested to pay off the mortgage was not forthcoming.

It must be observed that although the mortgagee was seeking repayments since 1964, no amount was paid on the outstanding capital of \$10,000 up to the time of the fire. It is difficult in these circumstances to resist the inference that husband and wife were somewhat embarrassed in finding that large sum of money required to pay off for a property on which little had been paid and much was owing.

During the week before the fire took place, a curious exodus of the Raufman family from the city of Georgetown became noticeable. The servant took two of the children to the wife's family in New Amsterdam in the county of Berbice, and returned back to the city; then the wife, who was in a city hospital, suddenly decided to leave the care of the hospital and undertake the none too comfortable journey to her family in New Amsterdam about four days before the fire took place; and finally the husband also departed to join his wife and children there only two days before the event. So that when the fire occurred, husband and wife and children were far removed from the scene.

On the very night of the fire, about 7.30 p.m., Jean Wilson, who occupied an apartment in the lower flat of the property saw the servant, who she knew was living with the Raufmans and working with them 'making mattresses', with some clothes on his bicycle consisting of several pairs of trousers and several shirts. She went out, and on her return at 12.30 a.m. was struck by the smell of kerosene oil, and so made a careful check around, but was not able to trace the source. She spoke to her neighbour and to other people outside of the building, after which she saw smoke coming from upstairs and so was able to remove her two children from the apartment.

Mr. John M^c Pherson, then Deputy Fire Chief and Prevention Officer attached to the Fire Brigade, who had been in the Fire Service for twelve years, visited the scene of the fire when it was in progress and said:

"As a result of the behaviour of the fire – the rapidity of the speed of the fire – the type of flame, I would say the fire was deliberate and inflammable liquid such as kerosene was used. An ordinary accidental fire could not spread as quickly as what I saw on the night of 7.2.65. The flame was bluish in colour.

He actually smelt vapour from petroleum – kerosene – in one or two places, and later returned to the premises to carry out an investigation. He saw; in the lower flat, a drum which contained kerosene oil. He went upstairs and at the eastern section there was a strong smell of kerosene oil as well as on the ground floor immediately below the kitchen. The entire top floor of the building was completely destroyed; the fire had not to any extent gone through to the bottom flat.

On the 8th February, police constable Donald Lloyd saw in the grocery a 45-gallon drum with a pipe attached with a tap and under this tap was a 4-gallon tin which contained about 3 pints of kerosene oil; also there was a pint measure and a funnel in that container.

About one week before this fire the wife had had the misfortune of suffering a loss of about \$800 worth of stock from her grocery.

The husband and servant were charged with arson of the property, and the servant was sentenced to a term of imprisonment for that crime.

The appellants sought to augment the circumstantial evidence elicited at trial by calling the servant as a witness, obviously in the expectation that he would give direct evidence of his participation in the crime and narrate how he came to commit that crime. At that time he was actually serving his term of imprisonment. But in his evidence he said:

“On the night of the 6.2.65 I went out to a sport and I returned around 11 p.m. (that is, to the property). I went into my room and went back to the sport . . . When I returned the place was on fire. Mr. Raufman did not prior to the fire offer me money to set the place on fire. I did not in fact set the place on fire. The police took a statement from me which I signed. I cannot remember if what I told the police is different to what I am saying now. I cannot remember if I told the police that Raufman had offered me \$300 to set the place on fire. The police made the statement and I signed it. It was not a free and voluntary statement.”

Counsel for the appellants then asked leave of the court to interrupt the examination of the witness to call the Asst. Supt. of Police to show under what circumstances the witness made the statement, in order to lay the foundation for the Court to deem the witness a hostile witness. Counsel for the respondent offered no objection and Laurie Lewis, Asst. Supt. of Police, attached to the Police Headquarters, was called as a witness. He testified that on the night of the 8th of February, the servant spoke to him at the station, as a result of which he cautioned him. The servant gave him a statement which he took down in writing in the presence of Sgt. Foo and a detective constable. Before this the witness had invited the servant to write the statement himself, but he requested the witness to do so for him. After this the witness offered the written statement to the servant to read for himself, but he was quite content to have the witness read it over for him and upon being asked whether he wanted to alter, correct or add anything to it, intimidated

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that it was true and correct and signed it in the presence of the witness. The witness further testified that he used no threats nor offered any inducement or promise to him, and that it was only one statement which he took from him. This statement was then tendered for identification and was marked. There was no cross-examination to detract in any way from what was said by this witness. The servant then identified that statement, which was admitted in evidence, and was deemed a hostile witness, whereupon counsel for the appellants proceeded to cross-examine him. But he repudiated the contents of the statement, which is as follows:

“Sir ah been working wid Mohamed Raufman fuh about five years, making mattress. He trust me and sometime he does send me to the Bank to bank money and sometime he does send me wid a cheque to draw money. The last Saturday in January Raufman send me wid two of he children, two boys Teddy and Major to his wife family at 14 Pitt Street, New Amsterdam. Ah go wid the afternoon train. Ah come back Monday night with some boys working at Thani. Ah reach in town bout seven to eight o'clock and ah go to Raufman. He tell me that they break and enter he place pon the Saturday night and they carry away goods and about over two hundred dollars and that things lil bad wid he and the only way he could get money is if the place bun.

He asked if I could do the job ah tell he yes. He tell me if I could do the job he going give me about three hundred dollars. He tell me that he going to Berbice pon Friday morning and that ah must do it pon Friday or Saturday night when he gone. Friday was the fifth of this same month. He tell me to tek kerosene oil from the drum downstairs and pour it all about the floor upstairs. He tell me that he going lef the door from the room wey I does sleep to the cake-shop open and that he going lef the door from the cake-shop to upstairs open. Ah tow he to the train station Friday morning and ah left he dey and ah tell he that ah got to go to work at Gossai. Ah sleep at Raufman Friday night. Saturday the sixth of February ah go to work at Gossai, ah knock off at four o'clock. Ah go up the bank and ah stat play with mi friends them from the bank. Ah gamble wid them till quarter to seven and ah go up the bank to me sister at First Street Agricola and she give me one dollar and fifty cents. From there ah go in Third Street Agricola to me brother but he were not in and he girl tell me ah must come back next Friday time. From there I come straight back to town at about eight o'clock time. Ah go to Raufman place, ah bathe, ah change mi clothes and ah come outside back bout half-past eight and from there ah go to a dance in Charles Street at a place where Lord Inventor living upstairs. The dance was downstairs. Ah lef dey around twelve thirty to one o'clock time Sunday morning and ah go back to Raufman place. Ah draw kerosene oil in a tin from a big drum in the shop. Ah go up-

stairs wid it, ah put the matrass to the wall in the big bedroom and ah start to throw kerosene pon the matrass ah then throw kerosene all over pon the floor and the corners then. Ah tek ah small piece of candle what a buy from the Putagee man pon the Saturday night at Meadow Bank. The Putagee man name Frances and ah tear the matrass and ah put ah piece inside and ah left a piece outside. Ah light the candle then and ah come downstairs and when ah shut the door Mack who does live downstairs call me and ah answer he and I walk away and ah go back right away to the dance. Whilst ah dey at the dance ah see the Firereel passing right in Charles Street and ah hear people saying they got big fire in Sussex Street ah come out from the dance and ah ride round and ah see this fire just where ah set it at Raufman place. Ah stay till the firereel put out the fire and ah ride home to Meadow Bank. Nothing more. The same Sunday morning one of mi friends at Meadow Bank say the police searching for me and ah decide to come in and give myself up and ah talk to a sergeant. Sir ah sorry fuh whae ah do, things were bad wid mi and the work ah doing is not steady work, someday ah don't work."

The question then arose as to what use could be properly made of the statement. Counsel for the appellants acknowledged the general rule that a previous statement inconsistent with a party's testimony can be used to contradict him, but is not itself evidence of the facts stated therein. What he went on to say after this was evidently not appreciated by the judge, for he attempted to show that a qualification existed "in the light of certain cases, among which was that of *Harvey v. Smith-Wood*, [1963] 2 All E.R. 127, which lays down certain principles based on the Evidence Act, 1938. It is unfortunate that no allusion was made to the similar provisions of that act which are to be found in ss. 90 and 91 of the Evidence Ordinance, Cap. 25, after having been introduced into the laws of this Country in 1952.

However, counsel for the wife must have understood that the statement of the servant was capable of proving that there was a conspiracy between the husband and the servant to set fire to the property for he argued according to the trial judge's note that there must be some evidence "to link Mrs. Raufman with the scheme of Raufman and Boston – if court accepts". But the trial judge ruled in his judgment that:

"The statement given by the witness Oscar Boston to Asst. Supt. Laurie Lewis was given in the absence of the plaintiff and Mr. Raufman, but was admitted to show that the witness on a previous occasion did make an inconsistent and contrary statement. This statement contained the only evidence implicating the plaintiff's husband in any way . . . What the witness told Asst. Supt. Lewis in the absence of the plaintiff or her husband is not evidence against either of them, but Mr. King in his address submitted that this prior inconsistent statement of Oscar Boston can be used to contradict him, but it is not in itself evidence of the facts stated therein,"

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This pronouncement of the learned trial judge would have been correct if it were made before 1952.

It then becomes necessary to look at the relevant portions of ss. 90 and 91 of Cap. 25, in an effort to ascertain whether the servant's statement to the police could have any evidential value, and, if so, what – in the circumstances of the case.

S. 90(1) provides:

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

- (i) if the maker of the statement either –
 - (a) had personal knowledge of the matters dealt with by the statement; or
 - (b) . . .; and
- (ii) if the maker of the statement is called as a witness in the proceedings:”

The other relevant sections are as follows:

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

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner.”

Then s. 91(1) says:

“In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Ordinance, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particu-

lar to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent any fact.”

This legislation clearly makes provision for the admissibility of a statement as to facts in issue in any civil proceedings where the direct oral evidence of a fact would be admissible; where that statement tends to establish that fact if the prescribed conditions are satisfied, and corresponds almost identically with the Evidence Act, 1938.

BARRY, J., in *Cartwright v. Richardson*, [1955] 1 All E.R. at p. 742, however, did not think that the Evidence Act, 1938, over-ruled the ordinary rules of procedure applicable in the trial of civil actions. That view, in our opinion, is not sustainable and cannot be maintained if effect is to be given to the plain express language employed.

In *Bearmans Ltd. and anor. v. Metropolitan Police District Receiver*, [1961] 1 All E.R. 384, DEVLIN, L.J., endorsed that –

“it is said rightly that the Evidence Act, 1938, represents a relaxation of the ordinary rules of evidence.”

It must, therefore, be seen that the prescribed conditions are first fulfilled, before the statement becomes admissible for use as evidence, then the Court will proceed to give such weight as is due in the light of the particular circumstances of the case.

As DEVLIN, L.J., said in the same case at p. 392:

“The main object of the Act of 1938 is to admit contemporaneous documents that are made by a witness who is actually called . . . The Act was passed to aid in the administration of justice . . . and it is desirable that the Act should be given a liberal interpretation.”

It is further clearly envisaged by s. 91(1) that a statement may be admissible as evidence although its maker had some incentive to conceal or misrepresent facts, but then the extent of depreciation, if at all, will depend on the circumstances, which may render its value of little account, or still be able to preserve some credence in what is there said.

Sir Raymond EVERSHED, M.R., said in *Jarman's* case, [1951] 2 All E.R. at p. 257:

“The legislature must clearly have contemplated that under the Act documents might come to be admitted, and might be properly admissible, which did not have that impartiality to which Lord Eldon, L.C., alluded . . . and, therefore, it was emphatic in stating that admission was one thing, but the weight to be attached to the document when admitted was another.”

I cannot find anything in the prescribed conditions of the Ordinance to debar the statement from judicial evaluation as part of the evidence in the case within the limits of what is there provided.

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In *Harvey v. Smith-Wood*, (supra), a witness on behalf of the plaintiff gave evidence which was apparently in conflict with the plaintiff's own evidence. Counsel for the plaintiff then sought to put in evidence a statement in writing made by the witness, who was an elderly man, more than six years before the hearing. It was held that the written statement was admissible under the Evidence Act, 1938, s. 1(1).

LAWTON, J., was of opinion, however, that the use of this provision "should be one which counsel should hesitate to adopt except in very special circumstances."

Both counsel and judge have this responsibility to share. Counsel will first satisfy himself after investigation that the circumstances are of a kind which will impart to the statement some such value as will aid in the administration of justice. And the judge (apart from seeing that other prescribed conditions are complied with) will be on the look-out to observe whether the maker of the statement was a person so interested that his "bias" should immediately disqualify the statement from consideration, or whether, in the circumstances, despite incentive to misrepresent facts, a useful purpose may still be served in having it available for final assessment by a trained legal mind, to such an extent as the circumstances may warrant.

In my view the servant's statement was properly admitted in evidence. All the provisions of s. 90(1) of Cap. 25 were fulfilled. The maker of the statement had personal knowledge of the matters dealt with in the statement and he was called as a witness.

Consideration was given to s. 90(3) which renders a statement inadmissible if made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement may tend to establish.

In *Bear mans Ltd. and amor v. Metropolitan Police District Receiver* (supra) at p. 388, the point as to whether "proceedings" in the subsection is limited to civil proceedings was mentioned but not decided. I take the view that the subsection applies to civil proceedings. In criminal proceedings the statement could be produced in examination-in-chief (if ruled to be free and voluntary), but would be evidence against the maker only. Since the statement of a maker was always admissible in criminal proceedings, the subsection was intended to be limited to civil proceedings. The maker of the statement, the servant, was not a person interested in civil proceedings.

Now to the question as to what weight (if any) the statement ought to be given.

The servant was a self-confessed criminal. It was not in his interest to incriminate himself, but he may have thought that it would mitigate his crime if he were to introduce his employer as the mastermind. Therefore whatever

is said to inculcate the husband must be scrutinized with care and accepted only after an approach with caution. One must hesitate except confirmatory aspects appear from the circumstances, which will now be examined. It was a fact that the whole Raufman family was away when the fire occurred, which, although suspicious, is not in itself evidence of connivance; but in addition an adequate supply of kerosene oil was left in the cakeshop or grocery carried on by the wife; the door to the cakeshop must have been left open to permit entry to procure that inflammable liquid; the door to the upper flat must have been left open to permit of entry there; Mc Pherson actually smelt kerosene oil in that upper flat; there was in fact a burglary when the servant had taken the children to New Amsterdam, which resulted in financial loss to the husband and wife. Jean Wilson saw him with a quantity of clothes on his bicycle the very Saturday night; Jean Wilson overheard the husband telling him a week after the fire that he talks too much, and that if he (the servant) had not called his name, the police would not have charged him: Wilson then told the husband that she had heard what he had said and was going to report to the police, but he said nothing, and she went to the police. There was no cross-examination on this evidence, and the trial judge said: "Mr. Raufman may have very well said so"; this seems to indicate that the husband was here rebuking his servant for disclosing what should have been a secret; the day before the fire he towed the husband on his bicycle to the train station; on his evidence on oath admitted returning to the property that Saturday night 'around 11 p.m.', and then leaving again, and when he returned the place was on fire.

The details of the statement fit into these facts and circumstances, and would lead to the conclusion that the servant did in fact set fire to the property, and that this was done on the instructions of the husband.

The next question for determination would be whether the wife was privy to this act of incendiarism procured by the husband. Was it all planned and executed while she was left completely in the dark? Or was it not with her connivance?

Jowitt's Dictionary of English Law described 'connivance' as 'where a person knows that a wrongful act is being done, and either assists or, being under a duty to interfere, does not interfere to prevent it.'

One must not forget how the three principal parties stood in relation to each other. The servant was the servant of both husband and wife, being employed in their joint venture of the business of the mattress factory.

The business relations of husband and wife were closely tied together. It could almost be said that they had common interests in the spectrum of their endeavours, and each was concerned with the promotion of the interests of the other. That they were both faced with a financial problem cannot be doubted. The effort to secure a substantial mortgage to pay off the mortgage was not successful. There was another policy of insurance for \$10,000 on the property which was assigned to the mortgagee. In the event of a fire, without any fraudulent involvement on the part of the mortgagee, the ques-

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tion of repayment of the outstanding capital balance of \$10,000 would be solved. Also if payment could be obtained by the wife on the other policy of \$6,000, this sum would be to her credit, and so also the value of the land on which the property stood. An attempt to sell the property to Jean Wilson in 1964 was unsuccessful. No amount had been paid on the capital owing to the mortgagee for the four years during which the mortgage was in existence prior to the fire. To complicate matters, a burglary took place about the end of January when the stock from the grocery was stolen, and \$200 in cash, resulting in a total loss of about \$1,000. The overall financial embarrassment must be considered as providing a real motive for planning a fire to procure relief from pressing commitments with resulting benefits. In the circumstances of the involvement of servant and husband, and with the existence of a motive in husband and wife, it would require but little evidence from which to draw the inference that the wife was actually aware of what was to take place and secretly acquiesced, where it would have been her duty to interfere. By not interfering she would in the result be receiving a fraudulent benefit from the appellants. The sudden evacuation of children to her family in New Amsterdam at least 70 miles away takes on an almost sinister look. When she herself leaves a hospital in the city a few days before the fire to undertake that journey, there must have been some urgent and cogent reason for so doing. It is hardly likely that a sick person would wish to leave the medical facilities and opportunities of the city and endure the known inconvenience of travel to New Amsterdam, except for some significant underlying reason. When she was joined there by her husband only one day before the fire, it is difficult to resist the inference that she knew of the plan to have the whole family well away from the scene to permit of the planned operation, and to provide an alibi for self and husband.

This conduct on her part, taken into account with all the circumstances, is sufficiently satisfying to conclude that she knew of what was about to be done, and acted accordingly.

To allow the judgments then to stand would be to allow the wife to benefit from a fraud at which she connived.

The appeal was therefore allowed and the judgment and order of the trial judge set aside with costs to the appellants in this court and in the court below.

LUCKHOO, J.A.: I concur.

CUMMINGS, J.A.: I concur.

Appeal allowed.

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[High Court Bollers C.J., May 9, 15, 16, 17, 18, 22, 24, 25, 1967,
January 25, 1968.]

Negligence — Stealing of books by employees of company under contract to print them for and on behalf of author — Failure of company to take reasonable care for custody of books — Whether company liable for unlawful acts of servants.

Contract — Printing copies of books for publication — Whether implied undertaking by printers to take care not only of printed books but also of additional copies and rough proofs — Failure to take care — Foreseeability of consequences.

Bailment — Whether entrusting copyright work to printers a bailment — Copyright Act, 1911, (U.K.) s. 7 — Duty of care by a bailee for reward. Copyright — Unauthorised sale of copyrighted work — Action for conversion in respect of unauthorised sale of copies and plates.

Damages — Measure of — Pecuniary loss — Uncertainty as to actual extent — How assessed.

During the year 1965 the plaintiff prepared the second edition of a legal work for publication. The first edition was entitled 'The Law of Unlawful Possession' and had been written by his father. The second edition was renamed 'The Law of Unlawful Possession, Larceny and Receiving'. The plaintiff began negotiations with the defendants for the printing of the book which eventually led to his signing of an acceptance of their quotation for the printing of 1000 copies.

After the plaintiff had corrected the proof submitted by the company, he received three bound copies on the 23rd April 1966. On the 11th May he sold the first copy to a legal practitioner, and, on making enquiries based on certain information which he had received from the practitioner, he learned that copies of his book were being sold by two of the company's employees who were employed in their bindery department.

The plaintiff instituted an action against the defendants for damages for negligence, breach of contract, detinue conversion and breach of copyright.

The procedure adopted by the defendants in their printery were, firstly, to prepare proofs of the manuscript for checking by the customer. After all correction were made the printing machines would be set for the final product. After printing, the pages are collated and then sent to the stitching department where they are stitched. They are then sent to the bindery to be glued in preparation for putting on the covers, which is also done in that department. Thereafter the completed books are sent to the despatch department for despatch to the customer.

