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THE LAW REPORTS OF GUYANA

ENMORE ESTATES LTD. v. GERSHAM BACCHUS

[Court of Appeal (Luckhoo, C, (ag.), Cummings and Crane JJ.A.) December 3, 1968, January 13, 1969.]

Workmen's compensation—No conflict of medical evidence—Appointment of medical referee.

Workmen's compensation—Medical report admitted by consent—Effect of—Workmen's Compensation Ordinance Cap. 111 s. 34, 43(2).

A workman was injured in the course of his employment. He instituted proceedings in the Magistrates Court and was examined by a medical referee who issued a report, but these proceedings were withdrawn. In fresh proceedings instituted by the workman his doctor gave evidence and the report by the medical referee in the earlier proceedings was admitted in evidence by consent. The magistrate, holding that there was a conflict of medical evidence, referred the matter to another medical referee whose evidence he accepted and dismissed the workman's claim.

HELD: (Cummings, J.A. dissenting) that under s. 34 of the Workmen's Compensation Ordinance Cap. 111 the magistrate was entitled to appoint another medical referee.

per Luckhoo, C., because a magistrate may refer a matter to a medical referee even though there is no conflict of medical evidence before the court.

per Crane, J.A. because there was in fact a conflict of medical evidence; the report of the earlier medical referee, having been admitted by consent, was *prima facie* evidence in the case.

*Appeal allowed.
Judgment of the Full Court reversed.*

G. M. Farnum Q.C. for the appellants.

D.C. Jagan with *A.O.H.R.*, *Holder* for the respondent.

LUCKHOO, C. (ag.): On the 17th May, 1964, whilst the respondent-workman was performing the duties of a watchman at an estate of the appellants, he received gunshot wounds on the right thigh which required hospitalisation for four weeks and treatment afterwards. On the 14th July, 1964, he saw Dr. Beadnell (the estate doctor) who recommended light work. He then requested the manager to provide conveyance to get to and from where "the light work" was to be, done, but the manager refused, and told him to see another doctor if he wanted. He saw Mr. Hugh, F.R.C.S., who examined him on the 20th July, 1964, and issued a medical certificate which showed the result of his medical examination. This disclosed that the workman complained of pain and numbness and inability to walk for long. The examination showed healed pellet scars, 1/2" wasting of the right thigh and induration of the right quadriceps. The opinion was expressed that the workman could not perform his normal duties; that he was not permanently disabled but only temporarily; and it was estimated the period of disability would be six weeks.

The manager, however, was not satisfied with that certificate, and it was the workman's evidence that he agreed "to make a joint application with the estate to see a medical referee".

On the 6th August, 1964, he submitted himself to Mr. Stracey as a medical referee, and a report of this examination was sent to the Commissioner of Labour. This revealed that the workman had complained of numbness and pain in the sole of the right foot and anterior aspect of the right thigh, but that clinically there was "no evidence" of any residual disability and incapacity was "nil".

The appellants ceased to make any periodic payments after the 24th July, 1964, and in October 1964 the workman brought proceedings for compensation, but on the 1st April, 1965, before any hearing, his solicitor, in his presence, withdrew those proceedings. As long as twenty months afterwards, proceedings were again instituted, by which time (as appears on the affidavit of Terrence Lee), Mr. Stracey, who would otherwise have been available as a witness, had left the country, and Mr. Beadnell (as appears from a statement by counsel in this court) was also out of the country when the matter came on for trial in the following year. Mr. Hugh, then, was the only medical witness at trial, but a certified copy of the certificate of Mr. Stracey which purported to be a report made in his capacity as a medical referee, was, by consent, put in evidence.

The magistrate's note reads as follows:

"By agreement of Mr. Jagan and Mr. Farnum a copy of Mr. Stracey's certificate to the Labour Commissioner is admitted as Exhibit 'E' as a certified copy of the Medical Report sent by Mr. Stracey to the Commissioner of Labour who had referred the applicant to Mr. Stracey in a joint application by the applicant and the respondent. This is to facilitate the respondent as not to call the Labour Department to prove these facts."

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"Continued on 20.2.67.

"Mr. Farnum closed the case of the respondent. Mr. Jagan said that he wished to call Mr. Stracey to give evidence in respect of his medical report, but he has left the country. Mr. Farnum agreed that he is not in the country".

And in his decision, the magistrate said:

"By agreement of the two counsel the certificate was admitted in evidence as Exhibit 'E'."

But it was the submission of Mr. Jagan in his address that that certificate was a nullity, as there was not due fulfilment of the conditions which must be satisfied before the referee's appointment.

Subsequently, however, the magistrate informed both counsel in the case that he was desirous of sending the applicant to be examined by a medical referee for report. Counsel for the appellants agreed to this, but Counsel for the workman objected. The magistrate, however, allowed an opportunity for both to consider whether they would agree on the naming of a referee (as provided by ordinance), but as this did not materialise, the magistrate exercised his own judgment (as provided by ordinance) and referred the matter to Dr. Bissessar who, on the 15th May, 1967, examined and certified the workman's condition as follows:

- "(1) No wasting of thigh muscles; both limbs are equal; also sensation and muscle again normal.
- (2) X-ray shows pellets in soft tissues of right thigh (12.5.67).
- (3) The incapacity of the said Gersham Bacchus has ceased (except for pellets in soft tissues)".

This opinion was in the teeth of that expressed by Mr. Hugh at the trial that there was 60% permanent partial incapacity, and accorded with Mr. Stracey's opinion that the incapacity was nil. The magistrate dismissed the claim and the workman appealed to the Full Court of the High Court of the Supreme Court of Judicature mainly on the grounds that the learned magistrate erred in not finding that the reference by the Commissioner of Labour to Mr. Stracey as medical referee was a nullity, and, further, that he had no jurisdiction to refer the matter to Dr. Bissessar as medical referee. The Full Court of the High Court concluded as follows:

"The Commissioner of Labour had no jurisdiction to refer the matter to Dr. Stracey as medical referee, and all subsequent proceedings must be considered a nullity. When, therefore, the magistrate purported to act under s. 34(2) and to refer the matter to Dr. Bissessar as medical referee, there was no basis for his so doing as there was then no conflict of medical opinion on the record. He was left simply with the evidence of Dr. Hugh and the admission by the appellant that Dr. Beadnell had recommended light work. The reference to Dr. Stracey was clearly null and void, and the further reference to Dr. Bissessar of no effect".

The order of the magistrate was consequently set aside and an order made for "periodic payments as from 24th July, 1964, for a period of five years, or until the incapacity had ceased, whichever be the earlier". From that order the appellants have appealed to this court advancing that the Full Court erred —

- (1) in holding that the reference by the learned magistrate to Dr. Bissessar as a medical referee was, in the event which had happened, a nullity;
- (2) in finding in the events which had happened the learned magistrate had no jurisdiction to refer the matter to a medical referee;
- (3) in failing to appreciate that even if Mr. Stracey's certificate was not conclusive as a medical referee, nevertheless, it did possess some evidential value which the magistrate was entitled to assess.

S. 43 of the Workmen's Compensation Ordinance. Cap. 111, provides for reference by the Commissioner of Labour of a matter to a medical referee 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" under certain conditions. I shall assume that the Full Court was right in holding that the conditions of the provisions of that section were not complied with, thereby rendering the reference to Mr. Stracey null and void and of no effect, just for the purpose of considering whether the magistrate in that event had any jurisdiction, in the circumstances of this case, to refer the matter to Dr. Bissessar as a medical referee. The magistrate's power to do so appears under the provisions of s. 34 of Cap. 111. Under sub. s. (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. 1 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.

(iii) A medical referee to whom any such reference is made shall, in accordance with regulations made under this ordinance, give a certificate of his findings, and such certificate shall be conclusive evidence as to the matters so certified.

These provisions remain unaffected by any regulations.

In England, under Reg. 36 of the Workmen's Compensation (Medical Referees in England and Wales) Regulations, 1932, made under the Workmen's Compensation Act, 1925, "before making any reference, the Committee, Arbitrator or Judge, shall be satisfied, after hearing all medical evidence tendered by either side, that such evidence is either conflicting or

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insufficient on some matter which seems material to a question arising in the arbitration, and that it is desirable to obtain a report from a medical referee on such matter."

The wording of our ordinance and the English regulation, although different in composition, is similar in effect. A magistrate in this country is enabled to exercise a judicial discretion to refer to a medical referee a matter of a medical character which seems material to any question arising before him. It is sufficiently wide to allow him to do so either when there is a material conflict of medical evidence, or where, although no conflict arises, evidence of a medical character which seems material to a question arising, for one reason or another appears insufficient, in which case, it is equally open for him to require a reference for the purpose of determining that question.

So, where a magistrate, despite the absence of any medical conflict, is unable to repose sufficient confidence in the medical testimony proffered, and considers it desirable to have recourse to a medical referee, he may do so under s. 34 to resolve the issue involved, and in that way relieve himself of any anxiety or misgiving which may arise from that evidence.

Medical evidence, then, which is tendered by either side, might be inherently insufficient, inconclusive, or unconvincing, whether it consists of one opinion or several opinions, or be rendered so by circumstances which affect its reasonableness and impair its acceptability. A magistrate who feels the need for assistance, perhaps to extricate himself from the web of conflict, or to lighten his darkness, clarify his doubts, or give him an assurance which he requires, can always turn to the resources of s. 34. Indeed, where the circumstances demand, he may be under a duty to do so. (See *Butler v. Pln. Versailles & Schoon Ord. Estate Ltd.*—Civil Appeal No. 4 of 1968).

Unfortunately the Full Court erroneously treated the reference in this case as one which could only come from a conflict of medical evidence and so argued that if the medical evidence, through Mr. Stracey's certificate, was a nullity, then there was no basis for a reference to Dr. Bissessar, as there was at this stage only the evidence of Mr. Hugh, and there was then no conflict of medical opinion on the record. This failure to recognise that conflict of medical testimony was only one way *and not the only way* of justifying a reference to a medical referee, has, in effect, unjustifiably resulted in a limitation and restriction being put upon the true meaning of s. 34 in a way which was never intended and does not appear in its wording.

I would now examine the circumstances of the case to ascertain whether the magistrate was right in resorting to a reference, not so much for reasons which he may have given, but for reasons which in reality exist and must have stimulated the stand he took. It must be observed at the outset that the very reference to Dr. Bissessar as a referee unmistakably indicates that he (the magistrate) was not prepared to act on and treat Mr. Stracey's certificate as that of a medical referee. This was to be the function

of Dr. Bissessar. Mr. Hugh's evidence was that he assessed the workman's permanent partial incapacity at 60% as he considered his condition was "incurable" after his second examination on 31st October, 1966. This evidence was not in happy accord with what he had certified on the occasion of his first examination on the 20th July, 1964, when he found that disability was not "permanent" but "temporary", and estimated to last *six weeks*. It would therefore be of some interest to try and ascertain what could have brought about such an appreciable change in the second opinion formed after an examination which took place 21 months later.

When Mr. Hugh's attention was drawn to this first certificate with a prognosis of temporary incapacity of six weeks, his answer was:

"My evidence that he has a permanent incapacity is based on his complaints in October 1966, when I found he was still suffering".

Then he went on to explain:

"I examined his leg for numbness or anaesthesia of the leg and found it to be correct. The burning is subjective whilst anaesthesia is objective . . . he was still complaining of the burning and numbness, which in my opinion was due to pellets embedded in the nerves . . . I thought his condition would have resolved completely, but from my latter examination it was not so as he had nerve lesions".

The workman's complaints of burning and his reaction to the examination for numbness must have materially influenced the variation in his second opinion, so that his truthfulness and consistency would become material factors in determining whether Mr. Hugh may not have been misled by ill-founded complaints of burning, or "reactions" to tests for numbness, which were not genuine. The relevance of the magistrate's estimation of his veracity must then assume some importance.

The workman's evidence, coupled with his demeanour in the witness-box, had led the magistrate to the conclusion that he was a witness who was "untruthful" and "not only evasive in answering questions, but was inconsistent". The magistrate used as an example his evidence when he said: "Since 1964, I have not earned money. I have never tried to get employment from the time of shooting until now because I did not feel fit'. But later, the witness was forced to admit that in 1966 he did work at Mon Repos as a watchman and was paid \$6.00 per night working three nights per week for three weeks, and that he had assisted his cousin in picking fruits at her farm at No. 2 Canal.

Further, it appears from the record that when he was cross-examined by Mr. Farnum as to whether his signature was not on a certain document, with a view to laying the foundation for showing that Mr. Stracey's appointment as a medical referee was properly done in accordance with the requirements of the ordinance, he swore that he had never seen a document like that before. He was shown another document and asked a similar question as to his signature being on that document. His answer was: "I am not certain

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if this is my signature on this document. I did not say that I believed this signature to be mine". The magistrate proceeded to note—"The court heard the witness say that he believed that signature on that document to be his". The workman further said: "If it is my signature. . . I would not be able to say how it got there. . . I would not say distinctly that I did not sign".

Such answers and other matters which appear, fully justify the magistrate's pronouncement that the witness was untruthful, evasive and inconsistent. When, therefore, Mr. Hugh's second opinion was based on complaints which came from such a witness, the judicial mind would be alerted to the thought of how far that opinion should be accepted at face value, especially when it differs so materially from the first opinion. Further, it is pertinent to observe that the workman did not return to Mr. Hugh until 21 months after the first examination at a time when Mr. Stracey had left the country; he was aware that his first proceedings for compensation was withdrawn since the 1st April, 1965, was without periodic payments since 24th July, 1964, and yet never filed the present proceedings until December 1965; at first he swore that he never earned money or had employment since 1964, no doubt to support the aspect of his incapacity, when it turned out to be otherwise; and it was more than 26 months after his periodic payments had ceased that for the very first time he had an examination which purported to reveal the existence of any permanent incapacity.

In this somewhat disturbing background, one can hardly avoid the question: Would a workman who is *genuinely* suffering from the handicap of 60% permanent partial disability and who is without the benefit of periodic payment endure the hampering effects of his misfortune for over two years before returning to his medical adviser and instituting the present proceedings?

Was it not a reasonable exercise of judicial discretion for the magistrate, under the circumstances, to ask for a referee's report as to whether the workman was under any such disability as to entitle him to have compensation? Could it be said that he did not fairly consider the particular case before him and honestly form his opinion? A discretion when applied to the court means a *sound* discretion. It must not be "arbitrary, vague and fanciful, but legal and regular". (See *Rex v. John Wilkes*, 1770 4 Burr. 2528). It must be according to the rules of commonsense, reason and justice, and if there is a miscarriage in the exercise of it, it will be reviewed. (See *Gardner v. Jay*, 29 Ch. D. 50 at p. 58).

Let me then look at the magistrate's reasons for decision. Three aspects emerge:

(1) He disbelieved the workman on his evidence that he was "presently getting pain from the knee down, with numbness and burning, or that he feels pain when he puts pressure on his foot".

In my view, this disbelief in the existence of numbness and burning really calls into question the accuracy of the medical opinion based on these symptoms.

(2). Then he said, "Although Doctor Stracey was not called as a witness, the court in view of its finding of fact of the workman, accepted the medical opinion of Doctor Stracey in preference to that of Doctor Hugh".

This seems to indicate that he did not find favour with the evidence of Mr. Hugh, whose evidence as to permanent incapacity was in a certain way based on the complaints in October 1966 of an "untruthful" workman. But, whilst he may have been disposed to accept Mr. Stracey's opinion in preference to Mr. Hugh, although Mr. Stracey was not called as a witness, it is a fact that he did not do so, and instead left it for Dr. Bissessar's opinion to hold sway. The effect of what he did was to leave all medical opinions behind and invite the aid of a fresh medical opinion to give him confidence in deciding a material issue which was causing him concern.

(3) Lastly, in his judgment he said that he felt it was desirable to obtain a report of a medical referee "as it was clear from the evidence that there were pellets in the right thigh, and the presence of such pellets led to conflicting opinions between Doctor Hugh and Doctor Stracey".

In view of the assumption previously made to treat Mr. Stracey's certificate as a nullity for the purpose stated, I do not propose to examine this aspect of the magistrate's finding, as it is my endeavour to look at the case as though Mr. Stracey's certificate never existed. Nevertheless, I consider the cumulative effect of the magistrate's findings at (1) and (2), together with the other circumstances and factors which tend to discredit the workman's case, to be sufficiently cogent to justify the reference made. William Lombard in 1592 advised justices to look for two guides in the use of a judicial discretion, that is, that the law must permit it, and the present case require its exercise. In my opinion, heed was duly paid to this advice in what the magistrate did.

Indeed, if on the magistrate's findings and the existing circumstances there had not been a reference to a medical referee, an appellate court may well have considered that the magistrate did not exercise his discretion judicially in not calling in aid s. 34 when the circumstances created and demanded the necessity for such a reference.

The effect of any attempt to deprive the magistrate of the opportunity of a reference in the instant case when he was not happy about Mr. Hugh's second opinion would result in forcing an acceptance of that opinion on him after findings of fact within his purview, which did not provide the basis for such an acceptance.

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Indeed, the magistrate was rewarded in his quest for another opinion to solve the problems which confronted him. Dr. Bissessar, in resorting to an x-ray of the affected area, was authoritatively able to pronounce that the pellets were "in the soft tissues of the right thigh". This confounded what Mr. Hugh had thought (from the symptoms of burning and numbness)—that they were "embedded in the nerves". There was then no foundation for the belief that there was any permanent incapacity. Whatever temporary incapacity there may have been had ceased.

In acting upon this conclusive certificate which, in my opinion, was properly obtained and received in evidence according to law, the magistrate rightly dismissed the workman's claim. It does not then become necessary to decide the other argument pressed by Mr. Farnum, Q.C., for the appellants, that, in law, Mr. Stracey's certificate tendered by consent did have some evidential value, even if not conclusive, as the certificate of a medical referee. As I have said already, even if Mr. Stracey had not given a certificate, sufficient had emerged from the circumstances of the case, and the findings of the magistrate, to require a reference to a medical referee for the determination of an important aspect of a medical character to decide a material issue in the case, which showed the workman's claim to be without foundation. I do not comprehend the existence of valid grounds for disturbing the exercise of the magistrate's decision.

The appeal will be allowed. The order of the Full Court is set aside and the appellants will have their costs in the Full Court and in this Court taxed.

CUMMINGS, J.A.: The respondent in this appeal (hereinafter referred to as "the workman") claimed compensation from his employers in accordance with the provisions of the Workmen's Compensation Ordinance, Cap. 111 (hereinafter referred to as "the ordinance"). The undisputed evidence before the learned magistrate was, that on the 17th May, 1964, while performing the duties of a watchman at Pln. Non Pareil, owned and operated by the appellants (hereinafter referred to as "the employer"), he was, in the course of his employment, shot by someone on the right thigh. As a result, he was hospitalised at Georgetown Hospital for seven days. After his discharge therefrom, he was admitted a patient at Lusignan Estate Hospital where he remained for two weeks. After his discharge therefrom, he took treatment at the employer's dispensary at Enmore.

On the 14th July, 1964, he saw Dr. Beadnell, the employer's doctor, who recommended light work but refused his request for transportation to and from the estate. It was not proved that he was given a certificate by the doctor in accordance with the provisions of the ordinance, and this doctor was not called at the hearing of the application.

On the 20th July, 1964, he saw Mr. Hugh who issued a certificate in Form 16, in which he stated that the applicant was temporarily disabled and recommended six weeks' leave.

On the 28th July, 1964, the workman, by agreement with the employer, applied to the Commissioner of Labour for the appointment of a medical referee. The latter examined the applicant on the 6th August, 1964, and found that his incapacity was nil, and issued a certificate accordingly.

No evidence was led to prove that Mr. Stracey was a referee chosen by both parties in accordance with s. 43(2) of the ordinance. Nor did this doctor give evidence at the hearing.

Mr. Hugh, however, was called by the appellants. He said that he was a medical practitioner and a Fellow of the Royal College of Surgeons. In his evidence-in-chief, he said:

"He had come to me on 20.7.64. I again saw him 31.10.66, and I examined him and found that he had multiple scars of four (4) shots in his right thigh. In my opinion the burning and numbness below his knee is due to the embedding of pellets in his nerves. I assessed him at 60% permanent partial disability as the condition is incurable and I took into consideration his occupation as a cane-cutter and also—of earning capacity".

In the course of his cross-examination, he tendered, by consent, the certificate which he had issued on 20th July, 1964, and said:

"My evidence that he has a permanent incapacity is based on his complaints in October, 1966, when I *found* he was still suffering".

And under re-examination:

"I *examined* his leg for numbness or anaesthesia of the leg *and found it to be correct. The burning is subjective whilst anaesthesia is objective.* I had suggested physiotherapy as I thought it would improve his condition to a point. I *felt then* that his condition was not permanent as he had swelling and hardness of the right quadriceps muscles of the thigh, *but when I saw him about a year after*, injuration of hardness of the muscles had not got better but he was still complaining of the burning and numbness which, in my opinion, was due to pellets embedded in the nerves. The first time I had seen him was on 20.7.64, which is about two (2) months after the alleged injury and then I gave Ex. "A" when I recommended six (6) weeks. I *thought then* his condition would have resolved completely, *but from my later examination it was not so*, as he had nerve lesions".

Mr. Stracey's certificate was, by consent, admitted in order to avoid formal proof by the Commissioner of Labour of the fact of the reference to him and that he had duly issued the document. Nevertheless, the learned magistrate, although not treating it as the final and binding certificate of a medical referee, attached to it such evidential value as to enable him to find that there were "conflicting opinions between Mr. Hugh and Mr. Stracey". He then proceeded to use this finding as a basis for the exercise

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of his discretion to appoint a medical referee in accordance with the provisions of s. 34(2) (i) of the ordinance.

In the course of his reasons for decision, the learned magistrate said:

"There was no agreement as to the *choice* of a Referee within a specified time and so the court appointed Doctor Bissessar as Medical Referee and he found that the 'incapacity of the said Gersham Bacchus has ceased (except for pellets in soft tissues.)' After Doctor Bissessar had sent his certificate in Form No. 20 which the court read, the court invited either party who is not satisfied with the Medical Report to have Doctor Bissessar available for cross-examination. The matter was adjourned for such purpose, but Doctor Bissessar sent a Medical Certificate that he was not well, and the matter was disposed of being marked dismissed on 14.7.67."

The workman appealed to the Full Court on several grounds, but the arguments centred mainly on the following submissions:

- (a) The reference by the Commissioner of Labour to Mr. Stracey as a medical referee was a nullity.
- (b) The learned magistrate had erred in accepting and acting on the contents of Mr. Stracey's report as evidence.
- (c) The learned magistrate had no jurisdiction to refer the matter to Dr. Bissessar as a medical referee.

The Full Court upheld these submissions and allowed the appeal, set aside the judgment and order of the learned magistrate, and further ordered that the periodic payments of \$100.00 per month to the workman should continue as from 24th July, 1968, for a period of five years or until the incapacity had ceased, whichever should be sooner, and fixed the workman's costs in that court and in the court below at \$31 and \$75, respectively.

The employer now appeals to this court on the grounds that the Full Court erred -

- (1) in holding that the reference by the learned magistrate to Dr. J. Bissessar as a medical referee was, in the event which had happened, a nullity;
- (2) in finding in the events which had happened the learned magistrate had no jurisdiction to refer the respondent to a medical referee;
- (3) in awarding to the respondent periodic payment of \$100 per month from the 24th July, 1964, for a period of five years until the incapacity ceases, whichever is the shorter, having regard to the evidence which was led in the court below;
- (4) in reversing the decision of the magistrate on the grounds hereinbefore stated;
- (5) in not remitting the matter back to the magistrate.

During the hearing before the learned magistrate, counsel for the workman had objected to the admission in evidence of Mr. Stracey's certificate on the ground that the statutory conditions for its acceptance as a certificate of a medical referee had not been fulfilled, and that as such it was a nullity and consequently inadmissible.

The learned magistrate, in admitting the certificate, recorded:

"This is to facilitate the respondent as not to call the Labour Department to prove these facts".

"These facts" could only mean facts which the Commissioner of Labour was competent to prove, and it is clear that he was not competent to prove the truth of the contents of the document.

Before this court, counsel stated that, after objecting, he had consented to the admissibility of the document merely for the purpose recorded, and not as any admission as to its contents. This was not disputed by counsel for the employer. The magistrate's note speaks for itself, and in the circumstances compels me to accept this statement.

It is quite clear that there was non-compliance with the statutory provisions of the ordinance with respect to Mr. Stracey's appointment as medical referee. It is trite law that such non-compliance rendered his certificate invalid as that of a medical referee.

As SLESSER, L.J., 29 B.W.C.C. succinctly put in *Hall v. Ladyshore Coal Co. Ltd.*,:

"It is contended for the employers that, as the certificate was not impugned, and as the judge proceeded to give judgment on the basis that the referee's certificate was valid—or, to use the judge's own words, that he accepted it—and that it was a conclusive finding of fact at a certain time, the court cannot consider the ground which is now urged by the respondent for upholding the judge's decision.

That view is, in my opinion, contrary to principle. Where a court is without jurisdiction to entertain a particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction on the court. A great number of cases, which it is unnecessary to discuss here, are cited for that almost elementary proposition at p. 532 of Volume 8 of the 2nd edition of Halsbury's Laws of England. The proposition there stated is that the consent of the parties cannot confer jurisdiction on the court to consider any particular matter. The matter which the county court judge considered, wrongly, was this final certificate. Although the judge held that it was only final and conclusive with regard to the workman's condition up to a certain time (for he thought that, after that time, it was open to him to consider whether there had been a recrudescence of disability arising from the original accident), yet, in my opinion, no consent or acquiescence by the parties could make this invalid cer-

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tificate into a valid one, so that the judge had no right to look at this certificate at all."

"The appeal fails for the reason, and for the reason only, that the judge had no jurisdiction to look at this medical referee's certificate at all, because the requirements of s. 12 not having been complied with by the employers, they therefore had no right to terminate the weekly payments which they were making on the basis of partial incapacity at the time when they served the notice under s. 12".

Could Mr. Stracey's certificate then have any evidential value? The answer appears at para. 2053 on p. 855 of the 10th Edition of PHIPSON ON EVIDENCE where the learned author states:

"If inadmissible evidence has been received (whether with or without objection), it is the duty of the judge to reject it when giving judgment; and if he has not done so, it will be rejected on appeal, as it is the duty of courts to arrive at their decisions upon legal evidence only; a party may, however, by his conduct at the trial, be precluded from objecting to such evidence".

No conduct of the workman so precludes him—in fact, he expressly, through his counsel, objected to the evidence.

The certificate was, therefore, of no evidential value.

There is no doubt whatever that s. 34(2) (i) of the ordinance confers on the magistrate a discretion to refer "any matter of a medical character which seems material to any question arising before him in the course of the proceedings before him" to a medical referee, but that discretion is a judicial discretion and must be exercised in accordance with well-established principles. If a Court of Appeal finds that a magistrate or trial judge failed to take into account facts and/or circumstances which he ought to have considered, or took such things into account when he ought not to have done so, for the proper exercise of the discretion, it will interfere and, if necessary, set aside the judgment.

First then, what matters of a medical nature did the learned magistrate have before him?

He could not look at Dr. Beadnell's certificate—in fact, no attempt was made to tender it, although the workman admitted that that doctor had recommended light work. He could not look at Mr. Stracey's certificate for reasons already mentioned.

At the end of the day, therefore, as the Full Court found, all the legal medical evidence before him was the clear, reasonable, unambiguous and uncontradicted evidence of Mr. Hugh. It is patent from his judgment that he came to the conclusion that he could not rely on Mr. Hugh's evidence because that was based upon the complaints of the workman whom he found to be untruthful.

But this is an erroneous conclusion founded upon a misdirection of himself, because Mr. Hugh said that as a result of the workman's complaints he '*found*' him to be suffering as he described, and he said that his finding of anaesthesia was based on an objective examination of the workman. Nowhere has this been contradicted or even challenged. After thus having misdirected himself, the learned magistrate stated the basis for the exercise of his judicial discretion in the terms already referred to earlier in this judgment but repeated here verbatim for convenience:

"Although Doctor Stracey was not called as a witness, the court, in view of its finding of fact of the workman, accepted the Medical opinion of Doctor Stracey in preference to that of Doctor Hugh. But Doctor Stracey's certificate was dated.

"As it was clear from the evidence that there were pellets in the right thigh, and the presence of such pellets having led to conflicting opinions between Mr. Hugh and Mr. Stracey, the court felt it was desirable to obtain a report of a medical referee".

It is this misdirection of himself with regard to the evaluation of Mr. Hugh's evidence, coupled with his taking into consideration the inadmissible contents of Mr. Stracey's certificate that formed the basis of the exercise of his discretion.

Moreover the parties had, by agreement, elected to have the medical aspect of the litigation settled by a medical referee appointed by the Commissioner of Labour. This had proved abortive because of non-compliance with the statutory provisions. It was not then open to the learned magistrate, without the consent of the parties, to descend into the arena and chose another method of determining this issue—and counsel for the workman strongly objected to this course.

The learned magistrate seems to have further misdirected himself by overlooking this objection as, in his judgment, he dealt with the matter as if it were merely "no agreement as to the *choice* of a referee".

I have carefully evaluated all the evidence in this case and can find no reason for disturbing the Full Court's conclusion, as there was no proper basis for the exercise of the judicial discretion conferred upon the learned magistrate by s. 34(2) (i) of the ordinance. The duty of an appellate court, in these circumstances, defined as it is in numerous authorities, is to intervene and avoid this improper exercise of discretion. (Vide *Agnes Butler v. Pln. Versailles & Schoon Ord. Estate Ltd.*-No. 4 of 1968, and the authorities therein cited). In that case, LUCKHOO, C. (ag.) delivering the judgment of this court said at p. 16 et seq.:

". . . 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.

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"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"

In this case it is the converse; clear uncontradicted evidence was before the court and that ought to have been acted upon.

I ought not to pass from this judgment without commenting on a reason advanced by the Full Court for the conclusion to which it came. That court said:

"When, therefore, the magistrate purported to act under s. 34(2) and to refer the matter to Dr. Bissessar as medical referee, there was no basis for so doing *as there was then no conflict of medical opinion on the record*, he was left simply with the evidence of Dr. Hugh and the admission by the appellant that Dr. Beadnell had recommended light work. The reference to Dr. Stracey was clearly null and void and the further reference to Dr. Bissessar of no effect".

In my view, conflicting evidence is only one of the circumstances which will justify the exercise of the discretion; there may be others. It is unnecessary to discuss these here, but sufficient only to mention one example—the case where compensation is sought but no medical evidence is tendered, in which case the court may wish to be advised and could exercise the discretion. At any rate, the appeal is from the judgment of the Full Court, and not from the reasons therefor.

Accordingly, I would dismiss the appeal, confirm the judgment and order of the Full Court, and order the appellants to pay the cost of this appeal.

CRANE, J.A. (ag.): The facts of this case have been fully and accurately set out in both the preceding judgments. It will therefore be unnecessary for me to do so again. As I see it, the crux of the matter lies in the meaning to be given to the following note which the learned magistrate appended as his reason for the admission by consent of the medical certificate of Mr. Stracey (Ex. "E") on the 16th February, 1967:

"This is to facilitate the respondent as not to call the Labour Department to prove these facts".

It appears to me that the magistrate's note is in clear and unambiguous terms and leaves no room for doubt about the intention of the parties on February 16, when they consented to the admission of that medical certificate into evidence. At that time the case for the applicant had already been closed but was re-opened, presumably at the request of counsel for the employers who wished to and did in fact cross-examine the applicant further. It was thereafter that Ex "E" was tendered and admitted as stated and the proceedings adjourned; but immediately on their resumption on February 20, 1967, counsel for the employers closed his case, whereupon a request was made by the workman's counsel that Mr. Stracey be called in support of the certificate, but the latter was no longer in the country. In my view, it was most unfair to the employers at that stage for the workman to request that course on February 20 after having agreed on February 16 to the admission of Ex. "E" particularly as the circumstances unequivocally pointed to no other reason than the fact that consent had been given to have its contents unreservedly admitted in evidence. For aught that is known counsel's request for the presence of Mr. Stracey on February 20, after the close of his opponent's case may have been due to the fact that he well knew that the doctor was not available.

As I view it, the above reason, as recorded by the learned magistrate, seems to have unfolded and expressed in no uncertain manner that it was contemplated by the parties that the "respondent(s)", i.e., Messrs. Enmore Estates Ltd., would have been required to prove in evidence the reference of the workman to Mr. Stracey and to put in the certificate which, by Reg. 48(b), "the Court may accept as *prima facie* evidence of the facts therein stated". To do so, they would have been obliged to call someone, most likely Mr. L. A. Dyal, who signed and certified it on behalf of the Commissioner of Labour. Therefore, in order to obviate the requirement, it was agreed by them to have a copy of the certificate put in to facilitate the respondents' proof of its contents.

If I am correct in the view that the contents of the medical certificate were properly admitted by consent, then I believe they became *prima facie* evidence in the case on February 16, and no expression of desire on the part of the workman on February 20 to have Mr. Stracey give evidence in support of it when the respondents had closed their case, could nullify

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what had been unreservedly and unqualifiedly admitted in proof of its contents by consent on February 16. Therefore there could be no legitimate attack at the address stage on the admissibility of the medical certificate for non-compliance with the provisions of s. 43(2) of the Workmen's Compensation Ordinance, Cap. 111, after that time when the employers were in no position to counter the allegations of invalidity raised against it. In my opinion, Ex. "E" was properly admitted into evidence. I believe there was ample justification for the magistrate's view, which the Full Court rejected, namely that a conflict between Mr. Hugh's oral testimony and the evidence of Mr. Stracey's certificate, which called for the application of s. 34(2) of the ordinance, the former having testified to a 60% permanent partial incapacity and the other to a nil return in that respect.

In my view, conflicting medical opinions are matters material to the question of the validity of a claim for compensation; they are within the embrace of s. 34(2) and are eminently suitable for submission by the magistrate to a medical referee. This the learned magistrate did when, in the exercise of his discretion, he submitted the matter to Dr. Bissessar as medical referee for his report after failure of the parties to come to an agreement as to the choice of one. It was as a result of that report of the cessation of the workman's incapacity that the claim was dismissed by the learned magistrate. So that, contrary to the view of the Full Court, there was indeed a basis for the submission to Dr. Bissessar.

For the above reasons, I agree that this appeal should be allowed and the order proposed as to costs by the learned Chancellor.

*Appeal allowed.
Judgment of the Full Court reversed.*

RE APPLICATION BY WILLIAM CHICHESTER

[High Court (Chung, J.) February 3,11,1969]

Certiorari—Departmental charges against Crown servant—Breach of departmental orders—Natural justice.

Crown servant—Dismissal.

The applicant, an employee of the Transport & Harbours Department was charged departmentally with misconduct. He was notified of the grounds on which it was proposed to dismiss him and requested to state the grounds on which he relied to exculpate himself. The applicant did not set out any grounds but said that he was innocent and wished to reserve his defence for the "inquiry". He was dismissed by the General Manager of the department, the respondent, who had power under statute to dismiss, subject to departmental orders. Two sets of departmental orders were in force, one requiring the holding of an inquiry and the other, under which the respondent was said to have acted, required that the employee shall have adequate opportunity for making his defence. No inquiry was held. The applicant moved for the issue of a writ of certiorari.

HELD –The respondent was required to act in a judicial manner. There was a breach of the rules of natural justice because the respondent knew that the applicant was awaiting an inquiry and did not inform him that no inquiry would be held, thus denying him an opportunity of being heard in his defence.

Order absolute.

B. E. Gibson for the applicant.

E. Beharry for the respondent.

CHUNG, J.: The applicant was employed as Deck Hand on Board the S.S. "Lady Berbice", a vessel in the service of the Transport and Harbours Department up to and including the 20th July, 1968.

On the 3rd September, 1968, he was charged that on the 25th July, 1968, at approximately 2300 hours whilst being a member of the crew of the S.S. "Lady Berbice", en route for Pomeroon River:–

- (a) Used indecent language in the presence of passengers which included a Sister of Mercy;
- (b) behaved disorderly in the presence of passengers and being abusive to Sister Carmen Sita of the Convent of Mercy who was a passenger;
- (c) threatened Mr. Clarke during an investigation by the Master of the vessel due to complaints received against him.

He was notified of the grounds on which it was proposed to dismiss him and was requested to send in to the General Manager the grounds on which he relied to exculpate himself. The applicant did not set out the grounds on which he relied to exculpate himself but informed the General Manager that he reserved his defence for the enquiry.

On the 25th November, 1968, the General Manager sent a letter to the applicant stating–

"On 3rd September, 1968, you were charged as follows–

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That on Thursday 25th July, 1968, at approximately 2300 hours whilst being a member of the crew of the S.S. "Lady Berbice" en route for Pomeroon River –

- (a) You used indecent language in the presence of passengers which included a Sister of Mercy.
- (b) Behaving disorderly in the presence of passengers and being abusive to Sister Carmen Sita of the Convent of Mercy who was a passenger.
- (c) Threatening Mr. Clarke during an investigation by the Master of the vessel due to complaints received against you.

2. Your defence to the effect that you were innocent of the charges and were reserving your defence for an enquiry which may be held is merely an endeavour on your part to see how best you can extricate yourself from the morass in which you have found yourself since there is written evidence to the effect that you did approach Sister Carmen Sita a few days after the incident and apologised for your behaviour.

3. It is also established from the Captain's report that whilst he was investigating the complaint made by Mr. F. Clarke about your unseemly behaviour you said ' to Mr. Clarke, "If you deh good stay good, if you know wha good fo you". This is threatening language and the offence of your using threatening language to Mr. Clarke is therefore established.

4. You are guilty of gross misconduct and the type of behaviour displayed by you on the day in question to the annoyance and embarrassment of passengers as well as on the Captain's Bridge strikes at the very core of decency.

5. Accordingly, it is now my decision to dismiss you from the service of this Department with effect from 25th November, 1968, inclusive, and to debar you from further employment in this Department.

(signed) J. W. Evelyn
General Manager

cc. C. A.
P.A.

The applicant now comes to this court for an order of *certiorari* alleging in his motion that the procedure set out in the Departmental Order dated the 27th June, 1961, was not followed, that no committee for enquiry was appointed and no enquiry was held to investigate the charges made against him and that the dismissal by the General Manager was in breach of the *audi alteram partem rule*, and, therefore, a breach of the natural rules of justice.

The respondent admits in his reply that the procedure to be followed on disciplinary matters are set out in the Departmental Orders dated the 8th March, 1945, 27th June, 1961 and the 17th April, 1963. Counsel for the respondent in his arguments before the court submitted that the General Manager acted under Departmental Order dated 8th March, 1945 and was not compelled to hold an enquiry.

He further submitted that an order of *certiorari* does not lie against the General Manager by virtue of 12 (1) of the Constitution of Guyana 1966. Those Departmental orders are now directives from the Public Service Commission. He referred to the case of *R. Venkata Rao v. Secretary of the State for India in Council: Appeal Cases 1937*, p. 248. In that case:

"The appellant, who held office in the civil Service of the Crown in India as a reader in the Government Press, Madras, fell under suspicion of being concerned in a leakage of information in respect of certain examinations papers, and was dismissed from the service. On a claim against the Secretary of State for India in Council for damages for wrongful dismissal:—

Held, that the procedure prescribed by r. XIV of the Civil Service Classification Rules, 1920-24, made under s. 96B sub-s. 2 of the Government of India Act, was not followed at the official inquiry which preceded the dismissal. The appellant's employment, however, was not of a limited and special kind during pleasure with an added contractual term that the procedure prescribed by the rules must be observed; it was by the express terms of s. 96B held, "during His Majesty's pleasure," and no right of action as claimed by the Appellant existed. The term of S.96B assure that the tenure of office, though at pleasure, will not be subject to capricious or arbitrary action, but will be regulated by the rules, which are manifold in number, most minute in particularity and all capable of change, but there was no right in the appellant, enforceable by action, to hold his office in accordance with those rules, and he could therefore be dismissed notwithstanding the failure to observe the procedure prescribed by them.

Section 96B and the rules make provision for the redress of grievances by administrative process".

Section 12(1) of the 1966 Constitution of Guyana, p. 15 reads:

"Any power of the Governor that, immediately before the appointed day, is validly delegated to any person under the existing Orders or is deemed to have been so delegated by virtue of section 17 of the British Guiana (Constitution) Order in Council 1961 shall, to the extent that that power could be delegated under article 94 (2) or 96 (2) of the Constitution to that person, be deemed, as from the appointed day and until the Judicial Service Commission or the Public Service Commission, as the case may be, otherwise directs, to have been so delegated."

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It seems, therefore, that section 12 deals with powers delegated by the Governor but the General Manager's powers to dismiss were given under Chapter 261, section 4 which refers to the First Schedule of Chapter 261. Under the First Schedule of Chapter 261:

- (a) He has powers to dismiss but subject to such departmental orders as may from time to time be made by the Governor.

In the case of *R. Venkata Rao* mentioned before, the appellant was dismissed by the State and the rule itself stipulated that he holds office during His Majesty's pleasure but makes provision for redress of grievances by administrative process. In the present case the applicant was dismissed by the General Manager whose power to dismiss is contained under s. 4 of Cap. 261. The General Manager cannot dismiss unless Departmental Orders are complied with. The 1961 Departmental Orders read:

1. If it is represented to the General Manager that an employee has been guilty of misconduct and the General Manager is of the opinion that the misconduct alleged is serious enough to warrant proceedings with a view to dismissal, he may, if he considers it appropriate, cause an investigation to be made into the matter in accordance with the following rules:—

- (i) The employee shall by direction of the General Manager be notified in writing of the grounds on which it is proposed to dismiss him and he shall be called upon to state in writing before a day to be specified (which day must allow a reasonable interval for the purpose) any grounds upon which he relies to exculpate himself.
- (ii) If the employee does not furnish such statement within the time fixed by the General Manager, or if he fails to exculpate himself to the satisfaction of the General Manager, the General Manager shall appoint a Committee to inquire into the matter. The Committee shall consist of not less than three persons. The Chairman shall be a person possessing legal qualifications. The members of the Committee shall be selected with due regard to the standing of the employee concerned, and to the nature and quality of the complaints which are the subject of the inquiry.
- (iii) The employee shall be informed that on a specified day the question of his dismissal will be brought before the Committee and that he will be allowed and, if the Committee shall so determine, required to appear before the Committee and defend himself.

The 1945 Departmental Orders read:—

2. Where an employee is charged with misconduct, an investigation shall be made into the matter in the manner prescribed by these Departmental Orders, and the employee shall be entitled to know the whole case made against him, and shall have an adequate opportunity throughout of making his defence.

3. (1) The nature and particulars of the case made against the employee shall be communicated to him in writing.

(2) Where the case, or any part thereof, made against the employee consists of documentary evidence the employee –

- (a) shall be supplied with a copy thereof; or
- (b) shall be given access thereto and a reasonable opportunity to make a copy or to take extracts.

4. (1) There shall be served upon the employee, along with the charge, a notice that if he desires to put forward a defence, he must submit the nature and the particulars thereof within a reasonable time (which shall be specified in the notice) after his receipt of the charge.

(2) Where the case, or any part thereof, against the employee consists of documentary evidence, and such evidence is not supplied to the employee at the time of the service upon him of the charge, the employee shall be entitled to submit his defence, which shall be in writing, within a reasonable time (which shall be the time as specified in the notice) after the day upon which the provisions of paragraph (a) or paragraph (b) as the case may be, of Departmental Order 3(2) have been complied with.

(3) The head of the sub-department, the Office Manager or the General Manager shall have power to enlarge the time specified in the notice, and any such enlargement may be made although the application for the same is not made until after the expiration of the time so specified.

(4) The employee shall acknowledge in writing the receipt of the charge or of the documentary evidence, as the case may be, when served upon him.

(5)

(6)

(7) Where the General Manager is of the opinion, after considering all the papers in the case, that the employee has been guilty of misconduct then –

- (a) in the case of an employee holding a full time post in the Department which carries a fixed or maximum salary of not less than \$1,584 per annum, he shall submit the papers in the case, together with his report and recommendations, to the Board who may impose a fine on the employee, suspend him from duty without pay or on half-pay for a stated period, disrate him or dismiss him; and
- (b) in the case of any other employee, he may impose a fine on him and suspend him from duty without pay or on half pay for a stated period, disrate him or dismiss him, or he may submit the matter to the Board for its decision.

It seems, therefore, that the General Manager is not compelled to hold an inquiry but the first step of the procedure in both Departmental Orders is

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more or less the same. That the particulars against him be communicated to him in writing and for the defendant to furnish particulars. Under the 1961 Departmental Orders, if no particulars are supplied by the workman a Committee shall be appointed to enquire into the matter.

In the present case the applicant was notified of the grounds on which it was proposed to dismiss him and he was requested to submit to the General Manager the grounds on which the applicant relied to exculpate himself. Those grounds were not supplied but the applicant informed the General Manager that he reserved his defence for the enquiry. The General Manager did not inform the applicant that he was not holding an enquiry but dismissed him without hearing the defence. In those circumstances the applicant was led to believe that an enquiry was to be held.

Even if the General Manager was acting under 1945 Departmental Orders, he did not strictly comply with Rule 3(2) which states that where the case or any part thereof made against the employee consists of documentary evidence, the employee (a) shall be supplied with a copy thereof; or (b) shall be given access thereto and a reasonable opportunity to make a copy or to take extracts."

Rule 4(2) states:

"Where the case, or any part thereof, against the employee consists of documentary evidence, and such evidence is not supplied to the employee at the time of the service upon him of the charge, the employee shall be entitled to submit his defence, which shall be in writing, within a reasonable time (which shall be the time as specified in the notice) after the day upon which the provisions of paragraph (a) or paragraph (b), as the case may be, of Departmental Order 3(2) have been complied with."

The letter dated 25th November, 1968, shows that evidence used against the applicant was written evidence. He was not supplied with a copy nor was he given access thereto. There is no doubt, therefore, that the General Manager did not act strictly under 1945. He was notified by the applicant that he reserved his defence for the enquiry but did not inform the applicant that no enquiry was to be held. He indirectly misled the applicant into a false sense of security that an enquiry was going to be held.

A body invested by statute with jurisdiction and persons who have entered into contractual relationship with it is subject to *certiorari* and in most cases where no redress for grievances is provided for, the court would grant *certiorari*. Both the 1945 and 1961 Departmental Orders show that the General Manager must act in a judicial manner and they make no provision for the redress of grievances.

In *R. v. Lymphe Airport Chief Immigration Officer Ex Parte Amrik Singh* (1968) 3 A. E R p. 163, the appellant was refused admission into England and the court set aside the order of refusal on a motion for *certiorari*. Lord PARKER, C. I, at p. 166, said: "This court is, as I have said many times, not a Court of Appeal; it is not for this court to sub-

stitute any decision in the place of that of the immigration officer or of the Home Department, but merely to see that, as is sometimes said, the Act has been administered fairly and in this particular case has been properly construed by those dealing with the matter."

The General Manager did not strictly comply with the 1945 Departmental Orders in that a copy of the written evidence was not supplied to the applicant nor was he given access to it.

He indirectly led the applicant into thinking that an enquiry would have been held, and thus the applicant was denied an opportunity of being heard in his defence.

In *Caesar v. British Guiana Mine Workers' Union* (1961) 3 W.I.R., p. 508,

"At a meeting of the executive council of the defendant Union held on January 17, 1959, a resolution was moved and passed that the plaintiff, a member of the Union and of its executive council, be expelled from the Union. No notice of the meeting had been sent to the plaintiff, nor was he informed of the allegations made against him or given any opportunity of being heard in his defence. The executive council purported to act under a rule which provides, *inter alia*:

- (a) that the council may expel from the Union 'any member who is proved to the satisfaction of the council to have been guilty of conduct prejudicial to the interest of the Union'; and
- (b) that any member so expelled 'shall have the right to appeal to the delegates conference, whose decision shall be final.'

The plaintiff claimed a declaration that his expulsion was *ultra vires*, and an injunction restraining the enforcement of the resolution.

Held: (i) The plaintiff was entitled to know what charge was made against him and to have an opportunity to be heard in his defence;
 (ii) the procedure adopted went to a matter of substance and was not a mere irregularity;
 (iii) the expulsion of the plaintiff was *ultra vires*.

At page 514, FRASER, J., as he then was, states:

"Any tribunal or body of persons such as the executive of the defendant Union which does not act in accordance with the principles of natural justice as expressed in the decisions, and as I have repeated, is acting *ultra vires* because rules of societies or associations cannot expressly or by implication sanction a procedure contrary to the principles of natural justice."

In the circumstances I have no hesitation in making the Order absolute.

Order absolute.

R. v. PETER RICHARD OSBORNE

[Court of Appeal (Luckhoo, C. (ag.), Persaud, J.A., Crane, J.A. (ag.),
January 6, February 14, 1969.]

Criminal law—Evidence—Similar facts—Evidence tending to prove mens rea—Discretion of Judge to disallow—Use to which evidence may be put—To refute defence—Application of proviso.

The appellant was convicted on 15 counts of an indictment charging him with falsification of accounts contrary to section 208(b) of the Criminal Law Offence Ordinance, Cap. 10. The particulars of offence tell of 15 instances when the appellant, a clerk in the government service, made or concurred in making false entries in specified time sheets and pay lists purporting to show that various sums of money were due to one "M. Thomas" as wages for various weeks from January to July, 1966. The Crown not only tendered those pay lists which concerned the indictment but also 29 others similarly purporting to show that various sums were due to "M. Thomas" as wages for other periods in 1966. They were all in the handwriting of the appellant.

HELD: that the evidence of the 29 other transactions was properly admitted as similar fact evidence and there was no reason for its expulsion on discretionary grounds; that the jury should have been told that the similar fact evidence is designed to serve a limited purpose to refute a defence, and cannot be used absolutely on its own to found a verdict; that the evidence in support of the indictment was overwhelming and despite the omission to give the necessary direction there was no substantial miscarriage of justice and the proviso would be applied.

Appeal dismissed.

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

J. C. Gonsalves-Sabola, Assistant Director of Public Prosecutions for the Crown.

LUCKHOO, C. (ag.): The appellant was convicted on each of 15 counts of an indictment charging him with falsification of accounts, contrary to s. 208(b) of the Criminal Law (Offences) Ordinance, Cap. 10, and was sentenced to three years' imprisonment on each, the sentences to run concurrently.

The particulars of offence, in effect, tell of fifteen instances when the appellant, as a clerk to the Government of Guyana, with intent to defraud, made or concurred in making false entries in specified time sheets and pay-lists belonging to the said government, his employer, purporting to show that various sums of money were due to one "M. Thomas" as wages for

various weeks, from that ending 29th January, 1966, to that of the 30th July, 1966.

The Crown, in support of its case, not only tendered those paylists which concerned the indictment, but also twenty-nine others, similarly purporting to show that various sums were due to "M. Thomas" as wages for other periods in 1966. They were all in the handwriting of the appellant.

The main grounds of appeal question the admissibility of these 'other' lists; their acceptance in evidence as a matter of course, without any apparent consideration of their probative value and/or prejudicial consequences and without any direction of any kind as to their evidential value.

It would appear that all the evidence now questioned was put in at the preliminary enquiry stage with counsel who appeared for the appellant at the trial (on all but the first day) in attendance. No objection was there raised, neither was there any at the trial.

The case for the Crown went this way: A number of persons employed at the central workshop of the Ministry of Works and Hydraulics had to be paid weekly. Those persons would be known to the time-keeper—in this case one Gardner, who performed that function for the whole of the year 1966, the material time in this case. His duty was to check the arrival of the workmen in the morning and after lunch. From his time-card he would write out a daily time-slip for each workman who reports for duty. His time-slips record the time the workman arrives at work, the type of work done and the job number. At the end of the day the foreman would certify the time-slips prepared by him by signing them. He would hand the time-slips to the costing clerk—then one Neville Giles—for the purpose of preparing other records, and afterwards to the appellant, as paysheet clerk, to prepare the paylists. Overtime slips similarly prepared would be certified by the foreman and then the Engineer.

In the year 1966 Gardner had no occasion to make out any time-slips for anyone by the name of "M. Thomas" as there was no workman, nor anyone known to him, by that name. So that he never prepared any time or overtime slips for any such person, nor entered that name on any time-card or in any time-book. The time-book is kept to record the names of the men who work in the yard. He knew the names of all the workmen working at the workshop, as anyone so employed would be introduced to him with his classification rate of pay and job number. For the whole of 1966 no time-slip was made out by him for or in the name of "M. Thomas".

Neville Giles was able to confirm that he received no time-slip in that year from the time-keeper with the name of "M. Thomas". Also, George Rutherford, a Class I Clerk from the personnel division since 1961, further disclosed that "whether an employee is temporarily or permanently employed a record is kept of his employment". So that he was able to say that "during the year 1966 no one by the name of 'M. Thomas' worked at the Ministry of Works and Hydraulics". On the testimony of these persons any paylist

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with the name of "M. Thomas" as a workman purporting to show that a sum was due for payment would be false in those particulars, as no such person had worked or earned any pay; and, consequently, the inclusion of this name on any payroll for payment on any occasion would result in the Government being defrauded to the extent of the various sums paid under that name. However, this happened in 1966 on at least forty-four occasions.

When in January 1967 the police commenced investigations, the appellant, as payroll clerk who made up the payroll with this 'unknown' name, was told by an Assistant Superintendent of Police that it was alleged that he had entered the name of "M. Thomas" on paylists as a person who had worked, and payment was made although there was no person by the name of "M. Thomas". He was cautioned and he said, "I made out the payroll and I do not know who is 'M. Thomas'." He was asked from where he had got the particulars to make out the paylists and he said that he had got them from time-slips given to him by Gardner, the time-keeper. Later he was asked if he had ever seen the person "M. Thomas", and he said, "I do not think so." Then he was asked if he had ever received the wages of "M. Thomas", and he said, "I do not think so." He made a statement in writing which is as follows:

"I prepare paysheets according to daily time-slips submitted by the time-keeper, Mr. Gardner. According to these time-slips I post hours and names from the details that is written on them. These time-slips are considered official. After completing the paysheets I placed these time-slips in a cupboard. There they are left for future reference. I see the name 'M. Thomas' with rates of and his pay for week ending 4th June, 1966, for \$95.03 on paysheet 09808, also 'M. Thomas' with his rate of pay and his wages as \$36.48 for week ending 18th June, 1966, on paysheet No. 09833; on paysheet No. 09860 I see the name 'M. Thomas' and his rate of pay and wages \$77.52 for week ending 9th July, 1966, on paysheet 09870, I also see the name 'M. Thomas' with his rate of pay and wages \$63.46 for week 6th August, 1966, on paysheet No. 06314 I see the name 'M. Thomas' with his rate of pay and wages \$52.44 for week ending 30th July, 1966, and on paysheet No. 06345 I see the name 'M. Thomas' with his rate of pay and wages as \$53.44. This entry was cancelled by me. I do not know why it was cancelled. All the entries to which I have referred were written by me from the information I got from the time-slips. I do not think I know 'M. Thomas' and I do not think I have received his pay."

A search was made for time-slips in the cupboard in which they were kept to see whether any bore the name "M. Thomas", but none there bore that name.

Allan Reid, an Engineer, also said that he did not know of any "M. Thomas" who worked in the workshop in 1966. He denied that what purported to be his signature on three overtime slips in the handwriting of the

appellant, were ever signed by him, and said when he signed another over-time slip the name "M. Thomas" was not on it. He said, further, that when a certain exhibit was handed to him by the appellant on the 9th June, 1966, he observed the name "M. Thomas" on the payroll and asked the appellant who was "M. Thomas" and the appellant told him that he was working in the workshop and that he (Reid) had signed paylists for "M. Thomas" before. He asked the appellant to show him the time-slip for "M. Thomas" and the appellant told him he would go and get it. At that time the paymaster was in the yard and the appellant asked him to sign the payroll and he would get the time-slips later. He signed that payroll, but the appellant did not return with the time-slips and he forgot about the matter.

Austin, an Assistant Engineer, said that he "signed the paysheets on the presumption that everything was correct." Evidence was also given from a number of persons who performed the duties of 'paymaster' that on a number of occasions payments were made to a person answering to the name of "M. Thomas" when the appellant would initial the paysheets as having identified the person "M. Thomas". On certain occasions payment was actually made to the appellant of amounts purporting to be due for payment to "M. Thomas" on written authorisations. For example, George Saunders, acting as paymaster, identified an authorisation dated 1st February, 1966, signed by "M. Thomas, operator", which reads:

"Paymaster,

I have authorised Mr. Osborne to collect my wages on my behalf as duty makes me unavailable.

Kindly pay same to him.

(Sgd.) M. Thomas,
Operator."

On this authorisation is marked

"Paid cheque"
2nd February, 1966.
Accounts Branch,
Ministry of Works and Hydraulics."

Payment was made to the appellant on the strength of that authority, and the appellant signed the paysheet as receiving that amount.

Then Omar Hack, as paymaster, similarly paid out an amount of \$60.99 to the appellant as wages of "M. Thomas" on another authority as follows:

"Paymaster,

Please pay my wages to Mr. Osborne for me as I am unable to collect same due to work.

(Sgd.) M. Thomas,
17.2.66."

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Two other such instances appear on the paysheets, Madhu Lall, as paymaster, told of two occasions when the name "M. Thomas" was called, no one appeared, and on the following day he made payment to a person who was brought to him by the appellant who said to him, "This is the person 'M. Thomas' who was not paid yesterday." He remembered the incident because the appellant wanted him to stop paying the watchmen and pay that person whom he had brought as "M. Thomas", but he refused to do so.

Ivan Hinds, described as a Scientific Assistant attached to the Government Analyst Department, who had certain experience in handwriting identification examined certain paysheets with the name "M. Thomas" written on the left-hand corner (that is, the column for the names of the workmen). He compared that with the signature on the authorisation tendered in evidence of dates, and the specimen "M. Thomas" written by the appellant, and formed the opinion that one and the same person wrote the name "M. Thomas" on the paysheets, the duplicate paysheets, and the authorisations "T" and "W".

In answer to the case above presented, the appellant called no witnesses, did not go into the witness-box, but was content to make the following statement from the dock:

"I joined the Ministry of Works and Hydraulics on the 9th December, 1965, in the accounts department, Head Office. At 2 o'clock on the same day I was transferred to the workshop of the said Ministry. There I was told to take over as payroll clerk from Mr. Giles. My job was to record from the time-slips and overtime slips supplied by the timekeeper names and hours worked, the rate of pay of employees on the paylists. My total on the payroll must correspond with the distribution clerk's total. This has always been done. After our totals have been compared and agreed upon, the payroll is checked and passed to the Engineers for approval. After the Engineer signs, the pay-lists are then presented to the paymaster for payment.

"At the pay table my job is to call the names and witness the payments. The foreman's job is to identify the employees. I only have contact with the workers once a week, that is on pay-day. I am innocent of this charge."

I apprehend the arguments of counsel, assiduously prepared and ably presented, to cover the following ground:

When the prosecution offered, and the court accepted in evidence the other paysheets similar to the subject-matter of the indictment, as a matter of course, this constituted a transgression of the rules of evidence, as in effect it allowed written and consequential oral evidence of *outside* matters to encumber the fair trial of the appellant; that it mattered not that no objection was taken to such evidence, as the court had a primary duty to ascertain whether at that stage of admission its acceptance was justified, and, even if legally admissible, whether a discretion at law to rule out that evidence or

some of it was judicially required. Further, the court's failure to consider the exercise of its discretion constituted a vital error which deprived the appellant of the opportunity of having the evidence ruled out. And, on the defence raised, the evidence of similar facts was not admissible because

- (a) It was not relevant to any issue which was a real issue between the Crown and the accused, since the accused had admitted making the entries, and having regard to the nature of the Crown's case, if the jury found that the information was not supplied by the time-keeper, then the inference of a fraudulent intent was manifest. There was therefore no real issue on the question of intent between the Crown and the accused.
- (b) It was clear then from the circumstances of the case that there was no reasonable probability of any defence of accident or mistake or innocent mistake within the meaning of "the Makin principle" being raised by the defence.
- (c) There was no question in issue as to the identity of the person who made the entries.
- (d) The repetition of the offences with which the accused was charged was not otherwise relevant to the proof of his guilt on any of the counts of the indictment.

Finally, it was said that it was the duty of the trial judge to direct the jury properly as to the limited use and relevance of such similar facts, which he failed to do. In particular, he should have warned them strongly against treating such evidence as evidence of a criminal propensity from which alone guilt could be inferred. The jury may well have used that evidence improperly in deciding whether the accused was guilty or not of the charges laid.

I shall now proceed to consider the case in the light of these submissions.

The effect of what the appellant had said, orally and in his written statement to the police, was clearly intended to indicate that he was not guilty of the allegation, because he accepted information supplied to him by Gardner, as he was bound to do, in good faith and in so doing never had any intention to defraud. This then would involve the consideration of two distinct questions:

- (a) Did the appellant receive from Gardner time-slips which provided for 'M. Thomas' to be paid wages for work done, as shown in the charges of the indictment? If he did not, then the responsibility for the falsification would fall squarely on his shoulders.
- (b) If he did, this would not be an end to the matter; the further question arises: Did he know of its falsity?

The answers to these questions will tell of his innocence or guilt.

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But, first, this vital legal aspect must be examined: Was it legally permissible to bring into play paysheets other than those covered by the indictment for the purpose of answering the questions arising from and posed by the defence?

In FOSTER'S CROWN LAW DISCOURSE 1, p. 246, it is said:

"The rule of rejecting all manner of evidence foreign to the point in issue is founded on sound sense and common justice. For no man is bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life.

The principle was expressed in another way in ROSCOE'S CRIMINAL EVIDENCE, 12th Ed., p. 78, as follows:

"Where a prisoner is charged with an offence, it is of the utmost importance to him that the facts laid before the jury-should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer."

And Lord CAMPBELL in *R. v. Oddy*, (1815) 2 Den. 264, gave practical effect to what is implicit in that principle when he said:

"The law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetration of the first."

A little over forty years afterwards, Lord HERSCHELL, in the first of the two oft-quoted principles, laid down in *Makin v. Attorney General for New South Wales*, (1894) A.C. 57, what has been approved as being of unquestionable authority, when he said:

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."

This general rule has been esteemed by Lord Sankey, L.C., in *Maxwell v. Director of Public Prosecutions*, (1935) A.C. 309, as "fundamental in the law of evidence as conceived in this country". This time-honoured safeguard seeks to prohibit the use of "past misconduct" solely for the purpose of establishing the fact of an alleged "present misconduct". The decision of the Privy Council in *Noor Mohamed v. R.*, (1949) 1 A.E.R. 365, provides an excellent illustration of a principle, easy to state but which could occasion difficulty in applying. The appellant was convicted of the murder of his reputed wife Ayesha, who died from poisoning. Evidence was admitted at the trial, to which objection was taken by the appellant's counsel on the ground that it tended to show that the appellant had murdered another woman, his wife Gooriah, which was not only prejudicial but irrelevant.

The Crown contended that the circumstances attending the two deaths made evidence concerning the earlier of them relevant to the charge.

Lord DU PARCQ, at p. 370, said:

"There can be little doubt that the manner of Ayesha's death, even without the evidence as to the death of Gooriah, would arouse suspicion against the appellant in the mind of a reasonable man. The facts proved as to the death of Gooriah would certainly tend to deepen that suspicion, and might well tilt the balance against the appellant in the estimation of a jury. It by no means follows that this evidence ought to be admitted. If an examination of it shows that it is impressive just because it appears to demonstrate, in the words of Lord Herschell, L.C., in *Makin's case* ((1894) A.C. 65), 'that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried,' and if it is otherwise of no real substance, then it was certainly wrongly admitted. After fully considering all the facts which, if accepted, it revealed, their Lordships are not satisfied that its admission can be justified on any of the grounds which have been suggested or on any other ground. Assuming that it is consistent with the evidence relating to the death of Ayesha that she took her own life, or that she took poison accidentally (one of which assumptions must be made for the purposes of the Crown's argument at the trial) there is nothing in the circumstances of Gooriah's death to negate these possible views. Even if the appellant deliberately caused Gooriah to take poison (an assumption not light to be made, since he was never charged with having murdered her) it does not follow that Ayesha may not have committed suicide. As to the argument from similarity of circumstances, it seems on analysis to amount to no more than this, that, if the appellant murdered one woman because he was jealous of her, it is probable that he murdered another for the same reason. If the appellant were proved to have administered poison to Ayesha in circumstances consistent with accident, then proof that he had previously administered poison to Gooriah in similar circumstances might well have been admissible. There was, however, no direct evidence in either case that the appellant had administered the poison. It is true that in the case of Gooriah there was evidence from which it might be inferred that he persuaded her to take the poison by a trick, but this evidence cannot properly be used to found an inference that a similar trick was used to deceive Ayesha, and so to fill a gap in the available evidence. The evidence which was properly adduced as to Ayesha shows her to have been acquainted, as it were, it may be supposed, most of the inhabitants of the village in which the appellant lived, with the fact that suspicion rested on him in respect of Gooriah's death, and the theory that Ayesha was deceived into taking poison by a similar ruse to that which is supposed to have succeeded with Gooriah seems to their Lordships to rest on an improbable surmise. The effect of the admission of the impugned

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evidence may well have been that the jury came to the conclusion that the appellant was guilty of the murder of Gooriah, with which he had never been charged, and, having thus adjudged him a murderer, were satisfied with something short of conclusive proof that he had murdered Ayesha."

It would then be seen that even if there was evidence implicating that appellant criminally in causing the death of Gooriah, it would not have been competent for the prosecution to lead it in support of a charge of the murder of Ayesha, when the evidence in the latter instance did not go beyond suspicion, and was in itself incapable of establishing Ayesha's death, for in effect it would mean that the jury on insufficient evidence would be asked to find that he was responsible for Ayesha's death because he caused that of Gooriah. In my view, it would have been different if the links in the chain of circumstantial evidence had established a case of the murder of Ayesha, and the defence had said her death was due to suicide, or if on the prosecution's direct evidence of the administration of poison, the defence had said the administration was by mistake, since, in those circumstances, the evidence of Gooriah's death would have been admissible to rebut those defences on the authority of what could be described as the second principle in *Makin's case*, which is as follows:

"The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

Before this was so admirably and compendiously enunciated, evidence of "past misconduct", in cases of coining, uttering, procuring abortion, demanding by menaces, false pretences and sundry species of fraud, etc., was constantly properly admitted in proving guilty knowledge or intent, or in rebutting an appearance of innocence which the facts, if unexplained, might convey. For example, in *Reg. v. Dossett*, (1846) 175 E.R. p. 126, the prisoner was indicted for feloniously setting fire to a rick of wheat straw on 29th March 1846, by firing a gun very near to it. It was proposed on the part of the prosecution to go into evidence to show that the rick had been set on fire on the 28th March, and that the prisoner was then close to it with a gun in his hand. Counsel for the prisoner submitted that the evidence was not admissible; it was seeking to prove one felony by another, and in effect asking the jury to infer that the prisoner set fire to the rick on the 29th because he did so on the 28th. The firing of the rick on the 28th, if wilfully done, was a distinct felony. MAULE, J., ruled as follows:

"Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. In many cases it is an important question whether a thing was done accidentally or wilfully. If a person were charged with

having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to shew that he knew what the powder was because he had administered it to another person, who had died, although that might be proof of a distinct felony. In the cases of uttering forged bank notes knowing them to be forged, the proofs of other utterings are all proofs of distinct felonies. I shall receive the evidence."

Numerous other cases are readily available within the categories of fraud, false pretences, etc., in demonstration of the principle. At this stage, I would only wish to refer to one other.

In *R. v. Richardson*, (1861) 8 Cox C.C. 448, the prisoner was indicted on charges of embezzling three sums of money. Evidence was available of fifty other instances of embezzlement. Counsel objected to this being led, arguing that each such sum sought to be proved should have been subjects of other indictments. WILLIAMS, J., was of the opinion that the evidence was admissible. He said:

"I shall ask the jury whether they are of opinion that the wrong castings in the wages book, and the false entries in the cash book, are the results of error or design."

It will be deduced from the above cases that one has first to come to grips with the issues on the case, and those arising from the defence, before determining the extent to which 'other' similar instances of misconduct could be helpful, in adjudication. Those instances as laid down must be —

- (a) Relevant to decide whether the acts alleged to constitute the crime charged in the indictment were designed or accidental. Or,
- (b) Relevant to rebut a defence which would otherwise be open to the accused.

Within the ambit of admissibility here contemplated, it would be difficult to improve upon STEPHEN'S definition of relevance when he said that the word "relevant" means that —

"any two facts to which it is applied are so related to each other that according to the common course of events one - either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or non existence of the other."

(DIGEST OF THE LAW OF EVIDENCE, 12th Edition, Art. 1.).

In this case a defence which was open to the appellant, and one which he actually seized upon, was that he had no *mens rea*, but innocently transmitted to the paysheets of the indictment the information which Gardner had given to him relating to "M. Thomas", which, if fraudulent, was Gardner's responsibility and not his, as his mind was an innocent one, uncontaminated with any intention to defraud.

If then those *outside* occasions of misconduct prove or render probable directly or circumstantially, that the appellant was in some way fraudulently

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implicated, or could negative the appellant's imputation as to Gardner's involvement, made with the object of demonstrating his own innocence, then those occasions would have the potential of showing or tendency to show the existence or non-existence of the requisite intention. In this way, it would be admissible and relevant in law.

I shall now proceed to examine what for convenience I shall refer to as 'the challenged evidence'. That evidence related to twenty-nine paysheets prepared by and in the handwriting of the appellant, covering a period from 7th May, 1966 to 24th December, 1966.

On the fact, which was established, that "M. Thomas" never worked nor earned money in 1966, each such paysheet took on a fraudulent appearance. But the appellant's answer was. "I do not know 'M. Thomas'. I only put his name down because I was told to do so." Does the 'challenged evidence' help to rebut this? The first matter there to be noticed is, the appellant actually initialled columns on certain of those paysheets in identification of "M. Thomas" after himself calling for a person answering *that* name to receive payment. Was he not by so initialling columns indicating that that person was known to him as "M. Thomas", and was prepared to vouch for his identification? Is it not for the jury to assess how incriminating this could be? The next stage disclosed (as already stated) that Madhu Lall, a paymaster, could not pay "M. Thomas" on two of the 'challenged' instances as there was no appearance; but, on the following day the appellant brought a person to him and told him, "This is the person 'M. Thomas' to be paid, whereupon he (Madhu Lall) made payment, and the appellant initialled the sheet. This took place on each of those two occasions.

The obvious relevance of this oral evidence in relation to those two particular incidents, was to show that the appellant was actively and openly sponsoring the fake 'M. Thomas' in a way that showed he was intimately connected with the fraud, and it also tended to negative his defence that the name 'Thomas' was supplied to him by Gardner.

Further, there was the evidence of Ronald Lloyd about the incident on the 6th October, 1966, when 'M. Thomas' did not turn up for payment, and on the following day the appellant brought *a person* to him and told him—that this was "M. Thomas" who was not paid on the previous day. On this representation that person was paid on one of the paysheets of 'the challenged evidence'.

Is this not another instance to show the appellant's active participation in the fraud? It seems to me that this conduct is the antithesis of innocence, and constitutes proof of knowledge, intention and *mens rea*.

Of even more cogent evidential value is the authorisation dated 5th November, 1966, in 'the challenged evidence' purported to be signed by "M. Thomas" in favour of the appellant to receive payment. The exhibit shows

that payment was duly made to the appellant on this authorisation. This brings the appellant as closely in line with the fraud as could be expected, and further confounds his explanation to the police, given on 13th January, 1967, two months afterwards, that he did not know "M. Thomas" and did not *think* that he "ever received his pay". Could he in a genuine transaction have forgotten the person whose authorisation he carried and whose pay packet he had received two months before, or the incident itself?

This evidence, in my view, ties in the appellant with a fraud which was systematically carried on throughout the year 1966, and makes it difficult for him to extricate himself on the pretext that he did not have the *mens rea*. At the same time, it has the effect of rendering Gardner's evidence that he never gave any time-slip with the name of "M. Thomas" to the appellant more credible by reason of the appellant's actual involvement.

But it is chiefly with the state of mind of the appellant that I would prefer to concern myself. The evidence exclusively referable to the indictment independently showed the appellant to have committed the acts charged with the intention to defraud; nevertheless it was still open to the prosecution to lead evidence to confirm the *animus* of those acts and rebut the defence raised of an innocent state of mind wholly ignorant of any falsity, provided the other acts of which evidence is tendered, are of the same kind as those in question and are connected in some relevant way with the appellant and his participation in the crime. In cases of fraud, similar transactions must as a rule have that nexus in method and circumstance with the offence charged, that takes on a similar character showing a systematic course of swindling or other fraudulent conduct.

And so, to prove that a given transaction was fraudulent, similar frauds by the same person, either prior or subsequent thereto, may be shown. Where, for example, a person is charged with fraudulently obtaining credit for board and lodging from another, evidence that shortly before he had hired lodgings from several other persons and left without paying, and that he still owed this money when he went to lodge with the other person, is admissible as showing a systematic course of conduct negating any reasonable or honest motive. (See *R. v. Wyatt*, [1904] 1 K.B. 188). In this case 'the challenged evidence' served to confirm what already clearly appeared from the other evidence in the case, *viz.*, that the facts and circumstances are consistent only with a guilty intent.

There is no room for the argument of counsel that this evidence did not concern a real issue which was actively debated. Even if Gardner supplied the information relating to "M. Thomas", the question of the appellant's complicity, if any, was still an issue to be answered. Neither is his argument that the evidence was not correctly received at the stage when tendered, of any avail. It was not (as was put) in "anticipation", of any "fancy defence". In reality, it was on a defence which was not only

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reasonably open, but was actually raised. In any event, Viscount SIMON'S opinion, in *R. v. Harris*, (1952) Vol. 36 C.A.R. 53, is not in favour of counsel's argument. There His Lordship said:

"The substance of the matter appears to me to be that the prosecution may adduce all proper evidence which tends to prove the charge. I do not understand Lord Herschell's words to mean that the prosecution must withhold such evidence until after the accused has set up a specific defence which calls for rebuttal. Where for instance, *mens rea* is an essential element in guilt, and the facts of the occurrence which is the subject of the charge, standing by themselves, would be consistent with mere accident, there would be nothing wrong in the prosecution seeking to establish the true situation by offering, as part of its case in the first instance, evidence of similar action by the accused at another time which would go to show that he intended to do what he did on the occasion charged and was thus acting criminally.

What Lord SUMNER meant in *Thompson v. Director of Public Prosecutions* (*supra*) when he denied the right of the prosecution to 'credit the accused with fancy defences' was that evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause."

The crucial words which have to be particularly noticed in this passage are the calculated reference to "all *proper* evidence", which it is warned ought not to be dragged in "*without* reasonable cause".

Further, counsel complains that the appellant lost the opportunity of having the transactions of similar fact evidence ruled out by the failure of the trial judge to direct his mind on the exercise of a discretion open to him. It cannot be denied that a judge has the right to disallow the evidence, although admissible, if the resulting prejudice is disproportionate to its probative value. (See *R. v. Straffen*, *R. v. Noor Mohamed*, *R. v. Harris*.)

An Appeal Court ought not lightly to interfere with the trial judge's exercise of discretion which he is entitled to use, if the judge there appreciated his function in that regard. When, however, no consideration at all is given to the matter, the court will be in a position to exercise its own discretion, if satisfied that the results has led to the acceptance of highly prejudicial evidence which, even if legally admissible, ought not to have been received, with the exercise of a proper discretion. (See *R. v. Fitzpatrick*, [1963] 3 A.E.R. 840 at p. 842.)

Further, in *R. v. Cook*, (1959) 2 A.E.R. 97, DEVLIN, J. (as he then was) said at p. 101:

"It is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision; but in this case we are not satisfied that the learned judge really exercised his discretion at all. He allowed the questions to be

put because he thought that counsel was strictly entitled to do so, although he, the learned chairman, queried whether it was necessary. Accordingly, it falls to us to exercise our own discretion in the matter."

If necessary, this court will not hesitate to exercise a discretion called for by the case, but unheeded by the trial judge.

Although GROSE, J., in *R. v. Inhabitants of Eriswell*, (1790) 3 Term. Rep. 707 at p. 711, did not take kindly to the notion "that rules of evidence should ever depend upon the discretion of the judges", today it has come to be accepted, as Lord PARKER, C.J., said in *Callis v. Gunn*, (1963) 3 A.E.R. 677 at p. 680. that

"In every criminal case the judge has a discretion to disallow the evidence even if in law relevant, and therefore, admissible if admissibility would operate unfairly against the defendant."

If the evidence can have only trifling weight, and the probable effect of its admission in prejudicing the accused would be out of proportion to its true evidential value, it would be unfair to allow any such evidence to gain acceptance. This rule is now regarded as irrefragable and exists to avoid harmful incursions from interfering with the essentials of justice. However, in this case there was no hint of prejudice or unfairness; instead, there was undoubted probative value in what was led, so that the question of exercising a discretion not considered by the trial judge does not now arise.

The evidence then was properly admitted and there was no reason for its exclusion on discretionary grounds.

But certainly the obligation to direct the jury as to the purpose and basis for its admission remained, and was not here discharged. In certain circumstances this could well lead to a quashing of the conviction.

If the evidence on the indictment was weak and doubtful, and the other evidence of misconduct strong and certain, then one may be left to conjecture whether the jury did not wholly reject that pertaining to the indictment and act on that outside of the purview of the indictment which would be wrong, as similar fact evidence is designed to serve a limited purpose to refute a defence, and cannot be used absolutely on its own to found a verdict. A jury then must be apprised as to how that evidence should be applied to the particular case, lest the lack of guidance should produce some miscarriage of justice.

In *Harris v. Director of Public Prosecutions* (*supra*), the following situation arose: There were eight counts in an indictment charging office-breaking and larceny at the same premises on various dates within a period of three months. There was sufficient evidence on which a verdict of Guilty could have been returned on the eighth count, but the evidence on the first seven counts mainly pointed to the existence of an opportunity to commit the crime. The judge had failed to warn the jury that the evidence called in support of the first seven counts did not in itself provide confirmation of the

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eighth count, which charged an offence on a specific date, and the case against the accused depended on the facts of that date. Viscount SIMON said at p. 59:

"The jury may well have been swayed, however illogically, in reaching its verdict of the eighth count by the earlier evidence. It should have been warned of this danger ... it was not directed to consider what part of the evidence was properly of weight in deciding its verdict on the eighth count ... if it could be said that a reasonable jury after being properly directed would, on the evidence properly admissible, without doubt have convicted on the eighth count, the proviso should be applied . . . it is sufficient to say that, in the present instance, it would be going too far to make this assumption, and the appeal must, therefore, be allowed."

The danger and difficulty of enlisting the proviso in *Harris' case* is apparent. The jury there may have utilized evidence of little, if any, probative or evidential value but heavily charged with prejudicial potentiality to reach a conclusion adverse to the accused on the only count on which there was evidence to convict. Any such misuse of evidence would be grossly unfair to the accused, and could have resulted in a substantial miscarriage of justice.

It is not the same, however, in this case.

The evidence which went to 'other' misconduct was of the same nature, character and significance as that which was charged. It may equally well have provided the basis for other counts similar to those charged. However, it cannot be disputed that what was clearly and essentially in proof of the indictment was abundantly sufficient to satisfy the burden of proof required without recourse to any other evidence. It pointed unrelentingly to a guilty participation of the appellant in the fraud of obtaining money on false pay-sheets which he had prepared, and all of the counts charged were thereby proved to the hilt. It was not in the least impaired by cross-examination, and in many vital aspects was not even challenged, as, for example, the authorisations of 1st February, 1966, and 24th June, 1966 (Exs. "T" and "W") purporting to come from the *imaginary* "Thomas" for the appellant to receive unearned payments, which were actually made to him. Neither were these authorisations explained in any way.

The evidence as it affected the indictment was overwhelming.

The court is empowered, where it considers that "no substantial miscarriage of justice has actually occurred", to dismiss the appeal although the ground of appeal as to the judge's failure to direct the jury on the similar fact evidence must be decided in favour of the appellant.

If that omission may reasonably be considered to have brought about the verdict, and if on the whole of the facts and with a correct direction, the jury might fairly and reasonably have found the appellant Not Guilty, then there will have been a substantial miscarriage of justice, because the appel-

lant will have lost the chance which was fairly open to him of being acquitted. This, however, does not appear. The only reasonable and proper verdict which can be visualized, despite the omission to give a necessary direction, is that which was returned, and so I cannot find that there was any substantial miscarriage of justice.

It does not concern this court that others, in one way or another, may have been implicated in this daring fraud. But the observation cannot be resisted that something must have been rotten in the state of safeguarding public funds, in that particular sector, which permitted an 'unknown' person who was not a workman and never earned any money, to receive payments week after week for over forty weeks in one year, some times twice above that of the other legitimate workmen by a process of concoction. The net result of this was that over \$3,000 was paid out for a period of less than one year to a non-existent workman. One shudders to think, if there are other instances, to what extent the public coffers may not have been otherwise impoverished! Eleven months after this fraud had been in progress, a clerk-in-charge of the Yard Office of the Ministry, at the commencement of his duties as such, checked to see that the names of the persons who actually worked were names of persons which were put on the payroll for payment. He checked the time-slips of workers against what was recorded on the pay-lists. He was not detailed to do this job, but he felt it should be done and did so. This was what led to the discovery of the particular fraud, and demonstrates that vigilance and honesty of purpose will reveal what indolence and connivance will suppress.

It is for the authority concerned, and other similar authorities, not only to be satisfied with the system in use, but to see that it is honoured in thought, word and deed, if public funds are not to be scandalously squandered.

I would, therefore, apply the proviso under s. 16 of the Federal Supreme Court (Appeals) Ordinance, 1958, No. 19 of 1958, and dismiss the appeal.

The conviction and sentence are affirmed.

PERSAUD, J.A.: I agree that this appeal should be dismissed, and do not wish to add to anything already uttered by my learned brothers, except that I would associate myself with the strictures made by the learned Chancellor regarding the series of fraud which this case has disclosed.

CRANE, J.A. (ag.): The accused, Peter Richard Osborne, stood his trial at the June sessions of the Demerara Assizes on an indictment containing 15 counts. Each charged that with intent to defraud he made or concurred in making false entries in certain time-sheets and paylists belonging to the Government of Guyana with whom he was employed as a pay-list clerk in the Ministry of Works and Hydraulics. The particulars in each case alleged

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that on those pay-lists were statements of various sums of money due to one "M. Thomas" as wages for 15 week-endings between January 29, 1966, and July 30, 1966. It, however, turned out that "M. Thomas" was a fictitious personage unknown to any of the personnel at the Central Mechanical Workshop of the Ministry of Works and Hydraulics, particularly to time-keeper Arthur Gardner, who worked there for some 18 1/2 years and whose duty it was to note and record the arrival and departure of workmen and to prepare timeslips in respect of each of them from which the accused, in the course of his duty as pay-list clerk, was wont to make up the departmental pay-sheets. So that if there was any person who would be most likely to know "M. Thomas", that person was time-keeper Gardner.

In bringing home the case to the accused, the prosecution led evidence which abundantly established that not only in respect of each and every one of those 15 week-endings charged, but also in respect of certain others subsequent thereto, an individual answering the name of "M. Thomas" was in the habit of presenting himself at the pay-table in order to draw pay on pay-days. There, he was either introduced by, identified personally by the accused, or had on at least two occasions authorised the accused in writing to receive his pay. These written authorisations, however, when compared with undisputed handwriting of the accused satisfactorily established that they were in fact written by the accused, notwithstanding that they purported to emanate from "M. Thomas" to the accused.

The defence which the jury were asked to consider was, that the accused relied entirely on Gardner's time and overtime slips from which he extracted all names, number of hours worked by each workman and such other details, like their rates of pay, etc., so as to enable him to make up the pay-sheets. In his statement from the dock, the accused pleaded his innocence; he urged that he had no contact whatever with workers save on payday when his duty was to call out their names and witness payments to them. Obliquely thereby he was urging that Gardner had all contact with workers and that having supplied him with time-slips on which he claims was the name of "M. Thomas", Gardner was the man who knew "M. Thomas".