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HELD:— (i) the defendants were negligent and in breach of their contractual liability in failing to provide adequate facilities for the safety of the printed material, and accordingly, were liable for the unlawful removal of any books by their servants;

(ii) in entrusting the manuscript, which was a copyright work, to the defendants for printing, the latter became bailees under s. 7 of the Copyright Act 1911 (UK), and as bailees for reward they owed the ordinary duty of care to the plaintiff, which is expected of a person in such a position;

(iii) as the plaintiff was the owner of the copyright in the book under the Copyright Act he was entitled to bring an action in conversion in respect of the unauthorised sale of any copies;

(iv) as the measure of damages would be greater for the breach of contract than for any other cause of action the award should be made under that head;

(v) despite the plaintiff's inability precisely to quantify his loss, the damages should not in all the circumstances be limited merely to such special damage as had been proved.

Judgment for the plaintiff.

B. O. Adams, Q.C., with Mr. E. W. Adams for the plaintiff.

C. L. Luckhoo, Q.C., with Mr. G. M. Farnum, Q.C., for the defendants.

BOLLERS, C.J.: In the year 1965 the plaintiff, who is a puisne judge of the High Court, prepared for publication the second edition of the book entitled 'The Law of Unlawful Possession' written by his late distinguished father, Sir Alfred Crane. The title of this new edition was renamed 'The Law of Unlawful Possession, Larceny and Receiving.' The purpose of writing this new edition was to bring the first edition up-to-date with respect to the latest authorities on the subject and to supply the needs of the police force, the courts, the legal profession and members of the public who were interested in this branch of the law.

In order to have the book printed and published the plaintiff, in the latter part of August 1965, approached the defendants who are a company incorporated in this country under the provisions of the Companies Ordinance, Cap. 328, and carry on the business of printers. He took with him the typescript of the new edition along with a copy of the first edition and a copy of Professor Zamir's work entitled *The Declaratory Judgment and certain cyclostyled decisions of the Court to be included in the new edition.* The plaintiff was assured by one of the senior employees of the company that it was possible for the company to produce the second edition, but it would require some time for them to assess the cost of printing. The

new edition was to be exactly similar in pattern, size and specification to Zamir's work.

On the 20th August, 1965, the defendant company submitted a quotation for the job and also a sample of paper. The quotation was signed and accepted by the plaintiff during the first week of December 1965, when the plaintiff ordered 1,000 copies at \$6.50 per copy. It took some time before production of the book got underway, and there were proofs submitted to the plaintiff from time to time when he made author's corrections.

Eventually on the 23rd April, 1966, three bound copies of the second edition were delivered to the plaintiff by the assistant to the production manager. It was then discovered that there were flaws in the bound volumes in respect of size and specifications which did not accord with the sample of Professor Zamir's work, a volume similar to which was wanted by the plaintiff. It was also noticeable that the paper, which did not accord with the sample shown to the plaintiff, was two shades in colour and the leaves had been cut too narrowly and did not leave a wide enough margin.

The plaintiff pointed out these faults to Mr. Ross, the foreman binder, and Mr. Gittens, the assistant to the production manager, and informed them that they had not kept faith with the agreement. He also informed them that there were two pages in the table of contents that were loose in each of the three volumes. They replied that the pages could not be stitched with the other leaves because of technical difficulties, but the leaves could be pasted in with the other leaves which would not be noticeable to customers. They then stated that it was impossible to remedy the faults but they could supply a larger cover and give a wider margin. It was also agreed upon that the difference in colour of the paper could be overcome by trimming the edges of the leaves. The plaintiff was then promised the delivery of twenty copies during that week, which promise was not kept.

On Saturday, 30th April, the plaintiff visited the premises of the defendant company and was informed by the production manager that the books were not yet ready, but on further enquiry he was informed that if he waited he could have twelve volumes before the close of business on that day. Later in the manufactory he saw what he considered the first twelve volumes produced according to specifications as the first three volumes had been rejected by him because of the faults as stated. The plaintiff saw the twelve volumes bound from already stitched material and saw them wrapped up and parcelled out and they were delivered to him and he gave a receipt for them.

On the 3rd May, 1966, the plaintiff ordered 1,000 paper jackets to go with the volumes and at the time fixed the price of a volume at \$10.00 which was inserted on the jacket, and on the same day he signed a quotation form for the covers. On that day sixty-eight more copies of the book were delivered to him. On the 11th May, 1966, the plaintiff received 200

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more copies of the book and signed a delivery note. On the 13th May, 1966, he received another 97 copies and on the 17th May, 1966, when he instituted the action he had received 380 copies. After the action was filed, the plaintiff received the full agreed quota of 1,000 copies of his book, which included the three rejects and paid off the balance of the contract price for the printing of the books, i.e., \$3,250 and received a notice of acceptance from the solicitor to the defendants.

On the 11th May, 1966, at 10.30p.m. the plaintiff sold the first copy of his book to a legal practitioner, who gave him certain information which shocked the plaintiff. Under the contract made between the parties, the defendant company was not authorised to sell or distribute, or offer for sale, or to dispose in any manner of any of the copies of his book. The simple arrangement was that the defendant company was to print 1,000 copies of the book and deliver them to the plaintiff at a price of \$ 6,500. After receipt of the information from the practitioner it was then, for the first time, to his utter dismay, the plaintiff became aware of what was subsequently proved to be an established fact, that during the months of April and May 1966 copies of his book were being hawked around and sold by two employees of the defendant company, employed in the bindery department, to members of the legal profession and the public. The price of these volumes which were sold varied from \$5.00 to \$10.00.

On the 12th May, 1966, the plaintiff received further information from another legal practitioner as a result of which he went immediately to the defendants' premises and there he saw the manager, Mr. Wilson, and told him that he had been informed by a legal practitioner that his books were all over the place and were being sold to lawyers by men who said they were selling on behalf of the Lithographic Company. The manager expressed surprise that the books should have taken the market like that and he called in his production manager and the assistant production manager who did not contribute to the discussion. The plaintiff informed the manager that he would hold the company responsible for any damage that he might suffer as the company was employed merely to print the books and not to sell or otherwise dispose of them. The manager appeared to think that it was a matter for the police. Later that day the plaintiff communicated with the police and made a report, as he realised that he would have to enter into competition with other people who were selling his books at under-value. It was from that date that the plaintiff received information from several members of the legal profession about the sale of his books which greatly disturbed him.

As a result, on his instructions, his solicitor wrote the company pointing out to them that the company was never authorised to sell or disseminate any copies of the plaintiff's work but it had been discovered that some copies had already been sold and other copies had been offered for sale to

legal practitioners by persons claiming to act on behalf of the company. The allegation that these acts clearly constituted a breach of agreement on the part of the company and an entitlement to damages was then made. Finally, it was alleged that the company had either wrongfully and unlawfully permitted such sales of the book or had been guilty of gross negligence in the custody of the books, and then followed a demand that steps be taken immediately to stop the illegal sale of the books. It was then stated that the plaintiff reserved the right to institute proceedings for damages but would refrain from so doing provided the company agreed to waive any outstanding balance in respect of the printing of the said books. The plaintiff was never favoured with a reply to this letter.

It transpired that after the plaintiff received the distressing information concerning his books, he paid several visits to the premises of the defendant company where he saw scrapped material relating to his book, i.e., covers and printed material, in a pile about two feet high lying behind the door of the office of the production manager. This was an open room to which the employees had access. The plaintiff complained to the production manager and Gittens about this situation, and he was informed that no one could touch the scrap material and it could be of no use to anyone and that the room was locked after duty hours.

The premises of the defendant company in which the printing business is carried on is a two-flat building and the bottom flat houses the printery section while the upper flat houses the collating section, the stitching section, the binding section and the finishing section, and on the occasion of the visit of detective inspector of police Vincent Renaldo to the premises on the 12th May, 1966, he noticed both stitched and unstitched products of the book and covers on some racks in the open office in the bindery department. The entire staff had access to these stitched and unstitched products of the books and covers. The police officer also noticed printed material of the book in a heap on the floor of the production manager's office. He was informed by the assistant production manager that these were rejects.

On enquiry the officer was informed by Mrs. Clarice Lynch, who is in charge of the collating section, that she received the printed materials from the printing section and after her staff had finished collating the material she passed it on to the stitching section. She did not count the loose leaf copies of the printed matter as the company kept no such record. Mr. Ross, the foreman in charge of the stitching, binding and finishing sections, said that after stitching was completed he did not keep a record of the actual amount of books stitched, as the company did not keep such a record. No records of any kind were ever produced to the police officer who was making enquiries into the matter nor did any of the employees ever suggest at the earliest opportunity to the officer that records were kept. Indeed, the manager, Mr. Wilson, stated that he was not aware that any records were kept and did not know that the stitched products were kept under lock and key.

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On the 13th May, 1966, there was a report in the "Guiana Graphic" newspaper under the caption "Police probe theft and sale of Law Books," that before the plaintiff could distribute the books several city lawyers were seen with copies and it was understood that the books were bought from a shady source at prices below the ordered cost.

On the 17th May, at the instigation of the plaintiff, advertisements were placed in the "Guiana Graphic" and "Daily Chronicle" newspapers stating that copies were available at "Chambers," Supreme Court, and Graphic bookshop only.

The system employed in the printing of the book was that the estimator would receive the manuscript from the customer and would calculate from the copy how much paper and printing would be required to do the job. If the estimate was accepted a job envelope was prepared. The job envelope would contain on the face of it all printing instructions, details of the various quantities of paper required and details of the specifications of the job. The job envelope is then passed to the production manager who then passes it on to the superintendent of the department which is first concerned with the production of the publication. The linotype machines set the type in slugs which are pieces of lead with the raised type on the surface. When the type is set proofs are prepared which are cleared by the proof-readers and then forwarded to the customer for his reading. The customer may make corrections and if he does so the whole line would have to be reset and a fresh proof prepared. Eventually there is an accumulation of proofs and preparation is made to print. The set type is made up into pages ready for printing.

There may be two machines working and printing at the same time clearing eight pages at a time, and then the paper is reversed and a new chase is put in the machine to print the reverse side. The pages are not cut and different pages of the book appear on large pieces of paper. All the sheets are later sent to the top floor and passed through a folding machine where the sheets are folded by the machine. The folded pages are grouped and arranged to form the book. From that section the pages are sent to the sewing machine on the same floor where they are stitched on to tapers. Before the pages are stitched they are put together in sections of sixteen pages each, then they are collated, by which is meant that they are put together in sections to form a complete book; each group forms a complete unstitched book and they are then put on a stand. After the books are collated they are sent to the stitching department where they are stitched. From there they go to the bindery where the stitched pages are glued in preparation for placing the covers. The covers are then fastened on by the binders and they press them and examine them to see that the pages are in sequence. They are then sent to the despatch department which is also on the top floor to be parcelled out for despatch to the customer. If they cannot

be despatched to the customer on that day the parcels are locked in a store-room on the top flat, the key to which is retained by the superintendent of the bindery department.

It is important to observe that in the various stages of production of the book, the unstitched and stitched materials are left exposed in the various departments during the day and overnight. The precaution of keeping the product under lock and key is only taken when the books are completed and there is an inability to despatch them to the customer.

It will be seen from this narrative of the facts of the case that I have accepted the evidence of the plaintiff and his witnesses and have rejected the evidence led by the defendant company wherever that evidence conflicted with the evidence led by the plaintiff and it appeared to me that the witnesses who gave evidence for the defence gave false evidence on vital matters in a bold attempt to extricate themselves or their employers from a difficult and serious situation.

The learned Chief Justice then proceeded to analyse the evidence and went on:

In complete breach of the terms agreed upon in the contract, it was clearly established that early in the month of April 1966 and in May 1966 the plaintiff's book which had been printed by the defendant company was being hawked around and offered for sale to members of the legal profession and also to the public, and there was proof that at least seven books were sold to the legal practitioners, who gave evidence, by employees of the company, Messrs. Bradshaw and Denny, who were employed in the bindery department and who had at least 70 books in circulation at a time when the plaintiff innocently believed that his books had not yet come off the production line.

It is in these circumstances that the plaintiff now brings this action against the defendant company in which he claims damages and an injunction grounded on breach of contract and/or negligence and/or conversion and for infringement of copyright in relation to his work. It is the main allegation in the plaintiffs statement of claim that there was an express or, alternatively, an implied term of the contract that the defendants were not entitled to sell, offer for sale and distribute the plaintiff's books whether or not they were rejects, and that the defendants were to take due and proper care of the said books when printed and all such additional copies and rough proofs incidental to the printing of the 1,000 books ordered whilst under their charge and deliver them to the plaintiff only and this they had failed to do; and there was the additional allegation that the defendants well knew at the material time that the market for such legal work was limited to members of the legal profession and to other persons especially interested in the work.

The defence to this action was mainly that if any person sold or offered for sale any copy of the book to any member of the public such person was not acting as the servant or agent of the company. There was the denial that

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the servants or agents of the company were negligent in the care and custody of the books. The claim is then made that the plaintiff had failed to pay the balance of the contract price, namely, \$3,250, for the printing and preparation of the books which became due and payable upon completion of the contract by the defendant company on the 25th May, 1966. The defendant company therefore counterclaimed for the balance of the purchase price which, as I have related, was subsequently paid off by the plaintiff and the counterclaim was not pursued. On the evidence adduced, I have arrived at the conclusion that there was clear proof of negligence on the part of the defendants in their failure to keep reasonable and proper care of the plaintiff's books or materials used in the production of the book when in their custody.

It is the submission of counsel for the defendant company that on the doctrine of master and servant, the company is not liable in negligence and indeed for the unlawful acts of their servants Bradshaw and Denny in the theft of the books, as these employees were employed in the bindery department for the purpose of binding books and not for the purpose of stealing them or selling them without authority. In other words, he submits that the master is only liable where the servant commits an unlawful act in relation to an act which he is authorised to do.

I think it is true to say that from the cases dealing with this doctrine the principle has been formulated that where the relationship of master and servant exists, the master is liable for the torts of the servant committed in the course of his employment, the nature of the tort being immaterial—(see Clerk and Lindsell on Torts, 12th ed. para. 213). The question whether a wrongful act is within the course of a servant's employment is a question of fact, and the test which is most frequently adopted is given by Prof. Salmond, namely, that a wrongful act is deemed to be done in the course of the employment if it is either (1) a wrongful act authorised by the master, or (2) a wrongful mode of doing some act authorised by the master; and it is here that counsel argues that the selling of the books by the employees did not amount to a wrongful mode of doing an act authorised by the master as the master had authorised them to bind books and not to sell books.

In my opinion the principle laid down in the doctrine of the liability of the master for the torts of his servants does not apply to the circumstances of this case and the cases of *Barwick v. English Joint Stock Bank*, (1867) L.R. 2 Ex. 259 and *Lloyd v. Grace, Smith and Company*, [1912] A.C. 716, do not help. It will be remembered that in the former case it had been laid down that for the master to be liable the wrong must be intended to benefit the master, but in the latter case it was held that this was not the law and if the wrong was done to benefit the servant when he was about his master's business, the master was nevertheless liable. In my view this doctrine has no application where there is initial negligence in the master and, indeed,

I have found in the present case that the defendant company was negligent in the publication and printing of the plaintiff's books and, indeed, in their performance of the contract. Support for this view is to be found in the case of *Cheshire v. Bailey*, [1905] 1 K.B. 237 at p. 241, where the liability of the master for the act of his servant which amounted to a criminal offence was discussed, and COLLINS, M.R., stated:

"It is a crime committed by a person who, in committing it, severed his connection with his master and became a stranger, and, as the circumstances under which it was committed are known, it raises no presumption of negligence in the defendant."

Again, DENNING, L.J. (as he then was) said in *Broom v. Morgan*, [1953] 1 Q.B. 597:

"The master's liability for the negligence of his servant is not a vicarious liability but a liability of the master himself owing to his failure to see that his work is carefully and properly done."

In the instant case the circumstances clearly show negligence in the defendant company. I go further and state that even if I were wrong in this view I would consider that the defendant company was liable for the tort of conversion or the crime of their employees in selling and offering for sale the plaintiff's books on the authority of *Lloyd v. Grace, Smith and Company*, (supra) where a solicitor was held liable for the fraud of his managing clerk who induced a client to transfer property to him and then dishonestly disposed of the property for his own benefit. In the House of Lords, in this case, Lord LOREBURN said (p. 725):

"If the agent commits the fraud purporting to act in the course of business such as he was authorised, or held out as authorised, to transact on account of his principal, then the latter may be held liable for it."

And Lord SHAW stated:

"I look upon it as a familiar doctrine as well as a safe general rule, and one making for security instead of uncertainty and insecurity in mercantile dealings, that the loss occasioned by the fraud of a third person in such circumstances ought to fall upon the one of the two parties who clothed that third party as agent with the authority by which he was enabled to commit the fraud."

In the circumstances of the case it is my view that it can be truly said that Bradshaw and Denny were clothed by the authority to bind the books by reason of which they were enabled to steal and/or convert the books. In any event, the books under the contract being the property of the plaintiff, it is established that where a servant has custody of goods which are the property of a third party, then the master would be liable for the loss of or damage to the goods caused by the servant's wrongful act if the act is done in the course of the servant's employment and this principle would apply whether or not the owner of the goods has actually bailed them to the master *Aitchison v. Page Motors Ltd.*, (1935) 154 L.T. 128.

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There is a statement in Batt on the Law of Master and Servant, 4th ed., p. 281, which declares on the authority of *Patent Safety Gun Cotton Co. v. Wilson*, (1880) 49 L.J. Q.B. 713, that even where a master employs a servant whom he knows to be a thief and a forger, he is not liable for thefts and forgeries committed, whilst the forger is in his employ, of cheques sent to him. This case, however, when examined, is found to concern the servant of the plaintiff who, in the circumstances of the case, had no relation with the defendant and owed the defendant no duty, and in my view is not applicable.

The cases of *Uxbridge Permanent Benefit Building Society v. Pickard*, [1937] 2 K.B. 298, *Barwick v. English Joint Stock Bank*, (1867) L.R. 2 Ex. 259, and *Lloyd v. Grace, Smith & Co.* then establish the proposition that the master will be liable if the fraudulent conduct of the servant falls within the scope of the servant's authority actual or ostensible. It could be fairly said that the theft or loss of the books in this case fell within the ostensible authority of the employees Bradshaw and Denny.

Counsel for the defendants next submits that the defendants have cleared themselves of negligence, if indeed there was any, as they have shown they acted in accordance with general practice. This submission is based on the dictum of MAUGHAM, L.J. (as he then was) which was almost ignored by the two other judges who sat on the appeal, in the case of *Marshall v. Lindsey County Council*, [1935] 1 K.B. 516 at p. 540, where he stated in the course of his minority judgment:

“An act cannot, in my opinion, be held to be due to a want of reasonable care if it is in accordance with the general practice of mankind. What is reasonable in a world not wholly composed of wise men and women must depend on what people presumed to be reasonable constantly do.”

This principle was also enunciated in the case of *Vancouver General Hospital v. Mc Daniel*, [1934] 152 L.T. 56 at p. 57 and approved of in *Whiteford v. Hunter*, (1950) W.N. 553 with a caveat by Lord MACDERMOT that such expressions are meaningless unless used in relation to some particular condition or state of affairs.

I wish to state here that in this case there is no satisfactory proof at all that the defendants acted in accordance with general and approved practice. There was indeed no evidence as to what was the general and approved practice of publishing and printing legal text-books in this country for this was the first venture of this kind ever undertaken by the defendant company. The managing director of the defendant company did attempt to say that the only printers in the United Kingdom who he knew adopted security measures while printing would be stamp printers and banknote printers, which in my view, because of his limited experience, must be

accepted with the proverbial 'grain of salt.' It must also be borne in mind in this connection that this gentleman had never worked with law publishers and had no experience whatever in the printing and publishing of legal textbooks. One must also bear in mind that what might be considered general practice in printing a law book in the United Kingdom might not necessarily be so in Guyana.

It is worthy of note that in *Marshall v. Lindsey County Council*, where MAUGHAM, L.J., raised this defence which he considered was open to the defendants, the majority decision was that the defendants were liable for the failure of their servant, the matron, in the course of her administration of a maternity home to inform the plaintiff of a case of puerperal fever as a result of which the plaintiff herself contracted the disease when she was admitted into the home shortly afterwards, when the matron knew or ought to have known that by reason of the absence of warning there was grave risk of danger to the plaintiff.

In keeping with the line taken by Lord MACDERMOT in *Whiteford v. Hunter*, I have no hesitation in holding that there were no particular conditions under the contract or state of affairs which suggested that security precautions should not be taken and records should not be kept in relation to the production of the plaintiff's book as, indeed, it was admitted by the defendants that there were previous cases of theft of materials from the factory.

The tort of negligence, as I understand it, is the breach of a legal duty to take care which results in damage to the plaintiff, that duty can arise not only under a contract but also under the test of proximity as laid down by Lord ATKIN in *Donoghue v. Stevenson*, [1932] A.C. 562 at p. 580: "You are to take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour." My neighbours being "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

The test for deciding whether there has been a breach of duty has long ago been laid down by ALDERSON, B., in *Blyth v. Birmingham Waterworks Co.*, (1856) 11 Ex. 781, when he stated that negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Under the contract then the duty was clearly owed by the defendant company to the plaintiff to take due and proper care of the books when printed and all additional copies and rough proofs incidental to the printing of the amount of books ordered, and under the test of proximity as laid down by Lord ATKIN, the defendant company ought reasonably to have had the plaintiff in their contemplation when they were directing their minds to the acts or omissions which were called in question in the production of the books. In other

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words, the injury to the plaintiff was the reasonably foreseeable consequence of the defendants' failure to take any security measures and to keep records in the production of the book.

A reasonable person would have seen that proper security precautions were taken in the production of this book by placing watchmen on the premises to see that no unauthorised person entered or left the premises, or that authorised persons had the minimum opportunity of leaving the premises with copies of the book, and would have ensured that records were kept of the materials used in the various stages of the production of the book, and would not have left the materials used in the production of the book exposed overnight and certainly when the production of the book was completed. All of this the defendants failed to do and permitted employees of the company to enter and leave the premises wearing coats, in which situation it would be a simple matter for an employee to conceal a copy of the book under his coat. There must then be in this case a breach of that legal duty to take care which caused injury to the plaintiff, and the defendant company must be liable in negligence.

If, indeed, there was a bailment of the plaintiff's goods with the defendant company, and I am of the view that by reason of the terms of the contract and s. 7 of the Copyright Act, 1911, there was such a bailment, then the law is clear that a bailee is not liable for the loss of or damage to a chattel bailed "unless caused by his negligence or that of his servants acting in the course of their employment:" per ROMER, L.J., in *Sanderson v. Collins*, [1904] 1 K.B. 628,633.

In the recent case of *Morris v. Martin & Sons Ltd.*, (1965) 3 W.L.R. 276, Lord DENNING, M.R., at p. 282 of his judgment, in dealing with the position of a bailment for reward, made it clear that once a man has taken charge of goods as a bailee for reward, it is his duty to take reasonable care to keep them safe and he cannot escape that duty by delegating it to his servant. If the goods are lost or damaged whilst they are in his possession, he is liable unless he can show – and the burden is on him to show – that the loss or damage occurred without any neglect or default or misconduct of himself or of any of the servants to whom he delegated his duty. The bailee, to excuse himself, must show that the loss was without any fault on his part or on the part of his servants. If he shows that he took due care to employ trustworthy servants, and that he and his servants exercised all diligence and yet the goods were stolen, he will be excused. I need hardly say that the defendants in this case have not shown that the loss or theft of the books occurred without any neglect or default or misconduct of themselves or of any of the servants to whom the duty of producing the books was delegated.

Under s. 6(3) of the Copyright Act, 1911, the plaintiff is presumed to be the owner of the copyright of his book. Under s. 7 he has an action

of detinue in respect of unsold infringing copies and plates which by virtue of the section are deemed to be his property, and an action for conversion in respect of such infringing copies and plates as have been sold: *Birn Bros. Ltd. v. Keene and Co. Ltd.*, [1918] 2 Ch. 281.

In respect of the claim for infringement of copyright of the plaintiff's work, to my mind, the case is clear. Copyright is infringed by anyone who, without the consent of the owner of the copyright, does anything the sole right to which is by the Copyright Act conferred on the owner of the copyright. The law of copyright in this country in the month of May 1966 was governed by the Copyright Act of 1911, which was introduced into this country with effect from the 1st July, 1912, by Proclamation published in the Official Gazette of the 21st June, 1913. Under s. 1(2) copyright means—

“the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever . . . ; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right —

(a) to produce. . . or publish any translation of the work; and to authorise any such acts as aforesaid.”

Under sub s. (2) of s. 2, copyright shall also be deemed to be infringed by anyone who —

“(a) sells or . . . or offers for sale

any work which to his knowledge infringes copyright or would infringe copyright if it had been made within the part of His Majesty's Dominions in or into which the sale or . . . or offering for sale . . . took place.”

Under s. 2, the author of a work is the first owner of a copyright therein. When, therefore, the servants of the defendant company sold or offered for sale copies of the plaintiff's book, there was clearly proved an infringement of the plaintiff's copyright, and 8 Halsbury's Laws, 3rd ed., p. 426 at para. 776 states that “it is an infringement of the copyright in a copyright work to reproduce the work or any substantial part thereof in any material form whatsoever without the consent of the owner.”

The Act of 1911 provided that copyright should be deemed to be infringed by, any person who, without the consent of the owner of the copyright, did anything the sole right to do which was by that Act conferred on the owner of the copyright. What is protected is not original thought or information, but the original expression of thought or information in some concrete form. The defendants in this case have made an unlawful use of the form in which the thought or information is expressed. The plaintiff is therefore entitled to damages for breach of copyright.

In Clerk and Lindsell on Torts, 12th ed., para. 1941, it is stated that the primary remedy for infringement is an injunction which will be granted almost as of right. The plaintiff need not prove any damage but there must

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at least be a likelihood of future damage. In this case the plaintiff has clearly proved damage and a likelihood that other unauthorised copies of his book may suddenly appear on the scene. Under s. 6 of the Act the usual civil remedies are available to him and the right to damages is kept alive as the owner of the copyright can recover damages for the loss which he has sustained by reason of the infringement or, in the alternative, he can obtain payment of the profits which have been made by the infringer from the piracy. *Birn Bros. Ltd. v. Keene and Co. Ltd.*, (1918) 2 Ch. 281.

Having found that the plaintiff has established his claim for breach of contract, negligence, conversion and breach of copyright he is clearly entitled to damages, and as the measure of damages would be greater in respect of the breach of contract than that under the other heads, I now proceed to examine this question and to award damages under the head of breach of contract only — see the decision of the Ontario Supreme Court in *Toronto Hockey Club v. Arena Gardens Ltd.*, (1924) 4 D.L.R. 384, which established that where a plaintiff sues for damages for breach of contract he cannot also recover damages for the breach as a tort if it be one.

In *Chaplin v. Hicks*, [1911] 2 K.B. 786, the principle is well stated that merely because precision cannot be arrived at it does not mean that damages cannot be assessed. The plaintiff has claimed a certain sum for loss of profits and another sum under the head of general damages and, as I understand it, to recover damages in contract the plaintiff must by virtue of the rule in *Hadley v. Baxendale*, (1854) 9 Ex. 341 prove either that the damage arose naturally from the breach or that it arose in special circumstances contemplated by the parties. The damages which arise naturally from the breach are said to be general damages. In Pollock on Contract, 12th ed., at pp. 528 and 529, the author describes general damage to be such damage as the law presumes to follow from an infringement of a legal right or a legal duty, and then cites *Aerial Advertising Co. v. Batchelors Peas, Ltd.*, [1938] 2 A.E.R. 788, where damages for breach of contract in respect of business loss were given even though loss of specific sums from specific customers was not pleaded and proved, as an illustration of general damages being awarded in contract. The comment of Prof. Street in his 'Principles of the Law of Damages' p. 20, is that plainly these damages were general damages in one restricted sense only in that they fell within the pleading rule of *Ratcliffe v. Evans*, (1892) 2 Q.B. 524 at p. 532, that the duty to plead and prove substantial loss was discharged in this context by proof of general business loss.

In the Batchelors Peas case the plaintiffs and defendants entered into a contract whereby the plaintiffs were to advertise the defendants' goods by flying over various towns, trailing behind the aeroplane words advising the public to buy the defendants' products. Unfortunately, in breach of the agreement, the pilot flew over a city and a town while the Armistice services

were in progress. The result of this flight was a denunciation of the defendants and a campaign that their goods would be boycotted. As a result there was a great decline in customers for the goods which the defendants had supplied to retailers. On the counterclaim the defendants were awarded general damages recoverable for pecuniary loss sustained in respect of the breach of contract. The submission was made that the damages recoverable for breach of contract in this situation should be restricted to special damage or, at any rate, to damage which could be precisely proved. This view was rejected by the learned judge, ATKINSON, J., who held so long as a loss can be proved, i.e. an actual loss, it is immaterial that it cannot be calculated with precision. In the course of his decision at p. 796, the learned judge stated:

“Difficulty of proof does not dispense with necessity of proof. In considering damage on this part of the case, one has to be very careful that one is not giving damages for injury to reputation and that type of thing. One can only give general damages in respect of the pecuniary loss which has been sustained.”

The judge then proceeded to award the sum of £300 damages being very careful to err on the low side for fear that it should be thought that he was giving damages for loss of reputation. It must not be overlooked that the pound in 1938 would be valued at three or four times what it is today.

In terms of the present case, the plaintiff has proved the actual sale and loss of seven books to legal practitioners and the circulation of seventy books being offered for sale to members of the public; the figure seventy must be accepted as the problem must be approached with the maxim *omnia praesumuntur contra spoliatores* in mind — see *Amory v. Delamirie*, (1722) 1 Str. 504. The evidence is that the plaintiff had disposed of 596 copies, 32 of which he had sent out of the country, in which case he would be left with 404 copies. Seventy copies of the book would yield a profit of \$245.00. It may well be that other unauthorised copies may appear on the market being sold at under-value, the plaintiff may well have to sell the remaining 404 copies at a price lower than \$10.00 each. Following the decision in the Batchelors Peas case and erring on the low side without a consideration of loss of reputation, I assess the general damages at \$1,000 for which sum I enter judgment in favour of the plaintiff and grant the injunction prayed for under para. 8(2) of the statement of claim. It is further ordered that the fifteen extra copies of the plaintiff's book tendered and admitted in evidence in court be delivered by the defendants to the plaintiff on the payment of \$97.50. I award costs to plaintiff to be taxed certified fit for two counsel. A stay of execution for six weeks is granted.

Judgment for the plaintiff.

Solicitors:

S. M. A. Nasir for the plaintiff.

J. E deFreitas for the defendant.

RAMPERSAUD KISSOON v. THE HAND-IN-HAND
MUTUAL FIRE INSURANCE COMPANY LIMITED

[High Court (Fung-A-Fatt, J.,) September 25, October 10, 16,
November 23, 1967.]

Insurance — Re-issue of fire policy in respect of a building — Insurers requiring insured to enter into new contract — Insured paying renewal premium and leaving signed application form for new contract with insurers — No new policy issued after two months — Whether building insured.

Insurance — Furnished building used at weekends — Watchman occupying garage at night — Whether building unoccupied — Insurance contract — what condition enforceable where no policy.

On the 10th October 1963, the plaintiff had insured a building situate at Clonbrook with the defendants against loss or damages by fire for one year. The premium paid was \$64.00. In September 1964 the defendants posted a renewal notice to the plaintiff but endorsed on it was a letter which intimated that it had become necessary to re-issue all policies on renewal. The letter went on to state that for the purpose of the re-issue of the policy it was necessary that the plaintiff enter into a new contract with the defendants and that an application form to be completed by the plaintiff is or will be forwarded to him.

On the 10th October, 1964 the plaintiff went to the defendants' office where he spoke with a clerk and paid to the cashier a sum of \$68.00 by way of premium for which he obtained a receipt for the sum paid. The additional

sum of \$4.00 was in respect of coverage against explosion. The clerk at the same time had given to the cashier an application form based on information given by the plaintiff and which had been signed by him. The receipt issued to the plaintiff was marked 'provisional premium receipt' and it was stated that it would remain provisional until a new application form signed by the insured had been received.

On the 4th December, 1974 the plaintiff's building was destroyed by fire. In an action to recover the insured sum the defendants sought to avoid liability by contending that a policy of insurance was not in force between the parties. Alternatively they contended that even if such a policy was in force the plaintiff was in breach of a condition in the policy in that he had left the building unoccupied for more than thirty days.

HELD: (i) although no new policy of insurance had been issued a contract of fire insurance was in force at the time of the fire as the defendants had offered a new policy to the plaintiff who by payment of the higher premium and the completion and submission of the required application form had accepted that offer;

(ii) the receipt which the plaintiff had obtained was in the nature of a cover note;

(iii) as the letter of offer of a new policy did not make reference to non-occupation as a bar to the defendants' liability, and as they had never shown nor sent a copy to the plaintiff, such a condition did not apply to him;

(iv) alternatively, even if the condition concerning non-occupation for thirty days applied, the defendants on whom the burden lay to prove this fact, have failed to discharge that burden;

(v) the fact that the building was fully furnished, occupied by the plaintiff and his family every week-end and sometimes by the plaintiff during weekdays, together with the nightly sleeping by the plaintiff's ranger in the garage in the building in order to keep watch, were sufficient evidence of occupation.

Judgment for the plaintiff.

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

J. King, for the defendant.

FUNG-A-FATT, J.: The plaintiff, who is a landed proprietor, claims in this action the sum of \$8,000:— (eight thousand dollars) as damages for breach of contract of fire insurance. The defendant company, which carries on the business of fire insurance and is incorporated by Ordinance in this country, denies that any policy of insurance or any contract of fire insurance was in force between the parties at the relevant time, in relation to the property alleged to have been insured.

Assuming but not admitting that such a contract of fire insurance was in force, the defendant company says in the alternative that the said

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contract would be subject to certain new conditions contained in a new policy which was being introduced at that time.

Para. 10 of the statement of defence reads as follows:—

“it was a condition of the said new policy then currently being issued by the defendants that the insurance would cease to attach to the property affected unless the insured before the occurrence of any loss or damage obtained the sanction of the company, signified by endorsement upon the policy, if the building insured became unoccupied and so remained for a period of more than 30 days.”

Para. 11 of the statement of defence then alleges—

“the said building was unoccupied and so remained for a period of more than 30 days prior to the alleged loss without the said sanction of the company and accordingly in any event, any such contract would have been ceased to be in force.”

The plaintiff in his reply joined issue with the defendant on his defence, and did not admit para. 10 and specifically traversed para. 11.

In my opinion there are three main legal issues in this case, namely:—

- (1) whether there was a contract of fire insurance in force at the material time in relation to the plaintiff's property which was destroyed by fire, and if the answer to this question is in the affirmative, then,
- (2) whether the condition set out in para. 10 of the statement of defence applies to such contracts, and,
- (3) if such condition does attach, whether or not there has been a breach of it on the plaintiff's part.

I shall now consider the facts of this case. The first important issue of fact in this case is whether or not the plaintiff had signed an application form on the 10th October, 1964. The plaintiff was the holder of a policy (without profits) of fire insurance, No. C 59632, with the defendant company and dated 10th October, 1963 (Ex. “A”). Under this policy a one-storeyed building situate on Lot B, Sec. B, Clonbrook, on the east coast of Demerara, was insured for \$8,000:— against loss of or damage by fire or otherwise directly caused by explosion. The annual premium was \$64:—

On the face of this policy it is stated:—

“Now be it known that during the said period of one year hereinbefore mentioned, and during every successive year for which the sum required for the renewal of this policy shall (with the consent of the Company) be paid to and accepted by the Company, the capital and

other funds of the Company shall be subject and liable to pay or make good to the insured or his legal representatives any such loss or damage by fire as may happen to the property hereinbefore described, subject to the Conditions and Regulations hereon endorsed, and not exceeding in the sum or sums respectively hereinbefore mentioned, amounting in the aggregate to the sum of \$8,000:—”

On the 21st day of September, 1964, according to the post mark, the defendant company posted a printed “renewal” notice to the plaintiff stating:—

“Please take notice that the under-mentioned policy will expire at 3 o’clock in the afternoon of the date stated but the premium(s) described below will be accepted subject to the signing of a new application form.

Policy No.	Sum Insured	Premium Due	
59632	\$8,000:—	\$64:—	
W.P.	10/10	EXP.4	
		\$68	
Mr. Rampersaud Kissoon, 7, Lamaha & Oronoque Sts., Queenstown, Bldgs. B, Sect. B, Clonbrook.		Date	Month
		10	Oct. 1964

(Sgd.) C. P. Fitt
Secretary

Kindly present this notice when paying the premium”
Endorsed on this renewal notice was this printed letter:—

“Dear Sir/Madam,

We attach hereto our Renewal Notice indicating the date on which the premium in respect of the above policy falls due.

In view, however, of the fact that this Company has become a member of the B.G. Fire Insurance Association, it has become necessary for us to re-issue all policies on renewal to confirm with the terms and conditions of the policy issued by the Association.

Where formerly the explosion damage clause was embodied in our policy, this cover has now been excluded under the new policy but on payment of an additional premium of 50 cents per \$1,000.00 per annum, you may, if you so desire, have your policy extended by endorsement to include this cover.

In the case of “Non Profit” policies, may we also point out that premiums on these policies will have to be paid annually, otherwise,

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they will be construed as short term policies and the premium charged will be calculated at the short period rates applicable.

For the purpose of the re-issue of this policy it is necessary for you to enter into a new contract with the Company and to facilitate matters, a partly filled in application form is or will be forwarded, which we would ask that you complete, sign and return to this Office together with the premium and your present policy.

The new policy will bear the same number and will be treated as a renewal on the new conditions.

Should you wish to examine the new conditions, a copy can be inspected at this Office at your convenience.

The New Policy will be forwarded in due course.

Yours faithfully,

(sgd.) C. P. Fitt,
Secretary.”

On the morning of the 10th October, 1964, the plaintiff went to the defendant company's office. He took his renewal notice to the clerk in the office and told him that he had come to renew his policy. He was informed by the clerk of the benefit of paying the small, additional sum for explosion covering. The plaintiff handed the renewal notice to the clerk, who then wrote the additional amount under the amount of \$64.00 appearing on the renewal notice and totalled them. The clerk then took an application form out of the drawer of his desk and told the plaintiff that it had to be filled up. The clerk asked the plaintiff certain questions, the answers to which he wrote down on the form.

The plaintiff signed the form and the clerk handed it to the cashier, to whom the plaintiff paid the sum of \$68.00 which was \$4.00 more than the premium which he had paid the previous year. The cashier handed to the plaintiff an official receipt, which was marked “provisional premium receipt” being a receipt for \$64.00 as premium and \$4.00 extra. At the foot of the receipt (Ex. “C”) was written the following annotation:—

“N.B. This receipt will remain provisional until a new application form signed by the Insured has been received.”

On the 4th day of December, 1964, the plaintiff's building at Lot B, Sec. B, Clonbrook was destroyed by fire. Its actual value had exceeded \$8,000:— and moreover, it had contained valuable furniture and household effects.

On the 5th December, 1964, the plaintiff's solicitor sent to the secretary of the defendant company a letter together with a claim form duly filled up and an affidavit from a competent carpenter contractor.

On the 4th February, 1965, nearly two months later the plaintiffs solicitor received a reply from the defendant company's secretary, in which it was stated, *inter alia*:—

“and he (i.e. the plaintiff) was required to sign a new application form which was forwarded to him for signature, in view of the decision of the directors that no old policies were to be renewed so that new terms and conditions could be introduced into the Company's policies of Insurance.”

“In the meanwhile your client paid on the 13th October, 1964, a premium of \$68:— for which a provisional premium receipt was issued on which it was clearly stated that it would be provisional until a new application form signed by the Insured had been received.”

“Your client has never returned this form to the Company and he was therefore not covered on the 4th December, 1964, the day on which his property was destroyed by fire.”