The jury, however, rejected his defence when they found him guilty of falsification on all counts contrary to s. 208(b) of the Criminal Law (Offences) Ordinance, Cap. 10, a verdict which, I must say I believe, was entirely justified. In fact, so overwhelming was the probative force of the evidence that any other conclusion by a reasonable jury after a proper summing-up than that the accused was guilty as charged, would have been inconceivable.

In my opinion, the only one of the six grounds of appeal in the amended grounds worthy of consideration is the fourth. Ground 4(a) alleges error on the part of the trial judge in having as a matter of course admitted into evidence as documentary exhibits a number of alleged false entries and statements of criminal acts other than those which were required for proving the subject-matter of the 15 counts of the indictment. It is con-

tended that these other documents and accompanying oral statements containing as they do allegations of similar acts of falsification by the accused, were not only inadmissible, but highly prejudicial to the accused and on that account vitiated the verdicts. But whilst ground 4(a) contends for their inadmissibility, ground 4(b) urges in the alternative that, assuming these other allegations of falsification than those charged were properly admitted, the learned trial judge ought to have directed the jury fully and adequately on the restricted use to which such evidence of similar facts could properly be made. In particular, complaint is made that he ought to have warned the jury against treating such evidence as proof of a criminal propensity and a disposition to commit the offences charged and against drawing any inference of guilt based on or assisted by the proof of such propensity. It was because of these omissions of the judge, it is urged that a miscarriage of justice has resulted, necessitating the setting aside of the convictions and sentences on all counts.

Before proceeding further, I think it is fair to mention that both before the examining magistrate and the trial judge, the offending statements were admitted without demur; nevertheless, non-objection by the defence to the admissibility of evidence can never properly be regarded as consent to such, and is certainly no bar to an attack thereon at a later stage if the interests of justice require it. It is the rule that in a criminal case even though parties may have agreed to admit inadmissible evidence, no one is bound thereby. Such evidence is always open to question on appeal. In this connection the following excerpt from the opinion of Lord SIMON, L.C., in *Stirland v. Director of Public Prosecutions*, (1944) 113 L.J.K.B. at p. 400 is considered relevant:

"It has been said more than once that a judge when trying a case should not wait for objection to be taken to the admissibility of the evidence, but should stop such questions himself (see *R. v. Ellis*). If that be the judge's duty, it can hardly be fatal to an appeal founded on the admission of an improper question that counsel failed at the time to raise the matter. No doubt, as Bray, J., said at pp. 61 and 763 of the respective reports in the same case, the court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal. But where, as here, the reception or rejection of a question involves a principle of exceptional public importance it would be unfortunate if the failure of counsel to object at the trial should lead to a possible miscarriage of justice. There is nothing in the Act of 1898 to suggest that such an objection is necessarily invalid unless taken at the time, and in other branches of the law the right to object on appeal that evidence was inadmissible is not necessarily forfeited by the failure to object when the evidence was given. The object of British law, whether civil or criminal is to secure,

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as far as possible, that justice is done according to law, and if there is substantial reason for allowing a criminal appeal, the objection that the point now taken was not taken by counsel at the trial is not necessarily conclusive."

As I have indicated above, the only question which I consider worthy of our attention in this appeal arises from the allegation that the decision *sub silentio* of the learned trial judge to admit those other pay-sheets dealing with alleged falsification by the accused committed after those specific instances forming the subject-matter of the charges as evidence in the case, operated to the prejudice of the accused even though no objection was raised by the defence. But before embarking on a consideration of this aspect of the matter, I will begin with the observation that although the subject of similar fact evidence has not yet reached its apogee of development, and is not altogether shorn of difficulty, it is, in modern times, rendered less uncertain of application, thanks to the formative period through which it has passed from *Makin v. Attorney General for New South Wales*, (1894) A.C. 57, and through *Noor Mohamed v. The King*, (1949) 1. A.E.R. 365 to *Harris v. Director of Public Prosecutions*, (1952) 1 All E.R. 1044. I believe in *Makin's case* it may be truly said that the groundwork for the admissibility of this type of evidence was firmly laid and in *Harris' case* the vicissitudes encountered in the 50 odd years of development of the principles have been thoroughly explained. In *Makin's case* the Lord Chancellor laid down two principles as the basis for the admissibility of similar fact evidence as follows:

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried."

". . . the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

Therefore, in order to render evidence of similar facts admissible, there must be some special nexus or connection between the fact which it is sought to have admitted into evidence and the fact it is sought to prove. It is not enough that there should exist a mere general similarity to the fact to be proved. Accordingly, acts which show a general disposition, habit or propensity to commit offences of the kind with which an accused person is charged are not receivable in evidence, notwithstanding they may indicate a probability that the accused did commit the offence charged. As Lord SUMNER observed in *Thompson v. R.*, (1918) A.C. 221 at p. 232:

"No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime."

It is otherwise, however, if those similar facts go to prove design by the accused, or that the act charged was not accidental but intended, or go to establish the identity of the accused or serve "to rebut", as Lord HERSHELL said above, "a defence which would otherwise be open to the accused", for then those facts will be relevant and therefore may be admissible, subject always to the court's discretion even though they have a tendency to show general propensity.

I have thought it fitting to set out and explain the law on this matter in view of the complaint in ground 4(b) viz., that assuming the evidence was admissible, the trial judge had not warned the jury against treating it as evidence of a criminal propensity to commit the particular type of offence charged.

Now, these being the principles which govern the admissibility of evidence of similar facts, my purpose will now be to apply them to the facts of the case with a view to determine whether there was justification for the admission into evidence of those other subsequent pay-sheets. In the first place, I will observe that what the prosecution had set itself out to establish was fraud by the accused in the nature of falsifying accounts over a period of some six months ending July 30, 1966, and that it was necessary in each case to prove an intent to defraud; in the second place, I will observe that the authorities are very clear on the point that such *mens rea* is capable of being proved by the commission by the accused of similar acts of fraud both prior and subsequent to the transaction or transactions in question such as would reveal a system or a systematic course of conduct amounting to "long firm fraud" - see *R. v. Rhodes*, (1899) 1 Q.B. 77, where on a trial for obtaining eggs by false pretence, it was proved that the prisoner had falsely represented by advertisements that he was carrying on a *bona fide* dairyman's business. Evidence was admitted that, subsequently to the transaction in question, he had obtained eggs from other persons by similar advertisements. Lord RUSSEL, C.J., said:

"It is plain that the prisoner was carrying on a single and entire scheme of fraud by means of one and the same sham business and sham advertisements. Had the transactions been disconnected and isolated, I should be by no means prepared to admit evidence of the later transactions upon a charge arising out of a former transaction. But here, where, so far from being isolated, a plain connection between each of these transactions is afforded by the advertisement, which shows that the whole scheme was one entire fraud, and that the business was an absolute sham, and that the method was the same in every case, and with the one view of defrauding the public, I am of opinion that the

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evidence with regard to the prisoner's subsequent transactions was admissible"

However, when such a fraudulent system has been established, evidence thereof is not automatically admitted; it behoves the trial judge to exercise a judicial discretion and to consider whether the evidence of similar facts has a material or substantial bearing on those facts to be proved. A judge always has a discretion to exclude such evidence, and in the exercise of it, he must weigh the pros and cons against too rigid an adherence to the letter of the principles on which the evidence is admitted with the requirements of justice in the particular case, and, if in his view so to adhere would operate to the prejudice of the accused, it is his duty to refuse to admit the evidence. If the judge rejects it, a Court of Appeal may not properly question his course of action. The problem is somewhat analogous to the case where a judge exercises his discretion and disallows questions addressed to the accused in cross-examination when he considers that such questions, in the light of the issues before the jury, are unfair to the accused, and that their prejudicial value outweighs their probative value. He then has a discretion to allow them. See *Stirland v. Director of Public Prosecutions*, (1944) A.C. 315.

Now the question which the judge had to consider was: Did the other paysheets really have a material bearing on the issues to be decided? Seeing that the prosecution had already charged 15 specific instances of alleged falsifications by the accused, it may be asked what would it have availed them in seeking to prove several more which were, so to speak, off the record? Why, as counsel for the accused has asked, ought they to have desired to make additional weight to that which the accused already had to carry? It was seemingly unfair to do so because the jury having already been put on enquiry with respect to the 15 alleged instances of falsification would be much more prone to think that the accused was guilty since it was being impressed on them that he was in the habit of falsifying paysheets.

When regard is paid, however, to the evidence of Assistant Superintendent of Police Isaac Alexander, the investigating officer who interrogated the accused and took a caution statement from him, it becomes very clear what was the task which confronted the prosecution. For though the accused admitted preparing the pay-lists, he denied he knew "M. Thomas", that he had ever seen him or that he had ever received pay on his behalf. It also became clear from his caution statement that the defence he was going to proffer would be that of innocence—that he had received all the information which he compiled on those paysheets from the time-cards, just as he had received them from the time-keeper Arthur Gardner. Such being the case to be proved for certain, in the light of the authorities, paysheets other than those evidencing the substance of the charges then became relevant in proof of the allegations specified in the particulars of the offences charged.

The prosecution were by no means "crediting the accused with fancy defences"; they were fully cognisant of what they had to prove, and were setting out to do so by evidence which was both relevant and admissible.

The evidence was relevant in that it tended to show that the accused indeed, contrary to what he had told the investigating officer, had professed to know who "M. Thomas" was, because in each case, so the evidence goes, his initials appeared opposite the name of "M. Thomas" on the paysheets. Assuredly, this mode of identification would rebut his statement to Alexander that he was ignorant of who "M. Thomas" was and that he did not think he received Thomas' pay, when in fact he produced at least two written authorities purporting to have come from "M. Thomas" to uplift his pay. Clearly, they were admissible in keeping with the principle of relevance and substantial materiality laid down in *Thompson v. R.*, (1918) A.C. 232, and *Makin's case* above.

The effect of the admission into evidence of those other paysheets as similar fact evidence was to establish in the accused the requisite *mens rea* in the charge, i.e., the intention to defraud by showing a *modus operandi* by a continuous and persistent course of fraudulent conduct. The evidence though admitted in silence, apparently as a matter of course and without reflection, as is contended, was plainly receivable on principle. The only remaining point is whether it can be properly said that the failure of the trial judge to direct the jury on the nature of the evidence he had admitted, how they were to approach it, and what was required of them in the circumstances, was prejudicial to the accused in the respect that he thereby lost the chance of an acquittal. It is certain, however, that he lost the chance of the imposition of a judicial discretion on the question of admissibility of the evidence. The principles of relevancy, admissibility and unfairness to the accused were in competition with each other, and it was the clear duty of the trial judge to have applied a judicial mind in resolving the conflict. His omission to have drawn the attention of the jury to the nature of the evidence in the light of the first of the two principles enunciated in *Makin's case* (above) must be regarded as a failure to exercise his discretion to exclude it if he considered that its prejudicial value outweighed its probative value, for it is impossible to say whether he had adverted his mind to the nature of it. His omission was a non-direction amounting to a misdirection in law.

The admissibility of evidence being a matter of law is always within the province of the trial judge, while the question of what is the appropriate weight to be attributed to it is in the jury's. But even if it can be said that the judge did advert his mind to the fact that what he was admitting was evidence of similar facts, and even though he may have thought it substantially relevant to the proof of the charges, this did not give it an automatic licence of admissibility, for the judge also had another principle to consider in keeping with the interests of justice, viz., what prejudicial effects, if any, would it have on the accused.

A theory which once held sway equated logically probative evidence and thus relevancy with admissibility; this was advocated as the correct approach by Lord GODDARD, CJ., in *R. v. Sims*, (1946) 1 All. E.R. 697,

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but has long been exploded by the House of Lords in *Noor Mohamed's* case in which Lord DUPARCQ advised as follows:

"It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge."

However, it is not in all cases in which such an occurrence will have a vitiating effect on a conviction because the test to be applied is whether it can be said that a reasonable jury after being properly directed would, on the evidence properly admissible, without doubt have convicted the accused; if so, the case would be a fitting one for the application of the proviso to s. 16 of the Federal Supreme Court (Appeals) Ordinance, 1958, No. 19 of 1958, since no substantial injustice will have been done by reason of the omission to direct the jury. See *R. v. Haddy*, (1944) 1 All. E.R. 319, approved by the House of Lords in *Stirland v. Director of Public Prosecutions*, (1944) 2 All E.R. 13 at page 15.

As I have observed above, the evidence against the accused in this case was overwhelming as any of the kind could be; the case was proved against him by evidence of the clearest and most convincing description, and his guilt established by a verdict which was thoroughly justified. I therefore think this is a proper case for the exercise of the proviso.

I, too, would dismiss the appeal and affirm the conviction and sentences.

Appeal dismissed.

B. DWARKA v. DEMERARA CO. LTD.

[High Court (Crane, J.) December 6, 1967, April 1, May 16,
June 11,12,13,1968, March 17,1969.]

Factory–Sugar factory–Supplying spares and lubricants from premises within the curtilage of factory–Whether incidental to the making of sugar–Factories Ordinance Cap. 115 ss 2(l)(a), 29.

The delivery of supplies and spare parts from a stores department and of lubricating oil from an oil bond, both within the curtilage of a sugar factory, was incidental to the making of sugar, and a person employed in the stores and the oil bond was employed in the factory and was entitled to double time pay for work done on Sundays, where no regulation provided otherwise.

Declaration accordingly.

A. Chase for the plaintiff.

C.L. Luckhoo, Q.C. with D.A. Singh for the defendant.

CRANE, J.: The defendants are a company incorporated in England, and registered under the local Companies Ordinance, Cap. 328. One of their enterprises in Guyana is a factory at Leonora, West Coast, Demerara, where sugar-cane is manufactured into sugar for gain. The factory building where the conversion processes take place is completely fenced, and in the curtilage of which is included the foundry, power-house and general stores buildings. The power-house, which has a shed attached to it, is situate immediately north of the foundry along with two dieseline tanks supplying fuel to machinery generating electric power under the shed where grinding operations take place. There is a lubricating oil-bond near to the machinery. In the stores to the west are kept, *inter alia*, all spare parts for the machinery concerned in the process while in the foundry all heavy iron goods are stored and turned, and repairs to machines carried out.

The plaintiff, Boodhoo Dwarka, first joined the defendant's employ as a punts checker in 1950. In 1961 he became a probationer stores assistant at \$ 15.00 per week, and rose to his present status as stores assistant in 1962 at \$75.00 per month. In evidence he stated that his duties were to serve dieseline to the power-house, forklifts and to muirhills in the shed. He also distributed lubricants to persons engaged on the machinery grinding cane into sugar. He was engaged in this task, which took him some 11/2 hours to accomplish, sometimes twice or thrice per day. In addition, he distributed electrical parts to places at the mills under the shed, and also attended the foundry to mark a variety of iron goods in order to see they were cut according to the lengths ordered from the stores.

In this case, the plaintiff claims that he has been short paid for a total of 215 hours during which time he worked overtime, at the defendants' request, as stores assistant on Sundays between the years 1961 and 1966, inclusive, during which time he performed the variety of tasks outlined above. He claims that as a worker who has been employed in manual labour in the process of making sugar at the factory, he became entitled to the right, under the Factories Ordinance, to receive double-time pay instead of the rate of one and one-half times his basic pay of \$ 130 per month actually received by him during the period in question, and seeks a declaration in respect thereof.

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While he acknowledges the Memorandum of Agreement—Ex. "A"—between the British Guiana Sugar Producers' Association and Sugar Estates' Clerks' Association of which he is a member, in which it is stipulated in section 6(b) for a rate of time and a half in respect of workers in the category of stores assistant, he contends that his rights under the Factories Ordinance, Cap. 115, have not been excluded but have been preserved in that it is provided therein that, "Nothing in this section shall be understood to waive any right or obligation of the Association, the Union or any employee under the Factories Ordinance (Cap. 115)." This must mean, in the context of section 6(b) above, that an employee will have a right to double-time pay if he can prove it.

Section 2(1)(a) of the Factories Ordinance, Cap. 115, as amended by section 2 of ordinance No. 39/1954, the relevant section, reads as follows:

" 'Factory,' subject to the provisions of this section means -

- (a) any premises in which, or within the close or curtilage or precincts of which persons are employed in manual labour in any process for or incidental to any of the following purposes, that is to say:
 - (i) the making of any article or of any part of any article:

Provided that no place situate within the close, curtilage or precincts forming a factory and solely used for some purpose other than the processes carried on in the factory shall be deemed to form part of a factory, but such place shall, if otherwise it would be a factory, be deemed to be a separate factory."

If, therefore, the plaintiff is correct in concluding that the defendants' factory falls within the provisions of section 2 of the Factories Ordinance above, then I think it follows that section 29(4) of the same ordinance will become applicable and give him a right, if he can prove it, to receive twice the rate of his basic wages in the absence of such proof as there has been in this case of the existence of regulations made by the Governor-in-Council prescribing the rate at which factory employees or persons engaged in any occupation therein may be paid. That section, so far as is material, reads as follows:

"29. (1) The Governor-in-Council may make regulations prescribing the rate at which a person, who is employed in a factory, or in any occupation in a factory, shall be paid.

(c) in respect of work on Sundays, Christmas Day, the day after Christmas Day, if Christmas falls on a Sunday, the day commonly known as Boxing Day, the first week-day of January, Good Friday, Easter Monday or Whit-Monday.

(4) Where, in relation to any factory or to any occupation in a factory the appropriate rate under paragraphs (a), (b) or (c) of sub-

section (1) of this section has not been fixed in regulations made under this section, such rate shall be, in the case of work on any day specified in paragraph (c) of subsection (1) of this section twice the rate at which the person employed would but for this section be paid, and, in the case of any other work, one and a half times the rate at which the person employed would but for this section be paid."

I have had the opportunity of studying the decision of *Mustapha Khan v Bookers Sugar Estates Ltd.*, No. 15/1966, dated 6th February, 1967, which interpreted section 29(4) above. It was not cited by either party. It does not help directly in the solution, and is clearly distinguishable from this case chiefly because of the fact that the employee was engaged to do boiler cleaning at a special rate of pay on a Sunday. His task of packing peggasse was that which he ordinarily performed on week-days. The contrary is the case here where the employee performed identical duties of an assistant store-keeper on both week-days and on Sundays. In explaining the operation of section 29(4) in this respect, STOBY, C, said:

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

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

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

While on the pleadings it is admitted that the factory at Leonora where actual grinding operations are carried on is one where sugar is produced from sugarcane, the plaintiff is put to proof that the factory is constituted under the Factories Ordinance, Cap. 115. I think, however, quite apart from the defendants' admission, there can be no doubt that at least that part of the defendants' mills situate under the shed attached to the power-house satisfies the statutory definition of a factory. Confirmation for this is to be found

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in the evidence of the defendants' Assistant Engineer, Mr. Overton Howard, who testified on the various processes in the manufacture of cane into sugar and the labour force involved in its production. He threw light on the part played by the general stores where plaintiff worked in making possible sugar production.

But while plaintiff insisted that part of his duties was to supply dieseline to forklifts and muirhills in the factory compound, Mr. Howard, for the defendants, strenuously denied the responsibility of general stores for the issue of dieseline; although he was prepared to admit that lubricating oils have always been kept in the oil-bond adjacent to the mill-house. However, just as the witness Basdeo, for the plaintiff, saw plaintiff issuing lubricants on a Sunday, Mr. Howard, too, saw him occasionally involved in the delivery of them from the bond on Sundays after using a hand-pump to obtain the product therefrom. Dieseline, Mr. Howard said, is kept in bulk-storage tanks, not inside, but outside the factory compound, and the duty in keeping them filled rests with the stores. The contents of these tanks, he said, are connected by supply lines to the sub-tanks from which forklifts and barges obtain their supplies of dieseline. These sub-tanks are under lock and key kept in the stores department and the product is released on the opening of the lock and a valve and depressing a button. The purport of this evidence is clear: It serves to establish a direct connection between stores and the issue of dieseline and the part played by the plaintiff in the distribution of a vitally essential product in the manufacture of sugar, viz., lubricating oil. On Mr. Howard's very admission—"All milling machines and turbines use lubricants. If there were no lubricants all grinding would cease. Lubricants are necessary for the production of sugar."

I think the main point to be decided in this case concerns the stores where the plaintiff is admitted to have worked at the defendants' request on Sundays, being the "place" mentioned in the proviso to section 2(1)(a) above.

The question to be decided is: Was the process or activity carried on in the stores, as related by the several witnesses for both the plaintiff and the defendants "other than" process for or incidental to the process or activity carried on in that part of the premises where cane is manufactured into sugar? Having given the matter much consideration, I have reached the conclusion that it is not. I think that the activity carried on at the stores was incidental to the making of sugar. The phrase "solely used for some purpose" in the proviso above, has been judicially interpreted to mean "solely used for some process." See *Thorogood v Van Den Bergh*, (1951) 1 All E.R. 682 at p. 686; and *Powley v. Bristol Siddley Engines*, (1965) 3 All E.R. 612 at p. 617.

In my view, it seems inescapable that the "stores" in this case is not excluded by the proviso aforesaid and so falls within the definition of section 2 of the Factories Ordinance. It therefore forms part of the defendants' factory despite the contention of counsel for the defendants that the supply

and delivery of supplies from the stores to the factory do not constitute a process. On this contention it is said that the supply or issue by the plaintiff of spare parts from the general stores, and lubricating oil from the oil-bond, which Mr. Howard admitted he did assist in doing could not be incidental to the manufacture of sugar; although Mr. Howard conceded that "lubricants are necessary for the production of sugar." It is also said that the issuing of supplies to the factory being obviously the real purpose of the general stores, as distinct from any process carried on in it, would cause the proviso to apply and exclude the stores as part of the factory. I am afraid an argument of this nature would unjustifiably put a fetter on the meaning of the word "incidental" and is out of step with authority. It is an argument which has already been canvassed but has long been exposed in *Thorogood's case* above, in which at p. 688 it was held to give a strained and unnatural interpretation to the meaning of that word for "a (purpose) process or (activity) which is incidental to a manufacturing process is not necessarily itself a manufacturing process." See *Powley's case* above at p. 617.

This being my view, which I believe is abundantly supported by authority, I consider that the stores fall within the definition of the word "factory" in Cap. 115; moreover, the evidence is, that the stores must be constantly open while grinding operations are taking place.

The only other point is the number of hours the plaintiff worked on Sundays during the period claimed for. He claims to have been short paid in respect of 215 hours; that his employers' attention was attracted to this fact by letter written on his behalf by his union – The National Association of Agriculture and Commercial and Industrial Employees. This letter—Ex. "C" – dated October 15, 1966, after referring to previous discussions on the subject of his claim to overtime, detailed the number of hours worked during the period in question and requested payment of an unpaid balance due on 215 hours. The employers acknowledged receipt a few days later. They requested further details showing a weekly and monthly breakdown, and there being no evidence of this from the plaintiff, themselves produced in evidence as they were bound to do, a record of the number of hours of overtime worked by plaintiff between 1961 and 1966 – see Ex. "D" But it will be observed that Ex. "D" merely records annual totals of the number of hours worked between the years 1961 and 1964 by the plaintiff; it does not give a breakdown of them into week-days and Sundays—as in the case of the years 1965 and 1966. It was explained that it was not possible to encompass this because the necessary overtime sheets, time-sheets and clock-cards were destroyed, though these were available for 1965 onwards.

Of the two accounts submitted, I have decided to accept the defendants' on the number of hours worked by plaintiff on Sundays, stated in Ex. "D"—even though this information is given thereon only for the years 1965 and 1966—because I think it is the more reliable of the two versions. I consider the absence of a detailed breakdown statement of the Sunday hours worked between 1961–1964 has been adequately explained,

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for I accept that every organisation cannot be expected to keep records indefinitely; some relating to previous years must need be destroyed so as to make space for others in future.

I believe the defendants' record of the number of hours worked to be the more reliable, particularly in view of the fact that it was examined against original documents from which it was constituted, and produced by the defendants in court when the court adjourned at the request of counsel for that purpose.

On the contrary, the hours stated in the plaintiffs letter Ex. "C" – can bear no comparison with Ex. "D". Take, for example, the hours worked in 1966. According to the plaintiff, he worked 92 hours, whereas the defendants credit him with having worked 151 hours. I believe the very unlikelihood of the defendants stating against themselves a greater number of hours than the plaintiff claims to have actually worked, leads me to conclude that it is preferable to accept their claim. On the other hand, the number of Sunday hours worked in Ex. "D" for 1965 are the converse to Ex. "C". Again, it is to be observed that between 1961 – 1964 in each case plaintiffs total hours worked exceeds the total for both weekdays and Sundays by the defendants. I therefore find Ex. "C" cannot be relied upon in any respect whatever. Moreover, as I have said, Ex. "D" was supported by vouchers which were examined in court. Its credit worthiness was unchallenged in cross-examination which made its acceptance decisive.

Accordingly, I will accept 269 1/2 as the number of hours worked by the plaintiff on Sundays during 1965 and 1966, and the figures for the other years not being available, I will accept 269/4 hours as the number worked for the entire period to which he is entitled.

I therefore make the following declaration and orders:

- (i) I hereby declare the entitlement of the plaintiff to double-time pay under the Factories Ordinance, Cap. 115, for work done by the plaintiff at the defendants' request on Sundays between the years 1961—1966 at their factory at Leonora, West Coast, Demerara.
- (ii) I hereby order the defendants to pay the plaintiff at twice the rate of his basic pay earned between 1961 and 1966 in respect of 269 1/2 hours, being the number of hours proved to have been worked by plaintiff on Sundays during these years, less what he has already received from the defendants in respect thereof at time and one-half pay.
- (iii) That the defendants do pay the costs of these proceedings to be taxed.

Stay granted for six weeks, as requested.

Declaration accordingly.

IN RE PETITION BY
JOHN MILLKEN AND THOMAS SHERWOOD WHEATING
v
COMMISSIONER OF INLAND REVENUE

[High Court (Crane, J.) March 6, 7, 10, April 17, 18, 20, May 5, June 12, 13, 20, December 8, 1967, March 30, 1968, March 18, 1969.]

Estate Duty—Valuation of shares—Net assets or liquidation valuation—Dividend yield and profits earnings valuation—Tax Ordinance Cap. 298—Estate Duty Ordinance Cap. 301 s. 14.

Estate Duty—Interest on—Payable from date assessment served.

Charles Wheating died in England 1960, testate but domiciled in Guyana. The inventory of his property showed him owning shares in Wieting & Richter Ltd. valued at \$20.00 each. The Estate Duty Ordinance Cap. 301 makes no provision as to the method to be used in valuing shares of a deceased person. The C.I.R. being dissatisfied with this valuation valued the shares at \$585.00 each, using a net assets or liquidation value method of valuation under which each item of the company's property was valued, liabilities as shown on the company's balance sheet were subtracted from the total, and the value of a share ascertained by dividing the number of fully paid up shares into the net result. On appeal.

HELD:—that (i) the real value of shares which a deceased person holds in a company at the date of his death will depend more on the profits the company has been making and should be capable of making having regard to the nature of its business than upon amounts which the shares would be likely to realise upon liquidation; the dividend policy of the company was to pay out small dividends and retain the major part of the profits in business in order to finance the company and to replace assets. In these circumstances the appropriate method of valuation is to use the dividend yield and profits earnings valuation in conjunction, resulting in a share valuation of \$85.00 per share.

(ii) interest on estate duty becomes payable from the date when a proper notice of assessment has been served by the C.I.R. on the party accountable and this is so even though the deceased died abroad and was domiciled in Guyana.

Appeal allowed.

C. Lloyd Luckhoo, Q.C. with John Stafford for the appellants.
Doodnauth Singh for the respondent.

CRANE, J.: This is an appeal under s. 14(3) of the Estate Duty Ordinance, Cap. 301, by the executors of the late Charles Wheating, who died testate in England on August 18, 1960, but was domiciled in Guyana.

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Among the many items of property appearing in the inventory consisting of both local and English assets, as delivered and declared by the executors, is a block of 341 shares valued at \$20. each, i.e. \$6,820.00, in Messrs. Wieting & Richter Ltd., hereinafter called "the Company".

Messrs. Wieting & Richter Ltd. is a well-known local company, and these 341 shares represent part of its total issued share capital of 4,127 shares of a par value of \$ 100 each.

Subsequent to the delivery of the inventory, i.e., between June 1961 and September 1966, much correspondence concerning it passed between the executors and the Commissioner of Inland Revenue. The Commissioner was not satisfied that the inventory disclosed the true number and value of those shares, and so in his letter of the 21st September, 1966, he fixed for estate duty purposes what he thought to be their correct number and value—839 shares at \$585 each, i.e. \$490,815.00. This letter, which includes his assessment, is of sufficient importance to warrant its being set out in full since it clearly indicates the terms of his dissatisfaction and the areas of disagreement on which the parties went to law.

"Estate: Charles Wheating, decd.

I have now been able to complete my examination of the Declaration and Inventory of the property of the abovementioned Estate, and I regret to say that I am dissatisfied with the inventory and estimate shown therein. I have therefore made an inventory and estimate, by virtue of the powers vested in me under the provisions of section 14(1) of the Estate Duty Ordinance, Chapter 301, a copy of which is hereto attached for your information and guidance.

2. Kindly note that in accordance with my aforementioned inventory and estimate, I have this day assessed the estate to duty amounting to \$225,710.07 (two hundred and twenty-five thousand, seven hundred and ten dollars and seven cents) as shown on the attached form. You will note that the sum of \$22,874.88 (twenty-two thousand, eight hundred and seventy-four dollars and eighty-eight cents) has been paid on the 6th December, 1961.

3. If after due consideration of my inventory and estimate you are dissatisfied with my assessment, you may appeal by petition under the provisions of Section 14(3) of the aforementioned ordinance to the Supreme Court, in which case, the amount of duty in dispute need not be immediately paid. If you do not intend to appeal, the whole amount should be paid immediately.

50 shares in Versailles and Schoon Ord. Ltd. at \$ 17	\$ 850.00
676 shares in Enmore Estates Ltd. at \$45	30,420.00
432 shares in Enmore Estates Ltd. at \$45	19,440.00
839 shares in Wieting & Richter Ltd. at \$ 585	490,815.00
Amount at credit in books of Wieting & Richter Ltd.	107,038.26

Assets outside the colony as per English Estate Duty	
Affidavit—£11,547 6s. 10d.	55,427.24
	\$703,990.50
Less	
Debts and funeral expenses	68,390.30
	\$635,600.20
ASSESSMENT	
Property subject to duty at 17 1/2% \$25,000	4,375.00
Property subject to duty at 35% \$610,600.20	213,710.07
	218,085.07
English rebate of £550 16s. 3d.	2,643.90
Plus interest at the rate of 6% p. a. from	215,441.17
20.2.61-6.12.61 (290 days at \$35.41 a day)	10,268.90
	\$225,710.07
Less paid on 6.12.61	22,874.88
	\$202,835.19"

There is, therefore, a difference of \$483,995.00 on the value of the Wieting & Richter shares, and this obviously makes such a tremendous difference to the amount of estate duty to be paid that it was the plank on which two of the three grounds of appeal were constructed.

In the statement of grounds of appeal from the Commissioner's assessment, it is objected, firstly that in so far as his decision relates to the value of the shares in Wieting & Richter Ltd., it is erroneous because it is based on the *value of the assets of the company* and not on the *market value of the shares*; secondly, that in so far as the decision seeks to assess duty on 839 shares, it is erroneous, because the deceased died possessed of only 341 shares and not 839; and, thirdly, that the amount of \$ 10,268.90 representing interest at 6% per annum for 290 days at \$35.41 per day, contained in the extract from the Commissioner's letter (above), is erroneous in that it is added to the amount of estate duty assessed before deducting the payment of duty acknowledged by the Commissioner on December 6, 1961. It is said that the effect of this is tantamount to an attempt to collect compound interest, which is contrary to the provisions of the Tax Ordinance, Cap. 298.

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It will be seen from the first ground of appeal that there is a difference of opinion on which of two methods of valuation employed was correct in ascertaining the value of the shares. This is a straight question of law. The Commissioner made use of the "net assets" or liquidation value method. This is arrived at by valuing each individual item of the company's property. All liabilities, as shown on the company's balance-sheet, are then subtracted from the total. The value of a share is then ascertained by dividing the number of fully paid-up shares into the net result. So that when the figure of 4,127 shares is divided into \$2,416,262, as shown on the company's balance sheet (Ex. "F") as the net result, the figure of \$585. per share is the answer. Such was the method employed by the Commissioner, which is questioned by the petitioners as being the inappropriate one to use in the circumstances of the company as a going concern where there were no immediate or remote prospects of a liquidation or any "take-over bid," and where the deceased's shareholding was only a minority one.

There is no provision in our Estate Duty Ordinance, Cap. 301, for valuing such assets of a deceased as consist of shares, as there exists in England in the shape of the Finance Act, 1894, s. 7(5). This defines "Principal value" as "The value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased." S. 7(5) requires the gross open market price, i.e., what the purchaser pays and not what the vendor receives, to be taken as the valuation figure. (See *Duke of Buccleuch & Anor. v. Inland Revenue Commissioners*, (1967) 1 All E.R. 129, 148).

What, then, is the correct machinery to employ in valuing shares for estate duty purposes, and what are the criteria for its determination? In Guyana we have no equivalent of the Finance Act, 1894, s. 7(5), on the matter of share valuation; there is no directive that shares are to be valued with reference to the principle of the open market. At one time in Australia a similar situation to ours existed, and the judicial approach had been to adopt the same line as indicated in *Inland Revenue Commissioners v Crossman*, (1937) A.C. 26, in the event that their revenue statutes did not direct any particular method of estimating value of assets. The courts took the view that "it is proper to estimate the value of the shares held by a deceased in a company, the Articles of Association of which contain restrictions on transfer, in the same manner . . ." i.e., as in *Crossman's* case—see per WILLIAMS, J., in *Abrahams v Federal Commission of Taxation*, 70 C.L.R. 23 at page 29. This is the approach I will adopt in this case.

The Australians, however, remedied the situation by protecting the public revenue against the depletion of valuations and the consequent reduction in duty assessable occasioned by the restrictive Articles of Association, by amending legislation giving specific guides to the method and calculation of value. It is suggested this is the approach which should be

adopted in Guyana to our ordinance, which is now more than 70 years old and badly in need of reconstruction and amendment.

While in England remedy was sought in the Finance Act, 1940, s. 55, in Australia it was to be found in the New South Wales Stamp Duties Act, 1920, and the Estate Duty Assessment Acts, 1914–1957, s. 15A(1)(a), (b), (c). Sub-para, (c) provides that—

"Where the estate includes any shares or stock which are not or is not quoted in the official list of any Stock Exchange, the Commissioner may, in his discretion . . . adopt as the value of any such shares or stock such sum as the holder thereof would receive in the event of the company being voluntarily wound up on the date of death."

The discretion given to the Commissioner to adopt a winding-up valuation is not mandatory, however, and should be regarded as applicable only in special cases where it is reasonable that such a method be adopted. He should not employ it merely because it is thought that it would produce a higher valuation. That would be a wrong exercise of his discretion indeed.

On the matter of the exercise of this discretion by the Commissioner in choosing the appropriate method of valuation, it was held in the High Court of Australia in *Federal Commissioner of Taxation v Sagar*, 71 C.L.R. 422 at p. 428, as follows:

"But the discretion must be exercised honestly and for the purpose for which it was given, that is to say, the method should be chosen which in the opinion of the Commissioner or Board or Court is most calculated to place a fair value on the shares as at the date of death. *And where a company is a going concern the instances would appear to be rare in which it would be proper to use para. (c).* One instance might be where the deceased held or controlled sufficient shares to enable him to pass a special resolution that the company be wound-up voluntarily, but even then it would appear to be preferable, where practicable, to use para, (a) or (b)."

I have cited the above passage with a view to showing the trend of judicial opinion on the appropriate use of the two methods which have been employed in this case, viz., (a) the net assets or liquidation value method, (b) dividend yield and profits earnings valuations and it is important to note, too, that in the case of *New Zealand Ins. Company Ltd. v Commissioner of Inland Revenue*, (1956) N.Z.L.R. 501, it was said that underlying method (a) above is always a notional liquidation, and in principle that method is directed to ascertaining what would be the net result to the shareholder if liquidation were carried out.

On behalf of the petitioners, evidence on valuation was given by Cecil Frederick Farrar, who is named in the will as one of the executors, but who later renounced probate. Mr. Farrar is a chartered accountant and partner in the Guyana branch of the firm of Pannel, Fitzpatrick Graham & Crewdson,

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chartered accountants. He is a Guyanese with considerable experience in accountancy and share valuation, and has been attached to the abovementioned firm for a period of over 30 years, during which time- that firm has been the accountants and auditors of Wieting & Richter Ltd. By consent, he laid over a four-page memorandum, prepared personally by him, on the valuation of shares in private companies generally, and Wieting & Richter Ltd. in particular. (Exs. "A1"-"A4").

In his memorandum Mr. Farrar considered the object of valuation of shares of such a company as Wieting & Richter Ltd., a going concern, is to arrive at their market value., i.e., "the shares must be valued on the basis of a hypothetical sale in a hypothetical open market between a hypothetical willing vendor (who would not necessarily be a director) and a hypothetical willing purchaser on the hypothesis that no one is excluded from buying and that the purchaser would be registered as the holder of his shares but would then hold them subject to the Articles of Association of the Company, including the restrictions on transfer." See *Re Lynall*, (1968) 3 All E.R. 322, 324. This was the principle that was applied in the Irish case of *Attorney General v Jameson*, (1905) 2 Ir. R. 218, and the Scottish case of *Salvesen's Trustees v Commissioner of Inland Revenue*, (1930) Sc. L.T. 387, and approved in *Crossman v Inland Revenue Commissioners*, (1937) A.C. 26.

It seems quite clear from the authorities, however, that the net assets value method employed by the Commissioner can only be justified if the shareholding of the deceased had been a majority, and not as it is shown to be, a minority shareholding. (See *Re Courthope*, 1928 7 A.T.C. 538). The principle is, that if there is the possibility, on the shares being valued, that a prospective purchaser could obtain a majority interest in the company, he would then be in a position to force its liquidation by passing a resolution to that effect. But this is far from being the case here, because the deceased as it has been proved, clearly had, on any view of the matter, only a minority shareholding in the company, even though it will be seen he was virtually dictator of it. There is also no evidence that there was the likelihood of a "take-over bid," or prospects of an early liquidation, the absence of which factors would render a net assets valuation the inappropriate method to employ in the circumstances.

In the *Salvesen* case (above), the relevant facts which the prospective purchaser of shares in a private company would be expected to enquire into were listed as follows:

- (i) The company's history.
- (ii) Its history from its inception to the date of the death of the deceased, and particularly its position at that date.

- (iii) Its prospects generally at that date.
- (iv) The depreciatory effect of the restrictions on transfer of shares contained in the Articles.

The evidence disclosed that Messrs. Wieting & Richter Ltd. was registered a private company on January 4, 1910, with a nominal share capital of \$500,000 divided into 5,000 ordinary shares of \$100 each, of which 4,127 had been issued as fully paid, and that it remained as such until August 18, 1960, the date of the death of its Governing-Director, Charles Wheating. Two families founded the company—the Wietings (later changed to Wheating), and Richters (later changed to Martin-Sperry). Every precaution was taken in the Company's Articles of Association to ensure that it retained its character as a family concern. For example, the most stringent provisions were made in those Articles on the transfer of shares. Art. 21 provided as follows:

"The directors may decline to register any transfer of shares to a person of whom they do not approve not being already a member of the company or the husband, wife, father, mother, brother, sister, son, daughter, or lineal descendant of a member or deceased member and may also decline to register any transfer of shares on which the company has a lien."

While Art. 35 empowered the deceased, who was the Governing-Director for life, to prohibit in any particular case the transfer of any share or shares without his consent, Ex. "C", an extract from the share register, shows that so strictly was this provision observed, that for some 50 years after incorporation the entire share-holding of the company was steadfastly adhered to and vested entirely in members of the two families above-mentioned. Under Art. 77 the deceased was appointed Governing-Director for life, a position which he held until the time of his death. Control of the company was *de facto* vested in him as holder of that post, and in addition to his power to prohibit transfer of shares, he could define, limit and restrict the powers of the other directors and even fix their remuneration. They even held office during his pleasure, for they could be removed by him though appointed by the shareholders in general meeting. In short, the deceased was virtually the dictator of the company, for he could himself exercise all powers, discretions and controls which, by the Articles are expressly to be or by law exercisable by the directors. As a matter of fact (and I say this in emphasis of the point I made above that our situation lags behind modern estate duty legislation), the Articles gave him such virtual quasi-control in the power structure of the company, that had we the equivalent of secs. 55(1)(a) and 55(2) of the Finance Act, 1940, I believe I would have had no option but to resort to the net assets valuation method employed by the Commissioner; for the deceased would then, by virtue of the preponderating power wielded by him, have "had the control of the company" so as to render the method of valuation prescribed by sec. 55(2)

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of the above Act the appropriate one. (See *Barclays Bank v Inland Revenue Commissioners*, [1960] 2 All E.R. 817 H.L.) But such is not our law.

The activities of the company are many and varied. They comprise: the manufacture of ice, biscuits and aerated drinks; the manufacture of edible oils through its subsidiary, the Demerara Oil & Cake Mills, Ltd. The company provided cold storage facilities conducted trade in foodstuffs, machinery, hardware and motor cars and agencies for shipping and airlines. Indeed, so wide were these pursuits that there was the ever present problem of adequate financing and the prospect of a general recession in trade to which every company with such diffuse activities was extremely vulnerable.

From a comparison of the evidence of Mr. Farrar with Mr. Patrick Yansen, a certified accountant, who was by order of court made pursuant to s. 14(4) of Cap. 301, directed to conduct a valuation and submit a report, it was shown that between the years 1955–1959 there was a serious shortage of working capital and the company was obviously operating under depressing financial circumstances. The report of Mr. Yansen, who appeared in court and testified to the advocacy of his valuation, revealed at page 4, Ex. "O", that the paid-up share capital at March 31, 1959, stood frozen at \$412,700 since incorporation and, together with accumulated reserves of \$1,097,784, proved totally inadequate after providing for fixed assets. The company therefore had recourse to loans and advances from the banks, and even from the employees' pensions scheme. The auditors' report read:

"Bank overdraft and loan are secured by a charge in favour of Barclays Bank, D.C.O., on the trade and other investments, together with an undertaking not to encumber any of the company's immovable property and to execute a legal mortgage thereon in favour of the bank if required to do so."

I appointed Mr. Yansen valuer *ad litem*. His mission was to ascertain the number of shares held by the deceased from the year 1910 to 1960 noting acquisitions and disposals thereof in the interim. He was directed to say, in the case of disposals by the deceased, what consideration, if any, passed in every case, if possible to the date of the death in August 1960; to examine all accounts and records in trade done by Wieting & Richter Ltd. with a view to arriving at a valuation of the shares in August 1960 with reference to the yield or annual percentage return which an investor would look for on his outlay and the application of that yield to the prospective annual percentage rate of dividend on the shares. He was directed to conduct an earnings yield valuation as well, and I think it is right to state here that I appointed him so that I should at least have before me an impartial valuation which the interests of justice seemed to demand since it was admitted that Mr. Farrar was at one time named co-executor under the will of the deceased and so could be regarded as a witness with an interest.

In establishing the dividend value basis, Mr. Yansen went back five years from 1960; just as did Mr. Farrar. He found the five-year average rate before tax to be 7.40%. This rate before tax is the percentage dividend rate which a prospective purchaser would, in the case of Messrs. Wieting & Richter Ltd. expect to receive on his outlay by inspecting the dividend record of the company. Here, Mr. Yansen is not in agreement with Mr. Farrar, for he considered that percentage too modest a return for a hypothetical purchaser to expect. At that time, he said, though private companies were paying larger dividends, none could be compared with Messrs. Wieting & Richter Ltd. since they did not compare in size and trading activities which would render a comparison unsuitable. At that time, too, it was possible to borrow money at 7%; fixed deposits in the New Building Society were bearing 5 1/2%, something they never did before in the company's existence. So Mr. Yansen considered an annual percentage yield of 8 1/2% would have been attractive. To this basic yield he considered it necessary to add another 1 1/2% in view of share transfer restrictions; another 1 1/2% for lack of liquidity and charge on assets; and a further 1% for the minority shareholding—a total of 12 1/2% as a prospective dividend yield. This, when capitalised, shows a valuation based on a percentage yield of \$59.20 per \$100 share, i.e.

$$\frac{7.40 \times 100}{12.5} = \$59.20 \text{ per share.}$$

But Mr. Yansen discovered that the dividend declarations, not only during the years 1955-1959, which he examined, but throughout the company's history, revealed a fixed policy dictated more by its lack of working capital than by its earning capacity, and he considered that any other course than the one it adopted would have been very imprudent if not impossible. This was the course concerning which Mr. Farrar testified, viz., that the company had been consistently forced to restrict its dividend payments due to its under-capitalized state, evidence of which could be found reflected in its reserves and its borrowing policy. He found the financial position of the company had so deteriorated that at the end of March 1959, the share capital stood exactly as it was at the time of incorporation at \$412,700 while accumulated reserves stood at \$ 1,097,784.

Such was the state of affairs which Mr. Yansen found: Dividend declarations, taken alone, did not picture accurately the true profitability of the company, for the dividend policy was to pay out small dividends and retain the major part of the profits in business in order to finance the company and to replace assets. It was for this reason he directed his attention to the earnings yield method of valuation which, as the following passage from GREEN'S DEATH DUTIES, 5th Ed., p. 419, shows was fully justified:

'The merits of quoted shares are often assessed on an 'earnings yield' standard, as well as by the dividends yield method described

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above. The use of an earnings yield is apposite as respects unquoted shares whenever the dividend alone does not truly represent the profitability of the company. This approach follows the lines already indicated, except that profits or 'earnings' and an earnings yield are substituted for dividends and a dividend yield. The 'dividend' and 'earnings' methods of valuation are not mutually exclusive and both may be used in conjunction. Where the value brought out by one differs widely from that shown by the other, an intermediate figure may be appropriate. In deciding the relative weight to be given to each, the size of the holding will be a relevant factor."

Between the same five-year period, 1955–1959, trading results showed an annual trade profit of \$54,085. This, when capitalised, gives a share valuation based on an earnings yield of \$ 106.58, i.e.

$$\frac{\$54,985 \times 12}{4127} \times 100 = \$ 106.58 \text{ per share.}$$

With a view to arriving at a fair market valuation both methods, which are not mutually exclusive, were considered together and an approximate assessment of \$85.00 per share as at the date of death arrived at.

Of the two valuations, I prefer that proffered by Mr. Yansen, for it seems to me that his is the more realistic. I believe the method adopted by Mr. Farrar in arriving at a valuation of \$20.35 per share is unreal and has neither principle nor authority in support of it. Quite rightly, in the same manner as did Mr. Yansen, he took the average five-year period immediately prior to the death as the dividend value basis, and having established a rate percentage of 7.40% before tax as the yield or annual percentage return which an investor would look for on his outlay, he went on to relate it to the prospective rate of dividend on the shares, basing it on a comparison of the rate of dividends obtained from certain public companies, viz., Bank Breweries Ltd., Enmore Estates Ltd. and Sterling Products, suggesting that a postulated yield of 20% free of tax on Wieting & Richter shares, i.e., of a private company is modest. There are, however, two obvious defects consequent on such a valuation. In the first place, it is quite unreal to value shares, in the financial circumstances which Mr. Farrar knew to exist in the company's state of affairs, only with respect to dividends, as the following excerpt from the judgment of the Lord Ordinary in an unreported case shows. (See LEADING BRITISH DEATH DUTY CASES, [1932], p. 165):

"I feel bound to say that these figures suggest to me very strongly that it would be quite fallacious to value these shares merely on the basis of the dividends paid and without regard to the amount of the profits which were earned but not distributed The directors of this company may have adopted a policy of only distributing a small part of the profits as dividend but it was impossible for them to pursue such a policy indefinitely."

It was the likelihood of the above in mind, as revealed in Mr. Farrar's evidence, that prompted me to direct Mr. Yansen to conduct an earnings yield valuation also. Indeed, Mr. Yansen found an exactly similar situation, as described by the Lord Ordinary above, to exist, which justified my fears, when he wrote at p. 5 of his report:

"The dividend declarations during the years 1955-1959, indeed throughout the company's history, reveal a fixed policy dictated more by its lack of working capital than by its earning capacity; any other course would have been very imprudent if not impossible to adopt. Consequently, at March 31, 1959, while the paid-up share capital was still \$412,700, the accumulated reserves plus unappropriated profits totalled \$1,097,784. Hence, the dividend declarations alone do not picture accurately the true profitability of the company."

In the second place, while it is generally considered inadvisable for a valuer to compare the activities of two companies, whether public or private, it is generally considered misleading to compare dividend yields of a private company with those of a public company. It is improbable that a potential purchaser would pay much attention to the price of shares in a public company in the same field of operations.

More and more judicial decisions are revealing the attitudes of the hypothetical purchaser who enters "into a dim world peopled by indeterminate spirits of fictitious or unborn sales." In a very recent case the dangers of his making too close a comparison between dividend yields of a public and private company, even though they engage in the same kind of enterprises, were well exposed. Dealing with the first of the three factors which affect valuation, viz., (i) the appropriate dividend yield; (ii) the prospective dividend; and (iii) the possibility of capital appreciation, PLOWMAN, J., said:

"Two approaches to the problem of an appropriate yield have emerged during the course of this case. The first is to take a purely arbitrary figure based on experience and expertise and work from that. The other is to ascertain the yield which can be obtained on investments in companies in the *same* general field of industry in the public sector and then to apply an arbitrary figure of discount for the fact that one is dealing not with a public company but with a private company. The latter method has the advantage over the former that it at least starts on a factual basis, but is open to criticism on a number of counts. For example, dividend policy in a private company is likely to be entirely different from dividend policy in a public company; and the regulations affecting the transfer of shares are likely to be entirely different in the two cases. Moreover, it is in the company and its management and not in the industry that the hypothetical purchaser is likely to be interested. These are only examples and there are no doubt numerous other factors which influence the stock market

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but are irrelevant in considering the value of shares in a private company, and in particular this company."

[See *Re Lynall*, (1968) All E.R. 322 at p. 333 *infra*].

In *Holt v Inland Revenue Commissioners*, (1953) 2 All E.R. 1499 at page 1509, DANCKWERTS, J., when considering "the prophetic vision of the prospective purchaser" said:

"I think the kind of investor who would purchase shares in a private company of this kind, in circumstances which must preclude his disposing of his shares freely whenever he should wish (because he will, when registered as a shareholder, be subject to the provisions of the Articles restricting transfer) would be different from any common kind of investor who had some special reason for putting his money into shares of this kind. He would, in my view, be the kind of investor who would not rush hurriedly into the transaction, but would consider carefully the prudence of the course, and would seek to get the fullest possible information about the past history of the company, the particular trade in which it was engaged and the future prospects of the company."

Moreover, as has been realistically said, a purchaser of shares in a company which is a going concern does not usually purchase shares with a view to attempting to wind-up the company. He would look mainly to the dividends which he could reasonably expect to receive on his shares. The real value of shares which a deceased person holds in a company at the date of his death will depend more on the profits which the company has been making and should be capable of making, having regard to the nature of its business, than upon the amounts which the shares would be likely to realise upon liquidation. (See *McCathie v Federal Commissioner of Taxation*, 69 C.L.R. 1, at p. 11).

For these reasons, I prefer Mr. Yansen's to Mr. Farrar's valuation. The latter merely related the average five-year percentage yield of 7.40% before tax to the figure of \$36.36 which, he says, represents a questionable 20% tax-free dividend, and arrived at \$20.36 per share, i.e.

$$\frac{740 \times 100}{3636} = \$20.36.$$

So that, contrary to what the Yansen valuation has shown, Farrar's made no attempt at arriving at a true basic yield, i.e., by showing what comparable investments the money market afforded the hypothetical purchaser during the relevant period, nor did he tack on to it any appropriate percentage allowances due to share transfer restrictions contained in the company's Articles of Association, nor any percentage due to the lack of liquidity and charge on assets, nor any taking into account the fact that the shareholding was a minority one. The method adopted by Mr. Farrar merely

attempted comparison of the company's dividends with those paid by three public companies, none of which was truly comparable in the respect that they carried on business in the same general field of industry of which PLOWMAN, J., spoke in *Re Lynall* above. I think the Valuation which he struck at \$ 20.35 per share was illusory and unsatisfactory and out of accord with the realities of the situation, and it is a matter for comment that notwithstanding Mr. Farrar's admission that the dividends paid during the five-year period prior to the death did not reflect the true profitability of the company since only a portion of profits were being distributed, he made no attempt to assess the value of the shares with reference to the earnings yield standard as did Mr. Yansen.

I will therefore accept Mr. Yansen's valuation at \$85.00 per \$100 share. Admittedly, it is below par, but I will accept the unchallenged reasons he has given for arriving at it, the chief of them being the serious shortage of working capital which hit the company during the years 1955-1959, and which caused it to operate under depressing financial circumstances necessitating the obtaining of bank overdrafts and loans on secured charges.

On the matter of the number of shares which comprised the second ground of appeal, I accept the figure of 341 shares to be the correct number which stood in the name of the deceased in the company's share register at the date of his death on 18th August, 1960. The Commissioner of Inland Revenue, as I have said, rejected this figure arbitrarily, as s. 14(1) of Cap. 301 empowers him to do in cases where he is dissatisfied. He fixed the number at 839 shares. It is very clear that this represents the total of the first three lots of acquisitions by the testator (*viz.* 540 + 260 + 33), and that the Commissioner took no account of share disposals by the deceased during the years 1910-1935. In cross-examination the *bona fides* of the share transfer between the members of the two families comprising the company were attacked. It was said that the transfers were void for want of consideration. In this regard I specially directed accountant Yansen to pay attention, and in his report, which was unchallenged by cross-examination, he stated that in each case except the original allotment of 540 shares, evidence of the consideration was to be obtained from the relating transfer forms. These were carefully scrutinized by him and found to be undoubtedly genuine documents.

The third and final ground relates to the addition of \$ 10,268.90 to the amount of estate duty assessed before deducting the payment of \$22,874.88 as duty made on December 6, 1961. It is said that this amounted to an attempt to collect compound interest, contrary to the Tax Ordinance, Cap. 298.

The assessment of the Commissioner appended to his letter of the 21st September, 1966, to the petitioners, already alluded to, explained how the figure of \$ 10,268.90 was computed, *viz.*, from 290 days at \$35.41 per day, *i.e.* from 20th February to 6th December, 1961. This period was clearly calculated, as was explained by counsel for the Commissioner, from

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six months after the death, in accordance with the practice prevailing in the Supreme Court Registry, because the deceased died abroad, though domiciled in Guyana. (See *G.T.B. de Freitas, decd.* [1949] L.R.B.G., p. 188).

It has, however, now been decided in *Commissioner of Inland Revenue v Gomes & Wight* (Civil Appeal No. 11 of 1967, dated November 2, 1967) that estate duty, and hence interest on it, by virtue of the Tax Ordinance, Cap. 298, becomes payable from the date when a proper notice of assessment has been served by the Commissioner on the party accountable for the same. If this is so, then there can be no doubt that interest in the matter under review became payable as from September 22, 1966, because the Commissioner has stated in para. 2 of his letter dated 21st September, 1966 (above): "I have this day assessed the estate to duty amounting to \$225,710.07 as shown on the attached form."

This letter, in the ordinary course of post, would have been received next day, i.e., on September 22, 1966. On the above authority, therefore, September 22, 1966, is the date from which interest on estate duty would begin to run.

In the result, the appeal is allowed on all three grounds, and I hereby declare and order as follows:

- (i) The deceased died possessed of 341 shares in Messrs. Wieting & Richter Ltd. at the time of his death.
- (ii) The use of the net assets valuation method employed by the Commissioner was erroneous in the circumstances. The value of each of the shares of the deceased at the time of his death was \$85.00 (eighty-five dollars) per \$ 100 share.
- (iii) Interest on estate duty became legally payable as from September 22, 1966; consequently it was wrong for the Commissioner to have added the \$10,268.90 as a charge before deducting the amount of duty of \$22,874.88 paid by the estate on December 6, 1961.
- (iv) Costs to the appellants certified fit for two counsel.

Appeal allowed.

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[High Court (Vieira, J.) June 21, 24, 25, 26, 28, 1968,
March 22, 1969.]

Libel—Pleading—Pleading extrinsic facts—Not required but desirable—Rules of the Supreme Court 1955 o. 17, r. 16.

Libel—Innuendo—Falling back on natural meaning of words when innuendo fails.

Libel—Fair comment—Malice—Failure to check accuracy of story—Rules of the Supreme Court 1955 o. 17, r. 25.

Libel—Damages—Aggravated damages—Apology—Defamation Act 1959 s. 9.

The defendants published an article written by C in the Evening Post which said that there was discontent among the technical staff at the Ministry of Agriculture "springing from failure to recommend promotions failure to fill numerous existing vacancies and failure to grant acting pay among other complaints" and that a branch of the Civil Service Association had sent a memorandum to the Prime Minister asking him to appoint a committee to investigate the grievances. Three days later another article by C was published. It referred to the memorandum (an unsigned copy of which had been sent to C) and said that this was "the most recent of a number of labour problems the Prime Minister has been personally asked to solve" although other institutions maintained by taxpayers money are established to resolve such issues and that this by-passing of the institutions must be regarded as a public vote of no confidence in the heads of Government departments or in the Ministers in charge of those departments; that there was gross incompetence evident in many Government departments and why employ so many ministers when others have to do the work; that the Prime Minister must be sorely disappointed in the number of "broomsticks" in his Government; that certain organisations have the power to see that those charged with certain responsibilities do their work or have them removed and that "Mr. Burnham should get a broom himself and sweep them out." The plaintiff, the Minister of Agriculture sued for libel. The defendants pleaded that the words in themselves are not libellous and no circumstances have been alleged showing them to have been used in a defamatory sense and that they are insufficient in law to sustain the action.

HELD: that (i) although under o. 17, r. 16 of the rules of Court 1955 extrinsic facts need not be alleged and set out in the pleading they nevertheless ought to be pleaded.

(ii) a plaintiff can fall back upon the natural meaning of the words complained of if he fails to establish the meaning attributed to them in a false or popular innuendo.

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(iii) the two articles read together are capable of referring to the plaintiff and of being defamatory of him and of bearing the meaning attributed to them by the plaintiff and that the plaintiff's witnesses could reasonably understand the words used so to mean.

(iv) the defence of fair comment was not established. The second article was based on the memorandum. C did not know the author of the memorandum and never tried to contact him, or otherwise to determine whether the contents of the memorandum were true or false. This amounted to malice and destroyed the defence of fair comment.

(v) aggravated damages would be awarded because (a) C said that if he had known the plaintiff as the Minister of Agriculture at the time he wrote the article he still would have written the same article and (b) no apology was made under s. 9 of the Defamation Act 1959.

The reasonable man in Guyana is the average Guyanese juror.

Judgment for the plaintiff.

F.R. Wills with Mrs. Pearlene Roach for the plaintiff.

A.S. Manraj for the defendants.

VIEIRA, J.: In this action the plaintiff claims the sum of \$25,000.00 (twenty-five thousand dollars) as damages for libel arising out of the publication of two articles during September 1966 in the EVENING POST newspaper, of which the defendants are the admitted publishers.

Peter Taylor, a director of the said company, who was sued jointly with the company, was not proceeded against and was dismissed from the suit with taxed costs up to and including March 23rd, 1967 when a notice of withdrawal was filed against him.

Up to 1967 the plaintiff was a solicitor of the Supreme Court of many years standing. He formally applied to have his name removed from the Roll of Solicitors in both England and Guyana with a view to being called to the Bar. Both these applications have been granted and he is now a member of the Honourable Society of Gray's Inn. He was and is a Member of Parliament and up to the general elections of last December was the Minister of Home Affairs. He was and is the Assistant-General Secretary of the People's National Congress which won the last elections and of which the Prime Minister, the Right Honourable L.F.S. Burnham, Q.C. is the Leader.

The two articles to which objection are taken are dated 16th September, 1966 under the heading "Another labour protest for P.M." (Ex. "A") and 19th September, 1966 under the caption "By-passing institutions" (Ex. "B").

At the time these two articles were written, the plaintiff was the Minister of Agriculture under whose portfolio were the Departments of

Agriculture, Animal Husbandry, Fisheries and Land Development with a then total complement of about 2000 employees in all categories.

Appointments to the Public Service were and are made by the Public Service Commission on the recommendation of the Permanent Secretaries of the various Ministries concerned. In theory, this is the sole responsibility of the Permanent Secretary, a responsibility that ought not to be shared with anybody else.

In the normal course of events, vacancies arise from time to time in all Ministries and Departments of Government which are sometimes filled by officers in acting capacities. In these circumstances it is the duty and the responsibility of the Permanent Secretaries to see that these vacancies are filled as expeditiously as possible and to make recommendations to the Public Service Commission accordingly.

In theory, Ministers have no power or authority to make any recommendations with regard to filling vacancies but they can urge their Permanent Secretaries to have existing vacancies filled as early as possible. As a matter of policy, however, Ministers can prevent the filling of acting posts which would mean there would be no acting pay.

As Governments come and go so Ministers rise and fall. Ministers have constitutional responsibilities so long as their party form the Government of the day whereas Permanent Secretaries are permanent civil servants who have executive responsibilities and who in fact are the real and effective heads of every Ministry.

A Ministry may function properly without a Minister, at least temporarily, and if there is a clash between a Minister and his Permanent Secretary either of them may separately approach the Cabinet. It would be a foolish Minister indeed who does not heed the advice of his Permanent Secretary, usually, a most experienced officer of long standing, and it is, in fact, common practise for the two of them to have daily consultations on matters pertaining to the day to day running of the Ministry concerned.

Unlike a Permanent Secretary or any other civil servant, a Minister is not subject to the authority and control of the Public Service Commission but solely to the Prime Minister who has power to remove him at any time and to whom he is directly responsible for the proper and efficient running of his Ministry.

It would appear that there is a limited order of precedence amongst Ministers of the Government as follows: –The Prime Minister, First Deputy Prime Minister, Second Deputy Prime Minister and, lately Third Deputy Prime Minister. All other Ministers rank equally among themselves in alphabetical order but this order may vary on state or other special occasions as may be directed by the Minister of Home Affairs who is the Minister in charge of ceremonial.

There are also Junior Ministers so called who are really Parliamentary Secretaries, a political post.

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In 1967 a Public Service Ministry was set up which is the responsibility of the Prime Minister. This new Ministry took over the functions of the Establishment branch of the Treasury as well as the training programme of the Ministry of Education and some of the secretarial duties of the Public Service Commission without, apparently, in any way affecting the executive authority of the Commission.

There are two main organisations to which civil servants in this country belong, viz:—The Civil Service Association (C.S.A.) and the Federation of Unions of Government Employees (F.U.G.E.) whose nominee to the Public Service Commission since 1965 has been the witness Frank Denbow.

The C.S.A. has several different committees and there is a branch of this organisation which is known as the Junior Technical and Professional Branch which is not restricted to any Ministry but permeates in every Ministry. A section of this branch is called the Agricultural Section which, as the name implies, is chiefly concerned with junior professional and technical officers of the Ministry of Agriculture.

It is generally accepted practice in the civil service that representations including complaints on behalf of the members of the C.S.A. are either made direct to the Permanent Secretary of the Ministry concerned or the Public Service Commission and not to any Minister, including the Prime Minister;

But it is trite knowledge that this procedure is not always followed and there have been several cases in both pre and post Independence days when memoranda have been sent directly to the Governor and Heads of Department and the Prime Minister and Ministers of Government respectively.

It is with this background that we now come to the events which have led up to the filing of this present action.

On September 12th 1966, this particular branch sent a written memorandum directly to the then Acting Prime Minister without going through either the acting Permanent Secretary of the Ministry of Agriculture, who at that time was the witness Stephen Angoy, or through the Public Service Commission of which the witness Frank Denbow was and is a full time member.

This memorandum was signed by one K.C.L. Millington on behalf of the Section and related to some 9 points raised and discussed at a meeting at which grave dissatisfaction was expressed, inter alia, about prolonged delays in effecting promotion, failure to confirm acting appointments and grant acting pay to officers, some of whom had been as long as 2 years acting in the post, whilst other officers were forthwith appointed to similar posts in a fixed capacity. The Prime Minister was requested to recommend that

a committee of enquiry be appointed to take evidence and to recommend such steps as would bring an intolerable situation to a speedy end.

On page 1 of the Evening Post of Friday September 16, 1966 there appeared the following article: –

"Another labour protest for PM".

"The Junior Technical and Professional Section of the Guyana Civil Service Association has sent a memorandum to the Prime Minister setting out a number of grievances and asking him to appoint a committee to investigate them."

"The memorandum refers particularly to discontent among the technical staff of the Ministry of Agriculture springing from failure to recommend promotions, failure to fill numerous existing vacancies and failure to grant acting pay among other complaints."

"It is understood that this has caused frustration among the members of the staff and has also resulted in general breakdown of good relations between them and the administration."

Sometime between the 12th and 18th September 1966 the defence witness, George William Collymore, a feature writer, who writes a column in the Evening Post under the heading "Opinion" saw an envelope on his desk addressed to the "Opinion writer of the Evening Post". On opening same he saw a copy of the memorandum sent to the Prime Minister (Ex. "C") inside together with a covering letter with certain instructions. This letter, apparently, was unsigned, but the same name 'Millington' as in (Ex. "C") appeared therein.

After reading Ex. "C" he wrote an article which was published in the 'Opinion' column of the Evening Post of Monday 19th September, 1966 as follows: –

"OPINION

BY-PASSING INSTITUTIONS"

"Although the Prime Minister is away on business, on his return he will find that the Junior Technical and Professional Section of the Guyana Civil Service Association has sent him a memorandum which he will be asked to investigate and settle a number of grievances."

"This is the most recent of a number of labour problems the Prime Minister has been personally asked to solve, although there are institutions established and maintained by taxpayers' money to resolve such issues."

"This by-passing of institutions and ministries must sooner or later be regarded as a public vote of no confidence in the heads of government departments, or to bring it home nearer, in the ministries under whose portfolios these departments fall."

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"If one can, for a moment forget the worship that some have for Mr. Burnham and which brings them the satisfaction of his supervision and ruling on labour and other problems, he cannot however, look away from the gross incompetence evident in so many Government Ministries".

"And in fairness to the taxpayer it must be asked: why employ so many Ministers of Government when others have to do all the work? and what work that isn't done is left undone."

"Dr. Jagan, in his time, boasted of finding popular support for "broomsticks" that he might nominate. He found that those "broomsticks" were a humbug in his administration. Today, Mr. Burnham must be sorely disappointed in the number of ministerial "broomsticks" in his government."

"For good reasons, he cannot afford to turn down requests made by organisations for his personal intervention in matters which affect them; but these organisations have it in their power to see to it that those who are charged with certain responsibilities do their work, failing which, they should have no stone unturned to have them removed from office.."

"Mr. Burnham should get a broom himself and sweep them out."

In paragraph 5 of his statement of Claim the plaintiff avers:—

"5. By the words aforesaid and more particularly those set out in paragraph 3 of this Statement of Claim the defendants meant and were understood to mean that the plaintiff was incompetent in his office as a Minister of Government and was unfit to retain the said office and should be removed therefrom."

The defendants admit the printing and publication but deny that the words have any of the defamatory meanings pleaded by the plaintiff. Further they say that the words in themselves are not libellous and no circumstances have been alleged showing them to have been used in any defamatory sense and that they are insufficient in law to sustain the action.

Paragraph 7 of the defence then states: —

"7. Insofar as the said words consist of statements of fact they are true and insofar as the said words consist of expressions of opinion they are fair and *bona fide* comment made without malice upon the said facts which are a matter of public interest.

It is submitted on behalf of the defendants:—

- (1) that the articles published do not refer to the plaintiff;
- (2) that the articles when read separately or together are not libellous or defamatory in any way;

(3) that the plaintiff is not relying on the plain and natural meaning of the words but his whole case in fact, is based upon inferences and, consequently, it is necessary for him to plead innuendoes which necessitates pleading facts to support the innuendoes;

(4) that the test is what interpretation or inferences or conclusions the ordinary reasonable man would place on the articles when read together and not what plaintiffs witnesses think, since their standards are much higher than ordinary citizens.

(5) that since it is conceded that the matters commented upon in the articles are matters of public interest, then it has to be ascertained whether or not the comments and/or opinions expressed in the said articles are fair and *bona fide* and it is strongly urged that this is so in this action.

I consider that procedural points of great importance have been raised by the pleadings in this matter.

In defamation, generally, the words may be so plain that no further explanation of them is needed. But if they are doubtful in meaning what is called an innuendo is required, the functions of which are not exhausted in the explanation of words but extend to identification of the plaintiff.

Innuendoes are of two kinds, viz:—

- (1) the so-called false or popular or ordinary or rhetorical innuendo, which is of recent growth and
- (2) the true or legal innuendo.

A false innuendo is one which arises from the words in their natural and ordinary meaning with or without inferential meanings and is no more than an elaboration or embroidering of the words used without proof of extraneous facts. The true innuendo, on the other hand, is one which depends on extraneous facts which the plaintiff has to prove in order to give the words the secondary meaning of which he complains—per *Lord HODSON in Lewis v Daily Telegraph Ltd. Same v Associated Newspapers Ltd.* (1963) 2 All E.R. H.L. at p. 165 (hereinafter referred to as *Lewis' case*).

In England, before the Common Law Procedure Act 1852, if the plaintiff alleged that the words had a different or wider sense than their ordinary meaning, extrinsic facts had to be pleaded "by way of introduction" or as a "prefatory averment" as it came to be called in the declaration. Section 61 of the 1852 Act did away with the necessity of pleading the prefatory averment while leaving it necessary to plead the innuendo. In *Watkin v Hall* (1868) 32 J.P. 485, BLACKBURN, J. analysed Section 61 and said at p. 486: —

"Before the alteration of the law, whenever an innuendo was supported by the prefatory matter as to having used the words in a particular sense, you must have proved it as laid, and you could not prove a different character of slander, where it was not supported by the prefatory matter it might be rejected and then the plaintiff

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might stand on the simple words if they were libellous or injurious or mischievous. The legislature, however, has altered that, and has enacted this: "In actions for libel and slander the plaintiff shall be at liberty to aver that the words or matters complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matters were used in that sense." Every innuendo is therefore good although it is not supported by a prefatory averment. And then the section goes on to say: - "and such averment shall be put in issue by the denial of the alleged libel or slander, and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient." Those latter words I can put no other meaning on them than that the legislature has enacted that in a declaration for libel or slander, with an innuendo that the words were in a particular meaning, it should be read as if there were two counts, one with the innuendo, and if the plaintiff proves either, that shall be sufficient".

A system of pleading was thus built up on this basis whereby, in many cases, no distinction was to be found between the true or legal innuendo and the false or popular innuendo. Since no special facts had to be pleaded to support the innuendo the distinction became blurred between the true or legal innuendo and that which was very often nothing but wordy explanation or attempted explanation of the words complained of in their natural and ordinary meaning—per Lord DEVLIN and Lord HODSON in *Lewis'* case.

This state of affairs continued until 1949 when a new rule, Order 19 rule 6(2) (now Order 82 rule 3(1) of the 1965 rules) was introduced which required that in the case of true or legal innuendoes, extrinsic facts must not only be proved but also pleaded. Thus the position partially reverted back to what it was before the 1852 Act was passed.

O. 19, r. 6(2) (now O.82, r. 3(1) provides as follows:

"3(1) Where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he must give particulars of the facts and matters on which he relies in support of such sense."

Now there are no comparable provisions in the local Rules of the Supreme Court, 1955 and the questions that at once arises is whether the English Rule is applicable to this country by virtue of Order 1 rule 3 which states as follows:—

"3. Wherever touching any matter of practice or procedure these Rules are silent, the Rules of the Supreme Court for the time being in force made in England under and by virtue of the Supreme Court

of Judicature (Consolidation) Act, 1925, or any statute amending the same shall apply *mutatis mutandis*".

In *White v Guiana Graphic Ltd.* (1962) L.R.B.G. 501 PERSAUD, J. (as he then was) held, in Chambers, that O. 19, r. 6(2) of the English Rules is applicable to British Guiana (now Guyana) by virtue of our O.1, r. 3. His Lordship referred to the judgment of HOLROYD PEARCE, L.J., (as he then was) in *Grubb v. Bristol United Press Ltd.* (1962) 2 All E.R. 380, C.A. where the learned Lord Justice said at p. 391:—

"Although it is not done in practice, I see nothing to prevent the plaintiff, if he chooses, from pleading what he contends to be the ordinary meaning of the words, either in a case where it is doubtful whether a defamatory inference is within the ordinary meaning or even where the words are plainly defamatory. He would be merely providing the defendant with the nature of his case on that point; but since the practice is to regard a plea beginning "by the said words the defendant meant and was understood to mean" as connoting a plea of innuendo from extrinsic facts, the plaintiff, unless he added the words "in their natural and ordinary meaning" to show that he was not pleading an innuendo proper, would no doubt be ordered to give particulars under R.S.C. Ord. 19 r. 6(2). If even, at that stage, the plaintiff made it clear that he was alleging no extension of meaning but only the ordinary meaning, the order would not apply and the plea would not be struck out for lack of particulars."

In White's case PERSAUD, J. was of the view that because the words "in their natural and ordinary meaning" were not added by the plaintiff then she was pleading a true or legal innuendo and the particulars asked for should be given.

With all due respect I cannot agree with the learned judge that our rules are silent on the question of pleading innuendoes. To my mind this is quite clear from the wording of the local Order 17 r. 16 which provides as follows:—

"16. In an action for libel or slander it shall not be necessary to state in the claim any extrinsic facts or any innuendo for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arises; it shall be sufficient to state generally that the same was falsely and maliciously published or spoken concerning the plaintiff, and, if such allegation be denied, the plaintiff must establish on the trial that it was so published or spoken."

It seems to me that the words "any extrinsic facts or any innuendo" in Order 17 r. 16 can only possibly refer to true or legal innuendoes and has no reference whatsoever to false or popular innuendoes.

Lord DEVLIN in Lewis' case in reference to Order 19 r. 6(2) succinctly said at p. 170:—

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"The word "innuendo" is not used. But the effect of the language is that any meaning that does not require the support of extrinsic fact is assumed to be part of the ordinary meaning of the words. Accordingly, an innuendo, however well concealed, that is capable of being detected in the language used is deemed to be part of the ordinary meaning."

Further, with all due respect to PERSAUD, J., I cannot agree that because the words "in their natural and ordinary meaning" are left out, that the words "by the said words the defendant meant and was understood to mean" must necessarily amount to a true or legal innuendo. This is quite clear, I think, from Lewis' case, where all the judges in both the Court of Appeal and the House of Lords were of the opinion that, although the paragraphs pleading the innuendoes were, in form, true innuendoes, nevertheless, in substance, they amounted to false innuendoes since no extrinsic facts were pleaded.

In tracing the history of O. 17, r. 16 I have been able to ascertain that it is in identical terms with s.17 of Ordinance 26 of 1855 which was intituled "An ordinance to provide an Amended Manner of Proceeding in the Supreme Court of Civil Justice of British Guiana". This ordinance was passed to amend ordinance 5 of 1846 which itself was passed to repeal ordinance 21 of 1844. It is of interest to note that in those days the term "Rules of Court" were not used but, instead, the rather quaint and long-winded "Amended Manner of Proceeding".

It is my opinion that s.17 of Ordinance 26 of 1855 was based upon s. 61 of the Common Law Procedure Act, 1852. If this assumption is correct, then the position in relation to the pleading of innuendoes in this country today is the same as it was in England between 1852 and 1949, i.e. true innuendoes must be proved by extrinsic facts before the meaning of the words complained of can be extended beyond their natural and, ordinary meaning, but as a matter of practice, such extrinsic facts need not be alleged and set out in the pleading.

I consider it a great pity that O. 19, r. 6(2) was never incorporated in our Rules in 1955 by the rule-making committee, since it is most helpful to defendants to know what is the real case that they have to meet. Further, it prevents slipshod practice and that "blurring of distinctions" referred to by Lord HODSON in *Lewis'* case at p. 166.

It is clear from *White's* case (*ubi supra*) that O. 17, r. 16 was never argued before PERSAUD, J., and, apparently, his mind was never in fact adverted to this Rule.

It is my considered opinion, therefore, that Order 19 r. 6(2) (now Order 82 r. 3(1) of the English Rules) is not applicable to the pleading of true or legal innuendoes in this country in view of the specific and express

words of O.17, r. 16. of the local Rules of Court. It is to be sincerely hoped that the rule-making Committee at present revising the local Rules of Court will incorporate O. 82, r. 3(1) in the new Rules and do away altogether with O. 17, r. 16.

As it undoubtedly would be eminently desirable to have uniformity in the pleading of innuendoes, it is suggested to the legal profession that where it is desired to plead a false or popular innuendo, then the words "in their natural and ordinary meaning" should always be inserted. Where a true or legal innuendo is contemplated then, O. 17, r. 16 notwithstanding, extrinsic facts ought always to be pleaded in a third paragraph as suggested by Lord DEVLIN, in *Lewis'* case at p. 171.

I am fully aware that the suggestions I have put forward can only really be done by consent, since it is clear that a plaintiff cannot be forced to give particulars and, consequently, the innuendo paragraph cannot be struck out by a judge in chambers for failure to do so. In this case it is not denied that the defendants never asked for particulars but, to my mind, this makes absolutely no difference in view of the clear and unambiguous language of O.17, r. 16.

It is to be noted that in *Lewis'* case the House of Lords considered it permissible to plead a false innuendo but left the question open whether it was necessary to do so. Lord DEVLIN said at p. 172:

"But I make the comment that, if it is not necessary, it is nevertheless a form of pleading universally used from the earliest times until 1949, and I can see nothing in the new rule that should alter so well established a practice."

Can a plaintiff fall back upon the natural and ordinary meaning of the words complained of, if he fails to establish the meaning attributed to the words ascertained in a false or popular innuendo? Both HOLROYD PEARCE, L.J. and HAVERS, J. in the Court of Appeal and Lord HODSON in the House of Lords in *Lewis'* case were of this view and so was BOLLERS, J. (as he then was in *Ramsahoye v. Peter Taylor & Co. Ltd.* (1964) L.R.B.G. 329 at p. 333. I entirely agree with this proposition. Does the same thing apply in the case of a true or legal innuendo? In my opinion, clearly not. There can surely be no question of falling back on the plain or natural and ordinary meaning of words since a true or legal innuendo can only be sustained by extrinsic facts which seeks to show a secondary or extended meaning.

In *Lewis'* case, Lord REDD made it quite clear that it is the duty of the judge to rule whether the words appearing in the publication are capable of bearing a defamatory meaning and, more particularly, in the meaning attributed to them in the innuendo. The noble Lord said at p. 154—

"The respondents admit that their words were libellous although I am still in some doubt as to what is the admitted libellous meaning. But they sought and seek a ruling that the words are not capable of having the particular meaning which the appellants attribute to them.

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I think they are entitled to such a ruling and that the test must be the same as that applied in deciding whether words are capable of having any libellous meaning. I say that because it appears that when a particular meaning has been pleaded either as a "true" or a "false" innuendo, it has not been doubted that the judge must rule on the innuendo and the case surely cannot be different where a part of the natural and ordinary meaning is, and where it is not, expressly pleaded".

Now a libel is the publication of any written or printed words which tend to lower a person in the estimation of right thinking members of society generally, or which make them tend to shun or avoid that person, or expose him to hatred, contempt, or ridicule.

The fundamental primary principle in the law of defamation is that a statement is not actionable, unless it is made and published "of and concerning" the plaintiff and is defamatory of him—*Knupffer v. London Express Newspaper Ltd.* (1944) 1 All E.R. 495 H.L. A class of persons cannot be defamed as a class, nor can an individual be defamed by a general reference to the class to which he belongs. In *Eastwood v Holmes* (1858) 1 F&F. WILLES, J. made his famous dictum at p. 349 –

"If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there was something to point to the particular individual."

Where, however, although defamatory matters may appear only to reflect on a class of individuals yet, if the words are capable of being shown to point to any one individual, an action for libel will lie at the suit of such individual. In *Le Fanu v Malcolmson* (1848) 1 H.L.C. Lord CAMPBELL said at pp. 667–8:

". . ., the first objection is that this libel applies to a class of persons, and that therefore an individual cannot apply it to himself. Now, I am of the opinion that that is contrary to all reason, and is not supported by any authority. It may well happen that the singular number is used, and where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury and the jurors are to determine, whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name, or whether he is called by another or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated".

In *Knupffer v London Express Newspaper Ltd.* (1944) 1 All E.R. 495
Viscount SIMON, L.C. said at p. 497—

"There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law—can the article, having regard to its language, be regarded as capable of referring to the appellant? The second question is a question of fact, namely, does the article in fact lead reasonable people, who know the appellant, to the conclusion that it does refer to him? Unless the first question can be arrived in favour of the appellant, the second question does not arise and where the trial judge went wrong was in treating evidence to support the identification in fact as governing the matter, when the first question is necessarily, as a matter of law, to be arrived in the negative."

Do Exs. "A" & "B" either separately or together refer to the plaintiff? This is clearly the first point that has to be decided in this matter because if they do not then this matter is at an end and must necessarily be dismissed.

To my mind Ex. "A" when read by itself is completely innocuous and has no reference whatsoever to the plaintiff. Ex. "B" when read alone is a rather subtle and somewhat complex document and, on the face of it, makes no reference to the plaintiff either as an individual or in his capacity as the then Minister of Agriculture.

But I am satisfied that when these two articles are read together they do in fact identify and particularise the plaintiff as one of a limited class, viz. Ministers of Government of which there is no real dispute that there were only 14 or 15 at the time of publication in September, 1966. This I think, is clear when one analyses the two articles.

Para. 1 of Ex. "A" speaks of the 'Junior Technical and Professional' Section of the Guyana Civil Service Association sending a memorandum to the Prime Minister setting out a number of grievances and asking him to appoint a committee to investigate them. Para. 2 then states that 'the memorandum refers particularly to discontent among the technical staff of the Ministry of Agriculture' concerning failure to recommend promotions, failure to fill numerous existing vacancies and failure to grant acting pay among other complaints.

Three days later Ex. "B" is published, para. 1 of which speaks about the Junior Technical and Professional section of the Guyana Civil Service Association sending a memorandum in which the Prime Minister, who was away on business, will be asked to investigate and settle a number of grievances. Para. 2 then speaks of 'this most recent' of a number of labour problems the Prime Minister has been personally asked to solve. Para. 3 speaks of 'bypassing of institutions and Ministries' and then goes on to say or to bring it home nearer, in the Ministers under whose portfolios these departments fall! Para. 4 speaks of "gross incompetence evident in so many Government Ministries". Para. 5 states 'why employ so many Ministers of Government when others have to do all the work'.

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Para. 6 speaks of 'broomsticks' which Dr. Jagan found were a humbug in his administration and that Mr. Burnham must be sorely disappointed in the number of Ministerial broomsticks in this Government. Paragraph 7 states that "these organisations . . . should leave no stone unturned to have them removed from office." Paragraph 8 states that Mr. Burnham should get a broom himself and sweep them out."

Having regard to the oral and documentary evidence in this matter I am satisfied that para. 5 of the Statement of Claim consists of both false and true innuendoes.

It is clear, I think, from *Le Fanu v Malcolmson* and *Knupffer v London Express Newspaper Ltd. (ubi supra)* that extrinsic evidence is admissible to show that the libel is referable to the plaintiff. In this case the extrinsic evidence is Ex. "A" plus the memorandum (Ex. "C"). Now Collymore has denied that "the most recent memorandum" in para. 2 of Ex. "B" refers to Ex. "C" but he admits that the word 'memorandum' in para. 1 of Ex. "B" does refer to Ex. "C". When one adds all of these up together it is clear, I think, that what is really pinpointed here is Ex. "C" which is surely 'the most recent memorandum' and which is restricted to the Junior Technical and Professional Section of the Ministry of Agriculture.

I consider that a clever attempt has been made to cause confusion in Ex. "B" by an indiscriminate juxtaposition of the words 'Ministers' and 'Ministries' which I feel is nothing less than a subtle attempt to take the spotlight away from the plaintiff who was the Minister of Agriculture when the two articles were written.

I entirely agree that the word 'broomstick' could not possibly refer to an inanimate object such as a Ministry and clearly, neither Dr. Jagan nor anybody else could ever nominate a Ministry. Even Mr. Burnham himself cannot dismiss a civil servant but only a Minister.

As a matter of law, therefore, I hold that Exhibits A & B' when read together are capable of referring to the plaintiff.

Where a judge sits with a jury as is almost invariably the practice in libel actions in England, it is a question of law whether the publication complained of is capable of a defamatory meaning and, if this is answered in the affirmative, then it is a question for the jury to decide whether in fact it bears that meaning – *Tolley v Fry* (1913) A.C. 333.

What is the position where a judge sits alone without a jury, as is the case in every civil action in this country? In *Woolford v Bishop* (1940) L.R.B.G. 93, CAMACHO, C.J. said at p. 95 –

"On this aspect of the case the single duty which devolves on this court in its dual role is to determine whether the words are capable

of a defamatory meaning and, given such capability, whether the words are in fact libellous of the plaintiff."

This dictum of the learned Chief Justice was approved by BOLLERS, J. (as he then was) in *Ramsahoye v. Peter Taylor & Co. Ltd.* (*ubi supra* at p. 331).

In *Slim v Daily Telegraph Ltd.* (1968) 1 All E.R. 497, C.A. DIPLOCK, L.J. (as he then was) in considering what is meant by the words "in their natural and ordinary meaning," opined that what really mattered was what the adjudicator thought was the one and only meaning that the readers as reasonable men should have collectively understood the words to mean - *ibid* at p. 505 letter C. His Lordship went on to say that juries must, 'all agree on a single meaning' and where there is a judge sitting alone without a jury, it is he, as sole adjudicator, who has to arrive at a single right meaning. His Lordship then said at p. 506 -

". . . with the concentration of functions on a single adjudicator, the need for his distinguishing between meanings which words are capable of hearing and the choice of the "right" meaning which they do bear, disappears. It would be carrying artificiality too far, even for the law of libel, to suggest that a judge sitting alone must approach the issue as to the natural and ordinary meaning of words complained of by asking not only the question. "What is the natural and ordinary meaning in which the words would be understood by reasonable men to whom they were published?" but also the further question - "could reasonable men understood then as bearing that meaning.

I find this a most attractive and illustrative dictum more in tune with modern thought and practice than the more traditional 'dual role' function, and, I accept and adopt it as being the correct approach for a judge to take in this country when trying both libel and slander actions.

Having said all of this I must now ask myself this single question-

"What is the right single meaning of the words in their natural and ordinary meaning which reasonable men to whom they were published, would understand them to mean."

In England the "reasonable man" is "the man on the Clapham omnibus," in the United States of America he is "the man who comes home from work in the afternoon, rolls up his sleeves and mows the lawn." There is no definition of the reasonable man in Guyana and this is not difficult to understand when one considers that we are a young undeveloped nation only recently detached from the apron strings of the metropolitan power. Further, we are not a homogenous race but, in fact, belong to at least 5 different ethnic groups, religions and cultures. We are only approximately 700,000 in numbers, the vast majority of whom are agricultural and industrial labourers. This makes it very difficult to arrive at a happy medium, but, nevertheless, I think we can say with a certain amount of accuracy that the average Guyanese juror may be considered as the average, responsible,

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intelligent, fair-minded Guyanese citizen and thus, the reasonable man in Guyana.

I realise that I am sticking my neck out somewhat and will be criticised even perhaps by my brother judges but it is important in this day and age that we have some idea of what the reasonable man in Guyana looks like even though he or she is merely an abstract figure.

Now it seems quite clear to me that the average Guyanese juror reading Ex. "B" by itself would understand that article in its natural and ordinary meaning' including false innuendoes as meaning that conditions were far from happy among the Junior Technical and Professional Section of the Civil Service Association who, not getting any satisfaction from the Public Service Commission and the Ministers themselves, have had to appeal directly to the Prime Minister, to investigate and settle a number of outstanding grievances. This showed, in no uncertain manner, a public vote of no confidence in the Ministers who either did very little or no work or were grossly incompetent in whatever little work they did in fact do. Like Dr. Jagan, Mr. Burnham must be sorely disappointed in having such humbugs and useless people running Ministries of Government and everything should be done to have such persons removed from office.

The true innuendoes in Ex. "B" are the words "Ministers" and "Ministries". As Lord REID said in *Lewis'* case at p. 154—

"What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of words".

Now the persons in this case who would have 'special knowledge' are the witnesses Angoy, Williams, Jai Narine Singh and Frank Denbow all of whom read Ex. "A" three days previously to reading Ex. "B" and all of whom, especially Angoy and Denbow with their detailed and thorough knowledge of civil service practice and procedure and the workings of the Public Service Commission, when they read Ex. "B", felt that it was referable to the plaintiff, the then Minister of Agriculture, and they all considered it to be an unfair and unjust criticism since it attacked the competence and integrity of the plaintiff in his capacity as Minister of Agriculture without any just cause or excuse.

I entirely agree with the opinion formed by these witnesses. I consider they could have formed no other possible reasonable opinion having regard to the tenor of the words contained in the two articles.

I am wondering whether Mr. Manraj anticipated my definition of the reasonable man in Guyana since it is significant that he asked all the plaintiffs witnesses whether they were jurors to which they all replied in the negative.

Now undoubtedly the real question to be determined in actions for libel is what words would convey to the ordinary man, i.e. the ordinary

reasonable man. In *Lewis'* case Lord REID referred to the fact that four of the five judges in the House of Lords giving the majority decision in *Capital and Counties Bank v George Henty & Sons* (1883) L.J.R. 232, H.L., stated the test in different ways. He also referred to the judgment of Lord HALSBURY in *Nevill v. Fine Art and General Insurance Co.* (1897) A.C. 68. Lord REID then said at p. 155—

These statements of the law appear to have been generally accepted and I would not attempt to restate the general principle.

"In this case it is, I think, sufficient to put the test in this way. Ordinary men and women have different temperament and outlooks. Some men are unusually suspicious and some are usually naive. One must try to envisage people between these two extremes and see what is the most damaging meaning that they would put on the words in question."

Previously the noble Lord had this to say at p. 154—

"There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of wordly affairs. I leave aside questions of innuendo where the reader has some special knowledge which might lead him to attribute to the words a meaning not apparent to those who do not have such knowledge."

The plaintiff's witnesses are certainly not jurors but this surely is a mere accident in view of the fact that being civil servants or members of public corporations or bodies they are exempt from jury service.

There is no average man among Guyanese jurors who may vary from the highly intelligent to the barely literate manual worker.

There can be no doubt that all the witnesses for the plaintiff are intelligent men but this surely does not mean that because of this they cannot be considered as average Guyanese jurors. The only way they are not in fact jurors is simply because of their exemption from service and nothing else.

A 'broomstick,' as Mr. Wills rightly pointed out, is the useless part of a broom. A broomhead by itself is not really useless since one can still sweep with it although it may be very uncomfortable. But what can one do with a 'broomstick' by itself except perhaps as a possible weapon, either of offence or defence, and, certainly it was not made for that purpose.

The "by-passing of institutions established and maintained by taxpayers money" can only possibly refer to the Permanent Secretaries to the Ministry and to the Public Service Commission the workings of which all the plaintiffs witnesses would have some knowledge about. I agree with Mr. Wills that to say that there is gross incompetence in so many Government Ministries and then to say what should be done to such Ministries (broom-

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sticks) is, in effect, to say that the Ministers at least share the gross incompetence in the Ministries.

The 'by-passing of institutions and Ministries' shows very little regard for the Permanent Secretaries of the Ministries or the Public Service Commission and to say 'what work that is not done is left undone' is to impute slackness and dishonesty in that Ministers are being paid for doing very little or no work at all.

Accepting the evidence of the plaintiff and his witnesses as I hereby do, I find the publication of 19th September, 1966 (Ex. "B") when read in conjunction with the publication of 16th September, 1966 (Ex. "A") and regard being paid to the contents of the Memorandum (Ex. "C") is capable of being defamatory of and concerning the plaintiff and, more especially, is capable of bearing the meaning of the words attributed to them by the plaintiff in his innuendo paragraph and that all the witnesses for the plaintiff having the special knowledge that they do could reasonably understand the words used so to mean.

Unlike slander, Libel is actionable per se, i.e. without proof of special damage.

The word 'malice' in the law of defamation may bear any of the three meanings, viz: –

- (a) intentionally doing a wrongful act without just cause or excuse;
- (b) doing an act with an evil motive, and
- (c) doing an act totally independent of either intention or evil motive and may include mere carelessness or even honest mistake.

'Malice' may figure in two stages of an action and its meaning varies according to the particular stage in which it occurs.

Firstly, it is normal practice for a plaintiff to allege in his statement of claim that the defendant published the words falsely and 'maliciously'. Here 'malice' means (a) and (c) above.

Secondly, 'malice' is a term of substance which the plaintiff must support by evidence in the defences of (1) fair comment and (2) qualified privilege. Here 'malice' means abuse of the fair comment or of the privilege by spite or wrongful or improper motive on the part of the defendant. Thus it can be seen that it is used according to either (a) or (b) above.

Para: 7 of the Defence in this action raises what has been termed the so-called "rolled-up plea" which, although criticised by the House of Lords in *Sutherland v Stopes* (1925) A.C. 47 has, nevertheless, been common form for the defence of fair comment since the decision of the Divisional Court in *Penrhyn v The Licensed Victuallers Mirror* (1890) T.L.R. 1.

The rolled-up plea is not a plea of justification but of fair comment only as was pointed out by the Full Court in its valuable judgment in *Guyana Marketing Corporation v. Peter Taylor and Company Limited et anor.* (No. 1685 of 1966 Demerara).

The defence of fair comment has long been recognised in English Law and, if successful, will defeat an action for libel or slander.

The gist of fair comment, as I see it, is that in any civilised society any person in public life or any private individual who makes himself or his work the object of public interest ought not to be above honest though adverse criticism. But for this defence to be effective 4 requirements are necessary, viz:—

- (1) the matter commented upon must be of public interest;
- (2) it must be an expression of opinion and not an assertion of fact;
- (3) the comment must be fair, and
- (4) the comment must not be malicious.

A matter of public interest, in general, can be said to be anything which may plainly be said to invite comment or challenge public attention.

It is for the judge to decide whether the matter is, or is not, of public interest – per LOPES, L.J. in *South Hettan Coal Co. Ltd. v N.E. News Association* (1894) 1 Q.B. 133 at p. 141.

In *Mc Quire v Western Morning News Ltd.* (1903) 2 K.B. 100, COLLINS, M.R. selected as a broad test of 'unfairness.'

"... something that passes out of the domain of criticism itself. Criticism cannot be used as a cloak for mere invective nor for personal imputation not arising out of the subject matter or not based upon fact."

The classic exposition of what is fair comment is that of FLETCHER MOULTON, L.J. in *Hunt v Star Newspaper Co. Ltd.* (1908) 2 K.B. 309 at pp. 319–20—

"The law as to fair comment so far as it is material to the present case stands as follows: In the first place, comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment: see *Andrews v Chapman* The justice of the rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from the facts, any injustice that it might do will be to some extent negated by the reader seeing the grounds upon which the unforgivable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. In the one case the in-

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sufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses.

In the next place, in order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails. This has been so frequently laid down authoritatively that I do not need to dwell further upon it: see for instance, the direction given by Kennedy, J., to the jury in *Joynt v Cycle Trade Publishing Co.*, which has been frequently approved by the courts.

Finally, comment must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation. This is the language of KENNEDY, J. in the case to which I have just referred. It is based on the judgments in *Campbell v. Spottiswoode*, a case of the highest authority, and is in my opinion, unquestionably a true statement of the law".

Now at Common Law a plea of fair comment could only succeed if the facts upon which the comment is based are stated truly. The common law position was modified by Section 6 of the Defamation Act, 1952, which provides as follows:—

"6 – Fair Comment – In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expressions of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as proved."

The Defamation Act, 1952, has been adapted in its entirety by our own Defamation Ordinance, No. 17 of 1959, s. 8 of which is in identical terms with s. 6 of the English Act.

It is interesting to note that s. 6 of the 1952 Act was commented upon in both GATLEY ON LIBEL AND SLANDER, 5th edition (1960) and CLERK AND LINDSELL ON TORTS 12th Edition where different views were expressed.

Para 559 at p. 332 of GATLEY states:—

"This section of the new Act (i.e. s. 6) appears to assume that in cases which invite the defence of fair comment on a matter of public interest, the gist of defamation lies, or may lie, in the adverse comment, and so appears to limit the obligation to prove facts ("shall not fail by reason only that the truth of every allegation of fact is not proved") (that latter quotation being a quotation from

the Act) to proof of such facts alleged or referred to in the words complained of as warrant the defamatory comment made. It is not difficult, however, to imagine a case in which the defamatory comment is mild by comparison (let us suppose) with some elements of a series of defamatory allegations of fact in the words complained of. On a literal interpretation of the section it might seem that a defendant in such a case who proved sufficient facts in the series to warrant the defamatory comment (leaving other defamatory statements of fact unproved) would satisfy the requirement of section 6 without being under any obligation to prove the truth of this residue of defamatory statements of fact".

Para. 1586 of CLERK AND LINDSELL states as follows:—

"If there is any defamatory sting in facts stated in the alleged defamatory matter they remain actionable unless they are justified. In a clear analysis of the defence of fair comment after the Defamation Act, 1952, ss. 5 and 6, the New Zealand Court of Appeal in *Truth (N.Z.) Ltd. v Avery* has accepted the view stated in the last sentence and has considered the relationship of justification and fair comment where both are pleaded. The court held (a) that fair comment is a defence to comment only and not to defamatory statements of fact, and that section 6 has not altered the law in this respect; (b) that where there is any defamatory sting in any of the facts on which the comment is based these defamatory statements of fact can only be defended by a successful plea of justification with now the benefit of section 5 of the Defamation Act, 1952."

In *Broadway Approvals Ltd. and Another v. Odhams Press Ltd. and Another* (1964) 2 All E.R. 904 Note, LAWTON, J. (as he then was) sitting with a jury said at p. 906—

"Counsel for the plaintiffs brought to my attention the judgment in the New Zealand case. It seems to me to be right in principle and I propose to adopt it for the purposes of my summing-up to the jury in this case. It follows that I do not accept as a correct statement of law what is said in GATLEY ON LIBEL AND SLANDER (5th Edition) para. 559. I prefer, as a correct statement of law, what is said in CLERK AND LINDSELL ON TORTS (12th Edition) at para. 1586".

On appeal to the Court of Appeal, a new trial was ordered but SELLERS, L.J. approved the reasoning in the New Zealand case. The learned Lord Justice said at p. 535—

"Reference was made in the argument to the Defamation Act, 1952, Section 6. There are kindred provisions in the Defamation Act, 1954, of New Zealand and *Truth (N.Z.) Ltd. v Avery* was cited in argument. I do not find it necessary to deal further with this aspect of the argument but I would express my agreement with the clear analysis of the effect of the New Zealand Defamation Act, 1954,

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in the judgment in that case by NORTH, J. (now the President of the New Zealand Appeal Court".)

I expressly adopt as a true construction of section 8 of the Defamation Ordinance, No. 17 of 1959, the passage quoted above at para. 1586 of the 12th Edition of CLERK AND LINDSELL ON TORTS and I agree with the sentiments expressed by LAWTON, J. and SELLERS, L.J. in the *Broadway Approval* case.

In this matter the defence has equally been guilty of slipshod pleading. In point of fact, if objection had been taken by the plaintiff then para. 7 of the defence which sets up the rolled-up plea should have been struck out for failure to comply with Order 17 Rule 25 of the Rules of the Supreme Court, 1955 which provides as follows: –

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

No particulars whatever have been given and none in fact were asked for. The plaintiff has only himself to blame for this unsatisfactory state of affairs and I have no alternative, in the circumstances, but to go fully into the merits of this defence of fair comment without any consideration that there is a substantial defect in the defence before me.

Now in this case it is conceded that the matter commented upon is one of public interest. This is obviously so since all decent, right-thinking Guyanese would have an interest in the welfare of public servants and the public as a whole and no one can really disagree with Mr. Jai Narine Singh's statement in cross-examination that "a satisfied civil service makes for a better administration."

In the defence of fair comment it is not always easy to draw the distinction between expressions of opinions and assertions of facts since, sometimes, the very same words may be one or the other according to the context. It is terribly important therefore that a critic should take pains to keep his facts and the comment upon them severable from one another, for as FLETCHER-MOULTON, L.J. pointed out in *Hunt v. Star Newspaper Co. Ltd (ubi supra)* if it is not reasonably clear that the matter purports to be comments, he cannot plead fair comment as a defence—*ibid* at p. 320.

In *Lyon v Daily Telegraph* (1943) 1 K.B. 746, SCOTT, L.J. said at p. 753—

"The right of fair comment is one of the fundamental rights of free speech and writing which are so dear to the British nation, and it is of vital importance to the rule of law on which we depend for our personal freedom."

It is well to remember, however, the words of Lord SHAW in Privy Council case of *Arnold v King Emperor* (1914) 83 L.J. at p. 300—

"To whatever lengths the subject in general may go, so also may the journalist, but apart, from statute law, his privilege is no other and no higher . . . the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of every other subject. No privilege attaches to his position."

What is the position, therefore, in this matter?

It is submitted on behalf of the defendants that Ex. "B" is an expression of opinion when read as a whole as it shows what ought to be done if certain things are true or are existing. It appears under the heading 'opinion' which is the opinion column of the Evening Post. It is further submitted that, although Collymore admitted not checking the facts contained in the memorandum (Ex. "C") this does not in law amount to malice although it may be reckless or call for better judgment.

It is my considered opinion that Ex. "B" contains grave and serious misstatements of facts and do not amount to responsible criticism.

It is a clear fact that a memorandum was sent to the Acting Prime Minister. It is also a clear fact that the said memorandum contain grievances requiring investigation. The 'most recent' memorandum is clearly Ex. "C" and surely this is fact and not opinion. "This by-passing of institutions and ministries" clearly refers to by-passing the Permanent Secretaries to the various Ministries, in this particular case, of Mr. Angoy, the Permanent Secretary of the Ministry of Agriculture at the time. To say that "work that is left undone" is surely a question of fact and not opinion.

It is obvious that the whole of Ex. "B" was based on the memorandum (Ex. "C") alone and was signed by one Millington whom Collymore did not know and did not even bother to contact. The excuse was that he was hard pressed for time. Further, Collymore never bothered to check either the contents or the authorship, neither did he even attempt to see whether the contents were true or not. In my opinion this is clearly malicious and destroys the defence of fair comment if, in fact, it ever existed in this case.

Journalists would do well to pay heed to the warning given by Lord DENNING M.R. in *Slim v Daily Telegraph Ltd. and Another* (1968) 1 All E.R. p. 497 at p. 503—

"When a citizen is troubled by things going wrong, he should be free to "write to the newspaper," and the newspaper should be free to publish his letter. It is often the only way to get things put

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right. The matter must, of course, be one of public interest. The writer must get his facts right: and he must honestly state his real opinion."

I am in complete agreement with Mr. Wills that in the context of this case when Lord DENNING speaks about "getting one's facts right" he means not only the contents of the memorandum (Ex. "C") but also the fact of by-passing and the fact of whether all the work is done or not.

It is my considered opinion therefore that Ex. "B" is not a fair comment but is based upon facts which have not been checked and whatever comment was made was not in consonance with those facts and is malicious' in the sense that Collymore had no genuine belief in the truth of his comment and therefore it is clearly libellous.

The only question that now remains to be decided is the quantum of damages to be awarded to the plaintiff.

On this question of damages, counsel for the defendants submitted that the plaintiff has not in fact suffered in any way since he was removed from the Ministry of Agriculture to the Ministry of Home Affairs, both equally important Ministries, and, further, the evidence does not support in any way the granting of aggravated damages in that he suffered no demotion in his status.

Now it seems to me that it would be invidious to presume that the Ministry of Home Affairs is more important than the Ministry of Agriculture or *vice versa*. So far as I am aware Government has not declared an order of precedence among Ministries. What I would say, however, is that the Ministry of Home Affairs is not less important than the Ministry of Agriculture. Apparently, therefore, the plaintiff did not suffer any loss of face amongst his cabinet colleagues since no question of demotion arose with regard to the transfer effected. This, I think, would be a mitigating circumstance.

The main principle of assessing damages is to compensate the plaintiff for loss of reputation i.e. the extent to which he is held in less esteem and respect and suffers loss of goodwill and association—STREET ON TORTS 3rd Edition (1963) at p. 336:

BOLLERS, J. (as he then was) succinctly put the difference between aggravated damages and exemplary damages in *Ramsahoye v Peter Taylor and Co. Ltd.* (*Ubi supra*) at p. 343—

"The essential formal distinction between the two heads of damages is that aggravated damages purport to measure harm (however intangible) to the plaintiff whereas exemplary damages are related solely to the defendant's conduct".

The best judicial survey on the question of damages in libel actions is undoubtedly that of DEVLIN, L.J. (as he then was) in *Dingle v Associated*

Newspapers Ltd. (1961) 1 All E.R. 897 C.A. approved (1962) 2 All E.R. 737.H.L.

In *Rookes v Bernard* (1964) 1 All E.R. 367, H.L. it was held, *inter alia*, that when considering the making of an award of exemplary damages, three matters should be borne in mind (a) the plaintiff cannot recover exemplary damages unless he is the victim of punishable behaviour (b) the power to award exemplary damages should be used with restraint and (c) the means of the parties are material in the assessment of exemplary damages –p. 411 Letters C.D. & E.

Taking all the particular circumstances into account in this matter, therefore, which has been somewhat aggravated by Collymore's bold statement that if he had known the plaintiff or the Minister of Agriculture in September, 1966 when he dashed off Ex. "B", he would still have written the same article and, further, as no apology was made under section 9 of the 1959 Ordinance, I award the plaintiff the sum of \$ 1500: as damages, which I consider reasonable, as adequate compensation for his feelings and any loss of dignity he may have suffered and I accordingly enter judgment for that amount in his favour. This was a very interesting and rather intricate matter which I consider fit and proper for the engagement of the services of two counsel and I therefore certify costs fit for two counsel accordingly less the sum of \$50.00 awarded to the defendant in any event on 28th March 1968 in addition an injunction is granted to the plaintiff restraining the defendants, their servants and/or agents, from printing, circulating, distributing and otherwise publishing the said libel affecting the plaintiff. There will be a stay of execution for six (6) weeks.

Judgment for the plaintiff.

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[Court of Appeal (Luckhoo, C., Persaud, Crane, J J.A.)
October 9, 10, 1968, January, 13, 1969.]

Local Government—Local Authority—Local Government Board taking over the power of a local authority—Whether powers include functions and duties—Whether principle of audi alteram partem is applicable before powers taken over—Local Government Ordinance Cap. 150 s. 19.

Section 19 of the Local Government Ordinance provides as follows:

"The 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 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."

Subsequent to a meeting held on March 8, 1967, at which certain rate payers and the Minister of Local Government were present, but not the members of the appellants council, even though the latter were requested to attend, a decision was taken to act under s 19. On April 6, 1967, that decision was communicated by the respondent Board to the appellants by letter. On April 7, 1967, the Board assumed the administration of the village to the exclusion of the appellants. The appellants sued for a declaration that the respondent's purported exercise of powers under s 19 was unconstitutional null and void and even if the powers were validly assumed there was a breach of the audi alteram partem rule because the members of the appellants council were not heard before the powers were assumed.

HELD— (i) that powers in s 19 includes functions and duties.

(ii) that the audi alteram partem rule did not apply upon a true interpretation of s 19.

Appeal dismissed.

Dr. F. H. W. Ramsahoye with D. C. Jagan, for the appellants.

M. Shahabuddeen Q.C., with Lindsay F. Collins, for the respondents.

PERSAUD, J.A. The appellants are a duly constituted local authority comprising a village district created pursuant to s. 24 of the Local Government Ordinance (Cap. 150), and the defendants are a duly constituted board under the provisions of s. 3 of the same ordinance. I shall refer to the appellants as the Village Council, the respondents as the Board, and to the Local Government Ordinance as the ordinance, for the sake of convenience.

The Board is vested with certain powers of supervision under the ordinance, including s. 19, the interpretation of which is the subject-matter of this appeal. That section provides as follows:

"The 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 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."

Subsequent to a meeting held on March 8, 1967, at which certain rate-payers and the then Minister of Local Government were present, but not the members of the Village Council, even though the latter were requested to attend, a decision was taken to act under s. 19. And on April 6, 1967, that decision was communicated by the Board to the Village Council by letter.

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On April 7, 1967, the Board assumed the administration of the village to the exclusion of the Village Council who have not been permitted to take any part in the administration of the village affairs, or to exercise any power or perform any functions or duties. This state of affairs continues up to the present time.

There was no enquiry by the Board into the administration of the village by the Village Council before the decision referred to above was taken, nor has any member of the Village Council been removed from office for any cause whatever, and no disciplinary action has been taken against the Village Council or any member or officer thereof under the provisions of the ordinance.

On April 10, 1967, the Village Council brought an action against the Board in which it claimed certain declarations to the effect that the Board's purported exercise of the power under s. 19 was unconstitutional, illegal, void and of no effect. On that same day, at the request of the Village Council, VIEIRA, J., granted an interim injunction against the Board, but this injunction was discharged on April 17 by the same judge who delivered written reasons for his decision on May 3, which reasons, the learned Solicitor General has incorporated in his arguments in this court.

The main action then came up for hearing before FUNG-A-FATT, J., who refused the remedies sought by the Village Council. This appeal is from FUNG-A-FATT, J.'s judgment.

Two main grounds of appeal have been argued before us. These are in substance as follows:

- (1) Sec. 19 of the ordinance only provides for the exercise by the Board of the powers of the Village Council, and does not include functions and duties, and the ordinance having made provision for the exercise by the Village Council of powers, duties and functions in other sections, the Board, when it purports to act under s. 19 may only exercise powers which are within the competence of the Village Council to exercise under the ordinance and not duties and functions, as prescribed by the ordinance; and that the exercise of such a power in these circumstances is an indication of bad faith on the part of the Board.
- (2) Even if it is competent for the Board to exercise the powers, duties and functions of the Village Council, then the members of the latter body have a right to be heard before any action can properly be taken under s. 19, for failure to avail the councillors the right to be heard, is a breach of the *audi alteram partem* rule.

For purposes of his first submission, counsel draws a distinction between powers, functions and duties, and having examined each expression analytically, submits in conclusion that each is juristically a separate concept with distinct and distinctive consequences. He has referred us to various sections of the ordinance, some of which provide for the exercise of powers simpliciter while others provide for the exercise of functions and duties, and submits that the legislature must have intended by the use of different expressions to circumscribe and delimit accordingly what it was delegating. For example, while s. 19 itself authorizes the Board to exercise all the powers of a local authority, s. 21(1) (b) empowers the Board to make by-laws defining and regulating the "powers and duties of village councils", etc., and 21 (1) (c) for the management and administration of villages or country districts generally. Therefore, argues counsel, when the expression "powers" is used in s. 19, it must be taken to exclude duties, functions, management and administration of villages; and that much support for this argument is gained from an examination of s. 17 of the Public Health Ordinance (Cap. 145), an ordinance not only *pari materia* with the Local Government Ordinance, but one which is closely associated historically with that ordinance.

It will be necessary, therefore, to examine the history of the Local Government Ordinance, but before doing so, I propose to refer to the rules of interpretation governing the use of different expressions in the same ordinance, and in different ordinances dealing with the same subject-matter.

I suppose the same can be said with some modification about the omission of words from a statute, as was said by Lord UTHWATT in *Lord Howard de Walden v. I.R.C.* (1948) 2 All E.R. 825 at 830, in respect of the introduction of new words in an existing statute. Lord UTHWATT said:

"I agree with the Court of Appeal to the extent that the introduction of new words into an existing section may alter the meaning of words already there. But no such alteration can result unless: (1) the requirements of the English language demands, or (2) those requirements permit it and the sense of the section demands it."

I use the expression 'with some modification', as I am of the view that, as in this instance, when it is a case of the omission of words rather than the introduction of new words, the likelihood of alteration of meaning is less.

It is a well-settled principle that a statute must be construed according to the intention expressed in the statute itself, that is, the intention of the legislature. And, as was said by Lord WATSON in *Salomon v. Salomon & Co.* [(1897) A.C. at p. 38]:

" 'Intention of the legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature properly would have meant, although there has been an omission to enact it. In a court of law or equity, what the

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legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

And it should be borne in mind, as was said by the Privy Council in *Crawford v. Spooner*, (6 Moo P.C.C.1):

"..... we cannot aid the legislature's defective phrasing of the Act, we cannot add, and amend, and, by construction, make up deficiencies which are left there."

And by that same body in *Casement v. Fulton*, (1845) 5 Moore P.C. at p. 141:

"..... in framing statutes, the same words should always be employed in the same sense."

On the other side of the line is the recognition that the language of a statute may be changed without intending to alter the meaning. As was said in *Hadley v. Parks*, (1866) L.R. 1 Q.B. at p. 457, that in drawing Acts of Parliament, the legislature as it would seem, to improve the graces of the style, and to avoid using the same words over and over again, constantly change the words without intending to change the meaning. In *Hopes v. Hopes*, [(1948) 2 All E.R. at p. 925], Lord DENNING quoted with approval the dictum in *Hadley v. Parks* (supra), and also expressed the view that it is by no means a safe guide that if a draftsman uses different words, he presumably intends a change of meaning, as he may change the wording (of an Act of Parliament) simply to improve the style. Again, in the older and well-known case of *A. G. v. Bradlaugh*, [(1884) 14 Q.B.D. 667], it was contended that the word "made" in the expression "the oath shall be made" in the Parliamentary Oaths Act, 1866, was to be construed as if it were different from the word "taken". BRETT, M.R., rejected this contention and said (at p. 684 *ibid*):

"..... it seems to me, looking at the preamble and at the manner in which the word is used, that the word 'made' has precisely the same effect as if it were 'taken'."

Again, in *Re Wright*, (1876) 3 Ch. D. 70 at p. 78, MELLISH, L.J., said when comparing the language used in the Bankruptcy Act, 1869 (U.K.) with that used in the previous Act of 1849 (U.K.):

"Everyone who is familiar with the present Act knows that the language of the former Acts has been very much altered in many-cases where it could not have been intended to make any change in the law."

With these principles in mind, it is now opportune to examine the history of what is now the Local Government Ordinance, Cap. 150.

I will commence at a point somewhat earlier than VIEIRA, J., did in his judgment.

In 1852 the Central Board of Health Ordinance (No. 5) was enacted, and it established a single Board of Health comprising of the then existing Central Boards of Health for Demerara and Essequibo, and for Berbice which had previously been created by statute in 1850 (No. 32 of 1850). The 1852 Ordinance was repealed by the Public Health Ordinance, 1878, which retained the Central Board of Health. This body remained as the authority charged with the implementation of both sanitary and local government provisions until 1907 when it was repealed, by the Local Government Ordinance of that year. The Central Board of Health re-appeared with the enactment of the Public Health Ordinance, 1934.

Meanwhile, a course of local government was being pursued by a series of other ordinances. I will only deal with those that I consider relevant to the matter in hand.

In 1866, the Village Ordinance (No. 1) was enacted. S. 1 of that ordinance provided for a Central Board of Villages. S. 6 provided:

"The Board under the directions of the Governor and subject to the provisions of this ordinance, shall have the general management and sanitary superintendence of all villages within the Colony, and shall supervise and control the several Local Boards and Officers thereof, and shall have and exercise in every such village in the place and stead of the Central Board of Health of British Guiana all the powers and authority of the said Central Board of Health; and the said Central Board of Villages shall not in the exercise of their powers under this ordinance be in any manner subject to the control of the Central Board of Health."

Apart from the superiority in status of the personnel of the Central Board of Villages (the Governor, Members of the Court of Policy, and other members appointed by the Governor) it is clear from the provisions of s. 6 that it was the intention that that Board was to stand in a supervisory capacity in relation to the Central Board of Health in "the general management and sanitary superintendence of all villages" with all the powers and authority of the Central Board of Health. All the powers and authority of the latter body included functions, powers and duties, and so where the expression 'powers' is used later on in that section, it must, in my opinion, have been intended to include functions and duties then being exercisable by the Central Board of Health under Ord. 32 of 1850. To restrict the meaning of 'powers' would be to render the section meaningless.

Thus, it will be seen that as long ago as 1866, the legislative was beginning to use the expression 'powers' to include functions and duties.

In 1873, the Village Ordinance (No. 10 of 1873) was passed to consolidate and amend the law relating to villages and to provide for the management, regulation and sanitary superintendence of villages. The Central Board of Health was retained with all the powers vested in it by the 1866 Ordinance. S. 14 of the 1873 Ordinance made the district commissary the

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superintendent of all villages in his district, and, as such, chairman of each village council. He was also authorised to exercise all the 'powers and authority' of a Local Board of Health subject to the directions of the Central Board of Villages, and under s. 15, in his capacity as chairman, he exercised the 'powers' of the Village Council.

Here again, it would seem that 'powers' was being used to include functions and duties. Were it otherwise, then it seems clear that the district commissary would have been impotent to do the things the Local Board of Health was required to do.

Then came the Public Health Ordinance, 1878, entitled 'an ordinance to consolidate and amend the Laws relating to Public Health'. This ordinance dealt with both public health and local government matters. Indeed, the ordinance was divided into parts; Part II dealt with sanitary provisions while Part III was devoted to Local Government provisions, even though the other parts were not exclusively one or the other but dealt with matters pertaining both to sanitation and local government.

S. 4 of the 1878 Ordinance divided the Colony (as Guyana then was) into Town, Village and Country Sanitary Districts, and provided that such districts shall be subject to the jurisdiction of Town, Village and Country Sanitary Authorities, respectively, who shall be "vested with the powers mentioned in this ordinance". S. 15 constituted the Central Board of Health of British Guiana vested with the 'powers' mentioned in that ordinance.

It would be idle to contend that the expression 'powers' used in ss. 4 and 15 above, in view of the general purport of those sections, should be interpreted to exclude functions and duties. A power can affect rights, duties and liabilities. (See SALMOND ON JURISPRUDENCE, 12 Ed., p. 229); but this does not mean that within a power may not be included rights, duties (functions) and liabilities, for to hold a power *in vacuo*, is to render the enabling legislation ineffective, which is the last wish that can be ascribed to any legislative body.

And so when s. 22 of the same ordinance provided that the Central Board (meaning the Central Board of Health) shall have and 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 whether there is or is not a Local Authority of such district, the powers vested in the Central Board of Health are no less wider than the powers vested in that body by s. 15.

The 1878 Ordinance was repealed by the Local Government Ordinance 1907. Under the latter ordinance, which immediately preceded the present Local Government Ordinance (Cap. 145), a Local Government Board was established and was vested with general powers of supervision, inspection and control over the several local authorities and the officers and servants thereof (s. 18).

It is not without interest to note that this ordinance also made provisions for sanitation, such as drainage, water supply, etc., and repealed the Public Health Ordinances, 1878 and 1907, and the Village Ordinance, 1892. Thus, as from 1907, there was one ordinance dealing with both local government and public health matters, viz. the Local Government Ordinance, 1907, which abolished the Central Board of Health.

S. 10 of the 1907 Ordinance provided as follows:

"The 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 Board expedient to do so, and may exercise any or all of such powers in any such District, whether there is or is not a Local Authority of such District."

And reference is in fact made in the 1907 Ordinance to s. 23 (presumably 22) of the 1878 Ordinance, so that there can be no doubt as to the source of s. 10 of the 1907 Ordinance. To my mind, therefore, the meaning of 'powers' in s. 10 of the 1907 Ordinance must be the same as that in s. 22 of the 1878 Ordinance, i.e. it would include functions and duties.

S. 19 of Chapter 150 is substantially the same as s. 10 above, and has already been reproduced in this judgment. It is my opinion, therefore, that s. 19 leaves no room for the interpretation sought for it by the appellants.

Counsel has attracted our attention to the provisions of s. 17 of the Public Health Ordinance, 1934 (now Chapter 145). In 1934 that ordinance re-established the Central Board of Health, repealing and re-enacting with certain modifications the provisions of the Local Government Ordinance, 1907, relating to sanitation. S. 17 provided as follows:

"(1) The Board may, for any cause which may appear to it expedient in exclusion of a local sanitary authority, exercise and perform any or all of the powers, functions, and duties of the local sanitary authority either generally or for any particular purpose or for a limited or unlimited period.

(2) If under the provisions of this ordinance the Board assumes the exercise and performance of the powers, functions, or duties of any local sanitary authority, the Government in Council, if satisfied that it is no longer necessary to expedient that the Board shall continue to exercise or perform such powers, functions, or duties, may declare that the exercise or the performance by the Board of the said powers, functions, or duties, shall cease, and thereupon the local sanitary authority shall resume the exercise and performance of its powers, functions, and duties.

(3) Nothing herein shall prevent the Board from relinquishing at any time the exercise of any powers, functions, or duties of a local sanitary authority which it might have assumed under the provisions of this ordinance."

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Counsel argues that when one finds (as was the case here) that two distinct subject-matters were dealt with in one ordinance, and there was a later division into two separate ordinances, each devoted to one of those subject-matters, then one must examine the language used in the respective ordinances carefully, particularly where one finds two sections in the respective ordinances providing for more or less synonymous situations. It is submitted that s. 19 of Chapter 150, and s. 17 of Chapter 145, are such sections, in that they both provide for the exercise of supervisory powers but in different language. The fact that 'powers, functions and duties' are used in one section and only 'powers' in the other indicates, says counsel, that 'powers' could not include 'functions and duties'.

I regret that I cannot acquiesce to such reasoning. As has already been shown, in the earlier ordinances 'power' really included 'functions and duties'. The fact that the draftsman chooses to spell out what is meant by 'powers' in a later ordinance does not prevent that expression from retaining the original meaning in the earlier ordinances—a meaning which has not been removed expressly or by necessary implication, and which in my opinion is, and is meant to be, retained. The submission must therefore be rejected.

I am reminded of the observations of Stephen, J., himself a draftsman of much experience, in *Re Castioni*, [(1891) 1 Q.B.D. 149] when he referred to Acts of Parliament as things which "although they may be easy to understand, people continually try to misunderstand".

In support of his first submission, counsel has also referred to ss. 24 and 70 of Chapter 150, and argues that a reading of the whole of the Ordinance would point to the assumption of the Village Council's (appellants') continuous function until the councillors are disenfranchised under s. 24 or dissolved under s. 70, and that the expression "whenever it appears expedient" in s. 19 does not give the Board *carte blanche* to suspend the activities of the Village Council indefinitely. Counsel argues strenuously and attractively that any other interpretation would deprive the inhabitants of the village concerned from their inalienable right to have their village affairs run by their duly elected representatives. Further, argues counsel, where no ground of expediency is apparent, the court is entitled to enquire into the circumstances surrounding the exercise by the Board of its powers under s. 19 and where none is apparent, the court is entitled to find bad faith.

I can find no limitation either as to occasion or to time in the language of s. 19, and I agree with the Solicitor General that the effect of the section is to vest in the Board a supervisory power the exercise of which is discretionary. As far as bad faith is concerned, it was alleged by the appellants

and denied by the respondents. Surely, in these circumstances, the burden of proving it is on those who allege, and the court will not assume that it exists without some evidence.

Bound up partly with the first submission, and the second is the argument that the courts have the jurisdiction to intervene if it is felt that the Board exercised its powers (assuming that it has the powers contended for) in bad faith.

Both in *Point of Ayr Collieries Ltd. v. Lloyd George* [(1943) 2 All E.R. 546], and *Carltona Ltd. v. Commissioners of Works*, [(1943) 2 All E.R. 560], Lord GREENE, M. R., has used language which indicates that if bad faith is established, the courts will interfere. Both of these cases were concerned with emergency legislation and the power of competent authorities appointed under such legislation. In the former case, the learned Master of the Rolls said (at p. 547):

"It is the competent authority that is selected by Parliament to come to the decision, and if that decision is come to in good faith, this court has no power to interfere, provided of course, that the action is one which is within the four corners of the authority delegated. . . ."

And in the latter, he said (at p. 564):

"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."

And lest it be thought that only emergency legislation has been construed in this fashion, I must advert attention to *Robinson v. Minister of Town Planning*, (1947) 1 All E.R. at p. 867, letter B, where SOMERVELL, L.J., said:

"I do not so construe the authorities. Words in a statute, of course, must be construed in their context. It must, however, be obvious that Parliament can confer the same unlimited discretion on Ministers for purposes other than war purposes."

But to get back to the point being urged by the appellants. In both *Ayr Collieries case* and *Carltona Ltd.*, the Master of the Rolls spoke of "allegations of bad faith", and in the instant case such allegations have been made in para. 6 of the statement of claim, but as I have already indicated, this allegation was denied. Now the question is, does the bare allegation invoke the suspicion of the courts and put the courts on enquiry? I think not. There must either be evidence of some sort, whether by affidavit or otherwise, or there must exist circumstances which would impel the courts to that conclusion, bearing in mind that the onus of proving such allegation rests on him who makes it. In this case, in my judgment, the fact that no

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charge or accusation has been made against any of the members of the Village Council, and there has been no attempt to dissolve the Council under s. 70 of the Ordinance is not enough on which to ground an allegation of bad faith upon the implementation of s. 19.

And I do not accept the proposition that the invocation of s. 19 produces the result of the Board being substituted for the Village Council. The true position is that the Village Council still exists and may revert to the administration of village affairs when the Board relinquishes the control.

Now to the second submission. As I understand counsel, assuming the Board can exercise all the powers, functions and duties of the Village Council under s. 19, and accepting there might have been a good reason for the Board's action, the Village Council was entitled to be heard under the *audi alteram partem* rule.

The facts are that the Secretary of the Board wrote the Chairman of the Village Council in the following terms:

"Sir,

I am directed to inform you that the Local Government Board has decided in accordance with the provisions of section 19 of the Local Government Ordinance, Chapter 150, to exercise all of the powers of the Local Authority of the Craig Village District as from today, 6th April, 1967",

and thereupon an officer of the Board moved in and took over control of the affairs of the Village Council on behalf of the Board, and continues so to do.

In *Nakuda Ali v. Jayaratne*, [(1951) A.C. 66], it was necessary to investigate the powers of the Controller of Textiles in Ceylon which flowed from a regulation providing *inter alia* that:

"Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer he may cancel the dealer's licence."

The Privy Council, while agreeing that Reg. 62 imposed a condition that there must in fact have existed such reasonable grounds, known to the Controller, before he could validly exercise the power of cancellation, did not accept the proposition that the Controller must have been acting judicially. At p. 77 (*ibid*) Lord RADCLIFFE said:

"It is not difficult to think of circumstances in which the Controller might, in any ordinary sense of the words, have reasonable ground of belief without having ever confronted the licence holder with the information which is the source of his belief. It is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct analogous to the

judicial process. And yet, unless that proposition is valid, there is really no ground for holding that the Controller is acting judicially or quasi-judicially when he acts under this regulation. If he is not under a duty so to act, then it would not be according to law that his decision should be amenable to review...."

Similarly in the instant case, it is not that the Board was acting either judicially or quasi-judicially so as to invoke the *audi alteram partem* rule, or to render its decision subject to judicial review.

It is true that the Minister of Local Government intervened in this matter, and it may be that his intervention precipitated the action of the Board. It may also be true that it is expected that the Board will reflect the policy of the government of the day in its various decisions. This is perhaps the stark reality of rule by a duly elected government. But I am not persuaded that in this case the Minister did aught but attempt to use his good offices to resolve a dispute between the Village Council and the ratepayers. Had it been otherwise, then it could well have been one step in the argument that the Board did not act strictly in accordance with the provisions of the ordinance.

No doubt it was the dictum of Lord UPJOHN in *Durayappah v. Fernando*, [(1967) 2 All E.R. 152]-a case from Ceylon-which inspired counsel's second submission. His Lordship set out the three matters which must always be borne in mind when considering whether the *audi alteram partem* rule should be applied or not. His Lordship said [at p. 156]:

"These three matters are: first, what is the nature of the property the office held status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or on what occasions is the person claiming to be entitled to exercise the measure or control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose on the other. It is only on a consideration of all these matters that the question of the application of the principle can properly be determined."

And then continued as follows, referring to the Municipal Council which was ordered to be dissolved by the Minister of Local Government:

". . . it cannot be doubted that the Council of Jaffna was by statute a public corporation entrusted like all other municipal councils with the administration of a large area and the discharge of important duties. No one would consider that its activities should be lightly interfered with. The Lordships may notice here an argument addressed to them that, as this was a local authority subject to the superior power of the Minister under s. 277, the exercise of this power was a matter properly left to him as the one responsible to the legislature to whom he was answerable for his actions and he could not be responsible to the courts under the principle *audi alteram partem*. Their Lordships dissent from this argument. The legislature has enacted

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a statute setting up municipal authorities with a considerable measure of independence from the central government within defined local areas and fields of government. No Minister should have the right to dissolve such an authority without allowing it the right to be heard on that matter, unless the statute is so clear that it is plain that it has no right of self-defence."

But it must not be lost sight of that in that case the Minister was vested with the right to dissolve the Council by a law which clearly required him to make a finding of fact, which he could hardly do without holding an enquiry of some sort, during which it would be incumbent on him to give the party whose conduct was being investigated an opportunity to be heard. In other words, the statute did not relieve the Council of its right of self-defence, as it provided as follows:

"(1) If at any time, upon representation made or otherwise, it appears to the Minister that a municipal council is not competent to perform, or persistently makes default in the performance of, any duty or duties imposed upon it, or persistently refuses or neglects to comply with any provision of law

Their Lordships disagreed with the approach in the case of *Sugathadasa v. Jayasinghe*, (1958) N.L.R. 457, where it was held that words such as "if the . . . considers expedient that", standing by themselves without other words or circumstances of qualification, exclude a duty to act judicially, and held instead that the section in *Durayappah v. Fernando*, when read as a whole, vested the Minister with judicial powers, and so the *audi alteram partem* rule applied.

A comparison between the Ceylon provision and s. 19 of Chapter 150 would indicate that in *Durayappah's* case it was implied that the local council should be heard in answer to the allegations to which the Minister was bound to give consideration and in regard to which he had to make a finding before he could dissolve the council, while in the instant case "the statute is so clear that it is plain that it (the Village Council) has no right of self-defence". Indeed, were one to compare the provisions of s. 70 (dealing with the dissolution of a Village Council) and s. 19 of the Ordinance, it would be seen that the former section provides for the village councillors to be heard, whereas in the later section not.

In conclusion, I would like to say that I have addressed my mind to the case of *Ridge v. Baldwin*, [(1963) All E.R. 66] even though we were not referred to it during the course of the arguments. In that case the House of Lords was required to deal with the claim of a chief constable who was dismissed under a section of the Municipal Corporations Act, 1882, s. 191 (4) (U.K.) which provided that "the Watch Committee may at any time dismiss any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same". It was held that in exercising the

power of dismissal (at any rate where that power was to be exercised on the ground of negligence, which was required to be proved) the Watch Committee were bound to observe the principles of natural justice. Lord Delvin accepted the position that whether or not the principles of natural justice are to be applied to any statutory procedure depends on an implication to be drawn from the statute itself. Again a comparison between the Municipal Corporation Act, 1882, and our ordinance discloses a clear distinction.

For the reasons given, and without for one moment attempting to derogate from the principles of natural justice, but solely upon an interpretation of section 19 of the ordinance based on its historical background, and in the circumstances of this case, I would dismiss this appeal with costs, and affirm the judgment of the court below.

LUCKHOO, C: I agree.

CRANE, J. A. (ag.): I have had the advantage of reading in draft the judgment of Persaud, J.A., with which I am in full accord. I would, however, express in short compass my belief that the question of whether or not the powers which are conferred upon the respondent Board by section 19 of Chapter 150 include duties and functions, is also capable of solution by the application of the doctrine of implied powers, since the character of the Local Government Ordinance, Chapter 150, is in the nature of an enabling statute.

The history of the Local Government Board has been sufficiently stated in the leading judgment, but if I may be permitted to recapitulate just briefly, in view of the point which I seek to make, it is to be observed that both subjects of public health and local government were originally contained in the same enabling ordinances—the Public Health Ordinance of 1878 which established a Central Board of Health and the Local Government Ordinance, 1907, which established the Local Government Board and expressly repealed the former ordinance.

In 1934, however, the Public Health Ordinance, now Chapter 145, wrought a separation by re-establishing the Central Board of Health (section 3), as a separate and distinct entity from the Local Government Board. It repealed and re-enacted with modifications the provisions of the Local Government Ordinance of 1907 relating to sanitation. Then came the Local Government Ordinance, 1945, now Chapter 150. This is a consolidating enactment dealing essentially with matters of local government and abolishing the Local Government Ordinance, 1907, and amendments, i.e. Chapter 84 (Major Edn.).

The general scheme of Chapter 150 is its division into central and local administration for the purpose of local government. At the head is the Local Government Board in which is vested by section 3(1) powers, duties and functions, all movable and immovable property, and all rights, liabilities

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and obligations under that ordinance. Accordingly, the Board has its own allocation of powers, duties and functions, and the local authorities likewise have their own.

The exercise which is now embarked upon by counsel for the appellant Village Council is a comparison of the wording of section 17(1) of Chapter 145 conferring enabling powers on the Central Board of Health with that of section 19 of Chapter 150, from which, it is to be observed, the words "functions and duties" are omitted. It is sought to reason therefrom, and from the fact of the common origin of these two statutes that the Legislature must have intended that the Local Government Board should be restricted solely to the exercise of such powers as are contained in the several sections of Chapter 150, without the exercise of any concomitant functions and duties in the managerial or financial aspect of local government. The argument is that Chapter 150 invests only the Chairman of the Local Authority (Section 80(3)), with powers, duties and functions, and the local authority of the village council with such (section 84(1)). If in case the Board thinks it expedient to exercise all or any of the powers under section 19, the Board cannot also exercise the council's functions and duties, for so to do will be *ultra vires* the Board. This is a seemingly ingenious argument on the part of the appellants, but I do not think it has the canons of construction in support of it.

Such powers as are granted the Local Government Board under Chapter 150, are both specific and general. Instances of specific powers are—to delegate any powers conferred upon it by the ordinance to committees (section 9(3)); to borrow money for the execution of any of the purposes under the ordinance and to mortgage any rate for the repayment thereof (section 10); to purchase at execution sale property sold for nonpayment of rates if it appears necessary to do so (section 11(1)); to make enquiries as directed by the ordinance (section 12), and a host of others including, by no means least, the controversial section 19 (below). General powers, on the other hand, relate to the superintendence of all village and country districts and the exercise of supervision, inspection and control of the several local authorities, its officers and servants.

Section 19 of the Local Government Ordinance, Chapter 150, is in the following terms:

"The 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 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."

It is well-known that the powers of a corporation created by statute, such as is the respondent Board which is incorporated with perpetual succession and a common seal, are limited and circumscribed by the statutes

which regulate it and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon those things which the law has sanctioned. Any power which the Legislature does not expressly authorise or impliedly grant which is reasonably necessary for the accomplishment of the object intended to be secured by the incorporation is *ultra vires*. These are the principles enunciated in the celebrated case of *Ashbury Rly. Carriage & Iron Co. v. Riche*, (1875) L.R. 7 H.L. 653. However, by virtue of being an enabling ordinance, power is conceded to the Board by necessary implication of the right to do everything indispensably necessary, for the fulfilment of its duties and functions. It is a maxim of the law that, "where anything is conceded, there is also conceded anything without which the thing itself cannot exist." This received judicial explanation in *Re Dudley Corporation*, (1882) Q.B.D. 86, 93, by BRETT, L.J., who is reported to have said when applying it to the solution of a problem involving a public corporation:

"... the general rule under this head of law is, that where the legislature gives power to a *public body* to do anything of a public character, the legislature means also to give to the public body all rights without which the power would be wholly unavailable, although such a meaning cannot be implied in relation to circumstances arising accidentally only."

So where a statute authorises a local authority to employ a proper number of persons to act as firemen, it impliedly authorises such firemen to preserve order during a fire and to exclude such persons from the burning premises as may be necessary to prevent the inconvenience which would arise from over-crowding or interference with their work. See *Carter v. Thomas*, (1893) 1 Q.B.D. 673.

Applying this principle to the matter in hand, I would reason this way: Were it to be held in the circumstances, that powers do not include duties and functions, the result would be an absurdity in the event of there being no local authority and the Board's assumption of powers under section 19. In that case, all the Board would stand possessed of would be a bundle of empty powers with no right to perform those necessary duties and functions which the ordinance has allocated to local authorities; e.g. in the case of an assumption of the powers of the local authority under section 84(1) to appoint certain officers and employ servants, this would not include a right to pay them. Again, an exercise by the Board of the powers of a chairman of a local authority between two meetings under section 80 would mean that the Board could not depute his duties and functions under section 9(3), which means that the Board itself would be stultified in the performance of those very powers which the ordinance has specifically assigned to it. This would undoubtedly paralyse the entire system of local government and result in chaos. The results of this kind of logic would be catastrophic indeed and such which the law by no stretch of imagination could have intended. It therefore

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seems to me there can be no difference whether there is or is not a local authority when the Board exercises its powers under section 19; the Board must have in addition the right to perform such duties and functions as are incidental to the exercise of its statutory powers under section 19, i.e. such duties and functions as are conferred either expressly or by necessary implication by the law. Therefore, quite apart from its own powers, duties and functions which section 3(1) vests in the Board, there are those which though not expressly given, it is in contemplation of law considered as having been given when performing such other powers as may be assigned to it by the ordinance. It is in this wise that I take it that section 19 must be construed. I think the main point which has been lost sight of is, that the Local Government Board is a supervisory body; the guardian of the local authority, and acts in the public interest, a fact which, when one appreciates the true position, is easily understood. The Board must therefore be in a position to perform an authority's powers, duties and functions in case the latter is remiss in duty if it is to exercise efficiently or at all the powers which it assumes. In my opinion, it is manifestly the intention of section 19 to enable the Board to perform them in such a case. As Lord HODSON said in *Padfield v. Ministry of Agriculture*, (1968) 1 A.E.R. 694 at 712:

"As the guardian of the public interest he (the Minister in that case) has a duty to protect the interests of those who claim to have been treated contrary to the public interests."

Enough has been said, I believe, to emphasise the point that the addition by the draftsman of the words "functions and duties" in section 19 would have been mere surplusage and unnecessary. It may well be that he was fully cognisant of this and deliberately refrained from so doing. In his "LEGISLATIVE DRAFTING & FORMS", 4th Ed., SIR ALISON RUSSELL at p. 19, counsels draftsmen to study any existing legislation and all attendant judicial decisions before going to work, and it seems certain this advice was heeded in drafting section 19 just as its facsimile, section 10 of the now repealed Local Government Ordinance, Chapter 84, was drafted. It behoves, I think, every efficient draftsman to have a sound knowledge of the canons of construction of statutes. All, unfortunately, are not so possessed, but if a draftsman is so equipped, then the finished product is certain to reflect the depth and extent of his learning. If the above observations are correct, then the decision of the draftsman to have excluded the words "duties and functions" in the latter ordinance and not follow slavishly those of a previous, may not be so inexplicable after all.

Therefore, like PERSAUD, J A., I do not attach any significance to their presence in section 17(1) of Chapter 145 as compared with their absence in section 19 of Chapter 150 other than that the draftsman was fully aware of his rules of interpretation of statutes.

I would also stress here another aspect of the construction of this section, although it bears particular relevance to the appellants' alternative contention on the principle of *audi alteram partem* respecting entitlement of the Board's intervention. It will be observed that section 19 says that "the Board shall have and may exercise . . . any or all the powers of a local authority"; so that in a case as the present where it has assumed *all* powers, there can be no concurrent administration between Board and local authority. Concurrent administration can only exist when the Board exercises *some*, but not *all* of the powers of the local authority. When the totality of powers is assumed by the Board, any powers which were formerly resident in the local authority must necessarily remain in abeyance until the Board relinquishes administrative control of them.

Though the judgment under review has treated the question of discretion under the section, I observe it has not done so from the standpoint of the true construction to be put upon its initial enabling words, viz. "The Board shall and may have . . .", and it is thought that a word or two may be helpful here.

I take the view that, in the circumstances which have revealed themselves in the affidavits and letters exhibited therein, the Board had a limited discretion in the matter and was perforce driven by a duty in the action which it took. These revealed allegations that the local authority was in bad shape; that it was so conducting its affairs as to bring it into discredit and disrepute; that there were complaints made by the Craig Ratepayers and Tenants Association regarding the failure of the Village Council to carry out essential works; and that there was petty bickering among councillors and ratepayers. Correspondence passed between them necessitating the intervention of the Minister of Local Government; who expressed the view that progress was impossible in the circumstances which he termed to be an atmosphere of indifference and opposition. That was why he asked them to consider deferring their statutory meeting until later so as to afford him an opportunity to address them both. This meeting did take place eventually in the presence of the Minister, and the result was that the Board exercised its powers under section 19. In my view, having thought it expedient, there was no further discretion left to the Board; it clearly became its duty and function to act in such circumstances. The words "shall have and may exercise" are not merely permissive as they seem, but compulsive when the Board considers it expedient to act under the section.

The Local Government Board Ordinance is a statute empowering the Board to perform acts for the benefit of other persons in the interests of public welfare. The fact that the Legislature has chosen to couch the Board's powers in terms enabling and not mandatory is not in itself conclusive that the power conferred on the local authority is entirely discretionary. It would have been astonishing indeed, I think, if, after all that has been revealed, the Board were to say that it would refrain from acting in the exercise of its discretion once it considered it expedient to act. The exercise of "all or any

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of the powers of the local authority" was no mere permission which the Legislature gave to the Board with a corresponding liberty in it to abstain from so doing if it thought fit in the circumstances revealed. The Board's duty was such as was reposed in it as officers of the public to be performed for the benefit of the ratepayers of the Craig Village Council; its powers as such were in the nature of a duty reposed in it as officers of the public to be performed for the benefit of the ratepayers of the Craig Village Council, for the ratepayers as members of the public had such rights in the matter of the proper and efficient running of their authority that made it the duty of the Board, acting ministerially as a depository of the power, to meet the demands of those rights and to prevent a failure of administration. See *Julius v. Bishop of Oxford*, (1880) 5 A.C. 214, a case which was considered by the House of Lords in the very recent case of *Padfield v. Minister of Agriculture*, (1968) 1 A.E.R. 694, and somewhat varying opinions expressed on it in relation to the triangle of concepts of discretion/power/duty. Lord REID held in *Padfield's case* that the Agricultural Marketing Act, 1958, in addition to conferring a limited discretion on the Minister of Agriculture by the words, "if the Minister in any case so directs", also conferred a power that is coupled with a duty to act if one of the Boards instituted by the Act had acted in a manner contrary to the public interest.

In giving his opinion, the noble and learned Lord stated as follows at pp. 700-701:

"As I have already pointed out, however, the Act of 1958 imposes on the Minister a responsibility whenever there is a relevant and substantial complaint that the Board is acting in a manner inconsistent with the public interest, and that has been relevantly alleged in this case. I can find nothing in the Act of 1958 to limit this responsibility or to justify the statement that the Minister owes no duty to producers in a particular region. The Minister is, I think, correct in saying that the Board is an instrument for the self-government of the industry. So long as it does not act contrary to the public interest the Minister cannot interfere; but if it does act contrary to what both the committee of investigation and the Minister hold to be the public interest, the Minister has a *duty to act*. And if a complaint relevantly alleges that the Board has so acted, as this complaint does, then it appears to me that the Act of 1958 does impose a duty on the Minister to have it investigated. If he does not do that, he is rendering nugatory a safeguard provided by the Act of 1958 and depriving complainants of a remedy which I am satisfied that Parliament intended them to have."

The whole point about *Padfield's case* in its relation to the solution of the problem on hand is that although, admittedly, a completely unfettered discretion in the Minister (the Local Government Board in the instant case) would negative any duty on his part, a limited discretion conferred on him by

law would nevertheless create the power/duty complex and make it compelling on him to act. I have already found that the words in sec. 19 of Chapter 150: "whenever it appears to the Board expedient so to do" confer a limited discretion on the Local Government Board which, once it has been exercised in a finding that grounds of expediency in the circumstances of the case, the Board is obliged to act. But I think the opinion of Lord PEARCE in the same case is even more apposite and supports the point I seek to make about the necessity for the Board's performance of its duty. At pp. 714 and 715, Lord PEARCE, speaking in the same vein, opined thus:

"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 ... It is clear, however, as a matter of common sense, that Parliament did not intend that frivolous or repetitive or insubstantial complaints or those which were more apt for arbitration should be examined by the committee of investigation, and no doubt the Minister was intended to use his discretion not to direct the committee to investigate those. . . Parliament has put into the hands of the Minister and those of the committee of investigation the *power and duty* where necessary to intervene. A general abdication of that power and duty would not be in accord with Parliament's intentions."

There remains to be considered the alternative contention of the appellants, namely, that if their view of section 19 is considered to be wrong, then the least they were entitled to is a right to be heard before the Board could think of adopting such drastic action as denuding them of all their powers, duties and functions. This right to have one's cause speedily heard before a fair and impartial tribunal and to be given the opportunity to state one's views with candour and without fear of intimidation is one of the pillars of natural justice which must be observed by all persons or bodies who exercise judicial or quasi-judicial as distinct from purely ministerial or executive functions. With this brief preview, it is evident that the success or failure of the alternative contention is dependent upon the relegation of the Board's act of assumption of powers into one or the other of the above categories, an exercise which must be made, though, admittedly, one not so easy to accomplish bearing in mind that great minds are much divided on the point.

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See *United Engineering Union v. Devanayagam*, (1967) 2 A.E.R. 367, where the Privy Council were divided on the question of what differentiates judicial from executive power.

The learned judge, however, did not think the matter before him presented any such difficulty at all when he said simply:

"It would seem to me that no question of natural justice can arise when all the ordinance required is that 'it appears to the Board expedient so to do'. The effect of section 19 to my mind seems to exclude all judicial review on the ground that the Board's action is fully administrative."

The judge, however, appears not to have appreciated, I respectfully say, the purport of the decision of the Privy Council in *Durayappah v. Fernando*, (1967) 2 A.E.R. 152 which was cited to him. In that case, their Lordships quite definitely counselled against the above approach to the matter and in no uncertain terms laid it down that the solution to the problem of the determination of the executive function is not to be found in such formulae as - "where it appears to", or "if it appears to the satisfaction of, or (as in the instant case), "if the considers it expedient that"; rather, their Lordships thought it requires a deeper investigation.

In order to determine whether the principle of *audi alteram partem* is applicable, Lord UPJOHN, in handing down the opinion of their Lordships' Board, advised as follows:

"In their Lordships' opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or on what occasions are the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose on the other. It is only on a consideration of all these matters that the question of the application of the principle can properly be determined."

I will now adopt the same approach as the Privy Council did in *Durayappah's case* by considering the respective positions of the Local Government Board and Village Council in relation to the "three matters" above.

On point one: I have already dealt somewhat, though not fully, with this aspect when I stated above that the scheme of Chapter 150 is to set up a central authority called the Local Government Board, and a local authority, the Craig Village Council, as two separate and distinct entities each with

powers, duties and functions of its own in the interests of local government, the Board being vested in possession of all movable and immovable property.

The status enjoyed by the Craig Village Council is that of a fully-fledged Village Council. It is of corporate status with a constitution of its own and may use a common seal. It is entrusted with the management of all administrative and financial business of the village and with its government generally. Also mentioned above is the fact that power is given to the Local Government Board in the nature of a superintending jurisdiction to be exercised over all village and country districts in the whole Country.

On point two: I have also shown above that entitlement to intervene in the affairs of a local authority comes about when, by virtue of being invested with power it becomes the duty of the Board, as donee of the power, to exercise it when the expediency of the case demands its exercise; in that case, no question of a discretion other than a duty to exercise it may then arise.

On point three: I am inclined to the view that there was no action taken against the Craig Village Council which may be properly called a sanction. The Village Council has not been removed from office; no charge has been laid against it; it has not been dissolved nor deprived of its property as was the municipal authority for the district of Jaffna in *Durayappah's case* above; it is still in existence; the only point is that its powers lie in abeyance and until the Board relinquishes their exercise. It is only in a case where the Village Council was being dissolved would its counsellors and representatives be entitled to a hearing (section 70(1)); or, if it were sought to remove its Chairman from office, would the principle of *audi alteram partem* apply (section 20 (2)(b)), for then the sanction would be the ultimate one and the ends of justice would best be served if he should be given a hearing in his defence.

It is doubtful, however, whether the term "sanction" may properly apply to the action taken under section 19. Admittedly, the Board is in the exercise of all powers of the Village Council, but there is no indication for how long this situation would endure; though the Village Council thinks the assumption will last for all time. Here I must express dissent, for it must be observed that the writ in this matter was filed barely four days after the Council's receipt of the Board's letter notifying it on the 6th April, 1967, of the assumption of all its powers as from that date. Surely, to have proceeded at law against the Board in the circumstances was to act precipitately, particularly in view of the admitted facts on the affidavits. How then can it be reasonable to suppose that the Board would assume the Council's power under section 19 for all time? It seems more reasonable to suppose that action was taken by the Board under the section as a temporary measure until all complaints against the Council, for what they were worth, had been investigated and a satisfactory state reached in its affairs, and that the Board would continue to function *vice* the local authority until such time arrived.

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Assuredly, there was no attempt on the part of the Board to alter the status of the Council, which in fact remains intact; nor to apply any sanction to it whatever, as was done in the case of the *Jaffna Municipal Authority* above. The measure adopted was entirely administrative and, it would appear, only temporary, for it was too early to say that it was taken with a view to impose any liability on, or to affect the rights of the Council. The appellants are in no position to gainsay this, for they gave the respondent Board by their precipitate action no opportunity to show otherwise was intended. Rather, it is the law itself which provides for the exercise of the Village Council's powers by the Board when the latter thinks it expedient.

Lastly, there is the allegation of bad faith, the onus of proving which they have failed to discharge. With respect of this, I think there can be no more fitting end to this judgment than to quote a passage from the judgment of Lord GREENE, M.R., in *Carltona Ltd. v. Commissioners of Works*, (1943) 560, with which I respectfully agree. This case involved the requisitioning of the appellant's factory by the Commissioner of Works in time of war under the Defence (General) Regulations, 1939, which provided that if a competent authority thought it necessary or expedient to do so in the interests of public safety, it could take possession of any land. The learned Master of the Rolls spoke in terms which seem to me quite relevant to the instant case as follows: [(1943) 2 A.E.R. 560, 563, 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 possibly 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 in 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 authorizes 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 to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction."

On the above analysis of the three matters, I am of the view that the Board's functions are correctly classified as administrative, and, as such, would not attract the principle of *audi alteram partem*.

For these reasons, I agree that this appeal should be dismissed with costs.

Appeal dismissed.

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[Court of Appeal (Luckhoo, C., Persaud and Cummings, JJ.A.),
December 2, 1968, February 7, March 31, 1969.]

Divorce—Roman-Dutch law—Malicious desertion—Constructive desertion—Application of concept of constructive desertion in English law to malicious desertion.

Divorce—Allegation of adultery not proved—Whether trial judge could use same evidence to find malicious desertion.

Divorce—Application for permanent maintenance made in petition for dissolution—Whether permissible—Matrimonial Causes Ordinance Cap. 166 s. 9, 14. Rules of Court (Matrimonial Causes) r. 43.

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In a divorce petition by the wife on the grounds of malicious desertion and adultery she was granted a *decree nisi* on the ground of malicious desertion and maintenance of \$90.00 per month. The judge rejected the allegation of adultery but found that there was an association which the wife believed to be adulterous and to which she objected and left the matrimonial home. On appeal by the husband.

HELD: (Cummings J.A. dissenting) that it was open to the trial judge to find malicious desertion even though the evidence led pointed to constructive desertion as known to English law, provided he could find that it was the clear intention of the husband to put an end to the marriage; that the judge having rejected the allegation of adultery may utilise the same evidence to find desertion; that by r. 43 of the Rules of Court (Matrimonial Causes) a petition for permanent maintenance must be a separate petition from the petition for dissolution of marriage.

*Appeal allowed in part.—Order for decree nisi affirmed.—
Order for permanent maintenance reversed.*

*B. O. Adams, Q.C., with C. V. Wight for the appellant.
F. R. Wills for the respondent.*

PERSAUD, J.A.: This is an appeal from an order made by a judge of the High Court whereby he granted a decree nisi to the respondent (wife) on the ground that the appellant (husband) had maliciously deserted her, and ordered the appellant to pay to the respondent the sum of \$90 per month as permanent maintenance. The cross-petition by the husband was dismissed.

In her petition, the wife had sought a dissolution of the marriage on the grounds of adultery and malicious desertion, and she also prayed that she be granted maintenance for herself.

The husband, in his answer, alleged that the wife had left the matrimonial home, and as a result had maliciously deserted him whereby he prayed for an order of dissolution on that ground.

The judge dismissed the cross-prayer, and granted the wife a decree nisi on the ground of malicious desertion, having found that the allegation of adultery made by the wife was not proved.

In the arguments before us, two main points arose for discussion. Firstly, whether the judge could properly have made the order for permanent maintenance where there was no separate petition for such relief, as is contemplated by r. 43 of the Rules of Court (Matrimonial Causes), Cap. 166 (Sub. Leg.); and, secondly, whether the judge, having dismissed the allegation of adultery, was right in making an order for a decree nisi based on malicious desertion, when, if anything, it could only be a case of constructive desertion. I will deal with these submissions in the reverse order.

Underlying the second submission must be the proposition that there is a distinction to be drawn between malicious desertion and constructive desertion with the result that where (as in the instant case) the petitioner it was who left the matrimonial home, the court may not grant a decree nisi based on malicious desertion.

Unlike the English legislation where the term 'malicious desertion' is unknown, s. 9(1) of the Matrimonial Causes Ordinance, Cap. 166, provides that a petition for divorce may be presented on the ground that the respondent has been guilty either of adultery or malicious desertion with or without adultery.

The term 'malicious desertion' has been inherited from the Roman-Dutch system, and is desertion proceeding *ex malitia*, i.e., from design or premeditated determination. Under that system, a petitioner seeking a divorce on the ground of malicious desertion was required to ask for an order for the restitution of conjugal rights, failing which, for divorce.

As was said by SHIPPARD, J., in *Gibbon v. Gibbon* (1881-82) 2 E.D.C. 280 at page 284:

"... by the rules of Roman-Dutch law judgment in a suit for restitution of conjugal rights must be obtained as a necessary preliminary to a decree a *vinculo matrimonii* on the ground of malicious desertion. This being so, it seems to me to follow that a decree of restitution of conjugal rights so obtained may fairly and openly be treated as a legal fiction, devised with a view to ulterior proceedings for divorce... The theory of the Roman-Dutch law appears to have been that divorce should never be granted while there remained hope of reconciliation. In cases of alleged malicious desertion the courts require proof that no such hope remained, and therefore would not dissolve a marriage on such ground till after proof of contumacious disobedience of a decree of restitution of conjugal rights".

But it is no longer necessary in this country to secure an order for the restitution of conjugal rights as a pre-requisite for a decree nisi for malicious desertion. As a matter of fact, even the doctrine of constructive desertion came to be recognised by courts administering law in accordance with the Roman-Dutch system. For instance, in South Africa, this doctrine was not unknown, and principles similar to those applied in the British Courts were beginning to be applied to cases there. In *Sutherland v. Sutherland*, (1910) N.L.R.219, for instance, BROOME, J., said: "Desertion is not to be tested by merely ascertaining which party left the matrimonial home first; the one who intends bringing the cohabitation to an end commits the desertion." Again, in *Crossley v. Crossley*, (1912) W.L.D. 99, BRISTOWE, J., said:

"The question seems to me to be who is the person substantially responsible for the separation. It does not matter which of the parties actually leaves the other. The party who really deserted is the one who compels the desertion."

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No clearer language is, in my view, required to indicate that the concept of constructive desertion had taken root, and was growing in the Roman-Dutch system, the practical result being that there is no real distinction between constructive desertion and malicious desertion in the sense that *malitia* must exist in both. As it has been put by VERITY, J., in *Matthews v. Matthews*, (1931–1937) L.R.B.G. 459:

"There does not appear ever to have been reported a comprehensive definition by the courts of this colony of the term 'malicious desertion', but consideration of cases decided in the courts of both South Africa and Ceylon gives assurance that under the Roman-Dutch system of law from which this ground for divorce has been adopted and to which one may rightly refer for guidance in this regard, malicious desertion must at least include a deliberate, definite, and final repudiation of the marriage state by one spouse against the will of the other and without just cause or legal justification."

And LUCKHOO, C.J. (ag.) in *Stull v. Stull*, [(1946) L.R.B.G. at p. 79], in referring to an allegation that the wife had deserted: ". . . but before I could find malicious desertion on her part I must be satisfied that she actually and wilfully brought to an end the existing state of cohabitation with the deliberate purpose of abandoning conjugal society."

For my part, I can find no difference between state of mind required to found malicious desertion, and that which must exist in the spouse whose conduct leads the other spouse to depart from the matrimonial home. The object is the same; the mode of achieving that object is different.

Finally, on this point, I wish to remark on MARNAN, J.'s observation in *Nisa v. Zaheeruddin*, [(1959) L.R.B.G. at p. 336] to the effect that counsel appearing for the wife in that case was unable to indicate any real distinction between the concept of malicious desertion and desertion as known to English matrimonial law. MARNAN, J., went on to quote with approval the dictum of VERITY, J., in *Matthews v. Matthews* set out above.

My conclusion, therefore, on this aspect of the matter is that it was open to the trial judge to make a finding of malicious desertion against the appellant even though the evidence led pointed to constructive desertion as is known to the English law, provided he could find from the evidence before him that it was the clear intention of the appellant by his conduct to put an end to the marriage. Were it to be otherwise, the state of the law being what it is, constructive desertion could not be a ground on which a petitioner can launch his petition in this country. Further, the courts of this country have always recognised constructive desertion as a ground on which to dissolve a marriage.

With regard to the charge of adultery, the judge found that he could not infer from the circumstantial evidence before him that that allegation had been proved and he accordingly dismissed the woman named from the proceedings. He had before him evidence of association and some familiarity

which he accepted, and of which he found that the wife had knowledge, and disapproved. And he utilized this evidence to find that the husband was guilty of maliciously deserting the wife. He deplored the husband's conduct in continuing his association with the woman-named, and found that it was this conduct of his which was ostensibly adulterous which drove the wife from the matrimonial home. The judge also described the woman-named as the husband's concubine, the relationship between them as an illicit affair, and the husband's behaviour as selfish, and his ways evil.

Counsel for the husband takes strong exception to the language used for he says, it indicates that although the judge refused to make a finding of adultery against the husband and the woman-named, yet he was in effect, by the use of the language already described, intimating that he was of opinion that the association was an adulterous one, which he could not properly do, having regard to his previous finding, and that he allowed that opinion to influence his finding of malicious desertion against the husband.

Counsel contends, further, that there was no specific allegation of desertion in the wife's petition, but rather there was a clear indication in her letter to her husband of her intention not to return to the matrimonial home; that the learned judge did not find that the husband refused to resume cohabitation, or that the wife made attempts at reconciliation; and in the circumstances, it was not open to the judge to find desertion except upon an amended petition, particularly as the view of the judge was that the husband had no desire to have the wife leave him.

In short compass, the learned judge found that there existed a liaison between the husband and the woman-named for at least five years, that the wife remonstrated with the husband, but to no avail; that because of his refusal to put an end to the friendship, the wife left for the United States in 1962, with the clear intention of not returning to the matrimonial home; that the husband was instrumental in the wife returning to Guyana, he having induced the American Immigration authorities to take certain action, but doubted the husband's sincerity to effect a reconciliation in view of the fact that he refused to put an end to the relationship with the woman-named. Applying the principles laid down in *Lang v. Lang*, (1954) 3 All E.R. 571, the judge held that the husband was guilty of malicious desertion.

In her petition, the wife did make an allegation of desertion—albeit constructive desertion—and in her evidence, she was saying that her husband had deserted her in 1962. As I understand her case, the events of which she testified as occurring after 1962 went to show her desire to resume cohabitation with her husband, but these do not detract from her case that she was deserted in 1962 when she was forced to leave home.

The question is: Could the judge, having rejected the allegation of adultery, utilise the same evidence to find desertion? The law is stated thus in RAYDEN ON DIVORCE, (9th Ed.), at p. 195:

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"Failure to bring a charge or prove the fact of adultery, where belief that an adulterous association is being carried on has been deliberately induced, does not preclude the establishment of a case of constructive desertion."

In *Glenister v. Glenister*, (1945) 1 All E.R. 513, the wife summoned the husband for maintenance on the ground of desertion. The defence was that the husband had had reasonable grounds for leaving the wife—one of his contentions being that she had committed adultery—but he failed to prove adultery. It was held that though no adultery had in fact been committed, the wife had conducted herself so as to give her husband reasonable ground for supposing that she had committed adultery, and in those circumstances, the husband ought not to be held to have left the respondent without reasonable cause.

In *Williams v. Williams*, (1943) 2 All E.R. at p. 752, DU PARCQ, L. J., said: "Conduct which falls short of adultery may excuse desertion and so in some circumstances may the honest though mistaken belief of one spouse that he or she has been wronged by the other."

This principle has been followed in several later cases, but the facts in *Baker v. Baker*, (1953) 2 All E.R. 1199, are somewhat similar to the facts in the instant case. In that case, the wife, by reason of the husband's conduct generally, and also in refusing her sexual intercourse, suspected that the husband was having an adulterous association with another woman. Upon being taxed by her with this allegation he denied it, also declaring that he did not know the person referred to. Later, the wife found him together with the woman named sitting in the front seat of his car. The wife left the home, and upon her bringing proceedings for maintenance on the ground of desertion, the magistrate gave his reasons as follows: "Adultery not proved, but satisfied wife had reasonable grounds for suspecting (husband) had committed adultery. *Glenister v. Glenister*." He found the husband guilty of desertion. On appeal, Lord MERRIMAN, P., said (at p. 1200 *ibid*):

"In my opinion, the magistrate was justified in saying, hypothetically and as a matter of law, that, if a man deliberately induces the belief that he is carrying on an adulterous association, and, in consequence, his wife leaves the matrimonial home, he can be held to have expelled her, and therefore, to have deserted her, even though she fails to bring a charge, or to prove the fact of adultery."

In this case, the judge found that there was the association to which the wife objected, that the wife believed that the association was an adulterous one, and that she left the matrimonial home in 1962 with the fixed intention of not returning. I cannot say that these are findings which the judge could not have properly made in view of the evidence which he had before him.

The judge also found that the appellant had no desire that his wife should leave him, and that he did everything to get her to return to him,

but he showed no signs of desisting from conduct which was the cause of his wife's leaving the home in 1962. In fact, there is evidence which the judge accepted, that in 1966 he and the woman-named had gone off to neighbouring Surinam with other friends, and that generally, he had not stopped being friendly disposed towards her. This could hardly convince a court that he was serious in his protestations to terminate his association with the woman-named. Even though the husband really did want to resume cohabitation, but he persisted in conduct which he knew would cause his wife to continue in the belief that he was committing adultery, then he will be presumed to intend the natural consequences of his act, and will be in desertion of his wife. See *Lang v. Lang*, (1954) 3 All E.R. 571, where it was held that if the whole of a husband's conduct is such that a reasonable man must know that it will probably result in the wife's departure from the matrimonial home, the fact that the husband did not wish this consequence to ensue does not rebut the inference that he intended the probable consequences of his acts, and thus intended the wife to leave the home.

I am not unmindful of the rule that the belief that the other spouse has committed a matrimonial offence must be reasonable, and the test of reasonableness an objective one. [See *Cox v. Cox*, (1958) 1 All E.R. 569]. In this case, I am of the opinion that the judge applied the correct test, and he having found that the appellant was guilty of malicious desertion in 1962, I am not disposed to disturb that finding.

But there still remains the question of the order for permanent alimony to be considered.

In her petition, the wife had asked that she be granted maintenance for herself, and the judge permitted an investigation into the husband's means, after which he made an order for the payment of \$90 per month to the wife during their joint lives, with liberty to both parties to apply for a variation on good cause shown

S. 14 of the Matrimonial Causes Ordinance, Cap. 166, enables the court to make an order against a husband for the maintenance of his wife 'on any decree for dissolution or nullity of marriage'. Rule 43 of the Rules of Court (Matrimonial Causes), Cap. 166, (Sub. Leg.), provides as follows:

- "(1) Applications to the court to exercise the authority given by sections 14, 16, 22, 26, 27 and 30 of the ordinance are to be made in a separate petition, which must, unless by leave of the court, be filed as soon as by the said sections those applications can be made, or within one month thereafter.
- "(2) When application is made for maintenance under section 14, the petition may be filed as soon as, but not before, a decree nisi has been pronounced."

Counsel for the wife has sought to answer the submission that it was not competent for the court to make the orders by saying that as the petition contained a prayer for maintenance, the judge had a discretion to grant

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maintenance to begin on the pronouncement of a decree nisi or a decree absolute. He contends that *Luke v. Luke*, (1942) L.R.B.G. 198, does not derogate from his proposition.

In *Luke v. Luke*, a separate petition for alimony was filed, but after the decree was made absolute, and the points taken were that the petition had been filed out of the prescribed time, and that a 'separate petition' in rule 43(1) meant a separate cause. The objections were overruled, and it was held that an application for permanent maintenance may be made:

- (1) at any time between the decree nisi and the decree absolute;
- (2) on the day the decree absolute is made, or within one month thereafter; or
- (3) with the leave, of court, on the expiration of one month after the decree absolute, if in the circumstances, reason and good sense so require."

In dealing with the question whether there should be separate petition, DUKE, J., said:

"In *Sidney v. Sidney*, (1867)36 L.J.P. & M. 75, Lord Cranworth pointed out that the jurisdiction in respect of applications for permanent maintenance is a 'discretionary jurisdiction, which is to be governed in its exercise altogether by the consideration of a variety of circumstances forming matter of allegation and, if need be, matter of evidence, wholly and entirely apart and different from that which is to obtain in a petition for dissolution of marriage'. It can therefore very well be understood why a petition for permanent maintenance must be a 'separate' petition from the petition for dissolution, even where the petitioner in both matters is one and the same person."

I am of the view that the language of rule 43 makes it inevitable that a separate petition must be filed, not as in the case in the United Kingdom where the Matrimonial Rules, 1957, make it imperative that an application for ancillary relief be made in the petition.

In *Charles v. Charles*, (1866) L.R.P.D. 260, it was held that the words "any such decree" appearing in a section equivalent to our s. 14 of Cap. 166 must refer to the decree absolute. At page 264 (ibid) the Judge Ordinary said:

"Now, the sense and convenience of the matter certainly point to the decree absolute. Before the court can order that the husband shall secure to the wife such sum of money 'as, having regard to her fortune, if any, to the ability of the husband, and to the conduct of the parties, it shall deem reasonable,' it must inquire into the fortune of the wife, and the ability of the husband. It must, therefore, take one of two courses. It must either suspend the decree *nisi* after the petition is proved until that inquiry has been gone into, or it may make the decree *nisi* at once, and go into the inquiry before the decree is made absolute. The latter is so obviously the most convenient course, that, if there is

any doubt on the matter, the court ought to adopt it, for it should so read the statute as to render it as useful as possible to the suitors."

My interpretation of the meaning of rule 43 may be regarded as one that may prove inconvenient to parties to divorce proceedings; and it may well be so, for the statute is not rendered as useful as possible to the suitors, but rule 43(2) could not, in my view be clearer to the effect that an application for maintenance may not be filed before the decree *nisi* is pronounced. If this is so, it follows that the court may not make an order for maintenance (I am not now speaking of alimony *pendente lite*) before the *nisi* order is made.