“In the circumstances, my Directors regret that they cannot entertain his claim and I am directed to forward you the enclosed cheque in his favour for \$68.00 being a refund of the amount paid by him and accepted by the Company provisionally as stated above.”

It is to be noted that in this letter there was no allegation by the defendant company that the plaintiffs building which was destroyed by fire, had become unoccupied and had remained so for more than 30 days.

On the 27th April, 1965, nearly five months after the plaintiff had made his claim the defendants posted to the plaintiff the following printed letter which was dated 22nd April, 1965,

“Dear Sir/Madam,

Re-issue of policy No. C 59632

On the 13th October, 1964, you paid the premium for the reissue of the above-mentioned policy but you did not submit the application form which was forwarded to you.

Kindly therefore complete, sign and return the form to this office as soon as possible, since the premium paid remains provisional until a new application form signed by you has been received and approved by the directors.

Please give this matter your immediate attention.

Yours faithfully,

(sgd.) C. P. Fitt
Secretary.”

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From the foregoing statement of facts it will be seen that I have accepted the plaintiffs evidence that on the 10th October, 1964, he had completed with the manual help of the defendant's clerk the application form, had signed it and it was handed to the defendant Company's cashier. I was impressed by the manner and demeanour of the plaintiff and after a consideration of all the evidence, accepted and believed his evidence in its entirety.

The learned trial judge then proceeded to analyse the evidence and went on:—

On the foregoing facts I am of the opinion that, although no policy of insurance was issued by the insurers to the plaintiff, a contract of fire insurance was in force at the material time. The contract was a new one. It is the better opinion that a renewal of an insurance policy constitutes a fresh contract. In this case the insurers had stated in their letter at the back of their renewal notice:—

“for the purpose of the re-issue of this policy it is necessary for you to enter into a new contract with the Company.”

The defendant company invited the plaintiff to take up a re-issued policy on renewal at an increased premium. The offer to take a new policy proceeded from them and the plaintiff's acceptance was signified by payment of the higher premium and the due completion and submission of the application form. The approval of the defendant's directors was, however, required before a new policy could be made out and issued.

Up to two months after the fire the defendant company not only retained the plaintiff's premium but also did not decline to insure his property. The witness, Moore, said that in a case where the new premium had been paid but an application form duly filled up and signed had not been received by the company, the customer's building was considered provisionally insured until the duly completed application form was submitted to the company. He also stated that if the customer had not only paid his premium but had also submitted a duly filled-up application form, he would be accepted as a matter of course for the issue of a new policy. The company, he said, had been receiving premiums year after year from persons who had not signed and submitted to the company application forms.

Mr. King, counsel for the defendant company, has submitted, however, that the due completion of the application form was a condition precedent to the formation of a valid contract of insurance. He expressed the view that the premium receipt constituted a provisional holding of money and not a provisional contract of insurance.

Mr. B. O. Adams, counsel for the plaintiff, has submitted that even if the signed application form had not been received by the defendant company, the receipt given to the plaintiff would remain provisionally valid and was in the nature of an interim cover note and that in any event the defendant company was estopped, in view of all the circumstances from denying that there existed a contract of fire insurance. Further the conduct of the defendant Company was such as to be calculated to induce the plaintiff into believing that there existed a contract of fire insurance.

Had I found that a duly filled-in application form had not been submitted, I would have been inclined to agree with the submissions of plaintiff's counsel on this score. But as I have accepted the plaintiff's positive testimony, I do not consider it necessary to deal with this aspect of the matter any further. There was on and after the 10th October, 1964 a valid and binding contract between the plaintiff and the defendant Company and both at the time of effecting the insurance and at the time of the loss, the plaintiff had an insurable interest in the building which was destroyed by fire.

The next point to be considered is whether it was a condition of this contract that the insurance would cease to attach to the property affected if the building insured became unoccupied and so remained for a period of more than 30 days without the company's prior approval.

It is to be observed that at the back of the renewal notice it was stated that the new policy would bear the same number and would be treated as a renewal on the new conditions, but the new conditions referred to earlier in the same letter made no reference to non-occupation. It was then stated in this document that should the policy holder wish to examine the new conditions, a copy could be inspected at the company's office.

The plaintiff was quite definite and I accept his evidence that he was never shown or sent a copy of the new conditions or informed as to what they were. The witness, Moore, admitted that he himself did not know all the new conditions of the new policy. If the plaintiff had been the holder of a policy at the time of the destruction of his building by fire, he would have been bound by the printed conditions contained therein but his policy had expired on the 10th October, 1964, and he had never been issued with a new policy. This failure to obtain a new policy was not due to any fault of his because the witness, Moore, admitted that the defendant company, despite accepting regular payments of premiums, at times took years to issue policies.

The plaintiffs building had, however, temporary and provisional cover until the issue or refusal to issue a policy of insurance.

The receipt which the plaintiff had obtained was in the nature of a cover note and the directors of the defendant Company could have withheld their approval of a policy in favour of the plaintiff.

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In *Weldon and Otter Barry on Fire Insurance* (2nd ed.) at p. 77 the law is correctly set out as follows:—

“The cover note is a valid and binding contract of Insurance, and may, to some extent, be regarded as a policy. It is nevertheless a contract separate and distinct from the policy which it precedes, and which is intended to replace it. As against the proposer, therefore, the terms and conditions of the policy form no part of the contract contained in the cover note, unless they are expressly incorporated therein or unless the proposer is shown to have been acquainted with them and to have agreed to be bound by them. On the other hand, as against the insurers, the cover note is to be construed with reference to the common form of policy issued by them, and they cannot rely upon a construction of the cover note inconsistent therewith.”

I find that any exempting condition as to non-occupation was not brought to the notice of the plaintiff before or at the time when the contract was made or even at any time before the building was destroyed by fire and it is therefore my opinion that it was not a condition of the contract of fire insurance that the building should not without prior consent become unoccupied and remain so for more than thirty days.

In *Alley v. Marlborough Court Ltd.* (1949) 118 L.J.R. 360, as a result of the negligence of the hotel management, the plaintiffs property in his bedroom was stolen. The hotel register which he had signed, had contained no reference to any exemption clauses but there was a notice in the bedroom which disclaimed liability for articles lost or stolen. As the plaintiff had not been aware of the notice until after the making of the contract, the exempting clause was held not to apply. At pp. 367 and 368 DENNING, L.J. had this to say:—

“The only other point in the case is whether the defendants are protected by the notice which they exhibited in the bedroom. The proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody.

The first question is whether that notice formed part of the contract. Those who rely on a contract to exempt themselves from their common law liability must prove that contract strictly. Not only must the terms of the contract be clearly proved but also the intention to create legal relations — the intention to be legally bound -must also be clearly proved. The best way of proving it is by a written document signed by the party to be bound.

Another way is by handing him before or at the time of the contract a written notice specifying its terms and making it clear to

him that the contract is on those terms. A prominent public notice which is plain for him to see when he makes the contract would, no doubt, have the same effect. Nothing short of one of these three ways will suffice. It has been held that mere notices put on receipts for money do not make a contract: see *Chapelton v. Barry Urban District Council*.”

Applying these tests to the present case, I think it is obvious that the receipt handed to the plaintiff by the defendant’s cashier made no reference to any exempting condition and in fact there is no evidence that any prominent public notice with the exempting conditions was exhibited in the company’s office.

Ex abundanti cautela I shall, however, consider the plaintiffs claim as if the contract contained the condition as to occupancy as alleged in para. 10 of the statement of defence. In my opinion counsel for the plaintiff has rightly submitted that where the plaintiff has established a prima facie case and the insurers resist liability on the ground that he has failed to perform a condition precedent or that they are protected by an exception clause in the policy, the onus of proving the non-performance of the condition or the application of the exception, as the case may be, lies upon the insurers, the defendant company, and that when they have discharged the onus, the plaintiff is entitled to call evidence in rebuttal. As is said at p. 231 of Ivamy’s General Principles of Insurance Law – “the burden of proving that a condition has been broken rests upon the insurers.”

Counsel for the plaintiff, however, elected to lead all his evidence at the same time, both as to the making of the contract and as to the state of occupancy of the insured building, while the defendant company offered no evidence as to occupation but relied upon cross-examination of the plaintiff and his witnesses.

In 1963 when the plaintiffs building was inspected by the insurers, it was valued at \$11,000:– by Leslie Johnson, their canvasser. The plaintiff himself estimated its value at between \$12,000:– and \$15,000:–. The plaintiff stated that the building comprised of three bedrooms which were furnished. There was a bed in each bedroom and there were three wardrobes containing linen and clothing, six chairs, wash basins, two large water tanks with fittings and kitchen utensils. The plaintiff was the proprietor of a coconut estate at Bee Hive, East Coast, Demerara, near to his building at Clonbrook. He used to carry on business in Water Street, Georgetown. The Plaintiff described this well-appointed house as his week-end home. He would spend most week-ends there with his family, from Saturday around 1.30 to 2.00 p.m. until Sunday around 4.30 to 5 p.m. He and his family had spent the week-end there before fire destroyed the building on the 4th December, 1964.

The plaintiff also occupied the house on occasions during week days. In November 1964 he did so about twice and also stayed and slept there

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overnight. He would receive telephone calls from his ranger and as a result made these business trips during the week days.

The plaintiff's sister lived in a building situate on the same lot B, Sec. B and kept an eye on the plaintiff's building during his absence. The plaintiff's ranger, Arjune Singh, gave evidence which I accept, that he had slept every night in the garage under the house and occupied it for about 6 p.m. to 6.30 to 7 o'clock the next day. This precaution was thought necessary by the plaintiff because apparent preparations to set fire to the building had been discovered sometime in November 1964.

At the time of the actual outbreak of the fire Singh was sleeping in his hammock in the garage. The garage was an enclosed portion under the house and formed part of the structure of the building.

Pandit Sarju Persaud, a Hindu priest and landed proprietor corroborated in material respects the evidence of both the plaintiff and Arjune Singh. On his way to the Hindu temple at 6 to 7 p.m. each day he would call on the ranger at the house to see whether the ranger was there and to have a look over the premises. He did this at the plaintiff's request.

In cross-examination by Mr. King the plaintiff frankly and unhesitatingly admitted that in his written statement to the police he had stated that at the time of the fire the building was "unoccupied". This statement was not produced in evidence but it is obvious that the police were investigating the origin of the fire on the particular night with a view of ascertaining whether there was possible arson or not. The explanation given by the plaintiff was that by "unoccupied" he meant that the building was not rented. He further explained that he had told the police that his ranger, Arjune Singh, slept in the garage at nights and had also told them about pandit Sarju Persaud in his statement. I accept the plaintiff's explanation as genuine and reasonable and I also believe the evidence of his two witnesses.

I am indebted to both counsel for their research in this action. Mr. King has submitted that even if I accept the plaintiff's case as to occupancy of the building, I could find that there was a breach of condition as set out in para. 10 of the statement of defence. He cited the case of *Forde v. The British Guiana and Trinidad Mutual Fire Insurance Co., Ltd.* (1965) 8 W.I.R. p. 1 and the various authorities referred to in it.

In that case the plaintiff had insured his dwelling house with the defendant company against damage or loss by fire. Condition 7 of the said policy reads as follows:—

“Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the insured, before the occurrence of any loss or damage, obtains the sanction of the

Company signified by endorsement on the policy by or on behalf of the Company —

(b) if the building insured or containing the insured property becomes unoccupied and so remains for a period of more than thirty days”

In *Forde's case*, HANSHELL, J., had this to say at p. 3 —

“I therefore find as a fact that the tenant left and vacated the house in question not later than the first week in September 1960. I also find that no one lived or slept in that house from the time Dick (i.e. the last tenant) vacated it until it was completely destroyed on November 8, 1960. I have had the benefit of argument on the meaning of the word “unoccupied” which occurs in condition 7 of the policy of insurance. There is a dearth of authority on this but I have accepted as guidance the American case *Ashworth v. Builders Mutual* and I am able to follow *Simmonds v. Cockell* in which case the learned judge was also justified in his decision by certain American cases. I have concluded that the provision for the policy to cease to attach if the house became unoccupied and remained so for more than thirty days, unless the insured before the occurrence of loss or damage, obtains the sanction of the Company signified by endorsement on the policy, is for the purpose of preventing interference by strangers. “Occupation” clearly means in this context that the house is to be used “continuously and without interruption as a residence.” This means, as I understand it, that a short temporary absence of the person or persons who are occupying the house as a residence will not cause the policy to cease to attach unless such absence should be for more than thirty days without the required sanction of the company. A short temporary absence for family convenience would not render the house unoccupied in normal circumstances.

In the present case it is clear that no one was occupying the house when it caught fire on November 5, and it had been unoccupied within the meaning of the policy for more than thirty days without the sanction of the Company having been endorsed on the policy. This policy in duplicate original is produced in evidence (Ex., “A”) and it is not endorsed with any such sanction. Therefore the policy has ceased to attach to the house in question when it caught fire on November 5, 1960.”

In the present case there has not been an absence from the house for more than thirty days. The plaintiff and his family often spent Saturday afternoon, Saturday night and the greater part of Sunday at the house. They lived and slept there during such times. The plaintiff was also in residence on two separate occasions on week-days during November 1964 and he slept there. The ranger also slept in the garage under the house. The plaintiff's sister was also present in the daytime.

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In *Swaby v. Prudential Assurance Co., Ltd.* (1964) 6 W.I.R. p. 246 LEWIS J.A., delivering the judgment of the court, had to construe the meaning of the identical clause that is to say,

“(b) if the building insured or containing the insured property become unoccupied and so remain for a period of more than 30 days.”

The learned judge expressed the following opinion at pp. 253 and 254:—

“In my judgment, if the learned trial judge meant that actual physical occupation was the determining factor, he gave the phrase two restricted a meaning. The words appear in one of a number of printed conditions and are applicable to buildings which may be occupied in various ways, such as, dwellings, seaside cottages, shops, warehouses, etc. In some cases the parties may not contemplate continuous actual physical occupation and it must always be a question when the building became unoccupied within the meaning of the condition.”

“ ‘Become unoccupied’ seems to me to imply a change of status — as applied to a dwelling house it implies that the occupier has ceased to dwell in it. Such a change does not, I think, occur when absence is merely temporary, there is a manifest intention to return, and control of the building adequate for its protection from intruders is retained. But I agree with counsel for the respondents that when the insurers have proved an absence of physical occupancy for more than 30 days the evidential burden of proving that there was in fact no change of status, that the house had not ‘become unoccupied,’ or that it only became unoccupied within the 30 days, shifts to the insured, though slight evidence may be enough to discharge this burden. I think that proof that no one has actually lived in the house for more than 30 days raises a presumption in favour of the insurer that the house has become unoccupied and has so remained for that period, and he is entitled to succeed unless there is no evidence to the contrary sufficient to counterbalance this presumption. As ASQUITH L.J. said in *Brown v. Brash*, the question is one of fact and of degree, and the sufficiency of the counterbalancing evidence must depend upon the circumstances of each individual case; but the temporary nature of the absence, the manifest intention to resume residence, and the adequacy of protection must be established.”

In *Swaby*’s case the policy holder had left the house more than 30 days before the fire; there was no evidence that any furniture or other symbols of occupation were in the house; his daily visits to the house was evidence that he retained control of it but not an intention to return

to live in it, and the fact that it was to be sold later in May and that he was preparing it for inspection did not suggest an intention on his part to return to live in it.

In the present action there has not been any change of status. The plaintiff never ceased to dwell in the building. There were furniture and other symbols of occupation in the house. The plaintiff manifested an intention to reside in the house over the weekends and at times during some weekdays. The building, at nights, was under the ranger's control and in the daytime was watched by the plaintiff's sister. The ranger stayed and slept in the garage which was a part of the structure of the building.

I find that the building had neither become unoccupied nor had remained so for a period of more than 30 days.

For the foregoing reasons I hold that at the time the plaintiff's house was destroyed by fire there was in existence a complete, valid and binding contract of fire insurance between the parties, that there was no exempting condition in relation to non-occupancy for a period of more than thirty days and that if such a condition did attach to the said contract, the plaintiff was not in breach of it.

I am therefore of the view that in refusing to honour their obligation under the said contract the defendant company was at fault.

Judgment will therefore be entered against the defendant in the sum of \$8,000:– with costs to be taxed in favour of the plaintiff.

Judgment for the plaintiff.

Solicitor:

L. L. Doobay for the plaintiff.

D. P. Bernard for the defendant.

DEMERARA COMPANY LTD. v. KANHAI SINGH

[In the Full Court on Appeal from a Magistrate's Court for the Georgetown Judicial District (Bollers, C. J. and Khan, J.) January 11 and 25, 1968].

Evidence — Question of fact — Workman's compensation — Powers of a court of trial — Circumstances in which appellate court justified in disturbing findings of fact.

The respondent had claimed compensation in the Magistrate's Court under the Workmen's Compensation Ordinance, Cap. 111, for an injury which he alleged was caused on the 4th December, 1964, when he fell and struck his right knee, in an accident which arose out of the course of his employment with the appellants. The magistrate gave judgment in his favour and the appellants appealed to the Full Court.

The respondent had received periodic payments from the appellants for two weeks after the accident, during which time he was being examined by their doctor. The doctor ordered an X-ray examination and his ultimate diagnosis, some two weeks after the accident, was that the appellant was suffering from a pre-existing disease, viz., osteo-arthritis. The respondent claimed that the pain continued and he consulted another doctor who diagnosed traumatic arthritis. He arrived at this conclusion without the aid of any X-ray pictures, and, although asserting that he found no evidence of osteo-arthritis, said that even if his diagnosis was wrong and the respondent had been suffering from osteo-arthritis, it had been aggravated by the accident.

The magistrate found that the appellant had been suffering from a pre-existing disease as diagnosed by the appellants' doctor, but that the accident had materially contributed to his existing condition.

HELD: (i) a magistrate in arriving at his finding of fact was entitled to disbelieve portions of the evidence, but there must be some logical basis for so doing;

(ii) it is not the function of an appellate tribunal to substitute its own finding of fact or to interfere with those of the court of trial merely because it took the view that, had it heard the matter at first instance, it may have come to a different conclusion;

(iii) in the present case, however, the magistrate had arrived at his conclusion of fact by a process of unjudicial reasoning.

Appeal allowed.

G. M. Farnum, Q.C., for the appellants.

D. Jagan, for the respondent.

Judgment of the Court: This is an appeal against the decision of a magistrate of the Georgetown Judicial District who made an award of compensation in favour of the respondent (the workman) under the provisions of the Workmen's Compensation Ordinance, Cap. 111, in respect of

an injury to his right knee sustained on the 4th December, 1964, while fetching a bundle of cane, when he fell and struck his right knee in an accident which arose out of and in the course of his employment by the appellants (the employers) as a cane-cutter.

The respondent received compensation from the appellants of periodic payments amounting to the sum of \$30.80 until the 15th December, 1964, on the basis of an average monthly wage of \$113.37, covering the period 4th December, 1964 to 15th Dec. 1964, thus showing *prima facie* that the appellants admitted that there was an accident which arose out of and in the course of his employment.

The evidence which was led in the magistrate's court disclosed that the respondent on the 4th Dec, 1964, while fetching a bundle of cane and crossing a drain on a plank, slipped and fell and hit his right knee. It became swollen and pained him. He reported to the driver who referred him to the dispensary at Pln. Farm. He was then referred to Dr. Weinstein, the estate doctor, who examined him on the 5th Dec, 1964, and ordered an x-ray. On the 15th Dec, 1964, the respondent was again examined by Dr.

Weinstein who told him to report to the manager on the following day. On the 16th Dec, the manager informed the respondent that the estate doctor had found him fit for work and discharged him, and therefore he must report for work. The respondent maintained that his knee was swollen and still pained him. On the 23rd December, 1964, the respondent was examined by Dr. H. Hugh, a private practitioner, who examined him recommended six weeks temporary disability and issued such a medical certificate. This certificate, the estate authority refused to accept and the respondent was informed that if he failed to work, he would no longer be employed. The respondent decided to go back to work in which he did forking and planting of cane. He was assisted in fetching the cane tops a distance of 18 to 24 rods by his son but he found that he could not plant the cane tops as he used to, as his knee was still paining him. He maintained that he could not fork and plant as well as he did formerly. He continued doing this work for five weeks which was included in the six weeks light work recommended by Dr. Hugh. On the 1st March, 1965, he returned to work cutting canes and on the 1st, 2nd and 3rd March was only able to work for half day as he found his foot more swollen and painful. On the 11th March the respondent expressed a wish to see a specialist doctor and as a result he was sent to the Georgetown Hospital, but did not see the specialist because he was unable to pay the fee. He returned to Dr. Weinstein who did not carry out any treatment but informed him that it was a matter for the estate. The respondent maintained that his knee remained stiff and swollen, and before this accident he had never had any pain from his knee. On the 19th March, 1965, the respondent again saw Dr. Hugh who examined him and assessed his case at fifty per centum permanent partial disability.

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Dr. Hugh, who gave evidence on behalf of the respondent (workman), stated that when he first examined the respondent on the 23rd December, 1964, he found limitation of full extension of the knee-joint. There was pain over the right internal collateral ligament of the knee-joint which was due partly to partial tearing of the said ligament. In his opinion these findings could have resulted from the accident as described by the respondent. He again saw the respondent on the 19th March, 1965, and found no change in his condition. It was at this stage that he made his assessment taking into account the respondent's occupation as a cane-cutter and loss of earning capacity. This witness admitted that he did not order x-rays and admitted that an x-ray could have shown that the patient was suffering from osteoarthritis, but there was no clinical evidence of this and his diagnosis was that the respondent was suffering from traumatic arthritis and not osteoarthritis. His view was that if the respondent was suffering from osteoarthritis of the knee the accident as described would have aggravated his condition.

Dr. Weinstein's evidence was that on the 5th Dec, 1964, he examined the respondent who complained of pain in the right knee. He found that the right knee was much larger than the left one and that the enlargement was solid and not fluid. His clinical impression was that the patient was suffering from osteo-arthritis of the knee-joint and he ordered an x-ray to confirm or deny his impression and did not prescribe any treatment then. This witness saw the respondent again in Dec, 1964, when he was presented with x-ray pictures of the patient which confirmed his condition of osteo-arthritis. Finally, on the 4th March, 1965 he saw the patient for the last time and saw that there was not much of a change in the condition of the knee. Dr. Weinstein maintained that he was positive in his clinical examination there was no injury to the ligament. He agreed that a fall affecting the knee joint could cause traumatic arthritis, but he excluded it, and he agreed that the fall as described by the respondent could have aggravated his preexisting osteo-arthritis, but he maintained that it did not. On his objective findings he excluded the possibility of an aggravation.

On this evidence, the learned magistrate found, among other things (1) that at the date of the accident, the respondent was suffering from a pre-existing disease to wit — osteo-arthritis which was aggravated as a result of the accident; (2) that the injury which was suffered by the workman resulted from the combined effect of the work and the pre-existing disease, but the work was in a material degree a contributing factor. The learned magistrate in his memorandum of reasons for decision then went on to say that from the court's findings, it was obvious that Dr. Hugh was mistaken, in his findings that the workman was suffering from traumatic arthritis and that this doctor had admitted that the x-ray could have shown that the patient was suffering from osteo-arthritis, but there was no clinical evidence of it. He then stated:

“Apart from Dr. Hugh’s diagnosis of traumatic arthritis, the court accepted his findings of ‘limitation of full extension of the right knee joint which was due partly to partial tearing of the said ligament. These findings could have resulted from the accident as described’.”

The learned magistrate then considered that the preponderance of evidence which he had accepted was in favour of the workman, and proceeded to award compensation in accordance with the assessment made by Dr. Hugh that is to say, on a fifty per centum basis for the workman’s permanent partial incapacity.

It is apparent from these findings that the learned magistrate accepted the diagnosis of Dr. Weinstein that the workman was suffering from osteoarthritis as being correct, and rejected the evidence of Dr. Hugh that he was suffering from traumatic arthritis as being incorrect, but accepted Dr. Hugh’s evidence that there was tearing of the ligament of the right knee, and arrived at the conclusion that the pre-existing disease of osteoarthritis had been aggravated as a result of the accident. The appellants (employers) now appeal to this Court on the two grounds available to them, that is, that the decision was wrong in law in that there was no evidence to support the finding of the magistrate, and secondly the decision was such that the magistrate, viewing the evidence reasonably, could not properly have so decided. On the second ground counsel for the appellants has argued that the magistrate’s acceptance of Dr. Hugh’s evidence that the respondent was suffering from torn ligaments and experienced limitation of movement was unreasonable as it was based on false premises, that is to say, a faulty diagnosis, and therefore it was not open to the magistrate to rely on Dr. Hugh’s evidence. Counsel for the respondent, in reply, has submitted that the magistrate could, in this situation, still have accepted Dr. Hugh’s evidence that there was limitation of movement and if there is a pre-existing diseased condition which has been aggravated or may be aggravated by an accident in the ordinary meaning, then the employer is liable to pay compensation, and the proviso (c) to S. 3 of the Workmen’s Compensation Ordinance, Cap. 111, does not apply, as this is an accident in its ordinary meaning. In support of his submission he cited *Demerara Company Ltd., v. Burnett*, 1 W.I.R. 547.

It is true that a magistrate, when arriving at a decision on a question of fact, is in the same position as a jury and it is, therefore, open to him to accept a portion of the evidence of a witness which he believes to be true and to reject the remaining portion of the witness’ evidence and discard it if he considers it untrue, but, of course, in his approach to the evidence of the witness on this aspect of the matter there must be some logical basis for so doing. We accept the true legal position pressed, upon us by counsel for the respondent, to be that the authorities show that once there is some evidence to support the finding of fact by the magistrate, this Court, as an appellate tribunal, could not properly interfere with the finding even though

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the court might take the view that had it heard the matter at first instance it might have come to a different conclusion. *Tyrie Ltd. v. Limber* [1944] 37 B.W.C.C. 130 and *Steele v. Robert George & Co. [1937] Ltd.* 1942 35 B.W.C.C. 38; *Kerr Or Lendrum v. Ayr Steam Shipping Co.*, [1914], 7 B.W.C.C. 801. In KERR'S case, in the House of Lords, Lord SHAW when speaking of a conclusion of fact to which the arbitrator had come, pointed out that the judges were not considering whether they would have come to the same conclusion as the arbitrator, as their duty was an entirely different one. Their duty, as he conceived it, was whether the arbitrator, having the advantage of hearing and seeing the witnesses, had come to a conclusion, which conclusion could not have been reached by a reasonable man. He then stated that each one of the judges of the appellate tribunal, in the position of the arbitrator might have reached a different conclusion and in that situation, while each of them would have conceded to each other that the conclusion to which he had arrived might have been reached by a reasonable man, they could not deny the same treatment to the arbitrator. He then made this classic statement:

“I could conceive of no circumstances more luminously favourable to the proposition that we are not here determining evidence for ourselves, but we are settling the main proposition and that alone, whether the arbitrator appointed by the legislature has reached a conclusion as to which we here, differing among ourselves, are able to affirm, that he could not have been a reasonable man in coming to that conclusion. So stated, the proposition in favour of supporting this judgment seems to be completely self-destructive.”

In *Steele v. Robert George & Co. Ltd.*, (supra) Lord ATKIN stated:

“As the decision was one of fact to support which there was ample evidence it is unassailable.”

In *Tyre Ltd. v. Limber*, (supra), FINLAY, L J., in speaking of an appeal from the County Court's decision of fact, stated:

“If there was no evidence to support the county court's finding that is, of course, a matter of law; but if there was some evidence (even if it may be some slight evidence) then the matter becomes one for the judge, and on the question of fact his decision is final.”

The principle, therefore, must be that if there is some evidence to support the magistrate's finding then his finding of fact cannot be disturbed, unless it is a conclusion to which no reasonable man could come, and if there is no evidence on which he could arrive at that conclusion then this Court, as an appellate tribunal can set aside his decision.

We are of the view that the magistrate, in this case, erred in his approach to the evidence when he accepted the evidence of Dr. Weinstein as to his diagnosis that the respondent was suffering from osteo-arthritis and proceeded to reject this doctor's evidence that there was no tearing of ligament, but accepted the evidence of Dr. Hugh that there was a tearing of

the ligament and limitation of movement. There was no logical basis for the rejection of the evidence of Dr. Weinstein that there was no torn ligament when it was he who had diagnosed correctly the condition of the respondent and had first seen and treated the respondent over a period of time and had taken the trouble to order x-rays which confirmed his diagnosis. Dr. Hugh, on the other hand, had only seen the respondent on two occasions and had not seen an x-ray and had diagnosed the condition of the respondent incorrectly. The evidence that he gave that if the respondent was suffering from arthritis of the knee joint, the accident, as described, would have aggravated his condition, was worthless, as he had diagnosed traumatic arthritis which was clearly wrong. The magistrate seems to have overlooked the statement of Dr. Hugh that there was no clinical evidence of osteoarthritis when Dr. Weinstein had stated that there was such evidence which was subsequently confirmed by x-ray. We are firmly of the opinion that the magistrate reached his conclusions of fact, of which the appellants complain, by a process of unjudicial reasoning and which must result in one to which no reasonable man could come. His decision, therefore, cannot stand. Furthermore, we agree with the submission of counsel for the appellant that there was no evidence that the accident which was sustained by the respondent caused any incapacity in the respondent and there was, therefore, no necessity to consider whether the proviso (c) to section 3 of the Ordinance applied in this case. The finding of the magistrate, therefore, that the accident caused the incapacity was not only unreasonable but, as a matter of law, was untenable. We consider that the position of appeals of this nature, on a question of fact, to be correctly laid down in the dictum of Viscount DUNEDIN in the case of *McKinnon v. Miller* [1909] S.C.373 which was adopted by the House of Lords in *Lendrem v. Ayr Steam-shiping Company* [1915], 7 BWCC 801 when he stated:

“If the learned Sheriff Substitute’s view was based upon such want of evidence, or such disregard of evidence, that we could say that it was a view to which no reasonable man had fairly a right to come, we could, although the question was one of fact, I think, correct his judgment. But I cannot say that I think that the inference that he drew from those facts was so violent as to entitle us to interfere with it.”

In our view, we can safely say that the magistrate’s view was based on such disregard of evidence to which no reasonable man could come when he disregarded the evidence of Dr. Weinstein that there was no torn ligament, with the result that the inference he drew, that the accident caused the incapacity, was so violent that we could properly interfere with his decision. For these reasons, the appeal must be allowed and the order of the magistrate set aside with costs to the appellants fixed at \$25.00 plus the cost of the record \$7.20. The appellants will also have their costs in the court below fixed at \$75.00.

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[In the Full Court on appeal from a Magistrate's Court for the Georgetown Judicial District (Bollers, C.J. and George, J.) October 27, November 3, 10, 1967, February 3, 1968.]

Rent Restriction — Premises licenced under Intoxicating Liquor Licensing Ordinance, Cap. 319 — Possession of premises given to the appellant together with the benefits of the hotel and a tobacco licence in consideration for payment of agreed weekly rent — Respondent paid annual licence fees — Licences in his name — Notice to quit — Respondent holding over — Magistrate grants possession — Whether contract illegal — Jurisdiction to grant possession under provisions of Rent Restriction Ordinance.

Possession — Ground of own use — Factors to be considered by magistrate — Rent Restriction Ordinance Sec. 16 (f) and (m) — Effect of failure of magistrate to address attention to requirements.

Contract of letting — Hotel premises together with enjoyment of benefit of hotel and another licence — Consideration not severable — No transfer of licences to appellant — Whether as tenant, appellant is servant or agent of licensee — Whether contract illegal — Intoxicating Liquor Licensing Ordinance Cap. 319 Secs. 4, 12, 43 and 44.

For a consideration of seventy-five dollars per week the respondent let the appellant into possession of certain hotel premises and undertook to allow him to enjoy the benefits of the hotel and tobacco licenses in respect of the premises, which were in his name and for which he agreed to continue to pay the annual licence fees.

The arrangement continued for seven years until the respondent served the appellant with a notice to quit. The appellant held over and the respondent filed a plaint for possession. The magistrate before whom the case was heard, granted an order for possession on the ground that the respondent required the premises for his own use.

On appeal it was contended that:

- (i) the magistrate had no jurisdiction to try the case, as the evidence disclosed no relationship of landlord and tenant between the parties;
- (ii) even if there was such a relationship disclosed by the evidence, it was unreasonable for the magistrate to make the order for possession, and,
- (iii) in so far as the contract purported to permit the appellant to enjoy the benefits of the hotel and tobacco licences which continued in the respondent's name, it made whole of the contract illegal.

HELD: (i) the following circumstances, viz., the duration of the respondent's occupation, the fact that he had been put in possession of the whole of the premises from the inception of the agreement, the improvements which the appellant as tenant had made over the years, and the fact that the parties themselves considered the relationship to be that of landlord and tenant, constituted ample evidence of a relationship of landlord and

tenant; and this evidence could not be displaced by the mere fact that the landlord retained the hotel and tobacco licences and paid the annual licence fees.

(ii) the failure of the learned magistrate to address his mind to the requirements of S. 17(f) and (m) of the Rent Restriction Ordinance and so to decide whether:

- (a) the premises were reasonably required by the landlord for his own use as a business premises, and;
- (b) it was reasonable in all the circumstances to make the order for possession, was sufficient reason for allowing the appeal and remitting the matter for trial *de novo*;

(iii) having regard to the provisions of ss. 4, 19, 43 and 44 of the Intoxicating Liquor Licencing Ordinance, Cap. 319, the contract, in so far as it purported to permit the appellant to enjoy the benefits of the hotel and tobacco licences, was illegal. Further as the contract was not severable the illegality tainted the whole of it. Accordingly the magistrate could not make the order for possession.

Quaere whether the respondent could claim possession of the premises in the High Court without pleading the illegality.

Appeal allowed.

Miss E. O. Edwards, for the appellant.

Mr. C. Hughes, for the respondent.

JUDGMENT OF THE COURT: This is an appeal from the decision of a Magistrate and Rent Assessor of the Georgetown Judicial District granting possession, to the respondent landlord, of certain licenced hotel premises situate at lot 1 Company Path, Georgetown. These premises together with the right to carry on the hotel under a licence issued to the respondent's wife under the Liquor Licensing Ordinance, Cap. 319, had been let to the appellant over seven years ago at a rental of \$75.00 per week. One week's notice to quit was duly served on the appellant on the 17th day of November, 1966, and he held over after its expiry. The respondent then filed a plaint for possession which resulted in the order, the subject matter of this appeal being made on the ground that the landlord required the premises for his own use.

The appellant has appealed on two grounds viz: —

- (1) It was unreasonable to make the order considering all the circumstances of the case; and
- (2) The learned magistrate erred in law in holding that the relationship of landlord and tenant existed at the time of the hearing.

Leave was granted the appellant to add another ground of appeal to which attention will be adverted later.

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We propose to deal with the second ground first. Counsel for the appellant submitted that the evidence disclosed no exclusive possession of the premises in the respondent and accordingly there can be no relationship of landlord and tenant. In support of this contention she drew attention to the fact that, under the agreement between the parties, the respondent at all material times had been paying all the licences including the hotel and tobacco licences, which have remained in his name or that of his wife. As a result she argues the intention of the parties could only have been to create a personal privilege in the appellant to carry on the business of a hotelier and tobacconist. In support of her contention she has referred to the case of *Isaac v. Hotel de Paris Ltd.* [1960] 2. W.I.R. 105. The facts of this case are as follows: The respondent company, owners of a hotel called Hotel de Paris, were the lessees of another building called the Parisian Hotel. J., who owned all the shares of the respondent company, had agreed to sell fifteen to the appellant. In December, 1955, at the appellant's suggestion the respondent company let him into occupation of the first floor of the Parisian Hotel, it being agreed that a night bar should be established there and should be managed by the appellant on behalf of the respondent company. In February, 1956, relations between J. and the appellant became strained, but at a meeting to settle their differences they agreed on terms which were to be embodied in a written contract. No concluded contract was reached but some of the proposed terms were acted on, viz., (i) the appellant was to remain in occupation of the first floor of the Parisian Hotel; (ii) he agreed to pay all expenses incurred in connection with the running of the Parisian Hotel, including the monthly rent which the respondent company paid to their landlord; (iii) he would retain for himself all profits and the dividends on his shares, if he acquired them. Another term, which was not implemented was that the appellant would pay the balance due for the purchase of the fifteen shares. The appellant remained in occupation at the Parisian Hotel, operated it, paid all expenses, took all the profits and paid the monthly rent to the respondent company which was accepted by them. No contract having been executed and the balance due on the shares not having been paid, J., in May, 1956, gave notice to the appellant that the deposits made under the agreement to purchase the shares were forfeited and required the appellant to quit the Parisian Hotel within seven days. The appellant did not do so, but in October, 1956, the respondent company issued a writ asking for a declaration that they were entitled to possession of the Parisian Hotel and an order for possession. The appellant claimed he was a tenant at a monthly rent. After the issue of the writ everything went on as before; the appellant paid the monthly rent and the respondent company accepted the amount but gave no receipt. In December, 1957, the court made an order for possession which was confirmed in May, 1958, but the appellant stayed on. On appeal to the Judicial Committee, it was held that the relationship between the parties was that of licensor and licensee.

Although we agree that the law does not impute an intention to enter into legal relationships where the circumstances and conduct of the parties

negative any such intention, see *Booker v. Palmer* [1942] 2 All E.R. 674, we do not think that the payment of the licences by the respondent is a sufficient circumstance for saying that the parties did not have the intention to create a relationship of landlord and tenant. In *Isaac v. Hotel de Paris, supra*, the hotel licence remained in the name of the respondent landlord but the periodic payments for it were made by the appellant while he was in possession. Although this was a circumstance which the Privy Council took into account in arriving at its conclusion that the appellant had only a personal privilege, it was by no means the only one. Among the other circumstances were the facts that from February 1956 the appellant had entered into an agreement to purchase nearly one fourth of the shares of the company and that his retention of net profits after paying the rental of \$250 per month and other outgoings was intended to be in lieu of the dividends on the shares if he acquired them. In addition, account was taken of the fact that two months before this latter arrangement was entered upon, the appellant ran a bar for and on behalf of the respondent company, but after February 1956 retained the profits.

In the present case, other than the payments of the licence fees when they fell due, there is no other evidence to deny exclusive possession and the existence of the relationship of landlord and tenant. On the contrary the appellant, who calls himself the proprietor of the hotel, stated in evidence that he rented it as a going concern and has expended over \$9000, presumably on improvements; while the respondent landlord stated that he put the appellant in possession of the whole of premises at the commencement of the agreement.

In coming to the conclusion that in this case there exists the relationship of landlord and tenant, we are not unmindful of the fact of the duration of the possession - over seven years. On this aspect of the matter Sir Raymond EVERSLED, M.R. in *Marcroft Wagons Ltd. v. Smith* [1951] 2 All E.R. 271 at p. 275 had this to say:—

“If three, four, five or six weeks had elapsed and then the plaintiff (landlord) had said ‘Well now we have given you reasonable time. We are afraid we must ask you to go’ it seems to me the defendants’ 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.”

Taking all the above circumstances into consideration, the rental required and paid — \$75.00 per week — and the fact that the parties themselves considered that a relationship of landlord and tenant existed, we feel constrained to the view that there is ample evidence to negative any suggestion of the existence of a mere personal privilege.

On this basis we now proceed to examine whether the learned Magistrate acted unreasonably in making the order. When premises are required by

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a landlord for his own use the Magistrate and Rent Assessor is enjoined by s. 16(f) and (m) of the Rent Restriction Ordinance, Cap. 186, to consider whether:

- (a) the landlord's application is *bona fide*;
- (b) the premises are required by the landlord for his own use as a business premises; and
- (c) it is reasonable to make the order asked for;

(see *Moakan v. Latchana* (Action No. 2298 of 1962) (No. 19 of 1963).) The Magistrate must first consider whether the premises are reasonably required by the landlord. Once having satisfied himself as to this he must then go on to consider whether it is reasonable in all the circumstances to make the order for possession. To neither of these points did the learned magistrate advert attention; and for this reason alone we would have found ourselves forced to remit the matter to the Magistrate for his findings on these two aspects of the case.