For the reasons which I have given, I would allow this appeal in part. That part of the judge's order which granted a decree *nisi* will be affirmed, and the wife will be at liberty to file an application for maintenance if she wishes. I will not disturb the order as to costs in the court below, but in this court each party will bear his own costs.

LUCKHOO, C: I concur.

CUMMINGS, J.A.: This appeal is from an order *nisi*, on the grounds of malicious desertion, made by the learned trial judge on a petition by a wife for divorce on the grounds of adultery, cruelty and malicious desertion by her husband and dismissal of his cross-prayer that her petition be rejected and that the marriage be dissolved on the grounds of her malicious desertion.

The learned trial judge also made orders for permanent maintenance and costs in her favour. The husband appeals to this court on the following grounds:

- "(1) The learned judge erred in law in holding that the appellant (respondent) had maliciously deserted the respondent (petitioner) in view of his findings of fact.
- (2) The learned judge erred in law in not holding that the respondent (petitioner) had maliciously deserted the appellant (respondent) in view of his findings of fact.
- (3) The learned judge erred in his application of the principles of law relating to constructive desertion.
- (4) The learned judge acted without jurisdiction when he purported at the time of pronouncing the decree *nisi* for the dissolution of marriage to order the appellant (respondent) to pay to the respondent (petitioner) permanent maintenance at the rate of \$90.00 per month having regard to section 43(1) of the Rules of Court (Matrimonial Causes).
- (5) The judgment of the High Court was against the weight of the evidence."

The facts of the case are fully dealt with in the judgment of Milord PER-SAUD; it is therefore unnecessary to repeat them here.

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The Matrimonial Causes Ordinance, Cap. 166, provides:

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

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

The learned trial judge in the course of his judgment said:

"It appears to me quite clearly from the facts of this case that they fall within the category of constructive desertion."

But then he went on to grant "a decree *nisi* on the ground of malicious desertion".

Are the terms "constructive desertion" and "malicious desertion" then synonymous? I recall at this point the classic example of the logicians in dealing with fallacies: "London Bridge is a stone bridge, but not every stone bridge is London Bridge". By analogy some forms of constructive desertion may also be malicious desertion, but all forms of "constructive desertion" are not necessarily "malicious desertion".

What, then, must a petitioner establish in order to obtain a decree on the grounds of "malicious desertion"?

In *Matthews v. Matthews*, (1931-7) L.R.B.G. at page 459, VERITY, C.J., said:

"There does not appear ever to have been reported a comprehensive definition by the courts of this colony of the term 'malicious desertion' but consideration of cases decided in the courts of both South Africa and Ceylon gives assurance that under the Roman-Dutch system of law from which this ground for divorce has been adopted and to which one may rightly refer for guidance in this regard, malicious desertion must at least include a deliberate, definite, and final repudia-

tion of the marriage state by one spouse against the will of the other and without just cause or legal justification.

The existence of this determination on the part of the deserting spouse may be deduced *from conduct of varying kinds*, but that its existence must be proved or properly inferred from the evidence is essential if it be desired that the court should dissolve the marriage on this ground.

The court will not lightly determine the marriage bond *where there is no clear and convincing evidence of such final repudiation* nor by its decree will the court convert into final dissolution what may well be but a temporary withdrawal, the result of hasty disagreement or misunderstanding.

It may be desirable that the law should prescribe, as in the case for petitions for judicial separation, some period beyond which alone could such a petition as the present be brought, not with the object of substituting statutory desertion for malicious desertion, but for securing a reasonable period within which the erring spouse might have time for consideration and the aggrieved spouse have opportunity for seeking by every means just reconciliation. This is a view which in my opinion might well receive consideration in the proper quarter, but, be that as it may, *no such period is prescribed by the existing laws of the colony*, nor do those laws require that there be refusal on the part of the respondent to comply with an order for the restitution of conjugal rights before a decree of dissolution of marriage be pronounced on the ground of malicious desertion as is required in South Africa.

Nevertheless, 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.*

While, therefore, it is not required by the laws of this colony that there should be any defined period of desertion nor that legal proceedings should have been instituted to secure either the return of the deserting spouse or refusal of return in obedience to an order of the court, *yet in many cases the element of time will be one for consideration in ascertaining whether or not the desertion is in fact evidence of final repudiation.* The efforts of the petitioner to secure or afford opportunity for the return of the respondent, moreover, will be for consideration in ascertaining whether or not the withdrawal is against the will of the petitioner."

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Of this passage, MARNAN, J., in the course of delivering the unanimous judgment of The Federal Supreme Court of the West Indies in *Nisa v. Zaheeruddin*, (1950) 1 W.I.R., at 539 said:

"For my part I have no hesitation in adopting as correct the principles so clearly stated in the passage I have just read."

In *Melbourne v. Melbourne*, (1950) L.R.B.G. p. 66, WARD, J., said:

"It is clear to my mind that in interpreting the meaning of malicious desertion under the Matrimonial Causes Ordinance recourse must be had to the concepts and established practice under Roman-Dutch law, since malicious desertion, as distinct from desertion, is unknown to English law. I must take it as VERITY, J., did in *Matthews v. Matthews* (*loc. cit.*) that the legislature in using this term intended to retain the principles of Roman-Dutch law as to malicious desertion."

Under the Roman-Dutch law, in order to establish malicious desertion it was necessary to prove:

- (1) Desertion.
- (2) That the desertion was without '*justa causa*'
- (3) That the petitioner had secured a decree of a competent court for *restitutio in integrum* against the deserting spouse. If the latter, despite the court's decree, refused to return to cohabitation—which was not merely limited to being under the same roof but included a denial of sexual intercourse—then that spouse was deemed contumax. The desire to bring the matrimonial state to an end was finally evidenced by this malice.

VAN ZYLE, in *THE JURIDICAL PRACTICE OF SOUTH AFRICA*, comments, as follows at page 489:

"The action for restitution of conjugal rights is after all only a fictitious preliminary to the action for divorce; . . . The tendency of modern decisions is rightly to look not to one isolated act, or the act of desertion by itself, but to take 'all the circumstances' into consideration, and to deduce therefrom, if it can reasonably be done, the act of desertion. Of course, if there is clear evidence of the refusal of the party to return, it is an act of desertion, and the decree must be granted; so also must be the decree be granted if the party has knowledge of the proceedings against him and enters no appearance or does not obey the order of court to return; but suppose there is no clear proof that he has knowledge of the proceedings, then the court must be satisfied from the evidence produced, and from all the surrounding circumstances of each particular case, that the party's conduct amounts to a desertion. It is a matter very much in the discretion of the court, and in judging of such conduct every ingredient should be taken into consideration; such as the pecuniary means and social position of the parties, their habits

and customs, the primary cause of the defendant's absence, under what circumstances he or she left, to or for what place, to a great distance or close by, to a foreign country or not, to a civilised country or a barbarous or sparsely populated one, the means of communication, the cause of the continued absence, the correspondence or not between the parties, the contribution by the one towards the other's support; also the efforts made by either to induce the other to return, or by a husband to induce his wife to follow him, or the means adopted or steps taken by the innocent party to discover the whereabouts of the other, the unexplained absence, and the defendant's silence. All these, I say, must be taken into consideration, and if they point to the possibility of the defendant's non-intention or non-likelihood to return to his or her spouse, and live and cohabit together, the decree for divorce must be granted. But even if there is clear proof that the desertion was *ab initio* malicious, the party may repent it, and on his or her offering to return, whether voluntarily or after a summons, the other party must take him or her back. The bare offer to return to the home is, however, not sufficient. There must be an actual return and a complete resumption of all previous conjugal rights and privileges: otherwise it would be in the power of the offending party to offer to return, so as partly and ostensibly to comply with the order of court, but in reality in order to prevent the other from getting his or her divorce, or again, having returned, to abstain from or refuse all other marital privileges, and so defeat the very end of marriage."

In the concept of constructive desertion the intention to desert is implied from the circumstances if the offending spouse goes away and/or does not cohabit for a specified period. In Roman-Dutch law, although time is an element to be considered, the desertion does not become malicious until there is a refusal to accept an offer to resume cohabitation.

That this was and is the law of this country was clearly appreciated by the learned trial judge when, in the course of his judgment, he said:

"It is well established that no woman whose husband carries on what is ostensibly an adulterous intercourse with another woman can be compelled to remain in the conjugal state and perform wifely duties for him. The law considers that this is too much to expect of her, and this is so, notwithstanding he has not actually brought his concubine in the matrimonial home. *In such a case the law says that the wife may express her willingness to remain with him on the condition that he gives up his illicit affair*; if he does not, she may properly withdraw from cohabitation, and in consequence of his refusal he will be guilty of desertion."

Must there not then be, for the wife's petition to succeed, some evidence of her return to the home and then of his non-fulfilment of the condition?

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It is at this point, in my view, that the learned trial judge, when considering the wife's petition, misdirected himself. Instead of doing what he set out to do, he diverted and considered the genuineness of the husband's invitation to the wife to return home, and did not consider whether the wife, after her return from the United States, did or did not "express her willingness to remain with him on the condition that he gives up his illicit affair".

She alleges in para. 13 of her petition "that when the petitioner returned from the U.S.A. the respondent refused to resume cohabitation with the petitioner and still refuses to do so."

In her examination-in-chief, she said:

"In October 1962 I returned from America. When I returned from the States the respondent still continued his friendship with Changlee and refused me sexual intercourse. When I returned he refused to live with me in the same home, i.e., in October 1962. He said he could not have anything to do with me.

In cross-examination she said:

"I have made efforts for a reconciliation. I tried to reconcile in 1966. I wanted the respondent to live with me again then. I admit persons came to me about 1962 and 1966 asking me to return to the respondent."

I can find nothing else on the record tending to establish that she "expressed her willingness to remain with him on the condition that he gives up his illicit affair", nor that she made any attempt to return to the matrimonial home.

The learned trial judge found:

"I have no doubt that once she got into the States it was her intention to stay there forever. I am certain of this because of her reply to a letter which the husband wrote asking her to return to him. In that reply (Ex. "B") she spoke her mind quite freely; she left nothing to conjecture about what she thought of him, of how he treated her, and after stressing how fed-up she was with his conduct, categorically stated she was through with him 'for keeps', that he should not come near her nor persuade her to return to him. That reply was obviously written in a vexatious mood because the respondent had written the American Immigration authorities with a view to having them terminate her stay in that country. Obviously, it was her intention to remain in the States because she accused him therein of not wanting her to lead an independent life which he knew she would if she got the chance of remaining there away from him; but he balked it."

And she herself further testified her intention when she said: "I did tell my husband he was having sexual relations with Changlee. This was during the last quarrel I had with him in 1961. He admitted it during the quarrel. I *have never forgiven him for it.*"

The learned trial judge went on to find:

"I have paid regard to the many entreaties for a return to cohabitation made both by and on behalf of the respondent to his wife, and above all, to the fact that even when his wife was out of the country and his sight, she was not out of his mind, for he wrote her to the intent that she should return to him, and also the American Immigration authorities whom he successfully persuaded to curtail her stay in that country. But how sincere were they really? He had no desire that Mrs. Siebs should leave him; he certainly did everything to get her to return to him, but he subjected her to degrading treatment, and even when she attempted to rid herself of him forever by entering the United States of America, he balked all her efforts in that direction by ensuring her return to Guyana. This course would have been justifiable had he changed his evil way of living, but he had not really done so. He must therefore be taken to have known as a reasonable man that so long as the same cause which motivated his wife's withdrawal from cohabitation continued, there could never really be any chance of a reconciliation between them. It was unreasonable to expect any wife to return to him and share the conjugal life so long as such behaviour continued. I therefore grant her a decree *nisi* on the ground of malicious desertion."

Although, therefore, the learned trial judge did not pursue his enquiry and make a direct finding of the wife's allegation about her efforts at the resumption of cohabitation, the findings just quoted clearly negative those allegations.

If that is so, then he has found malicious desertion on the wife's petition merely on the establishment of just cause. What he has found is that there was just cause for her leaving without going on to find that the husband had refused an offer to resume cohabitation.

That, with great respect, is not the Roman-Dutch concept of malicious desertion; according to which, Saul must be given a chance to become St. Paul.

With regard to the husband's petition, having found as he did, the learned trial judge ought to have concluded that the wife's petition was premature; she ought not to have anticipated that he would not change. In the words of VAN ZYL:

"But even if there is clear proof that the desertion was *ab initio* malicious, the party may repent it, and on his or her offering to return, whether voluntarily or after a summons, the other party must take him or her back. The bare offer to return to the home is, however, not sufficient. There must be an actual return and a complete resumption of all previous conjugal rights and privileges; otherwise it would be in

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the power of the offending party to offer to return, so as partly and ostensibly to comply with the order of the court, but in reality in order to prevent the other from getting his or her divorce, or again, having returned, to abstain from or refuse all other marital privileges, and so defeat the very end of marriage."

I agree with the observations of Milord PERSAUD with regard to the order for permanent maintenance.

Accordingly, I would allow this appeal, set aside the judgment and order of the learned trial judge and make an order *nisi* on the husband's petition. I agree with Milord PERSAUD on the question of costs.

*Appeal allowed in part—Order for decree nisi affirmed
—Order for permanent maintenance reversed*

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[Court of Appeal (Luckhoo, C., Persaud and Cummings JJ.A.)
February 10, March 31, 1969.]

Appeal—Workmen's compensation—Medical evidence—Finding by magistrate held by Full Court on appeal to be unreasonable—Principles on which finding of unreasonableness may be made.

Pleading—Finding by Full Court—Not pleaded and no evidence in support thereof—Whether Full Court entitled to make such finding.

The appellant applied for and was granted compensation by a magistrate on the ground that he had received an injury to his ear in the course of his employment as a cane cutter. On appeal, the Full Court held that the finding by the magistrate in favour of the appellant was unreasonable having regard to the medical evidence upon which, it was held, there was no conflict, and reversed the magistrate's decision. Upon further appeal.

HELD: (Luckhoo, C., dissenting) that (1) there was conflict in the medical evidence and that the finding by the magistrate was not unreasonable.

(2) the Full Court was not entitled to make a finding on an issue not raised in the pleadings or evidence.

*Appeal allowed
Award of magistrate restored.*

Solicitors:

J. O. F. Haynes, Q.C., with Ashton Chase for the appellant.

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

LUCKHOO, C: The appellant, a workman, suffered injury to his right ear in the course of his employment with the respondents on the 29th October, 1966, and was awarded compensation in the sum of \$1,729 for permanent partial incapacity resulting therefrom. The respondents appealed to the Full Court of the High Court of the Supreme Court of Judicature (afterwards referred to as the "Full Court") on grounds provided under s. 40 of the Workmen's Compensation Ordinance, Cap. 111, which enabled them to challenge the decision where

- (a) a question of law is involved;
- (b) the decision was one which the magistrate, viewing the evidence reasonably, could not properly make.

The Full Court, under s. 28 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, has powers

- (a) to affirm, modify, amend or reverse, either in whole or in part, the decision made by the magistrate, or may enter any judgment or make any order which the magistrate ought to have made;
- (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.

It was there said that in law the evidence was insufficient to prove that the appellant suffered any permanent partial incapacity as a result of the accident, and that the magistrate, viewing the evidence reasonably (on the facts before him), could not have decided as he did. That court found in favour of both grounds of appeal and set aside the magistrate's award.

The appellant now seeks from this court a restoration of what was originally ordered. To succeed, he must establish that the Full Court's decision was attended by error in law which calls for determination by this court; for under the Federal Supreme Court (Appeals) Ordinance, No. 19 of 1958, as adapted by the Guyana Independence (Adaptation and Modification of Laws) (Judicature) Order, No. 37 of 1966, no appeal lies from that court to this on a question of fact. If the Full Court, by virtue of its jurisdiction as a court of re-hearing, had adjudicated within the ambit of this legal authority, this appeal cannot succeed.

The magistrate had believed and accepted the evidence of the appellant, and the witnesses called in support of his case. With regard to that evidence which was of a medical character, and which came from Mr. Hugh (a witness for the appellant) and Mr. Das Gupta (the only witness for the respondents), he preferred to accept that of the former wherever it was in "conflict" with the latter. Full credit, therefore, must be assigned, and due weight given to what was adduced on the appellant's behalf, and wherever any

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conflict might appear from the medical testimony, Mr. Hugh's version must be accepted.

The appellant's case showed that on the 29th October, 1966, he was attempting to place a bundle of cane on his head when a piece of cane trash went into his right ear. He was unable to continue working, and reported the accident to another employee of the respondents, one Sarabjit, who took a pencil point and tried to examine his ear which was bleeding, after which the dispenser of the respondents' estate, one David, examined and treated him.

Previous to 29th October, the need never arose for him to have his ear attended by a doctor. After the accident, however, he was referred to Mr. Das Gupta, an ear specialist, on 31st October, 9th, 21st November, and 2nd December; he himself saw Mr. Hugh on 15th December and 26th January the following year. Further, he received attention from Doctors Brahman and Bacchus and one Mrs. Roberts but the last three were not called as witnesses.

His witness, Seecharan, saw his right ear bleeding on the 29th October, 1966, and had several conversations with him after that date when the appellant had "to turn his ear" to hear him. His wife, Rosa Jeaman, also said that since the 29th October, 1966, when she spoke to her husband, he would take "long to answer, and that "if he is facing me and if his right side turn to me, he does not answer me so readily. If the left side is turned to me, he hears well".

The dispenser, Harold David, examined the appellant's ear on the 29th October, 1966, and found several foreign bodies in the ear which he cleaned out with a piece of cotton wool. He saw blood on the wool and put ear-drops in the ear. He again saw the appellant on 30th October, cleaned out the blood-stains, and told him to see the estate medical officer. On 31st October, 1966, the appellant was seen by Dr. Brahman, the estate medical officer, and he, the dispenser, continued treating the right ear in accordance with instructions from Dr. Brahman and Mr. Das Gupta.

Mr. Hugh said that when he examined the appellant on 15th December, he found "nearly complete deafness of the right ear and blood scabs *on* the right ear-drum. He recommended him for six weeks temporary disability, and saw him again on the 26th January, 1967, when ear-drops were put in his ear, but those drops came out into his throat. He then examined the ear again and found "complete absence of the right ear-drum". He said that hearing from that ear was greatly reduced and completely absent, and so he assessed the appellant at 40% permanent partial disability, taking into account his occupation as a cane-cutter and consequent loss of earning capacity. One blood scab had obscured the ear-drum. The ear was still injured, as what was under the scab was not completely healed and the scab had remained. The ear could have bled about 10 days previously.

The crucial question posed was: Was the injury to the ear, which resulted in some measure of permanent partial incapacity, caused by the accident on the 29th October?

The respondents in their answer to the claim said:

- (a) "The applicant was examined and treated by Dr. A. P. Brahman who discharged him on the 8th November, 1966, after the abrasion had healed and certified him as fit to perform his normal duties from that date.
- (b) The applicant was also examined by Mr. P. R. Das Gupta, F.R.C.S., D.L.O., Ear, Nose and Throat Surgeon, Georgetown Hospital, on the 31st October, 1966, who found that the applicant's condition was in no way connected with his alleged injury on 29th October, 1966.
- (c) The respondents will contend that even if the applicant has suffered permanent incapacity (which is denied) such incapacity was not the result of an accident arising out of and in the course of his employment but was due to a pre-existing diseased condition.
- (d) They denied the allegations in the particulars (of the claim)."

The appellant then perforce had to meet the burden of proving that the injury took place on the 29th October. If the direct and/or circumstantial evidence did not establish this fact, his case could not succeed, also, if the injury was shown to be either before or after the 29th October, as in either event he will have failed to prove the real matter in dispute. The specific plea of a pre-existing diseased condition, which was put forward, is clearly in addition to what is contained in (b) and (d) above, and sufficiently raised the issue that the appellant's condition was in no way connected with his alleged injury on the 29th October. If it turned out to be "after" and not "before", as it was thought, no advantage could accrue to the appellant, because in neither instance will he have proved what was left for him to do, viz., that the accident took place on the 29th October.

Mr. Gupta's evidence was to the effect that when he examined the appellant's right ear on the 31st October, there was a small lacerated injury in the floor of the auditory opening just beyond the external opening. The ear was so packed with wax that he could see *nothing* inside. To meet the necessity of clearing that wax, he gave drops to soften it and ordered that the ear be syringed. That amount of wax could not have accumulated in two days, he said, and must have been there when the accident occurred. On the 9th November when he next saw the appellant, the laceration had healed, but the ear was still "full of wax" and again he was not able to see *inside*. On the 21st November the appellant returned to him with "a doctor's letter", when, upon an examination of the ear, he found a big "perforation", which could occur by the injection into the ear of any hard object. It was possible for a stiff piece of cane trash to damage the drum; but because

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of the amount of accumulated wax at the relevant time, it was his opinion that cane trash could not penetrate through so deeply and cause an injury to the ear-drum.

No evidence of any kind was led to contradict Mr. Gupta's positive statement of the amount of wax he saw on his first examination. This, the magistrate must be taken to have accepted when in his judgment he said that it was because Mr. Gupta "had found wax packed inside that he gave drops and ordered the said ear to be syringed". If it were otherwise, the appellant, the dispenser, or one of the other doctors would have known. Nor was Mr. Gupta cross-examined to show that he was not speaking the truth. Indeed, if the time which passed between treatment and removal of wax is any indication of the difficulty experienced in accomplishing the purpose, the blockage must have been extensive indeed.

Further, I can detect no medical challenge of Mr. Gupta's opinion that a piece of cane trash could not have penetrated the accumulation of wax which he saw, either in cross-examination or through other evidence. If Mr. Gupta's opinion on this question was ill-founded, one would have expected some contest, through Mr. Hugh, of a question which was obviously vital to the issues, and certainly far-reaching in its implications. In any event, any answer to this question would have had to take into account, not only the quantity of wax which existed, but the extent to which it had hardened, as, if it was to be considered as a protective shield which would avoid damage to the ear-drum by withstanding the penetration of cane trash, the factors of how much there was and how solid, must necessarily be pertinent, and surely the specialist, who saw for himself, ought to be in a more advantageous position in proffering an opinion than one who did not! Did the magistrate give to this evidence the weight which it deserved, or any weight at all? How did he direct himself on it?

In the exercise of its appellate jurisdiction, the Full Court must of necessity balance probabilities, draw inferences, and ensure that the magistrate, directed himself properly on the basis of his findings of fact. If the magistrate draws wrong inferences on fundamental matters, or misdirects or omits to direct himself on material evidence, then the justice of the case will be jeopardised, and distorted conclusions will be reflected in his decision, and this will require rectification.

When the Court of Appeal in Chancery exercised its jurisdiction, it would not allow an appeal unless satisfied that the judge was wrong. If in doubt at the end of the argument whether the judge was right or wrong, the appeal would be dismissed. This principle was well moulded by LOPES, L.J., in *Savage v. Adam*, W.N. (95) 109, when he said:

"Where a case tried by a judge without a jury comes to the Court of Appeal, the presumption is that the decision of the court below on the facts was right and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, then inasmuch as the appeal is in the nature of a re-hearing,

the decision should be reversed; if the case is left in doubt, it is clearly the duty of the Court of Appeal not to disturb the decision of the court below".

The judges in the Court of Appeal in *Colonial Securities Trust Co. Ltd. v. Massey & Others*, (1896) 1 Q.B.D. 38, endorsed the above statement.

In endeavouring to conclude whether a judge is satisfactorily made out to be wrong, resort is often had to an examination of the probabilities which arise from the accepted evidence. And BIRKENHEAD, L.C., in *Lancaster v. Blackwell Colliery Co., Ltd.*, (1919) 12 B.W.C.C. 400 at p. 406, laid down the law in these words:

"If the facts which are proved give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture, then of course the applicant fails to prove his case because it is plain that the onus in these matters is upon the applicant. But where the known facts are not equally consistent, where there is ground for comparing and balancing probabilities as to their respective value, and where a reasonable man might hold that the more probable conclusion is that for which the applicant contends, then the arbitrator is justified in drawing an inference in his favour".

The time has now come to see how far the case for the appellant was in reality taken by its own witnesses before considering how much it may have been retarded by the uncontradicted portion of Mr. Gupta's evidence.

When Mr. Hugh saw the "blood scab" on the right ear-drum on the 15th December, he said that there was nearly completely deafness, and this was consistent with the history of the accident given to him by the appellant. It was after this examination that he recommended him for six weeks temporary disability. The clear indication here was that there was an injury to the drum; that injury had bled; and had produced a blood scab which was recent and not yet healed.

If it could be known when the bleeding which gave rise to the blood scab occurred, that would be the likely time of the injury. No doubt with that in mind, counsel for the respondents asked a question which produced the following answer from Mr. Hugh: "The ear could have bled *about 10 days previously*". This would not be easy to reconcile with an injury on the 29 October, which would be 47 days before the 15th December. This seems to indicate the unmistakable probability that it was sometime after the accident that an injury was caused to the ear which then bled and produced a recent "blood scab".

It must be noted that the history given by the appellant to Mr. Hugh was that the ear had "bled for five days", and it is common ground that there was a laceration in the outer ear. There could then be no question of bleeding from the drum from the 29th October to 10 days before Mr. Hugh first saw him, that is, for about 37 days. This would not be in accord with the evidence. In any event, the reference that "bleeding" could have

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occurred "10 days previously" relates, and could only relate (if there is to be no artificial strain of language) to the blood which manifested itself on the *recent* scab, which Mr. Hugh thought could have occurred "10 days previously". The inferences to be drawn from this evidence are: (a) that what was seen on the 15th December was not, in reality, consistent with the injury alleged, and (b) instead, it was more consistent with an injury after the accident, and some while after.

As Lord REID said in *Benmax v. Austin Motor Co. Ltd.*, (1955) 2 W.L.R.:

"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. . . ."

The magistrate failed to appreciate the significance and inference to be drawn from this aspect of Mr. Hugh's evidence—an aspect which was of sufficient importance to attract the attention of a court of re-hearing, as it had the tendency of showing how recent the injury was which bled; and if it was as recent as Mr. Hugh thought, based on the time when it could have bled, then it would be improbable that it took place as long back as the 29th October.

Another aspect of Mr. Hugh's evidence must be looked at. He said that on the 15th December, 1966, he found "nearly complete deafness of the right ear". On the 26th January, 1967, the hearing was almost completely absent.

Although different language is used, the meaning conveyed in each case placed the lack of hearing almost on the same level. It is then difficult to understand how, in the latter instance, he found the hearing "greatly reduced", as compared with the former occasion, without concluding that he was in error in appraising too highly the degree to which the hearing was affected in the first instance, viz., on the 15th December. It must have been that much better, according to the "extent by which it was "greatly reduced" on the second occasion.

Then one comes, finally, to the evidence of Mr. Gupta. His evidence was specific. He spoke of two separate and distinct matters, viz., (a) the age of the perforation seen on the 21st November, and (b) the intensification of wax in the canal.

What was stated on the first aspect was not particularly definite, but the impression conveyed is that it was there before the accident. There could be no quarrel with the magistrate for not wishing to accept this either for the reason that he may have regarded the idea of an "old" perforation as being in conflict with Mr. Hugh's description of a "recent bloody scab", or for what he stated that if the applicant was hearing normally on the 31st October, the ear could not have been perforated then, when such a perforation would have affected the hearing. But this did not relieve the magistrate

of his clear duty to consider and deal with the important question, on the second aspect, as to whether the trash could have reached the ear-drum by penetrating through the depth of that wax, packed as it was seen to be in the ear canal.

Counsel for the appellant urged on this court that it would-depend on the stiffness of the trash, and with what force it entered the ear, as to whether it could penetrate the wax or not. I do not find this argument impressive. If the degree of force with which the trash entered the ear is to be judged by the small laceration in the outer ear, then it could not be considerable. Assuming not, the same considerable force which would cause the thrust of that trash to penetrate through to the depth of a wax-filled canal, must leave its mark, if not indelible, certainly a sufficient impression to be observed two days afterwards. But this was not the case. Further, would not the blood from the damaged drum have flowed through the opening made in the wax, or left its stain, from which Mr. Gupta was bound to know that he was on the wrong track?

The magistrate's omission to look at this most significant evidence in this case, constitutes a failure to direct himself on what was fundamental, substantial and unquestioned evidence which tended to have an absolute and exclusionary effect in ruling out the occurrence of injury on the day of the accident. It came from an expert, an ear specialist and Fellow of the Royal College of Surgeons, with a diploma in ortholaringal surgery of England and was completely missed out in the magistrate's assessment of evidence. His conclusion, then, in the light of this omission, could hardly do justice to the case. If he had adverted his mind sufficiently to its import, and the inference to be drawn from Mr. Hugh's evidence of a recent injury, it is difficult to see how he could with reason have decided as he did without the use of surmise, conjecture and guess, or fanciful theories. In any event, probabilities material to the estimate of the evidence were never taken into account, and matters of this kind would come within the ambit of the jurisdiction of the court of re-hearing.

In *The Sir Robert Peel*, (1880) 4 Asp. M.L.C. 321, 322, JAMES L.J., said:

"The court will not depart from the rule it has laid down that it will not overrule the decision of the court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression".

In using this standard of practice, Lord SUMNER in *S.S. Hontestroom v. S.S. Sagaporack & anor.*, (1927) A.C. p. 37 at p. 50, in construing facts in a court of re-hearing asked himself these questions:

"Is there any glaring improbability about the story accepted, sufficient in itself to constitute 'a governing fact', or any specific misunderstanding or disregard of a material fact....?"

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The Full Court, as a court of re-hearing, investigated the decision of the magistrate and came to the conclusion that it was satisfactorily made out to be wrong. That court said:

"On the facts as proved, it cannot be said that they justify the inference drawn by the magistrate that the injury which Mr. Hugh found in the ear of the respondent was as a result of the accident on the 29th October, 1966".

This conclusion seems correctly made, though not perhaps for the reason given, but for reasons which exist and which appear on a strict analysis of Mr. Hugh's evidence. Again, the Full Court could have concluded that certain "circumstances strongly suggested an interference with the ear during the interval", not so much for the reasons given as on the basis of Mr. Gupta's unchallenged evidence of the conclusion he drew from the presence of wax. This would certainly lead to an outstanding probability that at some time after the accident, something happened during the course of treatment for the removal of wax which led to the blood scab on the drum first seen on 15th December, and something further happened between then and 26th January next which led to a complete disappearance of the drum and scab. It should be borne in mind when considering this aspect, that Mr. Gupta had said:

"After the ear was syringed, the patient should come back; but did not come back and he went to Dr. Brahman. Between that, what happened I do not know. On the 21st November, 1966, I saw him with a doctor's letter and then observed the perforation".

So that if the amount and condition of the wax seen on the 31st October meant that trash could not have injured the drum on the 29th October, the "recent" injury seen by Mr. Hugh on 15th December must have come from something which happened subsequently, as would the complete disappearance of the drum from something which happened after the 15th December. These are inescapable inferences from the credible evidence in the case, taking into account the preference for Mr. Hugh's evidence "wherever there was conflict" with Mr. Gupta's.

In *Hansraj v. Bookers Sugar Estates Ltd.*, (Civil Appeal No. 32/67), the magistrate found that there was damage to the workman's brain through an electric shock of 440 volts which he had suffered at his feet, because of the kind of headaches from which he suffered afterwards. The Full Court concluded differently since the inferences to be drawn from evidence which was accepted did not satisfactorily prove the workman's case, and there was other evidence, which was overlooked, more likely to yield a surer conclusion. This court approved of what was there done, and attempted to set out the principles which an appellate court should have in mind when reversing a magistrate's decision. What had to be decided there is not wholly dissimilar from what falls for decision here. If, then, *on those facts* the Full Court's right to disturb the magistrate's decision was correctly endorsed by this court, I fail to see how it could be otherwise now.

Of course, even when members of a court of re-hearing fully appreciate the principles involved, they would find reasons for differing in the conclusion as to whether an original decision should stand or not. And even when there is full agreement in one appellate court, a subsequent appellate court, with jurisdiction, may restore the original decision; but this court's function does not permit of re-trying issues, although it may give the impression of so doing when examining evidence purely for the purpose of ascertaining whether the Full Court had *arbitrarily* assessed the weight to be given to evidence which was before the magistrate without giving just consideration to what was decided by the magistrate.

When the Full Court went on its task as a court of re-hearing, naturally it had to examine the question of whether the appellant had proved his case on a balance of probabilities. The answer was given in the negative. The effect of its decision, on the whole, was that there was not that preponderance of probability which could have caused the magistrate to be "reasonably satisfied". That this is so, I have endeavoured to show (for other reasons) on an analysis of Mr. Hugh's evidence, which in certain measure detracts from the appellant's case. Then the undisputed evidence of the quantum and condition of wax renders it inherently improbable that the injury was caused on the 29th October. This was a matter of critical substance to which the magistrate did not address his mind. Disagree I may with the way in which, on occasions, the mind of the Full Court was persuaded to reason, but agree I must with their conclusions. Even if I did not, what jurisdiction is there for this court to interfere when the Full Court, acting in accordance with legal principles, could have concluded as it did in the realm of its jurisdiction as a court of re-hearing, a privilege not given to this court? Whilst the Full Court may dabble in the "region of fact", this court could only interfere for a "legal reason". I have struggled in vain to find it without giving to this court a jurisdiction to re-try facts which it does not possess. If it could have been said that the Full Court was arbitrary or could not have reached its conclusion, in any event, on the proper inferences from accepted evidence, a different situation would arise, but this does not appear.

There is, however, one word of disagreement I would have with the judgment of the Full Court, that is, in saying that "the findings of the Magistrate might well be described as perverse". This has the tendency to indicate that there was a purposeful or reckless deviation from truth, which has occurred from something more than inadvertence, ignorance, or error in assessment. In the circumstances of this case, I do not think the magistrate's findings were fairly described. Because he drew wrong inferences or misdirected himself would not justify the unqualified stricture adopted. His findings may be unsatisfactory, unreasonable, or unjust, but anyone ought to hesitate before saying they were "perverse".

In *Metropolitan Railway Co. v. Wright*, (1886-90) A.E.R. Rep., Lord FITZGERALD said:

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"The judgment in the Court of Appeal imports that a verdict once found is not to be set aside unless it appears to be a verdict perverse, or almost perverse. If my recollection does not mislead me, we have departed in this House, in several instances, from the old rule which introduced the element of 'perversity', and have substituted for it that the verdict should not be disturbed unless it appeared to be not only unsatisfactory, but unreasonable and unjust".

I would therefore propose that the description of his findings as being "perverse" should be expunged from the record.

In the result, I do not find that any question of law arises for the consideration of this court. There is no legal basis to ask for the restoration of the order made by the magistrate as it was within the competence of the Full Court to say that the magistrate, viewing the evidence reasonably, could not properly so find.

I would therefore dismiss the appeal and affirm the decision of the Full Court with costs to the respondents.

PERSAUD, J.A.: I also am of the view that this appeal must succeed for the reasons set out by my brother CUMMINGS, and that the award made by the magistrate be re-instated.

I confess to have experienced some anxiety in arriving at this decision in view of Mr. Das Gupta's evidence to the effect that, in his opinion, having regard to the volume and condition of the wax in the appellant's ear on the 31st October, 1966, the ear-drum could not have been ruptured on the 29th October in the manner described by the appellant. But when one examines the totality of the evidence led in this matter, it is not possible in my judgment to say that the magistrate's decision was one which he could not reasonably have made. In this regard I wish to advert attention to the words of Lord ATKIN in *Powell v. Streatham Manor Nursing Home*, [(1935) All E.R. Rep. at p. 63] when dealing with the functions of a court of Appeal:

"The case resolved itself into an issue between the credibility of the patient and the doctor on one hand, and nurses on the other. The judge who saw the witnesses believed the former. I venture to think that such a finding in such a case precluded any successful appeal. I wish to express my concurrence in the view that on appeals from the decision of a judge sitting without a jury the jurisdiction of the Court of Appeal is free and unrestricted. The court has to rehear; in other words, has the same right to come to decisions on the issues of fact as well as law as the trial judge. But the court is still a court of appeal, and in exercising its functions is subject to the inevitable qualifications of that position. It must recognise the onus upon the appellant to satisfy it that the decision below is wrong: it must recognise the essential advantage of the trial judge in seeing the witnesses and watching their demeanour. In cases which turn on the conflicting

testimony of witnesses and the belief to be reposed in them an appellate court can never recapture the initial advantage of the judge who saw and believed".

I turn to another aspect of this case which has been dealt with by my learned brother CUMMINGS but in regard to which I would like to make a few short observations of my own. It concerns the ground of appeal in which it was urged that the Full Court had erred in holding that there was a *novus actus interveniens* which had not been pleaded by the respondents nor put in issue by them. Dealing with this aspect of the case, the Full Court said, having previously adverted to Mr. Das Gupta's evidence in these words—

"Dr. Gupta was saying that the entry of the cane trash into the ear could not have caused the perforation of the ear-drum which he found, for the simple reason that the cane trash could not have penetrated the large amount of wax he found in the ear in order to cause the perforation and, indeed, that the perforation was an old one and had existed prior to the date of the accident".

that:

"In view of the findings of Dr. Gupta who had seen the patient two days after the injury and six weeks prior to the examination by Dr. Hugh, these circumstances strongly suggested an interference with the ear during the interval.

"The learned magistrate did not consider this aspect of the matter and thus did not direct his mind to the question whether there had been opportunity for and actual interference with the ear during the interval between the respective examinations by the medical men".

With very great respect to the Full Court, it is my opinion that it was not open to the magistrate to give consideration to this aspect for the reason that this was not the case for the respondents before him. Indeed, it was not an issue before the Full Court. The case for the respondents was clearly that if the appellant was suffering from an incapacity, such incapacity was not as a result of an accident arising out of and in the course of his employment but was due to a pre-existing diseased condition. Indeed, one of the grounds of appeal taken by the respondents before the Full Court which also goes to support this proposition was:

"The evidence of Mr. Das Gupta that the injury to the respondent's ear-drum was an old injury was uncontradicted".

When regard is had to Mr. Das Gupta's evidence and to the matters to which I have already referred, there can be no doubt in my estimation that the respondents' stand in this matter was clearly that as pleaded and not as the Full Court found, that is, that the injury was as a result of an intervening act. In my view, it was not competent for the Full Court to have made such a finding when both the pleadings and the evidence did not raise this issue. The question for determination was whether or not an accident occurred on the 29th October which caused the appellant's ear-drum

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to be damaged. The magistrate, having heard the witnesses—both medical and lay—preferred the appellant's version. I can see no good reason why his finding should be disturbed, even though another tribunal might have come to a contrary conclusion, if the magistrate's finding is not an unreasonable one in the circumstances.

I wish also to state that I am in agreement with the observations of the learned Chancellor in dealing with the statement made by the Full Court to the effect that the findings of the magistrate might well be described as perverse.

CUMMINGS, J.A.: The appellant claimed in the Magistrate's Court in the Georgetown Judicial District compensation from his employers, Plantation Ressoouvenir Estates Limited, in accordance with the provisions of the Workmen's Compensation Ordinance, Cap. 111.

The learned magistrate awarded compensation to the workman as follows:

- (1) Lump-sum payment of 4%, being for permanent partial disability based on his monthly earning of \$68.05 or \$1,728.00.
- (2) Periodic payment of \$85.07, being from 8th November to 15th December, 1966.
- (3) Costs \$18.00.
- (4) Fee \$75.00.

The respondent appealed to the Full Court of Appeal on the following grounds:

1. (a) There was no evidence that the respondent (applicant) was suffering from a permanent partial incapacity within the meaning of the Workmen's Compensation Ordinance.
- (b) If there was such evidence, the learned magistrate erred in law in awarding compensation based upon an assessment of 40% having regard to the provisions of s. 8(1) (c)(i) of the aforesaid ordinance.
- (c) The magistrate failed to exercise his discretion judicially or at all when, in the circumstances of this case, he failed to refer the question to a medical referee.
- (d) There was no evidence to support the finding of the learned magistrate that the injury never healed.
2. The decision was one which the magistrate, viewing the evidence reasonably, could not properly make in that—
 - (a) The learned magistrate rejected the evidence of Mr. Das Gupta, an Ear, Nose and Throat specialist, in favour of the evidence of Mr. Hugh, who had two years experience as a House Surgeon in an Ear, Nose and Throat Department in 1937 and 1938, for no adequate reason.

- (b) The evidence of Mr. Das Gupta that the injury to the respondent's ear-drum was an old injury, was uncontradicted.
- (c) The learned magistrate disregarded the observed facts upon which Mr. Das Gupta based his opinion.
- (d) The applicant could hear reasonably well.
- (e) The learned magistrate erred in finding that the preponderance of evidence was in favour of the respondent.

The Full Court held that:

A. With respect to the first ground,

- (1) It was a question of law whether or not the learned magistrate had correctly evaluated the evidence, and
- (2) The learned magistrate misdirected himself that there was a conflict between the evidence of Mr. Hugh and Mr. Gupta whereas the evidence did not reveal any conflict, and as a result of such misdirection he drew wrong inferences and consequently his finding that the appellant (applicant) was suffering from a permanent partial incapacity as a result of the accident, was wrong.

B. With respect to the second ground,

That the magistrate's finding that the injury which resulted in a loss of hearing was caused by the accident, was clearly unreasonable and was so wrong that it would be unjust to allow the decision to remain, and allowed the appeal.

That court was of the view that the learned magistrate ought to have accepted the opinion of Mr. Das Gupta, and that consequently by rejecting it his decision was wrong; and proceeded to substitute its own finding of fact.

The appellant appealed to this court on several grounds, but the arguments were confined to the following two grounds:

- 1. Ground 3(c): That the Full Court erred in holding that the decision was one which the magistrate, viewing the evidence reasonably could not properly make having regard to the facts and circumstances of the case.
- 2. Ground 3(d): That the appeal should be allowed on the ground that the Full Court erred in holding that there was a *novus actus interveniens* which was not pleaded by the respondents nor put in issue by them.

A careful examination of the evidence is necessary for the consideration of the first ground.

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The workman alleged that on 29th October, 1966, in the course of his employment as a cane-cutter, he was endeavouring to push a bundle of cane, which he had lifted to his shoulder, on to his head, when a piece of cane trash entered and damaged his right ear. "I then dropped the bundle of canes and held on to my ear from which I heard a whistle. Then my eyes opened and I saw something like fire". He was unable to continue working and reported the matter to the respondents' driver, Sarabjit, who took a pencil point, tried to examine the ear, and said there was blood on it. The driver sent him to the employers' dispenser, David, who examined and treated him. He continued to feel pain and had not, up to the time of giving evidence before the magistrate, resumed work. He was attended to by Dr. Brahman and a Mrs. Roberts (presumably a nurse at the Estate Hospital). Prior to the accident on 29th October, 1966, he used to work regularly with the respondents, his ear never interfered with his work, and he was never attended to by a doctor for his ear. He said his ear healed and he felt "like air is coming out and I get pain in that area. If I put drops in my ear, it goes through my throat". *Even after 9th November, 1966*, his ear was running "blood water", and that condition was still present when he was sent by the estate doctor to Mr. Das Gupta on 9th November.

He saw Mr. Gupta at the Public Hospital, Georgetown, on the 31st October, 1966, and on 9th November, 1966. In all he saw him about four times. Mr. Gupta did not tell him he had an old perforation of the right ear-drum. "Since I saw Mr. Gupta I have never interfered with my ear" He also said: "Pieces of cane trash broke and the dispenser got out some pieces, but pieces remained inside. I saw what the dispenser took out on a piece of cotton wool".

Seecharan, a fellow workman, was at the time of the accident working in the same gang with the appellant. He said: "He called me during the day and I saw his right ear was bleeding and the applicant went to the driver to report. I had worked in company with the applicant before that day and he did not have to turn one ear to hear me. After the 29th October, 1966, I have had several conversations with him and he has to turn his ear to hear me".

The appellant's wife, Rosa Jeaman, also testified that she observed that after the accident he seemed to have difficulty in hearing from the right ear, whereas nothing seemed to have been wrong with his hearing before.

Harold David, the dispenser, saw the appellant at the estate dispensary at about 2.30 p.m. on 29th October, 1966, who told him that on that day a piece of "*trash stuck in his right ear*". He said:

"I examined it and found several foreign bodies and I tried to clear it out with a piece of cotton wool and I saw blood on the wool. I still cleaned it out and put ear-drops. On 30th October, 1966, and I again saw him and again cleaned out the blood-stains and told him to see the Estate Medical Officer".

On 31st October, 1966, the appellant was seen by the estate medical officer and was thereafter treated by the dispenser in accordance with instructions from the estate medical officer "along with the Ear Specialist".

The dispenser was not cross-examined, nor was the estate medical officer called, although the respondents' case was that the perforation was an old one resulting from disease before the accident.

Mr. Das Gupta, a registered medical practitioner, holder of a diploma of England in ortholaryngeal surgery since 1950, and an ear, nose and throat specialist, said that the appellant (applicant) was referred to him by the respondents' medical officer on the 31st October, 1966. He complained of injury to the ear by cane trash. Mr. Gupta found that:

- (a) Both ears were packed with wax.
- (b) There was a small lacerated injury in the floor of the right auditory opening just beyond the external opening.
- (c) He could see nothing inside because of the wax.
- (d) There was a little blood discharge in the auditory canal.
- (e) Applicant was hearing normally from both ears.

He gave drops to soften the wax and instructions that the ear was to be syringed later.

He next saw the appellant on the 9th November, 1966, and found that—

- (a) The laceration he had seen on 31st October, 1966, had healed.
- (b) Applicant's ear was still full of wax, and that consequently he still could not see inside.

Appellant should have returned to him after his ear had been syringed, but he did not; instead he went to Dr. Brahman.

Mr. Gupta again saw the appellant on 21st November, 1966, with a doctor's (presumably Dr. Brahman's) letter, and then he found "a big perforation of the right ear-drum". He last saw him on 2nd December, 1966. His opinion was that —

1. If the applicant's ear had wax to the extent he saw on the 31st October, 1966, he did not think any injury could have caused that perforation two days prior.
2. The perforation he found on 21st November, 1966, was an old one.
3. An ordinary medical practitioner can handle a laceration of the floor of the ear.
4. The ear-drum could become perforated by the injection into the ear of any hard object, *and it was possible for a stiff piece of cane trash to damage the ear-drum.*

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5. Because the ear canal was full of wax, the cane trash could not penetrate so deep.
6. The perforation was old and had nothing to do with the syringing.
7. In recent perforation of the drum there would be bleeding.
8. If the ear-drum was perforated, and the canal was blocked, blood could not travel.

It is not clear what Mr. Gupta meant when he said that the perforation was 'old'. In his examination-in-chief he seems to have been using 'old' as meaning prior to *the* accident, but in cross-examination he is relating "old" to the syringing, meaning that it was prior to the syringing. It should also be borne in mind that he did not ask the applicant whether or not he had had any trouble with his ear before.

His opinion that the appellant was hearing normally when he first saw him on the 31st October, 1966, is eroded by his admission that he did not then, or for that matter during any of his examinations, test the appellant for deafness. If, however, he is right in his opinion that the applicant was hearing normally when he first saw him, how could the perforation have been prior to the accident? As it is not only a notorious fact that a perforation of the ear-drum would cause loss of hearing, but it is also his own opinion that at the time of giving his evidence appellant would "very likely" be suffering from some loss of hearing in the ear which lends support to the view that there was a progressive deterioration of hearing after the accident.

Mr. H. C. Hugh said that he was a registered medical practitioner and has been a Fellow of the Royal College of Surgeons for 27 years. He has had experience in industrial matters. He had two years experience as a house surgeon in ear, nose and throat in 1937 and 1938, and as a general surgeon all branches of surgery fell within his competence. He examined the appellant on the 15th December, 1966, and found:

1. Nearly complete deafness in the right ear.
2. Blood scab on the right ear-drum.

Those findings, he said, were consistent with the injury alleged. He recommended him for six weeks temporary disability.

On 26th January, 1967, appellant was given ear-drops, and as he poured it into his ear the drops came into his throat. Upon examination, he found—

- (1) Complete absence of the right ear-drum.
- (2) Hearing was greatly reduced and almost completely absent.
- (3) One blood scab had obscured the ear-drum.
- (4) The ear was still injured, as what was under the scabs was not completely healed (and that is why the scab had remained).

- (5) The ear-drum, which is tympanic membrane, was absent except that there was a little rim left.

Apart from what the appellant said, he formed the opinion that—

1. The blood scabs suggested a *recent* injury.
2. The blood scabs did *not* come from the outer ear.
3. The scabs had remained because the injury under them was not completely healed.
4. The scab which he saw on the second occasion was on the ear-drum.
5. A general surgeon is as adept given similar conditions as an ear, nose and throat specialist.
6. The ear could have bled about 10 days previously.
7. His findings were consistent with the injuries alleged.

What Mr. Hugh in effect found was evidence that there had been an injury to the ear-drum which caused bleeding, as a result of which blood scabs formed on the ear-drum and remained there up to the time he saw them because the injury had not healed. When he said the ear could have bled about 10 days previously, I understand him to mean up to 10 days prior to his examination of the patient. He says that these findings are consistent with the injury alleged by the workman. In other words, he is saying that the condition of the ear, as he found it on 15th December, 1966, and 26th January, 1967, could have been caused by the entry of a piece of cane trash into the appellant's ear on the 29th October, 1966, as alleged by the appellant. In this context it must be clear that Mr. Hugh used the word 'recent' as embracing the 29th October, 1966, in contradistinction to the respondents' allegation in their answer that the perforation was due to some disease prior to the accident.

Now, Mr. Das Gupta has also said that cane trash could cause such an injury, but he negatives this probability by saying that

- (1) The wax he saw could not have accumulated in two days.
- (2) Because the ear canal was full of wax, cane trash could not penetrate so deep.

How expert is this opinion? It may well be that the rate of accumulation of wax in a person's ear is a question for a doctor who has made a special study of that organ, but there can be no mystery about the probability of a piece of cane trash penetrating wax in the ear and causing damage to the ear-drum. That must depend on the stiffness of the cane trash and the force of its impact, neither of which elements was in evidence for Mr. Das Gupta's consideration. The evidence is that the appellant "attempted to put it (the bundle of canes) on his head, and in pushing it a piece of cane trash went into his ear". In order to push the bundle of canes from his shoulder to his head all the force at his command might well have

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been employed. Suppose this man had fallen upon a nail which entered his ear by the point, would the opinion of a doctor be necessary to say that this would penetrate ear wax? Could this not penetrate in such a way as to leave most of the wax undisturbed? Could not then sufficient wax be formed over a minute hole to obscure the ear-drum altogether even though at the particular point it is not as thick? Mr. Das Gupta said that on 9th November, 1966, the abrasion on the outer ear had healed. The appellant said there was "bloody water" coming from his ear after the abrasion on the outer ear had healed. Mr. Hugh said that the scabs he saw did not come from the outer ear. Well, whence came the blood which formed the blood scabs on the injured ear-drum?

The learned magistrate, who saw and heard the witnesses, accepted –

- (1) The appellant's version of the manner in which the accident occurred and the fact that he had never had any trouble with his ear before, and that he never interfered with it after the accident or at all.
- (2) The dispenser's evidence that he removed cane trash from the appellant's ear on the day in question, and that the ear was bleeding.
- (3) The evidence of his co-workman and his wife that he never had any trouble with his ear before.

Having accepted that and considered that both doctors were of the opinion that such an injury could have resulted from the workman's version of the accident, he rejected Mr. Gupta's wax theory.

Was the decision then one which the magistrate, viewing the evidence reasonably, could not properly make? That is the sole question for determination in this case. And as the magistrate's findings involved, not only perception, but also evaluation of the evidence, this is a question of law. In my view, the Full Court correctly directed itself when, through the learned Chief Justice, it referred to the case of *Kerr or Lendrum v. Ayr Steam Shipping Co., Ltd.*, (1914) 7 B.W. C.C. p. 801, and regarded that its functions in such circumstances were as set out by LORD SHAW at p. 813:

"In regard to the merits of the case, I much regret the difference of opinion in your Lordships' House. I should state my main proposition thus: That we, in this House, are not considering whether we would have come to the same conclusion upon the facts stated as that at which the learned arbitrator has arrived. Our duty is a very different—a strikingly different - one. It is to consider whether the arbitrator appointed to be the judge of the facts, and having the advantage of hearing and seeing the witnesses, has come to the conclusion, which conclusion could not have been reached by a reasonable man. Had I been the arbitrator, had the noble Earl on the Woolsack been the arbitrator, had my noble and learned friend on my left, Lord Parmoor, been the arbitrator, we should each of us have

reached the same conclusion as that reached by the arbitrator in this case. Had my noble and learned friends opposite, either of them, been the arbitrator, they would have reached an opposite conclusion. I let it be freely granted that we are all reasonable men, and I will also freely grant that as such each of us is willing to concede of the others that the conclusions which we respectively reach on the same facts, although quite opposite conclusions, are such in each case as may have been reached by a reasonable man. But, I ask myself, what right have we to deny similar treatment, not in this case, to each other, but to the arbitrator set up by the Legislature to determine the facts in the first instance? 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.

"On the facts I will only say this: that I see no occasion to invoke authority. As we have experienced, authority in this case is too often a source of much confusion; because when you enter the region of authority in discussing propositions in fact so elementary and so simple as occur here, you are extremely apt, as a court of law, to be led by the temptation of legal formulae into what is essentially a usurpation; that is to say, into the position of upsetting, for a supposed legal reason, something which exists and remains from beginning to end in the region of fact".

But the Full Court did not apply its own discretion. Its finding that the magistrate's decision was unreasonable was based on his rejection of Mr. Das Gupta's "wax theory". Is the magistrate's decision unreasonable because he preferred the evidence of the lay witnesses to that of Mr. Das Gupta?

The learned author of PHIPSON ON EVIDENCE, 10th Ed., at p. 481, para. 1286, in dealing with the question states:

"Value of Expert Evidence. The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly, biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmation of preconceived theories; moreover, support or opposition to given hypotheses can generally be multiplied at will. Indeed, where the jury accept the mere untested opinion of experts in preference to direct and positive testimony as to facts, a new trial may be granted. The court has accepted the evidence of a wife as to the paternity of a ten months child, in spite of the unanimous opinion of several doctors".

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In *Jarman v. Leeds Forge Co., Ltd.*, (1917) 10 B.W.C.C. p. 545, the headnote reads as follows:

"A workman had been receiving compensation for some time for a severe compound fracture of both legs, when the employers offered him light work. He tried this for ten days, but alleged that his injuries caused him pain and prevented him from doing it. The employers thereupon stopped compensation and the man applied for an award. He called no medical evidence but relied upon his own statements in the box as to his inability to work. The employers contended the man was able to work, and called two doctors in support of this view. The Judge believed the man and awarded compensation.

Held, this was a pure question of fact, and the man's own evidence was sufficient to support the award".

In a note of his award, the County Court judge said:

"Accepting as I do the applicant's evidence as substantially true, *and in the absence of any medical alternative explanation of the facts deposed to by the applicant*, I draw the inference that his symptoms are the result of the very bad fractures he sustained, and that he is still totally incapable of doing his old work, and greatly hampered in the endeavour to do any work, even if suitable work could be found for him. I do not think he could do the bush-dressing work, or that in the open market he can command as much as half his old wages. I fix the weekly payment at the sum of 13s. 4d."

On appeal, counsel for the employers submitted that there was no evidence to support the finding, as the County Court judge was not entitled to accept the uncorroborated evidence of the workman himself, and wholly disregard the medical evidence of the employers.

SWINFEN EADY, L.J., in his judgment at p. 547 said:

"This is a hopeless appeal. This workman tried his level best for ten days to do the work of a bush-dresser which he did seated. After ten days he had to give it up because of the pain in his legs, and he had to have more medical attendance. He had had an open discharging wound on his left ankle for a long time. It is said he called no medical evidence, but I see he tendered a certificate, and objection was taken to its admissibility in evidence. He was not in a position to call medical evidence. The best test of a man's ability to do the work offered is whether he honestly tried to do the work offered him, and failed, as this man did. It is quite impossible for us to say that there was no evidence on which the judge could find as he did. The appeal accordingly fails, with the usual consequences".

BANKES and WARRINGTON, L. J.J., concurred.

See also *Penman v. Smith's Dry Docks Co. Ltd.*, (1915) VIII B.W.C.C. p. 487.

In *Metropolitan Rail Co. v. Wright*, (1886) A.E.R. Rep. 1886–1890, in dealing with the functions of the House of Lords in an appeal from the Court of Appeal, LORD HERSCHELL in the course of his judgment, said:

"The question which we have to determine is, not what verdict we should have found, but whether the Court of Appeal were wrong in holding, as they have done, that the verdict was not against the weight of evidence. The case was one unquestionably within the province of a jury; and in my opinion the verdict ought not to be disturbed unless it was one which a jury, viewing the whole of the evidence reasonably, could not properly find". (His Lordship went through the details of the evidence, and concluded:) "I am not prepared to say that a jury might not reasonably find that the accident was due to the negligence of the defendants' servants. I, therefore, move Your Lordships that the judgment under appeal be affirmed, and that the appeal be dismissed with costs".

LORD WATSON concurred.

LORD FITZGERALD said:

"The judgment of the EARL OF SELBORNE, L.C., in the Court of Appeal, imports that a verdict once found is not to be set aside unless it appears to be a verdict perverse, or almost perverse. If my recollection does not mislead me, we have departed in this House, in several instances, from the old rule which introduced the element of 'perversity', and have substituted for it that the verdict should not be disturbed unless it appeared to be not only unsatisfactory, but unreasonable and unjust. The question then for your Lordships' consideration is, whether the evidence so preponderates against the verdict as to show that it was unreasonable and unjust. I am of opinion that the appellants, upon whom the onus lies, have failed to establish that this verdict was unreasonable or unjust, and, therefore, I think that it ought not to be disturbed".

And LORD HALSBURY stated:

"The facts of this case may, of course, be differently viewed by different minds. I am content with the view of the facts as stated by the Lord Chancellor, and I am disposed to think that I should have found the same verdict. But what I take to be of supreme importance, as defining the functions of judges and juries is the principle upon which a new trial can be granted upon the ground that the verdict is against the weight of the evidence. I think that the principle laid down in *Solomon v. Bitton* is erroneous, as reported, in the use of the word 'ought'. If a court—not a court of appeal in which the facts are open for original judgment, but a court which is not a court to review facts at all—can grant a new trial whenever it thinks that reasonable men ought to have found another verdict, it seems to me that they must form and act upon their own view of what the

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evidence, in their judgment, proves. That, I think, is not the law. If reasonable men might find (not 'ought to find') as was said in *Solomon v. Bitton* the verdict which has been found, I think no court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges. The Lord Chancellor has put the proposition in a form which is not open to objection, but one which perhaps leaves open for definition in what sense the word 'properly', is to be used. I think the test of reasonableness, in considering the verdict of a jury, is right enough, in order to understand whether the jury have really done their duty. If their finding is absolutely unreasonable a court may consider that that shows that they have not really performed the judicial duty cast upon them; but the principle must be, that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal. If the word 'might' were substituted for 'ought to' in *Solomon v. Bitton*. I think the principle would be accurately stated. I concur in the motion of the Lord Chancellor that this appeal should be dismissed with costs".

In my view, the Full Court erred in finding that there was no conflict between the evidence of Messrs. Hugh and Das Gupta. This is opinion evidence.

The respondents pleaded at paras. 3 and 4 of their answer:

"3. The applicant was also examined by Mr. P. R. Das Gupta, F.R.C.S., D.L.O., Ear, Nose and Throat Surgeon, Georgetown Hospital, on the 31st October, 1966, who found that the applicant's condition was in no way connected with his alleged injury on 29th October, 1966.

"4. The respondents will contend that even if the applicant has suffered permanent incapacity (which is denied) such incapacity was not the result of an accident arising out of and in the course of his employment but was due to a pre-existing diseased condition".

In support of that pleading, Mr. Gupta's opinion was that the perforation was an old one and was *not* consistent with the workman's allegation as to the manner in which and the time when it occurred. (It should here be observed that he offered no opinion as to how and when it occurred.) Mr. Hugh's opinion was that it was a *recent* perforation and was consistent with the workman's allegation that it was the result of the accident on 29th October, 1966. Surely those are contrary opinions on the vital issue in the case? Is not that then conflict? And where there was conflict between the two experts, the learned magistrate preferred Mr. Hugh's evidence.

Even, however, if the magistrate misdirected himself as to this, he had at the end of the day the following circumstances explaining how the injury occurred:

1. The evidence of Mr. Hugh that the condition he saw when he examined the appellant on 15th December, 1966, was consistent

with an injury to the ear by a piece of cane trash received on 29th October, 1966.

2. Evidence of Mr. Das Gupta that it is possible that a stiff piece of cane trash could damage the ear-drum.
3. Evidence of appellant and his wife that prior to 29th October, 1966, he had no difficulty in hearing. He was never attended to by a doctor for his ear and his ear never interfered with his work.
4. Evidence of Seecharan, appellant and wife that subsequent to 29th October, 1966, appellant displayed difficulty in hearing.
5. Evidence of Mr. Das Gupta that on 31st October, 1966, appellant appeared to be hearing normally.
6. Evidence of both Messrs. Hugh and Das Gupta that damage to ear-drum would affect hearing.
7. Evidence of appellant, Mr. Das Gupta and the dispenser that appellant subsequent to 31st October, 1966, was referred to the specialist by Dr. Brahman.

Applying the circumstantial evidence test, do not these links, in the absence of some co-existing circumstance explaining how the injury occurred, lead inevitably to the conclusion that the injury was the result of the accident as alleged by the workman?

It seems to me that the learned magistrate could have reasonably acted upon these circumstances, if accepted, and disregarded Mr. Das Gupta's opinion evidence that no piece of cane trash could have penetrated to the ear-drum particularly in view of the fact that there was no evidence of size, length and rigidity of the piece of cane trash, and that that question as to whether or not a piece of cane trash can penetrate a quantity of wax is not a medical or specialist question, but is one about which the magistrate could and did form his own opinion without expert assistance.

Even, therefore, if the learned magistrate did misdirect himself as to conflict between the medical experts, he had sufficient other evidence to support his finding. And it is the law that in such circumstances his finding should not be disturbed (*Vide Brinckman v. Harris*, (1916) 9 B.W.C.C. p. 200, and *Jackman v. Hamlet Engine Co. Ltd.*, 9 B.W.C.C. p. 269).

Consequently, I find merit in the appellant's contention, and would allow the appeal on this ground alone.

It would only have been necessary to consider the second ground of appeal if the Full Court was right on the first. But I ought not to pass from this judgment without observing that the Full Court made a finding that was neither pleaded nor supported by any direct evidence. The respondents' case was that the perforation of the appellant's ear-drum was an old one caused by disease, but the Full Court inferred from the evidence, and substituted,

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a finding that the injury was the result of a *novus actus interveniens*. Whether or not this could be a reasonable inference is a question of law and one which therefore falls within the ambit of this court's scrutiny. In my view, it was not competent for the Full Court so to find as this was never the respondents' case.

Moreover, even if this was within the Full Court's competence, that finding is one of supervening accident, which might merely have operated on a condition created by the accident of 28th October, 1966; it would still have been open to the learned magistrate to have found that the incapacity was the result of the original accident. See *Brown v. Kent*, (1936) B.W.C.C. p. 745; *Bowen v. Meggitt*, (1916) 10 B.W.C.C. p. 146; *Laverick v. Gray & Co. Ltd.*, (1919) 12 B.W.C.C. p. 176; *Thoburn v. Beddlington Coal Co., Ltd.*, (1911) 5 B.W.C.C. p. 128.

In the circumstances, I would allow this appeal with the usual consequences.

Appeal allowed.
Award of magistrate restored.

R. v. JOHN FRANCISCO De FREITAS

[Court of Appeal (Luckhoo, C., Persaud, Crane JJ.A.)
January 24, February 4, 11, 18, March 31, 1969.]

Criminal law—Murder—Provocation—No evidence—Should not be left to Jury.

Criminal law—Murder—Drunkenness—Mere scintilla of evidence—Should not be left to Jury.

Criminal law—Summing up—Should not be unnecessarily long and repetitious.

The appellant was charged with the murder of a man with whom he had an altercation in a night club. They were both ordered to leave the premises and did, but some minutes later the deceased returned, followed by the appellant who pulled a revolver from his waist and shot the deceased at least three times at very close range. The defence was an alibi.

HELD: On a charge of murder it is a question of law for the judge to decide whether there is evidence on which the jury can find manslaughter. Having told the jury that there is no evidence of provocation, it was a mistake to leave the issue for their consideration. Where there was a mere scintilla of evidence of drunkenness the issue should not have been left to the jury, but

having left it, the judge should have directed the jury to consider whether the evidence fell short of the capacity of the appellant to form the intent necessary to constitute the crime.

Appeal dismissed.

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

J. Gonsalves-Sabola for the Crown.

PERSAUD, J.A.: This appeal was argued on the 4th, 11th and 18th of February, and on the last mentioned date, we indicated that the appeal would be dismissed, but that we would give our reasons later. I have read the reasons prepared by my learned brother CRANE, and I agree with them, but would like to make a few observations of my own concerning the summing-up itself, and in connection with the duty of a trial judge when dealing with the question of manslaughter. I do so with the greatest of respect to the trial judge in this case, but I feel that some comments emanating from this court may be of some assistance.

It would not help to say that a judge should necessarily alter his style of summing-up, and I do not so intend, for, as the French rightly say, *chacun son gout*. But it should not be lost sight of that it is the paramount duty of a judge sitting with a jury to explain the law affecting the case in hand, and to recount the salient features of the evidence to the jury in language that they can understand and follow. Involved, long and repetitive sentences can serve no useful purpose, but would rather have the tendency of confusing the jury, and, of course, it can always be claimed that justice has not been done when jurors have not had a proper grasp of either the facts or of the principles of law which they are required to apply to the facts.

The summing-up in this case is, if I may say so, replete with diffused statements of the law. To give one example, here is an extract where the judge attempts to deal with the question of *mens rea* arising out of provocation, and the legal consequences thereof. The judge said:

"It has been sometimes held as a matter of law, as I said, I projected it to you – I do not think it arises in this case but I nevertheless indicate it to you because it falls within the scope of the law which one should consider even though obliquely in the circumstances of this case, that if provocation should arise in the circumstances of any case and a man is killed and the man is killed in circumstances which would tend to suggest that he formed the intention to kill, if that intention to kill has arisen as a result of the provocation to which the person has been previously subjected or under which the person laboured at a particular moment of time, if the killing was done deliberately under the stress of provocation, well, then, the law says the intention as such arises from

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that provocation and the provocation as such affects the intention, and accordingly, the intention must be related to provocation. So in these circumstances the person could only be guilty of the lesser offence of man-slaughter if you find all the elements proved which, in a crime of murder, would be reduced when this aspect of provocation arises on the evidence".

It is my opinion that such circumlocutory language might very well have had the effect of causing utter confusion and disarray in the minds of the jury. The learned judge himself seemed to have recognised this possibility, as he later expressed the hope that what he had said did not sound too complicated and involved, and he then proceeded to explain the same point in very short compass, and in very simple language.

It must not be felt that I am advocating too retracted a summing-up, nor am I pursuing the type of summing-up that was held to be unsatisfactory in *Dihal v. R.*, (1960) 2 W.I.R., where the law was explained, the facts narrated, but no attempt was made to relate one to the other. The whole object of a summing-up is that the real issues must be left to the jury in language that they can follow, and in reasonably short compass, for after all, the jurors do not make notes of what a judge tells them, and it would be unfair to expect them to understand and retain points attracted to their minds in language which they find difficult to comprehend.

One other point. In this case, the judge expressed the opinion in his summing-up, and quite rightly too, that there was no evidence of provocation. There could not have been from the point of view of the defence which was an alibi, and there was nothing in the case for the prosecution which suggested that this was the situation. Nevertheless, the judge, in dealing with the question of provocation, used these words:

"If I may assess the evidence and project for your consideration, I think that there is no evidence in this case to suggest that there was provocation as such. You decide as judges of the facts, but it seems to me that there is nothing in this case to suggest that there is provocation and I think I can safely direct you that there is no provocation in the circumstances."

And again:

"If, indeed, the facts are proved to your satisfaction to the extent that you feel sure which would tend to support the finding of provocation it would have the effect of reducing murder to manslaughter. But as I said, in the circumstances of this case it seems to me that that evidence does not exist at all and in the circumstances of this case it may very well be that the verdict which you are called upon to find in this case is either a verdict of guilty or not guilty of murder, or guilty or not guilty of manslaughter only if there is a killing without the necessary intent."

Then he went on to give them a positive direction that there was no room for provocation, accident or self-defence. As it turned out, the jury convicted for manslaughter; but it is difficult to say whether such a verdict was because the jury found provocation (which was non-existent but which the judge invited them to consider), or whether they based their verdict on a finding of drunkenness which was left to the jury. In the course of his arguments, counsel for the appellant expressed the view that in all probability, the verdict was what it was because the jury must have taken into account the evidence that the appellant had been drinking. This may be so, but it is impossible to tell with any degree of certainty when provocation was also left to the jury.

The point I wish to stress is that the question whether or not there is evidence of any particular offence fit to go to the jury is, in my judgment, a matter of law to be determined by the judge, and having ruled, it is not open to him then to leave the same issue for the consideration of the jury. It is not expected that a judge should abdicate his functions.

There are several cases relating to the duty of the judge where the evidence does not disclose the offence of manslaughter, and a reference to a few of them may be of some assistance.

In *R. v. Robinson*, 16 Cr. App. R. at p. 141, HEWART, L.C.J., said:

"It is plain that the Commissioner was of the opinion that there was no evidence to go to the jury on the question of manslaughter. That being so, he (the Commissioner) was bound to decline to put the question of manslaughter to the jury. Where there is no evidence of manslaughter the question should not be left to the jury."

In *R. v. Thorpe*, 18 Cr. App. R. at p. 191, the Lord Chief Justice, referring to *R. v. Robinson* (above) said:

"If there is no evidence on which a verdict of manslaughter can be properly found, it is the duty of the judge not to leave the question of manslaughter to the jury, but if there is evidence, then it is the duty of the judge to leave the question to the jury, notwithstanding that it has not been raised by the defence, and is inconsistent with the defence which is raised."

In *R. v. Gauthier*, 29 Cr. App. R., at p. 119 CASSELS, J., re-stated the law, and exposed the danger which may ensue in the event of the judge leaving the issue of manslaughter to the jury, having already expressed the view that there was no evidence pointing to manslaughter. CASSELS, J., said:

"It is for the judge to say whether there is any evidence upon which it would be reasonable for a jury to bring in a verdict of manslaughter. If there is no such evidence, he must withdraw the issue from the jury. A jury cannot return a verdict of manslaughter except upon evidence. If there is no evidence and a judge leaves the issue of man-

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slaughter to a jury, then there is a real danger that a jury may, for reasons of sympathy with the accused person or disapproval of the conduct of the deceased person, adopt a soft option available and evade their duty, which is to return a true verdict according to the evidence, by returning a lesser verdict which there is not a shadow of evidence to support."

And, lastly, in *Holmes v. Director of Public Prosecutions*, 31 Cr. App. R., at p. 137, this is how the matter is put by Viscount SIMON:

"In dealing with provocation as justifying the view that the crime may be manslaughter and not murder, a distinction must be made between what the judge lays down as matter of law, and what the jury decides as matter of fact. If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces death, it is the duty of the judge as matter of law to direct the jury that the evidenced does not support a verdict of manslaughter."

I do not intend to say anything further, but to repeat that I agree with the dismissal of the appeal, as if the identification of the appellant was accepted by the jury (and they must have done so), then a conviction was inevitable.

CRANE, J.A.: At about 8.00 p.m. on the evening of 26th December, 1966, at the "Pinky Galaxy", a city night spot in Regent Street, Cleo Samuels was wounded several times. He was shot at point blank range by a gunman with whom he had an altercation. Samuels was rushed to the Public Hospital where an emergency operation was performed, but he succumbed from bullet wounds on 30th December, 1966.

The accused, John Francisco de Freitas, was later identified as the assailant, and his apprehension some three months following the incident led to his being charged with Samuels' murder.

The principal witnesses for the prosecution were three female employees of the "Pinky Galaxy"—Theresa Balkarran, Sylvia Austin and Doreen Persaud. They were present at the incident and, at the trial, gave eyewitness accounts of it. Each identified the accused as the person who was engaged in a quarrel with the deceased and who discharged a loaded revolver at, and a few feet away from him. Through them it was established that the accused was a frequent visitor to the "Pinky Galaxy" whither he was in the habit of resorting for entertainment; that on the evening of the fatality he visited the hotel, danced once with Sylvia Austin and slapped her on the face when she refused his request for a repeat dance. This was the beginning of the trouble, for when Doreen Persaud interceded on Austin's behalf, she too was slapped. This incident brought about the intervention of the de-

ceased, Cleo Samuels, and the altercation between him and the accused. The three women also related how both the deceased and the accused were ordered out of the hotel by the caretaker, how the deceased returned some minutes later followed by the accused who pulled a revolver from his waist and shot the deceased at least three times at very close range.

At his trial, the accused raised an alibi supported by one witness, viz., that at the time when the offence is alleged to have been committed he was at his father's home, where he passed the entire night, and that his identification by Doreen Persaud at a parade was a case of mistaken identity. The jury, however, rejected both the alibi and his claim to have been mistakenly identified when they convicted him of the lesser offence of manslaughter.

Foremost among the amended grounds of appeal is a complaint that the trial judge failed to direct the jury adequately on the effect of drunkenness on the question of *mens rea* in relation to manslaughter. It is contended the jury ought to have been directed that the offence of manslaughter involved some *mens rea*, that drunkenness could negative it and thus be a complete defence thereto, and that if they were in any doubt about whether the degree of drunkenness exhibited by the accused in fact negated his *mens rea*, they ought to have been told to acquit him altogether of the charge.

Before considering this ground (No. 6), the first taken on behalf of the accused, it is pertinent to answer the question which arose *arguendo* as to the relevance of it in view of the alibi. At first sight, an alibi would appear to posit that either the accused was at the "Pinky Galaxy" at the time and committed the crime or he was not. So that if the jury found that he was indeed there and did commit it, what necessity is there to proceed further and consider any complaint on the ground of misdirection on *mens rea* in manslaughter, or any other complaint for that matter? The matter does not rest there, however, and here it may well once more be appropriate to emphasize that an alibi, strictly speaking, is not a defence like those of drunkenness, provocation or self-defence which it is incumbent on an accused person to raise; it is only for convenience called a defence. As was said by STOBY, C, in *R. v. Adams & Lawrence*, (1967) Cr. Apps. 101 and 104/1967 dated 24th November, 1967: "The jury must be satisfied beyond reasonable doubt that the accused committed the offence, *whether an alibi is the defence or not*", that is, the prosecution must prove its case, whether the jury believe the alibi or not. It is for this reason that it is always necessary to enquire behind the alibi whether the prosecution has proved its case, and that is why we are now, notwithstanding the jury's verdict of guilty of manslaughter, examining the merits of the amended grounds of appeal.

Evidence of alcoholic excess on the part of the accused was provided by prosecution witness, Doreen Persaud, a waitress at the hotel. While she testified to the effect that the accused had drinks with friends and appeared to be under the influence of liquor, nothing further in amplification thereof was elicited from her. It was left to the accused, under cross-examination, to reveal that he had been drinking for some time on Xmas Eve day; that he

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had no sleep either on that night or on Xmas night because he was drinking and sporting on and off with women until Boxing morning. With this evidence before him, coupled with the fact that immediately prior to the shooting incident the accused had assaulted two women for what must be regarded as no sufficient reason at all, there was posed somewhat of a problem for the judge who felt himself justified in leaving the issue of drunkenness to the jury after explaining to them the *mens rea* required to constitute the offence of murder. He thereafter invited them to consider the lesser offence of manslaughter, if they found that the specific intent necessary to constitute murder was lacking, in this wise:

"Theresa Balkarran, continuing her evidence at the hotel, said that the accused was at the hotel about 6.30 at the bar, and you will reflect that Doreen Persaud said in her evidence that he appeared to be under the influence of liquor when he asked if she was Sylvia's mother or wanted to represent her. In that regard, you will perhaps give due consideration to this aspect of intent which I indicated to you yesterday. You will remember I told you that the Crown has to prove that the person who they allege, that is the accused, committed or inflicted the injuries on Cleo Samuels which resulted in his death, had the intent at the material time to do Cleo Samuels serious bodily harm or to kill him. The Crown has to prove that that intent existed, and of course the Crown, insofar as actual words were not used, is asking you to infer or imply from the circumstances that that was the intent which existed at the time. Well, you will have to find that that is so if the Crown is to prove the indictment to the extent that you feel sure.

In considering that you will give consideration to this aspect of drink, and you will ask yourself whether the person who was drinking there at the time, if it was the accused—the person whom Doreen Persaud said appeared to be under the influence of liquor—if the person was under the influence of drink to such an extent as to be incapable of forming the necessary intent, because of course, if a person is incapable of forming the necessary intent, well then, the person cannot really be found guilty for a charge of murder because the intent would not be there. But examine the circumstances and see whether the person in these circumstances was incapable or not. If incapable and the other elements are proved the person may be found guilty of manslaughter only."

Though it is conceded by both prosecution and the defence, and rightly too I think, that this was a mere scintilla of evidence and did not justify the judge leaving the issue of manslaughter to the jury on the ground of drunkenness, nevertheless, it is contended that once the judge did leave that issue, it was incumbent on him to give a proper and adequate direction with regard to it.

Objection is taken to the direction of the trial judge which is extracted above on the ground that it is now an anachronism. The objection is that

without telling them more, it was a misdirection for the judge to have left the jury the impression that a manslaughter verdict must necessarily follow in all cases where a murderous intent was not proved, notwithstanding the very clear pronouncement of the House of Lords in *Director of Public Prosecutions v. Beard*, (1920) A.C. to that effect, viz.:

". the law is plain beyond all question that in cases falling short of insanity a condition of drunkenness at the time of committing an offence causing death can *only*, when it is available at all, have the effect of reducing the crime from murder to manslaughter."

It is further contended that the judge not only ought to have told the jury, having decided to leave the issue to them, that a manslaughter verdict was possible in the absence of proof of the specific intent, but also that he ought to have given them the further direction that such a verdict was only possible if they found that at the time the accused discharged the gun he must have intended to cause some harm or risk of harm to the deceased. It was essential, it is argued, for the judge to have given this direction in view of the principles enunciated in the cases of *R. v. Church*, (1965) 2 All E.R. 72, and *R. v. Lamb*, (1967) 2 All E.R. 1282, the rationale of which is that it is not good law that whenever any unlawful act is committed in relation to a human being which results in death, the crime of manslaughter is inevitably committed since the existence of some *mens rea* is an essential element in the crime.

"For such a verdict" (that is, manslaughter) "inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm." [See *R. v. Church* (above) at page 76].

This contention of counsel is important because, if correct, it would mean that in every case where the jury returns an alternative verdict for the lesser offence of manslaughter, such a direction as is contended for, must have been given if the verdict is to stand.

It is unnecessary to go fully into the facts of either *Church's* or *Lamb's* case; it is sufficient only to say that while it is accepted that it is not the law that whenever any unlawful act is committed in relation to a human being which results in death, there must at least be a conviction for manslaughter, there were live issues of manslaughter which in fact arose in both those cases necessitating specific direction on *mens rea* from the trial judge. On the contrary, I think it is true to say there was no such live issue in the instant case; such an issue, strictly speaking did not arise at all. *Lamb's* case was a substantive case of manslaughter in which the Court of Appeal held that it was not *per se* an unlawful act to point a loaded revolver at the victim and pull the trigger causing the discharge of a live round which rotated in line with the firing pin and in the place of an empty chamber. The defence was that the accused, who was inexperienced in the use of firearms, had no knowledge of

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the abovementioned fact. Knowledge of the accused was therefore the live issue in dispute; hence a direction of *mens rea* became necessary.

In *Church's* case, the issue arose from evidence during the trial which disclosed that the victim of the brutal assault was alive before she was immersed in water and drowned, which was the effective cause of death. This fact revealed from the autopsy clearly called for a direction on *mens rea* in manslaughter, because if Church honestly believed his victim was already dead (which was his defence at the trial), throwing her into the stream could not be an unlawful act. The trial judge's direction that the death being unlawful it did not matter whether the victim was dead or not, could not thus be sustained.

It seems therefore clear from the words of the above quotation that there are admitted limitations to the application of the principle in *Church's* case, and that from the very circumstances of this case it must inexorably follow that all sober and reasonable minded people would recognise that deliberately and without justification, shooting another three times then pursuing him downstairs into the hotel yard and discharging a fourth round at him must of necessity subject that other to some serious harm. If this be so, then *Church's* case, cited as an authority in these circumstances, is hardly apposite. See, too, *R. v. Maitland, Forrest & Dahl*, (1965) 9 W.I.R., 80, 88, in which, though *Church's* was not cited, the same approach was adopted to the problem in hand, and a direction in similar circumstances to the present was held unnecessary.

The question of whether there is or is not evidence on which a reasonable jury could return a verdict of manslaughter is always one of law for the trial judge to decide. If he thinks there is no such evidence, his duty is to withdraw the issue, if indeed there is one, from the jury, for a jury cannot return a verdict of manslaughter except upon evidence. In the instant case, provocation was not put forward as a defence, neither did any evidence of it emerge either in words or conduct from the facts in the case for either the prosecution or defence. This being so, there was no reason why the judge should have bothered to direct the jury on the point at all; but he did. Admittedly, no harm was done when he told them that he could safely direct there was no provocation, although he gave no systematic nor accurate direction with regard to the law of provocation. But at the same time he astonishingly and contradictingly left it to them to find provocation, and told them that if the facts proved it to their satisfaction, it would be open to them to return a verdict of manslaughter. On this point, the trial judge gave the following directions:

"You have to ask yourselves, too, whether there is any room for provocation. If you reflect on the evidence you may very well think that it tends to suggest that at some period of time there might have been some talk as between the deceased person and the accused who is alleged to have fired these shots. If you reflect on the evidence as led, if you accept it, you may think that they were put

downstairs at some moment of time. We do not have on record the actual words which transpired and so we cannot speculate that they were words as such which would cause any reasonable person, and specifically the accused person, to lose his self-control and so react in this particular way. We do not have any evidence of the words used by the deceased as such so, as I said, we cannot speculate on those words.

If you examine the evidence you may very well think that there is no evidence to suggest that the deceased person struck the accused person. The suggestion is that it was the accused person who fired the shots so you may very well ask yourselves whether there is anything at all which may commend itself to your reason so that you could find that there is any provocation. If I may assess the evidence and project for your consideration, I think that there is no evidence in this case to suggest that there was provocation as such. You decide as judges of the facts, but it seems to me that there is nothing in this case to suggest that there is provocation and I think I can safely direct you that there is no provocation in the circumstances.

Insofar as this aspect of provocation is concerned, it may be appropriate at this* stage to tell you that provocation, if you find that it exists in the case, would tend to support the finding of manslaughter. If, indeed, the facts are proved to your satisfaction to the extent that you feel sure which would tend to support the finding of provocation it would have the effect of reducing murder to manslaughter. But, as I said, in the circumstances of this case it seems to me that that evidence does not exist at all and in the circumstances of this case it may very well be that the verdict which you are called upon to find in this case is either a verdict of guilty or not guilty or murder or guilty or not guilty of manslaughter only if there is a killing without the necessary intent."

In other words, it is plain that the judge was directing the jury that it was open to them to consider a verdict of manslaughter and acquit altogether if they thought fit, when both the facts and the law did not lend support to" that view. It is evident that this was a misdirection, for not only ought he to have told the jury as a matter of law—which is within his function - that there was no provocation, but the judge ought to have told them that there were no facts on which they could properly find a verdict of manslaughter on the ground of provocation, and that they ought not to return one on that ground. But as I said, he may very well have refrained altogether from mentioning provocation. In fact, he ought to have done so because it could not have been helpful but only serve to mislead the jury. In this respect, it is thought that the following warning of the Court of Criminal Appeal in *Charles Eugene Gauthier*, (1943) 29 Cr. App. R. 113 at page 119, would prove helpful in similar instances in the future:

"A jury cannot return a verdict of manslaughter except upon evidence. If there is no evidence and a judge leaves the issue of man-

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slaughter to a jury, then there is a real danger that a jury may, for reasons of sympathy with the accused person or disapproval of the conduct of the deceased person, adopt a soft option available and evade their duty, which is to return a true verdict according to the evidence, by returning a lesser verdict which there is not a shadow of evidence to support. There was here no evidence upon which the jury could reasonably have brought in a verdict of manslaughter; on the contrary the evidence was all the other way."

Concluding now our observations on this ground, it may be rightly said, as in *Gauthier's* case, the evidence was "all the other way"; and that if there are any criticisms which may be levelled at the directions of the trial judge's summation on this ground they are that his failure to present the law fairly and adequately to the jury resulted in their unjustifiably taking too lenient a view of the charge they were called upon to consider. There was absolutely no warrant in law or on the facts for asking the jury to consider the alternative defence of provocation, on which there was not a tittle of evidence in support; and drunkenness, on which there was but a mere scintilla. However, having decided to leave the question of drunkenness to the jury, he ought to have directed them to consider whether the evidence fell short of the capacity of the accused to form the intent necessary to constitute the crime. If they found that it did fall short and merely established that his mind was affected by drink so that he more readily gave way to the act of discharging the loaded gun at the deceased, he should have told them that the presumption that the accused intended what took place had not been rebutted.

But when he thought it proper to have left provocation to them to find as a fact, together with the fact that there was some evidence of drunkenness, it is evident that he omitted again to give the appropriate directions which such a combination of defences would call for and which were approved and confirmed by the Court of Criminal Appeal in *R. v. Mc Carthy*, (1954) 2 All E.R. 262 at page 265, per Lord GODDARD, C.J.:

"In view of the three decisions of the House of Lords to which we have referred, it is, in our opinion, now settled that apart from a man being in such a complete and absolute state of intoxication as to make him incapable of forming the intent charged, drunkenness which may lead a man to attack another in a manner which no reasonable, sober man would do cannot be pleaded as an excuse reducing the crime to manslaughter if death results."

Had these directions been given, it is felt there ought to have been left no doubt whatever in the jury's minds as to how they were to approach the question of such meagre evidence as appeared on the record on the point of the *mens rea* of the accused alleged to be under the influence of liquor. The direction in *Mc Carthy's* case has been traced, as the quotation indicates, through decisions of the House of Lords, one of which was the decision in *Beard's* case, the *locus classicus* on the matter of the mental element in drunkenness; and quite recently in the House of Lords in *Attorney General*

for *Northern Ireland v. Gallagher*, (1961) 3 All E.R. 299, 313. It therefore represents modern opinion at the summit and the correct approach on that question in cases involving evidence of alcoholic excess, and it seems to me to be a complete answer to the contention of learned counsel that the dictum of the Lord Chancellor in *Director of Public Prosecutions v. Beard* (above) is outworn and anachronistic.

The law remains that a condition of drunkenness at the time of the commission of the offence which causes death may only reduce the crime, if it reduces it at all, from murder to manslaughter. This is still good law today just as it was re-stated in 1920; there is therefore no room for a verdict of total acquittal from a capital charge when death is occasioned by the influence of alcoholic excess. The contrary was, however, the suggestion of learned counsel who argued for the application of the principle in *Church's* case; but a verdict of manslaughter arising from inability of an accused to form the specific intent to constitute murder stands on a different footing from any other verdict of the like kind and a specific direction on *mens rea*, as suggested, is unnecessary to sustain the verdict. Contrary to counsel's suggestion, the accused indeed lost no chance of an acquittal by the absence of the direction because there can be no complete acquittal.

The only other ground of appeal which it is thought worthy of consideration deals with the complaints on the question of the identification of the accused. Complaint is made that the judge failed to give a full and sufficient direction on the point as to whether the identity of the accused as the assailant had been properly established. It will be recalled that the accused was not arrested until after the expiration of three months from the date of the incident. He was arrested by Reginald Rogers, the proprietor of the "Pinky Galaxy", at the Atkinson Field motor race circuit where he attended a meeting, and given in charge of a police constable as "the gentleman wanted by the police to assist in the investigation of a murder which was committed at my premises on December 26, 1966". Exactly how Rogers became possessed of this information does not appear, but strange to say, not one word was asked of this very important witness as to how he became so possessed.

It is, however, quite possible that Rogers, being proprietor of the hotel, would be expected to have known the accused as a frequent customer who resorted there; or, perhaps, he was a witness to the incident on the evening in question, or spoke from a description he learnt about the accused - he did not say—and we must not speculate. His identification of the accused can only be conjectural and unreliable.

Evidence of the identity of the accused, on which the prosecution was no doubt relying, was provided by the three female employees. Theresa Balkarran, the cashier, knew him for some two years and spoke of him as the visitor to the hotel who shot Cleo Samuels on the night of the incident. Sylvia Austin identified him too, as the man who danced with her and slapped her because she did not favour him with a repeat dance, but had

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failed to point him out on an identification parade which was conducted in relation to the matter. It is worthy of comment that her answers under cross-examination on why she had so failed were contradictory and unsatisfactory, although it might have been difficult for the jury to say whether her hesitancy was attributable to a desire at the time to assist the accused or to the effects of the lapse of three months on her memory. Yet Austin-like Theresa Balkarran, who was not asked to attend the parade as a witness—merely identified the accused from the dock at the preliminary inquiry. The third witness, Doreen Persaud, however made no mistake; she identified the accused at the parade. In this respect, it is contended that the judge failed to warn the jury about the unreliability of identification from the dock as a positive means of establishing the fact of the accused as the assailant, and to direct them on its probative value and on the approach they should adopt to evidence of that sort.

Very much like the facts of the case of *Slinger v. R.* (1965) 9 W.I.R. 271, only one of three witnesses identified the accused as the assailant on parade—the other two did so at the preliminary inquiry. One had never seen him before the night of the incident, while the other knew him only by sight. On objection being taken that the identification from the dock was unsatisfactory, and so as a matter of law it ought to have been the subject of a direction from the trial judge, it was held—and in our opinion quite rightly too—that identification is essentially a matter of fact for the determination by a jury, and that each case must be decided upon its own particular circumstances. *Slinger's* case was later approved in *Herrera & Dookeran v. R.*, (1966) 11 W.I.R. 1, where, at p. 4 WOODING, C.J., ruled that the identification in court was by no means nugatory; "it would be for the jury to assess". An attempt was made by learned counsel for the accused to question the authority of these two decisions from Trinidad when he submitted that the authority of *Gardner & Hancox*, (1915) 11 Cr. App. R. 265, was not considered in the two cases; had it been he contended, it might well have influenced the result.

Very briefly, in *Gardner & Hancox*, both accused were charged with house-breaking. Gardner was convicted, Hancox was acquitted. The only evidence against Hancox was that he was seen by witnesses coming away from the neighbourhood of the broken cottage with a bag. There was no identification parade held, but he was identified for the first time from the dock. The Court of Criminal Appeal held when acquitting him, that it was impossible to say on that evidence alone that any jury would have been justified in convicting him. It can be readily seen that the evidence against Hancox was inherently weak, so his case, even if it were cited, could have been of little or no assistance in the Trinidad cases, and likewise can form no basis for a comparison with the facts of the case under review. There was no evidence fit to be left to the jury against Hancox which implicated him with the break, apart from certain inadmissible incriminating statements by his co-accused. If there was not sufficient evidence against Hancox, there could be nothing worth the jury's while to assess. So it was not merely the fact, as appears from a

cursory reading of the judgment of AVORY, J., that each one of the identifying witnesses saw Hancox for the first time after the day of the break in the dock which vitiated the conviction, but the fact that there was no case fit to be left to the jury against him.

Therefore, whether or not a man is properly identified will always remain essentially a question of fact for the jury to decide.

In assisting them to decide the question, the learned judge presented each of the three female witnesses, who testified to the fact of identification, in turn to the jury. He told them that as judges of the facts it will be up to them to accept or reject their testimony and that the testimony of each must be considered separately. He told them at page 156 of the record that they might very well think they could not rely on Sylvia Austin's identification from the dock, and that if indeed they could not, then they should discard it altogether. This was just the sort of direction in such cases of which Lord PARKER, C.J., approved in *R. v. Roads*, (1967) 2 All E.R. 84, at page 85 when he commented on a Mr. Kirby's failure in that case to attend an identification parade and his identifying the accused from the dock; although the learned Chief Justice still thought there was some slight value in that method to be left for the jury to say what weight they could attach to it.

On the contrary, a most important point in favour of the accused is that the judge warned them that they ought not to convict merely because of Doreen Persaud's identification of the accused at the parade unless they were otherwise satisfied that the accused was the person who shot the deceased. In other words, he was telling them they ought not to rely on identity evidence alone to found their verdict. When such a direction is put into the scales and weighed, it seems to me that all complaints and allegations of a biased and one-sided summing-up pale into insignificance.

The only other observations which I think are really necessary on the summing-up relate to the method and manner in which it has been conducted. The brief remarks which I here make are entirely my own. They are offered constructively and in good part, with no intent at undue criticism of the learned judge's style.

I start with the observation that there is no particular way in summing-up evidence to a jury. It is characteristic of each judge that he will reveal a style and impart an approach of his own to his work. So long as he explains the relevant law to the jury, analyses the facts in such cases calling for it, and leaves then to function within their province, no fault can properly be found. A summing-up, however, must not be unnecessarily long and repetitive; a judge is not entitled to assume, nor should he give himself cause to fear that he has not been understood and that the jury has been entirely unreceptive to his directions by indulging in too frequent repetitions of the points of law and fact which have already once, or even twice, been explained to them. This may only tend to confuse instead of assisting them. The correct method to adopt is not the schoolmaster/pupil approach. As Lord GODDARD, C.J.,

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once said in *R. v. Kritz*, (1950) 2 All E.R. 406 at page 410: "Juries are not such fools as they are often thought to be." In theory they are ordinary, intelligent common people drawn from various walks of life and, for that reason, are considered best suited to decide everyday matters of fact.

In this case, the summing-up occupied over one hundred and thirty pages of a record of two hundred and thirty-five pages, and it is found that its undue length is due not only to the judge's repeated explanations of what had already been explained before to the jury, but also the reading out of evidence led at the trial without any attempt at an explanation.

Moreover, I consider in some instances the language employed by the learned judge most involved for a jury of laymen to follow easily. It would appear to be the style of the judge to express himself in rather long periods—parenthetically and circumlocutionally. This produces some difficulty for the Court of Appeal, and I expect also for jurors, to follow readily. I believe the use of as few clauses as possible is always desirable when addressing ordinary rural folk such as generally comprise the local panel.

I will conclude with another excerpt from the summing-up which I think amply illustrates the faults I find:

"It has been sometimes held as a matter of law, as I said, I projected it to you—I do not think it arises in this case but I nevertheless indicate it to you because it falls within the scope of the law which one should consider even though obliquely in the circumstances of this case, that if provocation should arise in the circumstances of any case and a man is killed and the man is killed in circumstances which would tend to suggest that he formed the intention to kill, if that intention to kill has arisen as a result of the provocation to which the person has been previously subjected or under which the person laboured at a particular moment of time, if the killing was done deliberately under the stress of provocation, well then, the law says the intention as such arises from that provocation and the provocation as such affects the intention, and accordingly, the intention must be related to provocation. So in those circumstances the person could only be guilty of the lesser offence of manslaughter if you find all the elements proved which, in a crime of murder, would be reduced when this aspect of provocation arises on the evidence. I hope that does not sound too complicated and involved for you but it simply means that if the intention to kill as such arises as a result of provocation, well then, the person could not be convicted for murder. But as I said, in the circumstances of this case I do not think that there is any provocation at all but I nevertheless let you appreciate some aspect of the law which, if you are disposed to think of provocation could be of some help to you."

The first period is obviously too long. It contains too many clauses and clearly caused the learned judge to entertain a doubt as to whether his message was being understood. Fearful lest it might not have been, he tried to enlighten them further by reducing the foregoing to simplicity in a few lines

—a course which could well have been taken in the first place by the use of a few simple words and short sentences.

It was for the above reasons that we dismissed the appeal on the 18th February last, considering at that time that they were worthy to be put on record.

LUCKHOO, C: I Concur.

Appeal dismissed.

CYRIL CHIN AND RUDOLPH CHIN v. LUTCHMIN ALI

[High Court (Mitchell, J.) October 9,14,24,1968. April 9,1969.]

Immovable property—Sale of—Payment made "as a deposit in part payment"—Whether returnable to purchaser upon default.

On December 21, 1967, the plaintiffs entered into a written agreement with the defendant for the purchase of a property from her. It was stated in the agreement that \$600.00 was paid by the plaintiffs "as a deposit in part payment" and that this sum represented liquidated damages which would go immediately to the vendor (defendant) should the purchasers (plaintiffs) fail to take transport within the time specified in the agreement. The agreement provided that the transport is "to be advertised and passed immediately or at the earliest possible opportunity and in this connection all parties must swear to their individual affidavits of sale and purchase respectively today the 21st day of December 1967 and this is of the essence to this agreement of sale and a fundamental condition therein". The defendant wrote the plaintiffs on April 1, 1968 calling upon them to take up the transport which was ripe for passing. This they did not do. On April 25th she wrote saying that the agreement was at an end and she then resold the property to third parties. The plaintiffs entered an opposition claiming a return of the \$600.00 less expenses.

HELD: that the plaintiffs were not entitled to the return of the \$600.00.

Judgment for the defendant.

R. H. McKay for the plaintiffs.

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

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MITCHELL, J.: Cyril Chin and Rudolph Chin, the plaintiffs, entered into an agreement of sale with Lutchmin Ali as in Ex. "A", whereby the defendant agreed to sell to the plaintiffs the property described in the agreement for the sum of \$6,050.00 (six thousand and fifty dollars). No oral evidence was led in this case by the plaintiffs and the plaintiffs relied on the tender of certain documents, Ex. "A" (the agreement of sale), Ex. "B" (a letter from Mr. Zaman Ali, Barrister-at-Law) and Ex. "C" another letter from Mr. Zaman Ali, Barrister-at-Law, to the plaintiffs, which were admitted in evidence in this case by consent of the parties, in support of their claim.

According to the agreement Ex. "A", Mrs. Lutchmin Ali, the defendant, agreed on the 21st December, 1967, to sell to Rudolph Chin and Cyril Chin, the plaintiffs, certain property described in the agreement for the sum of six thousand and fifty dollars (\$6,050.00). The sum of six hundred dollars was paid by the purchasers as a deposit in part payment to the vendor (defendant) and the amount was acknowledged. The remainder of the purchase price was to be paid by the purchasers on the passing of the transport of the said property to the purchasers. It was further stated in the agreement that the sum of six hundred dollars (\$600.00) represented liquidated damages which would go immediately to the vendor should the purchasers fail to take transport within the time specified in the agreement.

The time specified in the agreement was stated as follows: –

"Transport is to be advertised and passed immediately or at the earliest possible opportunity, and in this connection all parties must swear to their individual affidavits of sale and purchase respectively today the 21st day of December, 1967, and this is of the essence to this agreement of sale, and a fundamental condition therein."

No oral evidence was led by either the plaintiff or by the defendant that there was a breach of that condition and there is no such allegation either in the plaintiffs statement of claim or in the affidavit of defence of the defendant.

However, the letter Ex. "B" dated 4th April, 1968, from Mr Zaman Ali, Barrister-at-Law, who wrote on behalf of his client Lutchmin Ali, it was stated that the transport for the property in question at lot 35 Lyng Street, Charles-town, Georgetown, had been advertised in the Official Gazette on 17th February 1968, and was then ready for passing. A 'request' was made that the plaintiffs take up the said transport without further delay and mention was made that the plaintiffs were in breach of the agreement of sale dated 21st December, 1967.

There is no evidence that the plaintiffs replied to that letter. Mr. Zaman Ali wrote another letter, Ex. "C" dated 25th April, 1968, on behalf of his client Mrs. Lutchmin Ali, in which he indicated that Mrs. Lutchmin Ali in exercising her right under the agreement of sale and purchase had forfeited the deposit paid by the plaintiffs, and that she considered the agreement as null and void and at an end. Those are briefly the circumstances which have given rise to this claim in which the plaintiffs are opposing the passing of the trans-

port between the defendant, Lutchmin Ali and Goldburn Alonzo Hunte and Safickan, on the grounds that the defendant is indebted to them in the sum of \$363.50 as the balance remaining from the deposit of \$600.00 on the sale price of the property after deducting the agent's commission amounting to \$116.50.

The defendant in her affidavit of defence admitted having entered into an agreement of sale on 21st December, 1967, as at Ex. "A", and that the plaintiffs paid her the sum of \$600.00 as a deposit towards the purchase price of \$6,050.00 and said that the conveyance was advertised in the Official Gazette of 17th February, 1968, and that the plaintiffs failed and neglected to take up transport and to complete the performance of the said contract and that she is entitled to the forfeiture of the deposit made by the plaintiffs.

I find as a fact, which is admitted by the parties, that the sum of six hundred dollars (\$600.00) was paid by the plaintiffs to the defendant as a deposit "in part payment" of the purchase price in terms of the agreement Ex. "A" which was entered into between the parties, fully conscious of the obligations which the contract embodied in the document imposed, and the implications arising from the document.

The case of *Jason Smith v. Itwaria* 1938 L.R.B.G. p. 61 was a case in which a document was executed by the parties and in the document it was stated that Itwaria received one hundred dollars (\$100.00) "in part payment" for a certain portion of land, and a cottage and the balance of one hundred and seventy-five dollars (\$ 175.00) was to be paid by Jason Smith.

The balance of \$175.00 was not paid by Jason Smith and the non-completion of the sale was entirely due to the fault of Jason Smith in not paying the balance of the purchase money within a reasonable time of the signing of the document acknowledging the receipt of his \$ 100.00.

In the course of his learned judgment, CREAN, C.J. said:

"The law seems to be quite clear that if a payment is made *in part payment of the purchase money it cannot be retained by the vendor of the property. Howe v. Smith* (1884) 26 Ch.D. 89.

If, on the other hand the payment of \$ 100.00 was paid by way of *deposit*, that is, was paid by way of security for the completion of the contract, then the defendant would appear to be entitled to retain it: *Collins v. Stimson* (1883) 11 Q.B. Div. 142."

In the case of *Sylvia Alexandre Hutchins v. Jane Mary Belle Allen* (1931-7) LR.B.G. page 446 CREAN, C.J. had previously stated principles similar to those stated in the case of *Smith v. Itwaria* abovementioned.

In *Howe v. Smith* (1884) 27 Ch.D. 89 on a sale of real estate the purchaser paid £500 which was stated in the contract to be paid "*as a deposit, and in part payment of the purchase money*". The contract provided that the purchase should be completed on a day named, and that if the purchaser should fail to comply with the agreement the vendor should be at liberty to

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resell and recover any deficiency in price as liquidated damages. The purchaser was not ready with the purchase money, and, after repeated delays, the vendor resold the property for the same price. It was held that the deposit although to be taken as part payment if the contract was completed, was also a guarantee for the performance of the contract and the plaintiff having failed to perform his contract within a reasonable time, had no right to a return of the deposit.

In the circumstances of this case the \$600.00 was paid as "*a deposit in part payment*" in almost the identical words used in *Howe v. Smith* and it was further stated in the contract in this case:

"This sum of \$600.00 (six hundred dollars) represents liquidated damages to go immediately to the vendor should the purchaser fail to take transport within the time specified hereunder."

In relation to the transport the parties agreed in the contract, and I quote:

"Transport is to be advertised and passed immediately or at the earliest possible opportunity and in this connection all parties must swear to their individual affidavits of sale and purchase respectively today 21st day of December, 1967, and this is of essence to this agreement of sale and a fundamental condition herein."

Ex. "B" dated 4th April 1968 reminded the plaintiffs of their default and that default was not remedied.

The \$600.00 in the circumstances of this case, to my mind, having regard to all the foregoing was not just a liability imposed on the purchaser if he made default, giving rise to the deposit being returned to the purchaser subject to any claims for expenses as is suggested in the case of *Palmer v. Temple* 9 Ad. & E. 508. In the words of COTTON, L.J. in *Howe v. Smith* with reference to *Palmer v. Temple*:

"In my opinion this is a clause which merely fixes the amount which the vendor is to be entitled to, if he follows the course which is there pointed out, it fixes the amount which he is to claim in that event: but, in my opinion, if the vendor had irrespective of that clause a right to retain the deposit under the circumstances existing in the present case, this clause would not give the purchaser the right to recover the deposit."

In my view the \$600.00 paid by the plaintiffs in this case was not only for the part payment of the purchase price, but also a deposit: The plaintiffs were also made aware at the signing of the agreement that it was an amount which they would have to pay if they failed to take up transport at the earliest possible opportunity and that to my mind was to ensure that they did take up the transport as agreed.

In the words of Lord Justice JAMES from *Ex parte Barrell*, Law Rep. 10 Ch. 512 as re-iterated by COTTON, L.J. in the said *Howe v. Smith* case:

"the deposit . . . is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited; but if on the default of the purchase the contract goes off, that is to say, if he repudiates the contract, then according to Lord Justice JAMES, he can have no right to recover the deposit".

To my mind, also having regard to the evidence submitted to this court, there is nothing to suggest that the plaintiffs, apart from paying the deposit and probably swearing to an affidavit of purchase had done anything in the performance of the contract. The plaintiffs' conduct in the circumstances may be said to amount to a repudiation of his part of the contract and it has been well settled that he cannot under those circumstances take advantage of his own default to recover his deposit from the defendant.

In the same *Howe v. Smith* case BOWEN, L.J. in the course of his judgment said:

"The question as to the right of the purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract. In principle it ought to be so, because of course persons may make exactly what bargain they please as to what is to be done with the money deposited. We have to look to the documents to see what bargain was made".

and referring to the case of *Palmer v. Temple* (9 Ad & E 508) he says that at page 520 there is this observation:

"The general ground on which we rest this opinion is that in the absence of any specific provision, the question whether the deposit is forfeited depends on the intent of the parties to be collected from the whole instrument."

FRY, L.J. added the force his judicial opinion in the same case when he said:

"Money paid as a deposit must, I conceive, be paid on some terms implied or expressed."

and in this case the terms were clearly expressed which was that the \$ 600.00 should go immediately to the vendor should the purchaser fail to take transport within the time specified in the agreement. FRY, L.J. goes on to suggest the antiquity of the practice of giving something to signify the conclusion of the contract and thought that a deposit in *Howe v. Smith* was the "earnest" mentioned by the earlier writers. He thought that the expression used in that case "as a deposit and in part payment of the purchase-money" related to "two alternatives and declares that in the event of the purchaser making default the purchase money is to be forfeited and that in the event of the purchase being completed the sum is to be taken in part payment."

In the case of *Randolph Parris v. James Francis Burton* (1949) L.R.B.G. p. 63 in which there was a written agreement for the purchase of immovable

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property by the plaintiff from the defendant, the plaintiff paid a certain sum on account of the purchase price, and the balance was to be paid on the passing of transport within three months. At the end of the agreement it was stated that: –

"On failure on the part of the purchaser, through any fault of his, all sums paid in connection therewith to be the *bona fide* property of the vendor and be treated as liquidated damages for breach of agreement."

It was held by the learned trial judge, MANNING, J., that those words indicated the intention of the parties, that the sum paid was to be a guarantee by the plaintiff of the due performance of his part of the agreement, and accordingly when the plaintiff failed to complete the purchase the defendant was entitled to forfeit the sum so paid even if he sold the property subsequently at a higher price.

In that case reference was made to *Doobay v. Moulai* (1942) L.R.B.G. 411 where it was held by the Full Court, VERITY, C.J. and DUKE, J. that:

- (1) the payment of the sum of \$20.00 while it was to be taken on account of the purchase price if the contract of sale were performed, also partook of the nature of a guarantee of due performance on the part of the purchaser, and thus made by him by way of deposit and
- (2) that the contract of sale having been repudiated by the purchaser the sum of \$20.00 paid by him by way of deposit at the time of the conclusion of the contract of sale remains the property of the vendor and the purchaser was not entitled to recover from the vendor the sum of \$ 20.00 so paid.

Reference was also made to the case of *Nadim Autar v. John G. Valverde* (1942) L.R.B.G. p. 442 which was decided by the West Indian Court of Appeal (GERAHTY, C.J., COLLYMORE, C.J., VERITY, C.J.) and where in relation to the facts in that case the principles was stated reiterating that of COTTON, L.J. in *Howe v. Smith* previously mentioned and that of Lord ST. LEONARDS in his book on VENDORS AND PURCHASERS where he said that a purchaser "cannot, by his own default, acquire a right to rescind the contract".

The total effect of all the judicial opinion to which I referred and my having found that the \$600.00 was as the contract said "a deposit in part payment" and not just a part payment of the purchase price, and that there is a clear stipulation as an expression of the intention of the parties, and as to what should happen to the said \$600.00 if the purchaser is in default, is that I find that the plaintiffs are not entitled to recover the amount of \$600.00 so paid by them to the defendant. Accordingly, I find the defendant is not indebted to the plaintiffs in any sum and it is competent for the defendant to pass transport to any person and to Goldburn Alonzo Hunte and Safickan as advertised in the Official Gazette dated 18th May 1968. I also find that the

opposition entered on 31st day of May, 1968, in terms of the statement of claim is not just, not legal and not well-founded.

The plaintiffs' claim for (a) an injunction and (b) declaration in terms of the statement of claim are refused.

Before concluding this judgment it may not be inappropriate to state that I hold the view that the \$600.00 in the circumstances of this case was not a penalty. It has been stated by FRY, J. in *Wallis v. Smith* (1882) 21 Ch. 243 at page 249 and confirmed by the Court of Appeal.

"The question whether a sum is a penalty or liquidated damages is one of construction. . . In the first place it is quite plain that the words "liquidated damages" describing the nature of the payment, are by no means conclusive. It was thought in *Reilly v. Jones* 1 Bing 302 that they were conclusive, but *Kemble v. Farren* 6 Bing 141 has shown that they are not. In *Green v. Price* 13 M & W 695 the Court of Exchequer seem to have thought that the onus of proof was upon those who asserted that a sum described as "liquidated damages" was a penalty. In every case the court seems to have thought that the words had little or no operation."

In *Wallis v. Smith* there were appropriate references to *Hinton v. Sparkes* Law Rep. 3 C.P. 171; *Lea v. Whitaker* Law Rep. 8 C.P. 70, and other cases, and it was held that where there is a condition for the forfeiture of a deposit for the breach of various stipulations even though some of them may be trivial, or for payment of a fixed sum of money, the forfeiture will be enforced and not treated as a penalty. There will be costs to the defendant fixed in the sum of \$400.00 (four hundred dollars).

Judgment for the defendant.

AUBREY DENNIS HUNTE v. J. W. EVELYN
&
TRANSPORT & HARBOURS DEPARTMENT

[High Court (Chung, J.), April 22, 1969.]

Crown servant—Transport & Harbours Department—General Manager T & H. D. in his official capacity—Action for wages against—Whether maintainable—Transport & Harbours Ordinance Cap. 261 ss. 15, 22, 47, 53.

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In an earlier action the plaintiff sued the T. & H.D. for wages due but the action was dismissed on the ground that the T. & H.D. could not be sued in the circumstances. In the present action the plaintiff sued both E. in his capacity as General Manager of the T. & H. D. and the T. & H. D. for the same wages due.

HELD: (i) as against the T. & H.D. that the only action maintainable against it is that authorised by s. 22 of the Transport and Harbours Ordinance Cap. 261; that in any event the matter is *res judicata*.

(ii) as against E, that E as head of a government department cannot be sued in his official capacity.

Action dismissed.

B. E. Gibson, for the plaintiff.

E. Beharry for the defendants.

CHUNG, J.: In action No. 653 Demerara the plaintiff sued Transport and Harbours Department for the sum of \$342.63 being short payment of wages due to the plaintiff by the defendant while he was employed as a clerk at Vreed-en-Hoop sterling during the months of September 1965; October, 1965; November, 1965; December, 1965 and January, 1966.

The defence in that case being:

- (1) that the plaintiff was employed as a clerk by the defendants to sell tickets and whilst so employed, certain tickets were not accounted for in the daily and monthly balances prepared jointly by the plaintiff and one Chesney.
- (2) a departmental investigation was held in respect of the said irregularities and the plaintiff was interdicted from duty by the defendants from the 18th September, 1965 up to the completion of the inquiry and put on half pay for that period.
- (3) the inquiry found that both the plaintiff and Chesney were negligent in the performance of their duties but the circumstances did not warrant a dismissal.
- (4) the defendants admitted the figures set out in the plaintiffs statement of claim and contended that they were entitled to interdict the plaintiff from his duties and put him on half pay and to withhold payment of the other half of his pay during the period of interdiction.

In that case a point *in limine* was taken—that the Transport and Harbours Department could not be sued in the circumstances. On the 20th January, 1968 the point *in limine* was upheld by FUNG-A-FATT, J., and the plaintiff's action was dismissed.

On the 9th October, the plaintiff was granted leave by MITCHELL, J. to join the Transport & Harbours Department as an added defendant within 7 days. This was done by the plaintiff.

In the present action the plaintiff sues J. W. Evelyn in his capacity as General Manager of the Transport & Harbours Department, a department established by statute under Chapter 261 of the Laws of Guyana and claims from him the sum of \$342.63 being the sum due, owing and payable to him. The claim in the present action is the same as that decided in action No. 653 of 1967.

Counsel for the defendant and counsel for the plaintiff have agreed that in this matter it is a question of law only. Counsel for the defendant has submitted *in limine* that the present action cannot be brought or maintainable against the defendants as the Transport & Harbours Department is a government body and the only actions that can be brought against the department are those under section 22(1) of Chapter 261. Moreover, as far as the Transport & Harbours Department is concerned, the judgment of FUNG-A-FATT, L, binds the plaintiff. In other words, the matter is *res judicata*. He contents that against J. W. Evelyn in his capacity as General Manager the action must fail as there is no provision whereby Evelyn can be sued in his official capacity.

Section 22(1) of Chapter 261 is the only section which gives the department the right to sue or be sued: —

"all actions and suits relating to contractual rights and liabilities in respect of loss or damage occurring upon the railway and government vessels in respect of any matter or thing done or omitted upon the railway and such vessels or otherwise in connection with the business of the railway and such vessels, which, if the railway and such vessels were the property of any company, firm, or person carrying on the business of a carrier in the colony, might under the law of the colony be brought by or against such company, firm, or person may be brought by or against the department"

Section 22(2) states:

"in any action or suit to be brought by or against the department in pursuance of this part of this ordinance, it shall be sufficient to describe it as the Transport and Harbours Department".

This part of the ordinance deals with the railway and government vessels.

Section 47 exempts the department for default of the General Manager:

"Neither the government nor the department shall be liable under this part of this ordinance for any damage occasioned through the fault or negligence of the General Manager or any person employed in the pilotage service."

This part of the ordinance deals with harbours and pilotage.

Section 53 exempts the General Manager from personal responsibility.

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It reads:

"The Members of the Advisory Council, the General Manager and all persons employed by the department shall be exempt from personal responsibility for any act or thing done under the provisions and powers of this ordinance; and all damages and costs which may be recovered against the department in any action or suit for acts so done shall be paid out of the revenue of the department."

It can be seen therefore that the only actions that can be brought against the department are those stated in section 22(1). Therefore insofar as the action against the department is concerned that action is hereby dismissed. Even if the present action could have been maintained against the Transport & Harbours Department, then the defence of *res judicata* would have succeeded for this court cannot sit as an appellate court over the decision given by FUNG-A-FATT, J.

The next question is "Can the General Manager be sued in his official capacity?" Counsel for the plaintiff has submitted he can be sued because under Ordinance No. 2 of 1846 the Demerara Railway Company was incorporated and section 14 of Chapter 261 states:

". . . all the rights, powers, privileges and capacities which the company, its chairman, directors, manager, officers or servants have heretofore possessed and enjoyed by virtue of any ordinance for carrying on and regulating and maintaining the railway and the business of the company are hereby transferred to and vested in the Governor..."

and section 15 states:

"The General Manager shall manage the railway, and shall possess all the rights and privileges for carrying on the railway vested in the Governor."

He states that because all these rights and privileges for carrying on the railway are possessed by the General Manager, therefore he can be sued, and that s. 53 contemplates such actions against him.

It has long been decided that the head of a government department cannot be sued in his official capacity. He may be sued in his individual capacity (see *Raleigh v. Goschen*, 1898 1 Chancery, p. 73). In *Abrams v. The members of the Governing Body of the Anglican Schools in British Guiana and others* 1960 L.R.B.G. p. 78 Held: The Director of Education is a crown servant and not a body corporate and as such he is not therefore a legal person and cannot be sued. In *Bainbridge and Another 'v. the Postmaster General and Another* 1906 1 K.B.,p. 1977 Held: The Postmaster General is not liable in his official capacity as head of the Telegraph Department of the Post Office, for wrongful acts done by his subordinates in carrying on the

business of the department. The same arguments to some extent were put forward in that case.

As I said before in the present case, section 53, Chapter 261 exempts the General Manager from personal responsibility for any act or thing done under the provisions and powers of this ordinance. Chapter 261 does not make the General Manager a corporate body so he can sue or be sued in his official capacity. All that Section 53 does besides exempting the Advisory Council, the General Manager and all persons employed by the department from personal liability, is to make provision for all damages and costs which may be recovered in any action or suit as can be maintained under section 22(1) against the department for any act committed by those persons mentioned in Section 53 to be paid out of the revenue of the department.

In the circumstances this action against him stands dismissed.

Action dismissed.

ENMORE ESTATES LTD. v. POORAN

[Court of Appeal (Luckhoo, C., Persaud and Cummings, JJ. A)
March 14, April 30, 1969.]

Workmen's Compensation—Medical evidence—Medical referee Discretion to appoint—Circumstances justifying appointment Workmen's Compensation Ordinance Cap. 111 s. 34(2)(1).

The respondent was injured in August 1960 and was paid periodic payments. In 1961 he was examined by the appellant's doctor who pronounced him fit but he complained of continued pain and a medical referee was appointed, but upon his leaving the country without giving a conclusive report a second medical referee was appointed who in February, 1962 pronounced the respondent fit and the periodic payments were stopped. In August 1967 the respondent instituted proceedings, the only medical evidence being that of a doctor on behalf of the respondent who found a permanent partial disability of 80% it being conceded by the appellants that the appointment of the second medical referee, who had also by then left the country, was bad and his report was inadmissible. The appellants complained that all the doctors who seemed to have treated the respondent were out of the country, that they could not raise arguments as to the degree of disability and applied for the appointment of a third medical referee but this was refused by the magistrate who granted the respondent compensation and his award was upheld by the Full Court. On appeal.

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HELD: (Cummings, J.A. dissenting) that the magistrate in the exercise of his discretion should have granted the application for the appointment of a medical referee.

Appeal allowed.

Matter remitted to magistrate for appointment of a medical referee and for a fresh assessment based on his report.

G. M. Farnum, Q.C., for the appellants.

D.C. Jagan with A. O. H. R. Holder for the respondent.

LUCKHOO, C: The respondent, a workman, claimed compensation and/or periodic payments from the appellants, his employers, for permanent partial incapacity suffered as a result of injury to his right knee when on the 30th August, 1960, in the course of his employment, he slipped and fell whilst fetching cane and struck his knees on a punt. Periodic payments were made to the respondent from the date of the accident until the 4th February, 1962, when the appellants wholly ceased to make these payments on the ground that the workman had fully recovered from the effects of the accident. Despite this fact, it was not until the 10th day of August, 1967, that the respondent claimed compensation.

The appellants, in their answer, alleged that the respondent's disability was temporary and had ceased since 3rd February, 1962, when the respondent was examined and certified as fit and fully recovered from his disability by Mr. Shenolihar, a surgeon appointed as a medical referee by the Chief Labour Officer. This appointment, however, was not considered to have been properly made, and the magistrate found that the respondent was entitled to judgment in the sum of \$4,992 for 80% permanent partial incapacity, together with the sum of \$3,947 as periodic payments from the date of the accident to the 30th August, 1965, at \$87 per month, that is, \$5,220 less \$1,273 already received by the respondent. From this decision there was an appeal to the Full Court of the High Court of Judicature, but the appeal was dismissed, and the order of the magistrate affirmed.

The grounds of appeal before this court really concern two matters:

- (a) Whether there was not error in the finding that the incapacity was due to the accident in question.
- (b) Whether the magistrate had exercised his discretion properly and in accordance with judicial principles when he refused to refer the question of the respondent's disability to a medical referee when requested to do so.

The first question presents no difficulty for decision. The defence had only questioned whether disability did or did not exist. It never sought to say that if there was disability, it was not due to the accident, until an amendment to this effect was asked for which was refused.

On the prevailing pleadings, it is difficult to see how the magistrate could properly have decided that any existing incapacity was not due to the accident. This apart, the tenor of accepted evidence so indicated. It was within the province of the magistrate to have so decided, and for the Full Court to endorse, as it did. This court does not have the jurisdiction to dabble in the "region of fact", but could only interfere for a "legal reason". So that it would be pointless to examine the arguments of counsel in this sphere when in reality they concern matters essentially of fact.

It therefore only remains to consider whether in law the magistrate properly refused the application of counsel for the appellants when he asked that the court appoint a medical referee under s. 34(2)(1) of the Workmen's Compensation Ordinance, Cap. 111, which reads 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 before him in the course of the proceedings before him".

When this application was made, counsel for the respondent contended that the court would have no power to send the matter to a medical referee as there was no conflict in the evidence as to the workman's 'present condition'. The magistrate dealt with the matter by saying:

"I have no difficulty in finding that the applicant is suffering from 80% permanent partial incapacity due to the accident, and it is not necessary to invoke the provisions of s. 34(2) of the ordinance".

In order to determine whether the magistrate acted correctly in refusing the application, there must be an examination of what led to and precipitated the making of the application and how it was considered.

The respondent was examined after the accident, namely, on the 2nd September, 1960, by the appellants' medical officer, Dr. Beadnell, and treated. He was seen again on the 9th September, 29th October and 5th November, 1960, and was discharged on the 3rd February, 1961, when still complaining of pain in his knees, but this doctor could detect "no abnormality", and in a certificate of the 3rd February, 1961, he considered that the respondent was "now recovered from the effect of any injury he suffered".

However, the respondent was referred to Mr. Grewal at the Georgetown Hospital as he was still complaining of pain to the right knee. For about a month Mr. Grewal gave him electric treatment and then sent him back to Dr. Beadnell who, in turn, sent him to the personnel manager who referred him to do "normal duties as a canecutter". He worked for about three days and then gave it up, after which he was sent by the Labour Department to Mr. Stracey for examination in his capacity as medical referee. No question arises as to the legality of Mr. Stracey's appointment. This surgeon operated on the knee in September 1961 at the Georgetown Hospital where the respondent was kept for about one month, put on exercise for about another

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month, and then recommended for light work. But, again, the respondent complained of pain in his knee, by which time Mr. Stracey was out of the country, and so it was decided to have another medical referee appointed, and Mr. Shenolikar was appointed by the Labour Department to act as such. He duly issued a report; a copy of which was given to the respondent who was aware that the report said that he must go back to his normal duties.

The report was tendered in evidence and showed that clinical and radiological examination of the knee-joints did not reveal any abnormality or residual disability, and in the opinion of Mr. Shenolikar, a Fellow of the Royal College of Surgeons, "the patient was fit again to resume normal duties having made a complete recovery". This report was tendered in evidence through Mr. Compton Singh, a Senior Labour Officer, who knew that Mr. Stracey was appointed as a medical referee on the 21st February, 1961, that he made a report by letter dated 29th March, 1961, addressed to the Commissioner of Labour, but apparently could not say at that stage what was the respondent's disability. This witness further said:

"On the 10th January, 1962, Mr. Wesley, Assistant Personnel Manager of Enmore Estates Ltd., made a fresh application for the appointment of a medical referee. Our last report from Mr. Stracey was dated 3rd November, 1961, in which he said he had aspirated the joint and he would let the department know further. Mr. Stracey left the country shortly after and one Mr. Rayman issued a report".

At the beginning of the cross-examination of this witness, counsel for the appellants said that he would have to concede that the reference to Mr. Shenolikar was bad as, if one medical referee is appointed and his appointment is invalid, the Chief Labour Officer has no power to appoint another referee under the same reference. I shall therefore assume that the concession was well made and treat the report as being ineffective for the purpose for which it was tendered.

Before Mr. Stracey was appointed as a medical referee, the respondent had consulted Mr. Hugh, a Fellow of the Royal College of Surgeons, on the 13th February, 1961, who found that there was sinusitis with fluid in the right knee, and recommended him for four weeks' leave for "temporary disability". Mr. Hugh never saw the respondent again until the 30th August, 1966, and on examination found a 12" long operation scar at the joint of the right knee with wasting of the quadriceps muscles of the right knee to about 1 1/4". He said, "there was fluid in the knee, limitation of flexion, and extension of the knee, with instability of the knee-joint due to the stretching of the ligaments and atrophy of the castus intermus muscle", and was of the opinion that the recovery of the knee was out of the question, and assessed his disability at 80% partial disability "because . . . he was totally unfit for any manual labour and therefore there was consequent loss of earning capacity".

Under cross-examination, he said:

"The removal of a cartilage from a person's knee would not necessarily cause a disablement of a person. He may still be active . . . After about six months his disability, if he had any, would have been assessable. It would be permanent at that stage".

Mr. Shenolika explained in his report that the respondent had a torn medial semi-lunar cartilage in the right knee-joint as a result of his injury; that the diagnosis, however, was missed by the estate medical officer and Mr. Grewal, which caused delay in his obtaining treatment; that he was operated upon by Mr. Stracey on the 9th September, 1961, and that the knee had resolved to normality at the time of examination.

It may not be amiss to observe that when considering the ground of appeal which read: "The magistrate acted unreasonably in failing to refer the matter to a medical referee as by reason of such failure the magistrate could not decide the matter judicially but only by guess", the Full Court said: "We do not agree as it appears to us that the appellant company by continuing the periodic payments for one year after the respondent was discharged as fit for duty by Dr. Beadnell, was recognising that the respondent was suffering from a disability. In these circumstances, it was open to the magistrate to have accepted the evidence of Mr. Hugh that at the time of his examination in July 1966 the respondent had suffered a permanent partial incapacity".

With respect, I find it difficult to follow this reasoning. It implies a justification for the acceptance of Mr. Hugh's evidence to the point of rejecting the application by alluding to irrelevant circumstances.

Even if it can be said that the appellants, by continuing periodic payments for one year after the respondent was discharged as fit for duty by Dr. Beadnell, were thereby recognising that the respondent was suffering from some disability, does not the fundamental question still arise for answer: What was the disability which was recognised? For to recognise the possible existence of some disability is far different from conceding that that disability is permanent, let alone to the extent of 80%. In any event, however, the complete stoppage of periodic payments in February 1962 was a clear indication that whatever disability was recognised had ceased, and so two questions would remain for answer:

- (a) Was there any disability after 4th February, 1962, and, more particularly, at the time of the hearing of the action? And
- (b) If there was, to what extent?

I regret that I can find no relevance in what the Full Court postulated (as to the making of periodic payments one year after Dr. Beadnell had discharged the respondent) to justify the magistrate's acceptance of Mr. Hugh's evidence that at the time of his examination in July 1966 the respondent was suffering from permanent partial incapacity. The circumstances alluded to, had no such probative value. Neither the magistrate nor

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the Full Court looked for what would be pertinent in order to determine whether it was open to accept Mr. Hugh's evidence without reference to a medical referee. The question which required attention was: Did the circumstances of the case impose a duty on the magistrate to yield to the application for a reference? This court, in *Agnes Butler v. Plantation Versailles & Schoon Ord. Estate Ltd.* (Civil Appeal No. 4 of 1968), dealt with the question of the duty of a magistrate on an application of this kind and said:

"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". I propose now to look at the circumstances of this case to see whether, in law, sufficient reason existed for the grant sought.

Mr. Stracey's appointment as a medical referee was the outcome of some, but not a great deal, of conflict of medical viewpoints between Dr. Beadnell and Mr. Hugh. The appellants rightly continued to make periodic payments until Mr. Stracey, in the interests of both parties, was able to certify as a medical referee whether the original disability had ceased or was continuing and, if so, to what extent. Unfortunately, Mr. Stracey left the country in November 1961 without issuing his certificate. The appellants then became worried about the prospect of paying money to someone whose condition did not call for such payments, and so wrote to the Labour Department urgently requesting the appointment of another medical referee. This was duly attended to, and after Mr. Shenolikar filled that position, his report, as above pointed out, indicated sufficient to encourage the appellants to think that there was no need to make any further payments. The appellants, accordingly, were prepared to justify discontinuance of these benefits on the basis of that report, which was known to the respondent.

I shall pause here to reflect on the situation if the workman had brought his claim in February 1962 after the cessation of periodic

payment. He would have been able to object (according to what was conceded) that Mr. Shenolikar's reference was bad. Having removed this report out of the way, there would only have remained Dr. Beadnell's evidence, which was against him, and Mr. Hugh's evidence, which was in his favour only to the limited extent of temporary partial incapacity for four weeks. The case then would cry aloud for the appointment of a medical referee because both sides wanted it, and neither side was able to have it, since the first appointment (Mr. Stracey) had produced nothing conclusive, and the second appointment (Mr. Shenolikar) was not proper (as I understand the argument) while the first subsisted.

Under these circumstances, could the magistrate have avoided his duty in making the appointment of a referee?

As matters went, however, the astonishing situation appears that a respondent, who was allegedly under the stress of 80% permanent incapacity, was prepared to carry this burden for more than five years after his periodic payments were stopped, before bringing suit. He had known that Mr. Shenolikar had pronounced him fit; that no payment was being made or was likely to be made to him, and so faced the bleak prospect of grave incapacity without compensation. What really prevented him from approaching the court earlier in this predicament is not easy to discern. Was he really suffering, or was he not? It is true he said he saw Mr. Stracey (presumably on his return) in July 1966, and that Mr. Stracey operated on his knee then, but there is no evidence to show the nature or form of that operation. What was done, and the result, has not been revealed in any way. When counsel for the appellants made his application for the appointment of a medical referee, he said that "all doctors who seemed to have treated" the respondent were out of the country, with the result that the appellants could not "raise arguments as to the degree of disability". The statement that "the doctors" were "out of the country" was not contradicted, and at once it became apparent that one of the parties to the suit was likely to suffer severely from the disadvantage of the non-availability of witnesses, although the extraordinary delay in the commencement of proceedings was brought about by the other party.

This court considered a not dissimilar situation in *The Enmore Estates Ltd. v. Gersham Bacchus* (Civil Appeal No. 7 of 1968) when, in a majority judgment, the decision of the Full Court was reversed and the magistrate's reference to a medical referee was upheld. In that case, the workman waited for more than 26 months after his periodic payments had ceased and then found his way back to his medical adviser who had originally certified only partial temporary incapacity for six weeks; but after the second examination purported to find the high percentage of 60% permanent partial incapacity. By this time, it would appear, the original medical referee was out of the country. His certificate was produced in evidence, but the legality of the reference was challenged. In good sense the magistrate appointed a medical referee, despite counsel's objection. I found it necessary to say:

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"In this somewhat disturbing background one can hardly avoid the question: Would a workman who is genuinely suffering from the handicap of 60% permanent partial disability and who is without the benefit of periodic payment, endure the hampering effects of his misfortune for over two years before returning to his medical adviser and instituting the present proceedings? Was it not a reasonable exercise of judicial discretion for the magistrate under the circumstances to ask for a referee's report as to whether the workman was under any such disability as to entitle him to have compensation? Can it be said that he did not fairly consider the particular case before him and honestly form his opinion? A discretion, when applied to the court, means a sound discretion. It must not be arbitrary, vague and fanciful, but legal and regular".

The value of adopting the course which the magistrate took was amply demonstrated by the referee's report: he was able to have an X-ray of the affected area done, and was authoritatively able to pronounce that there was no basis whatsoever for the opinion projected with confidence, by the surgeon specialist that gunshots were "embedded in the nerves thereby causing permanent incapacity". An award based on 60% permanent partial incapacity would have been wrongly made if the magistrate had adopted the line of least resistance and said that he had found no difficulty in accepting the evidence of the surgeon specialist. The tenor of the workman's case in its setting and circumstances was disturbing, until resolved by a reference which was rewarding and re-assuring.

In the present case, a greater length of time was allowed to elapse with the disadvantage resulting to the appellants in not being able to have available as witnesses either Mr. Stracey or Mr. Shenolikar. On the application made, was the magistrate, in law, discharging his duty by merely saying that he had no difficulty in finding that the respondent was suffering from 80% partial incapacity due to the accident, and that it was not necessary to invoke the provisions of s. 34(2) of the ordinance when urgent circumstances and factors remained unconsidered?

Nowhere does he really give any reasons for his refusal, except to indicate that he was impressed with Mr. Hugh's evidence. Of course, magistrates are, and must be free in appropriate cases to select what evidence appeals most, and this would apply to competing medical opinions— that is a clearly established legal right. Where, however, an application is made for the exercise of discretion under a statutory power, the obligation to act judicially in deciding whether to acquiesce in or deny the request must not be confused with the right to prefer a particular witness. The fact that a witness may tickle the fancy of a magistrate, does not relieve him of his duty to consider whether circumstances exist, independent of the testimony of the witness, which would predominate over considerations of credibility and justify the grant sought. He must address his mind properly to this aspect, and cannot abdicate his responsibility under the guise of his liking for a witness.

When the magistrate became aware that there was such a conflict between Dr. Beadnell and Mr. Hugh in 1961 which led to the appointment of Mr. Stracey as a medical referee, this ought to have alerted him that in all probability it would fall to him to decide a question of a medical character, and that material to this question would be whether the respondent was suffering from any disability and, if so, to what extent. After the certificate of Mr. Shenolikar was tendered in evidence, he would have known that for the second time the parties were seeking medical adjudication outside of Mr. Hugh and Dr. Beadnell. When the reference to Mr. Shenolikar was conceded to be bad, even if he had to put out of his mind exactly what Mr. Shenolikar said in his report, yet he would still be expected to remember that the respondent knew of Mr. Shenolikar's opinion, and that the appellants discontinued payment to him because of that report. Neither ought he to forget that the respondent for no apparently good reason allowed something like four or five years— an inordinately lengthy period - to elapse before taking proceedings, or at least four years before re-visiting his own doctor.

When counsel made the uncontradicted statement that the medical experts who could have testified for the employer, had left the country before the proceedings were brought or heard, the magistrate ought to have weighed this in the circumstances of the respondent's delay, and even to have asked himself whether or not it was by mere coincidence that the proceedings were brought at a period when those concerned were absent, and if it was fair to the employers to have so embarrassed them if it was not mere coincidence. For since Mr. Shenolikar's examination in 1962, there is no evidence of any other medical person treating the respondent between then and July 1966. Did the magistrate look at Mr. Hugh's evidence under cross-examination when he said: "After about six months his (the workman's) disability, if he had one, would have been assessable. It would be permanent at that stage." How then was Mr. Hugh's original opinion of "temporary incapacity for four weeks"] to be reconciled with his ultimate opinion, more than five years afterwards, of "80% permanent incapacity" when, after *about* six months he would have expected the workman's disability, if he had had any, to be assessable as it would have been permanent at that stage? Is not some measure of uncertainty created here? Did not the requirements of justice demand that a reference should be made in order to ascertain where the truth lies?

To consider the matter from another angle: if when the case was called in 1967, Mr. Hugh was not available, would it not have been fair to have had a medical referee appointed, in such circumstances of the workman's dilemma?

A medical referee ought to find it easy to confirm any well-founded opinion of 80% permanent partial incapacity, and the workman would be placed at no disadvantage. For that matter he may even find a greater degree of disability. The concern is not what he finds, be it in confirmation, denial or reduction of Mr. Hugh's estimate pronounced more than five years after

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his first examination, but to avoid the denial of a legitimate check in the light of the unexpected frustrations of past efforts, and the other circumstances of the case. The circumstances did not permit of such a ready acceptance of Mr. Hugh's evidence (I would emphasize) *as would or should preclude the appellants from having this opportunity*. In the same way as this court endorsed the reference to a medical referee in *Gersham Bacchus v. The Enmore Estates Ltd.* (supra), I find myself coerced into thinking that there should have been a reference in this particular case. The magistrate omitted to direct himself fully on all the matters which would or ought to have led him to a different conclusion had he pondered on them. He failed to consider the inherent weakness of Mr. Hugh's evidence (uncontrasted with any other medical testimony) that after about six months (and Mr. Hugh did see the respondent after about six months) his incapacity, if he had any, would have been assessable; it would have been permanent at that stage. But yet he was only able to assess temporary incapacity for four weeks! He failed to consider the two abortive attempts previously made with the concurrence of the parties to have a medical referee resolve their differences he failed to consider whether it was, in the circumstances, proper to allow a medical opinion to be final with him which came from one whose original opinion had previously given rise to two references; he failed to consider the significance of the respondent's delay of years in bringing proceedings, and the effect and possible prejudice it may have had on the case for the appellants; he ought not to have deprived the appellants of the opportunity of a reference which they deserved to have from the circumstances; he overlooked and was not alive to important aspects in the history of the case.

Even if there was room for the acceptance of Mr. Hugh's evidence in preference to the other admissible evidence, there was, in my view, no room for the refusal of the application. The one does not necessarily follow from the other. The magistrate could, despite his favourable reaction to Mr. Hugh's evidence, have judicially noticed the need created by the circumstances as to have an independent opinion to fill the gap caused by the absence of Messrs. Stracey and Shenolikar, in all probability through the workman's long-standing delay in bringing his claim.

I would, accordingly, remit the matter to the magistrate for reference to a medical referee and to assess compensation, if at all, *de novo*, in conformity with that report and law. The appeal is allowed for this to be done, and the order of the Full Court is set aside. Each party is to bear his own costs in the Full Court and this court.

PERSAUD, J.A.: The facts in this matter have been fully set out by the learned Chancellor, and I do not wish to elaborate thereon. The only matter which merits consideration is whether the magistrate had exercised his discretion properly and in accordance with judicial principles when he refused to refer the question of the respondent's disability to a medical referee when requested so to do. The relevant section dealing with this matter is s. 34(2)(i) of the Workmen's Compensation Ordinance, Cap. 111, which provides 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 before him in the course of the proceedings before him".

I will commence by saying that it having been conceded that the appointment of Mr. Shenolikar as a medical referee was bad, it is not open to this court or to any other tribunal to give any consideration to the contents of his certificate or report, save that due regard may be had to the fact that an appointment was made (even though abortive) after September 1961 which in itself would go to show that up to then, and notwithstanding the operation performed by Mr. Stracey, there must have existed some divergence of medical opinion as to the extent of the workman's disability. It also shows that consequent upon this report being made available, the employers ceased to make periodical payments to the workman, thereby indicating that they must have been advised that the latter was no longer suffering from a disability. I will therefore disregard the contents or any evidence relating thereto of Mr. Shenolikar's report in its entirety.

After the accident which occurred on August 30, 1961, was reported, as was to be expected, the workman was examined by the doctor employed by the employers, and on February 3, 1961, that doctor issued a certificate in which he expressed the view that the workman had recovered from the effect of any injury he had suffered. Notwithstanding the opinion of this doctor, and no doubt because of the complaints of the workman that he was still suffering from pain, the employers caused him to be examined by Mr. Grewal, the Surgeon-Specialist. Mr. Grewal gave the workman electric treatment and returned him to the employers' doctor who once again certified him as being fit for normal duties as a canecutter. The workman attempted to work, but complained of pains still. Then Mr. Stracey, another surgeon-specialist, was appointed a medical referee to examine the workman and to submit a report. Mr. Stracey submitted an inconclusive report on March 29, 1961, and it would appear that in November 1961 Mr. Stracey was still giving his attention to the worker's knee, for he aspirated it, (that is, he removed fluid from it by suction) and promised a further report. No doubt, it needed some time before the surgeon could express a firm opinion as to the worker's disability, if any. Mr. Stracey never submitted his report, however, as he had left the country. It was then—in January 1962—that steps were taken to appoint Mr. Shenolikar a medical referee, but as I have already stated, it has been conceded that this appointment was bad.

The employers ceased periodic payments as from February 1962, that is to say, they continued such payments for approximately one year after their doctor had certified the workman fit for work. This fact, together with the fact that they obtained a reference to a medical referee would indicate, in my opinion, that they (to put it at its lowest) entertained some doubt as to the workman's fitness, and wanted a second opinion. This is because when the appointment of Mr. Stracey was made in 1961,

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there existed some difference of opinion between the employers' doctor and Mr. Hugh who had examined the workman on February 13, and found him suffering from sinusitis with fluid in the knee.

Mr. Hugh's diagnosis is confirmed by Mr. Stracey's subsequent treatment of the knee.

When the matter came to be heard by the magistrate, the position was as follows: The workman had suffered an injury to his knee in respect of which the employers paid compensation having discarded their doctor's opinion as to disability; the matter had been referred to a medical referee who had not submitted his report; the same medical referee performed an operation on the same knee in September 1961; a second operation was performed by the medical referee in July 1966; Mr. Hugh's diagnosis following an examination in February 1961 was later substantially confirmed by the medical referee; Mr. Hugh's examination in 1966 disclosed a permanent partial incapacity of 80%.

An unsatisfactory feature of this case is that the workman waited until 1966 to return to Mr. Stracey and Mr. Hugh, and this may well lead one to believe that in these circumstances the workman deliberately waited until Mr. Stracey was out of the country with the result that his evidence would not be available. But the workman has explained the delay to the satisfaction of both the magistrate and the Full Court, and I am not disposed to find his explanation an unreasonable one, though this lapse of time may make it all the more desirable to obtain a report from a medical referee.

To revert to the position before the magistrate . . . There was a dispute as to the workman's degree of disability, and the report of the medical referee was not available. As LORD HANWORTH, M.R., said in *Jones v. William M. M. Wilson & Co. Ltd.*, 19 B.W.C.C. 412:

"The employers are entitled to a decision by the medical referee, and that they have not had".

In that case the headnote reads as follows:

"The workman obtained a certificate of disablement by compressed air disease, and at the employers' request the matter was referred to a medical referee under s. 8(1)(f) of the Act of 1906. In his certificate the medical referee said: 'It is impossible for me to give a certificate either agreeing with or against that given by the certifying surgeon, as it is outside my province as an ophthalmic surgeon. . .' The County Court Judge held that in these circumstances the certificate of the certifying surgeon was conclusive.

Held, there had been no decision by the medical referee, and the case must go back for the appointment of a fresh medical referee".

Having regard, therefore, to the lapse of time between the accident and the filing of the application (the application was filed in August 1967), and to the fact that a reference was made to a medical referee and that

report has not been submitted, and cannot now be submitted because of the fact that the medical referee no longer resides in this country, I am of the opinion that the justice of the case demands that the matter be submitted to another medical referee.

It must be borne in mind that s. 34(2)(i) of Cap. 111 does not necessarily contemplate a divergence of opinion, but empowers the court to submit 'for report any matter of a medical character which seems material to any question arising before him'. It seems to me that it does not admit of dispute that the degree of disability of an injured workman is a material question, and in the instant case the material question, a question which was submitted to a medical referee for report which report has never been available to the court. In these circumstances, I am of the view that this is a case which requires the opinion of a medical referee so that right may be done.

I would, therefore, allow this appeal and remit the matter to the magistrate with an order that he refer the matter to a fresh medical referee, and a fresh assessment made on his report.

I do not feel that the workman should be made to pay the costs of this appeal as it is not his fault that the report of the medical referee was not forthcoming. Therefore, each party should bear his own costs of this appeal, and in the Full Court.

CUMMINGS, J.A.: With the exception of ground 1(a), all the grounds of appeal turn on questions of fact for which, in my view, the learned magistrate had every justification in finding as he did.

Ground 1(a) is, in effect, that the magistrate ought to have exercised the discretion vested in him by s. 34(2) of the Workmen's Compensation Ordinance, Cap. 111, and appointed a medical referee.

That section reads 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 before him".

It is trite law that in administering the provisions of that section the magistrate is exercising a discretion. This court will not interfere with the exercise of that discretion unless it can be shown that the magistrate acted upon a wrong principle, that is, that he took something into consideration that he ought not to have considered, or that he failed to consider something that he ought to have considered. The magistrate considered all the relevant facts carefully and acted upon the evidence of the appellant and Mr. Hugh, whom he expressly found to be credible witnesses. He considered but rejected any evidence that conflicted with theirs.

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The evidence of those credible witnesses established the respondent's contention that he suffered from a permanent disability as a result of an accident which occurred in the course of his employment.

Quite apart from the advantages the magistrate had of seeing and hearing the witnesses, advantages which this court or the Full Court could never recapture, the evidence accepted is clear, logical and, on a balance of probabilities, true.

The workman sees a doctor within a few days after the accident. The magistrate accepts the workman's evidence as to the circumstances in which that accident occurred. He is crossing a bridge placed between the dam and a punt with a load of cane on his head. The bridge gives way, he falls into the punt. This is the type of punt, as I understand it, normally used on sugar estates—made of iron and steel. He falls with a load of cane on his head, or he drops the load of cane—the evidence is not clear—but he falls, not slips, into the punt. He hit both his knees. The learned magistrate must have considered it amazing, and it is, in my view, disturbing that on the 29th October—three or four months after the accident—that a doctor who is aware of the accident, and examined the respondent two days after, could diagnose some form of arthritis knowing that this man fell and hit his knees.

It is not beyond the realms of probability that there can be this coincidence, but what justification does this doctor give for his opinion? When he sees both knees swollen he "*assumes*" that this man working on the estate all his life—over 20 years—was suffering from arthritis, when he knows that this man fell in a punt a few months before and he had examined him a few days after the accident! Now how reliable is this evidence? The magistrate seems to have considered it unreliable.

After five months—but before six months had expired—Mr. Hugh sees the workman, certifies that he is suffering from a temporary disability. Mr. Hugh later in his evidence says that permanent disability could only have been assessable six months after the accident. The only time six months after the accident that he saw this workman is six years after. When he first saw him he could only, according to his own evidence, assess temporary incapacity. He could not tell until after six months had elapsed. That is not a circumstance, in my view, with great respect to those who think otherwise, that justifies criticism of Mr. Hugh's evidence. It is reasonable and is quite consistent with his later findings.

The evidence of Dr. Shenolikar is altogether inadmissible and cannot be considered for any purpose based upon the truth or otherwise of it. Even if it could be, the learned magistrate was not bound to accept it. See PHIPSON ON EVIDENCE, 10th Ed., at p. 481, para. 1286, where the learned author said:

"Value of Expert Evidence. The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly, biased in favour of the side which calls them,

as well as over-ready to regard harmless facts as confirmation of pre-conceived theories; moreover, support or opposition to given hypotheses can generally be multiplied at will. Indeed, where the jury accept the mere untested opinion of experts in preference to direct and positive testimony as to facts, a new trial may be granted. The court has accepted the evidence of a wife as to the paternity of a ten months child, in spite of the unanimous opinion of several doctors".

What evidence, then, did he have before him when he exercised this discretion? –the evidence of a workman whom he believed. Now, it is germane to a finding one way or another on the exercise of his discretion to consider whether the magistrate, upon reviewing all the evidence, accepted and preferred the workman's evidence. He did so. And then, in addition to this evidence, there is the reasonable evidence of Mr. Hugh that a man who fell in a punt and who gave him the history that this man gave him, was suffering in 1966 from a permanent disability. (See my judgment in *Sugrim Jeaman v. Le Ressenouvir Estates Ltd.*—Civil Appeal No. 47/1968, p. 14 *et seq.*). (See elsewhere in this volume).

The reason advanced for the delay in bringing this action was accepted by the magistrate and the Full Court. Mr. Stracey had not concluded his examination and treatment of the workman until 1966 when he performed another operation. The latter's state of mind was that he was not, prior to that time, in a position to come to a final conclusion to enable him to bring a claim for workmen's compensation, as Mr. Stracey, he said, was still "trying with" his knee. When Mr. Stracey was finished "trying with" his knee and it was still not better, he went to Mr. Hugh, who then assessed permanent partial incapacity and gave the rating. What justification could there then be for a magistrate to exercise his discretion and send this back to another medical referee?

In this case, the magistrate at the end of the day had before him evidence of credible witnesses. He says expressly, "Dr. Hugh is an excellent witness. I accept his evidence. If it conflicts with any other evidence I accept his". He considered all the other evidence and made his findings of fact. The Full Court reviewed this, and concluded that there was no reason to interfere with the discretion exercised.

Upon what basis could this court now interfere? In my view, any interference as to the magistrate's exercise of that discretion in those circumstances would be unjustified, and I am of the view that the Full Court was right when they refused to interfere. The case of *Jones v. William M. M. Wilson & Co. Ltd.*, 19 B.W.C.C, cited by my brother PERSAUD, is clearly distinguishable from the instant case as there was a statutory obligation cast upon the arbitrator in the circumstances of that case to refer the matter to a medical referee. Consequently, when the referee's report was

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inconclusive, that obligation not having been discharged, he was accordingly bound to send the matter back to a referee for a conclusive report. There was no question of the exercise of a discretion as in the instant case.

For these reasons, I would dismiss this appeal with the usual consequences.

*Appeal allowed.
Matter remitted to magistrate for
appointment of a medical referee
and for a fresh assessment based on
his report.*

BRIDGPAUL v. REYNOLDS METAL COMPANY
[High Court (Vieira, J.) January 28, 31, May, 3, 1969.]

Nuisance—Dust from bauxite operations—Reasonable user—Public or private nuisance—Prescriptive right to commit nuisance—Nuisance, negligence and the rule in Rylands v Fletcher distinguished.

The plaintiff sued the defendants in nuisance, negligence and under the rule in *Rylands v Fletcher*. The plaintiff who lived half a mile away from the defendants' bauxite plant alleged damage by bauxite dust from the plant to his house, furniture; that his house had to be swept six times a day and that every morning the dust had to be wiped from his children's faces and eyes and removed from their nostrils. The dust would be found on his family's food and cooking utensils. The plaintiff had occupied his house since 1938 and the plant started operating in 1945.

HELD:— (i) there was no liability under the rule in *Rylands v Fletcher* because there was no non-natural user. The plant was erected to process bauxite and that is what it has been doing since 1945.

(ii) there was no negligence because the defendants have taken all reasonable care and had used modern equipment that was not financially prohibitive.

(iii) the defendants were not liable in nuisance because (a) the plaintiff had failed to prove that the bauxite dust did in fact amount to a nuisance and (b) the escape of dust resulted from a reasonable use of the premises.

(iv) the escape of dust was a public not a private nuisance and the plaintiff had no locus standi to bring the action.

(v) a party may obtain a prescriptive right to commit a private nuisance.

Judgment for the defendant.

M.R. Persaud for the plaintiff.

C. Lloyd Luckhoo Q.C., with David A. Singh for the defendants.

VIEIRA, J.: The bauxite industry is one of the major sources of revenue to the economy of this young and undeveloped independent nation.

In Guyana, bauxite is mined at McKenzie on the Demerara River by the Demerara Bauxite Company Limited (familiarily known as Demba) and at Kwakwani on the Berbice River by Reynolds Guyana Mines Limited, a subsidiary of the defendants (hereinafter referred to as the company) which is incorporated in the State of Delaware, United States of America.

Bauxite was first mined at Kwakwani in 1940 by the Berbice Company Limited which erected a plant in 1945 at Everton on the Berbice River, some 4 miles south of the town of New Amsterdam, for the purpose of drying and processing raw bauxite ore.

In 1952 the company purchased the holdings of the Berbice Company for an undisclosed amount. The mines at Kwakwani are on lands leased from the government but the plant at Everton is the transported property of the company.

The raw bauxite is transported by river from Kwakwani to Everton, a distance of approximately 140 miles, where it is processed and then shipped in ocean-going barges to Porto Diablo in Venezuela where it is unloaded and then transhipped to various countries in the world.

The disadvantage of Kwakwani as opposed to McKenzie (where three more times the amount of bauxite is processed at a cheaper cost) is that ocean-going ships cannot enter the Berbice River due to the very hard bar at its mouth.

Unfortunately, the cost of bauxite per ton in Guyana is considered the highest in the world. Transportation costs, for example, to the United States of America is about U.S. \$16.75 per ton as opposed to U.S. \$5.00 per ton from Africa to the United States of America and U.S. \$5.50 per ton from as far away as Australia to the Dominican Republic in the Caribbean.

There can be no doubt, I think, that the bauxite industry is a very highly competitive one and it is always well to remember that bauxite is also mined in neighbouring Surinam (formerly Dutch Guiana). In relation to world production, Guyana is the 5th or 6th largest producer in the world.

Despite these quite serious disadvantages, however, the company's subsidiary, Reynolds Guyana Mines Limited, increased its capitalisation from U.S. \$8 million to U.S. \$18 million and a considerable expansion programme has taken place at the plant at Everton since 1965 involving an

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expenditure of approximately U.S. \$8 million. Presumably, with such a large capital expenditure, the quality of bauxite in Guyana must be of a high order, thus offsetting the high cost of production to a large extent and no doubt also, the stable political climate obtaining in the country today is another extenuating factor.

Under this expansion scheme bauxite production has been increased by approximately 60% rising from an annual production of 350,000 tons of raw bauxite in 1965 to 825,000 tons in 1968, 50,000 tons of which was calcined bauxite.

From its inception in 1945 up to the year 1964, the plant at Eyerton only had one drier, officially called the No. 1 drier but familiarly known as "Old Smoky" due to the fact that its stack or chimney had no apparatus to minimise the amount of dust which inevitably poured out over the plant and the surrounding countryside including the small rural community of Rotterdam consisting of only about 20–30 houses which is situate about a half of a mile to the south of the plant and where the plaintiff has been residing since his marriage in 1938.

In 1965 and 1968 the company erected two new driers, the Nos. 2 and 3 driers, at a cost of approximately G2 1/2 million, each of which has 2 centrifugal dust collectors and 'Old Smoky' (the No. 1 drier) was withdrawn from service in either March or April, 1968 and is now in the process of being rebuilt as a standby in cases of emergency or whenever the other two driers are in need of repairs. The chimney of each of the two driers is about 40 feet high.

In 1967 the company put down a calciner, i.e. a kiln in which raw bauxite is passed through at the extraordinarily high temperature of 3100° Fahrenheit, which cost a fantastic G\$6 million. This unit has 6 centrifugal dust collectors.

Both the Nos. 2 and 3 driers and the calciner are as modern as money can buy and all the dust collectors work on the centrifugal principle where air is the energising force. The air is sucked through a cone forming a cyclone, the top of which is large. The air is drawn through the sides of the cone and spins around throwing the heavy dust particles to the outside. The particles then fall down through the cone at the bottom of which are two valves. When the dust load on the first valve becomes heavy it drops on the second valve which permits the first valve to close. The second valve then opens and drops the dust on to a conveyor belt, which is covered and is an extended U in shape, and which takes the trapped bauxite dust particles to the product building where it is stored until a ship arrives, when the collection of bauxite dust, which is now raw bauxite, is fed back on to the conveyor belt and eventually dumped into the ship's hold.

The purpose of the driers is to remove the free moisture in the raw bauxite. In the wet season about 22% of the raw bauxite is water, of which about 19% is recovered in the driers. In the dry season the percentage of water is about 15-17% of which about 3% would remain after drying.

In the calcining process two types of water are recovered, viz:— (a) the free moisture and (b) the chemical moisture. In this process 100% of the free moisture would be recovered and the chemical moisture remaining would be about 30% of which only about 0.2% remains after heating.

The water that is extracted from the raw and calcined bauxite comes out of the stack or chimney as water vapour or cloud or steam. Not all that comes out is dust.

The plant burns between 700,000 to 800,000 gallons of Bunker C. fuel per month, none of which comes out as dust.

It is estimated that between 60-65% of all the dust particles are trapped by the 4 dust collectors on the Nos. 2 and 3 driers and approximately 80-90% by the 6 dust collectors on the calciner. Each of these 10 dust collectors cost approximately U.S. \$60,000.

Now the case for the plaintiff, as I understand it, is that there was no real dust problems as such before 1962 but since the implementation of the Company's expansion scheme, the bauxite dust coming out of the chimneys of the plant at Everton has increased to such an extraordinary amount that, to quote his own words "(it) is now pouring like rain." Things have reached such a stage in fact he alleges that, not only is life uncomfortable but almost unbearable, and the health of himself, wife, three children and four grandchildren, are in constant jeopardy.

He was living in an old house which he had to condemn because all the zinc sheets on the roof were damaged by the bauxite dust and in 1966 he erected a new two-storey building at a cost of approximately \$ 10,000 and even the gutters of this building have been broken by the accumulation of dust which only takes about one hour to get as thick as a 1/4 inch. All his furniture, worth about \$3,000 has been damaged and the house has to be swept at least 6 times a day to get rid of this constant nuisance.

Every morning his wife and himself have to wipe off the dust from the children's faces and eyes and out of their nostrils.

The bauxite dust is like a monster permeating everything including the very food they eat and all the cooking utensils are literally covered with this insidious menace.

In addition, in 1965, the 200 orange and 250 dwarf coconut trees that he had planted in the farm around his house died as a result of this dust.

In 1966 he developed nasal trouble and a sore throat as a direct result of inhaling this dust and since that time he has seen Dr. Mohabir about 30 times at his surgery in New Amsterdam. On each occasion he has paid \$5.00 and was given nose drops and tablets which usually lasted about 6 weeks at a time. His eldest daughter Jaitree and her 4 children have also been to Dr. Mohabir as has his 15 year old daughter and his 26 year old son who also saw Dr. Das Gupta, Ear, Nose and Throat specialist on 3 occasions in Georgetown.

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It is the case for the company that they have taken all reasonable steps to abate the dust coming from the plant at Everton and that they are at all times prepared to do everything in their power, once it is not financially prohibitive, to keep abreast of all modern technological advances in the control of air pollution and, in particular, dust abatement. Their contention, in fact, is that they have committed no nuisance or, if a nuisance does arise, then it has been going on uninterruptedly for 20 years or more and, accordingly, a prescriptive right has been acquired thereto.

The essence of the tort of nuisance, which is essentially one of fact, is interference with the use and enjoyment of land by a variety of substances, both tangible and intangible. Its object is to adjust the relationship between neighbours so that the minimum of hardship and inconvenience may be produced.

The tort of nuisance is really a practical one and represents a balance of conflicting interests. It has repeatedly been said that the rule in nuisance cases is '*sic utere tuo ut alienium non laedas*' (use your own property so as not to injure your neighbour's) but this maxim has been criticised since the law recognises that a man may use his own property so as to injure his neighbour without committing a nuisance—*Bradford Corporation v Pickles* (1895) A.C. 587. It is only if such use is unreasonable that it becomes unlawful.

The phrases 'give and take' 'live and let live' are much nearer the truth than the Latin maxim. In *Ball v Ray* (1873) L.R. 8 Ch. App. 467 Lord SELBOURNE, L.C. well expressed the position at p. 469.

"In making out a case of nuisance of this character there are always two things to be considered, the right of the plaintiff and the right of the defendant. If the houses adjoining each other are so built that from the commencement of their existence it is manifest that each adjoining inhabitant was intended to enjoy his own property for the ordinary purposes for which it and all the different parts of it were constructed then so long as the house is so used there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But on the other hand, if either party turns his house, or any portion of it, to unusual purposes in such a manner as to produce a substantial injury to his neighbour, it appears to me that this is not according to principle or authority a reasonable use of his own property, and his neighbour showing substantial injury, is entitled to protection."

Every man is entitled to demand that his neighbours shall not interfere with the healthy and comfortable enjoyment of the property which he owns or occupies by polluting his air or shutting out his light or making his house resound with noises and vibrations or filled with noxious smells. All these rights the law protects and interference with them is an actionable nuisance.

Private nuisance consist of two main heads, viz: – (a) a sensible or visible material injury to property which is not merely trifling in its nature

and which results in a diminution of the value of the property—*St. Helen's Smelting Co. v Tipping* (1865) 44 L.J.R. H.L. 66 and (b) a substantial interference with the comfort and enjoyment of land which is not merely of a delicate or fastidious nature—*lex non fovet votis delicatorum* (The law does not favour the wishes of the fastidious) *Walter v Selfe* (1854) 4 De Gex & Smale, 315.

In the *St. Helen's Smelting case* (ubi supra) the House of Lords drew the distinction between these two heads of nuisance. Lord WESTBURY, L.C. said at p. 72—

"With respect to the latter namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must, undoubtedly, depend greatly on the circumstances where the thing complained of actually occurs. If a man lives in a town, of necessity he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce; also for the enjoyment of property and for the benefit of the inhabitants of the Crown and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop; but when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or business is a material injury, then, unquestionably, arises a very different consideration, and I think that in a case of that description the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours would not apply to circumstances the immediate result of which is sensible injury to the value of the property".

Now in this matter the plaintiff has claimed under both these heads viz:— (1) damage to his house, furniture, farm and its produce and (ii) substantial interference with the health of himself and his family. But he is apparently only concerned with the latter since his lawyer, in reply to the addresses by defence counsel stated and I quote, "the plaintiff is solely relying on personal discomfort of himself and his family."

One of the difficulties of the tort of nuisance is its affinity to two other torts, viz:— (1) negligence and (2) strict liability under the rule in *Rylands v Fletcher*.

The torts of nuisance and negligence overlap to a large extent but the key of the solution is, I venture to think, that as pointed out by Professor STREET, that, whereas in negligence the stress is on the type of conduct,

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viz: that styled negligent, in nuisance the emphasis is on the invasion of the interest which may either be by intentional or negligent activity and, in a few instances, even by non-negligent activity –THE LAW OF TORTS, 3RD EDITION, (1963) at pp. 212-213.

In *Read v Lyons* (J) and Co. Ltd. (1946) 2 All E.R. Lord SIMONDS said obiter at p. 475.

". . . if a man commits a legal nuisance it is no answer to his injured neighbour that he took the utmost care to commit it. There the liability is strict...."

The two torts are, however, distinguishable in at least 3 respects, viz: (1) in negligence, the plaintiff must prove that the defendant was under a duty to care; in nuisance, all the plaintiff need show is that he has been injured by the defendant's conduct and then the burden is upon the defendant to establish some appropriate defence. In *Sedleigh-Denfield v St. Joseph's Society for Foreign Missions* (1940) L.J.R. Vol. 109, H.L. p. 893, Lord Wright said at p. 904 –

"It has affinity also with a claim for negligence because the trouble arose from the negligent fitting of the grid. But the gist of the present action is the unreasonable and unjustified interference by the defendant in the user of his land with the plaintiff's right to enjoy his property. Negligence, moreover, is not a necessary condition of a claim for nuisance. What is done may be done deliberately and in good faith and in genuine belief that it is justified.

Negligence here is not an independent cause of action but is ancillary to the actual cause of action which is nuisance."

(2) In negligence, assuming that the duty to take care has been proved, the vital question is—Did the defendant take reasonable care? But in nuisance it does not in the least follow that the defendant is relieved of liability even if he has taken reasonable care. It is true that the result of a long chain of decisions is that unreasonableness is a main ingredient of liability for nuisance. But here "reasonable" means something more than merely taking proper care." It signified what is legally right between the parties taking into account all the circumstances of the case, and some of these circumstances are often such as a man on the Clapham omnibus could not fully appreciate—WINFIELD ON TORTS 7TH EDITION (1963) p. 396—the same passage appearing in the 5th Edition at p. 448 was cited with approval by MC RUER, C.J. in *Russell Transport Limited v Ontario Malleable Iron Company Limited* (1952) 4 D.L.R. 719 at p. 731.

(3) Contributory negligence is a defence appropriate to negligence but not to nuisance.

The tort of nuisance also overlaps with the rule in *Rylands v Fletcher* (1868) L.R. 3 H.L. 330, perhaps one of the most celebrated decisions in England law in which the classical exposition of doctrine was delivered by

BLACKBURN, J. in the exchequer chamber and which was affirmed by the House of Lords.

BLACKBURN, J. enunciated the rule at pp. 279-280 as follows: –

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

In the House of Lords, Lord CAIRNS held the defendant liable because he had made a 'non-natural' use of his land but he regarded the judgment of BLACKBURN, J. as reaching the same result and entirely concurred with it. Perhaps the best explanation of the term '*non-natural user*' is that given by the Privy Council in *Richards v Lothian* (1913) A.C. at p. 280 –

"it must be some special use bringing with it increased dangers to others and must not merely be the ordinary use of the land or such a use as it proper for the general benefit of the community".

The rule in *Rylands v Fletcher* was the starting point of a liability which, as developed by the courts in subsequent decisions, was wider than any which preceded it, but the decision of the House of Lords in *Read v Lyons & Company Limited* placed a brake upon any comprehensive theory of strict liability and *Rylands v Fletcher* is now restricted to non-negligent conduct in a series of defined situations only and, if a plaintiff's case falls outside those limits, he must establish intentional or negligent conduct on the part of the defendant. Further, the dictum of Lord SIMONDS that –

"the law of nuisance and the rule in *Rylands v Fletcher* might in most cases be invoked indifferently."

illustrates how far the House of Lords recognised the affinity of the two torts.

The ground of the House of Lords' decision in *Read v Lyons & Company Limited* is that there is no liability under the rule in *Rylands v Fletcher* unless there is an escape of the substance from the occupier's land. 'Escape' was defined as –

"escape from a place where the defendant has occupation or control over land to a place which is outside his occupation or control—per Viscount SIMON at p. 168."

"escape from the place in which the dangerous object has been maintained by the defendant to some place not subject to his control—per Lord PORTER, at p. 177."

The phrase 'essentially dangerous' has been frequently used by judges and text-book writers as an equivalent of the phrase 'likely to do mischief' as used by BLACKBURN, J. and indeed all the substances held liable under

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the rule in *Rylands v Fletcher* have either been inherently dangerous or potentially or apparently dangerous.

There are, however, certain differences between the two torts which are not exhaustive and which it is difficult to state with any full degree of confidence for as Professor STREET points out –

"the trend is towards bringing *Rylands v Fletcher* closer to Nuisance"—TORTS at p. 255.

Thus (1) *Rylands v Fletcher* is confined to the accumulation and escape of physical objects whereas nuisance includes damage done by intangibles such as noise even though nothing likely of itself to cause such noise was kept on the defendant's land;

(2) the statutory defence of accidental fires is not available in *Rylands v Fletcher*.

(3) liability under *Rylands v Fletcher* is based on non-natural user of land and on the object being dangerous in itself. It is doubtful in what sense, if any, the first of these restrictions applies to nuisance but it is clear that the second restriction does not.

(4) In *Rylands v Fletcher* liability is quite independent of negligence. There are cases where liability in nuisance is strict but there are many instances where there is no liability in nuisance unless there is negligence. In *Sedleigh-Denfield v St. Joseph's Society for Foreign Missions* Lord WRIGHT said at p. 904 –

"The liability for a nuisance is not, at least in modern law, a strict or absolute liability."

Now in this action the plaintiff has sued in nuisance, alternatively in negligence. By paras. 5 and 8 of his statement of claim he has, in effect, also pleaded the rule in *Rylands v Fletcher*, which I shall deal with first.

It was submitted on behalf of the company that nowhere in the evidence can it be said that the bauxite ore coming from Kwakwani and stored at Everton could cause any mischief at all if it escapes, since all the substances held liable under the rule have either been inherently dangerous or apparently dangerous.

The clear and uncontradicted evidence of Dr. Annamanthado, who has been the company's doctor in New Amsterdam for the past 10 years, is that bauxite dust is not harmful or injurious to health although, being an irritant; it may cause discomfort if swallowed or if it gets into one's eyes or into one's food. He has not known of one single case during those 10 years whereby workers from the plant at Everton, where health on the whole he has found remarkably good, have suffered any pathological disability from the inhalation of this dust, neither has he ever received a single complaint about any worker suffering from the said bauxite dust.

According to George Wagner, Plant Superintendent at Everton since June 1967, a man with 25 years experience in underground mining of bauxite

in Arkansas, United States of America, the silica content of bauxite mined in this country is about 6% which percentage, according to Dr. Annamathado, could never cause the disease known as silicosis which is defined in Chambers Twentieth Century Dictionary Revised Edition (1952) as "disease caused by inhaling silica dust". In his opinion, for silicosis to arise from bauxite dust there must be a very high crystalline content of silica of at least 30-40%.