However, as stated above leave was granted to the appellant to add a further ground of appeal, viz. that "the decision was erroneous in point of law in that the contract of tenancy being one prohibited by law the Magistrate had no jurisdiction to grant an order for possession". As we have already pointed out, the contract of tenancy includes both the use and occupation of the premises and the use of licences, both hotel and tobacco, in consideration for the payment by the defendant of \$75.00 per week. It was conceded by both counsel that in so far as the respondent purported to rent the premises as a licenced hotel premises he acted in contravention of the provisions of the Intoxicating Liquor Licensing Ordinance, Cap. 316. By s. 3(b) of that Ordinance, a hotel licence authorises the sale of malt liquor, wine and spirituous liquor to be consumed on the licensed premises; and by s. 4 such a licence must be issued only to a person who holds a certificate under s. 19 of the Ordinance. Such a certificate is issued by a Liquor Licensing Board to an applicant, after the Board has considered the application in accordance with s. 12 of the Ordinance. In its consideration of an application, the applicant's character is of substantial importance. Ss. 43 and 44 of the Ordinance *inter alia* prohibits the sale of malt, liquor, wine or spirituous liquor on premises licenced for that purpose, except by the licence holder or his employee. Our finding of the existence of a relationship of landlord and tenant between the respondent and the appellant in our opinion must necessarily exclude any conclusion that the appellant tenant was, in the carrying on of the hotel business, a servant or agent of the respondent. We are, therefore, of the opinion that as the hotel licence remained in the name of the respondent, the contract of tenancy, in so far as it relates to the sale of spirituous liquor and malts by the appellant, was illegal and in violation of the Ordinance. As we find ourselves unable to separate the legal from the illegal portions of the consideration, the whole contract must of necessity be tainted with the illegality. (*Lound v. Grimwade* [1888] 39 Ch. D. 605, *Benett v. Benett* [1952] 1 All E.R.413).

The next question is, is the respondent in requiring possession under and by virtue of the Rent Restriction Ordinance, Cap. 186, forced to rely on the illegal contract and so caught by the legal maxim *in pari delicto potior est conditio defendentis*. In this regard it is conceded that if he could make out his claim without relying on the illegal contract the action for possession is maintainable (*Singh v. Kulubya* [1963] 3 All E.R. 499.)

In that case the plaintiff, Kulubya, an African, and the registered owner of Mailo land, agreed to lease three plots to the defendant, Singh, an Indian, without obtaining the consents made necessary by the relevant legislation, and allowed the latter to remain in possession. In an action by the plaintiff to recover possession and for rent, *mesne* profits and damages the defendant pleaded the illegality. The plaintiff then abandoned his claim for rent, *mesne* profits and damages. In his judgment, Lord MORRIS of BORTH-Y-GEST, said at pages 502 and 503:

“Although as has been seen the plaintiff set out in his plaint that he had entered into agreements to lease the plots of land to the defendant his right to claim possession did not depend on these agreements. Though the plaintiff did in his plaint claim *mesne* profits and damages he abandoned those claims and at the trial made no claim for rent or for *mesne* profits. He was able to rest his claim on his registered ownership of the property . . . Quite irrespective of the circumstances that the plaintiff by giving notices to quit had purported to withdraw any permission to occupy, the defendant was not and never had been in lawful occupation. The defendant for his part could not point to or rely on the illegal agreements as justifying any right or claim to remain in possession and without doing so he could not defeat the plaintiff’s claim to possession . . . Because the agreements were unlawful no leasehold interest vested in the defendant. He had no right to hold over or to hold from year to year. His occupation of the land was contrary to law.

“Their Lordships consider, therefore, that the plaintiff’s right to possession was in no way based on the purported agreements . . . Indeed he could have presented his claim (if it were limited to possession) without being under any necessity of setting out the unlawful agreements in his plaint. He required no aid from the illegal transactions in order to establish his case. It was sufficient for him to show that he was the registered proprietor of plots of land and that the defendant who was a non-African was in occupation without possessing the consent in writing of the Governor for such occupation and accordingly had no right to occupy.”

Unlike *Singh v. Kulubya* the respondent not only recites the oral agreement of tenancy between himself and the appellant and the fact that it was determined by notice to quit but also led evidence in support of this ‘pleading’. In other words, in order to comply with the Rent Restriction Ordinance, he was compelled to prove the existence of a contractual tenancy, its valid

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determination, and a holding over, and thus establish the existence of a statutory tenancy. In our opinion his claim was only made out by his reliance on the illegal contract. Although s. 26 of the Rent Restriction Ordinance specifically provides that claims and proceedings under the Ordinance shall be made or instituted in the Magistrate's Court, see *Garnett v. Fernandes* (1960) L.R.B.G. 246 and *Saul v. Small* (1962) L.R.B.G. 189, we are of the opinion that the claims and proceedings there contemplated can only be those which involve no illegality. If the evidence discloses an illegal transaction we feel that to allow the landlord to succeed despite the illegality would be to act contrary to the well established maxim referred to above. We do not feel that the legislature contemplated and intended that every proceeding in which a landlord is forced to rely upon an illegal contract must, despite the illegality, be adjudicated upon under the rent restriction laws.

We adopt as a correct statement of the general rule that portion of LINDLEY, L.J.'s judgment in *Scott v. Brown Doering Mc Nab & Co.* (1892) 2 Q.B. 724 at p. 728, to the effect that "no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality." This does not in our opinion necessarily lead to the conclusion that the landlord is without a remedy for, because of the fact that the agreement is unlawful, no leasehold interest vested in the appellant and his carrying on of the hotel under the existing licence is contrary to law. He may be able to present his claim for possession without being under the necessity of setting out the unlawful agreement, and for this purpose it may be sufficient to show that his wife is the registered holder of the hotel licence in respect of the building of which the respondent is in possession after notice to quit has been served on him. He can then claim possession thereof by virtue of her registration as the holder of the licence: *Singh v. Kulubya* [1963] 3 All E.R. 499. If this is so, can the respondent properly launch such a claim in the magistrate's Court? As we understand the position a magistrate's jurisdiction to grant possession is based either on the Landlord and Tenant Ordinance or the Rent Restriction Ordinance. To do so under either statute a plaintiff (landlord) must prove the existence of a relationship of landlord and tenant. For the respondent landlord to do so in the instant case, he would, perforce, have to plead and rely on the existence of the unlawful agreement which would be fatal to his claim, *Ritche v. Smith* (1848) 6 C.B. 462 and *Gas Light & Coke Co. v. Turner* 6 Bing N.C. 324, and we feel that a Magistrate, in such a circumstance cannot help but decline to adjudicate. However, it should be possible in such a circumstance for the landlord to obtain possession in proceedings instituted in the High Court. We must not be taken or understood, by our conclusion, as condoning a breach of the provisions of the Liquor Licensing Ordinance. The fact that there is evidence of such a breach is a factor which must weigh heavily with any Court and it is only on the narrow ground of the jurisdiction of the magistrates' courts in a suit such as this that we have come to our conclusion.

For the above reasons we hold that the learned Magistrate and Rent Assessor had no jurisdiction in the matter and accordingly allow the appeal. The appellant will have his costs fixed at \$29.60.

Appeal allowed.

MARICS AND COMPANY LIMITED, Plaintiffs, FRANK PACHECO FERNANDES, Added Plaintiff v. FLORENCE WHITE, MIRIAM HINDS, OLGA BURKE, AGATHA ROMAN, RUDOLPH HINDS, ISMAY WATKINS and EVELYN SOLOMON

[High Court (Khan, J.) August 31, October 18, 19, 23, December 11, 1967, January 4, February 1, 5, 1968.]

Practice and procedure — Plaintiff not a legal entity — Whether new plaintiff can be joined.

Practice and procedure — Defendant residing outside jurisdiction — Writ issued and served without leave — Entry of appearance and filing statement of defence — Summons to set aside writ abandoned — Effect of objection taken At trial — Rules of High Court, O. 54.

Agency — Agreement of sale of immovable property — Agent of vendor — What constitutes a valid appointment.

Agency — Agent signing contract in own name — Whether entitled to sue for specific performance — Whether position affected by fact that principal is an unincorporated body.

Prior to their incorporation the plaintiff's predecessors carried on business under the trade name of Marics and Company. There is no evidence that this name was registered under the Business Names Ordinance. The added plaintiff who was the agent of Marics and Company, entered into an agreement with the defendants to purchase certain immovable property owned by them and which adjoined those occupied by the company.

On the 25th March, 1966 the added plaintiff, purporting to act on his own behalf, and the defendants entered into an agreement of purchase and sale. The seventh defendant was resident outside Guyana and the others purported to sign the agreement on her behalf. On the 23rd June, 1966 the plaintiffs were incorporated.

The defendants failed to pass transport and the plaintiffs instituted proceedings for specific performance. They, however, did not obtain leave

MARICS AND COMPANY LIMITED, Plaintiffs, FRANK PACHECO FERNANDES, Added Plaintiff v. FLORENCE WHITE, MIRIAM HINDS, OLGA BURKE, AGATHA ROMAN, RUDOLPH HINDS, ISMAY WATKINS and EVELYN SOLOMON

to issue a writ against the seventh defendant out of the jurisdiction, and a summons filed by her challenging the procedure was not pursued. Two of the defendants had no objection to the passing of title, and one in fact gave evidence on behalf of the plaintiffs. A third defendant took no part in the proceedings. The others all pleaded fraud. It would appear that after the evidence had been led, counsel for the defendants submitted that the evidence had disclosed, if at all, a contract between the added plaintiff and the defendant. An application was then made to add Frank Fernandes as a plaintiff and after hearing arguments this was granted on terms. But counsel on their behalf made two further submissions viz, that as the evidence disclosed that the added plaintiff had entered into the contract as agent he could not sue as a principal and in any event as his principal was unincorporated the contract was unenforceable; and secondly that as no prior approval had been obtained to issue and serve the writ against the seventh defendant outside the court's jurisdiction, the issue and service amounted to an irregularity.

On the issues of fact raised the trial judge rejected the defendant's evidence of fraud.

HELD: (i) there is no need for express written authority to constitute a person as an agent for the purposes of entering into an agreement of purchase and sale of immovable property, but in any event the letters which passed between the third and seventh defendants clearly show that the latter had constituted the former as her agent;

(ii) although the principal was not a legal entity, the agent was entitled to sue for specific performance in his own right as he purported to enter into the agreement as a principal;

(iii) the failure to apply for leave to issue the writ against the seventh defendant out of the jurisdiction was an irregularity and as the defendant had taken no action in pursuit of her summons to have the proceedings struck out; it was too late to raise such an issue at the trial.

Judgment for the added plaintiff.

J. A. King for the plaintiffs.

Mrs. P. Roach for the defendants.

KHAN, J.: The first named plaintiffs are a company incorporated under the Companies Ordinance, Cap. 328 and carrying on business at their registered address, 187 Charlotte Street, Lacytown, Georgetown. Prior to the 23rd June, 1966, they were unincorporated. On the 1st January, 1966, they took over the business of one Mendonca who operated at the same address, under the name and style of Marics and Company. Incorporation, however, was not effected until 23rd June, 1966.

On the 25th March, 1966, Marics and Company obtained the services of the added plaintiff to enter into an agreement of purchase and sale with the defendants for the purchase of the adjoining property, lot 186, Charlotte Street, Lacytown with the object of extending their business premises.

The first named defendant, Florence White, is owner by transport of one undivided third part or share of and in lot 186 Charlotte Street, Lacytown, Georgetown. The remaining six named defendants are owners by transport No. 1271/64 of the remaining two undivided third parts or shares of and in lot 186 Charlotte Street, Lacytown. All the defendants save and except Burke and Solomon reside on the said lot 186 Charlotte Street, Lacytown. The defendant, Burke, resides at 32 Crean Street, Georgetown and the defendant, Solomon, at 30 Old Devonshire Road, Balham, London, S.W. 12, England.

On the 25th March, 1966, the added plaintiff and the defendants entered into the following agreement:

“MEMORANDUM OF AGREEMENT OF SALE made this 25th day of March, 1966, between FLORENCE WHITE, OLGA ROSALINE BURKE of 32 Crean Street, Georgetown, AGATHA ROMAN, MIRIAM HINDS, spinster, RUDOLPH HINDS, ISMAY WATKINS, of lot 186 Charlotte Street, Lacytown, Georgetown and EVELYN SOLOMON at present residing in England (hereinafter called “the vendors”) of the one part and FRANK PACHECO FERNANDES of lot 92 Middle Street, Georgetown, (hereinafter called “the Purchaser”) of the other part.

PARTIES — The Vendors and the Purchaser.

PROPERTY — Lot number 186 (one hundred and eighty-six) in that part of Georgetown called Lacytown, with the buildings and erections thereon (as held under Transports Nos. 351 of 4th March, 1940 and 1271 of 20th July, 1964).

PRICE — \$26,000:—of which the sum of \$2,600 is paid as a deposit and on account on the execution hereof (the receipt whereof the vendors hereby acknowledge) the balance to be paid on the passing of transport.

TRANSPORT — To be advertised forthwith and to be passed to the Purchaser or to his nominee within 3 months from the date hereof; upon failure on the part of the Vendors (*sic*) then the Purchaser to have the right to cancel the sale and to be refunded the said deposit; upon failure on the part of the Purchaser then the Vendors to have the right to cancel the sale and to forfeit the deposit.

POSSESSION — To be given on the passing of transport and the Vendors undertake to give vacant possession of the front building on the said lot.

RATES & TAXES — To be apportioned as at the date of passing of transport.

MARICS AND COMPANY LIMITED, Plaintiffs, FRANK PACHECO
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EXPENSES — Costs of transport and of this agreement to be borne equally between the parties.

INSURANCE — The Purchaser will effect his own insurance on the buildings on the property, the Vendors will in the meanwhile hold all existing policies of fire insurance for the benefit of the purchaser.

AS WITNESS the hands of the parties the day and year first above written.

WITNESSES	(Sgd.) F. White
1. W. A. Moseley	Olga Rosaline Burke
2. H. W. De Freitas	Agatha Roman Rudolph Hinds Miriam Hinds Ismay Watkins
	On behalf of themselves and Evelyn Solomon
\$ 1.00 stamp cancelled	F. Pacheco Fernandes Purchaser.

Walter Moseley was the house agent. The property in question was valued for estate duty in 1964 by the said house agent for \$17,000:—No repairs or improvement was effected since. In pursuance of the agreement the added plaintiff paid over to the defendants through Burke the amount of \$2,600:— which is acknowledged in the Agreement of Sale.

The third named defendant, Olga Rosaline Burke (hereinafter referred to as Burke) was originally the executrix of her mother's estate. She still collects the rent of the property in question and accounts to the defendants in respect of their individual shares in the income of the property. Burke, in the course of her evidence, related how the sale came about. She stated inter alia:

“ This sale came about in this way. Mr. Moseley came to me in March, 1966 and told me that my sister Mrs. Roman is wilting to sell her interest. I told Moseley that he has to consult the others as it is not Mrs. Roman's alone. I told him that I am willing to sell and that he must go and consult the others. I knew him well and he knew all the others. He left to consult the others. The following day Moseley returned to me and offered me \$25,000 for the property. I told him 'No, you must get more'. He left and returned the next day and offered \$26,000. He, Moseley, said he had a purchaser who would pay \$26,000. I asked him who was the purchaser and he said one Kranenburg. He is the secretary of the plaintiffs' company. Moseley then left. A few days after I met Moseley on the road and he said he

was just coming to me to tell me that I must be at Cameron & Shepherd at 1 p.m. as the others would be there. I went at 1 p.m. When I got there I saw my brother Hinds who sat near to me. I asked him for the others. After a while Mrs. Roman came. I then saw Moseley with Mrs. White. They came in a car. Miriam Hinds and Watkins did not come. I asked Roman if she knew the price and she said 'Yes, \$26,000'. I had the transport which is in the name of all of us except White. That is for our mother's share. I then handed it to Mr. Herman De Freitas who asked many questions about the transport and the interests. Mr. De Freitas then sent the transport with a clerk to the Deeds Registry to make certain inquiries about a previous transport. My mother owned two-thirds of the property and my transport was in respect of the two-thirds. Inquiries were being made about the remaining one-third share and the transport for it. Mrs. White owns the one-third share. Mr. Herman De Freitas asked us a number of questions and wrote down our answers. An agreement was then made and he read it over to us and explained it. Mrs. White was present and appear to understand. Mr. De Freitas brought out the money and counted it. It was \$2,600. He brought it from somewhere else and counted it. I can't remember if we had all signed. After Mr. De Freitas brought the money and counted it he asked 'who is going to count this?' Mr. Moseley then took the money and began to count it. He said it was correct. Rudolph Hinds who was in a great hurry called for his share. Mr. Moseley handed me \$300 and I handed it to Hinds and I got a receipt from Mr. Hinds for the amount. This is the receipt — tendered exhibit "C". Mrs. White had signed the agreement and was waiting but after Hinds was paid she said she would like to go home and Mrs. Roman took her across the road and she Mrs. Roman returned to the office. Mrs. White lives just about 150 yards from the office. Mrs. Roman then took the money. I gave her \$300. She did not give me a receipt then. Later she gave me this receipt (ex. C2) I paid \$311 for transport fees. I then left and went to the property to give Miriam Hinds and Watkins their shares. When I got there I asked them "Why did you not come to the office?" and Watkins replied that she did not know that I was there. Moseley was there with me and I gave Watkins \$300 and I got the receipt (ex. C3). I then paid over \$300 to Miriam Hinds and got this receipt (ex. C4).

I did not see Mrs. White at that time. I usually keep moneys for her from her share of the rents and give her every week as is requested by her. I have been doing this up to last week. I had her money and 3 days after she came to me and she said she was asked if she got her share. I told her that I have her money. She then said that I must keep her share as I was doing all the business for her and that if she kept it, it would be stolen. I have it up to now. After I gave her all the money I had apart from this transaction I told her that I only had the property money left and she said she did not want it and I must

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take it back to Mr. De Freitas. That was about two to three months after. Everybody had signed before the paying of the money. I signed on behalf of my sister (Solomon) also.

Mr. Herman De Freitas read the agreement out after it was typed, but he took down all the particulars first on a piece of paper. We were in the office while the agreement was being prepared. After it was read and explained to all of us we all signed.

Mr. Fernandes and Mr. Moseley left us and went with the agreement to get Watkins and Miriam Hinds to sign. They returned shortly after. Mr. Moseley and Fernandes told us that they gave no trouble to sign. I saw their signatures on the document. I showed exs. B¹ and B² to Mr. De. Freitas. I know my aunt Mrs. White very well. She certainly knew at the time the terms of the agreement including the amount of the sale price: \$26,000. It is untrue that I conspire to sell the property when she Mrs. White did not want to sell. I was looking after the property since my mother's death. I know nothing about the valuation of properties. I relied on Mr. Moseley and try to get the most I can. No other person made any other offer. A few days after Mrs. Roman came to me and told me that we gave away the property. I told her 'Not me, because you sent Moseley to me'. I did not send him. She then said we can give back the money and get more for the place. I am willing to carry out the sale to the plaintiffs. A few nights after this I got a letter from Dr. Ramsahoye. I swore my affidavit. As far as I am concerned I am willing to honour the agreement of sale and complete the sale".

The facts as stated by Burke are accepted by the court.

The four defendants: Miriam Hinds, Roman, Rudolph Hinds and Watkins, received their share of the advance and issued the receipts (exs. C1 – C4).

The defendant, Burke, stated that she is not defending the action and is willing to pass transport. Rudolph Hinds who was present in court throughout the hearing stated that he was defending. He did not file a defence and did not give evidence at the hearing. He was unrepresented by counsel. He admitted (after a statement made by counsel for the plaintiffs) that he stated in Bail Court that he was going through with the sale. Although he did not file a defence he was invited to ask questions of the witnesses but declined.