It is to be noted that where the interference is with personal comfort, it is not necessary that any injury to health should be shown in order to establish a nuisance – *Crump v Lambert* (1867) L.R. 3 Eq. 409. It is enough that there is a material interference with the ordinary comfort of human existence—*ibid* per Lord ROMILLY, M.R. at p. 413 –

The essential elements of the rule in *Rylands v Fletcher* is that there must be (1) an escape of a physical and tangible substance from the occupier's land which (2) he has brought and stored there and (3) the substance is likely to do mischief if it escapes.

Bauxite dust is the 'substance' in this action and to my mind clearly falls within (1) & (2) above. Bauxite ore is collected and stored at the plant at Everton and when heated it gives off vapour and dust particles which go into the atmosphere and are dispersed over the surrounding countryside. But does (3) apply? In my opinion clearly not. Bauxite dust, because of its low silica content of only 6%, is not harmful or injurious to health and cannot, accordingly, be considered as something inherently dangerous or potentially or apparently dangerous. But of course this is not an absolute criterion because the 'substance' in *Rylands v Fletcher* was 'water' and, except in exceptional circumstances, it is difficult to visualise anything more harmless than ordinary water. It seems to me that why the rule does not really apply here is that 'there has in fact been no 'non-natural user.' The plant was erected at Everton to process bauxite and that is exactly what it has been doing constantly since 1945 with an increased production since 1965 when the expansion programme was started. There is no question here of any special use bringing increased dangers. It may amount to a nuisance but it has no application to the rule in *Rylands v Fletcher*.

Let us now consider the question of Negligence. Here again, to my mind, the plaintiff must necessarily fail. Accepting that a duty of care does arise on the part of the company then, surely, the company has in fact taken all reasonable care. They have used the most modern equipment that money can buy, at least equipment that is not financially prohibitive. No doubt, they must have been fully aware that dust abatement was a factor to be considered in their expansion programme and this is admitted by Mr. Roosevelt, the General Manager, of Reynolds Guyana Mines Limited, the company's subsidiary, but it was in their interest to minimise the amount of the dust escaping since they would be losing money for such escape as was pointed out by Mr. Roosevelt.

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The only question to my mind therefore, is whether the company has committed an actionable nuisance for which they would be liable in damages.

Now clearly bauxite dust has been coming out of the plant at Everton since its erection by the Berbice Company Limited in 1945 which I accept is the year during which it was erected. Up to 1964 there was only one drier, viz., Old Smoky, through whose chimney 100% of the dust particles escaped, In 1965 and 1968 Nos. 2 and 3 driers were erected and in 1967 the calciner was built.

According to Mr. Roosevelt, whose evidence on this aspect has not in any way been contradicted, total production of raw bauxite in 1965 was 350,000 tons of which there was a total escape of dust particles amounting to 100%. In 1966 total production of raw bauxite amounted to 500,000 tons, 167,000 tons of which went through Old Smoky and 333,000 tons through the No. 2 drier. There was a 100% escape from Old Smoky and 40% escape amounting to about 133,000 tons from the No. 2 drier. The total escape therefore was about 300,000 tons representing 60%.

In 1967 total production were about 830,000 tons of which 30,000 to 40,000 tons were put through the newly erected calciner. The total escape was about 490,000 tons representing 60%. In 1968 total production was about 825,000 tons of which about 310,000 tons escaped representing a percentage escape of about 38%.

According to Sydney Carrega, Administrative Superintendent of the plant at Everton, production in 1946 amounted to between 250,000 and 300,000 tons which jumped to about 400,000 tons during the 1950's where it remained constant until the expansion scheme started in the 1960's.

These figures, to my mind, clearly indicate that, although production has increased considerably to about 60% as a result of the costly expansion scheme nevertheless, the amount of dust coming out of the 10 centrifugal dust collectors on the Nos. 2 and 3 driers and the calciner (Old Smoky not being in operation since March or April 1968) has in fact been considerably reduced from 60% to about 38%, a significant decrease of 22%. But the decrease is more remarkable when one considers in 1946 when about 250,000 to 300,000 tons of raw bauxite was processed there was a 100% escape through Old Smoky yet, 22 years later, in 1968 despite a jump in production to about 825,000 tons representing a 60% increase in production only about 313,500 tons representing a percentage of 38% escaped.

It is well settled that a person cannot complain of personal inconvenience and discomfort if he goes to reside in a district in which noisy or noxious trades are carried out unless he can show that the noise or smoke or smell complained of amounts to a substantial addition to the already existing noises, fumes or smells—*Polsue and Alfieri Ltd. v Rushmer* (1907) A. C 121 where Lord LOREBURN, L.C. agreed with the statement by COZENS-HARDY, L.J. in the Court Appeal that –

"It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonable comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern pattern and is reasonably worked."

To my mind the undisputed facts in this case do not fall within the principle paid down in *Rushmer's* case since here there has been no substantial addition in the amount of bauxite dust coming from the plant at Everton. On the contrary, there has in fact been a considerable reduction in what it was before when only Old Smoky was in operation.

The figures given by Mr. Roosevelt are based on opinion and not on mathematical calculations but it is the opinion of an engineer and not a layman. Further, they have not been disputed or discredited in any way and I am prepared to accept them as being reasonably accurate.

Has the company acquired a prescriptive right as contended for on their behalf? Now the first time the plaintiff ever made any complaint to the company was when his lawyer sent them a letter on his behalf dated 1.11.65. Action was not in fact filed until 17th May, 1967.

Thus for at least 20 years the plant has been in constant operation before the plaintiff first complained to the company by letter (Ex. "A") and for 22 years before he actually tiled suit.

In *Sturges v Bridgman* (1879) 11 Ch. D. 852, a confectioner had for more than 20 years used a pestle and mortar in his back premises, which abutted on the garden of a physician, and the noise and vibration were not felt as a nuisance and were not complained of. But in 1873 the physician erected a consulting-room at the end of his garden, and then the noise and vibration became a nuisance to him. He accordingly brought an action for an injunction. Held (affirming the decision of JESSEL, M.R. at first instance) that the defendant had not acquired a right to an easement of making a noise and vibration and, accordingly, an injunction would be granted.

JESSEL, M.R. said at p. 855 –

"The only serious point which has been argued for the defendant is that by virtue of the statute (i.e. 2 & 3 Will. 4 C 71) or by prescription, he was entitled as against the plaintiff to make this noise and commit a nuisance. Now the facts seem to be that until a very recent period it was not a nuisance at all. There was an open garden at the back of and attached to the plaintiff's house, and the noise, it seems, if it went anywhere, went over the garden, and, of course, was rapidly dispersed; as far as I can see upon the evidence before me, there was until a recent period no nuisance to anybody, no actionable nuisance at all. The actionable nuisance began when the plaintiff did what he had a right to do, namely, built a consulting-room in his garden, and

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when on attempting to use the consulting-room for a proper purpose, he found this noise too great for anything like comfort. That was the time to bring an action for nuisance."

A right to commit a private nuisance may be acquired as an easement by prescription. The most common method of acquiring an easement is by 20 years continual user which is neither *vi clam nor precario*. In *Liverpool Corporation v H. Coghill & Son Limited* (1918) 1 Ch. 307 it was held that the secret discharge of an effluent containing borax in solution form into the plaintiffs sewers unknown to and unsuspected by the plaintiffs or their predecessors for over 20 years was not of such a character as would establish a prescriptive right and, further, since acts neither preventable nor actionable could be relied upon to found an easement, time therefore did not begin to run against the plaintiffs prior to 1908, when for the very first time, perceptible damage to the crops grown on a sewage farm run by the plaintiffs was noted.

It seems quite clear to me that the principles enunciated in *Sturges v Bridgman* and the *Liverpool Corporation* case do not apply to the facts of this case. Here the plaintiff has been living at Rotterdam which is about 1/2 mile away from the plant since 1938, about 7 years before the plant was erected, from which time it has been running full blast for 20 years and more, during which time he has done absolutely nothing in relation to the dust coming from the plant. He has had a right to sue since at least 1945 and was well aware of the dust problem which he himself admits was no real problem prior to 1962. Further, there has been nothing furtive or secret about the operation of the plant by the company. Smoke and dust have been coming from the plant at Everton since its erection in 1945 quite openly and there has been no attempt to hide anything.

Some textbook writers are of the opinion that it is apparently impossible or, at least doubtful, for anyone to acquire a prescriptive right to annoy one's neighbour in cases where there is a *perpetual change in the amount of inconvenience caused*, e.g. in cases like fumes, smells, noises or vibrations—vide CLERK & LINDSELL ON TORTS, 12th Edition (1961) para. 1278; STREET ON TORTS, 3rd Edition (1963) at p. 235.

In WINFIELD ON TORT, 7th Edition (1963) noted 40 at p. 43 it is stated, inter alia –

"There are dicta that a right may be acquired by prescription to annoy your neighbour by smoke, smells and noise, although the quality of the inconvenience is constantly changing. There is no reported case when such a right has arisen by prescription: *Waterfield v Goodwin* (1957) 105 L.J. 332; *Khyatt v Morgan* (1961) N. Z L R 1020, 1024."

In *Waterfield v Goodwin* (1955) C.L.Y. para. 1941 (County Court), the plaintiffs had occupied a semi-detached house since 1926. The defendants occupied the adjoining house. The plaintiff claimed damages and an injunction to restrain the defendants from allowing excessive noise

to emanate from their premises, alleging that music lessons and playing and the playing of wireless and gramophone excessively loudly constituted a nuisance. The defendants denied the nuisance and claimed a prescriptive right to continue the noise. His Honour Judge TURNER giving judgment for the plaintiff held that the noise was an interference with the ordinary physical enjoyment of the plaintiff's house and that there was no case in which it had been decided that a right to commit a nuisance had arisen by prescription.

In *Halsey v. Esso Petroleum Co. Ltd.* (1961) 1 W.L.R. 683, VEALE, J. in speaking about a noxious smell of oil which was of a particularly nauseating character and which grew in intensity and frequency in recent years over and above an occasional smell of oil which had been present for many years, said at p. 696 –

"I hold that this smell, of which the witnesses have given evidence, and which may or may not be due to heated oil, does amount to a nuisance, and further that any defence of prescription in respect of it falls because the frequency and intensity of it which constitutes the nuisance have not continued for anything approaching 20 years."

In relation, to noise coming from the defendants' plant and from tankers going to and coming from the depot the learned judge had this to say at p. 702 –

"It is pleaded in the defence that any nuisance has been legalised by prescription. There is no substance in that contention except in so far as I have already dealt with it in relation to smell. The nuisance for which I hold the defendants liable have not continued for anything approaching 20 years and there had been persistent complaints. No question of prescription can arise until a nuisance is first committed. The nuisances of which the defendants are guilty are all of recent origin."

In *St. Helen's Smelting Company v Tipping* MELLOR, J's direction to the jury has become a classic since it was enunciated over 100 years ago in 1863 and was upheld by the Queens Bench, Exchequer Chamber and House of Lords. The learned judge said, *inter alia*, at pp. 68–

"If a man for twenty-one years or more has carried on in a particular district a work which is noxious to his neighbours, and has for a period of time sent noxious smells and impure air over the neighbourhood, and that has been submitted to for twenty years, he gets in time what is called a prescriptive right to do what he has done."

In *Sturgess v Bridgman* THESIGER, L.J. delivering the judgment of the Court of Appeal said at p. 863 –

"This being so, the law governing the acquisition of easements by user stands thus. Consent or acquiescence by the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts of user, which go to the proof of

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either the one or the other, must be, in the language of the civil law, *nec vi nec clam nec precario*; for a man cannot as a general rule, be said to consent or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licences. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold, that an enjoyment of which a man cannot prevent raises no presumption of consent or acquiescence."

These dicta, to my mind, clearly show that the judges may well have held the defendants may have acquired prescriptive rights, if there had been uninterrupted user for 20 years or more.

It seems to me to be quite in tune with this modern day and age that noises, smells, smoke, vibrations, dust and vapours may be the subject of prescriptive rights provided the following elements are present: –

- (1) uninterrupted user for at least 20 years
- (2) of which the plaintiff has knowledge, actual or constructive;
- (3) acquiescence on the part of the plaintiff.
- (4) who has had full opportunity during those years to either prevent or bring an action in respect of such user.

If a nuisance does in fact exist here then it is of vital importance to decide whether it is a private or public nuisance.

Every public nuisance is an indictable misdemeanor at common law and is normally brought in the name of the Attorney General or by a relator i.e. a private person at whose suggestion an action is commenced by the Attorney General. The Attorney General has an absolute discretion to decide in what cases it is proper for him to sue on behalf of a relator—*London County Council v Att. Gen.* (1902) A.C. 165.

A private person cannot sue in respect of a public nuisance unless he can prove that it has caused him damage beyond that which he suffers in common with the rest of the public—*Benjamin v Store* (1874) L.R. 9 C.P. 400. He may of course, as explained above, become the relator to an action by the Attorney General, in which case he is never a plaintiff.

No prescriptive right to commit a public nuisance can be acquired by any lapse of time—*Harvey v Truro Rural Council* (1903) 2 Ch. 638. An unredressed public nuisance is one of the few crimes which the Crown cannot pardon.

Whether a nuisance is a public or a private one is a question of fact. Statutory nuisances and those nuisances which interfere with public health, morals and rights of passage on land or water have all been held to be public nuisances. But such nuisances as those which interfere, by noises, smell, or smoke or dust or vibrations or vapours, must be *sufficiently far reaching* before they become a public nuisance.

In *R. v Lloyd* (1803) 4 Esp. 200, the noise of a tinman, which affected only three houses of Clifford's Inn, was held not to be a public nuisance. In *R. v Davey* (1805) 3 Esp. 217 when a man was indicted for erecting furnaces and ovens for burning coke and it appeared that the sulphurous smoke was offensive to the inhabitants of the adjoining houses, HEATH, J. directed an acquittal, because it did not appear that the grievance was injurious to the general health of the inhabitants.

In *Saltau v. De Heald* (1851) 2 Sim. (N.S.) 204 an injunction was sought by a private individual to stop the ringing of a bell which disturbed the plaintiff and the neighbourhood generally. It was doubted whether it was a nuisance for which an action would lie at the suit of a private individual or whether it was a public nuisance. KINDERSLEY, V.C., held that a private action would be on these grounds –

"I conceive that, to constitute a public nuisance the thing must be such as, in its nature or its consequences, is a nuisance—an injury or a danger, to all persons who came within the sphere of its operation, though it may be so in a greater degree to some, than it is to others. For example, take the case of the operations of a manufactory, in the course of which operations volumes of noxious smoke, or of poisonous effluvia, are emitted. To all persons who are at all within the reach of those operations, it is more or less objectionable, more or less a nuisance in the popular sense of the term. It is true that to those who are nearer to it, it may be a greater inconvenience than it is to those who are remote from it; but, still, to all who are at all within the reach of it, it is more or less a nuisance or an inconvenience. . . . If, however, the thing complained of is such that it is a great nuisance to those who are more immediately within the sphere of its operations, but is even advantageous or pleasurable to those who are more removed from it, then, I conceive it does not come within the meaning of public nuisance."

If a nuisance does exist in this case then, surely it would be a public nuisance and not a private one. If the bauxite dust was in fact 'pouring like rain' as alleged by the plaintiff causing damage to his property and great discomfort to himself and family 1/2 a mile away, how much worse must it be with those poor unfortunate persons who lived in the immediate vicinity of the plant, both north and south of it.

But, as a matter of fact, I do not accept that there is any nuisance in this case for two main reasons: –

(1) the plaintiff has totally failed to prove that the bauxite dust emanating from the plant at Everton does in fact amount to a nuisance having regard to the evidence adduced on behalf of the company which I accept, on the balance of probabilities, in preference to that of the plaintiff himself alone.

(2) the escape of the dust (and it is clear that some amount of dust did and does escape) resulted from a reasonable use of the premises.

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In my opinion the plaintiff has grossly exaggerated his claim. He saw fit to call not one witness on his behalf. He did not call Dr. Mohabir neither did he bring any agricultural or chemical expert to give us some technical data as to whether bauxite dust could in fact kill citrus plants or damage furniture and the zinc roofs and gutters of houses. According to the defence, plants and shrubs actually grow in the compound of the plant. I have no reason to disbelieve this.

In cross-examination the plaintiff made this statement which I consider significant.

" I have no expert witness who would be able to say whether reasonable precautions have been taken by the defendants.

" I would rely on my lawyer's advice in relation to this aspect."

I also consider it most significant that he erects a \$10,000 house in 1966 after his lawyer wrote Ex. "A" to the company on 1.11.1965. Thus, he was well aware of the alleged nuisance, he made a complaint about it and yet he proceeds to erect a \$ 10,000 house.

I also consider it significant that the plaintiff's wife never suffered any nasal-trouble. In point of fact it is admitted that she never went to the doctor once.

On the final analysis therefore, on the balance of probabilities, I do not consider that the bauxite dust amounts to a nuisance in this action. Assuming, but not admitting, that I may be wrong in this respect then I am of the opinion that it would be a case of a public nuisance and not a private nuisance and the plaintiff therefore would have no locus standi accordingly.

For these reasons, therefore, this action fails on all grounds and hereby stands dismissed. In view of the importance of this matter and its complexities, there will be costs to the company certified fit for two counsel. There will be a stay of execution for six (6) weeks.

Judgment for the defendant.

WEST BANK ESTATES LTD. v. ALEXANDER PHILLIPS

[Court of Appeal (Luckhoo, C., Cummings and Crane JJ.A.)
March 3, 25, May 23, 1969.]

Workmen's compensation—Computation of—Ankylosis resulting in loss of use of index finger—Loss of index finger a scheduled injury—Whether ankylosis an injury.

Statute-Proviso—Whether applicable to two subsections—Workmen's Compensation Ordinance Cap. 111 s. 8(1)(c).

S. 8(1) (c) of the Workmen's Compensation Ordinance Cap. 111 provides as follows:

"Subject to the provisions of this Ordinance the amount of compensation shall be as follows; namely:

- (c) where permanent partial incapacity results from the injury –
- (i) in the case of an injury specified in the schedule such percentage of the compensation which would have been payable in the case of permanent total incapacity as is specified therein as being the percentage of the loss of earning capacity caused by that injury;

and

- (ii) in the case of an injury not specified in the schedule, such percentage of the compensation payable in the case of permanent total incapacity as is proportionate to the loss of earning capacity permanently caused by the injury:

Provided that such compensation may be increased having regard to the nature of the injury sustained in relation to his type of work and other circumstances".

The respondent, a workman in the employ of the appellant, injured his left index finger in the course of his employment. The medical evidence was that there was ankylosis of the first and second phalanges and the consequent loss of movement of the finger rendered it tantamount to a total loss of its use. The respondent was granted compensation by a magistrate under s. 8(1)(c)(ii) and was assessed at 25% permanent partial disability and this award was affirmed by the Full Court. On appeal.

HELD: that (i) the injury was one specified in the schedule viz. loss of index finger and there fixed at 15% permanent partial disability and that ankylosis is not an injury as such but a condition which supervened as a result of the injury to the finger.

- (ii) the proviso at the end of s. 8(1)(c)(ii) is not a proviso to s. 8(1)(c)(i).

Appeal allowed.

Award of magistrate varied.

G. M. Farnum Q.C. for the appellants.

Ashton Chase for the respondent.

LUCKHOO, C: The respondent, a workman employed by the appellants, suffered injury to his left index finger on the 8th September, 1966, in the course of his employment whilst supervising general work at a boiler, and was not able to resume work from then until the 18th October, 1966. However, since the accident, that index finger was left in a semi-flexed position, for which incapacity he claimed compensation alleging before the

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magistrate that he was still feeling pains "on the site where it was squeezed and in the palm" of his hand.

Mr. Hugh, his medical adviser, examined that finger on the 14th November of that year and gave evidence in support of his claim for compensation. He found on examination a scar on the palmer surface of the second phalangeal joint of that finger with loss of the soft tissues at the side of the scar; there was adherence of the scar to the deep tissues; and partial ankylosis of the joint with consequent loss of movement of the finger, owing to scarring, and adhesions of the scar and tendons underlying the scar. These findings, he said, were consistent with the injury alleged – that, of having the left index finger crushed. He assessed that the result of the injury would give rise to a 25% permanent partial disability, taking into consideration the workman's occupation and loss of earning capacity, as his work involved the use of both hands. He said, further, "The still and semi-flexed condition of the left index finger will not disappear".

The appellants, in their answer, claimed that they had made payments to the respondent from the 8th September to the 17th October when he was examined and certified fit to perform normal duties; that the amount of compensation claimed was not due, and that they were not liable for the payment of any further compensation. Their main contention was that the earning capacity of the respondent in his particular employment was not diminished as a result of the injury to his finger, and they sought to prove by evidence that he had continued to earn in his resumed employment with them what he was earning before, if not, on certain occasions, even more. Charles Miller, a witness on their behalf, whose evidence was accepted by the magistrate, said, in effect, that the injury did not hinder the respondent when he resumed his work, and that he could and did perform his work as before.

It was submitted by counsel for the appellants to the magistrate that there was no incapacity within the meaning of the Workmen's Compensation Ordinance, Cap. 111, as although there was some physical incapacity, he did not suffer any loss through that in his employment. But counsel for the respondent, in his reply, was at pains to draw the distinction between earning capacity and amounts actually earned. He contended that the fact that a workman has been taken back by his employers at wages equal to those before the accident was not conclusive evidence of his ability to earn that amount, or that his earning capacity had not been affected; and, further, that the court ought to consider whether the workman's opportunity of getting employment was not "narrowed as a result of the accident". His contention was that it would be a misdirection on the part of the court merely to consider whether the workman was physically able to do his former work without further enquiring whether his earning capacity in the open market had not been diminished.

The magistrate, in his decision, found that Mr. Hugh's assessment of the existence of 25% permanent partial incapacity had not been refuted, and on that basis awarded the sum of \$1,680 as compensation.

Whereupon, the matter was taken on appeal to the Full Court of the High Court of the Supreme Court of Judicature where it was argued that there was no evidence that the earning capacity of the respondent was diminished as a result of the injury to the index finger, and the further ground of appeal appears that "The learned magistrate erred in disregarding the provisions of the schedule to the Workmen's Compensation Ordinance, and accordingly the assessment was excessive".

In their decision, the Full Court mostly, if not entirely, devoted its attention to what was considered to be "the main ground" which disputed the right to compensation. When it came to the quantum of damages, all that was said was:

"As Dr. Hugh's uncontradicted evidence, which was accepted, revealed that there was a 25% permanent partial incapacity, taking into consideration the workman's occupation and earning capacity which did not appear to us to be unreasonably excessive, we held that the magistrate was not in error when he entered judgment in favour of the respondent, and accordingly made an award".

In the appeal now before us, there is no longer a challenge of the respondent's right to have an award made in his favour, but the sole question raised concerns the method of measuring what that amount should be. In argument, it was asserted that the injury suffered in reality falls within the schedule to the Workmen's Compensation Ordinance (Cap. 111), which sets out various percentages fixed for the loss of members or parts of the body. There the percentage fixed for the loss of three phalanges of the index finger is 15%, and the stipulations appear that where there is a total permanent loss of *the use* of a member, that shall be treated as "loss of member"; that the percentage of incapacity for ankylosis of any joint shall be reckoned as from 25 to 100 per cent of the incapacity for loss of the use of that member, according to whether the joint is ankylosed in a favourable or unfavourable position; and that in the case of a right-handed workman, an injury to the left arm or hand and, in the case of a left-handed workman, to the right arm or hand shall be rated at ninety per centum of the above percentages.

For the purpose of reckoning the percentage of ankylosis in this case, counsel for the appellants informed the court that although Mr. Hugh's evidence described the ankylosis of the joint as partial, he would be prepared to agree that the ankylosis which involved the three phalanges should be regarded as 100% so as to allow the respondent to have the full benefit of the percentage payable according to the schedule for total permanent loss of the use of the index finger, viz., 15% of that sum which would have been payable upon permanent total incapacity, which, under s. 8(1) (b) of the said ordinance, would be a sum equal to forty-eight months' wages.

It was counsel's contention that the award in this cause could only be properly made in the way provided by the schedule, and that there was no discretion in the court to adopt any other method. He referred to

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s. 8(1)(c)(i) of the ordinance which, in making provision for the payment of permanent partial incapacity resulting from an injury, decreed that it should be:

"In the case of an injury *specified in the schedule* such percentage of the compensation which would have been payable in the case of permanent total incapacity as is *specified therein* as being the percentage of the loss of earning capacity caused by that injury".

The magistrate clearly did not resort to this method of computation. Instead, he followed what counsel for the respondent asked him to do, that is, to make a grant under s. 8(1)(c)(ii) of the ordinance, which provides that:

"In the case of an injury *not* specified in the schedule, such percentage of the compensation payable in the case of permanent total incapacity as is proportionate to the loss of earning capacity permanently caused by the injury:

"Provided that such compensation may be increased having regard to the nature of the injury sustained in relation to his type of work and other circumstances".

All concerned apparently at that time overlooked the inescapable fact that the injury, in reality, was one which was "specified in the schedule". It was so because there was ankylosis of the joint which could have been assessed at anything between 25 to 100 per cent of the loss of the use of that member; that ankylosis gave rise to what could be regarded as a complete restriction in the use of the finger; this total loss in the use of the finger is expressly equated in the schedule with the total loss of the finger itself—a disablement fixed at 15% of the amount payable for total permanent incapacity. All the factors, then, which were necessary to govern the award for the particular injury and its resultant condition *emerged directly from and fell within the strict confines of the schedule itself*. In every sense of the word, it was an injury specified in the schedule, because the schedule fully provided for the manner of assessment of what should be paid for the particular extent of ankylosis involving three phalanges of the index finger.

How, then, could the magistrate have properly utilised Mr. Hugh's assessment of 25% permanent partial disability when the injury was not outside the scope and limitations of the schedule? When the Full Court observed that the award did not appear "to be unreasonably excessive", this was obviously on the assumption that the injury did not fall within the schedule.

Counsel for the respondent sought to meet the difficulty which faced him, by arguing that even if the injury fell within the schedule, the magistrate, under the proviso of s. 8(1)(c)(ii)—above set out—could have increased the compensation, and as long as it was not unreasonably excessive, it should not be disturbed.

The question which I shall now consider is: Does the proviso under cl. (c)(ii) (abbreviated) apply to cl. (c)(i) (also abbreviated)?

Each of these two clauses is undoubtedly separate and distinct from the other. Each seeks to establish independently of the other a mode of arriving at the quantum of compensation by creating two different classes of cases—one concerned with injuries which are specified in the schedule; the other with those which are not.

Therefore, as soon as it will have been established that an injury falls within the schedule, an automatic process is set in motion, which calls for pinpointing the percentage or percentages applicable.

The very nature of this exercise seems to leave little room for the indulgence of any discretionary power, for the law, having taken the trouble to intervene directly by saying what is to be allowed, will not lightly suffer any interference except there is room for an interpretation to the contrary. The precise and unambiguous language employed militates against this.

Clause (c)(ii) stands in striking contrast. It is not so hidebound. Instead, it palpably indicates that the extent of the incapacity must be gauged and evaluated from credible evidence; and that even after this will have been done, a further power is expressly given to the magistrate through the proviso to go beyond the result suggested by the evidence, should he find it proper to do so, and increase the compensation "having regard to the nature of the injuries sustained in relation to his type of work and other circumstances".

So that even if the opinion of medical evidence may indicate a certain percentage of partial total incapacity, the magistrate, notwithstanding, may, on a scrutiny of the nature of the injury, the type of work and other circumstances, increase the amount in the exercise of the judicial discretion here conferred.

In comparing (c)(i) and (c)(ii), then it becomes abundantly clear that under the former the law is in control in fixed instances, and determines the outcome of the claim, whilst under the latter the assessment of evidence will decide the issue, with the further power under the proviso to award a greater sum if it can be justified.

Although as a general rule one finds a proviso operating by way of qualification upon or exception out of something which would otherwise be within the ambit of the substantive or enactment provision, yet the mere use of the words "provided that" does not always mean that what follows is a true proviso, for it may add to and not merely qualify what is gone before and so be regarded as a fresh enactment, independent of the enacting provision. (See *Leveridge v. Kennedy*, [1960] N.Z.L.R. 1).

The proviso under (c)(ii) could truly be said to be almost in the nature of a substantive enactment adding to what has already been specifically provided under (c)(i). I fail to see how there could be any transposition of any such addendum from one category to another different category

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without doing violence to accepted canons of construction. A proviso must ordinarily be construed with reference to the clause to which it is appended; that is its purpose. It would not only be foreign to the proper functioning of a proviso to take it out of its context and allow it to enlarge the scope of another clause, but would in effect be legislating without any semblance of authority; for to read the proviso into (c)(i) would be to inject words there to give a power without any trace of other words anywhere to indicate any such intention. This would be a very serious invasion upon ordinary rules of construction. If words to that effect are to be imported, it must be by necessary implication, and I have searched in vain to find the basis for so doing. To do otherwise, would alter the operative effect of what the law had set out. Any proposed method of interpretation must not sin against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso.

In the further alternative, counsel for the respondent has submitted that, apart from the injury, the respondent said he felt pain on the site where it was squeezed and in the palm of his hand, and he contends that the particular injury, together with the pain experienced in the palm of the hand, took the injury outside of the scope of what the schedule provides for. I regret that I am unable to appreciate this argument. The medical testimony shows one injury involving the index finger. The existence of pain in the site of the injury and in the palm of that hand in no way necessarily indicates that some other injury exists for which compensation is payable. Speculation must not be substituted for that direct and specific evidence which shows one injury. Whether the very ankylosis in the index finger might be the cause of the pains experienced in the palm of the hand or not, cannot affect the issue for determination, which concerns compensation for the loss of the use of the index finger. The law says this is equivalent to the loss of the finger for which 15% of the amount payable for total permanent incapacity is allowable. Whether the respondent is a right-handed worker or not does not appear from the record, and so a calculation must be based on 15% of 48 months' wages, which would amount to \$1,008.

I would therefore vary the magistrate's award and the order of the Full Court so that the respondent may have this sum. Each party will bear his own costs in the Full Court and in this court, but the magistrate's order as to costs will remain.

My brother CUMMINGS has asked me to say that he agrees with, this judgment.

CRANE, J.A.: The facts have already been stated in the leading judgment. There is no necessity to repeat them.

In every case where permanent partial incapacity results from an injury suffered by a workman, the first thing to have settled as a preliminary to computing the amount of compensation is, whether the injury is one specified or not specified in the schedule to the Workmen's Compensation

Ordinance, Cap. 111. An examination of sub-paras, (i) and (ii) of s. 8(1)(c) of that ordinance will make this clear:

"8. (1) Subject to the provisions of this ordinance, the amount of compensation shall be as follows, namely:—

(c) where permanent partial incapacity results from the injury—

(i) in the case of an injury specified in the schedule such percentage of the compensation which would have been payable in the case of permanent total incapacity as is specified therein as being the percentage of the loss of earning capacity caused by that injury; and

(ii) in the case of an injury not specified in the schedule, such percentage of the compensation payable in the case of permanent total incapacity as is proportionate to the loss of earning capacity permanently caused by the injury;

Provided that such compensation may be increased having regard to the nature of the injury sustained in relation to his type of work and other circumstances".

The magistrate in this case was asked to and did consider the situation as an injury falling under sub-para, (ii), i.e., not being one specified in the schedule, and the award of \$1,680 which he made thereunder is based on Mr. Hugh's assessment of a 25% permanent loss of earning capacity. On appeal, the Full Court agreed with the award. The main issue now before us is whether the Full Court was right in agreeing with the magistrate that the injury was unscheduled and that the quantum of compensation was properly determined and awarded under sub-para, (ii) of s. 8(1)(c).

I find myself in agreement with the judgment of the learned Chancellor, and I am of the opinion that it was wrong for an injury of the nature inflicted on the workman's left index finger not to have been considered, in the light of the evidence, as one specified in the schedule, and for the court to have awarded compensation otherwise than on that basis. I think it was plainly a scheduled injury, from the very nature of the evidence of Mr. Hugh that the ankylosis of the first and second phalanges and consequent loss of movement of the left index finger rendered that finger for all practical purposes tantamount to a total loss of its use. The medical evidence is that there was a "partial ankylosis of the joint and consequent loss of movement of the left index finger, owing to scarring and adhesions of the scar and the tendons underlying the scar. The still and semi-flexed condition of the left index finger will not disappear". Along with this finding must be considered the directions in the schedule to the effect that a "total permanent loss of use of member shall be treated as loss of member".

The question which therefore arises is whether, notwithstanding there is clear evidence that an injury is one specified in the schedule, it is competent for the magistrate to have ignored the provisions of the schedule

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and assessed in the light of the medical evidence which revealed an entire loss of the use of the finger, that there was a degree of permanent partial incapacity amounting to 25%. The matter is one of much practical importance because if the magistrate's assessment is permissible, it means that he can give the "go-by" to such instances where the evidence clearly reveals a loss within the schedule and assess compensation as directed in sub-para, (ii) if it appears to him it is more advantageous to the workman, that is to say, that the quantum of compensation will be the greater thereunder than under sub-para. (i).

This brings into prominence the proviso below sub-para, (ii) and the arguments addressed to us on its applicability to both sub-paras, (i) and (ii).

There can be no doubt, I think, that the proviso does refer to sub-para, (ii) seeing that it follows immediately thereunder; but does it also to sub-para, (i)? If it does, there can be no dispute that the magistrate is thereby granted an unlimited licence or discretion to increase the quantum of an award *suo motu* beyond the percentages indicated in the schedule. Could this really have been the intention of the Legislature? In my judgment it could not have been. I say so after construing the consolidating provisions of the above sub-paras, of the 1952 ordinance with its precursor s. 5(1)(c)(i), (ii) of the Workmen's Compensation Ordinance, 1934. I observe in the earlier ordinance the absence of any proviso to para, (c) with a view to ascertaining the intention of the Legislature for the introduction of the proviso into the later enactment of 1952. I note that the comma formerly positioned between the last two words in sub-para, (i) of s. 5(1)(c) in the 1934 ordinance has now been replaced by a semi-colon, and that the proviso follows immediately after the colon in sub-para, (ii) of the 1952 ordinance. It appears to me that all this is meaningful from a construction point of view, for by positioning the semi-colon after sub-para, (i) of s. 8(1)(c), it is clear that the draftsman's intention was that the proviso should not be made to apply thereto. He obviously meant to shut out its operation to sub-para. (i). I believe that the following extract from LEGISLATIVE DRAFTING & FORMS by SIR ALISON RUSSELL, K.C., 4th Ed. p. 104, will support the view for which I contend because we have the precise situation before us. Speaking on the topic of the proviso and exceptions, the learned author says:

"It is to be observed that if the proviso is a proviso to the whole section or sub-section then the section or sub-section ends with a colon (not a full stop) and the proviso begins with a fresh line".

There is another reason why I think the proviso inapplicable to sub-para, (i). Here I am expanding on what I have already said above. Any application of the proviso to sub-para, (i) will produce this absurd results the magistrate will be granted an unfettered discretion to increase the amount of compensation, the quantum of which the Legislature has already fixed, to such an extent that he could well go beyond the maximum degree of disablement and award in excess of the scheduled 100%. This, of course, is absurd, and any construction of the proviso which would enlarge the scope

of sub-para, (i) to give such a meaning and intent to the Legislature as is contended for, is obnoxious for repugnancy. In this connection, I believe the following statement as throwing light on the workings of the legislative mind is very apposite; it is to be found in MAXWELL ON INTERPRETATION OF STATUTES, 11th Ed., p. 153:

"An author must be supposed to be consistent with himself, and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it. It cannot be assumed that Parliament has given with one hand what it has taken away with the other".

I am clearly of the opinion that what has happened in this case is that the magistrate has wrongly construed ankylosis (i.e. partial or complete rigidity of a joint) as an unscheduled injury *per se*. Ankylosis, however, is not an injury as such, but is the condition which supervened as a result of the injury sustained by the workman. In this case the evidence revealed that the injury to the workman was scheduled—total loss of his left index finger; and since the schedule directs that, "the percentage of incapacity for ankylosis of any joint shall be reckoned as from 25–100 per cent of the incapacity for loss of the use of that member, according to whether the joint is ankylosed in a favourable or unfavourable position", it seems to me that the correct percentage which the court ought to have awarded for the total loss of that finger, notwithstanding its ankylosed condition, is 100% of 15% of \$140 x 48 = \$1,008.

For the above reasons, I am in agreement with the order proposed by the Chancellor.

*Appeal allowed.
Award of magistrate varied.*

SHIEK UNIS SATTAUR AND FEYAUD SATTAUR

v.

CLIFTON LIVERPOOL

[In the Full Court on appeal from the Magistrate's Court of the Corentyne Judicial District (Bollers, C.J. and Morris, J. (ag.), May 27, 1969.)]

Criminal law—Summary jurisdiction offence—Larceny—Receiving—Principal in second degree—Recent possession.

Full Court—Power to substitute conviction of larceny for receiving—Power to remit matter to magistrate—Summary Jurisdiction (Offences) Ordinance Cap. 14 s. 66(b)—Summary Jurisdiction (Appeals) Ordinance Cap. 17, s. 28(a), (b).

The two appellants SS and FS father and son were jointly charged with larceny of 26 pounds of rice contained in two paper bags at the Transport & Harbours wharf at Springlands where a ship was loading rice. The clerk-in-charge of the wharf saw FS, a porter on the wharf, enter the office with a parcel, and when challenged by him, FS said that SS had given him something to keep and that SS had also given him another parcel with rice to keep. FS produced two paper bags with the rice. Shortly afterwards SS, an operator transporting rice at the Rice Marketing Board bond at Springlands, near the T & H.D wharf, arrived and confirmed that he had given FS the rice to keep but said that the rice was collected from bags that had burst on the wharf and that he intended to return the rice to the Rice Marketing Board. Asked why he had not referred the matter to the clerk-in-charge of the R.M.B. office, SS made no reply. At the close of the prosecution case the magistrate called on FS for a defence to receiving but FS gave no evidence and closed his case. The magistrate found that SS had stolen the rice and handed it to FS to remove from the site and convicted SS of larceny and FS of receiving. On appeal.

HELD:— that (i) SS having admitted possession of the two bags of rice shortly after they were missed or stolen, in the absence of a reasonable explanation could properly be convicted of larceny.

(ii) the evidence disclosed that FS may have been a principal in the second degree to the theft and he could not properly be convicted of receiving.

(iii) the Full Court cannot substitute a conviction of larceny by FS nor can there be a remission to the magistrate because:

- (a) the Full Court can only make an order the magistrate could have made and the magistrate, being a creature of statute, he could not have convicted FS of larceny after calling for a defence to receiving.
- (b) a substitution by the Full Court of a conviction of larceny would involve a firm finding of fact that FS had stolen the rice whereas the magistrate could have found that FS was an innocent agent and acquitted him.

- (c) the magistrate having already found that FS had received the rice with guilty knowledge it would be prejudicial to remit the matter to him to call upon FS for a defence to larceny, when the magistrate would have to consider whether FS was a principal in the second degree or an innocent agent.

*Appeal of the first appellant dismissed.
Appeal of the second appellant allowed.*

B. Prasad for the appellants.

G.A.G. Pompey for the respondent.

JUDGMENT OF THE COURT: On Thursday the 6th June, 1968, the "M.V. Mahaicony" was moored alongside the Transport & Harbours wharf at Springlands and rice was being loaded onto the vessel bound for Georgetown. The clerk in charge of the wharf was on board another vessel nearby when he saw the second named appellant, a porter employed on the wharf, moving about suspiciously and go across from the bond to the office. The second-named appellant carried a parcel under his arm and appeared to be looking around him. The clerk went towards him but by the time he reached him this appellant had already entered the office and was on his way out, He did not have the parcel with him and when the clerk enquired about it the reply was that his father had given him "something to keep." The second-named appellant was then instructed by the clerk to get the parcel and bring it to him. When this was done, the clerk saw that it was a paper bag bearing the stamp 'Rice Marketing Board' and it contained rice. The appellant then said that he had another parcel and when he was asked to produce it he removed a similar paper bag containing rice from behind some furniture in the office. In all the two paper bags contained 26 1/4 lbs. of rice.

The clerk in charge then summoned the superintendent in charge of the Rice Marketing Board at Springlands to the scene, whereupon the second-named appellant in the presence of the superintendent and the clerk in charge when asked where he had got the rice from replied that he had been given the rice by his father to keep.

The first-named appellant who was the father of the second-named appellant and was employed as an operator transporting rice at the Rice Marketing Board bond at Springlands, arrived on the scene about 15 minutes later and in the presence of the second-named appellant was asked by the superintendent if he had given his son two bags of rice to keep, and he replied in the affirmative stating that it was rice collected from bags which had burst on the wharf and that he would hand the rice back to the Rice Marketing Board. The first-named appellant was then asked why he had not reported the matter to the clerk in charge of the Rice Marketing Board office. The first-named appellant offered no reply to this question. The

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police were then summoned to the scene and later removed the appellants to the Springlands Police Station. At the station the appellants were duly cautioned and each elected to make a statement in writing.

In his statement to the police, the first-named appellant stated that on that very afternoon he was detailed by the supervisor of the Rice Marketing Board to transport rice from the bond to the vessel moored at the Springlands wharf and when unloading the rice one bag got torn and some of the rice scattered on the wharf and as part of his job was to collect all rice and return it to the bond, he went to the Rice Marketing Board bond and collected two paper bags and picked up the rice and put it in the bags. He then asked his son, who was working on the nearby Transport & Harbours wharf, to keep the bags of rice until he returned. He stated he did this as he had not finished picking up all the rice and he was hoping to pick up the balance of the rice when he returned to the wharf. He claimed that his instructions were, by the previous superintendent, to pick up rice on the wharf when bags are torn and this was done by all operators. When he returned to the wharf to collect the two paper bags of rice, he was told that a porter had instructed his son to take the two bags of rice into the Transport & Harbours bond until his return but the clerk in charge of the wharf had already held up his son with the rice.

In his statement to the police the second-named appellant repeated that he was at the Transport & Harbours wharf when his father came in with a truck and gave him the two bags of rice and told him to keep them and he was told by a porter to put the two bags of rice in the Transport & Harbours bond which he did. He then went away and on his return he found the two bags outside the door of the bond and he picked them up and was carrying them back into the bond when the clerk in charge of the wharf intervened and questioned him, whereupon he informed the clerk in charge that his father had given him the rice to keep.

The system employed by the Rice Marketing Board in dealing with the spillage of rice on the wharf is that two empty jute bags are kept by two men whose job it is to collect such rice and to return same to the Rice Marketing Board by lorry. These men are placed on the wharf from the time loading starts and as fast as the bags are filled they are returned to the Rice Marketing Board bond and are replaced by two other empty bags that are sent to these two men. No other employee or person for that matter is allowed to be in possession of spillage rice, either on the Transport & Harbours wharf or the Rice Marketing Board bond which is adjacent to the wharf, and no instructions had even been issued to the contrary. The two paper bags in which the rice was found were taken from a stock of such bags kept in the Rice Marketing Board bond and are the property of the Rice Marketing Board. On that day no bags of that kind were issued to anyone and certainly not to the two appellants.

There was the further evidence by a porter employed on the Transport & Harbours wharf, which was accepted by the magistrate, that on the day in question about 2 p.m. he had seen the second-named appellant in the bond with the two paper bags and he had enquired of him what he had in them and was told that they contained rice, whereupon he informed the second-named appellant not to keep the rice in the paper bags because as the Rice Marketing Board were loading rice, if the bags were seen in the bond it would implicate everyone.

It is important, at this stage, to observe that there was certain evidence given by the chief bond clerk of the Rice Marketing Board who was responsible for spillage collected on the wharf to the effect that about half-an-hour after the enquiries into this matter had started the first-named appellant had informed him that he had picked up some rice on the wharf and had put it into empty bags and that an interested worker sometimes picks up rice which falls from damaged bags and returns it to the bond, and that he had known the first-named appellant to have done this in the past. He also stated that there was no order or regulation to say that workers should not collect rice and return it to the bond. This evidence was emphatically rejected by the learned magistrate who arrived at the conclusion that this witness was out to assist the appellants if he could by giving false evidence.

In answer to the joint charge of larceny of the two bags of rice, property of the Rice Marketing Board, contrary to Sec. 66(b) of the Summary Jurisdiction (Offences) Ordinance, against the two appellants, the first-named appellant gave evidence on oath in which he relied on his statement made to the police and claimed that he did not intend to steal the rice but his intention was to return it to the bond.

In these circumstances the learned magistrate at the close of the case for the prosecution called on the second-named appellant to lead a defence in answer to a charge of receiving, whereupon the second-named appellant gave no evidence himself and closed his case.

On these facts the learned magistrate found that the first-named appellant had stolen the rice and handed it to the second-named appellant his son to remove from the site. He then proceeded to convict the first-named appellant of the offence of larceny and the second-named appellant for the offence of receiving stolen property knowing it to be stolen.

Both appellants appealed from their respective convictions and the main ground of appeal argued by counsel on behalf of the first-named appellant was that the decision of the magistrate was erroneous in law, in that there was no evidence of any intent by the first-named appellant to deprive the owner and that the magistrate had erred when he proceeded to convict on the only evidence that this appellant had no right to the possession of the rice on the wharf. We did not agree with this submission and dismissed the appeal. In our view there was an abundance of evidence on which the learned magistrate could have properly found, as he did so

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find, the intent to deprive the true owner permanently thereof on the part of this appellant. There was the circumstance that under the system only the two employees on the bond were entitled to have spillage rice in the jute bags which were supplied to them for that purpose. There was the admission by this appellant that he had placed the rice in two paper bags which he had removed from the stock in the Rice Marketing Board bond which he had no authority to do, and had given it to his son to keep, and there was the evidence from the clerk in charge of the bond in which the paper bags were kept that he did not issue any paper bags to any person on that day. Further when this appellant was asked why he had not reported the matter to the clerk in charge at the Rice Marketing Board office, he did not reply when an answer might reasonably have been expected from him (*R. v Christie*) (1914) A.C. 545. This appellant then having admitted possession of the two bags of rice shortly after they were missed or stolen in the absence of a reasonable explanation he could properly be convicted of the offence of larceny. The magistrate in his reasons did not find that he had given a reasonable explanation but rejected his explanation as being false, it was clearly then open to the magistrate to have convicted him for the offence of larceny *R. v. Schama & Abramovitch* (1914) 84 L.J.K.B. p. 396.

Turning our attention now to the appeal of the second appellant, we are convinced that the evidence revealed an acting in concert by the appellants in pursuance of a common design to commit the offence of larceny for which the appellants were charged and that the case for the prosecution against the second-named appellant was that he was a principal in the second degree in that he was present aiding and abetting the first appellant in the commission of the offence. From the circumstances as to the time and place of the commission of the offence when the second appellant was handed the goods, it is clear that he was in the same position of a man keeping watch and waiting outside of a house while a burglar in the house plunders the house and hands out the goods to him. See the statement of ALDERSON, B. in *Reg. v Perkins*, 1 Den. page 459. The learned magistrate was therefore in error when he treated the case against the second appellant as one of receiving stolen property. It was clearly a case of larceny if the evidence for the prosecution was to be believed.

The question now arises whether having been found guilty by the magistrate of the offence of receiving this court could now properly remit the matter back to the magistrate for him to call upon the second appellant to answer a charge of larceny or in the alternative whether this court, purporting to act under Section 28(a) and (c) of the Summary Jurisdiction (Appeals) Ordinance, Chap. 17, could substitute a conviction for the offence of larceny.

In *R. v Coggins* (1873) 12 Cox 517, it was well established that one who is a principal in the second degree to a larceny cannot be convicted as the principal in the first degree of receiving the stolen property. In the recent case of *R. v Thompson* (1965) C.L.R. 553, Thompson was indicted with stealing a lorry and its load, alternatively with receiving the load. The evidence against him was that when asked about the matter he said "who shopped me" "we nicked the lorry". The case for the prosecution was presented on the basis that the theft was committed by the lorry driver and Thompson received the load from him. T's defence was a complete denial. The judge only left the receiving count to the jury who convicted T. of receiving and was discharged from giving a verdict on the larceny count. Thompson appealed on the ground that the jury were not directed that a person cannot be convicted of receiving goods if he has stolen them and and the evidence was as consistent with larceny as with receiving and also consistent with Thompson being merely an aidor and abettor or conspirator. It was held that if the evidence is really all one way on larceny or receiving, then only one count should be left to the jury. However, that was not the position; the use of the word "nicked" was more consistent with T. being a thief and a verdict of larceny would be substituted. The distinction to be drawn, however, between that case and the instant appeal is that the appellant by using the word "nicked" was more or less admitting that he had stolen the goods rather than received them, in the instant case the second appellant was stating that he had merely been asked to keep the goods in which case if this were believed he might well have been found to have been an innocent agent.

Finally, in *R. v Froggett* (1965) 2 A.E.R. page 832, it was held that even if the jury were satisfied beyond reasonable doubt that the prisoner had in fact received the goods they would have been bound to acquit of the offence of receiving if they thought it reasonably possible that the prisoner was a principal in the theft of the goods. In that case the Court of Criminal Appeal considered the law to be correctly stated in RUSSELL ON CRIME (12th Edition) Vol. 2:

"A person assisting in the stealing is a principal in the first or second degree and a receiver must be a person who is not a principal felon."

It follows therefore that the evidence having disclosed that the second appellant may have been a principal in the second degree to the theft of the paper bags of rice, he could not properly be convicted of the offence of receiving, nor could this court substitute a conviction for the offence of larceny which would involve a firm finding of fact by the court that the appellant had stolen the goods, whereas it would have been open to the magistrate to have found that the appellant was an innocent agent in which case he would be entitled to an acquittal. The magistrate having already found that the appellant had received the goods with guilty knowledge, it would be highly prejudicial to him to remit this matter back to the magistrate

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to call upon the appellant to lead a defence in answer to a charge of larceny, for the magistrate would then have to consider whether the appellant was a principal in the second degree to the offence of larceny or whether he was a mere innocent agent. Furthermore, under Sec. 28(a) & (c) Chap. 17 this court can only make an order that the magistrate could have made, the magistrate being a creature of statute, and the magistrate could not have convicted of the offence of larceny after having called on the appellant to answer a charge of receiving.

For these reasons we are therefore reluctantly compelled to allow the appeal and set aside the conviction and sentence of the second-named appellant. We make no order as to costs.

*Appeal of the first appellant dismissed.
Appeal of the second appellant allowed.*

BOB HUBERT VEERASAMMY v. DENNIS PASEA

[High Court (Khan, J.) December 3, 1968, May 3, 31, 1969]

Practice and Procedure—Service of writ out of the jurisdiction—Without leave—Nullity or irregularity—Fresh steps in action taken.

The plaintiff filed a writ in the Supreme Court against the defendant who lived in England and it was served on him without first obtaining an order granting leave to serve the writ outside the jurisdiction. The defendant entered an appearance under protest and the plaintiff applied in chambers for an order that the service effected on the defendant be deemed to be good and proper. This was granted, the defendant's solicitor offering no objection. Several steps were taken in the action by both sides and the matter was ripe for hearing when the defendant applied (1) to set aside the order which deemed service good and (2) to strike out the writ of summons as bad in law.

HELD: that (1) the plaintiff's failure to obtain leave to serve the writ out of the jurisdiction was an irregularity and not a nullity.

(ii) the application would be refused because (a) to seek to set aside the writ after eleven months knowledge of its irregularity was too long, and

(b) several fresh steps in the action were taken after knowledge of the irregularity.

Application refused.

C. A. F. Hughes for the plaintiff.

A. S. Manraj for the defendant.

KHAN, J.: The defendant by his solicitor, Sheila Avrill Trotman, on the 16th November, 1968 took out this summons for the following orders:—

- (a) That the order dated 23rd January, 1968, in this matter be set aside for the following reasons:
 - (i) The plaintiff did not comply with the procedure for serving a writ out of the jurisdiction of the courts of Guyana as laid down in Order 9 of the Rules of the Supreme Court of Guyana, and consequently the writ of summons herein filed on the 28th day of October, 1967, is bad in law and could not properly be subsequently regularised by *ex parte* summons on the 23rd January, 1968.
 - (ii) Such further or other order as to the court' seems just.

Briefly, in chronological sequence the facts are that on the 28th October, 1967 the plaintiff by his duly constituted attorney filed the writ of summons in this action against the defendant who resided at 57 Great North Way, London, N.W. 4. England, without first obtaining an order granting leave to file such writ of summons outside the jurisdiction of the courts of Guyana.

The plaintiff thereafter by arrangement with certain London solicitors caused a sealed and certified copy of the said writ of summons to be served personally on the defendant on the 5th December, 1967.

On the 16th December, 1967 Mr. Ivan Gavin Zitman (Solicitor) entered an appearance under protest to the writ of summons on behalf of the defendant. One month thereafter the plaintiff made an *ex parte* application to the judge in chambers for an order that the service effected on the defendant be deemed to be good and proper service on the defendant and sufficient compliance with the rules of court regarding service of a writ out of jurisdiction and that the time for entering an appearance thereto be extended to 42 days from the service of the writ. The judge refused to hear the application *ex parte*, adjourned the matter and ordered that the defendant be served with a copy of the application.

On the matter coming on for hearing the defendant was represented by his then solicitor, Mr. Zitman. The application was duly heard and granted on the 23rd January, 1968, Mr. Zitman offering no objection. This is the order dated 23rd January, 1968 which this application seeks to set aside as bad in law and a nullity.

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After the order was made several steps in the action were taken until it became ripe for hearing viz. on the 7th February, 1968 Mr. Zitman consented to an extension of time to enable the plaintiff to file and serve his statement of claim which was filed and served the said day. No defence was filed and the plaintiff on the 6th March, 1968 issued a notice of default of defence in accordance with O.25, r. 15 of the R.S.C. 1955.

On the 28th May, 1968 the plaintiff requested final judgment in Bail Court; the defendant having failed to file his defence. On the 13th June, 1968 the defendant appointed Mrs. Sheila Avrill Trotman to be his Solicitor in place and stead of Mr. Zitman and on the matter coming on for hearing in Bail Court on the 17th June, 1968 defendant obtained leave to file a defence which was duly filed on the 20th June, 1968. The plaintiff then requested hearing again on the 14th November, 1968.

After all the above steps were taken and the action was ripe for hearing the defendant on the 16th November, 1968 filed the present summons to set aside the order (*supra*) and to strike out the writ of summons as bad in law:

Order 9 rule 1 provides that service out of the jurisdiction of a writ of summons . . . may be allowed by order of the court or a judge whenever –

- 1– (a) The whole subject matter of the action is immovable property situate within the jurisdiction, or . . .
- (b) c, d, etc. etc.

Order 9 Rule 4: provides:

"that every application for an order under rules . . .

(1) . . . shall be supported by affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action . . . and snowing in what place or country such defendant is... and the grounds upon which the application is made; and no such leave shall be granted unless it shall be made sufficiently to appear to the court or judge that the case is a proper one for service out of the jurisdiction under this order".

Mr. Manraj for the defendant applicant conceded that the case of the plaintiff is one on which the judge could have made a proper order under Order 9 rule 4, as the whole of the subject matter of the action is immovable property situate within the jurisdiction his main contention being that the plaintiff served process out of the jurisdiction without first obtaining an order of the court or judge. Consequently, it is his submission that the omission to first obtain such an order cannot be cured after because the omission is not a mere irregularity but a nullity which cannot be cured by O. 54 r. 2 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".

The substantial question therefore in my view for determination is whether the plaintiff's omission complained against is a nullity or a mere irregularity as the learned judge dealt with the matter as an irregularity.

It is therefore desirable to examine the distinction—if we can—between proceedings or orders which are nullities and those in respect of which there have been nothing worse than an irregularity. I fail to find any definition in the rules which draws a line between these two classes; and exactly where that line lies may not in certain circumstances, be easy to discover. It has been said however that the existence of the distinction is one which has been recognised in the language of many authorities: (*per* Lord GREENE M.R. in *Craig v. Kanssen* 1943 1 All E.R. p. 11). In *Anlaby v. Praetorius* 1888 20 Q.B.D. 764 judgment was obtained in default of defence. FRY, L.J. at page 768 stated *inter alia*:

"... the last day for delivering the defence was 10 days from January 28, and the judgment entered on February 7th was premature and irregular. In such a case the right of the defendant to have the judgment set aside is plain and clear. The court acts upon an obligation; the order to set aside the judgment is made *ex debito justitiae*; and there are good grounds why that should be so, because the entry of judgment is a serious matter, leading to the issue of execution ..."

In *Craig v. Kanssen* 1943 1 All E.R. p. 108 where an order was made against the defendant when no summons was served upon the defendant as required by the Rules of the Supreme Court Lord GREENE, M.R. stated *inter alia*:

"But in the present case we are not concerned with an instance of non-compliance with a rule, nor with an irregularity in acting under any rule. The irregular entry of judgment was made independently of any of the rules; the plaintiff had no right to obtain any judgment at all..."

In the same case LOPES, L.J. said this:

"I entirely agree that order 70, rule (1) does not apply here. It was meant to apply where a party had made some blunder in his proceedings, as by delivering a pleading too late, but the present case seems to me altogether outside the operation of r(1), because the judgment was entered prematurely, without any right whatsoever; To obtain that judgment was a wrongful act, and not an act done within any of the rules. The defendant is therefore entitled '*ex debito justitiae*' to have it set aside".

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In *Hewitson v. Fabre* (1888) 21 Q.B.D. 6 the defendant, who was not a British subject, had been served with the writ instead of with notice of writ, as the rules provide: The service was out of the jurisdiction: Held:— the proceedings was void *ab initio*: a service was no service at all.

In *Hamp-Adams v. Hall* (1911) 2 K.B. 942 was again a case of judgment in default of appearance. In that case VAUGHN WILLIAMS, L.J. said at pp. 943,944:

" . . . where proceedings are taken by a plaintiff in the absence of the defendant it is most important that there should be at every stage a strict compliance with the rules; and therefore it is a reasonable and proper thing in the case of proceedings by default to treat non-compliance with such a rule as order 9, r. 15, not as a mere irregularity which can be waived, but as a matter which prevents any further proceedings from being taken on the writ."

On the other hand in *Fry v. Moore* (1889) 23 Q.B.D. 395 where the writ was properly issued but irregularly served—as in the instant case—it was held to be a mere irregularity. The difficulty in defining the precise line which separates an irregularity from a defect which makes the order a nullity is referred to in *Fry v. Moore (supra)*. There Lord IINDLEY, L.J. said at page 398.

"But then arises the question whether the order for substituted service was a nullity, rendering all that was done afterwards void, or whether it was only an irregularity. If it was the latter, it could be waived by the defendant. I shall not attempt to draw the exact line between an irregularity and a nullity. It might be difficult to do so. But I think that in general one can easily see on which side of the line the particular case falls, and in the present case it appears to me that the proceeding was rather an irregularity than a nullity. The writ was properly issued, but it was improperly served, and I am not prepared to say that by no subsequent conduct of the defendant the irregularity could be waived."

LOPES, L.J. in the same case said at page 399:

"It is said that the proceedings was a nullity, and no doubt the distinction between a nullity and a mere irregularity in procedure is often a very nice one. But in the present case I think there was only an irregularity."

The court accordingly decided against the application to set aside the judgment.

In the instant case it was conceded by counsel for the defendant applicant that the writ was properly issued but was improperly served. The defendant suffered no prejudice whatsoever. The plaintiff respondent applied to regularise the omission as soon as possible and before the issue of the statement of claim.

From the above authorities it appears that an order which can properly be described as a nullity is something which the person affected by it, is entitled '*ex debito justitiae*' to have set aside.

Mr. Hughes for the plaintiff (respondent) has put it more succinctly. He submitted that in order to constitute a nullity it must go to the root of the matter amounting to a denial of natural justice. He relied on *Fry v. Moore* (*supra*) and urged that the omission was a mere irregularity which in the chronicle of events was certainly waived, originally by Mr. Zitman who appeared on the 23rd January 1968 and offered no objection to the order now challenged. Thereafter he took several fresh steps in the action which constituted a bar within the meaning of Order 54(2) of the R.S.C., (Guyana). Having considered the authorities I have formed the opinion that the plaintiff's omission was a mere irregularity and not a nullity. The test put more tersely appears to be whether a failure of natural justice has been caused by the omission – (*vide Marsh v. Marsh* 1945, A.C. at p. 284 P.C.).

The next and final question to be determined is whether the irregularity was not waived in all the circumstances in the teeth of Order 54 rule (2).

The defendant applicant had knowledge of the irregularity since he entered an appearance 'under protest' which is a conditional appearance—dated 16th December, 1967. By Order 10 rule 20(2).

"a defendant shall be entitled either before entering appearance or within 7 days after entering appearance to take out and serve a summons or serve notice of motion to set aside the service upon him of the writ or of notice of writ or to discharge the order authorising such service or to strike out the writ on the ground that –

- (i) The court has no jurisdiction to determine all or part of the plaintiffs claim; or
- (ii) the issue of the service of the writ was irregular; or
- (iii) (iv).... "

The defendant entered appearance under protest on the 16th December, 1967 and took no other step. Thirty (30) days after when the plaintiff respondent sought an *ex parte* order to regularise the service, the trial judge ordered that the defendant be served. The matter then became *inter partes*. The defendant was represented by solicitor who offered no objection to the order sought; to seek to set aside the writ after more than 11 months' knowledge of its irregularity is not made "within a reasonable time" *vide Reynolds v. Coleman* (1887), 36 Ch. D. 453 C.A. where it was held that 12 months was too late to set aside service out of the jurisdiction. Moreover, in the instant case several fresh steps in the action were taken after knowledge of the irregularity contrary to order 54(2) of the R.S.C. (Guyana).

In the result I must refuse the order sought and dismiss the application with costs fixed at \$75.00 to the plaintiff in any event.

Application refused.

DONALD YARD v. PAUL BURNETT

[In the Full Court on appeal from the Magistrate's Court of the West Demerara Judicial District (Bollers, C.J. and George, J.) June 6, 1969]

Spirits—Custody of illicit spirits—Unlawful possession of spirits—Proper charge to be brought—Spirits Ordinance Cap. 319 ss. 89,104.

The appellant was charged with the custody of illicit spirits contrary to s. 104(3) of the Spirits Ordinance Cap. 319. A customs department party entered the appellant's shop and having read the search warrant to him searched and found methylated spirits and a small quantity of bush rum. The appellant was convicted by a magistrate. On appeal it was argued that the appellant ought not to have been charged under s. 104(3) but under s. 89(1) of the Ordinance.

HELD: that s. 104(3) is directed to the entry and search of any house or place for distillery apparatus, spirits or materials for the manufacture of spirits which are unlawfully kept or deposited in such place and the seizure thereof; the mischief sought to be cured by s. 104 is that of preventing the unlawful manufacture of spirits; the appropriate charge with regard to the bush rum should have been one for the commission of an offence under s. 89 of Cap. 319.

Appeal allowed.

D. J. Christian for the appellant.

G. H. R. Jackman for the respondent.

Judgment of the Court: About 4.30 p.m. on Saturday, 25th May, 1968, the Assistant District Commissioner of the West Demerara District, who was authorised by the Comptroller of Customs and Excise to perform the functions and duties conferred on the latter by the Spirits Ordinance, Chapter 319, went to the shop of the appellant at Hyde Park, East Bank Essequibo, accompanied by Customs Officer, Kumar Singh, and Customs Guard, Forde. The party found the appellant and his wife in the shop and the Assistant District Commissioner identified himself and informed them that he had a warrant to search the premises for illicit spirits. He read the search warrant to them and the appellant consented to the search. In the parlour behind the counter he found a bottle, Ex. "D", which contained a small quantity of clear liquid and also behind the counter he found a bottle which contained a small quantity of liquid. In the kitchen were found two bottles, Ex. "B" and Ex. "C", which contained small quantities of liquid. The liquid in all these bottles, to the A.D.C., smelt of bush rum. The bottles were opened up and handed to the appellant and his wife to smell and they were asked if they recognised the odour of spirits. The appellant and wife did not reply to this question. These four bottles and their contents were then conveyed to the Police Station at Parika where they were handed to Paul Burnett, an officer of the Customs & Excise. This officer examined the bottle Ex. "A"

and found it contained liquid with the odour of methylated spirits. He examined the bottles, Exs. "B", "C" and "D", and found they contained small quantities of liquid with the odour of bush rum. The bottles Exs. "A", "B", "C" and "D" were then labelled DY No. 1, DY, No. 4, DY No. 3 and DY No. 2, respectively and signed P. Burnett and dated 25.5.68. The contents of the bottles Exs. "B" and "C" were then thrown into the bottle Ex. "D". The bottles Exs. "A" and "D" were then sealed with C.&E. seal No. 1. All of this was done in the presence of the appellant. Later the two bottles were delivered to the Government Analyst who subsequently returned the Exhibits to the Customs Officer, Paul Burnett, along with his certificate of analysis (Ex. "E") which showed that the contents of Ex. "A" (DY No. 1) were 0.2 of a pint of methylated spirits and the contents of Ex. "D" (DY No. 2) were 0.01 of a pint of alcoholic liquid which contained bush rum.

The defence of the appellant which was rejected by the magistrate was that a member of the party had brought the four bottles to the appellant's shop and planted them on the premises. In these circumstances the magistrate was satisfied that the prosecution had proved its case against the appellant beyond reasonable doubt and convicted the appellant of the offence for which he was charged of being in custody of illicit spirits contrary to section 104(3) of the Spirits Ordinance, Chapter 319, and imposed a penalty on the appellant of \$ 1,000 or 12 months.

The appellant appealed to this court on the main ground that the decision was erroneous in point of law in that there was no proof that the appellant was found in possession of spirits which was used for the manufacture of spirits as required by section 104(3) of Chapter 319 under which he was charged and that the charge, if any, should have been brought under section 89(1) of the Spirits Ordinance, Chapter 319, which provides that any person who is in unlawful possession of spirits shall be liable to a penalty. Under subsection (5) of this section everyone possessing any quantity of the substance known as bush rum is deemed to be a person unlawfully possessing spirits under the said section.

We agree with this submission as in our view section 104 of Chapter 319 under which the appellant was charged is directed to the entry and search by an officer of any house or place for distillery apparatus, spirits or materials for the manufacture of spirits *which are unlawfully kept or deposited in such place* and the seizure thereof.

For a full appreciation of the submission we set out hereunder the relevant subsection of section 104 which reads as follows:

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

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(2) Anyone so authorised may at any time, either by day or by night, but at night only in the presence of a police officer or constable, if he is not a member of the police force, break open and forcibly enter any house or place aforesaid, and seize any distillery apparatus, spirits, or materials for the manufacture of spirits found therein, and either detain them or remove them to a place of safe custody.

(3) All distillery apparatus, spirits and materials for the manufacture of spirits so seized shall be absolutely forfeited and the owner of any distillery apparatus, spirits, or materials for the manufacture of spirits, or the person in whose custody they are found, shall be liable for every house or place in which they are found, and also for the distillery apparatus, spirits, or materials for the manufacture of spirits, or materials for the manufacture of spirits, to a penalty not exceeding one thousand dollars, and, in addition to the penalty, to imprisonment, with or without hard labour, for any term not exceeding twelve months.

(6) Anyone found in a house or place where the distillery apparatus, spirits, or materials for the manufacture of spirits are found, or in the vicinity thereof, shall be deemed, unless he prove the contrary to the satisfaction of the magistrate, to be the owner or person in charge of the distillery apparatus, spirits, or materials for the manufacture of spirits."

It will be seen that under subsection (1) if an officer makes oath that there is good cause to suspect that any distillery apparatus, spirits or materials for the manufacture of spirits *is or are unlawfully kept or deposited in any place a justice of the peace may issue a warrant authorising the officer to search the place.*

Under subsection (2) if the officer is *so authorised* he may during the day or by night and if he is not a member of the Police Force, he may by night only in the presence of a police officer or constable break open and forcibly enter the place and seize any distillery apparatus, spirits or materials for the manufacture of spirits found therein. The officer or person not a member of the Police Force must therefore be authorised under a warrant issued in pursuance of subsection (1) and must therefore be authorised to search *for distillery apparatus, spirits or materials for the manufacture of spirits which are unlawfully kept or deposited.*

Under subsection (3) all distillery apparatus, spirits and materials for the manufacture of spirits *so seized* shall be forfeited and the owner of any of those articles or the person in whose custody they are found is made liable for every house or place in which they are found and also for the articles themselves and to a penalty.

Under subsection (6) anyone found in a place where the distillery apparatus, spirits or materials for the manufacture of spirits are found or in the vicinity thereof is deemed to be the owner or person in charge of those articles unless proved to the contrary.

Thus on the analysis of this section it is clear that the appellant could not have been convicted under section 104(3) as the section relates to distillery apparatus, spirits or materials for the manufacture of spirits *which are unlawfully kept and deposited* in any house or place; and there was no proof that the methylated spirits and the bush rum found on the appellant's premises were unlawfully kept or deposited therein for the purposes of that subsection.

Furthermore the word "spirits" appearing in section 104, in our view, must mean "spirits" as defined in section 2 of the ordinance, that is, spirits of any description. Besides, in our view, the mischief sought to be cured by section 104 is that of preventing the unlawful manufacture of spirits.

In addition, with regard to the bush rum found in the appellant's possession, section 89(5) of the Ordinance expressly provides that anyone found possessing any quantity of that substance shall be deemed to be a person unlawfully possessing spirits under section 89(1), and a report under the hand of the Government Analyst certifying that the substance in his opinion is bush rum or contains bush rum shall be *prima facie* evidence of that fact and thereupon the onus of proving the substance is not bush rum is thrown onto the defendant. But for subsection (5) a person in possession of a quantity of rum similar to that in the appellant's possession would not have committed any offence as it is only if one is in possession of more than a pint of spirits without a licence or permit that an offence is committed (see sec. 89(2)). In our opinion the appropriate charge with regard to the bush rum should have been one for the commission of an offence under section 89(1) in view of the provisions of section 89(5); and as we have already pointed out, no offence is committed if a person is merely found in possession of 0.2 of a pint of methylated spirits.

For these reasons we allowed the appeal and set aside the conviction and sentence of the magistrate and awarded the appellant costs fixed in the sum of \$29.20.

Appeal allowed.

CHINTAMANIE AJIT

v.

HORACE MITCHELL, AKBAR KHAN
S. RAHAMAN, JAYME ANTHONY JORGE

[High Court – In Chambers (Vieira, J.) April 15, 29, May 13, 27, June 7, 1969.]

Judge–Action against–For things said or done in judicial proceedings–Barrister and solicitor joined in proceedings–Abuse of the process of the Court–Power of the Court to stay or dismiss–Inherent jurisdiction–Rules of the Supreme Court O. 17 r. 31, 32.

In an earlier action the plaintiff had sued the Commissioner of Police and another police officer for one million dollars damages for malicious prosecution. This action was dismissed by Mitchell, J. The plaintiff then sued Mitchell, J., claiming "reimbursement" for the million claimed from the Commissioner of Police. The Crown Solicitor, Jayme Jorge filed a summons to strike out the action against Mitchell, J., as being an abuse of the process of the court and was represented at the hearing before Khan, J. by Crown Counsel S. Rahaman. The plaintiff did not appear at the hearing and the matter was struck out. The plaintiff then sued Mitchell, J. Khan, J. Crown Counsel Rahaman and Crown Solicitor Jayme Jorge, the defendants in the present action, for one million dollars damages for conspiracy in "stifling" his action against Mitchell, J. Upon a summons to strike out this action.

HELD: – that (i) apart from the power given by rules of Court, the High Court has an inherent jurisdiction to stay or dismiss actions and to strike out pleadings which are vexatious or frivolous or are in any way an abuse of the process of the court.

(ii) a judge of a superior court of record is not liable for anything said or done in the exercise of his judicial functions. Immunity extends to all judges, lawyers, parties and witnesses in respect of things said or done by them in the course of judicial proceedings.

Action dismissed.

The plaintiff in person.

E. Beharry, Crown Counsel for the defendants.

[The plaintiff appealed and VIEIRA, J. gave his reasons for decision].

VIEIRA, J.: No evidence was led in this matter but the pleadings and affidavits in support disclosed the following facts which were not disputed: –

(1) On 5th July, 1966, the appellant filed a Writ of Summons (No. 1471/66 Demerara) claiming the sum of One million dollars (\$ 1,000,000: –) from one Ian Puttock, then Commissioner of Police and one Hampden Stuart, then Sergeant of Police No. 5900, in respect of an alleged incident

that took place on 6th January, 1966, at the corner of Middle and Waterloo Streets, Georgetown, as a result of which he alleged he was unlawfully and maliciously arrested, detained in custody, charged and subsequently prosecuted.

(2) On 5th October, 1967, the action was tried by the first-named respondent, who is a judge of the High Court of the Supreme Court of Judicature of Guyana (hereinafter referred to as Justice Mitchell) who dismissed the claim with costs certified fit for counsel.

(3) On 18th January, 1968, the appellant filed a Writ of Summons (No. 411 of 1968) against Justice Mitchell claiming the sum of one million dollars (\$1,000,000: -) as a reimbursement for the sum he had claimed from Messrs. Puttock and Stuart in the previous action, No. 1471 of 1966, together with additional damages in the sum of one hundred thousand dollars (\$ 100,000:-) with interest at the rate of 6% and also costs.

(4) On 17th June, 1968, the fourth-named respondent, who is the Crown Solicitor of Guyana (hereinafter referred to as the Crown Solicitor) filed a summons on behalf of Justice Mitchell to dismiss Action 411 of 1968 mainly on the ground that it was not competent in law for the appellant to proceed with his action since it was nothing less than an abuse of the process of the court.

(5) On 25th June, 1968, the third-named respondent, who is a Barrister-at-Law, attached to the Attorney General's Chambers (hereinafter referred to as Crown Counsel) appeared as counsel for Justice Mitchell instructed by the Crown Solicitor. The matter was heard in chambers by the second-named respondent, who is a judge of the High Court of the Supreme Court of Judicature of Guyana (hereinafter referred to as Justice Khan). The appellant was in default of appearance and the action was struck out by Justice Khan who awarded costs to Justice Mitchell fixed in the sum of \$75:-

(6) On 17th July, 1968, the appellant gave written notice to the four respondents in accordance with the Justices Protection Ordinance, Chapter 18.

(7) Justice Khan's Order was entered on 31st August, 1968.

(8) On 7th October, 1968 the appellant filed this present action (No. 3346 of 1968) claiming the sum of one million dollars (\$1,000,000: -) jointly and severally against the four respondents as damages for alleged conspiracy in stifling action 411 of 1968.

(9) On 15th April, 1969, the plaintiff filed a summons seeking to insert the words "maliciously and without reasonable or probable cause" after the word 'concert' in paragraph 3 of the indorsement of claim as well as the words "and everyone of the four defendants herein conspired together and acted in concert maliciously and without reasonable or probable cause" between the words 'law' and 'and' in line 7 of page 8 of paragraph 11 of the statement of claim.

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(10) On 8th May, 1969, Crown Solicitor filed a summons accompanied by an affidavit in support asking for an order that Action 3346 of 1968 be dismissed on the ground that the appellant had "no right in law to bring the said action and that the writ of summons and statement of claim should be accordingly struck out as being an abuse of the process of this court.

(11) On 27th May, 1969 I deemed the amendments sought in the indorsement of claim and statement of claim to be in order.

(12) On 7th June, 1969 I upheld the preliminary objection and struck out the writ of summons and statement of claim under the inherent jurisdiction of this court and dismissed Action 3346 of 1968 as being an abuse of the process of this court.

It is from this decision that this appeal has been brought and I now give my reasons therefor.

Counsel for the respondents argued three grounds, viz: –

(a) the summons to strike out was not brought under the Rules of Court 1955 (Guyana) (hereinafter referred to as the local Rules) but under the inherent jurisdiction of this court under which, at any stage, the court could strike out a matter which, in its opinion, amounted to an abuse of its process;

(b) as regards Justices Khan and Mitchell, they are judges of the High Court and, as such, are immune from civil process, and

(c) as regards Crown Counsel and Crown Solicitor, they were equally protected, since it is a necessary corollary that they, as legal advisers to the two High Court judges, were privileged from whatever was done by them in court and, consequently, there could not be any conspiracy between them.

Mr. Ajit, in reply, submitted that: -

(a) this court had no jurisdiction to entertain the summons to dismiss for the reason that the pleadings had been closed and issues joined, hearing requested and hearing fees paid;

(b) the respondents could not go before a judge in chambers after submitting themselves to the jurisdiction of the trial judge because the very same preliminary objection could be taken before the trial judge and, to allow the application, would amount to a multiplicity of proceedings and would cause great delay because if the appellant won this appeal then the matter would have to be sent back to the trial judge for trial;

(c) there is no rule in the local rules which allowed the respondents to make such an application since the only matters that can be dealt with in chambers are laid down in Orders 41 and 43 of the Local Rules;

(d) an application to a judge in chambers to strike out a plaintiff's statement of claim can only be done on the ground that the claim discloses no cause of action and this must necessarily involve looking at the facts, and

(e) this Action had been brought under the Justices Protection Ordinance, Chapter 18, and, in accordance with that ordinance proper notices were served and acknowledged by the respondents and, in the notices, it is clearly stated that they acted "maliciously and without reasonable or probable cause."

Pleadings generally in the High Court in this country are governed by Order 17 of the Local Rules. There are two rules of this Order which relate to the striking out of pleadings and these are contained in r. 31 and 32.

O.17 r. 31 provides as follows:—

"31. The court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action: and may in any such case, if the court or judge shall think fit, order the costs of the application to be paid as between solicitor and client."

O.17 r. 32 states:

"32. The court or a judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action of defence being shown by the pleadings to be frivolous or vexatious, the court or judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

These two rules are in identical terms with O. 19 r. 27 and O. 25 r. 4 respectively of the English Rules of Court 1883 (hereinafter referred to as the 1883 Rules) which have now been conveniently amalgamated into the new English Rules of Court 1965 (hereinafter referred to as the 1965 rules) as O.18 r. 19(1) which provides as follows:—

"19. (1) The court may at any stage of the proceedings order to be struck out or amended any pleadings or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass, or delay the fair trial of the action;
or

(d) it is otherwise an abuse of the process of the court.

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

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It is to be noted that paragraph (l)(d) above did not form part of the 1883 Rules but it has always been accepted as part of the common law that there is an inherent jurisdiction in the High Court of Justice in England to stay or dismiss actions and to strike out pleadings which are vexatious or frivolous or in any way an abuse of the process of that court.

This inherent jurisdiction arose apart from all rules and orders and was a valuable adjunct to the powers conferred on the court by rules of court.

The following cases clearly illustrate this fundamental principle.

In *Reichel v Magrath* (1889) 14 App. Cas. 665, the appellant brought an action against his bishop and the patrons of a benefice claiming a declaration that he was vicar of the benefice and that an instrument of resignation which he had executed was void, and an injunction to restrain the bishop from instituting and the patrons from presenting any other persons to the benefice. The action was tried and judgment given against the appellant on the ground that the vicarage was void by reason of his resignation thereof with the consent of the bishop. Afterwards the respondent, having been duly appointed to the benefice as the appellant's successor, brought an action against the appellant claiming a declaration that he was the vicar and a perpetual injunction to restrain the appellant from depriving him of the use and occupation of the house and lands. In his defence the appellant set up the same case as that on which he had been defeated in the action in which he was plaintiff. In affirming the decision of the Court of Appeal Lord HALSBURY, L.C. said at p. 668 –

"My Lords, I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again. It cannot be denied that the only ground upon which Mr. Reichel can resist the claim by Mr. Magnath to occupy the vicarage is that he (Mr. Reichel) is still vicar of Sparsbalt. If by the hypothesis he is not vicar of Sparsbalt and his appeal absolutely fails, it surely must be in the jurisdiction of the Court of Justice to prevent the defeated litigant raising the very same question which the court has decided in a separate action.

I believe there must be an inherent jurisdiction in every Court of Justice to prevent such an abuse of its procedure and I therefore think that this appeal must likewise be dismissed."

In *Lawrence v Lord Norrey* (1890) 15 A.C. 210 the appellant filed a statement of claim in the Queen's Bench Division in June 1866 against the respondents claiming possession of the Townley Estate in the County of Lancaster alleging that he was the heir at-law of Richard Townley who died in 1706, alternatively, as the heir-at-law of Jonathan Lawrence, the younger, who died in 1816, seised of the premises claimed. A summons was taken out to dismiss the action, on the ground that no reasonable cause of action was

disclosed and that it was frivolous and vexatious. This summons was referred to the Divisional Court by the judge in chambers and, whilst the matter was pending there, the appellant took out a summons for leave to amend which was also referred to the Divisional Court to be heard with the other summons. The proposed amendments were framed with the view of showing such a concealed fraud as would prevent the lapse of time operating, by virtue of the Statute of Limitations, as a bar to the action. It was held that general averments of fraud were not sufficient and that the statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the deprivation of the land sought to be recovered. In default of such allegations the court may, by virtue of its inherent jurisdiction, dismiss the action as an abuse of the procedure, where the claim is incapable of proof and without any solid basis. Lord HERSCHELL, L.C. said at p. 219: –

"It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved."

In *Willis v Earl Howe* (1893) 2 Ch. 545, the plaintiff brought an action of ejectment in 1892 and alleged in his statement of claim that he was the heir-at-law of one William Jennens who died intestate in 1798 through whom the respondent was claiming to be the true heir-at-law and that by virtue of concealed fraud on the part of the respondent and his successors in title he, the appellant, and his predecessors in title had been deprived of the estates in dispute and that such concealed fraud could not with reasonable diligence have been discovered and acted upon until he attained his majority in 1887. The respondent moved to have the statement of claim struck out as being frivolous and vexatious and filed an affidavit setting out facts which showed that the appellant could have discovered the concealed fraud, if any, more than 12 years before the commencement of the action. The respondent without delivering a statement of defence, moved before KEKEWICH, J. to take the statement of claim off the file as not disclosing any reasonable cause of action and to dismiss the action as frivolous and vexatious. In support of his application an affidavit was filed setting out certain facts. KEKEWICH, J. made an order that the statement of claim should be struck out and the action dismissed as frivolous and vexatious. The Court of Appeal upheld the learned judge's decision

LINDLEY, L.J. said at p. 551 –

"But when we look at the affidavit filed by the defendant's solicitor Mr. Tramer—and it has been settled that an application of this kind may be supported by affidavits - it is obvious that this is a most hopeless action. The story about the superstitious child has been circulated since 1853 and the plaintiff's predecessors in title might

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have discovered the fraud long ago, if fraud there was, without any difficulty. The action is utterly hopeless and without foundation and I therefore think Mr. Justice KEKEWICH was right in not allowing it to go on."

In *Chatterton v Secretary of State for India in Council* (1895) 2 Q.B. 189, the appellant, an officer in the Indian Staff Corps, brought an action for libel against the respondents in respect of a communication in writing made by the Secretary of State to an Under-Secretary of State in the course of the performance of his official duty with regard to the treatment of the plaintiff by the Indian military authorities and government. The master made an order dismissing the action as vexatious. This order was affirmed on appeal by the judge in chambers and subsequently by the Divisional Court and the Court of Appeal. Lord ESHER, M.R. said at pp. 190-191: –

"The master, the judge at chambers and the Divisional Court have all come to the conclusion that the action is one which cannot by any possibility be maintained; that it is not competent to a civil court to entertain a suit in respect of the action of an official of state in making such a communication to another official in the course of his official duty, to enquire whether or not he acted maliciously in making it. I think that conclusion was correct. The authorities which have been cited to us appear to show that, as a matter of clear law, a judge at the trial would be bound to refuse to allow such an inquiry to proceed, whether any objection be taken by the parties concerned or not. It follows that such an action as this cannot possibly in point of law be maintained; and that being so, to allow it to proceed would be merely vexatious and a waste of time and money. The reason for the law on this subject plainly appears from what Lord Ellenborough and many other judges have said. It is that it would be injurious to the public interest that such an inquiry should be allowed, because it would tend to take from an officer of state his freedom of action in a matter concerning the public weal. If an officer of state were liable to an action of libel in respect of such a communication as this, actual malice could be alleged to rebut a plea of privilege, and it would be necessary that he should be called as a witness to deny that he acted maliciously. That he should be placed in such a position, and that his conduct should be so questioned before a jury, would clearly be against the public interest and prejudicial to the independence necessary for the performance of his functions as an official of the state. Therefore the law confers upon him an absolute privilege in such a case."