The added plaintiff Fernandes, the defendant Burke, the house agent Moseley and Mr. De Freitas (solicitor) testified on behalf of the plaintiffs.

The defendant Roman in her defence filed denied that a valid agreement was made by her on the 25th March, 1966, or at all, to sell the plaintiff the property set out in the statement of claim. He averred that

“ the purported agreement in writing referred to by the plaintiffs in their statement of claim is a fraudulent transaction and is null, void and of no effect, the specific act of fraud being that the plaintiff purported to purchase the defendant’s property when she never agreed to sell same to the said plaintiff. The defendant never authorised Olga Burke one of the co-defendants to swear to any affidavit of sale on her behalf and the purported affidavit of sale and conveyance were part of a fraudulent conspiracy between the plaintiffs and the said Olga Burke to convey the property and defraud the defendant thereby.”

The two other defendants Hinds and Solomon repeated the same story in their defence filed.

Florence White, the number one defendant, denied that the agreement in writing was made with her consent with the plaintiff on the 25th March, or at all, to sell the plaintiffs the property set out in the statement of claim. She stated that the claim is a fraudulent transaction and is null and void and of no effect. She said she was never a party to any such agreement – to any such transaction. She did not know who made the transaction and she did not take part in any such transaction. She said the purported sale was fraudulent – a fraudulent conspiracy between the plaintiffs and their agents and that they got her to sign merely to show that she owned the property.

This defendant (Mrs. White) and the number four defendant (Roman) were the only defendants who testified in their defence. No other witness was called.

Roman stated on oath that she was the attorney of the number seven defendant, Evelyn Solomon, who resides in England. She tendered a power of attorney (ex. G) and stated that she (Roman) was representing Solomon in this action.

In respect of the number one defendant, her counsel, Mrs. Roach submitted that she (Mrs. White) had signed the document under the mistaken belief that she was only indicating that she had an interest in 186, Charlotte Street. Her defence is *non est factum*”. Counsel relied on the well-known case of *Foster v. Mackinnon* (1869) LR 4 CP, 704. Mrs. Roach, however conceded that the number one defendant is capable of understanding, but no one had explained to her what was going on and she was incapacitated by her age and from virus.

Counsel for defendants further submitted that the plaintiffs – Marics and Company, Limited – not being incorporated at the time could not have contracted. The defendants never entered into any agreement with Marics and Company but with Fernandes.

After the adjournment, Mr. King for plaintiffs made application to add Fernandes as an added plaintiff. After argument and consideration the application was granted on terms, the first named plaintiffs were ordered to

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pay the defendants costs to be taxed up to the time of the application. The defendants were given an opportunity to file an amended defence, if necessary, and the matter was accordingly adjourned.

At the resumption the defendants did not avail themselves of the opportunity of filing any amended defence but Mrs. Roach further submitted that the added plaintiff having contracted as agent of plaintiffs cannot now assume the character of principal, he having named his principal before.

Counsel relied on *Fairlie v. Fenton* (1880) LR 5 Exch. 169 and *Fisher v. Marsh* (1865) 6 B and S, 411.

In *Fairlie v. Fenton and anor* a broker sued in his own name upon a contract made by him as broker. Held he was not a contracting party. KELLY, C.B. in the course of his judgment stated inter alia: at p. 171:

The numerous cases cited to us shew that in certain contracts the agent may himself sue as principal; but in none does it appear that a broker has successfully maintained an action on a contract made by him as broker. He may, no doubt, frame a contract in such a way as to make himself a party to it and entitled to sue, but when he contracts in the ordinary form, describing and signing himself as a broker, and naming his principal, no action is maintainable by him . . .”

In the same case PIGOTT, B. stated thus at p. 172:

I am of the same opinion. On the plain construction of the contract the plaintiff is no part to it; but only signs, as broker bought and sold notes for the respective parties. *Baring v. Corrie* shews the difference between the position of a broker and a factor; and that the broker has no right to sell in his own name. In the present case, I do not think that he has in fact done so.”

And CLEASBY, B. stated, *inter alia* at p. 172:

I am of the same opinion. There is no doubt a broker cannot sue; he has no authority to sell in his own name, or to receive the money, and has nothing to do with the goods “To use the brief but expressive language of an eminent Judge, ‘a broker is one who makes a bargain for another, and receives a commission for so doing.’ Properly speaking, a broker is a mere negotiator between the other parties, and he never acts in his own name, but in the names of those who employ him. . . .”

It is obvious that the above case is inapplicable to the present one under consideration. So too is the case of *Fisher v. Marsh* (supra) where the principal’s name was disclosed in a contract made by the agent, obviously only the principal can sue, unless the agent, by distinct words, makes the contract his own.

In the present case Mrs. Roach contended that there was no principal and indeed it was found that the purported principal was unincorporated and so non-existent. No principal was named in this contract; the added plaintiff contracted prima facie in his personal capacity and is entitled to sue in his own right. Mrs. Roach's submission is therefore untenable and misleading.

In respect of the number seven defendant Solomon, Mrs. Roach submitted that she was not served with the writ; "that the service, if any, was irregular and asked that Solomon be dismissed as she entered appearance only to be heard – "Solomon not having signed is not a party to the contract." Other cases cited appear on the record. This submission on behalf of Solomon was made at the close of the case. Throughout the hearing in this matter Solomon was represented by Mrs. Roach and her attorney Roman who submitted to the jurisdiction. Mr. King adverted the court's attention to a summons, in the Court's file, before a Judge in chambers asking that the service of the writ and subsequent proceedings against the defendant Evelyn Solomon be dismissed. This was never brought to the attention of the court during the hearing and no such application was made to the judge in the course of the hearing. The application was not proceeded with but withdrawn.

Mr. King pointed out that Solomon received the writ. The letter (ex. B5) acknowledges this. Roman stated in her evidence that she was defending the action for Solomon. Roman is Solomon's attorney. No steps were taken at the trial to set aside the writ. An abortive attempt before another judge in chambers was made and withdrawn. It is Mr. King's submission that Solomon submitted to the jurisdiction and/or waived any irregularity. He cited O. 54 r. 2. The plaintiff is asking for specific performance of the whole contract but will accept any part thereof.

Mr. King relied on *Thomas v. Dering* (1837) 1 Keen, 729, and *Basma v. Weekes* [1950] 2 All E.R. p. 146.

In respect of the number one defendant the issue raised is one of fact. Mr. King submitted that all the defendants are bound. The allegations of fraud were not pursued.

Having considered the whole of the evidence and having observed the demeanour of all the witnesses who testified, I believe and accept the evidence of Burke who was supported by Mr. De Freitas. I believe and accept the evidence of the plaintiffs' witnesses in preference to the number one and number four defendants' evidence wherever their evidence conflict.

I am satisfied that Mrs. White knew very well that she was going to Cameron and Shepherd to sell her interest in the property and this was explained to her as stated by Mr. De Freitas whose evidence I believe and accept in its entirety. I find that Mrs. White was obviously prompted and induced by Roman to reject the sale with the hope of getting a higher price. This is also borne out by a letter tendered by Roman from Solomon. It was

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Roman who on being told by someone that they could have got a higher price went to Burke and told her that they ‘threw away the property.’ I find that the reason the defending defendants have for not completing the sale is that they feel they could get a higher price, and indeed, the letter (ex. B6) allegedly written by Solomon to Roman establishes this fact. I find no truth in the defence filed. It is unfounded, fictitious and speculative. Mrs. White, admittedly an old woman, impressed me as no fool, imbecile or idiot. Counsel for her admitted that Mrs. White was and is capable of understanding, but submitted that no one explained to her what was going on. I am satisfied that she knew what was going on from Moseley, Burke and Mr. De Freitas and she enlightened Mr. De Freitas when he told them that they had no title to the whole, as he stated. In the witness-box she took advantage of her age and indulged in matters of lighter vein. She is no fool and certainly knew what it was all about.

In those circumstances, her case does not fall under the principle of *Foster v. Mackinnon* (supra). She must therefore perform her contract.

In respect of Roman I do not believe her story that the offer was \$40,000: by Moseley and that she was under that impression when she signed the agreement of sale. She knew very well that it was \$26,000 as she was the chief mover in the sale and was most anxious to sell having regarded to her conversation with Hinds before she went to Cameron & Shepherd, as stated by Moseley. Moreover, Burke asked Roman at the office of Cameron and Shepherd if she knew the price and Roman said ‘Yes, \$26,000’. I find Roman a clumsy liar. After the sale she learnt that the real purchasers were No. 1 plaintiffs and got the idea that they sold the property at too low a price. She then got busy and induced the other defendants not to complete the sale believing she could repudiate the sale easily. She gave a receipt for the amount she received. She impresses me as the defendant who was most active in the negotiations leading up to the sale and, indeed, thereafter, resulting in this action.

The considerations with respect to Evelyn Solomon who is admittedly in England are somewhat interesting. Does the sale bind her? On examination I find the defendants who signed the agreement of sale purported to sign on her behalf. The first question is: Were they or anyone authorised to sell Solomon’s interest?

It appears that at the time of the sale Solomon and Burke were on very good terms. The letters (exs. B1 to B5) establish this. In ex. B1 dated 3rd June, 1964, she stated *inter alia*:

“I do hope you get the place sell and give everyone their share.”
On the 11th June, 1964 she wrote in ex. B² *inter alia*:—

“As you see I have left you to collect whatever is there for me My problem is finding the passage. I was thinking if you could send some money and lend me and you can take it out of my share after selling the house.”

On the 9th December, 1966, in ex. B³ she stated *inter alia*:—

“Sorry to hear about the worries over the house. Why did mother have to leave something because you had to share the burden all the time. I am going to write and tell them to sign before going to court. Perhaps they don’t know they would get less money after going to court. I am very worried over this matter.”

In January, 1967 Solomon wrote Burke as follows:—

“I hope you have got the matter fixed over the sale of the house. I wrote telling the others that if they allow the matter to be taken to court they will get less money for the sale. I don’t know if they listen to the little advise. In your last letter you mention about the advance on the sale. Please send mine. I will pay the postage. You can get postal order from post office.”

In ex. B⁵ she wrote:—

“I am sorry about all the trouble you are having with the house. It would have been better if Simme did not have anything to leave for anyone then it wouldn’t been all this fighting. Do you want me to return the summons? Please let me know the result of the case. You can send the money and take out the money for postage.”

In August, 1967, Solomon wrote Roman ex. B⁶ acknowledging two letters from Roman. She stated *inter alia*:—

“You will have to send and let me know what I will have to do to stop the sale. I think the money Olga is selling the place for is not enough. If she can get more money it is best for her to hold on a bit longer. I have not heard from Olga as yet. As soon as I do I will inform you. If the others have signed you and I will have to hold heads together and stop the sale.”

From the last letter Roman had obviously convinced Solomon that they can get more money for the property in question. It seems to me that this is the sole reason why the defendants have refused to complete the sale. It is, however, clear from the above correspondence that Solomon had authorised Burke to sell the property and send her share. Is this a good authority to sell realty?

At p. 387 of Cheshire and Fifoot on (Contracts (5th Ed.) it is stated as follows:—

(1) EXPRESS APPOINTMENT

“Except in one case no formality, such as writing, is required for the valid appointment of an agent. An oral appointment is effective. This is so even though the contract which the agent is authorised to

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make is one that is required by law to be evidenced by writing, such as a contract to buy or to take a lease of land. Thus if an agent appointed orally signs a contract in his own name for the purchase of land, the principal can give parol evidence to show the existence of the agency, and can then enforce the contract against either the agent or the vendor.

The one exception is where the authority of the agent is to execute a deed on behalf of the principal, in which case the agency itself must be created by deed. The agent, in other words, must be given a power of attorney. Instances of transactions for which a deed is necessary are conveyances of land, leases exceeding three years, and the transfer of a share in a British ship. So if an agent is authorised to execute a conveyance of land to a purchaser, he must be appointed by deed, but this is not necessary if his authority is merely to enter into a contract for the sale of land.”

I would hold that Burke properly entered into the contract on behalf of Solomon for the sale of the property in question. The letters (ex. B¹ to B⁵) in my judgment are good and sufficient authority for Burke to act for Solomon as she did in the agreement of sale.

The next point for consideration is the question of jurisdiction in respect of the defendant Solomon who resides out of the jurisdiction. She admitted in her letter ex. B⁵ that she received the summons. She wrote inter alia: “Do you want me to return the summons?” The subject matter of the action is immovable property situate within the jurisdiction and an order could have been obtained. It appears therefore that the writ was properly issued – in accordance with O.5 rr. 1 to 4 of the Rules of the High Court. The objection, however, appears to be that there was non-compliance of O. 9 r. 4 in that no order or leave was first granted by the Court or a judge for service on Solomon out of the jurisdiction. Mrs. Roach contended that it was an irregularity and I agree with her contention.

O. 54 provides relief in cases of an irregularity. O. 10 r. 20 provides that where there is such non-compliance, the defendant could move the court before or within 7 days after entry of appearance to have the writ set aside. No such step was taken before or after the entry of appearance and no such application was made to the judge in the course of the hearing of the action. The court’s attention was adverted to a summons on the file which was made while the action was part heard, to a judge in chambers, but this summons was noted as withdrawn. This point of jurisdiction in respect to Solomon was only raised during the address stage by counsel for Solomon. Mr. King relies for relief on O. 54 which provides as follows: —

“(1) Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceedings

void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit.”

“(2) No application to set aside any proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.”

In *Fry v. Moore* (1889) 23 Q.B.D. 395 where a writ was properly issued but irregularly served – as in the present case – it was held to be a mere irregularity which could be waived. In the present case the defendant Solomon entered appearance on the record and by counsel at the hearing. The defendant Roman represented Solomon as her attorney at the hearing. She never protested the jurisdiction but on the contrary submitted to it and took full part in the proceedings. The defendant, Solomon, ought not to be allowed at this unreasonably late stage of the proceedings to approbate and reprobate at the same time. This defendant’s conduct fell in the teeth of o. 54 r. 2, she having taken fresh steps in the action after knowledge of the irregularity of service. Moreover, the protest is unreasonably late. The application to set aside is refused.

Finally, it appears to me pellucidly clear from the letter – ex. B6 – that the repudiation of the contract in question is based on the hope of getting more for the property. For these defendants no question of inconvenience or hardship was raised. The number 1 defendant, Mrs. White, had put forward the question: “If I sell, where shall I go? If I sell, where shall I sleep?” This question was answered by Mr. De Freitas who told her that she owned one third of the property and she would get more than \$8,000 and she could buy a little place of her own. The evidence is that she agreed to sell. The defendants Burke and Rudolph Hinds are willing to pass transport and the other defendants ought not to be allowed to dishonour their contract because they feel that they can get a higher price. This action is brought within the equitable jurisdiction of the court and to deny the added plaintiff the benefit of his contract is to defeat the ends of justice. Rescission of this contract is not an adequate remedy. It appears to me that it is just and equitable to grant the added plaintiff and the plaintiffs the orders prayed for in the amended statement of claim, para. 5(a).

It is therefore ordered that the defendants do pass transport to the added plaintiff or his nominee – the first named plaintiffs – of the property described in para. 1 of the statement of claim within six weeks hereof, failing which the Registrar of Deeds is hereby authorised and directed to pass the aforesaid transport on behalf of the defendants on payment of the balance of the purchase price.

I have already indicated that I have awarded costs to be taxed in favour of the defendants up to the date of the granting of the application for the amended writ. The plaintiffs shall, therefore, recover their taxed

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costs incurred after the date of the granting of leave to add the plaintiff, Fernandes, and that costs be recovered from the numbers one, two, four, and seven defendants only, certified fit for counsel. There is a stay of execution for six weeks.

Judgment for the added plaintiff.

Solicitors:

Cameron & Shepherd for the plaintiffs.

D. Dial for the defendants.

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v.

E. G. CORREIA AND THE ATTORNEY GENERAL OF GUYANA

[In the High Court (Mitchell, J.) February 9, 10, April 1, May 8, 1967,
February 9, 1968.]

Declaration — Nature of — Discretionary remedy — Circumstances in which it may be granted — Sufficiency of interest.

Declaration — New road service licences — Notice inviting application for — Existing holders of road service licences — Whether sufficient interest to entitle them to seek a declaration.

Injunction — Ancilliary to main relief — Main relief not granted — Whether court would grant ancilliary relief.

On the 13th August, 1966, the Ministry of Communications published a notice in the Official Gazette inviting tenders to operate four new bus services on the Corentyne coast. Included in the notice were the routes of the new service. The plaintiffs are the holders of road service licences which empower them to operate buses in the Corentyne area, and they filed an action against the first defendant, who was at all material times the Minister of Communication, and the Attorney General, as the second defendant. As Minister of Communications, the first defendant, was the Prescribed Authority under the Motor Vehicles and Road Traffic Ordinance, Cap. 280; and the plaintiffs sought a declaration that the invitation issued by him in that capacity and which was published in the Official Gazette was illegal and void. They also sought an injunction restraining him, in that capacity, from awarding road service licences to any persons in pursuance of the invitation.

HELD:— (i) before the court would consider whether to exercise its discretion in favour of the grant of a declaration, a plaintiff must show that he has some right or interest in the subject matter of the dispute’;

(ii) the likelihood that a person's economic situation may be adversely affected is not such a right or interest;

(iii) even if, at a meeting which the first defendant had with the plaintiffs, it was indicated that the representations which they had made would be rejected, this was not evidence of a breach of any obligation owing to the plaintiffs so as to entitle them to a declaration;

(iv) the injunction in the circumstances was not a relief that could be granted on its own merit.

Action dismissed.

F. W.H. Ramsahoye, for the plaintiffs.

Doodnauth Singh, for the defendants.

MITCHELL, J.: The plaintiffs aver that they are owners of road service licences and operate buses under such road service licences in the Corentyne area of Guyana.

The first named defendant is and was at the time of the filing of the writ, and of the hearing of this action, the Minister of Communications.

The plaintiffs claim against the first and second-named defendants is for

a declaration that the invitation issued by the Prescribed Authority and published in the Official Gazette of the 13th August, 1966, concerning the establishment of bus services to operate on the Corentyne coast is illegal and void.

The plaintiffs also claim against the first-named defendant —

an injunction restraining him from awarding, in his capacity as Prescribed Authority, any road service licence to any person in pursuance of the invitation for tenders mentioned in the Official Gazette of 13th August, 1966.

The facts are that on 13th August, 1966, there appeared in the Official Gazette, a publication made by authority of the Government of Guyana, a notice among other notices under a heading "Invitations to Tender," and purporting to be issued from the Ministry of Communications, which was itself headed "New Bus Services to operate on the Corentyne Coast," and which went on to state that "tenders are invited for the operation of four new bus services on the Corentyne coast," and the routes of the new services were stated, and the terms and conditions to be satisfied by each tender. The notice also stated that "the Prescribed Authority does not bind himself to accept any tender and retains the right to reject any tender without assigning any reason therefor".

It is against this invitation to tender for the new bus routes that the plaintiffs are complaining, and in connection with which they are saying that there is a transgression by the first named defendant of ss. 62 and 63 of the Motor Vehicles and Road Traffic Ordinance, Cap. 280, and more particularly

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sub.-s. (1) of s. 63, and are asking for a declaration and injunction. The plaintiffs are saying that the procedure adopted by the Minister, in inviting tenders as he did, is not in compliance with s. 63 of Cap. 280 and that such a tender could not be made in the Official Gazette, in such circumstances. This is essentially a matter of construction of that section. The first-named defendant contended that there has been a compliance with the section, and that he did take into consideration the representations made to him and the various matters necessary and as referred to in it which he should consider in the exercise of the discretion conferred by the Ordinance.

He further contended that at no time did he act personally, and that as a Minister of the Government he cannot properly be sued in his personal capacity as has been done by the plaintiffs.

The second-named defendant contended that no action can properly be brought against him without a fiat having first been obtained as required by s. 46 of the Supreme Court Ordinance, Cap.7, and that no fiat as such was at any time applied for or obtained by the plaintiffs to commence these proceedings against him.