In *Higgins v Woodhall* (1889) 6 T.L.R. 1 C.A. an action had been brought in New York by a person named Martin acting as the committee in lunacy of one John Gill, who subsequently died, against the present defendants for obtaining from John Gill by fraud and duress certain property, and judgment was given for the plaintiff in that action for £15,000.

The plaintiff who was the administrator of John Gill brought the present action upon this judgment and the defendants applied for the action to be stayed until the costs of a previous action between the same parties had been paid. The Divisional Court held that they had no jurisdiction to stay the action and accordingly dismissed the application. The Court of Appeal dismissed an appeal from the Divisional Court. Lord HALSBURY, L.C. delivering the judgment of the court said that –

he had no doubt that the court had jurisdiction to interfere in the way suggested, and that their jurisdiction was not limited to the power given by Order XXVI Section 4. But that jurisdiction would only be exercised in the case of vexatious proceedings, and a judicial discretion must be used as to what proceedings were vexatious. The court must not prevent a suitor from exercising his undoubted rights on any vague or indefinite principles.

In *Vinson v The Prior Fibres Consolidated Ltd.* (1906) W.N. 209, the plaintiff sued on behalf of himself and all other shareholders of an American company and claimed eight declarations in respect of the transfer of the property of the company in which he was a shareholder to a new company and also in respect of various acts of the defendant who was the secretary, director and treasurer of the old company. The defendant applied by summons that the statement of claim be struck out and the action dismissed against him "under the inherent jurisdiction of the court" and on the ground that the statement of claim disclosed no cause of action against him and was frivolous and vexatious. The defendant tendered an affidavit in support of his application when the summons came up for hearing in chambers. The plaintiff objected to its admission and the question before the court, on the adjournment of the summons, was whether this affidavit was admissible or not. The affidavit in question went to show that the old company in America had long since been dissolved and that no relief could now be claimed on behalf of any of its shareholders. KEKEWICH, J. said that—

'it was not necessary to put into the notice the words "under the inherent jurisdiction of the court," as, if it was a properly drawn application, it would invoke the inherent jurisdiction of the court as well as that given by Order XXV r. 4. In the case of *Willis v. Earl Home* (1893) 2 Ch. 545, an affidavit was admitted in support of a similar application, and for the purpose of destroying the plaintiff's case. Although the affidavit in the present case might turn out to be useless, his Lordship could not reject it in the first instance and the summons must be sent back to the master with an intimation that he was to receive the affidavit.

In *Webster v Bakewell Rural District Council* (No. 2) (1916) 115 L.T. 673, a local authority, in order to repair the surface of a highway, cutaway part of a bank at the side of the road which was believed to have been formed of gradually accumulated road scrapings. The yearly tenant of

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an adjoining small cottage and garden brought an action against the local authority, alleging that the partial removal of the bank had rendered his wall unsafe. Held, that the bank in question was between the boundaries of the original highway and that the removal of a portion of it had not materially affected the support to the plaintiff's wall. ASTBURY, J. then went on to say at p. 679 –

"The plaintiff has no substantial interest in the property, nor has he suffered any real damage. Mr. Thornhill's action was therefore a piece of useless litigation and an abuse of process which, in my opinion, ought not to be encouraged. I therefore dismiss the action with costs under the Public Authorities Protection Act."

These authorities, to my mind, clearly show that, apart from any rule or order there is an inherent jurisdiction in the High Court of the Supreme Court of Judicature of Guyana equally with the High Court of Justice in England to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process. But this great and valuable power ought not to be exercised willy-nilly but should be limited strictly to exceptional circumstances where it is perfectly clear that the claim cannot succeed or cannot be proved or is without any solid basis. The proper course where an action is frivolous or vexatious or an abuse of process is to dismiss it and, in so deciding, the court is entitled to go into the facts and, affidavits as to those facts, are admissible. In deciding whether to exercise its discretion, the court must act judicially, and must not debar a plaintiff from exercising his undoubted rights upon any vague or indefinite principle.

Although both rules 31 and 32 of Order 17 of the local rules speak of "at any stage of the proceedings" it is always advisable to make an application promptly and, as a rule, before the close of the pleadings or the court may, in its discretion, decline to exercise the jurisdiction - *Cross v Home* 62 L J. Ch. 342, where it was refused after the action had been set down for trial and was only forty out of the list. But in *Tucker v Collinson*, 34 W.R. 354 BRETT, M.R. was of the opinion that the application could be made even after the pleadings were closed.

In England, applications to strike out pleadings are made in the Chancery Division by summons or motion and in the Queen's Bench Division by summons to the master in chambers either on a summons for directions or by ordinary summons which should specify those parts of the pleadings which the applicant desires to have struck out – *Williamson v London and North-Western Railway* (1879) 12 Ch. D 709.

It was my opinion that the Crown Solicitor had properly come by way of summons in chambers to dismiss this action even at the stage that he did and it seemed to me that the appellant could not really say he was surprised because since 14th January, 1969, at least, when the defence was filed, he had knowledge that the respondents would take a preliminary point of law that the statement of claim disclosed no cause of action against the

defendants and that the action was therefore not maintainable and ought to be dismissed—vide para. 8 of the defence.

I had, and have no doubt whatsoever, that in view of the nature of this action the appellant had absolutely no chance whatsoever of succeeding, and his proper remedy was surely to have appealed against the decision of Justice Mitchell in dismissing Action 1471/66.

I take it to be well settled law that a judge of a superior court of record is not liable for anything said or done in the exercise of his judicial functions however malicious, corrupt or oppressive be the words or acts complained of. I need only to refer to three cases to show that this is clearly the law.

The first case I shall refer to is that of *Rosanna Fray v Sir Colin Blackburn, K.T.* (1863) 122 E.R. 217, where the plaintiff brought an action against one Henry Voules before the defendant, one of Her Majesty's Judges of the Queen's Bench Division. On 15th January, 1867 the plaintiff obtained a rule nisi of the same court against Voules for the payment of costs occasioned by adjournments. The rule came up for argument before the said judge on 28th January and he discharged the rule with costs.

It was argued on behalf of the defendant that no action lies against a judge of one of the superior courts for anything done by him in his judicial capacity. Further, the declaration was bad in that it did not allege malice and also defective in that it did not allege want of reasonable and probable cause. The court, consisting of COCKBURN, C J. WIGHTMAN, CROMPTON and MELLOR, JJ. gave judgment for the defendant on 27th January 1863: the plaintiff in person applied for leave to amend her statement of claim by introducing an allegation of malice and corruption. CROMPTON, J. said at p. 217-

"It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be allowed to have been done maliciously and corruptly, therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges, and prevent their being harassed by vexatious actions. In the present case, there can be no doubt that the action is most improper and vexatious."

Per Curiam (CROMPTON and MELLOR, JJ)

"Leave to amend refused."

The second case to which I shall refer is *Scott v Stansfield* (1868) 3 Ex: 220 where the plaintiff alleged that the defendant, a County Court judge, maliciously and without any reasonable or probable cause and not on any justifiable occasion told the plaintiff, who was the defendant in an action before him and who was sitting in court at the time that he was "a harpy preying on the vitals of the poor."

In the Court of Exchequer KELLY, C.B., said at p. 223 –

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"The question arises, perhaps for the first time with reference to a county court judge, but a series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action will be against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts but to the court of a coroner and to a court-martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequence."

The third and last case is that of *Anderson v Gorrie and others* (1895) 1 Q B 668 C.A. which was an action brought against three defendants, who were judges of the Supreme Court of Trinidad and Tobago, to recover damages for certain acts done by the defendants in the course of certain judicial proceedings, which acts were alleged to have been done maliciously and without jurisdiction and with knowledge of the absence of jurisdiction. Lord Esher, M.R. said at p. 671 –

"To my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office. If a judge goes beyond his jurisdiction a different set of considerations arise. The only difference between judges of the Superior Courts and other judges consists in the extent of their respective jurisdiction."

As regards the immunity of Crown Counsel and Crown Solicitor I think that this is adequately covered by the valuable judgment of Brett, M.R. in *Munster v Lamb* (1883) 11 Q.B.D. 588, which was an action against a solicitor for words spoken of the plaintiff by the defendant while he was defending a client at petty sessions. The defamatory suggestion made by the defendant was unsupported by any evidence in the case. The learned Master of the Rolls in delivering the judgment of the court comprising himself and Fry L.J. assumed, for the purpose of his decision, that the defendant spoke the words maliciously and without any justification but, nevertheless, held that no action would lie against the defendant for uttering those words. Brett, M.R. said this –

"Certain persons have been specified in decided cases as persons to whom this privilege does apply: they are judges, advocates, parties and witnesses: with regard to three of these four classes – that is, to all

except advocates – there are undoubtedly decisions to that effect. The reason for the rule is not anything peculiar to a witness or a party, but the reason is that the rule is necessary for the due administration of the law and for the benefit of the public at large - that is, the reason for the rule is public policy. If it is right and wise that such a privilege shall be extended to a judge, even though what he says is said with malice, even though it is irrelevant and spoken without reasonable and probable cause—and if the privilege is equally given to a witness who speaks or acts in a similar way—how can it be understood that it is not equally, I would say more, beneficial to the public that a counsel and an advocate should come to the performance of his duty with an equally free and unfettered mind? If anyone needs to be free of all fear in the performance of Ms arduous duty an advocate is that person. His is a position of difficulty: he does not speak of that which he knows, but he has to argue and support a thesis, which it is for him to contend for: he has to do this in such a way as not to degrade himself: but he has to do it under difficulties which are often pressing. If in this position of difficulty he had to consider whether everything which he uttered were false or true, relevant or irrelevant, he could not possibly perform his duty with advantage to his client: and the protection which he needs and the privilege which must be accorded above all for the benefit and advantage of the public. If this be so, then most certainly the reason for the rule covers an advocate more than it would a witness, as it is of the last importance that he should be able to keep his mind clear, calm and free. In such a case, then, the question of malice cannot be raised, the question of bona fides cannot be raised, the question of relevancy cannot be raised, the only question which can be raised is whether what was said in the course of the administration of the law; and if that be so, then the action against an advocate must be stopped, since for words so uttered neither civil action nor criminal prosecution can be maintained."

The statement of claim in this matter, many parts of which were rambling and repetitive and some actually incomprehensible, in particular paragraph 13, clearly showed, to my mind, that whatever acts the appellant alleged were done by Justice Mitchell in dismissing Action 1471 of 1966 were judicial acts done within his jurisdiction and not ministerial as alleged by the appellant.

His allegation that, as Action 1471 of 1966 was one of fact, he was accordingly deprived of appealing to the Court of Appeal and the Privy Council, is clearly bad law since an appellate court does have the right to upset a judge on questions of fact where it is of the opinion that the judge's conclusion on the facts is unreasonable or cannot be supported having regard to the evidence adduced.

His complaint against Justice Khan, as I understood it, was not only under a purported ground of prejudice in that he had sued that judge but,

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also, that Justice Khan was without jurisdiction when he heard the summons to dismiss filed on behalf of Justice Mitchell by the Crown Solicitor on 17th June 1968 since, at that time, no application or request for hearing had been filed (vide paragraph 2 of indorsement of claim). This of course is ridiculous. The summons to dismiss of 17th June 1968 was not an originating summons but a summons to dismiss which, under O. 17 r. 31 or 32, can be made at any stage of the proceeding and, which, apparently, at that time, had been made before defence had been filed.

As regard the Crown Solicitor and Crown Counsel he made the barest allegation that they knew that the appellant had sued Justice Khan and that the two of them got together to stifle action 411 of 1968 I must confess that I did not quite understand what the appellant meant by the word 'stifling'. I considered it rather significant that nowhere in his statement of claim does the appellant complain or deny that he was not present when Action 411 of 1968 was struck out. He gave no reason why he was not there but I gained the impression, from the way the pleadings were drafted by the appellant himself, that as he felt that Justice Khan had no jurisdiction to hear Action 411 of 1968 then there was no need for him to be present.

Even accepting that I was wrong in granting the amendment to the statement of claim sought of the appellant by the insertion of the words "maliciously and without reasonable or probable cause," this did not effect the merits of my decision, because as CROMPTON, J. pointed out in *Frey v. Blackburn* (ubi supra), such an amendment would not make good an action that obviously could not succeed as a matter of law, as was the case here.

The appellant is a man well-known to both the High, Court and the Court of Appeal of this country—this is undoubtedly a notorious fact. He is a man with a tremendous zest for litigation and there can be no doubt that he is very much au fait with the procedure governing civil actions in the High Court and with the local rules. But it is a great pity that he does not use his talents to more constructive purposes and it seems to me that, however much it may be distasteful to place a brake upon a citizen's constitutional and legal rights, nevertheless, this particular appellant ought not to be permitted to make scandalous, disrespectful and often unfounded statements in actions which, apparently, he takes a pleasure in bringing against high government officials and Her Majesty's judges in particular.

In *Chintamanie Ajit v Her Majesty's Attorney General for British Guiana* (Action 2409/62) (unreported decision No. 22 of 1964) the appellant sued the Attorney General for the very large sum of Five Million dollars (\$5,000,000) alleging, inter alia, that Her Majesty's justices were corrupt and biased against the East Indian population of Guyana of which he was one. CRANE, J. (as he then was) had no hesitation in summarily striking out the offending paragraphs under the court's inherent powers to prevent abuses of its process and said this at p. 3 –

"The appellant is a presumptuous fellow and it is lamentable that his scornful abuse of Her Majesty's Judiciary was not appreciated by her Law Officers whose obvious course (which is the least they could have done) was to apply under order 34 rule 41 of the Rules of Court to have the offending portions of the affidavit struck out as scandalous."

I submit that the time is now ripe when representations be made to the Honourable the Attorney General that legislation be introduced in this country similar to section 51 of the Supreme Court of Judicature (Consolidation) Act, 1925, sub-section 1 of which provides as follows: –

"51(1) –If, on application made by the Attorney-General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings whether in the High Court or in any inferior court and whether against the same person or against different persons, the court may . . . order that no legal proceedings shall without the leave of the High Court or a judge thereof, be instituted by him in any court. . ."

By section 1(1) of the Supreme Court of Judicature (Amendment) Act, 1959, the following words were inserted after the words "in any court" above, viz: –

"and that any legal proceedings instituted by him in any court before the making of the order shall not be continued by him without such leave."

In *Re Vernazza* (1960) 1 All E.R. 183, C.A. ORMEROD, L.J. said at p. 185 –

"The words of the section are "without any reasonable ground instituted vexatious legal proceedings." They are referring to legal proceedings, and the question is not, whether they have been instituted vexatiously, but whether the legal proceedings are in fact vexatious. I suppose most proceedings are vexatious to the persons against whom they are directed, and therefore, the further question has to be considered whether, though they may be vexatious, they have been brought without any reasonable ground. That is a matter for the court to decide. But if, in the opinion of the court the proceedings are vexatious and there is no reasonable ground for bringing them, then they are within the category at which this section aims.

For these reasons the writ of summons and the statement of claim were struck out under the inherent jurisdiction of this court and the action dismissed as an abuse of the process of this court and costs were awarded to the respondents fixed in the sum of \$ 80.00.

Action dismissed.

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[Court of Appeal (Luckhoo, C., Cummings and Crane, JJ.A)
February 12, April 17, June 18, 1969].

Divorce—Roman-Dutch law—Malicious desertion—Constructive desertion—Whether constructive desertion is a concept recognised by Roman-Dutch law—Matrimonial Causes Ordinance Cap. 166.

After abuse and threats by the wife to kill the husband he removed from the matrimonial home and petitioned for divorce on the grounds of malicious desertion and cruelty and was granted a decree nisi on these grounds by the trial judge.

It was argued on appeal that the husband's case was one of constructive desertion which did not form part of the law of Guyana as a ground of divorce.

HELD—that constructive desertion was known to Roman-Dutch law in its concept of malicious desertion and that the trial judge was justified in granting the decree nisi on the ground of malicious desertion.

Appeal dismissed.

B.S. Rai, for the appellant.

C.W. Hamilton, for the respondent.

LUCKHOO, C.: The appellant, the wife of a union which for the most part was not blessed with matrimonial felicity, seeks a reversal of the order of the trial judge granting her husband, the respondent, a decree nisi on his petition for divorce, and asked instead that a decree nisi be pronounced in her favour on her answer and cross-prayer.

It was after five years of inharmonious relationship that the husband petitioned the court for a dissolution on the grounds of desertion and cruelty. In her answer, she resisted his claims and alleged that it was he who was cruel to her; that he had left her without any just cause or excuse; that she was always willing to resume cohabitation with him and was still willing to do so. She subsequently filed an amended answer and cross-prayer alleging that her willingness and efforts to resume cohabitation were wholly rejected, and in the circumstances prayed for a dissolution of her marriage because of cruelty and desertion.

The husband, in his evidence at trial, recounted the occasions when his wife taunted, humiliated and abused him, assaulted and subjected him to acts of cruelty, and threatened and terrorized him. These, in effect, were said to make life so unbearable and intolerable that he was literally forced to flee on the 10th August, 1966, from the home of her parents where he had been residing with her eighteen months before, after his own home had been

stoned and bombed as a result of certain civil disturbances which had occurred.

It was not disputed that after the 10th August they never shared each other's society. The ultimate breaking-point came about in this way: On the day before, that is, the 9th August, his wife had threatened to kill him and to get her former husband to burst his head if he did not leave the home. In this incident of hostility, the wife, he said, went on to ask him if he ever saw a man's head separated from his body. With what degree of earnestness these words were spoken it would be difficult for a court to assess, but it is a fact that he kept awake for the whole of that night until daybreak, and, in his own words, left "just in time to escape a cutlass attack". That was on the morning of the 10th August. This forced him to seek refuge at the home of his brother-in-law, one Albert Kandasammy, a detective-constable, after which there was never any resumption of cohabitation, although the wife subsequently went and begged him to return, but he told her she had "scared him for his life".

On the evidence of Kandasammy, it would appear that the wife, on the occasion of that visit, became abusive and cursed him. This could hardly be termed an attitude of penitence or contrition for her conduct in bringing about his departure from the home.

But a proper understanding and judgment of what transpired on the 9th and 10th August requires some reference to the history of the marriage. This revealed that the appellant was in the habit of using filthy and abusive language to her husband, a schoolmaster and at one time a Catechist of the Church. How distasteful and irksome this must have been to him could hardly be questioned! But her unsavoury attitude was not confined only to smothering him with abuse; she was also offensive in the use of violence on him. On one occasion she stabbed him with a kitchen knife causing actual bodily harm. On another occasion she wounded him with a grater; and on yet another occasion threw hot water on him. Then she would indulge in the habit of taunting him about his lack of virility and making odious comparisons between himself and her former husband, which must have been as disgusting to him as it was provoking. This she actually climaxed by expressing an intention of living again with her former husband or of having another man.

Once at her parents' home, he was attacked by the father with a cutlass and her mother with a stick, as a result of which he was forced to lock himself in a bedroom. But despite his wish that they should set up their own home, she insisted that if he got another home she would take another man and not join him. And it was to please her that he continued to live at her parents' home.

In continuing to live there, he faced the prospect of violence, but what was he to do when his wife was unwilling to live elsewhere?

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It is true that he himself did admit assaulting his wife on one occasion with a piece of galvanised pipe, but he explained that this had occurred under the stress of great provocation when she had called him an ass and made disparaging comparisons between him and her former husband, a canecutter, with the condemnation that he was a "no-good" and was too old for her. But, for this solitary lapse, he duly made an ample apology.

The learned trial judge was impressed with the frankness and candour of the husband's testimony. He found him to be a credible witness, and also believed the witnesses called on his behalf. As a result, he granted a decree *nisi* on grounds of cruelty and malicious desertion. On the other hand, he did not find in favour of the wife's cross-petition and so dismissed same.

From that order the appellant appealed to this court on two grounds:

- (a) That the judgment was unreasonable and against the weight of the evidence.
- (b) That the learned trial judge had erred in applying the law relating to malicious desertion to the facts and circumstances of the case.

With regard to the first ground, I cannot find that the judgment of the trial judge was demonstrated to be affected by any material inconsistencies or inaccuracies. Nor was it shown that he had failed to appreciate the weight or bearing of circumstances admitted or proved, or that in some other way he had gone wrong. This court cannot say that he ought to have believed the wife and not the husband. In matrimonial cases, especially, it is so necessary to see the parties as they give their evidence to judge as to their credibility because, to quote the words of Lord THANKERTON, in *Watt v. Thomas*, (1947) 1 All E.R. 582 at p. 587: "The law has no footrule by which to measure the personalities of the spouses."

The second ground of appeal vigorously pressed on us, and with a great deal of conviction, by counsel for the appellant, was that it could not be truly said that constructive desertion forms a part of the law of this country as a ground of divorce, and the husband's case rested on that basis and so he was not entitled to a decree. This proposition arises from the fact that the Matrimonial Causes Ordinance, Cap. 166, section 91, which enumerates the grounds on which a petition for divorce may be presented, does not speak of desertion simpliciter, but of malicious desertion. This, counsel argues, is a concept rooted in Roman-Dutch law with a meaning peculiar to itself, and does not include constructive desertion as is known to English law. He asks this court to reconsider whether its decision in *Siebs v. Siebs*. (See elsewhere in this volume) was a correct one. He said he had consulted Nathan's "THE COMMON LAW OF SOUTH AFRICA", page 280 onwards, which does not appear to deal with any doctrine of constructive desertion; that he was unable to trace any case of malicious desertion (founded on constructive desertion) in the 'DIGEST ON SOUTH AFRICAN CASE LAW' (to the end of 1905) compiled by Murray Bisset; that in "THE THEORY OF

THE JUDICIAL PRACTICE OF THE COLONY OF THE CAPE OF GOOD HOPE AND OF SOUTH AFRICA GENERALLY" by C. H. Van Zyl, 2nd Ed., 1902, at page 487, there appears the following statement: "The deserting party, though the desertion be for good reasons, cannot bring an action for desertion"; and he asked the court to conclude that where one party left for good reason, at the most it could only be used as a "shield" and not as a "sword" in charges of malicious desertion under the Roman-Dutch common law.

The matter will be reconsidered for the purpose of trying to ascertain whether this court incorrectly decided this point in *Siebs v. Siebs (supra)*.

From and after 1st January, 1917, the Roman-Dutch law which, before then, used to apply to all questions relating to husband and wife, marriage, separation and divorce, with certain exceptions, ceased to apply to this country. The Matrimonial Causes Ordinance, Cap. 166, which was enacted two days before, that is, on the 30th December, 1916, anticipated this abrogation and provided for malicious desertion as a ground of divorce. WARD, J., with justification in *Melbourne v. Melbourne*, (1950) L.R.B.G. 63 at page 66, said:

"It is clear, to my mind, that in interpreting the meaning of malicious desertion under the Matrimonial Causes Ordinance, recourse must be had to the concepts and established practice under Roman-Dutch law, since malicious desertion, as distinct from desertion, is unknown to English law. I must take it, as Verity, J., did in *Matthews v. Matthews*, (1936) L.R.B.G. 459, that the Legislature, in using this term intended to retain the principles of the Roman-Dutch law as to malicious desertion."

In order to appreciate what this concept of malicious desertion embodied, it will be necessary to lift the veil of its historical past and see how and in what form it was introduced into this country with the advent of Dutch imperialism.

Art. 18 of the Political Ordinance of the States of Holland and West Vriesland of 1st April, 1580, which applied to Essequibo and Demerara by virtue of Art. 59 of the Order of Government of the States General of October 13, 1629, provided for divorce on the ground of adultery, but not on the ground of malicious desertion. (See Vol.2 of the 1895 edition of the Laws of British Guiana, Appendix A, and Vol. 1 of BURGE'S FOREIGN AND COLONIAL LAWS, 1907, p. 119.).

Whilst the exact time that malicious desertion was admitted as a ground of divorce is a matter of some uncertainty, yet it was known as early as 1623. And the law relating thereto was later embodied in a Placaat of the 18th March, 1656, the 91st section of which is as follows:

This was, in effect, the very foundation of the law of malicious desertion.

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"Anyone who, frivolously or maliciously leaves his spouse, or who, on any intolerable grounds, withdraws himself from the marriage bond or goes away and leaves his spouse with the intention of not returning to her again, leaves the innocent party free to re-marry, and when the innocent party has for long but to no purpose employed other means to get the guilty party back, he may complain to the judge of the place where he resides who, after due enquiry, and being satisfied of the desertion, and after duly summoning the deserter, may grant leave to the innocent party to re-marry and shall, moreover, condemn the deserting party to abandonment from the country". This was, in effect, the very foundation of the law of malicious desertion.

The application of the Political Ordinance to Essequibo and Demerara was continued by resolution of the States General of October 4, 1774, but the resolution also extended to the colonies "all the laws of Holland in general and, more particularly, all laws, statutes, resolutions and ordinances of Their High Mightinesses . . . transmitted to the colonies." (See Vol. 1 of the 1895 edition of the Laws of British Guiana at page 1). Presumably, one of the laws so transmitted must have been the Placaat of 1656, for reference to this as the basis of the law is made in the local case of *Glasgow v. Glasgow*, reported in the Official Gazette of the 12th December 1904, at page 1570. In that case, LUCIE-SMITH, Acting Chief Justice, sitting with HEWICK, J., and HUDSON, J. (ag.), said at p. 1570:

"Under the Roman-Dutch law, malicious desertion is a ground for dissolution of marriage. It is made so by the Placaat of 18th March, 1656, section 91. By that section of the Placaat, the court may grant to the innocent party leave to re-marry when he has employed to no purpose every means to get the guilty party back. . . . The innocent party had to bring two actions. He had first to obtain an order for restitution of conjugal rights, and then, if no cohabitation, he could bring an action for dissolution of the marriage. This is the settled practice of the Roman-Dutch law as is shown in the cases collected in 1 Menzies 252 commencing with the case of *Campbell v. Campbell*."

It may be convenient at this stage to observe that the procedural requirement of having first to obtain a decree for restitution of conjugal rights, which could only lead to a divorce if disobeyed, was eliminated by section 2 of the Matrimonial Causes Ordinance, which provided for the jurisdiction of the Supreme Court to be exercised as far as possible "in the same manner and in accordance with the same principles and rules as jurisdiction in those matters is exercised by the Probate, Divorce and Admiralty Division of the High Court of Justice in England" (subject to certain relevant Rules of Court and other Ordinances). This section, then, whilst virtually discarding the Roman-Dutch matrimonial practice and substituting what prevails in England, still left the Roman-Dutch concept of malicious desertion untouched.

Does the Placaat of the 18th March, 1656, then in any way demonstrate any tendency to embrace the doctrine of constructive desertion?

Let us look at the language. It granted relief to the innocent party who did not "frivolously or maliciously" leave the other spouse, or who did not "on any intolerable grounds" withdraw from the marriage bond. Was this relief to be denied the innocent spouse who was forced to flee from the brutality of a partner scheming thereby to secure an absence which suited his purpose, or who, with deliberation and determination, contrived by other forms of intolerable behaviour to force the other to leave the home? Does the robber who, at the point of a gun, secures the surrender of his victim's possessions through fear, escape the consequences of his act because the booty was surrendered? Is not the true "deserter" the architect of the desertion whose malice is the coercive force which controls and secures the other's departure? It could only be a question of time before the concept was given due appreciation.

Courts have so often to construe and pronounce upon what is done, not in a literal sense, but to give due effect to what is intended. This was so well expressed by Lord DENNING in *British Movietonews Ltd. v. London & District Cinemas Ltd.*, (1950) 2 All E.R. 390, a case in which the words of a contract indicated one thing, but the parties intended another. At page 396 His Lordship said:

"The day is gone when we can excuse an unforeseen injustice by saying to the sufferer: 'It is your own fault. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself.' We no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of Chalmers. We realise that they have their limitations and make allowances accordingly. It is better thus. The old maxim reminds us that: '*Qui haeret, in litera haeret in cortice*', which, being interpreted, means: He who clings to the letter, clings to the dry and barren shell and misses the pit and substance of the matter."

The strict interpretation of the Placaat under Roman-Dutch law certainly did not cling to the letter when it laid down that a continuous withdrawal from the connubial bed is held to amount to malicious desertion.[See VAN LEUWEN'S ROMAN-DUTCH LAW, 2nd Ed., Vol. 1, at page 120(f)] Van Zyl, in his JUDICIAL PRACTICE OF SOUTH AFRICA, at page 487, puts it thus: "When either spouse obstinately refuses the other the privileges of the marriage and remains there obstinate and determined, it is also a direct cause for divorce ... as constituting malicious desertion" (and I emphasize the words which follow) "*it may also be implied from the general conduct of the parties.*"

This, to my mind, clearly establishes that from very early times there was the clear realisation that to do justice to the provisions of the Placaat, it was sometimes necessary to look at the general conduct of the defendant to

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see whether malicious desertion could be properly implied; as, in the case when there is a withdrawal from the connubial bed.

This is supported by other writers. GEORGE WILLE, in his "PRINCIPLES OF SOUTH AFRICAN LAW", at page 126, said:

"Malicious desertion is the act of one of the spouses, without just and sufficient cause, of leaving the joint residence and of staying away with the intention, either originally or later, of not returning; or, the persistent refusal, without good reason, of the marital privileges In addition, malicious desertion is constituted of what is termed constructive desertion, namely, where the offender does not actually leave the joint household, but his conduct is such that he is substantially responsible for the separation, and intended to bring it about. For example, where the husband orders his wife to leave the house, or where his conduct is so intolerable as to compel her to leave him, such intolerable conduct may be constituted by wilful failure by the husband to support his wife or children by his beating her severely on more than one occasion, or by habitual intemperance on the part of the husband or of the wife. Similarly, where one of the spouses leave the other and subsequently makes *bona fide* efforts to return, but the other spouse refuses to take back the former, the conduct of the latter spouse amounts to malicious desertion."

In LEE'S ROMAN-DUTCH LAW, 5th Ed., this paragraph appears:

"It must be noted that cruelty is not in South Africa, as it now is in England, a ground for a decree for a divorce, but is an element to be taken into account in determining whether the conduct of the defendant amounts to what is called constructive desertion, this conduct on the part of either spouse compelling the other to go away, provided that (as in all cases where divorce is sought on the ground of malicious desertion) it clearly indicates an intention to bring the marriage to an end."

And in LEE & HONORE ON THE SOUTH AFRICAN LAW OF PROPERTY, FAMILY RELATIONS AND SUCCESSION, at page 102, para. 368, it is said:

"The court will decree a divorce on the ground of malicious desertion against a spouse who persistently and wilfully refuses marital privileges to the other, or who by cruelty or misconduct forces the other to leave."

A number of cases are referred to, but, unfortunately, most of them are unavailable in this country. I have only been able to secure two of the number of reports referred to, which may be useful for the purposes of this judgment. They are *Rankin v. Rankin*, (1908) Vol. 30, Natal Law Reports, p. 109, and *Palser v. Palser*, (1914) South African Law Reports, at p. 201. In the former, the husband's conduct was considered. He was in the habit of

drinking excessively and forced the wife by his behaviour to leave the home. The circumstances are set out in the judgment of BALE, J., at page 112. He distinguishes his judgment in a previous case (*James v. James*—22 N.L.R. 265), and went on to say:

"I think, however, that case is distinguished from this in respect that there the wife left the husband, who was an inebriate, because their furniture had been seized and sold in execution. The wife left the husband, and made no attempt to get him to provide her with a home. In the course of my judgment in that case, I quoted from a decision then in the WEEKLY NOTES, in which Lord Justice Collins, now Lord Collins, said: 'No one can desert who does not actually and wilfully bring to an end an existing state of cohabitation.' And then further on he said: 'The original cause of the separation was the refusal of the wife to comply with the ordinary conditions of married life.' Now, I ask myself the question, did not the defendant by his conduct terminate the state of cohabitation. I think he did. He neglected his duties as a husband. He went away from her, stayed away from her, and, though they resumed cohabitation for a few days, he failed and neglected, notwithstanding her request, to provide her with a home. He, by his conduct, refused, or made it impossible, to comply with the ordinary conditions of married life. Although the defendant did not in so many words refuse to comply with the conditions of married life, he made it impossible for her to live with him, because he did not support her, and she could not live with him while the guest of her friends."

In *Palser v. Palser*, SEARLE, J., said at page 203:

"It was unreasonable to expect her to remain in the house under the circumstances detailed in her evidence. Under the circumstances I think the plaintiff is fully entitled to maintain this action, and to the order she asks for."

Let us now turn to cases which have occurred in this country, in which the courts have had to decide what amounts to desertion under Roman-Dutch law. I say hinder Roman-Dutch law' because the ordinance under which the courts were called upon to -adjudicate on the concept of desertion, was an ordinance in the year 1905, that is, Ordinance No. 19 of 1905, section 2 of which made provision for an application to the magistrate for a wife who complained of desertion. In that year, the Roman-Dutch law applied to this country and so desertion there must be taken to be malicious desertion under Roman-Dutch law, just as when Roman-Dutch law was about to be abrogated, malicious desertion was specifically mentioned under the Matrimonial Causes Ordinance, 1916, to indicate the retention of the Roman-Dutch concept.

The first case I would refer to is, *The Administrator-General, Curator of Gomes v. Gomes*, (1893) 3 L.R.B.G. N.S. 67. It was a case where an insolvent, scheming to acquire his minor wife's property, was obliged to run

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away to Surinam to avoid criminal prosecution, but there was evidence that the court considered satisfactory that before the flight he beat the plaintiff with a rope and a balata whip, in consequence of which she took refuge in her mother's house. This beating took place on more occasions than one. It is clear that the court, which comprised ATKINSON and KIRKE, JJ., relied substantially on this finding in coming to the conclusion that the husband had been proved guilty, *inter alia*, of conduct which amounted to desertion.

Then there is the case of *Mariai v. Vythalingam*, a case in which that eminent judge and jurist, Mr. Justice DALTON, in 1919 pronounced upon the meaning of 'desertion' under the same ordinance of 1905 to which I have already referred. In that case, the husband sent a telegram to his wife's parents, which was a false telegram which caused them to attend at his house, and then he told them that he did not want his wife. The parents, to use the words of the judge, "in order to prevent the girl from being put on the dam, took her away from the home". It was argued on appeal before Mr. Justice DALTON that it was the wife who had deserted because she left with her parents and went away from the matrimonial home. But Mr. Justice DALTON did not agree with the argument. He narrated the facts and went on to use an English case which contained the concept of constructive desertion to rule as follows:

"On the authority of *Charter v. Charter*, (65 J.P. p. 246), to constitute desertion it is not necessary that the husband should actually have turned his wife out-of-doors. It is sufficient if by his conduct he has compelled her to leave the house, the question being whether it was his intention to break off matrimonial relations. Here the defendant clearly showed his intention to break off all relations with his wife. The appeal is therefore dismissed."

Then I would like to refer to the case of *de Florimonte v. de Florimonte*, a decision of the Full Court, (1947) L.R.B.G. at p. 79, in which it was held that a husband cannot put an end to constructive desertion on his part unless he proves genuine repentance and sincere and reasonable attempts to get his wife back. In the course of his judgment, LUCKHOO, J. said: "Desertion is not a single act complete in itself, but is manifested by a course of conduct on the part of the husband terminating with the last act which drives the wife from the matrimonial home."

The case of *Rayman v. Rayman*, (1949) L.R.B.G., contains a very illuminating judgment of WORLEY, C.J. in the course of which he refers with approval to a passage in RAYDEN ON DIVORCE, 4th ed., para. 128 of Cap. 2, which seems to state the law with a great deal of clarity, and he utilises that pronouncement in order to find for the wife on the basis of constructive desertion. That passage reads as follows:

"The party who intends to bring the cohabitation to an end and whose conduct in reality causes its termination, commits the act of desertion; the weight of the fact that the spouse took the step of leav-

ing the matrimonial Home depends upon the other facts; there is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation and does so by leaving his wife and that of a husband who, with like intent, obliges his wife to separate from him. So if a husband, having the desire and intention to separate from his wife, orders her to leave him, the separation must be 'attributed to him and amounts to desertion; and such desertion will not be terminated unless the deserting spouse makes sincere and reasonable attempts to bring the desertion to an end.'

The last local case to which I would refer is *Stephen v. Stephen* (unreported) in which STOBY, J. (as he then was) said:

"I am persuaded that, broadly speaking, there is no distinction between the concept of desertion in the Roman-Dutch interpretation of malicious desertion except in this one respect; that under the latter system, by virtue of a different approach to the subject by Dutch jurists and judges, a husband or wife who, wilfully and without reasonable cause, persistently declined to have sexual relations with the other, is guilty of desertion even though they remain under the same roof."

In answer to the line of thought manifested in these cases, counsel for the appellant pressed his argument in this way: He said that Brouwer, a noted Dutch jurist, recognised no justification for desertion in the other spouse. According to this authority, counsel said, a husband who had reason to complain of the bad behaviour of his wife was not entitled to remove himself from the consortium. His proper course was to petition for a separation from bed and board, even if life was made intolerable for him. And he argues that the logical consequence of this was that there could be no such thing as constructive desertion, that is, conduct so intolerable as, in fact, to justify termination of the marriage relationship.

In my view, this rigid approach obviously is out of alignment with the body of authority referred to already. Does it not miss the spirit of that flexibility which was demonstrated when imputing malicious desertion to a husband who withdraws from the matrimonial bed? Does it take into account the fact that the law does not stand still but develops through the passage of time with enlightenment and changing social conditions?

VAN ZYL, in his distinguished work, realised at a very early time that the wording of the Placaat had its shortcomings, and in a number of instances he made reference to that. But at page 488 he says this:

"On a comparison of the references as to cases decided in this Chapter, with the opinions of the various writers on this subject, it will be seen how each writer and each decision has added something new to the former, and how new points have been adopted and hardened into law, as it now is, by custom; and how gradually the said Placaat received a more and more liberal interpretation by the decisions and practice of the courts, as the knowledge of human nature became more extended."

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And that this is so must be recognised.

Lord GODDARD, in *Terrell v. Colonial Secretary*, (1953) 2 All E.R. 490 at p. 496, said:

"In my opinion, once a doctrine has become a rule of law, as I think this has, the court is bound to apply without inquiring into its origin It was by inquiring into the origin of the rule of law that consideration is necessary to support a simple contract that Lord Mansfield fell into error when he held, doubtless to the astonishment of the profession in *Pillans v. Van Mierop*, that an agreement evidenced by a document under hand only, but without consideration, could be supported."

To seek to reverse the current of so desirable a legal development as that relating to constructive desertion on some tenuous basis, would be, in my opinion, to do a disservice to the development of the law and restrict its proper scope to confines which would not meet the requirements of society as it advances.

In *Siebs v. Siebs*, PERSAUD, J.A., said this:

"As a matter of fact, even the doctrine of constructive desertion came to be recognised by courts administering law in accordance with the Roman-Dutch system. For instance, in South Africa, this doctrine was not unknown, and the principles similar to those applied in the British Courts were beginning to be applied to cases there. In *Sutherland v. Sutherland*, (1910) N.L.R. 219, for instance, Broome, J., said: 'Desertion is not to be tested by merely ascertaining which party left the matrimonial home first; the one who intends bringing the cohabitation to an end commits the desertion.' Again, in *Crossley v. Crossley*, (1912) W.L.D. 99 Bristowe, J., said 'The question seems to me to be, who is the person substantially responsible for the separation. It does not matter which of the parties actually leaves the other. The party who really deserted is the one who compels the desertion.'

I can find no reason for departing from the concurrence which I had previously given to what PERSAUD, J.A., had said in *Siebs v. Siebs*, (above) and I am further fortified as to the correctness of that decision.

The last case to which I would refer is a case which had been referred to by my brother CRANE in his original judgment of *Seibs v. Seibs* (above) – the case of *Lang v. Lang*, (1954) 3 All E.R. 572, where Lord PORTER, at p. 573, said:

"As it is, the wife, who had been brutally ill-used and insulted over a long period, since she was the first to leave the matrimonial home, had to found her petition on desertion: and in order to succeed, had to establish what is described as 'constructive desertion'.

For those reasons, I consider that the trial judge's findings that constructive desertion is known to Roman-Dutch law in its concept of malicious desertion should not be disturbed.

CUMMINGS, J.A.: I have considered the evidence adduced at the trial and can see no reason whatever for interfering with the findings of the learned trial judge. That accepted evidence established three things:

- (1) Desertion by the wife.
- (2) Desertion without *justa causa*.
- (3) Refusal to accept an offer made by the husband for her to repent and return to the matrimonial home.

In *Siebs v. Siebs* (above) decided by this court on 31st March, 1969, I treated the topic in the manner following:

"Are the terms 'constructive desertion' and 'malicious desertion' then synonymous? I recall at this point the classic example of the logicians in dealing with fallacies: 'London Bridge is a stone bridge, but not every stone bridge is London Bridge.' By analogy some forms of constructive desertion may also be malicious desertion, but all forms of 'constructive desertion' are not necessarily 'malicious desertion'.

"What, then, must a petitioner establish in order to obtain a decree on the grounds of 'malicious desertion'?"

"In *Matthews v. Matthews*, (1931-7) L.R.B.G. at page 459, VERITY, C.J., said:

"There does not appear ever to have been reported a comprehensive definition by the courts of this Colony of the term 'malicious desertion' but consideration of cases decided in the courts of both South Africa and Ceylon gives assurance that under the Roman-Dutch system of law from which this ground for divorce has been adopted and to which one may rightly refer for guidance in this regard, malicious desertion must at least include a deliberate, definite, and final repudiation of the marriage state by one spouse against the will of the other and without just cause or legal justification.

"The existence of this determination on the part of the deserting spouse may be deduced *from conduct of varying kinds*, but that its existence must be proved or properly inferred from the evidence is essential if it be desired that the court should dissolve the marriage on this ground.

"The court will not lightly determine the marriage bond where there is no clear and convincing evidence of such final repudiation nor by its decree will the court convert into final dissolution what may well be but a temporary withdrawal, the result of hasty disagreement or misunderstanding.

"It may be desirable that the law should prescribe, as in the case for petitions for judicial separation, some period beyond which alone could such a petition as the present be brought, not with the object of substituting statutory desertion for malicious

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desertion, but for securing a reasonable period within which the erring spouse might have time for consideration and the aggrieved spouse have opportunity for seeking by every means just reconciliation. This is a view which in my opinion might well receive consideration in the proper quarter, but, be that as it may, no such period is prescribed by the existing laws of the Colony, nor do those laws require that there is refusal on the part of the respondent to comply with an order for the restitution of conjugal rights before a decree of dissolution of marriage be pronounced on the ground of malicious desertion as is required in South Africa.

'Nevertheless, 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.

'While, therefore, it is not required by the laws of this Colony that there should be any defined period of desertion nor that legal proceedings should have been instituted to secure either the return of the deserting spouse or refusal of return in obedience to an order of the court, yet in many cases the element of time will be one for consideration in ascertaining whether or not the desertion is in fact evidence of final repudiation. The efforts of the petitioner to secure or afford opportunity for the return of the respondent, moreover, will be for consideration in ascertaining whether or not the withdrawal is against the will of the petitioner.'

"Of this passage, MARNAN, J., in the course of delivering the unanimous judgment of the Federal Supreme Court of the West Indies in *Nisa v. Zaheruddin*, (1959) 1 W.I.R., at 539, said:

'For my part I have no hesitation in adopting as correct the principles so clearly stated in the passage I have just read.'

"In *Melbourne v. Melbourne*, (1950) L.R.B.G. p. 66, WARD, J., said:

'It is clear to my mind that in interpreting the meaning of malicious desertion under the Matrimonial Causes Ordinance recourse must be had to the concepts and established practice under Roman-Dutch law, since malicious desertion, as distinct from desertion, is unknown to English law. I must take it as Verity, J., did in *Matthews v. Matthews* (above) that the legislature in using this, term intended to retain the principles of Roman-Dutch law as to malicious desertion.'

"Under the Roman-Dutch law, in order to establish malicious desertion it was necessary to prove:

- (1) Desertion.
- (2) That the desertion was without '*justa causa*'.
- (3) That the petitioner had secured a decree of a competent court for *restitutio in integrum* against the deserting spouse. If the latter, despite the court's decree, refused to return to cohabitation—which was not merely limited to being under the same roof but included a denial of sexual intercourse - then that spouse was deemed contumax. The desire to bring the matrimonial state to an end was finally evidenced by this malice."

I have always taken the view that the party leaving the home is not necessarily the guilty spouse if the other party was responsible for that leaving. I appreciated Mr. Rai's point that when the ordinance referred to malicious desertion under the Roman-Dutch law it was referring to the concept as demonstrated in Holland and not, as it later developed in South Africa, but, in my view, with great respect the words '*justa causa*' are wide enough to permit of judicial legislation. In other words, with changed sociological conditions, '*justa causa*' permits of room for constructive desertion, and, although originally the term had nothing to do with the conduct between the spouses, and was a separation caused by war or becoming a monk, the judges in South Africa extended the concept to embrace any behaviour of one spouse which was so unreasonable that it was unjust to expect the other spouse to remain subjected to it.

Consequently, I am in full agreement with the concept that constructive desertion is a part of the Roman-Dutch law as it was developed in South Africa and as it ought logically to have been developed in Guyana. In fact, there are many cases in which it appears that that view was taken, even though, perhaps, different reasons may have been given. VAN ZYL, at page 489, states:

"It is a matter very much in the discretion of the court, and in judging of such conduct every ingredient should be taken into consideration; such as the pecuniary means and social position of the parties, their habits and customs, the primary cause of the defendant's absence, under what circumstances he or she left, to or for what place, to a great distance or close by, to a foreign country or not, to a civilised country or a barbarous or sparsely populated one, the means of communication, the cause of the continued absence, the correspondence or not between the parties, the contribution by the one towards the other's support; also the efforts made by either to induce the other to return or by a husband to induce his wife to follow him, or the means adopted or steps taken by the innocent party to discover the whereabouts of the other, the unexplained absence, and the defendant's silence. All these,

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I say, must be taken into consideration, and if they point to the possibility of the defendant's non-intention or non-likelihood to return to his or her spouse, and live and cohabit together, the decree for divorce must be granted." (But these are the words which are pregnant with meaning and words which persuaded me to take the stand which I take). "But even if there is clear proof that the desertion was *ab initio* malicious, the party may repent it, and on his or her offering to return, whether voluntarily or after a summons, the other party must take him or her back. The bare offer to return to the home is, however, not sufficient. There must be an actual return and a complete resumption of all previous conjugal rights and privileges: otherwise it would be in the power of the offending party to offer to return, so as partly and ostensibly to comply with the order of the court, but in reality in order to prevent the other from getting his or her divorce, or again, having returned, to abstain from or refuse all other marital privileges, and so defeat the very end of marriage."

In the concept of constructive desertion the intention to desert is implied from the circumstances if the offending spouse goes away and/or does not cohabit for a specified period. In Roman-Dutch law, although time is an element to be considered, the desertion does not become malicious until there is a refusal to accept an offer to resume cohabitation.

I said in *Siebs v. Siebs* (above) that it was implicit in the learned trial judge's finding that there had been such an offer by the husband. The trial judge took the view that the husband's behaviour justified the inference that he had no intention to change his ways. What, then, was the point in the wife's returning? In my view, the law is, that there must be an acceptance of an offer to resume cohabitation and proof, by behaviour after the resumption, that it was not *bona fide*, before the party seeking the divorce could succeed. This is the sole point on which I differed from the rest of the court in *Siebs v. Siebs* (above).

In this case, as I said before, all the elements to justify a decree *nisi* exist. The learned trial judge found desertion, he found the desertion was without just cause, and he found that the husband had asked the wife to return and she had refused this offer to follow him into a new matrimonial home which he had been forced to provide. Therefore malicious desertion was established. Consequently, in my view, the judgment of the learned trial judge is correct.

For these reasons, I agree that this appeal should be dismissed. I have heard nothing in this case to persuade me to alter the views I have expressed in *Siebs v. Siebs*, to which I unrepentantly adhere.

CRANE, J.A.: There is no doubt that the law of constructive desertion is part of our law. This has been adequately traced by the Chancellor from its origin right down to modern-day decisions. I feel, however, this is no forum for me to enter, though I must express my concurrence with the result of the decision given in this case.

I feel that I should not enter into discussion on the case of *Siebs v. Siebs*, a case of constructive desertion, the decision of which was exhaustively considered in the present appeal. It was a case in which I happened to be the trial judge, and I do not think it would be proper for me to say anything in justification of the decision I gave. I must abide by the opinions given of that case by my learned brothers, and for that reason I say no more.

I agree that this present appeal should be dismissed.

Appeal dismissed.

BARBARA ERMILINA DANIELS
v.
FRANK ALEXANDER DANIELS

[In the Full Court on appeal from a Judge in Chambers
(Bollers C.J., Mitchell and George JJ.) June 13, 20, 1969].

Divorce—Application for re-hearing—Roman-Dutch Law—Procedure—By motion to single judge—Matrimonial Causes Ordinance Cap. 166 s. 2(1), 12(1), 31—Matrimonial Causes Rules Cap. 166 r. 53—Federal Supreme Court (Appeals) Ordinance 1958 No. 19 of 1958 ss. 9–13.

The appellant applied by summons to a judge in chambers to have a decree *nisi* of divorce which was granted to the respondent set aside. In her affidavit in support she said that after being served with the petition she at the respondent's request (i) resumed co-habitation (ii) informed her lawyers that she was no longer defending the suit as the parties were reconciled. The respondent agreed to discontinue the proceedings he had started. On hearing that the respondent was granted a decree *nisi, ex parte*, the appellant removed from the matrimonial home. The judge in chambers declined jurisdiction. On appeal.

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HELD: that (i) in these circumstances a court exercising a Roman-Dutch common law jurisdiction would order a rescission of the decree and a re-hearing of the petition.

(ii) applications for re-hearing should be made to a single judge by motion in open court and not by way of summons in chambers.

Appeal dismissed.

R. McKay for the appellant.

B. DeSantos for the respondent.

GEORGE, J.: This is an appeal from the decision of a judge in chambers, who declined jurisdiction on an application by way of summons by the appellant to have the decree *nisi* in a matrimonial cause which was obtained by the respondent on the 2nd October, 1967, set aside. The other substantial relief which she sought, and which is really complementary of the first, was that she be at liberty to serve and file an entry of appearance and an answer to the petition.

The following facts were disclosed in the appellant's affidavit in support of her summons: A copy of a petition for divorce was served on her on the 21st June, 1967. The following day she consulted a legal practitioner and made arrangements to defend the suit. A few days later, and before any action had been taken to this end her husband, the petitioner, requested that they resume cohabitation. This they did on or about the 9th July, 1967. He also asked her to instruct her legal advisers that she no longer proposed to proceed with the suit as they had reconciled their differences. He further intimated to her that he would discontinue the proceedings he had instituted. Her affidavit further stated that she and the respondent lived and cohabited in the same house until the 18th October, 1967, when she left the matrimonial home after learning that he had obtained a decree *nisi, ex parte*, on the 2nd October, 1967. This decree she contended was obtained without her knowledge and further stated that if she had known that the respondent had intended to proceed with the petition she had every desire to defend it and would in fact have done so. The respondent in his affidavit by way of reply denies all that the appellant had deposed to.

The issue involved in this appeal is not whether or not the appellant's allegations are true but whether assuming their truth a judge sitting in chambers has the necessary jurisdiction to adjudicate.

The trial judge in his written ruling had this to say:

"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. . ."

After stating the facts on which the ruse was based, he proceeded to examine the legal position and came to the conclusion that the appellant was not a person who could properly invoke the jurisdiction of the High Court to have the decree set aside. His conclusion was based on an examination and analysis of s. 12 of the Matrimonial Causes Ordinance, Cap. 166. Great reliance was placed on the case of *Squires v. Squires* (1959) 2 All E.R. p. 85. In this case a decree nisi was granted to the wife (petitioner) on the 7th July, 1958, on the ground of cruelty. The husband did not defend the suit but was represented by counsel at the hearing. After the decree *nisi* had been handed down, he issued a summons requiring the wife to show cause why it should not be rescinded. The ground on which he based his application was that since the decree *nisi*, and between the 4th and 23rd August, 1958, they had resumed cohabitation and that sexual intercourse had taken place between them on various dates between that period. Accordingly he claimed the cruelty had been condoned and that there had been an effective reconciliation. It was assumed that an application for a rescission was in fact one under s. 12(2) of the Matrimonial Causes Act 1950 (U.K.), and in this regard STEVENSON, J. had this to say at p. 91:

"The present summons is in form a summons to rescind the decree. No point has been taken that the form of this summons disqualified it in itself from being considered as a possible proceeding under s. 12(2)".

The relevant portion of s. 12(2) of the Matrimonial Causes Act 1950 is in the same language as s. 12(1) of the Matrimonial Causes Ordinance, Cap. 166. It reads as follows:

". . . any person shall be at liberty . . . to show cause why the decree should not be made absolute by reason of its having been obtained by collusion, or by reason of material facts not brought before the court".

The court in *Squires v. Squires* construed the words "any person" in the U.K. Act as not applying to a respondent, and the learned trial judge followed this decision.

The rationale for the inclusion in legislation on matrimonial causes of a provision such as s. 12(1) has been aptly put by Lord MERIVALE, P., in *Sloggett v. Sloggett* (1928) P. 148: a suit based on adultery. He said that,

"It is a matter of public interest that a decree for dissolution of marriage should not be obtained on evidence which has been manufactured so as to indicate adultery where none in fact has taken place".

In other words, the function of the section is to ensure the protection of the public which is presumed to have an interest in ensuring that the marital status is not changed contrary to the justice of the case or as a result of collusion, or withholding any other material fact from the court's attention.

Besides sub-s. 1 of s. 12, sub-s. 5 empowers the Attorney General to intervene for similar reasons; and I have no doubt that if facts such as those in

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Squires v. Squires were brought to his attention, he would not hesitate to take action under the latter subsection. If, therefore, these two provisions are the only ones in the Matrimonial Causes Ordinance empowering a challenge of a decree *nisi* in the High Court, then the learned trial judge was correct and the appellant's case must fail, notwithstanding that she alleges that the respondent obtained the decree by means which would amount to fraud. (See *Ogilvie v. Ogilvie*, 9W.I R371). I accordingly now propose to consider whether these are in fact the only provisions which enable proceedings to be brought in the High Court to set aside a decree *nisi*.

The general jurisdiction of the High Court in matrimonial causes is set out in s. 2(1) of the Matrimonial Causes Ordinance, Cap. 166. This subsection reads as follows:—

"Subject to any ordinance, the High Court . . . shall exercise all jurisdiction in respect of divorces and other matrimonial causes and disputes. . . in as full and complete a manner as it has hitherto exercised jurisdiction in divorce and matrimonial causes under the Roman Dutch common law and that jurisdiction shall as far as possible be exercised in the same manner and in accordance with the same principles and rules as jurisdiction in those matters is exercised by the Probate Divorce and Admiralty Division of the High Court of Justice in England, subject to any rules of court made under this ordinance, the Supreme Court Ordinance or any amending ordinance. . ."

This section in effect preserves the Roman-Dutch common law jurisdiction in relation to divorce and matrimonial causes which had been exercised by the Supreme Court before the enactment of the ordinance in December 1916. S. 28 of the first title of Book 42 of VOET'S COMMENTARIES on the Roman-Dutch common law leads me to the conclusion that, in circumstances such as those set out in the appellant's affidavit in support of her summons, a court exercising a Roman-Dutch common law jurisdiction would have no hesitation in ordering a rescission of the decree and a rehearing of the petition. However, as regards the procedure to be adopted to such an end, s. 2 enjoins the High Court to adopt, as far as possible, the same procedure as that exercised by the Probate Divorce and Admiralty Division of the High Court of Justice in England. As the Matrimonial Causes Ordinance was enacted in 1916, it is to the English procedure in force at that time that one must look for the answer. The relevant English rules of procedure for the purposes of this case are r. 62 of the Rules and Regulations in Divorce and Matrimonial Causes, dated December 26, 186S, as amended in August 1885 and s. 1 of the Supreme Court of Judicature Act 1890. R. 62 reads as follows:—

"An application for a new trial of the issues of fact tried by a jury or for the re-hearing of a cause shall hereafter be made to a Divisional Court of the Probate Divorce and Admiralty Division and shall be by notice of motion filed in the registry stating the grounds of the application. . .";

while s. 1 of the Supreme Court of Judicature Act 1890 provided that:—

"From arid after the commencement of this act every motion for a new trial or to set aside a verdict, finding or judgment in any cause or matter in the High Court in which there has been a trial thereof, or any issue therein, with a jury, shall be heard and determined by the Court of Appeal and not by the Divisional Court of the High Court. . ."

Besides the above provisions, the Rules Committee constituted under the provisions of s. 19 of the Judicature Act, 1881 had, in 1892, made R.S.C. Ord. 39 r. 1 which reads as follows:-

". . . every application for a new trial or to set aside a verdict, finding or judgment where there has been a trial with or without a jury shall be made to the Court of Appeal."

The distinction between a 'new trial' and a 'rehearing' is explained in BROWN AND WATTS on the LAW AND PRACTICE IN DIVORCE AND MATRIMONIAL SUITS (8th ed.) at p. 223 and RAYDEN'S ON DIVORCE (10th Ed.) at p. 788. The former expression is used only in relation to a cause tried before a judge and jury while the latter is confined to one tried before a judge alone.

In *Smith v. Smith* (1897) P. 293, an application was made to the Court of Appeal for an order for a rehearing of a divorce cause heard by a judge without a jury. LINDLEY, L.J., at p. 294 had this to say:

"I think it clear, on looking at the Act and the rule that this application ought to be made to the Divisional Court of the Probate Divorce and Admiralty Division, and that we have no jurisdiction to entertain it"

A similar issue came up for consideration in the Divisional Court of the Probate, Divorce and Admiralty Division of the High Court in *Garnett v. Garnett & Calderon* (1919) 35 T.L.R. 521, and that court allowed the application. It would appear that R.S.C. Ord. 39, r. 1 made in 1892 "was either not referred to or if referred to was apparently treated as subject to the divorce rule, r. 62" above mentioned. (*Per* EVERSHED, M.R. in *Prince v. Prince* (1950) 2 All E.R. 375 at p. 378). The foregoing decisions lead me to the conclusion that the practice in the Probate, Divorce and Admiralty Division of the English High Court in 1916 was that all applications for rehearing in divorce suits tried by a judge without a jury should be made to a Divisional Court. And there are several English authorities in which a Divisional Court has granted a rehearing even though the applicant had not entered appearance or taken any part in the trial. (See *Manners v. Manners & Fortescue* (1936) 1 All E.R. 41, *Winter v. Winter* (1942) 2 All E.R. 390 and *Montague v. Montague* (1967) 1 All E.R. 802). It would appear that the courts in their examination of such applications act on the principle that in matrimonial matters there is always something more to be taken into account than the mere individual merits of the parties and consider it their

duty to take cognisance of the interest of the State as well as private interests (see *Prince v. Prince* (1950) (*supra*)).

In Guyana there has never been, at least since 1916, any procedure for the trial of a divorce or matrimonial cause by a judge sitting with a jury. Every such cause is tried by a judge alone. The result, therefore, must be that if the English rules of practice and procedure are applicable all applications for rehearing (or for a new trial), as distinct from an appeal, to set aside a verdict or finding after trial must be heard by a court equivalent to an English Divisional Court.

In *Ex parte Surujballi* (1948) L.R.B.G. 1, the Full Court of British Guiana held that, by virtue of the provisions of s. 26 of the Supreme Court Ordinance, Cap. 7, the comparable authority in Guyana, vested with exercise of the powers of a Divisional Court in England, is a single judge in whom that section vests with the whole of the original jurisdiction of the High Court. The powers granted by this section are, however, stated to be "subject to any statutory provision". The statutory provisions which, I apprehend, can have some bearing on this aspect of the matter are ss. 2 and 31 of the Matrimonial Causes Ordinance and r. 53 of the Matrimonial Causes Rules. The former provision enjoins the use of the English procedure "as far as possible". I construe these words as meaning no more than that the English procedure should be applied *mutatis mutandis* and accordingly, in my view, do not in any way affect the scope of s. 26 of the Supreme Court Ordinance. Nor do I think that r. 53 of the Matrimonial Rules affect its scope. This rule merely provides that applications to the High Court shall be made to a judge in court, if by way of motion, or to a judge in Chambers, if on a summons, but does not go on to state what applications are to be made by motion and what by summons.

S. 31 of Cap. 166 provides that appeals shall be from any decision of the High Court in a divorce and matrimonial cause in the same manner as from any other decision of the court. This section in my opinion refers to the procedure to be adopted in the event of an appeal. This procedure is set out in Part II (ss. 9 to 13) of the Court of Appeal Ordinance. S. 9 provides that an appeal shall lie to the Court of Appeal from an order of a judge where such order is a decree *nisi* in a matrimonial cause, and sub-s. 7 of this section provides that the jurisdiction to hear any such an appeal shall be to the exclusion of the jurisdiction of any other court. On the hearing of an appeal the Court of Appeal is, *inter alia*, empowered to confirm, vary, amend or set aside the order of the High Court and to substitute any order which that court could have made (s. 10). It is also empowered to order that a new trial be held, that is, that the judgment or order of the High Court be set aside and there be a re-hearing of the suit.

I now propose to consider whether by virtue of s. 9(7) this exclusive right to set aside a judgment or order and direct a re-hearing on appeal bars the use of the procedure of moving the authority in Guyana comparable to the English Divisional Court from ordering a re-hearing. As I understand

sub.-s. 7 of s. 9, it is only the jurisdiction to hear an appeal (in the context of this case from a decree *nisi*) which lies exclusively in the Court of Appeal, but that when such an appeal is presented that court is given the power to order a new trial. In the absence of a definition to the contrary (and there is none) this does not in my opinion signify that an appeal means or includes an application for a re-hearing. An appeal, strictly so called, is one "in which the question is whether the order of the court from which the appeal is brought was right on the material which that court had before it" (*per* Lord DAVEY in *Ponnamma v. Arumogam* (1905) A.C. 383 at p. 390). Further support is lent to this view by o. 58 r. 2 of the English ANNUAL PRACTICE, 1963. The order deals with appeals to the Court of Appeal and the rule reads as follows:-

"This order . . . applies to an application to the Court of Appeal for a new trial or to set aside a verdict or judgment after trial with or without a jury, as it applies to an appeal to that court, and references in this order to an appeal and to the appellant shall be construed accordingly."

I am accordingly of the view that s. 9(7) of the Court of Appeal Ordinance is not a bar to proceedings for a re-hearing being entertained by a judge of the High Court in a case such as this. In so far as the power to order a re-hearing is concerned it would appear that the Court of Appeal has a concurrent jurisdiction, in relation to matrimonial causes with a judge of the High Court.

I come finally to consider whether in invoking the jurisdiction of a judge of the High Court it was open to the appellant to come by way of summons. It is in this regard that I think that this appeal must fail, for r. 62 of the English Rules referred to above specifically provided that any application for a re-hearing shall be by motion. It applies to Guyana; and r. 53 of the Matrimonial Causes Rules states that any application by motion must be to a judge in open court. I am accordingly of the view that the procedure by way of summons is wrong and therefore would dismiss this appeal.

There shall be no order as to costs.

BOLLERS, C.J.: I concur.

MITCHELL, J.: I concur.

Appeal dismissed.

BENJAMIN FRASER v. BOOKERS SUGAR ESTATES LTD.

[In the Full Court on appeal from the Magistrate's Court for the Berbice Judicial District (Bollers, C J. and Morris, J.) May 27, June 23, 1969.]

Workmen's compensation—Reference to medical referee deemed invalid—Reference to second medical referee—Appeal against second reference before final order—Whether permissible—Summary Jurisdiction (Petty Debt) Ordinance Cap. 16 s. 23 part 4—Summary Jurisdiction (Appeals) Ordinance Cap. 17s. 3—Workmen's Compensation Ordinance Cap. 111, ss. 23(1), 34, 37, 40(1), 42(4), 43—Workmen's Compensation Regulations reg. 48(3).

The appellant made a claim for compensation and was referred to a medical referee for an assessment of his incapacity. Regulations provided that where a medical referee had been employed as a medical practitioner in connection with any case on behalf of an employer, he shall not act as a referee in that case. At the trial the evidence indicated that the medical referee may have been so employed and the magistrate held that the reference to him was invalid and referred the appellant to another medical referee for a report. Without presenting himself for examination and without the report of the new medical referee being issued, the appellant appealed to the Full Court on the ground that the magistrate wrongfully found that the reference to the first medical referee was invalid.

HELD: that at the time of the appellant's reference to the second medical referee or when he was ordered to submit himself for medical examination, there was no order made by the magistrate from which an appeal would lie, as there had been no final adjudication on the matter at that stage.

Appeal dismissed—Matter remitted to magistrate to conclude hearing.

R. P. Rawana for the appellant.

M. A. Churaman for the respondent.

Judgment of the Court. In this appeal which arises out of a claim for compensation under the Workmen's Compensation Ordinance, Chapter 111, (hereinafter referred to as the ordinance), the short point to be decided is whether when a magistrate under Section 34 of the ordinance submits to a medical referee for report any matter of a medical character and before the certificate of the referee is issued it can be said that he has made an order from which an appeal will lie to the Full Court.

The matter arose in this way. The appellant (workman) was referred to a medical referee Dr. Baird, resident Surgeon of the New Amsterdam Hospital, by the Commissioner of Labour for an assessment of his incapacity under Section 43 of the ordinance. As a result of which the medical referee gave a certificate as to the condition of the workman (Ex. "A") in which he stated that the workman still had a partial disability as a result of an injury,

which had aggravated osteo arthritis of the spine from which the workman had been suffering. It was the opinion of the medical referee that with further treatment for about 2 weeks the appellant would be fit to resume duties which did not necessitate bending or straining of the back.

At the hearing of the claim for compensation, counsel for both parties agreed that the court should refer the matter back to Dr. Baird for a final assessment of the injury to the appellant for a final report. In his final report (Ex. "B") dated some 3 months after his first report the medical referee was of the opinion that the workman was unfit for work of any kind and that the permanent partial incapacity was due to osteo-arthritis which was aggravated by the accident and assessed his disability at 65%.

At the resumption of the hearing, counsel for the employers applied to the court that the medical referee testify because he had been informed that this medical practitioner had treated the workman before the reference was made. In his evidence Dr. Baird was unable to say positively whether he had or had not seen the workman apart from his 2 examinations in his capacity as referee. He was however confronted with a letter addressed to Dr. Subrayan which he admitted that he had signed and in which he had stated that he would see the workman on a date subsequent to the date of his examination and report, but stated that after checking his records he did not see the appellant as requested by Dr. Subrayan.

The attention of the learned magistrate was then directed to section 42 subsection 4 of the ordinance which enacts that where a medical referee has been employed as a medical practitioner in connection with any case by or on behalf of an employer he shall not act as a medical referee in that case. As a result, the magistrate held that the reference to Dr. Baird as a medical referee was invalid and referred the appellant to Dr. Lee a surgeon specialist of the Georgetown Hospital for a report of the disability of the appellant if any. Without presenting himself for examination and without the report of the medical referee being issued, the workman appeals to this court on the ground that the magistrate wrongly found that the reference to Dr. Baird was invalid. The point is however now taken by counsel for the employer (respondents) that there was no order made by the magistrate from which an appeal would lie as there has been no final adjudication of the matter which affects the rights of the parties permanently and therefore there can be no right of appeal at this stage. Counsel for the appellant however urges that section 40(1) enacts that an appeal shall lie to the Full Court from any order of a magistrate and this was an order made by a magistrate and therefore appealable. He referred to the list of cases set out in the 36th Edition of WILLIS WORKMEN'S COMPENSATION at page 672 under the caption "Appeal from any decision or order of a judge" wherein it is stated that it was formerly held that appeals from any order or decision not arising in or out of arbitrations under the Act should go to the Divisional Court and not to the Court of Appeal, but under an amended paragraph an appeal now lies to the Court of Appeal direct where the judge gives "any decision or makes any order under this Act" and this includes any order or decision under

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section 23(1) relating to the recording of agreements or the consideration of any order which has been made in the matter of the Act e.g. an order for the examination of witnesses or the dismissing of an application on the ground that proper service has not been effected.

In our view, these English cases cited by counsel for the appellant do not apply and the position is governed by the provisions of the ordinance itself. It is section 34 of the ordinance which confers up the magistrate's court jurisdiction to entertain claims for compensation under the ordinance and section 37 enacts as follows: –

"Save as is specially provided in this ordinance a magistrate's court shall, upon or in connection with any question to be determined thereunder have all the powers and jurisdictions exercisable and be subject to all the duties and obligations to be performed by a magistrate's court of the district in or in connection with civil actions in such court and the law, rules and practice in such civil actions shall, *mutatis mutandis*, apply; and any order made by a magistrate under this ordinance may be enforced as if it were a judgment or order of the court."

It will be seen that under the first limb of that section the magistrate is subject to all the duties and obligations to be performed by a magistrate's court of the district in or in connection with civil actions in such court and the law, rules and practice in such civil actions shall *mutatis mutandis* apply.

Under section 23 of the Summary Jurisdiction (Petty Debt) Ordinance, Chapter 16 at the conclusion of the hearing the court is required to give its judgment in a case and shall, if required by either of the parties give the reason thereof in writing to either the plaintiff or the defendant as the case may be. Judgment is defined in Chapter 16 to include an order or decision of a magistrate under the said ordinance.

Under section 3 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 17, it is enacted that unless the contrary is in any case expressly provided by ordinance, any one dissatisfied with a decision of a magistrate may appeal therefrom to the court in the manner set out and subject to certain conditions. One of the conditions set out in section 4 is that the appellant may at the time of the pronouncing of the decision give oral notice of appeal or within 14 days thereafter file and serve a written notice of appeal. It follows therefore that before a party can appeal there must first of all be a decision, and a decision is defined in the ordinance to mean a final adjudication of a magistrate in a cause or matter before him and includes a judgment, order, or other determination of the cause or matter. From these provisions it follows that at the time of the reference to the medical referee Dr. Lee, there was no decision of the magistrate as there was no final adjudication and determination by him in the cause or matter as indeed there could be no judgment or order made within the meaning of the Summary Jurisdiction (Appeals) Ordinance, Chapter 17. There was therefore no order made within the meaning of section 40 of the Workmen's Compensation Ordinance,

Chapter 111, from which an appeal would lie. We are further fortified in this view when we consider that under the second limb of section 37 of Chapter 111 any order made by a magistrate under the ordinance may be enforced as if it were a judgment or order of the court.

Under part 4 of the Summary Jurisdiction (Petty Debt) Ordinance, Chapter 16 under the caption Execution it will be seen that the only judgment that can be enforced in the magistrate's court is a judgment for the payment of money. When therefore in this case the magistrate referred the matter and the appellant to a medical referee for report there was no judgment or order which could be enforced, and this is plainly shown by Regulation 48(3) of the Regulations made under section 46 of the ordinance which enacts that if a workman is ordered by the court to submit himself for examination by the medical referee and he refuses to do so or in any way obstructs the same his right to compensation and to take or prosecute any proceedings shall be suspended until the examination has taken place or such obstruction has ceased. Consequently, on the appellant being referred to the medical referee or on being ordered by the court to submit himself for medical examination by the medical referee it could not be said that an order had been made by the court within the meaning of section 40 of the ordinance from which an appeal would lie to the Full Court, as there was no final adjudication in the cause or matter.

For these reasons we consider the appeal to be premature and the appeal must be dismissed with costs to the respondent fixed in the sum of \$28.00 and the matter is referred back to the magistrate with a direction to conclude the hearing and determination of the matter and to adjudicate thereon according to law.

*Appeal dismissed—Matter remitted to
magistrate to conclude hearing.*

JANET BURROWES v. JOHN MOHAMED

[High Court (George, J.) January 13, March 3, July 4, 1969.]

Hire purchase—Monthly instalments—Waiver of breaches—Payment to the defendant at his place of business for the time being—Change of place of payment—Seizure of article—Whether justified.

Contract—Cause of action—Whether based on unilateral extensions of time or breach of contract.

The plaintiff entered into a hire purchase agreement with the defendant, a hardware retailer at Wismar for the purchase of a refrigerator, the property

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to pass to her on payment of a total sum of \$670.90. She undertook to pay monthly instalments of \$25.95 for eighteen months between November 26, 1962, and April 26, 1964. The plaintiff made irregular payments which were accepted by the defendant until May 5, 1964, when he recorded on a card supplied by him "one month to pay \$133.90 from date". On May 16, 1964 a further sum was paid leaving a balance of \$83.90. Before the month's extension had expired, civil disturbances broke out, the defendant's business premises were burnt down and he moved to Georgetown to temporary premises. The defendant wrote the plaintiff but the letter was not received. The plaintiff enquired for the defendant without success and offered to pay the agents in Guyana for the refrigerator, but this was not accepted. On April 6, 1965 an agent of the defendant travelled to Wismar and was paid \$12.00 by the plaintiff and said he would return in one month for the outstanding balance. The agent returned on May 29 and, in the absence of the plaintiff, entered her home and seized the refrigerator. On hearing this, the plaintiff met the agent at the Wismar stelling and offered to pay him the balance but he refused it. The plaintiff sued for damages for breach of contract. Clause 2 of the hire purchase agreement required the plaintiff to pay the monthly instalments punctually to the defendant at his place of business for the time being and without previous demand and clause 6 empowered the defendant from time to time and as often as any default is made in the punctual payment of the instalments to retake possession of the refrigerator without any prior demand or notice and notwithstanding any waiver of a previous failure to pay punctually.

HELD: that (i) by refraining from enforcing clause 6 the defendant chose to waive the several breaches and affirm the agreement and cannot set up in aid of his right to seize the refrigerator the fact that the instalments were not paid off in eighteen months.

(ii) the seizure was not justified because the agent by saying he would return for payment in one month had changed the place of payment, and not having turned up on May 6, he should have given the plaintiff reasonable notice of his new date of arrival or in the circumstances of his unannounced arrival, a reasonable time within which to get the money, and his refusal to accept payment on May 29 was a failure to give her reasonable time within which to pay.

(iii) the plaintiff sued for breach of agreement and the unilateral extensions of time granted her by the defendant played only a supplementary role in her action.

Judgment for the plaintiff.

B.E. Commission for the plaintiff.

A.O.H.R. Holder for the defendant.

GEORGE, J.: In this case the plaintiff claims damages in the sum of \$1,000.00 for breach of a hire purchase agreement made between her and the defendant at Wismar, Demerara River, on the 1st November, 1962.

The facts, which are to a large extent undisputed, are as follows: Between the years 1962 and 1964 the defendant carried on the business of a hardware retailer at Wismar, Demerara River. On the 26th October in the former year the plaintiff's husband and agent entered into a hire purchase agreement with him on her behalf with regard to an Electrolux refrigerator. The agreement provided that the property in the refrigerator should pass to her on the payment to the defendant of a total, sum of \$650.60 Towards this sum a payment of \$204.00 was made on the signing of the agreement and the plaintiff was required to pay the remainder in one year in monthly instalments of \$37.25, commencing from the 26th November, 1962. Subsequent to the signing of the agreement and as a result of representations made by the plaintiff's husband, the monthly instalments were reduced to \$25.95. As a consequence of this the plaintiff was required to pay, and her husband agreed to it, an increase in the total sum of \$670.90, payable in eighteen months, i.e. at latest by the 26th April, 1964.

From the very inception payments were made quite irregularly and in an erratic manner. For example, the first instalment was not paid until the 8th January, 1963. The next payment was a sum of \$10.00 on the 15th January, followed by another sum of \$10.00 on the 30th January and a further sum of \$10.00 on the 27th February, 1963. This irregular manner of payment continued until the 5th May, 1964, when the plaintiff's husband paid to the defendant a sum of \$125.00 and the latter recorded on a card supplied by him, and on which all payments made were recorded, the following note: "One month to pay \$133.90 from date." This sum represents the balance then outstanding.

On the 16th May, 1964, the plaintiff's husband paid a further sum of \$50.00 leaving a balance of \$83.90, but, before the one month period of extension given by the plaintiff on the 5th May, 1964 could have expired, widespread civil disturbances broke out at Wismar and the defendant's business premises were burnt down. The plaintiff's husband states, and I believe him, that he made several enquiries as to the defendant's whereabouts after the disturbances had ended but to no avail. The defendant had in fact left the Wismar area for Georgetown where he had set up temporary premises. I accept the defendant's testimony that he sent a letter dated the 10th October, 1964, to the plaintiff from these temporary business premises. I accept the defendant's testimony that he sent a letter dated the 10th October, 1964, to the plaintiff from these temporary premises informing her of the outstanding amount and requesting a speedy settlement, but I believe her when she states that she never received this letter. In coming to this latter conclusion, I have taken into account the fact that there was not then a postal delivery service in the area where she lived. In addition, I believe that in August, 1964, the plaintiff's husband sent a sum of \$15.00 to Bookers Stores limited in Georgetown which company he says was the general agents for the Electrolux brand of refrigerators and the defendant a sub-agent. I also believe that he did travel to Georgetown during the following month and make tender of the sum of \$83.00 at Bookers Stores Limited. Neither sum

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was accepted by the company. This behaviour, to my mind, is inconsistent with him or his wife receiving a letter of demand from the defendant and doing nothing about it, even if it were by way of replying.

On the 6th April, 1965, the defendant's agent, one Phil, travelled to Mackenzie to collect the outstanding balance. The plaintiff's husband paid him \$12.00 and Phil promised to return the following month to collect the outstanding amount, but no date was fixed except that he granted them one month's grace. According to the plaintiff and her husband this sum of \$12.00 was paid by them on account of their indebtedness. Phil, however, issued a receipt for it by way of seizing expenses. The intention of the plaintiff and her husband may have been to pay the sum on account of their indebtedness but I do not feel this was communicated to Phil. Phil returned on the 29th May at a time when the plaintiff was not at home and her husband was a patient in hospital. He entered their home and seized the refrigerator. The plaintiff, who was then at her farm was informed of this and immediately left, obtained the sum of \$90.00 and went in search of Phil. She found him at the Wismar Stelling and offered to pay him the balance outstanding but Phil refused informing her that if she desired to recover the refrigerator she should travel to Georgetown to Hack's Cycle Store where she would meet the defendant. Both the plaintiff and her husband did this on the 7th June. This, I believe was the first time that they received any intimation as to the defendant's new place of business.

With regard to what transpired between them on this visit I accept and believe the evidence of the plaintiff, her husband and the Police Constable Brown in preference to that of the defendant. I do not believe that the plaintiff and her husband told the defendant that at the time when Phil had seized the refrigerator they had no money to pay the outstanding sum. On the contrary I believe that the plaintiff did take with her to Georgetown the necessary funds to pay off the outstanding balance. It seems to me very unlikely that these people would have travelled to Georgetown in order to negotiate with the defendant for the return of the refrigerator without taking with them any money whatsoever.

I now proceed to examine whether in the light of my findings of fact the plaintiff is entitled to succeed. In this regard two paragraphs of the hire purchase agreement are of paramount importance, viz. paragraphs 2 and 6. The former requires that the plaintiff pay the monthly instalments punctually to the defendant at his place of business for the time being and without previous demand. The latter *inter alia* empowers the defendant, from time to time and as often as any default is made in the punctual payments of the instalments, to retake possession of the refrigerator, without any prior demand or notice and notwithstanding any waiver of a previous failure to pay punctually.

In *Machine v. Gatty* (1920) 1 A.C. 376 the English Court of Appeal held that the words "punctual payment" meant payment on the day stipulated and not within a reasonable time thereafter. But it must be noted that

the hire purchase agreement between the plaintiff and the defendant does not provide that it shall determine *ipso facto* in the event of a breach. Accordingly, the defendant was not bound to exercise his power of termination, as he in fact refrained from doing, on the numerous occasions that the plaintiff failed to pay punctually. By refraining from enforcing clause 6 of the agreement the defendant choose to waive the several breaches and affirm the agreement. It accordingly continued for the benefit of both parties. Indeed, as I have already pointed out, on the 5th May, 1964, over two weeks after the plaintiff should have completed payment of all the instalments the defendant granted to her a period of one month within which to pay the then outstanding amount of \$133.90. Before this period expired disaster fell and his business was razed to the ground. The first question to be determined on this aspect of the case is the effect of the grant of the extended period for payment, gratuitously made. In my opinion, the legal principle applicable has been established by the House of Lords as long ago as 1877 in *Hughes v. Metropolitan Railway Co.* (1877) A.C. 439, a case in which persons were held to have so conducted themselves as to have enlarged the time for doing what had been agreed to be done by a particular date. Lord CAIRNS at p. 448 had this to say:

"It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense or held in abeyance the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

In *Birmingham & District Land Co. v. London & Northwestern Railway Co.* (1888) Ch. D 268 the English Court of Appeal was urged to limit the above proposition to cases where penal rights in the nature of forfeiture or analogous to those of forfeiture were sought to be enforced. BOWEN, L.J. at page 286 firmly rejected any such limitation. He said:

"The truth is that the proposition is wider than cases of forfeiture. It seems to me to amount to this, that if persons who have contract against others induce by their conduct those against who they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for a particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed . . ."

I am accordingly of the opinion that the defendant cannot set up in aid of his right to seize the refrigerator the fact that the defendant did not pay off the instalments within the eighteen month period agreed upon with the plaintiff.

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Before considering the second aspect of the defendant's gratuitous extension of the time viz. the plaintiff's right to sue on it I propose to examine the requirement contained in the hire purchase agreement for payments at the defendant's "place of business for the time being."

It is well settled that, if no place for payment is stipulated in an agreement, the obligation is that of the hirer to seek out the owner wherever he may be in Guyana and pay him. *Haldane v. Johnson* (1853) 8 Exch 689. On the other hand if a particular place is specified then the hirer fulfills his obligation by taking the necessary steps to pay at that place. In the present case the place of payment was stipulated, viz. the defendant's "place of business from time to time." The question, therefore, is whether when the defendant changed his place of business from Wismar to Georgetown it became the plaintiff's duty to seek out this new place of business and pay him within the month. In *Thorn v. City Rice Mills* 40 Ch D. 357 it was held that if two places are named as places for payment it is the duty of the creditor to notify the debtor at which of the two he desires to be paid.

In my opinion the words "place of business from time to time" cannot be construed as specifying particular places of business. It is only limiting in the sense that the plaintiff is enjoined to make payments at the defendant's place of business wherever that may be, as distinct from any other place e.g. his residence. In my opinion the general principle requiring a debtor to seek out and pay his creditor is applicable and the plaintiff's duty to do so within a month from the 5th May, 1964. This she failed to do. If no other circumstances had intervened the defendant would have been entitled to judgment. But the defendant's agent, when he met the plaintiff on the 6th April, 1965, in effect not only granted her a further period of one month within which to pay the outstanding balance but changed the place at which payment should be effected by promising to return to collect that balance. He failed to return within the period but eventually appeared at the defendant's home on the 29th May, 1965, at a time when she was not present and took away the refrigerator. The issue here is, was the seizure under the circumstances justified? I take the view that it was not. Having changed the place of payment and failed to turn up at the appointed date it was in my opinion taking undue advantage to go to the defendant's home without prior notification and seize the article. The agent's attitude becomes the more indefensible when he refused to accept the offer of full payment before he left the area. I hold the view that the agent ought to have given the defendant reasonable notice of his new date of arrival or in the circumstance of his unannounced arrival a reasonable time within which to get the money. His refusal to accept her tender of the money so soon after the seizure amounts in my view to a failure to give her reasonable time within which to pay after his unannounced arrival.

The only other problem to be resolved is whether the plaintiff could found her cause of action on these series of unilateral extensions of time granted her by the defendant and or his agent. The general principles on this aspect of the matter are laid down in *Coombe v. Coombe* (1951) 1 All E.R.