The defendants also contended that the plaintiffs failed to comply with the provisions of the Justices Protection Ordinance, Cap. 18.

It is perhaps appropriate at this stage, without going into the merits or demerits of the defences raised by the defendants, to consider, in so far as the plaintiffs have asked, whether the Court could, or would be disposed to grant the declaration asked for, or, the injunction, in the circumstances of this case.....

The action was commenced by writ of summons and so there seems to be no impediment from the strictly procedural point of view to the granting of a declaration. However, the real question is, could or would the Court grant a declaration order and or injunction in the circumstances of this case?

According to 22, HALSBURY'S LAWS (3rd ed.) at para. 1610 on declaratory judgments and judgments against the Crown it is stated, and I quote —

“It is sometimes convenient to obtain a judicial decision upon a state of facts which has not yet arisen, or a declaration of the *rights* of a party without reference to their enforcement.”

It is also stated that “it is essential that some relief should be sought, or that a *right* to some substantive relief should be established, and “the declaration claimed must relate to some *legal right*” (*Nixon v. A.G.* (1930), 1 Ch. 566 C.A.; [1931] A.C. 184 H.L. at p. 139 and must confer some tangible benefit to the plaintiff, and at para. 1611 that “the power to make a declaratory judgment is a discretionary one.” And that “the Court will no make a declaratory judgment where the

question raised is purely academic” (*Howard v. Pickford Tool Co. Ltd.*, [1951] 1. K.B. 417 C.A.) “or the declaration would be useless or embarrassing (*Smeeton v. A.G.* [1920] 1 Ch. 85)”.

These various principles received judicial consideration in the case of “*Guaranty Trust Company of New York v. Hannay & Co.* (1915) 2 K.B. 536, C.A. in which a number of authorities was reviewed and considered, and in the course of which BUCKLEY, L. J. in his learned judgment, and at p. 548, said—

“An injunction is a remedy which the Court applies under proper circumstances to *enforce an obligation*. A declaration includes a pronouncement of the Court upon the construction of a document on which an alleged obligation towards the plaintiff depends or delimiting the obligation as existing in point of law. . . . Neither declaration nor injunction, nor relief is, in my judgment within the jurisdiction of the Court unless it be founded upon alleged facts showing (if true) a cause of action. If such facts are alleged but are not proved, the Court may, of course make a declaration or express an opinion disclosing the ground on which the action fails and may thereupon dismiss it.”

He further said at p 553 as an expression of opinion on the decision of the Court of Appeal on *London Association of Shipowners v. London and India Docks Committee* (1892) 3 Ch. 242—

“That decision, therefore, in my opinion, is expressly to the effect that *only if the plaintiff has rights in the matter in respect of which the declaration is sought can a declaration be made*”.

Continuing BUCKLEY, L. J. said:—

“There is another decision in the Court of Appeal, *Dyson v. Attorney General* (1911) 1 K.B. 410 which requires careful consideration. It is a case in which the plaintiff sued for a declaration that he was under no obligation to fill up Form IV under the Finance (1909-10) Act, 1910. In other words, the plaintiff was alleging that he was not under an *obligation* and asking for a declaration to that effect. But the action contained an allegation that the Commissioners threatened to enforce penalties against him for failure to make the return”.

and on p. 554 he said, when making his observations on the *Dyson* case, and I quote —

“the plaintiff was threatened with penalties if he did not do certain acts which according to the defendant’s construction of the Act he was bound to do. *The question, therefore, was as to the construction of a document which bound the plaintiff and upon which the defendant was threatening him with penalties if he did not act upon the footing that the construction was that which the defendant alleged*”.

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There is no such circumstance or comparable circumstance in this case giving rise to the right on the part of the plaintiff to come to this Court and ask for a declaration in so far as his established interests are concerned, or, are threatened.

Continuing BUCKLEY, L. J. said—

“In both *Dyson v. Attorney General* [1912] 1 Ch. 158 and *Burghes v. Attorney General* [1912] 1 Ch. 173 the judges rely upon the threat of penalties as material element”.

There is no threat emanating from s. 63(1) of Cap. 180 itself, to affect any rights or interests of the plaintiffs as holders of road service licences. The threat which the plaintiffs apprehend, is in the forthcoming exercise of the discretion of the Prescribed Authority and it is to be appreciated that they had no right to direct how that discretion is to be exercised.

Again, there is no cause of action as between the plaintiffs and the defendants in so far as they are not bound towards each other by statutory obligations or by mutual obligations arising out of the Ordinance.

PICKFORD, L. J. in the course of his learned judgment in the said *Guaranty Trust* case at p. 558 said —

“I find that FARRELL, L. J. said in *Chapman v. Michaelson* [1909] 1 Ch. 238 at p. 243, quoting from LINDLEY, M. R. in *Ellis v. Duke of Bedford* (1899) 1 Ch. 494 at p. 514; Moreover now, under the Judicature Act actions can be brought merely to declare *rights*, and this is an innovation of a very important kind, . . .”

The principle I wish to deduce from the foregoing extracts is not one as to the mere procedure to be adopted in seeking a declaratory order, or, whether the plaintiff must have a cause of action or not, but rather whether the plaintiff must have a *right* which the Court is asked to declare, whether that right is enforceable or not, or, whether there is made a claim for consequential relief or not. Continuing in the course of the same judgment in the *Guaranty Trust* case at p. 560 PICKFORD, L.J. referred to the case of *Brooking v. Maudslay Son & Field* 38, Ch. p. 636 and said at p. 561:

“This seems to me a clear decision that there may be a *right* to a declaration, although the person asking for it has no cause of action apart from the rule and I think the cases of *Dyson v. Attorney General* [1912] 1 Ch. 158 and *Burghes v. Attorney General* [1912] 1 Ch. 173 are to the same effect”.

Continuing PICKFORD, L. J. said at p. 562 —

“I think therefore that the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not,

and at the instance of any party who is interested in the subject-matter of the declaration. *It does not extend to enable any stranger to the transaction to go and ask the Court to express its opinion in order to help him in other transactions*".

With regard to the foregoing extract from the judgment of BUCKLEY, L. J. it is to be appreciated that rights do not necessarily coincide with interests, and vice versa, and not all interests are protected by rights. It appears to me that initially to succeed in their request the plaintiffs must have a right or an interest in the subject matter of the declaration. Can the plaintiffs in the circumstances of this case be said to have an interest? It is true that they hold road service licences, and in so far as road service licences may be granted to persons to operate over the said route in part, or, whole they may be concerned with the manner and extent to which the use of their own licences may be affected in terms of profit or loss. But this interest in profit or loss as the case may be, is a bald interest arising out of the legitimate use to which they have put the licences which have been already granted to them. It is their own profit or loss from the use of their own licences, rather than the legitimate or illegitimate use of a licence granted to another under the Motor Vehicles and Road Traffic Ordinance, Cap. 280, with which they are concerned; and in so far as invitations to tender for road service licences have been issued by the Minister of Communications, they apprehend that there will be a decrease of profits, or an increase of loss if licences are granted to other persons. This is my finding of fact having regard to the evidence of Walter Hintzen as to the operation of his bus service over the years, and the statistics of passenger traffic which he has invited me to consider, as indicative of the prevailing circumstances.

That interest, however, is not an interest in the subject matter of the declaration, i.e., the invitation itself issued by the Prescribed Authority and published in the Official Gazette of 13th August, 1966, concerning the operation of four new bus services, and it is not an interest which arises in relation to the plaintiffs, founded on an obligation or right which they have under the Motor Vehicles and Road Traffic Ordinance, Cap. 280, by virtue of their merely holding and legitimately using the road service licences which they have, as distinct from the mere right to make representations to the Prescribed Authority for the exercise of his discretion to grant or refuse a road service licence to any person.

To my mind, to enable the plaintiffs to have an interest in the subject-matter in circumstances which would have supported an application for a declaration, it was necessary for them to make applications themselves in reply to the invitation to tender as appearing in the Official Gazette of 13th August, 1966. This, they failed to do. Apart from their purely personal interest in their own profit or loss in the use of the particular road service licences granted, the plaintiffs are in no better or worse position, or have no greater or less interest than any other member of the public. The mere fact of being members of the public does not give the plaintiffs the right, or

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sufficient interest to make this application for a declaration in the circumstances of this case. It has been said that “the Attorney General is by law the representative of the public interest”. There is no breach of statutory duty in so far as the plaintiffs are concerned because none is conferred on the Prescribed Authority apart from what may be described as the obligation imposed by s. 63(1) of Cap. 280 on the Prescribed Authority in the exercise of a discretion to grant or to refuse a road service licence i.e. to “take into consideration any representations which may be made by persons who are already providing transport facilities along or near to the routes or any part thereof.

To my mind the Motor Vehicles and Road Traffic Ordinance, Cap. 280 does not by its terms give the plaintiffs, in the circumstances of this case, the right or interest to make an application for a declaration as they have done. S. 63(1) of the Motor Vehicles and Road Traffic Ordinance, Cap. 280 states:

“In exercising its discretion to grant or to refuse a road service licence in respect of any routes and its discretion to attach conditions to a road service licence the Prescribed Authority shall have regard to the following matters and take into consideration any representation which may be made by persons who are already providing transport facilities along or near to the routes or any part thereof etc.”

It may be contended on behalf of the plaintiffs that in so far as they are already providing transport facilities along or near to what I find as a fact to be the routes or part of the routes mentioned in the invitation to tender, it is incumbent on the Prescribed Authority to take into consideration any representations which they may make in exercising his discretion to grant or refuse a licence. I agree with that contention. The operative words, however, in the circumstances of this case as they apply to the plaintiffs in my opinion *are in exercising its discretion to grant or to refuse a road service licence and take into consideration any representation which may be made by persons who are already providing transport facilities.*

To my mind having regard to those operative words mentioned, the time at which the discretion is to be exercised by the Prescribed Authority is the time of granting or refusing of the road service licence as the case may be, and the granting or refusing as the case may be, in my opinion, must apply to, or, be in relation to some person or persons who are in a position to be granted or refused road service licence. The time for granting or refusing a road service licence had not yet arrived in the circumstances of this case, and the invitation to tender as advertised in the Official Gazette was a preliminary step towards the exercising of the discretion and the time when that discretion would be exercised, and was not the exercise of the discretion itself. Again the plaintiffs, in the circumstances of this case, were not persons towards whom the discretion conferred by s. 63(1) of Cap. 280 in granting

or refusing a road service licence may be exercised on account of the fact that they themselves were not applicants at the time for road service licences in terms of the invitation to tender or otherwise.

The Prescribed Authority thus has no obligation towards them in so far as the granting or the refusing of a road service licence is concerned, or in so far as the exercise of its discretion in connection with the granting or refusing of a licence is concerned. Accordingly the plaintiffs as a corollary cannot in my opinion claim an obligation or right, or the declaration of an obligation or right in that regard as none exists for them, or, in relation to them.

The words “and take into consideration representations which may be made by persons who are already providing transport facilities etc”, in s. 63(1) to my mind indicate that the Prescribed Authority should give consideration to the representations made to him and he does not have to solicit or invite those representations, and if they were not made or are not forthcoming he does not have to take them into consideration at all. In so far as these representations are to be made, there is no indication as to what point of time and in what sequence of events they may be made, but it is appreciated that they should be made before the discretion to grant or refuse a road service licence is exercised if the Prescribed Authority is to give relevant and due consideration to them. In so far as the Minister of Communications as Prescribed Authority had a meeting with a delegation of persons who were already providing transport facilities along or near to the routes mentioned in the invitation to tender, and I so find as a fact, and I also find that this delegation included the plaintiffs, Walter Hintzen and Nandalall, and in so far as this meeting was before the grant or refusal of the road service licences which flowed from the applications to the invitation to tender (which grant or refusal has not yet occurred) the plaintiffs to my mind cannot be heard to say at this stage and at this point of time that the Prescribed Authority has not taken into consideration their representations.

There is nothing at this stage, I find as a fact, to indicate that the Authority has not done so or has done so. Moreover, it is to be observed that the exercise of the discretion of the Prescribed Authority is not fettered, or to be fettered by the fear or fact of offending the uses to which persons who make representations to him, legally make of the road service licences already granted them, or, the persons themselves. To do so, in my opinion, would be to hamper and stultify the expansion and progress of the road services, and it must be presumed that the Minister of Communications as Prescribed Authority would act and exercise his discretion (until there is reason to think to the contrary) in the best interest of good government of the State and its peoples at all times within the scope of his executive authority with regard to the road services.

Again, there is nothing in the Ordinance to indicate that the Prescribed Authority must act on the representations made to him by persons who are already providing transport facilities. There is nothing to suggest that he must

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accept those representations or must reject them. Were it otherwise there would be no exercise of a discretion at all in terms of s. 63(1) of Cap. 280. Accordingly, to my mind, even if at the meeting of 31st August, 1966 the Minister of Communications (as the Prescribed Authority) indicated in a manner which, in so far as it was human and physical, must be personal to himself, that he rejected the representations which the plaintiffs made to him, the plaintiffs cannot be heard to say that he has committed thereby a breach of an obligation owing to them, for he owed them none in the circumstances; or that he committed a transgression of a right, for none existed for them; nor could they question the mere exercise of his discretion *simpliciter* in those circumstances. To my mind the exercise of the discretion is reflected only in the grant or refusal of a road service licence.

In so far as the application by the plaintiffs is for a declaration that the invitation to tender issued by the Prescribed Authority is illegal and void because of non-compliance with s. 63(1) of Cap. 280, it is perhaps, appropriate to mention also that provision is made at s. 66 for the right to appeal. S. 66 states:

“Any person whose application for the grant of a road service licence is refused . . . may appeal to the Governor in Council against the decision of the Prescribed Authority, etc.”

There is, thus, provision in the Ordinance itself for a review of the decision of the Prescribed Authority, and the conferring of a right on the part of certain persons to have this done. But the essential prerequisite for the exercise of such a right of appeal or review is that the person or persons must have made an application for the grant of a road service licence and had been refused or had his licence revoked or suspended. The plaintiffs failed to apply for the licences, and by the simple canon of construction “*expressio unius est exclusio alterius*” they excluded themselves from being considered as possibly falling under the provisions of s. 66 of Cap. 280 with a right of appeal. To my mind they have no interest in the subject-matter of the declaration, and no right giving rise to an application for a declaration, of that right or any obligation or interest flowing from the right.

It is to be appreciated that the mere breach of a statutory duty (and I find that there is no breach of statutory duty in the circumstances of this case) does not necessarily give a private person a right of action. Whether or not it does, depends on the construction of the particular statute from which the alleged breach flows.

For the reasons given I do find that the plaintiffs have no right to a declaratory order and in the terms requested in the circumstances of this case. I, also, find that the plaintiffs have not established a right to some substantial relief. I, also, find that if a declaration were made as requested by the plaintiffs it would be useless, in that the plaintiffs would be in no better position if the declaration were granted them than if it were refused in so far as their

intrinsic right to use their road service licences is concerned, and in relation to the use they make of that right, and the use to which they put their road service licences, apart from their own ideas of profit and loss.

I, also, find that if the plaintiffs were granted the declaration requested in the circumstances of this case it would be merely embarrassing to the Prescribed Authority, in the person of the first named defendant and no more.

Accordingly, in the exercise of my discretion, this being a discretionary remedy, and upon a mature consideration of all the circumstances and for the reasons given, the application of the plaintiffs for a declaration as requested is refused. Having regard to the facts as I find them and to what I conceive and perceive to be the law applicable to those facts, I think it worthwhile to declare that I find that the invitation to tender issued by the Minister of Communications as published in the Official Gazette of 13th August, 1966 is legal and valid, and I so rule.

The plaintiffs are claiming a declaration and an injunction.

In so far as the declaration is concerned the plaintiffs are contending that the procedure adopted by the Minister of Communications in inviting tenders as he did is illegal and they wish a declaration that that is so.

The plaintiffs are not asserting that they had a right to tender which the Minister has infringed, nor are they saying that by the Minister's invitation to tender, their rights under their road service licences have been abrogated so that a declaration as to their own rights thereunder in relation to the action of the Minister is necessary and essential. They are not saying that. Rather, they are simply questioning the propriety and legality of the Minister's invitation to tender in the circumstances, and following on that are asking for a declaration, and an injunction restraining him from awarding any road service licence in pursuance of the said invitation to tender.

Whilst it is appreciated that the Motor Vehicles and Road Traffic Ordinance, Cap. 280, confers certain statutory duties on the Minister as the Prescribed Authority, I do find that in the circumstances of this case there is no breach of any duty owed by the Minister to the plaintiffs in particular as holders of road service licences, or as members of the public, nor is there an infringement or threatened infringement of any public right emanating from that Ordinance or any other Ordinance by the Minister, as distinct from their claim that he has deviated or departed from the course of procedure set out in the Motor Vehicles and Road Traffic Ordinance. There is no curtailment of the right of the plaintiffs as members of the public to have applied for road service licences also, in answer to the invitation to tender.

Accordingly, I find that the substantial claim in this action is for a declaration, and the claim for an injunction is ancillary to the claim for a declaration, and the claim for the declaration is not for ascertaining or determining the rights of the parties, but rather for the determination of

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allegedly a point of law, and is a device used by the plaintiffs for attacking the decision of the Minister of Communications to invite applications for tender as he did.

In the circumstances of this case I hold the view that there was no violation of any legal or equitable right of the plaintiffs by the defendants or either of them, nor was there any threatened violation. Whatever right the plaintiffs had, or might have, as holders of Road Service Licences remained intact with them, nor in the circumstances of this case would those rights cease, or, be brought to an end by the mere invitation to tender, the consideration of the applications as a result of the invitation to tender, or the granting of a road service licence to one or more persons other than the plaintiffs themselves, as a result of the consideration of the applications.

Ss. 62 and 63(1) of the Motor Vehicles and Road Traffic Ordinance, do not provide for the granting of a road service licence to one or more persons to the exclusion of all others on, along or near to any route or routes. As a corollary s. 63(1) of Cap. 280 may be said to envisage the granting of road service licences, albeit at the discretion of the Prescribed Authority, to several persons, thus giving rise to possible competition among the several licencees along any route or routes. Thus even if the Prescribed Authority (the Minister of Communications) had acted in a manner which the plaintiffs thought proper and legal, in full compliance with s. 63(1) of Cap. 280, in the exercise of his discretion (which they are not entitled to question provided he has exercised it in compliance with the sub-s.), the Prescribed Authority could have nevertheless granted licences to other persons to operate road services – buses – in competition with the plaintiffs. There is thus no right, on the part of a holder of a road service licence to prevent or restrain the granting *simpliciter* of a road service licence to any other person whom the Prescribed Authority in the exercise of his discretion think fit. Accordingly, the mere granting of a licence to any other person by the Prescribed Authority could not give rise to an injunction being granted against the Prescribed Authority from so doing and thus the plaintiffs could not be granted an injunction to restrain the Prescribed Authority from granting a licence to any person whom he considered fit in terms of s. 63(1) of Cap. 280.

It would thus seem that the injunction sought in this case, stems solely from, or is appended only to the request for a declaration that the Prescribed Authority acted illegally, and is not a relief that could be granted on its own merits, or from a right or interest in any or one of the plaintiffs.

In so far as I find that there is no right, and that the Court in the exercise of its discretion should not make the declaration requested by the plaintiffs, and in so far as I find that the claim for an injunction is merely ancillary and appended to the claim for a declaration, I find that the Court cannot grant the injunction prayed for in the circumstances of this case and the application for an injunction is thus refused.

The determination of the issues as to whether a declaration should be made by the Court in the circumstances of this case and whether an injunction should be granted the plaintiffs disposes wholly of the plaintiffs' claim. While I consider that the arguments raised as to the application of the Justices Protection Ordinance to this case, and the necessity to have a fiat of the Attorney General before the plaintiffs could proceed with the claim, stimulating and attractive, I do not think it necessary to go into the merits or demerits of them.

The plaintiffs' action for a declaration and injunction would, therefore, be dismissed with costs to the defendants to be taxed certified fit for counsel.

Action dismissed.