767 at page 770 *per* DENNING, L.J. who had this to say after a review of all the relevant authorities:

"In none of these cases was the defendant sued on the promise, assurance or assertion as a cause of action in itself. He was sued for some other cause, for a pension, a breach of contract, or possession, and the promise, assurance or assertion only played a supplementary role, though no doubt an important one. That is, I think, its true function. It may be part of a cause of action but not a cause of action itself."

The plaintiff in the present action sues for breach of agreement and in my opinion has called in aid the extensions of time granted for payment by the defendant or his agents, and which I hold were intended to affect the legal relations between them, merely in a supplementary role. In the result she is entitled to succeed. The defendant has sold the refrigerator for \$120.00 but I feel that this was much below its market value. On the other hand, I take into account that the plaintiff has the use of it for over three years and it must as a result have depreciated appreciably. Taking all the circumstances into consideration, I award her damages in the sum of \$300.00 with costs fixed at \$300.00.

Judgment for the plaintiff.

SHIPPING ASSOCIATION OF GEORGETOWN AND OTHERS
v. IVAN BENTINCK

[Court of Appeal (Luckhoo, C., Persaud, Crane JJ.A.)
April 28, 29, July 24, 1969.]

Employment—Wages to be paid in money—Prescribed rates—Agreement for rates to be reduced and difference paid to a Fund—Fund no benefit to employee—Whether employee entitled to prescribed or reduced rates—Labour Ordinance, Cap. 104 ss. 19, 20, 24.

The respondent, a stevedore, was entitled to be paid in accordance with a schedule of wage rates for waterfront workers agreed between the Shipping Association of Georgetown and the Guyana Labour Union. The Schedule prescribed that the amounts of \$4.79 and \$5.59 for the period of eight hours of the second shift were to be reduced by the amounts of 67 and 78 cents respectively and be credited to a Levy Stabilisation Fund. This Fund was to be used to confer benefits on certain categories of stevedores which did not include the respondent. The respondent having worked for the relevant period was paid the reduced sum, the rest being credited to the Fund. He sued for the difference and obtained judgment. On appeal the appellants argued that

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the respondent was paid his full wages and that the sum retained was held in accordance with the agreement between the Shipping Association and the Union.

HELD: (i) that the respondent had been paid less than the prescribed wages contrary to the Labour Ordinance Cap. 104 and any agreement providing for deductions from those wages would be illegal, null and void.

(ii) that the appellants, having been ordered by a judge in chambers to give particulars of an agreement which they had pleaded, and having failed to give the particulars were rightly prevented at the trial from leading evidence of the agreement.

Appeal dismissed.

G. M. Farnum, Q.C., with *Mrs. A. Khan* for the appellants.
Ashton Chase with Hafiz Khan and Miss S. Doobay, for the respondent.

PERSAUD, J.A.: This appeal involves matters of considerable importance in connection with labour relations in this country, matters relating to the question of what constitutes a deduction from wages, the principles governing such deductions, and whether such deductions are legally permissible. These, in turn, necessarily involve a consideration of ss. 19, 20 and 24 of the Labour Ordinance, Cap. 104.

The facts as found by the learned Chief Justice, from whose decision this appeal is brought, and against which findings there is no challenge, are as follows:

The respondent (plaintiff) is a worker on the waterfront, and is unregistered. This means that, according to the Georgetown Port Labour Registration Scheme—a scheme agreed upon between the Labour Union concerned with watching the interest of waterfront workers and the Shipping Association of Georgetown (the first appellants) for providing the shipping companies with a constant labour force to be employed in loading and unloading ships—the respondent is in the category of worker to be employed last after other categories of workers have been employed and, of course, if there is sufficient work available to unregistered workers. It also means that he is not a member of the recognised Union, nor does the Union represent his kind.

The Shipping Association of Georgetown is incorporated under the Companies Ordinance (Cap. 328), and is comprised of certain shipping agents (the second appellants), their main function being to fix terms and conditions of employment and wages of waterfront workers who are employed by the shipping agents. No doubt the shipping agents and the Union find it more convenient to have all matters pertaining to labour on the waterfront discussed with a central body, thereby securing uniformity and balance in all their agreements.

It is unnecessary to deal with the method of employing registered workers except to point out that they are required to attend at what has been called a "calling-on-centre", which is operated by the Association, and there they are allocated work to be performed at the various wharves owned by the shipping agents. But the unregistered worker is required to attend the calling-on centre merely to ascertain whether there is a labour shortage, and it is only in that event he may be employed. He is sent to the wharf where there is a shortage, and if he is employed, he is given a tag which he presents to the firm that employed him. Upon the completion of the job of work, he is given a pay-slip which he is required to present at the calling-on centre where he is paid. His wages would have been sent by the employer to the Association, accompanied by the necessary pay-sheets which have been prepared.

At the calling-on centre, tariff sheets prescribing the rates of wages to the waterfront workers are sold to stevedores. These rates represent those agreed upon between the Union and the Association. Much turns on these sheets, and I will deal with them later in this judgment.

By an agreement made in 1960 between the Guyana Labour Union representing the waterfront workers, and the Association representing the employers, a fund called the Levy Stabilisation Fund (hereinafter referred to as 'the Fund') was created. In 1961 and 1962, the main benefit flowing from the Fund was a guaranteed wage to registered stevedores in the event that there was not sufficient work available for all. Sickness benefits were not included, but later a scheme was formulated whereby a certain percentage of the total night payroll was paid by the employers to the Association to be credited to the Fund for the benefit of registered workers only. Again, the unregistered worker derived no benefits, under this scheme. It is also important to observe that neither the employers nor the Association made any contributions of their own to the Fund.

As from October 7, 1964, as is indicated in the tariff sheets, the rates of wages in respect of the second shift for stevedores, of whom the plaintiff was one, were fixed at \$4.79 for the first half, and \$5.59 for the second half, and as from October 25, 1967, those rates were increased to \$5.79 and \$6.76. On the 1964 tariff sheet there is a reference to these amounts with the words "To be reduced by the amounts shown hereunder as due to be credited to the Levy Stabilisation Fund", and the sums by which those amounts were to be 'reduced' were 67 cents in respect of the first shift, and 78 cents in respect of the second shift. In the 1967 tariff sheet reference is again made only to the two night shifts, and again there are endorsed words to show that the amounts prescribed as the wages for those shifts were to be reduced by 10% which latter amounts were to be credited to the Fund. The tariff sheets for 1962 and 1965 provided for the same arrangement, except, of course, the rates of pay and of reduction varied

The immediate observation I would wish to make in relation to the arrangement provided for by the tariff sheets is this: It is possible for a registered stevedore to arrange to work on shifts other than the night shifts, in

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which case no contribution is made to the Fund in respect of his wages, with the result that he receives his full wages as prescribed by the tariff sheets, and yet enjoy the benefit of the Fund; while an unregistered worker employed on the night shifts (and be it remembered that an unregistered worker is the last category to be employed, and in all probability he would have no choice but to accept employment on the night shifts) would have his wages reduced so that contributions may be made to the Fund, the benefits of which he is not allowed to enjoy. A more inequitable scheme I can hardly imagine, and it fills one with consternation that it can be regarded by some with complaisance. Of course, I imagine the employer's answer to criticism of this nature would be that not only did the Union concerned accept the scheme on behalf of the workers, but also that the workers concerned have themselves agreed to the operation of such a scheme. I can also quite understand the employers being unwilling to bargain with more than one union, as to do otherwise may not make for pacific relationships on the waterfront and, in any event, can be criticised by the Union as being bad trade union practice; but the fact remains that because the unregistered worker is not a union member, in order to secure employment, he must agree to conditions of work whereby he suffers a reduction of wages thereby providing a benefit for union members only. It is to be hoped that cognisance will be taken of this situation, and steps taken to remedy the defects.

In the instant case the worker claims that his employer has paid him less than the prescribed wages, thereby infringing ss. 19 and 20 of the Labour Ordinance (Cap. 103), and that he is entitled to recover the difference. The employers and the Association, on the other hand, argue that the worker has really been paid his full wage; that there was not a deduction, but that in accordance with agreements reached between the Association and the accredited union, there was a reduction of wages. In other words, say the appellants, what was done here was a calculation of wages as was the case in *Chawner v. Cummings*, (1846) 8 Q.B. 311, and *Sagar v. Ridehalgh & Son Ltd.*, (1931)1 Ch.D. 310.

The relevant sections of the Labour Ordinance are not dissimilar to the provisions which appear in the Truck Acts of the United Kingdom, and therefore the English decisions are instructive on the points raised in this appeal. Ss. 19, 20 and 24 of our ordinance provide as follows:

"19. (1) Except where otherwise permitted by provisions of this Part of this ordinance in every contract for the hiring of any employee, or for the performance by any employee of any labour, the wages of such employee shall be payable in money only, and not otherwise, and if in any such contract the whole or any part of such wages is payable in any manner other than in money, such contract shall be and is hereby declared illegal, null and void.

(2) Except where otherwise permitted by the provisions of this part of this ordinance, the entire amount of the wages earned by

or payable to any employee in respect of any work done by him shall be actually paid to him in money and not otherwise."

"20. Every employee shall be entitled to recover from his employer the whole or so much of the wages earned by such employee, exclusive of sums lawfully deducted in accordance with the provisions of this part of this ordinance, as shall not have been actually paid to him by his employer in money."

"24. Nothing contained in this part of this ordinance shall extend, or be construed to extend, to prevent any employer or agent of such employer, from making, or contracting to make, any stoppage or deduction from the wages of any employee for or in respect of —

- (c) any medicine or medical attendance supplied by the employer to the employee at the latter's request."

It would seem to follow from the above provisions that the appellants can only succeed if there is a deduction authorised by the ordinance [see *Williams v. North's Navigation Collieries, Ltd.* (1906) A.C. 136], or if the amounts paid to the respondent represent the true wages due to him. They have argued for the latter proposition.

This then takes us back to an examination of the cases relied on by the respondent.

The question whether the employer is calculating the amount due and payable to an employee, or making a deduction which is not permitted, has been described in FRIDMAN'S MODERN LAW OF EMPLOYMENT (1963) as one of the great subtlety.

In *Chawner v. Cummings*, the plaintiff was employed by the defendant as a frame-work knitter, that is, as a weaver of gloves in frames provided by the defendant, and paid according to the quantity of work he performed, a certain agreed gross price per dozen pairs of the fingers of gloves, subject to certain charges and deductions. Such charges and deductions were made in accordance with the usage of the trade, such usage being known by the plaintiff, and related to the letting by the employer to the plaintiff of the frames used in connection with the employment. Lord DENMAN, C J., held that this was a matter of the calculation of wages, and nothing more.

And *Sagar v. Ridehalgh & Son Ltd.* was a case which concerned deduction for bad work. Again, as in *Chawner v. Cummings (supra)*, a contract had been made which took into account the usage of the trade. According to such usage, the wages depended upon the quality of work, and where the workman produced bad work, it was held, following *Chawner v. Cummings*, that the employer was entitled to make the deductions, as in doing so, he was really calculating the workman's wages.

It will be seen that both those cases turned substantially on the fact that the agreements accorded with the usage of the trade in question. In my

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opinion, they are of no assistance to the appellants, for it can with truth be said that there may be instances where the circumstances of a particular case may take a contract of employment outside the ambit of the Act.

There is one case that would appear to support the contention of the appellants, but a close examination discloses that this is not so. I refer to *Hewlett v. Allen*, (1894) A.C. 383. There the appellant entered into the service of the respondent and signed an agreement to conform to all the rules and regulations of the respondent's works, one of the regulations being that all employees were to become members of the sick and accident club. In accordance with the rules of the club, weekly payments were made to the club treasurer, and from the fund thus established relief was given to the members in case of sickness or accident. Each week a certain sum was deducted from the appellant's wages, and paid into the club. She never required and never received any relief from the fund. In an action to recover the amount deducted from the appellant's wages, it was held that her entire wages within the meaning of ss. 3 and 4 of the Truck Act had been paid to her, and even assuming that there was a contract that was illegal, null and void, within s. 2 of the Act, the respondent by making the weekly payments to the club with the assent of the appellant had discharged his obligations to her.

Lord HERSCHELL, in the course of his judgment, observed (at page 387) that during the whole time she was in employment, the appellant received the advantages of being a member of the sick and benefit club. "Although", said the Lord Chancellor, "she in point of fact did not fall ill during the time she was in . . . employ, she received the benefit of having secured to her in case she fell ill a considerable weekly payment out of the sick fund." I wish to observe that in the instant case, the evidence is clear and unequivocal that the workman never stood to receive any benefits from the Fund, and therein lies the difference between *Hewlett v. Allen* and this case.

The Lord Chancellor went on to distinguish the earlier case of *Ex parte Cooper, In Re Morris*, (1884) 26 Ch. D. 693, where a part of the workman's wages was retained by the employer to pay a doctor, or into a fund to be paid to the doctor for medical attention, but was retained by the employer. It was there held that there was no valid payment to the workman.

Apart from the distinction I have sought to draw between *Hewlett v. Allen* and the case now in hand, Lord WRIGHT in – *Penman v. The Fife Coal Co.*, (1936) A.C. at page 60 expressed the view that *Hewlett's case* went to the limit of what is permissible in the way of a liberal construction of the Act. In the *Penman's case* it was held that a workman was entitled to recover deductions from his salary made by the employer to be devoted to an outstanding debt owed to them by the workman's father, even though the workman had signed a written consent to the deduction in order to save the family from eviction. This case may be regarded as hard on the employers, but, if anything, it shows that even in the teeth of a written consent, the courts will

not hesitate to deprive the employer from the benefits of a contract that is illegal and void under the Act.

This is how the matter was put by Lord WRIGHT in *Pratt v. Cook Son & Co.*, (1940) 1 All E.R. at page 416. After stating that the appellant (workman) was an artificer to whom the Act applies, Lord WRIGHT said (at page 416):

"It must, it seems, follow, unless there is in the Act some specific exception to the contrary which takes this contract out of sec. 1, that the contract was illegal, null and void. If that is so, the appellant must be entitled to say that he is not bound by the illegal and void contract, but has the right to claim to be paid a fair remuneration for his services, and, after giving credit for any money payments which he has received on account of remuneration, to recover under sect. 4 so much of the wages earned by him as was not actually paid to him by the respondents in the current coin of the realm."

Another case in which the workman agreed to have certain sums of money deducted weekly from her wages was held to be void, is *Kenyon v. Darwin Cotton Mfg. Co.*, (1936) 1 All E.R. 310. In that case the workman had agreed to purchase shares in the employer's company, and that the payments towards the acquisition of the shares should be made by weekly deductions from her wage.

Several other cases can be found where the courts were all inclined to the view that the Truck Acts were enacted to put an end to an evil practice and for the protection of the workman, and should be construed accordingly. There appears to me no reason why ss. 19, 20 and 24 of the Labour Ordinance, which must have the same aims and objects of the Truck Acts, should be differently interpreted.

I would hold, therefore, as the learned Chief Justice did, that this was not a case of the computation of wages. In my judgment, the tariff sheets make it impossible to hold that the rates of wages set out therein are anything else than what they are, namely, wages, and no amount of sophistry can make it otherwise. Much argument centred around the question whether or not overtime rates had been prescribed, but in my judgment, not much turns on this issue. Counsel argued that the tariff sheets merely indicate a formula to be used for the purpose of computing the wages. In my view, the tariff sheets prescribed the rates of pay for normal working hours, i.e., the normal hours in an eight-hour day; it then proceeds to fix the rate of pay in respect of hours worked outside of that period, which can be regarded as overtime rates.

I am in agreement with the learned Chief Justice when, in the course of his judgment, he said:

"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 dis-

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guise the refund as a pay-out what was in fact paid to each worker was the individual sum he had paid in, less a small percentage for expenses"

And if there was an agreement for the deductions to be made, such agreement would be caught by s. 19 of the ordinance, and would be illegal, null and void.

I must not leave this case without making a few observations as regards the burden of proof, a matter which was raised in the court of first instance and pursued in this court. In their defence, the appellants had alleged that the plaintiff had been paid in full without any deduction whatever for all 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.

Learned counsel for the appellants pointed out that in view of the finding of the Chief Justice that the Labour Union did not represent the respondent, the production of the agreement or agreements referred to in the pleadings would have been useless, and in fact they are not relevant to the appellant's case. Indeed, he conceded that as far as he could ascertain the agreements would not have assisted in the interpretation of the tariff sheets. But, on the other hand, he has also submitted that the trial judge arrived at an interpretation of the tariff sheets without the benefit of the whole agreement.

In the statement of claim, the respondent (plaintiff) pleaded that he was entitled to the prescribed rates of pay, that he had not been paid at that rate, and that he was entitled to be paid the difference. The appellants (defendants) denied that the plaintiff was not paid at the full rate, and alleged that he was paid without any deductions. In their amended defence, they repeated the above allegation, and further pleaded that the plaintiff had been paid at the rate prescribed by agreements between the Association representing the employers and the Guyana Labour Union, the accredited representatives of the waterfront workers.

At that stage of the proceedings, I would think that the appellants (defendants) having pleaded the agreements, had the onus cast on them to produce such agreements. But the matter does not rest there. Upon the respondent (plaintiff) taking out a summons, an order was made by a Judge in Chambers enjoining the appellants to supply particulars of the agreements pleaded, and that on their failure so to do, they be precluded from giving evidence in connection therewith. They failed to comply with the order, and at trial, the respondent (plaintiff) took up the position that having failed to comply with the order, the appellants could not lead the evidence. The learned Chief Justice agreed with the respondent's submission.

I am of the view that the Chief Justice was right in so ruling. It is difficult to understand the attitude of the appellants as regards leading this evi-

dence at the trial in the face of an order which said they could not lead it. The legal burden of proving what the prescribed rates of pay were, and that he had not been paid those rates, lay on the respondent (plaintiff) and once that has been achieved, a provisional presumption arises that he had not been paid at the prescribed rates. But this is not conclusive. The appellants (defendants) would then have to prove by whatever legal means at their disposal that the respondent had been paid at the prescribed rates. [See *Huyton-With-Roby U.D.C. v. Hunter* (1955) 2 All E.R. 398]. In the instant case, they have failed to do so.

For the reasons I have given, I would dismiss this appeal, and affirm the judgment of the court below. The respondent must have his costs of this appeal.

LUCKHOO, C.: I agree.

CRANE, J.A.: The principle that he who enjoys the benefit of anything must also bear the correlative burden, has its origin in Natural Justice. It is to be found expressed in the Digest thus: "*Secundum naturam est, com-moda conjusque rei eum sequi, quern sequuntur incommoda.*" (D. 50, 7, 10); and in the maxim that "Equality is equity." This principle "applies precisely in the case of a covenant running with the land and in the case of a contract which is made on behalf of or is assigned to another". (See *Jowitt's Dictionary of English Law* [1959] at page 1463).

This appeal provides an apt illustration of the converse of the above principle which also holds good, for, in like manner, it is considered to be just and proper that he who bears the burden ought also to share in any resultant benefits.

The respondent, Ivan Bentinck, was at all material times a waterfront worker in the category of an unregistered worker or 'tagman'. Being so placed, it was his lot to accept such employment as he found, because, in the hierarchy of the waterfront, job-security and equality of job-opportunity are not readily enjoyed by all stevedores. The claims of the registered stevedore to employment predominate, and must be given priority. He must at all times be considered before the 'first-preference', the 'second-preference' and the unregistered stevedore. But there is yet a further inequality: only the registered may enjoy the fruits of collective bargaining between labour and management, as represented by the Guyana Labour Union and the appellant Shipping Association of Georgetown (hereafter called 'the Association').

In the High Court, Ivan Bentinck, the respondent in this court, sought three declarations and two orders. The declarations were:

- (1) That he was entitled to receive without deduction from the Association and the four appellant shipping companies (hereafter called 'the Companies') amounts of \$4.79 and \$5.79

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representing his full rate of wages earned by and payable to him on those dates between 1962 and 1966 on which he worked in the two half-night shifts—4 p.m.—8 p.m. and 9 p.m.—1.00 am, respectively.

- (2) A declaration that those sums represented the rate of wages for a stevedore on those night shifts with effect from the 7th October, 1964.
- (3) A declaration that the system under which the appellants purported to reduce his wages by 14% when they credited amounts of 67 and 78 cents to a Levy Stabilisation Fund was illegal and null and void.

The two orders were:

- (1) The repayment of all amounts deducted from 1962 to the present time.
- (2) An injunction restraining the appellants from deducting any further wages.

Both the Association and their co-appellants are incorporated bodies. But while the latter admits responsibility for the employment and the supplying of the necessary funds and instructions to the Association for payment of stevedores, the Association denies it acted in any other capacity than as paymaster to the stevedores. All appellants, however, contend that the respondent received his full wages without any deductions whatever for all work performed by him "at the rates prescribed by *agreements* between the Association, representing the companies, and the Guyana Labour Union, the accredited representatives of waterfront workers". (Para. 5 of Statement of Defence).

Thus, the defence being payment in accordance with agreements, the failure of the appellants to disclose particulars about them when requested to do so, led to interlocutory proceedings in the High Court. There, an order was made in default of which the appellants were precluded from giving evidence concerning them at the trial.

At the trial, the main point which the trial judge had to decide was the legitimate rate of pay for a stevedore who worked on the night shifts — 4 p.m.—8 p.m. and 9 p.m.—1 a.m.—on ordinary week-days, Mondays to Fridays, as from October 7, 1967. This involved a finding whether amounts of 67 and 78 cents were proper deductions from the gross amount paid in respect of the two night-shift periods per day mentioned above. Was it \$4.79 or \$4.12 in respect of the first night shift? Or was it \$5.59 or \$4.81 in respect of the second night shift? Unfortunately, from the appellants' standpoint, there was no proof of payment on the basis of those agreements alleged in the statement of defence, for they were not put in evidence despite the interlocutory order. The latter was not obeyed, and though at the trial there was a somewhat belated attempt at compliance to produce one of the agreements, it

was not persisted in when objection was taken on behalf of the respondent, and after counsel for the appellants informed the court that he was not relying on that agreement "in respect of para. 5 of the amended defence" in which payment in full was pleaded. This I understand to mean—in proof of the assertion of payment in full made therein. Thereafter, no other agreement was sought to be put in by the appellants, and the trial continued without them.

In my opinion, the *onus* of proof of payment clearly lay on the appellants. It was their duty to satisfy the judge on their pleading that the respondent was paid his wages in full accordance with those agreements between the Association and the Guyana Labour Union representing all waterfront workers. It is said that the Guyana Labour Union represents only registered but not unregistered stevedores; therefore, in the absence of proof that a collective bargaining agreement was legitimately negotiated by that Union with the intention and the object of legally binding and of benefitting the collective interests of all classes of stevedores, can it be said that it acted on behalf of unregistered workers? But whatever may be said in the absence of those agreements pleaded by the appellants, the very recent case of *Ford Motor Co. Ltd. v. A.E.F.*, (1969) 2 All E.R. 481, shows that the courts have now declared in favour of the view long held by eminent legal contributors and textwriters, and expressed in the report of the Royal Commission on Trade Unions & Employers' Associations, (1965-1968. Cmd. 3623) - chaired by Lord Donovan—that in the British climate of industrial relations collective bargaining agreements are not legally binding; that they are not directly enforceable by action for damages, but only indirectly in court by declaration to determine their meaning and import, or by the extra-judicial method of strike action. This is so, it is said, because the parties to them never do really intend to make them binding. In the above case, GEOFFREY LANE, J., discharged an *ex parte* injunction on two defendant trade unions for attempting by unlawful means to procure the variation of a written agreement between them and the plaintiff motor company. The judge in so doing found that neither the Company nor the Unions had intended to make their agreement binding at law. His Lordships so ruled after considering para. 471 of the Commission's report which runs as follows:

"This lack of intention to make legally binding collective agreements, or, better perhaps, this intention and policy that collective bargaining and collective agreements should remain outside the law, is one of the characteristic features of our system of industrial relations which distinguishes it from other comparable systems. It is deeply rooted in its structure. As we pointed out in Chapter III, collective bargaining is not in this country a series of easily distinguishable transactions comparable to the making of contracts by two commercial firms. It is in fact a continuous process in which differences concerning the interpretation of an agreement merge imperceptibly into differences concerning claims to change its effect. Moreover, even at industry level,

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a great deal of collective bargaining takes place through standing bodies, such as joint industrial councils and national or regional negotiating boards, and the agreement appears as a 'resolution' or 'decision' of that body, variable at its will, and variable in particular in the light of such difficulties of interpretation as may arise. Such 'bargaining' does not fit into the categories of the law of contract."

Nevertheless, I will show that even had the pleaded agreements been tendered in evidence and shown that the Guyana Labour Union had indeed acted on behalf of all waterfront workers, with the intention of creating legal obligations on their behalf with the Association, it cannot be said that the Union acted in the workers' interests when it acted outside the law by concluding an agreement which was null and void *ab initio* so far as it restricted the unregistered worker from participating in a fund to which he financially contributed on an equal basis with others.

Evidence of Bentinck's entitlement to the rates of pay claimed by him is furnished by the "Schedule of Wages Rates (daily, basic, premium and overtime) for Waterfront Workers with effect from 7th October, 1964, as agreed between the Association and the Guyana Labour Union". (See Ex. 'D') The directions given therein are that the amounts of \$4.79 and \$5.59 for the period of eight hours of the second shift were to be *reduced* by the amounts shown hereunder as due to be credited to the Levy Stabilisation Fund". Those amounts are 67 and 78 cents for the first and second half-night shifts, respectively.

The agreements pleaded by the appellants, for what they were worth, were obviously in justification of the "reduced" amounts; but they were not produced. Their absence is to be regretted, particularly that dated 26th May, 1960, since it would have furnished documentary evidence of the origin and purpose of the Levy Stabilisation Fund, and of the trend in the general climate of opinion on both sides of industry on the intention of the parties to create binding legal obligations. We are told, however, that the Levy Stabilisation Fund, to which the reduced sums were credited, was the creature of an agreement which gave the worker a premium for night-work, i.e. a sum in addition to the basic rate of pay for his having to work during dark hours in bonds and ships; that the appellants were non-contributors to it, and that the fund's main purpose was to provide a guaranteed minimum wage of \$19.00 per week to every *registered* stevedore who became entitled whenever his weekly wages fell short of that figure. In that event, the deficit was to be implemented from the fund which originated with the shift system after payment of overtime rates ceased in 1961 for work done in excess of eight hours. We are told, too, that the appellants became liable under the Factories Ordinance, Cap. 115, to pay only the basic rate of pay for eight hours of work, whether by day or night, but it was decided to pay an additional 25% on the basic rate for night work and to "fund" the difference between this rate and former overtime rates in the interest, and for the

benefit of the wage stabilisation of the registered worker—hence the origin of the Levy Stabilisation Fund.

Under the present shift system, it is said workers are not entitled to old overtime rates of pay, these being evidently more than the basic rate plus 25%. Therefore, instead of the appellants profiting by any excess in hand which the changeover to the night shift system occasioned, the surplus was "funded" in the interests of registered workers who had certain obligations to fulfil under the shift system; but just exactly what these obligations are has not been disclosed.

The Chief Justice, however, rejected the suggestion that the figures given in respect of the two night shifts included any premium to the worker. He was satisfied that the difference between the basic rate and the night shift pay was constituted solely from overtime rates stated on Ex. 'D'. In my view, this is a finding of fact which is amply supported by both oral and documentary evidence; it is a finding on which the judge cannot properly be disturbed, for in one breath the appellants were urging before him that ever since March 3, 1961, payment of overtime as a policy was abolished with the advent of the shift system; yet in another, they qualified that by admitting that overtime is still in vogue, though payable only to workers who labour in excess of eight hours in any one day, in accordance with the Factories Ordinance, Cap. 115. It was also admitted that it is quite possible for a tagman' like the respondent to work for more than eight hours a day. This seems to me a most important admission for, quite apart from the wage schedule, when it is considered in the light of the failure of the appellants to produce records showing that the respondent had only done a minimum of eight hours *per diem* and no more, there is absolutely no foundation for saying that he is entitled to no more than the basic eight-hour wage for any day or night on which he worked. I think this must follow because the respondent may very well have been one of those unregistered 'tagmen' who earned basic + overtime, having worked in excess of eight hours. If he did so earn, then the contention that the appellants' responsibility after March 31, 1961, was limited to the payment of the basic wage of \$6.40 *per diem* cannot be sustained. (The basic wage is computed at the rate of 80 cents per hour x 8 hours). This must mean that the 14% contribution by the respondent to the fund was made from what was undoubtedly his own property.

However all this may be, the fact remains that all classes of stevedores contribute to the Levy Stabilisation Fund on an equal basis from their night shift earnings; they do so by having a "reduced" wage, as the appellants prefer to call it, paid them on the understanding that the deductions would be paid into the fund for the benefit of only registered workers. There was a tremendous outcry following on the inauguration of the Levy Stabilisation Fund; a wave of industrial unrest followed the deductions during the first eight months of the shift system, i.e. between the 3rd March, 1961, and the 26th November, 1961. Workers objected. There were a series of work

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stoppages resulting in the appellants' decisions against further deductions and the refund of all contributions to the latter date.

Deductions were, however, recommenced from August 1962 when the Association made them obligatory once again if workers were desirous of obtaining employment. It is an important fact to note that there is no distinction between the rates paid to nor hours worked by registered and unregistered stevedores; they all do the same work for the same number of hours on night shifts for the same rates of pay for their labours; it is obligatory on all to contribute to the Levy Stabilisation Fund from which, it is agreed, only the registered worker may benefit. But legality of these deductions apart, in the light of all above it is not easy to see nor to justify a policy which served to benefit only one category of worker at the expense of the others. Admittedly, after repayment of the deductions in 1961, the fund was depleted to such an extent that it became necessary for the Association to obtain bank overdrafts with a view to securing the guaranteed minimum of \$19.00; there was, in fact, no proper fund between January 1962 and August 1962. But I am at a loss to discover what can ever be the rationale of any labour policy which excludes the unregistered stevedore from participation in the benefits of a fund to which he also contributes equally!

As I have observed, those obligations which the registered worker had to fulfil, have not been stated. It is quite possible that the appellants considered that as only the registered category of worker was saddled with them, only he should benefit from the fund; I know not. But it was submitted that since the respondent knew from the wage schedules and from the deductions therein set out what he was going to receive, the figures stated as deductions therein could never have been really part of his salary. In keeping with this trend of argument, it is suggested that those deductions representing as they did only a mode of calculating the wage the worker is to receive, the principle of truck legislation in the Labour Ordinance has not been violated. It is this aspect of the matter which was stressed as the main point in the appeal before us; (*See Sagar v. Ridehalgh & Sons Ltd.*, [1931] ICh.D. 310).

The principle behind all truck law is the enforcement of payment of wages to workmen in cash' and not in kind. It is the recognition by the law of the need for its protection of the weak against the strong. The law justifies the necessity for its intervention in the sphere and in the interest of good industrial relations on account of inequality in the relative bargaining strengths of employer and employee, and that is why it insists that the wages of any employee of any labour "shall be payable in money only, and not otherwise". (Sec. 19, Cap. 103). It is "illegal, null and void" to contract to the contrary, and any employer who does so commits a crime. He must not impose any restrictions as to where or how wages shall be spent; nor can he recover the price of any goods supplied on credit to the worker; he cannot even set-off sums allegedly owing for goods supplied against the worker's claim for wages.

The relevant sections of the Labour Ordinance, Cap. 103, which embody the spirit of this type of legislation, were cited to us by counsel for the respondent. Section 19 makes it obligatory that the wages of an employee be paid in money and not otherwise, unless permitted by the ordinance, and if a contract of employment provides in whole or in part for payment in any other manner, it is "illegal, null and void". Section 20 provides that the employee is entitled to recover the whole or so much of wages earned, exclusive of such lawful deductions which are contained in section 24, none of the provisions of which concern any scheme like the Levy Stabilisation Fund.

The deductions or "reductions" of 67 and 78 cents (as the Association chooses to call them) were compulsory stoppages in the sense that the stevedore had no option, if he wanted employment, except to comply. Yet, I think, in keeping with modern day notion of contract, which I will explain below, it cannot really be said there was never a contract; that the respondent never really did authorise nor assent to them. The question is, how valid was such a contract.

Sometimes it would happen that an unregistered worker was given priority for employment by being promoted to the 'first-preference' list, provided he signed an application form emanating from the appellants and approved by the Guyana Labour Union agreeing to his rates of pay for the two night shifts being "reduced" by 14% in the same manner as in the case of the registered worker, and provided he was prepared to give an undertaking to the effect that – "I understand that I shall not be entitled to a minimum guaranteed weekly payment except upon transfer to the Port Labour Register". This appears to me to put beyond dispute the Association's intention to benefit only registered stevedores from any collective bargaining agreements between the Union and themselves. There is, however, no indication that the respondent ever signed any like form. This he denied doing. All he was issued with by the Association were standard forms of, wage schedules from which he learnt of hours and conditions of employment and rates of pay in respect of the two night shifts involved, and the very important fact that "reductions" in the certain specified sums were going to be made from his wages and credited to the Levy Stabilisation Fund.

The true relationship between the respondent and the Guyana Labour Union is not known for certain.) It is said that the Union does not extend its representation to unregistered stevedores; although I think this is justly denied by the appellants. Those collective agreements pleaded between the Union and the Association are not in evidence; it is unknown whether the Association may negotiate directly with the unregistered worker. This, however, was clearly not so in this case, for from the text of Ex. 'D' on which the respondent bases his claim, it is evident that the Guyana Labour Union contracted with the Shipping Association on behalf of *all* waterfront workers, including the respondent. But the learned judge found that the respondent had neither assented to nor authorised the deductions. I do not take this view. His finding seems to me to be based primarily on the facts that the respondent was not a member of the Guyana Labour Union so that the Union

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did not have the authority to contract on his behalf. I must respectfully express my disagreement with this finding which has overlooked the nature of collective bargaining agreements in industrial relations, and the ratio of the decision in *Hewlett v. Allen*, (1894) A.C. 383, from which he sought to distinguish the instant case.

In that case, as extracted from the head-note, the appellant, Louisa Hewlett, entered the service of the respondent. She signed an agreement to conform to all the rules and regulations of the respondents' works. One of the regulations directed that all employees were to become members of a sick and accident club. In accordance with the rules of the club, weekly payments were made to the club's treasurer, and from the fund thus established, relief was given to the members in case of sickness or accident. The appellant received each week a ticket showing the gross amount due to her and the weekly deduction on account of the payment to the club, the balance alone being paid to her. She never required and never received any relief from the fund. After leaving her employment she brought an action against the respondent under section 4 of the Truck Act, 1831, to recover the amount of the weekly payments in the club thus deducted from her wages. It was held that within the meaning of sections 3 and 4 of the Truck Act, 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. It was also held, affirming the decision of the Court of Appeal, that even assuming (but without deciding) that there was in this case a contract which was made illegal, null and void by section 2 of the said Act, the respondent, by making the weekly payments to club with the assent of the appellant, had discharged his obligations to her.

In essaying to distinguish *Hewlett's case*, the Chief Justice, after citing a passage in the speech of Lord WRIGHT in *In Penman v. Fife Coal Co., Ltd.*, (1936) A.C. 45, in which *Hewlett v. Allen* was considered, said:

"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."

There are two faults which I find in the above extract. In the first place, I believe it is erroneous to say that the deductions had been unauthorised or were not assented to by the respondent, for it appears to me that the force and effect of the Wage Schedule, Ex. 'D', as constituting evidence of a contract between the appellant Shipping Association and the Guyana Labour Union on the respondent's behalf, has been lost sight of. The idea of contract as representing a concurrence of the wills of two parties, one of whom promises something to the other who, on his part, accepts such promise, expounding as it does the individualistic theory of contract based on the 19th

century doctrine of *laissez-faire*, has long ceased to hold sway in the collectivist era of the 20th century. The doctrine of the concurring wills of the parties conducing to a *consensus ad idem* is an anachronism, for today by the force of economic pressure and business expediency in the complex structure of modern-day society, it has given way to the standardized form of contract. These forms must be accepted by all workers engaged in any well-organised industry, for it would be inconceivable for employers now that mass production attracts mass employment, to contract with each of their employees separately and distinctly. Without doubt, inherent in all contracts is the underlying notion of assent, but a party, unlike a tortfeasor, is bound because he has agreed to be bound. In this regard, I think the attitude of the courts in relation to hire-purchase agreements is relevant, as seen from the following extract from the judgment of DIPLOCK, J., in *Lowe v. Lombank*, (1960) 1 All E.R. 611, at page 613 *infra*:

"The common law, as counsel for the defendants points out, subject to some restrictions based on public policy, permits persons to make whatever contractual bargains they please and will enforce those bargains. This general principle, of which the underlying assumptions are that persons entering contracts are of equal bargaining power and read and understand what they sign, ignores the fact that under modern conditions many transactions, particularly of hire-purchase, are entered into by ignorant persons whose only choice is either not to enter into the transaction at all or to enter into it on the terms of a standard agreement, drafted by the hire-purchase company, and containing numerous clauses printed in miniscule characters which the hirers do not in fact read and, if they did, would be incapable of understanding."

It is in the above respect that I believe the wage schedule represents evidence of a standardized agreement the contents of which were offered to and accepted by all stevedores, including the respondent, when he offered his services to the appellants. He is bound thereby because he laboured with the terms of Ex. 'D' in mind, an indication that he had agreed to be bound by the terms negotiated by the Union with the Shipping Association. But I am considering whether it cannot be held that the respondent had been in direct negotiation with the appellant Association. I say so in view of the complaint he personally made to the manager about deductions from his pay-packet, the reply he received thereto, and the fact that he, nevertheless, continued to work. According to the respondent, the manager told him that it was the Association's decision to deduct from everybody's, and that, "Either you work or you can't work", which I understand him to mean - "These are our terms of employment; you may accept or reject them as you please." If this is so, I believe by the very fact that the respondent worked thereafter, he can hardly contend that he had not given his authorisation or assent to the deductions for the Levy Stabilisation Fund. These are the reasons why I am unable to accept the view that there was no authorisation nor assent by the

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respondent for the deduction to be credited to the Levy Stabilisation Fund. In the second place, I think *Hewlett v. Allen* is to be distinguished from the case under review in so far as the requirement of the law that the entire amount of the respondent's wages has not been paid to him is concerned. (Section 19).

The purport of that case clearly is, that a deduction from a worker's pay-packet is not unlawful if it is no more than a payment of part of his wages to some third person, provided the worker so requests; and in so far as the employer is concerned, that represents payment of wages in full without deduction. Other deducted contributions commonly found in industry today are to provident funds, pensions schemes and burial societies. There is no difficulty in justifying deductions paid to trustees of the appropriate scheme on the same principle—that it is the worker who has requested them. This is indeed the ratio of *Hewlett's case*; so that it is not correct to say that once the deductions do not fall within those permitted by the ordinance they are not lawful. In other words, notwithstanding a deduction does not fall within those listed in section 24 of the ordinance, it may also be lawful, once it satisfies the test of being a full payment to the employee of his wages in money, and it does so if payment is made to anyone at the worker's request. Take, for example, a written request by an employee to his employer to deduct half of his pay and to pay it to some third person at the pay-table, though not within section 24, is a valid discharge and within the law of payment in money of half of the employee's wages.

It is of interest to note that the principle behind these deductions from worker's wages is maintained in section 24 of Cap. 103 where, in almost every paragraph a deduction has to be made "at the latter's request", i.e. the employee's; although with us, there is no obligation that such request should be in writing as in the proviso to section 23 of the Truck Act. 1831, requires. But I should imagine a writing would simplify proof of a request. However, it is probable that the Legislature deliberately excluded that requirement since the art of writing is not universal with us.

Now to distinguish *Hewlett's case* from the present. In both cases part wages was directed to be paid by the worker to a particular fund with the ostensible object that he would receive a benefit from that fund should the need for it arise. There is this difference, however, which I think is fundamental: that during the whole time Mrs. Hewlett was employed she shared the advantages of being a member of the sick and benefit club, and that although she did not fall ill during that time, she received the benefit of having secured to her in case she fell ill a considerable payment out of the sick fund. In the appeal before us, the same cannot be said of the respondent Bentinck. Admittedly Hewlett, like Bentinck, made contributions to the fund from which she derived no tangible benefit, but that was only because she had no need of it. The important point and distinguishing feature which is decisive is, that those benefits were hers if the need for them arose; they were secured to her under a contract in case she fell ill and it is in this sense

it may be said she derived a benefit. She had a vested interest in the fund and a right to share in it.

Not so, however, in the respondent's case. There was from the very beginning to be no benefit or consideration of any kind accruing to him, nor to any member of his category until he was promoted to the Port Labour Register, which event may never happen, if it happens at all. His was only at the most a contingent interest in the Levy Stabilisation Fund. Meanwhile, despite his continuous protests, he is to go on making contributions to a scheme in which he may never participate. This seems to me to be the most ugly aspect of the whole case, for both in law and in conscience, how can it be said that the respondent was paid the whole of his wages *in money* as the law requires, when, notwithstanding his agreement that deductions be made, from the very inception he was to derive no right, interest, profit nor benefit from a fund to which he contributed his earnings? It was only in such consideration or benefit that payment in money could legally be reflected. But the injustice of the case is self-evident; he is being made to receive nothing in return for his contributions to the Levy Stabilisation Fund. In my judgment, it is this fact which serves to distinguish *Hewlett v. Allen* from the instant case, and which had made the contract of employment between the appellants and the Guyana Labour Union, on the respondent's behalf, "illegal, null and void" *ab initio*, and violated a cornerstone in the edifice of modern social security law, viz., a fair wage for a fair day's work.

It must follow that the respondent is entitled to recover from the appellants all deductions so improperly made from his wages, and that the Chief Justice was right in his declarations and orders.

I agree that the judgment of the court below be affirmed, and the appeal be dismissed with costs.

Appeal dismissed.

RICARDO da SILVA v. D. A. ABRAMS

[Court of Appeal (Luckhoo, C., Persaud, C J. (ag.), Crane, J A.)
May 21, July 10, 24, 1969].

*Customs—Customs duty—Keeping uncustomed goods—Intent to defraud—
Necessity to prove—Customs Ordinance Cap. 309, s. 216.*

*Statute—Revision of the laws—Alteration in arrangement—No alteration in
meaning.*

Full Court—How far its decisions bind itself, judges and magistrates.

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The appellant was convicted by a magistrate with knowingly keeping uncustomed goods contrary to s 216 (c) of the Customs Ordinance Cap. 309. On appeal to the Full Court by the appellant it was submitted that an essential ingredient of the charge viz. the intent to defraud the revenue of any duty was neither alleged nor proved. The Full Court dismissed the appeal, overruling previous decisions of the Full Court which lent support to the submission. On appeal.

HELD: (i) that the change effected by the Commissioner for the revision of the laws in the arrangement of section 216 of the Customs Ordinance Cap 309, by creating sub-paragraphs out of one paragraph, and numbering them, did not alter the meaning of the section.

(ii) that under section 216(c) the prosecution must prove an intent to defraud the revenue of any duty payable.

(iii) that where there are previous inconsistent decisions of the Full Court judicial comity does not prevent that Court from forming its own view as to which should be followed, but that judgments of the Full Court laying down principles of law or settling the interpretation of ordinances or statutes are binding on magistrates, judges at first instance and the Full Court.

Appeal allowed. Conviction and sentence quashed.

C. Lloyd Luckhoo, Q.C. for the appellant.

C. Kennard, Senior Crown Counsel, for the Crown.

LUCKHOO, C.: The appellant was charged with and convicted for the following offences

- (1) That on the 10th December, 1967, at New Hope, Pomeroon River, he knowingly kept uncustomed goods, to wit, six drums containing a quantity of gasolene and one drum of gasolene and two drums of petroleum oil. And
- (2) That on the 19th December, 1967, at Pln. Glenhurst, Pomeroon River, he knowingly kept uncustomed goods, to wit, 23 drums containing a quantity of gasolene, eight drums of gasolene and one drum of petroleum oil.

Both charges were said to be contrary to s. 216(c) of the Customs Ordinance, Cap. 309.

The case for the prosecution was that on 10th December, 1967, a Customs Officer, accompanied by policemen, executed a writ of assistance on the appellant's premises at New Hope, and later searched his other premises at Glenhurst. At those places they found the articles which form the subject-matter of the charges against him. At New Hope the drums were exposed to view, but at Glenhurst they were covered with coconut branches, and some were actually hidden from view. The appellant, when

challenged by the Customs Officer, said that all the drums contained gasoline and that they belonged to him, and he submitted a bill for the purchase of 11 drums of gasoline. But he said he had no bills for the purchase of the gasoline found at Glenhurst which he had bought from different persons. Further, he gave the explanation that he kept the drums at Glenhurst in the way they were found as "he did not want anyone to interfere with them". He was told it was suspected that he had uncustomed goods, and on the following day arrested.

At the close of the case for the prosecution, counsel for the appellant submitted that the evidence did not show that the appellant knew he had uncustomed goods. This submission was overruled, and the appellant gave evidence in which he put forward to the magistrate that he had purchased locally the gasoline, kerosene and diesel fuel between April 1966 and September 1967, and tendered certain documents in support of this. He further said that he sold petrol to people who had outboard engines.

The magistrate, in considering the nature of the charges against the appellant, said

"Inasmuch as the burden of disproof (if I may use that term) shifted onto the appellant when a *prima facie* case was made out against him, I had to decide the issue not beyond a reasonable doubt, but on a balance of probability. In other words, to my mind the appellant would have been entitled to an acquittal if on the balance of probability I found that he either did not knowingly keep the goods, or that he did not have uncustomed goods.

"In the instant cases, the first exception did not obtain as the appellant admitted ownership of the fuel found. I therefore had to determine whether the appellant paid the proper duty on the goods, or whether the articles were lawfully imported, or whether the appellant bought the articles in the normal course of his business.

". . . there was no evidence that the appellant paid any duty on the fuel, nor was there evidence that he lawfully imported the articles into the country. Indeed the issue to be decided was whether the fuel was bought in the normal course of business, as the appellant claimed he did.

"I did not believe the appellant's story and I found that his explanation was unreasonable".

The magistrate's reference above to the "burden of disproof no doubt arises from the provision of s. 216 of Cap. 309 which provides that –

"In any prosecution under the customs laws, the proof that the proper duties have been paid in respect of any goods or that the same have been lawfully imported or exported, or lawfully put into or out of any aircraft or ship, or lawfully transferred from one aircraft or ship to another aircraft or ship shall lie on the defendant".

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From conviction and sentence there was an appeal to the Full Court of the High Court of the Supreme Court of Judicature mainly on two grounds, viz;

- (a) that an essential ingredient of the charge was missing from the particulars of the complaint, viz., the words 'with intent to defraud the revenue of any duty thereon', which made the complaint defective and bad and so also the conviction;
- (b) that in any event the prosecution was obliged to prove that the appellant knowingly kept goods which he knew to be uncustomed, with the intention to defraud the revenue of duty thereon, and this they failed to do.

But the Full Court affirmed the Magistrate's decision.

Now the appellant seeks to have that order reversed, similarly, on the argument that it was necessary for the prosecution not only to allege and/or prove that the appellant knew he had uncustomed goods, but that he intended to deprive the Customs of revenue to which they were entitled, and that he had failed to direct himself as to the necessity to allege and prove this intent. If the argument is sound, then the appeal must be allowed, as a decision will have been given in a matter without taking into account a necessary and specific ingredient of the offence, viz., an intent of a particular kind, which could well have affected the result reached.

Now, the particular offence for which the appellant was charged fell within one of five sub-paragraphs lettered (a) to (e). In moving from one sub-paragraph to another, there is to be found a semi-colon at the end of each, followed by the word "or". In this case, it may be well to set out sub-paragraphs (c) and (d) in view of their relevance. Under the former, the offence charged is included with others where anyone

"knowingly harbours, keeps or conceals, or knowingly permits or suffers or causes or procures to be harboured, kept or concealed, any prohibited, restricted or uncustomed goods; or . . . "

And under the latter, the element of a specific intention is introduced which does not appear in the former where anyone

"knowingly acquires possession of or is in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any goods with intent to defraud the revenue of any duties thereon, or to evade any prohibition or restriction of or applicable to such goods; or . . . "

Counsel for the appellant contends that the intention so specified under (d), viz., "with intent to defraud the revenue of any duties thereon", applies not only to the paragraph in which it appears, but equally to the other paragraphs which precede it.

The Full Court, however, thought that it was wrong to import into paragraphs (a), (b) and (c) that specific intention which only appeared in

paragraph (d). In reaching this conclusion, a comparison was made between the format of the corresponding English section and s. 216 of Cap. 309. An attempt was made to demonstrate such a difference in meaning as would render the English authorities practically useless in interpreting our section, for it was said that whereas the English section "has lumped or included together all the separate offences created under the section, the draftsman of the local ordinance has split up s. 216 into five subsections and in each subsection has created several distinct and separate offences".

And it was further said, that under the Interpretation Ordinance here, the word "or" was to be construed disjunctively and not as implying similarity, as there was the absence of any words to indicate a contrary intention; that each sub-paragraph was then to be treated as a separate section "creating several separate and distinct offences mutually exclusive the one from the other"; and that it followed therefore that the words "with intent to defraud" would be only referable and applicable to the offences created in the particular subsection where these words appear.

With great respect to that court, this reasoning appears to me to be fallacious, and it will be seen to be so if reference is made to the origin of our enactment.

The English s. 186 came to us (with necessary modifications) as unwieldy as it appears in the Customs Consolidation Act, 1876, in one paragraph, as s. 162 of our Customs Ordinance, in the year 1884. In both enactments the separation between the various kinds of offences created was similarly effected by means of the use of semi-colons only followed by the word "or". The language creating the offences was the same and the number and kinds of offences did not differ. Further, it was clear that the "or" which followed after each semi-colon was disjunctive in both, and was intended to introduce a different classification of offences from that which went before.

I have set out our section under A of the schedule at the conclusion of this judgment with the English section under B of the schedule for the purpose of illustrating how the one was for all practical purposes cast in the mould of the other.

So that in 1884 offences against our s. 162 could bear no different construction than that under the English Act. Any relevant English authority, then, on the question of the construction of their section (according to its weight) would be expected to find suitable recognition in this country in construing ours. And so it transpired when the case of *Frailey v. Charlton*, (1919) 26 Cox C.C. 500 (of undoubted authority) was applied here, just as it was in England. There the Magistrate dismissed summons for contravening s. 186 of the Customs Consolidation Act, 1876, and the question for consideration was, whether he was justified in dismissing the information on the ground that he came to the conclusion that there was no intention to contravene the prohibition or Order-in-Council prohibiting export. The defendant had some 30 tablets on board the ship, which were considered

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to be exported. The question for determination was, whether in those circumstances he could be convicted under s. 186.

Lord READING at page 506 of the report said:

"I find it in a group of sections for the prevention of smuggling, without coming to the conclusion that the offence is not committed unless the act is done with intent to defraud His Majesty of any duties or with intent to evade the prohibition. Every word of the section confirms me in that view, because, in view of the language used, the construction for which Mr. Given contended is one which it seems to me to be impossible for us to adopt. He said that we ought to read the words 'or shall be in any way knowingly concerned' as a restriction on the generality of the language. I think that that is so, but it does not supply any reason why the restriction should not be equally applicable to the earlier part of the section, which says that 'every person who shall import or bring or be concerned in importing or bringing into the United Kingdom any prohibited goods . . . or shall unship or assist, or be otherwise concerned in the unshipping of any goods which are prohibited', shall be guilty of an offence, and then later there are the words, 'or shall be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any such goods'. All those are words of most general application, and, if they are subject to no restriction, they would make a person liable who helps to unship a barrel or takes delivery of it on the quay side, even though he might be a perfectly innocent labourer or foreman or merchant and they would make every person liable who knew the fact that he was dealing with particular goods, notwithstanding that he did not know that there was a prohibition or restriction as to their import.

"I cannot see any reason why we are to apply the restriction only to the general words of the later part of the section when there are equally general words in the earlier part of the section. I have, therefore, come to the conclusion that the restrictive words were intended to apply to all the prohibited acts mentioned in the section. Where you have the words, 'or shall knowingly harbour, keep, or conceal' any prohibited goods, you must have, for the purposes of the offence, these words, 'with intent to defraud His Majesty of any duties due thereon, or to evade any prohibition or restriction of or applicable to such goods'. Any other interpretation would be doing violence to the language.

And DARLING, J., at page 508 said:

"It is perfectly plain that anyone concerned in doing those things has the defence that he did the act not with intent to defraud the Crown or to evade any prohibition or restriction."

This case was referred to and applied in *Harry Franks*, (1950) 34 C.A.R. at page 222, where it was held that an indictment charging a prisoner

with being concerned in dealing with goods the import of which is prohibited or restricted, contrary to s. 186 of the Customs Consolidation Act, 1876, is defective if it does not contain an allegation that the act was done with the intention either to defraud the Crown of the duties thereon, or to evade a prosecution or restriction applicable to such a case. There the appellant was convicted of being concerned in bringing into the United Kingdom certain goods, the importation of which was restricted, contrary to s. 186 of the Act. The indictment contained no allegation of intent, and on the hearing of the appeal it was conceded by counsel for the Crown, on the authority of *Frailey v. Charlton*, that it was defective on that ground. To require that there should be an allegation of a specific intent, is to recognise the obligation to supply its proof. So that although the offence of importing restricted goods under the 1876 Act was distinctly removed from that which contained the words of this specific intent by several semi-colons and disjunctive "ors", this decision accepted that from the nature and purpose of the enactment that intention ran throughout the several offences and so reached even that of importing restricted goods, where no words actually exist to convey this ingredient.

Then there was the case of *Abraham Cohen*, (1934) C.A.R. 239, where it was made clear by GODDARD, L.C.J., that the jury should be reminded that intent to defraud the revenue is a necessary ingredient of the offences under the Customs Consolidation Act, 1876. He said that the appellant will not be guilty unless he knew that duty had not been paid.

I shall now trace the development of our s. 162 of the 1884 Ordinance, cast, as I have said, in the mould of the English Act, to ascertain whether by any stretch of argument any changes wrought could have affected the original meaning which it inherited from the English Act, which made proof of intent to defraud vital to the success of any prosecution for the offences there created.

In the year 1904, the Hon. Sir Thomas Crossley Rayner was appointed a Commissioner for the purpose of preparing a new and revised edition of our statute laws. His powers were limited, by Ordinance No. 7 of 1904, s. 6(1), to the extent that the power conferred upon him in s. 4 "shall not be taken to imply any power in him to make *any alteration or amendment in the matter or substance of any Ordinance or part of an Ordinance*". His task completed, the Customs Ordinance appeared in the laws of British Guiana in the revised edition by Rayner as s. 164. Nothing occurred by way of change to affect its meaning. There was no alteration in matter or substance. The change of a word here or there was of a trifling nature. This section is set out at C in the schedule for further comparison. It will be seen to be almost exactly the same as s. 162 of the 1884 Ordinance, except that the Commissioner, undoubtedly realising how difficult it was to pick out at a glance the several offences there stated, set them out under numbered paragraphs. The nine sets of offences originally established by s. 162 with the aid of semi-colons and the "or" which followed, now had in addition a number given to each. This factor, being as it was merely a change in form,

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could not and was never intended to affect any aspect of the meaning which its purpose and language could properly impart; for although "lumped" together originally in one paragraph, it was just as divided by the semi-colons and "or" as when set out subsequently in sub-paragraphs. The substance was the same, the punctuation the same; the only alteration was one of arrangement.

In the year 1926, a further revision of the laws was thought necessary, and Sir Charles Major, then Chief Justice of British Guiana, was, by Ordinance No. 4 of 1926, commissioned to undertake this task. Again, by s. 6(1) of that ordinance, the power conferred on him was said not to imply any power "to make any alteration or amendment in the matter or substance of any ordinance or part of an ordinance." This was obeyed, for, apart from the change of a word here or there, he reproduced exactly what appeared in the Rayner Edition, except that, instead of numbering the paragraphs as was there done, he chose to letter them from A to I. Under D of the schedule will appear s. 168 of Cap. 33 of the Major Edition for further comparison.

After this the Customs Ordinance, as contained in the Major Edition, was repealed by the Customs Consolidation Ordinance, No. 69 of 1952, and the penalty for evading customs laws regarding imported or exported goods, previously enacted under s. 168 of Cap. 33, was covered by s. 216 of this 1952 Ordinance. Whilst its structure remained the same as that which it replaced, some amendations were made as to the nature of the offences created. But the intention to "defraud the revenue of any duties thereon" was preserved under one of the sub-paragraphs in the same way as it existed before; and so, in conformity with the interpretation established by authority, must be taken to apply to the previous sub-paragraphs, although not expressly included therein.

This section is included, again for further comparison, in the schedule under E. It now appears without change in the last revision of our laws undertaken and performed by Sir Donald Kingdon as s. 216 of Cap. 309.

To sum up, then, what transpired from 1884 to the present time, we have this: In 1884 the English section was adopted in substance and form. In the Rayner Edition its meaning was untouched, its effect retained; but its form became more presentable in the way of displaying the offences created by numbering what had previously only appeared between semicolons. In the Major Edition, its meaning and effect were similarly unaltered, but the sub-paragraphs were lettered instead of numbered. In the 1952 Ordinance and in s. 216 of Cap. 309, the sub-paragraphs were also lettered, but whilst the offences did not remain identically the same, the relevant "intention" was, nevertheless, preserved in the same way.

When, therefore, the Legislature passed the 1952 Ordinance, it must be assumed that it was aware of the interpretation which the courts had placed on what stood before; that is, that the relevant intention specified in one set of offences was extended to other sets of offences which

appeared elsewhere in that very section; and so, by adopting the same scheme of presentation it must be taken to have intended that the same construction should continue, otherwise a different method of drafting would have been employed to secure another effect.

If a distinction, then, is to be drawn between our present ordinance and the English Act, for the purpose of seeking to avoid the operation of the "intention" as obtains under the latter, there must appear some valid justifiable difference capable of bolstering the thought. But where is it to be found? To be realistic, it just does not exist.

When the Full Court, then, in this case took the deliberate step of overruling and departing from positive judicial pronouncements on this matter made by Full Courts in three previous cases, ranging over the years 1931 to 1966, there was no justification for so doing, for I am wholly unaware of the existence of any challenge or criticism of those relevant utterances, now disacknowledged by that court in this case. Those utterances occurred in *Licorish v. D'Andrade*, (1931-37) L.R.B.G., at p. 146, when the appellant was charged under s. 168(b) of the Customs Ordinance, Cap. 33 (Major Edition) with being concerned in the unshipping of 12 lbs. of saccharine on which duty had not been paid. The Full Court there said, on the authority of *Frailey v. Charlton*, that, under that section, the words "with intent to defraud His Majesty for the Colony of any duties thereon" in sub-paragraph (h), applied to all the various offences created in the earlier part of the section.

Then in *Martin v. D'Andrade*, (1931-37) L.R.B.G. at p. 387, SAVARY, C.J., no doubt confirmed this view in saying:

"With regard to the extent to which the words 'with intent to defraud' govern the words in s. 168(g), this has already been dealt with by this court in the case of *Licorish v. D'Andrade*."

And in *Soodass v. D'Oliveira* (Appeal No. 70/66), LUCKHOO, C.J., referred to *Licorish v. D'Andrade* when he also had before him *Martin v. D'Andrade*, and reiterated that "the prosecution must prove an intent to defraud the revenue, and that this intent may be inferred from the surrounding circumstances.

It may not be irrelevant to notice that SAVARY, C.J., in *Martin v. D'Andrade* had indicated that judicial comity does not prevent the Full Court from considering previous inconsistent decisions of the old appellate court or of the Full Court, and forming its own view as to which should be followed, but that judgments of the Full Court laying down principles of law or settling the interpretation of ordinances or statutes are binding on magistrate, judges of first instance, and the Full Court.

The Full Court, however, in this case thought that the judges in those cases in the Full Court "were in error in their approach to the question" by overlooking the circumstance "that s. 168 of Cap. 33, now s. 216 of Cap. 309 (Kingdon Edition) created several offences in each

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subsection, which must be construed as a separate section, and that the words 'with intent to defraud' merely appeared in subsection or paragraph (h), and no other subsection". It was suggested that what was said was "*per incuriam*" on the basis that there was some step in the reasoning which was demonstrably wrong. And reference was made to the dictum of Lord EVERSHED, M. R., as to the meaning of *per incuriam* in *Morelle Ltd. v. Wakeling*, (1955) 2 Q.B. 379.

To be justified in this resolve to reduce the authority of what was previously established would require an obvious detection of some manifest slip or error to which those courts-had succumbed. Where there is no more than a difference of viewpoint, courts, of co-ordinate jurisdiction ought not to depart from decisions which have been unchallenged except clearly shown to be *per incuriam* in the sense understood in *Morelle v. Wakeling* (supra).

A very heavy onus then remains to be shed before it could be said that it was right to depart from the pronouncements previously made. Were they decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that it could really be said "that some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong"?

Two different thoughts appear. One seeks to confine the relevant "intention" within its immediate compartment; the other, supported by authority here and in England, was of a broader vision, and extended its application to other compartments. Nothing appears which would justify the rejection of the latter.

The several offences created under the English section were just as distinctly held apart by semi-colons and the disjunctive "or", as by lettered subparagraphs with similar punctuation. If the purpose of the enactment and the language used sufficiently manifested the intention that a specified *mens rea* in one set of offences should be read in all, it is of little consequence that the other offences are in sub-paragraphs or in the same paragraph separated by semi-colons. The necessity to read in what the Legislature intended is what is of paramount importance and that must be gleaned from considerations such as are laid down in *Frailey v. Charlton*, in the passage already quoted.

Now I turn to the effect of the error in omitting to consider the necessity of *mens rea* to defraud the revenue as an ingredient of the offence.

The fact that the appellant was knowingly in possession of dutiable goods, and gave an unacceptable explanation as to how he came by that possession, might, depending on the particular circumstances, be consistent with more than one inference. His possession may be that of a person who knew the goods were uncustomed and had the intention of defrauding the revenue; or, equally, that he obtained the subject-matter of the charge unlawfully, or received them knowing that they were stolen. If he is

knowingly in possession of dutiable goods, then under s. 216 of Cap. 309 (supra), a certain onus lies on him, and it would be incumbent on him to prove that the proper duties were paid, etc. If he gives an explanation, it may be accepted, disbelieved or may raise some doubt. But it must never be thought that because his explanation may be disbelieved, the magistrate must necessarily proceed to a conviction. As was said by Goddard, L.C.J., in the *Cohen case* (supra) at page 245:

"It appears to the court that Mr. Widgery was right in his submission that these cases are closely analogous to those of receiving stolen goods when the evidence relied on for the prosecution is merely possession of goods recently stolen. That has always been held to be *prima facie* evidence of guilty knowledge, or, in other words, to raise a presumption of guilt, so that if no explanation is given by the receiver the jury are entitled, but not compelled, to convict. On the other hand, if the explanation given either satisfies the jury or raises a doubt in their minds as to guilty knowledge, the defendant is entitled to an acquittal. A case is never proved if the sum of the evidence leaves the jury in doubt. So in the present class of case, once it is proved that the accused was knowingly in possession of dutiable goods which he has not proved had paid duty, if he gives no explanation, he may be convicted of harbouring. If he does give an explanation, the jury should be told that if it either satisfies them that he did not know the goods were uncustomed or it leaves them in doubt whether he knew, he should be acquitted."

To fail to consider the intention to defraud as an ingredient of the offence might lead to a conviction where the evidence really only indicates the possession of a receiver or thief, but not of one wishing to cheat the revenue or, where doubt might exist as to whether the latter is the case or not. The magistrate must necessarily address his mind to the subject of the required intention. The surrounding circumstances in this case are equally consistent with the appellant obtaining possession of the goods unlawfully, and do not necessarily indicate that he had the specific intention which was required by law. For it was shown that he was in the habit of purchasing similar commodities from Georgetown in large quantities in the course of his business, which were sent to where he resided, by the production of bills from the suppliers of the commodities in his name.

In *Vieira v. Winchester*, (1966) 10 W.I.R. 400,

"Winchester was charged under s. 205 of the Customs Ordinance with being knowingly concerned in the removal of goods with intent to defraud Her Majesty's Customs of customs duty. He was seen leaving the gate of the customs area and looking rather bulky. When questioned, he replied that he was wearing two pairs of pants. On search, seven pairs of socks were found on him. The magistrate found there was an intent to steal, and, although it was possible to infer an intent to defraud Her Majesty's Customs, he held the latter intent had not

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been proved beyond reasonable doubt, and dismissed the charge. On appeal,

Held: The respondent's intent at the time he came into possession of the articles was to steal, and his mind was not directed to the question of defrauding the revenue."

In the circumstances of this case, the appellant was entitled to, but did not have the benefit of any consideration by the magistrate before conviction as to whether the requisite intention to defraud could be properly inferred. And as the evidence was as consistent with unlawful possession either as receiver or thief, on a rejection of his explanation, the quality of his possession called for serious consideration which it did not receive.

In all the circumstances, therefore, it would appear to be right to allow the appeal and quash the conviction and sentence with costs, and I would so order.

PERSAUD, (C.J. ag.) I agree.

CRANE, J.A. I agree.

Appeal allowed.

SCHEDULE

A

Extract from the Customs' Ordinance, 1884.

"As to Offences committed by and Penalties attaching to Persons

Penalty for evading duties of Customs	162. Every person who imports or brings or is concerned in importing or bringing into the Colony any prohibited goods or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unshipped or not; or unships, or assists or is otherwise concerned in the unshipping of any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty, the duties for which have not been paid or secured; or delivers, removes, or withdraws from any ship, quay, wharf, or other place previous to the examination thereof by the proper Officer of Customs, unless under the care or authority of such Officer, any goods imported into the Colony or any goods entered to be warehoused after the landing thereof, so that no sufficient account is taken thereof by the proper Officer, or so that the same are not duly warehoused; or carries into any Colonial Bonded or other warehouse any goods entered to be warehoused or to be re-warehoused, except with the authority or
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under the care of the proper Officer of Customs, and in such manner, within such time, and by such roads or ways as such Officer directs; or assists or is otherwise concerned in the illegal removal or withdrawal of any goods from any Colonial Bonded or other warehouse or place of security in which they have been deposited; or knowingly harbours, keeps or conceals, or knowingly permits or suffers, or causes or procures to be harboured, kept, or concealed, any prohibited, restricted, or uncustomed goods, or any goods which have been illegally removed without payment of duty from any Colonial Bonded or other warehouse or place of security in which they may have been deposited; or knowingly acquires possession of any such goods; or is in any way knowingly concerned in carrying, removing, depositing, concealing or in any manner dealing with such goods with intent to defraud Her Majesty or the Colony of any duties thereon, or to evade any prohibition or restriction of or applicable to such goods; or is in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of Customs, or of the laws and restrictions of the Customs relating to the importation, unshipping, transshipping, landing and delivery of goods or otherwise contrary to the Customs Ordinances; shall for each such offence forfeit treble the value of the goods, and of the duty payable thereon, or Five Hundred Dollars, whichever is the larger sum, and the offender may either be detained or proceeded against by summons."

B

Extract from "The Customs Consolidation Act, 1876".

"186. Every person who shall import or bring, or be concerned in importing or bringing into the United Kingdom any prohibited goods or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unshipped or not; or shall unship or assist or be otherwise concerned in the unshipping of any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty, the duties for which have not been paid or secured; or shall deliver, remove or withdraw from any ship, quay, wharf, or other place previous to the examination thereof by the proper officer of Customs, unless under the care or authority of such officer, any goods imported into the United Kingdom or any goods entered to be warehoused after the landing thereof so that no sufficient account is taken thereof by the proper officer, or so that the same are not duly warehoused; or shall carry into the warehouse any goods entered to be warehoused or to be re-warehoused, except with the authority or under the care of the proper officer

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of the Customs, and in such manner, by such persons, within such time, and by such roads or ways as such officer shall direct; or shall assist or be otherwise concerned in the illegal removal or withdrawal of any goods from any warehouse or place of security in which they shall have been deposited; or shall knowingly harbour, keep or conceal, or knowingly permit or suffer, or cause or procure to be harboured, kept, or concealed, any prohibited, restricted, or uncustomed goods, or any goods which shall have been illegally removed without payment of duty from any warehouse or place of security in which they may have been deposited; or shall knowingly acquire possession of any such goods; or shall be in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any such goods with intent to defraud Her Majesty of any duties due thereon, or to evade any prohibition or restriction of or application to such goods; or shall be in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of Customs, or of the laws and restrictions of the Customs relating to the importation, unshipping, landing, and delivery of goods, or otherwise contrary to the Customs Acts; shall for each such offence forfeit either treble the value of the goods, including the duty payable thereon, or one hundred pounds, at the election of the Commissioners of Customs; and the offender may either be detained or proceeded against by summons."

C

Extract from "An Ordinance to consolidate and amend the Laws relating to Customs." (1884).

"Offences and Penalties.

- | | |
|--|-------------------------|
| Penalty
on person
evading
duties of
Customs. | 164. Every person who – |
|--|-------------------------|
- (1) Imports or brings, or is concerned in importing or bringing into the colony any prohibited goods or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unshipped or not; or
 - (2) Unships, or assists or is otherwise concerned in the unshipping of, any goods which are prohibited, or of any goods which are restricted and imported contrary to such restriction, or of any goods liable to duty the duties for which have not been paid or secured; or
 - (3) Delivers, removes, or withdraws from any ship, quay, wharf, or other place, previous to the examination thereof by the proper Officer of Customs, except under the authority or care of such Officer, any goods imported into the

Colony or any goods entered to be warehoused after the landing thereof, so that no sufficient account is taken thereof by the proper Officer, or so that the same are not duly warehoused; or

- (4) Carries into any Colonial Bonded or other Warehouse any goods entered to be warehoused or to be re-warehoused, except with the authority or under the care of the proper Officer of Customs, and in such manner, by such roads or ways, and within such time as such Officer may direct; or
- (5) Assists or is otherwise concerned in the illegal removal or withdrawal of any goods from any Colonial Bonded or other Warehouse or place of security in which they have been deposited; or
- (6) Knowingly harbours, keeps, or conceals, or knowingly permits or suffers, or causes or procures, to be harboured, kept, or concealed, any prohibited, restricted, or uncustomed goods, or any goods which have been illegally removed without payment of duty from any Colonial Bonded or other Warehouse or place of security in which they have been deposited; or
- (7) Knowingly acquires possession of any such goods; or
- (8) Is in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with such goods, with intent to defraud His Majesty or the Colony of any duties thereon, or to evade any prohibition or restriction of or applicable to such goods; or
- (9) Is in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of Customs, or of the laws and restrictions of the Customs relating to the importation, unshipping, transshipping, landing and delivery of goods or otherwise contrary to the Customs Ordinances,

shall for each such offence forfeit treble the value of the goods and of the duty payable thereon or five hundred dollars, whichever is the larger sum, and the offender may either be detained or proceeded against by summons."

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D

Extract from "The Laws of British Guiana".

Chapter 33—CUSTOMS (1885)

"Offences and Penalties.

Penalty
on person
evading
duties of
Customs.

168. Everyone who –
- (a) imports or brings, or is concerned in importing or bringing, into the colony any prohibited goods or any goods the importation of which is restricted, contrary to the prohibition or restriction, whether the same be unshipped or not; or
 - (b) unships, or assists or is otherwise concerned in the unshipping of, any goods which are prohibited, or of any goods which are restricted and imported contrary to the restriction, or of any goods liable to duty the duties for which have not been paid or secured; or
 - (c) delivers, removes, or withdraws from any ship, quay, wharf, or other place, previous to the examination thereof by the proper officer of customs, except under the authority or care of that officer, any goods imported into the colony or any goods entered to be warehoused after their landing, so that no sufficient account is taken of them by the proper officer, or so that they are not duly warehoused; or
 - (d) carries into any colonial bonded or other warehouse any goods entered to be warehoused or to be re-warehoused, except with the authority or under the care of the proper officer of customs, and in the manner, by the roads or ways, and within the time that officer directs; or
 - (e) assists or is otherwise concerned in the illegal removal or withdrawal of any goods from any colonial bonded or other warehouse or place of security in which they have been deposited; or
 - (f) knowingly harbours, keeps, or conceals, or knowingly permits or suffers, or causes or procures, to be harboured, kept, or concealed, any prohibited, restricted, or uncustomed goods, or any goods which have been illegally removed without payment of duty from any colonial bonded or other warehouse or place of security in which they have been deposited; or
 - (g) knowingly acquires possession of any of those goods; or
 - (h) is in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with those

goods, with intent to defraud His Majesty or the Colony of any duties thereon, or to evade any prohibition or restriction thereof or applicable thereto; or

- (i) is in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duties of customs, or of the laws and restrictions of the customs relating to the importation, unshipping, transshipping, landing, and delivery of goods or otherwise contrary to the Customs Ordinances,

shall for each of those offences forfeit treble the value of the goods and of the duty payable thereon or five hundred dollars, whichever is the larger sum, and the offender may either be detained or proceeded against by summons."

E

Extract from "An Ordinance to consolidate and amend the law relating to Customs". (1952)

(This is the same as s. 216 of Cap. 309.)

"PART XII

GENERAL

- | | |
|--|--|
| Penalty for evading customs laws regarding imported or exported goods. | <p>216. Every person who –</p> <ul style="list-style-type: none"> (a) imports or brings or is concerned in importing or bringing into the Colony any prohibited goods, or any goods the importation of which is restricted, contrary to such prohibition or restriction, whether the same be unloaded or not; or (b) unloads or assists or is otherwise concerned in unloading, any goods which are prohibited, or any goods which are restricted and imported contrary to such restriction; or (c) knowingly harbours, keeps or conceals, or knowingly permits or suffers or causes or procures to be harboured, kept or concealed, any prohibited, restricted or uncustomed goods; or (d) knowingly acquires possession of or is in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with any goods with intent to defraud the revenue of any duties thereon, or to evade any prohibition or restriction of or applicable to such goods; or |
|--|--|

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- (e) is in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any import or export duties of customs, or of the laws, and restrictions of the customs relating to the importation, unloading, warehousing, delivery, removal, loading and exportation of goods,

shall for each such offence incur a penalty of treble the value of the goods or five hundred dollars at the election of the Comptroller; and all goods in respect of which any such offence shall be committed shall be forfeited."

CHARLES SINGH v. GORDON HOWARD

[In the Full Court on appeal from the Magistrate's Court for the George town Judicial District (Persaud, C. J. (ag.) and Khan, J.) July 25, 1969.]

Criminal law—Summary jurisdiction offence—Roguery and vagabondage—Several defendants separately charged—Cases taken together—Whether consent given—Magistrate's inadvertent reference to joint charge—Summary Jurisdiction (Offences) Ordinance Cap. 14, s. 144(iv)—Summary Jurisdiction (Procedure) Ordinance Cap. 15 s. 28.

The appellant and two others were separately charged with the offence of roguery and vagabondage. The cases were heard together, the magistrate writing in his note book the words "by consent". In his reasons for decision the magistrate spoke of the defendants being jointly charged. It was argued on behalf of the appellant that there was not on the record sufficient to indicate that he agreed to be tried together with the other defendants and even if he did, vagrancy was not the type of offence in respect of which defendants can be tried jointly. On appeal.

HELD: that (i) the words "by consent" written by the magistrate was sufficient to indicate that the charges were heard together with the consent of all the defendants.

(ii) the defendants were not jointly charged; their cases were heard together and the magistrate's misstatement that they were jointly charged was inadvertent and did not effect the rest of his decision.

Appeal dismissed.

S. E. Wilson for the appellant.

G. H. R. Jackman for the respondent.

Judgment of the Court. In this case, the appellant and two others were separately charged with the offence of roguery and vagabondage in that on Sunday, 26th May, 1968, they were found under the dwelling house of one Jasoda Singh at Herstelling, in the Georgetown Judicial District, and did not give a satisfactory account of themselves, contrary to section 144(iv) of the Summary Jurisdiction (Offences) Ordinance, Chapter 14.

The facts relevant to this appeal are that the three men were seen by the occupants of Jasoda Singh's house under the floor of one of the bedrooms in the process of stripping themselves of their clothes and donning masks. An alarm was raised and the men ran away. The yard in which Jasoda Singh lived was enclosed with palings.

The three charges were heard together. And the first point taken on behalf of the appellant before us is that there does not appear on the record sufficient to indicate that the appellant agreed to be tried together with the other defendants, and even if he did, vagrancy was one of the types of offences in which the defendants, separately charged, could not be tried together.

After entering the cases, but before taking the evidence, the magistrate wrote the words "By consent". This in our opinion is sufficient to indicate that the three charges were being heard together with the consent of all the defendants, which was not the case in *Emmanuel v. Cox* (1967) 10 W.I.R. 560, referred to us by counsel for the appellant. There the magistrate did not record in his note book that he had asked the defendants whether they objected or not, although he did state so in his reasons for decision, and it was held that it was the duty of the magistrate to do so, as it was a matter which might or might not go to the jurisdiction of the court. As we have already indicated, there is enough on the record to show that the magistrate obtained the consent of the appellant and the other defendants for the three charges to be heard together.

Even if there was consent, argues counsel, vagrancy is not the type of offence in respect of which defendants can be tried jointly.

Jurisdiction to hear complaints together is vested in a magistrate by section 28 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 15, which provides as follows: —

"Where two or more complaints appear to arise out of the same circumstances the court may, if it thinks fit, and if all the parties consent, hear and determine the complaints at one and the same time."

We would have thought that the instant case is an example of two or more complaints arising out of the same circumstances. We can find no authority which says that two or more vagrancy charges which appear to arise out of the same circumstances cannot be tried together once the parties agree. Certainly *Gordon v. Alves* (1959) L.R.B.G. 5, relied on by the appellant in this case, lays down no such proposition. We have been referred to a Canadian case of *Ex. p. Wright, Ex. p. Parker* (1910) 54 Can. Crim. Cas. 310, a reference to which is to be found as note 1363 at p. 25 6 of the E. & E. Digest

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(Repl.) Vol. XIV, but except for the heading "When joint and several counts in indictment", there is nothing to indicate what the decision was in that case.

It seems to us that the words "where two or more complaints appear to arise out of the same circumstances" can mean either two or more complaints in relation to one defendant or to more than one defendant; but it must necessarily contemplate several complaints being heard together, and complaints arising from the same set of circumstances.

The closest authority we have been able to find is *Re Stipendiary. Magistrate of Brighton* (1893) 9 T.L.R. 522. There the two defendants were separately summoned for an assault on the same person on the same occasion, and the point taken was that the justices tried the defendant for a joint assault before they had evidence that it was joint. It was held that the defendants could be tried jointly, even though they had objected to this course of action.

We agree that the nature of the offence may make it wrong to try several defendants jointly, but in this case we cannot say that this is so. Section 144(iv) of Chapter 14 under which the appellant was charged reads thus-

"Everyone who does or suffers any of the following acts or things shall be deemed to be a rogue and vagabond, and shall, on conviction thereof, be liable to a penalty of fifty dollars or to imprisonment for three months, that is to say, everyone who —

(iv) is found in or under any porch, verandah, gallery, outhouse, passage, gateway, dwelling-house, warehouse, store, shop, stable, or other building, or in any yard, garden, or other enclosed place or land for any unlawful purpose, or, being found in any of those places, does not give satisfactory account of himself."

We can find nothing in this section which suggests that the procedure adopted by the magistrate was wrong. In his reasons for decision, the magistrate did speak of the three defendants being jointly charged. This is incorrect; the defendants were not jointly charged; their cases were heard together. We believe that this mis-statement was due to inadvertence, but in any event it does not affect the rest of his decision.

For this reasons, we would dismiss this appeal and affirm the conviction and sentence. The appellant must pay the respondent's cost fixed at \$24.80.

Appeal dismissed.

C. VIBART WIGHT v ALFRED J. E. HUTCHINS

[High Court (Vieira, J.) April 23, July 26, 1969.]

Debt–Non-payment of judgment debt–Committal–Judgment summons–Procedure–Instalment order–Immediate committal order–Suspended committal order–Rules of the Supreme Court 0 36 r. 29–Summary Jurisdiction (Civil Procedure) Rules Cap. 12 Subsidiary Part 24–Debtors Ordinance Cap. 42–Insolvency Ordinance Cap. 43–Insolvency Rules Cap. 43 Subsidiary rr. 342–58.

The creditor filed an application for a committal order against the debtor in respect of an unpaid judgment. Counsel for the debtor argued as a preliminary objection that it is not competent for the creditor to bring committal proceedings without first giving the debtor an opportunity to pay the judgment and costs either by a lump sum or by instalments under a judgment summons.

HELD: – that (i) a judgment summons by its very definition in r. 343 of the Insolvency Rules is a committal summons and a committal summons is a judgment summons.

(ii) jurisdiction with respect to judgment summonses is derived from s. 4 of the Debtors Ordinance Cap. 42 and the procedure is set out in Rules 343–58 of the Insolvency Rules made under the Insolvency Ordinance Cap. 43.

(iii) On a judgment summons the Court may make either (a) an instalment order without committal or (b) an immediate committal order or (c) a suspended committal order.

*Preliminary objection overruled.
Instalment order made.*

Ashton Chase for the Judgment creditor.
R.E. Morris for the Judgment debtor.

VIEIRA, J.: On 4th September 1961, the judgment creditor (hereinafter referred to as the creditor) who is a Barrister-at-Law, obtained judgment against the judgment-debtor (hereinafter called the debtor) who is an accountant, in the sum of \$1600 with costs in the sum of \$372.26 together with interest on the said capital sum of \$1600 at the rate of 6% per annum from 28th February, 1959, until payment, which now totals the sum of \$1972.26.

On 18th June, 1968, the creditor applied for a committal order (No. 45 of 1969) but this was subsequently withdrawn for reasons not agreed upon in the affidavits and which do not concern us here.

C. VIBART WIGHT v. ALFRED J. E. HUTCHINS

On 15th January, 1969, the creditor filed this present application which is for a committal order against the debtor in respect of the said judgment and costs.

Counsel for the debtor now takes a preliminary objection on the ground that it is not competent for the creditor to bring committal proceedings without first giving the debtor an opportunity to pay the judgment and costs, either by a lump sum or instalments, under a judgment summons.

His argument is three-fold, viz: –

(1) it is a condition precedent to the bringing of committal proceedings that recourse must first be had to the process of a judgment summons, failing which the former proceedings would be null and void and not merely irregular.

(2) as there is silence regarding the practice in the High Court of this country in relation to committal proceedings, then, by virtue of Order 1 Rule 3 of the rules of the Supreme Court 1955 (Guyana) (hereinafter referred to as the 1955 Rules), the English practice and procedure is applicable, and

(3) to grant this application would be a denial of the debtor's right to freedom of his person guaranteed under the Constitution of Guyana.

Counsel for the creditor in reply, submits: –

(1) that these proceedings are brought under section 4 of the Debtors Ordinance, Chapter 42, which provides for committal either (a) for default of payment of a debt or (b) for default of payment of an instalment of a debt;

(2) the 1955 Rules are not silent and, therefore, the English Rules do not apply;

(3) because of the proceedings so far the debtor is estopped from raising this point at this stage and must be deemed to have waived any procedure by way of judgment summons, and

(4) assuming that this court finds this application to be the wrong one, then the creditor would pray in aid Order 54 of the 1955 Rules, since this application, would be merely irregular and not void.

The Debtors Ordinance Chapter 42 (hereinafter referred to as the ordinance) came into operation in this country with effect from 1st January, 1885 and is based upon the Debtors Act 1869 of the United Kingdom Parliament (hereinafter called the 1869 Act) which abolished imprisonment of persons who made default in the payment of money except in six (6) specified cases or circumstances laid down in section 4 thereof.

The 1869 Act, however, did not take away the power of the High Court of Justice or of the County Courts to imprison a debtor who has made default in the payment of a judgment debt.

In England, jurisdiction as to judgment summons and committal orders in the High Court was assigned to the judges in Bankruptcy except in matrimonial causes which were assigned to the Probate, Divorce and Admiralty Division. Since 1921, bankruptcy business is assigned to the Chancery Division. During vacation, bankruptcy business is dealt with by a Judge in Chambers in the Queen's Bench Division.

Bankruptcy jurisdiction is also vested in those County Courts which have not been excluded from exercising such jurisdiction by the Lord Chancellor, and these courts, in addition to their ordinary powers have the powers and jurisdiction of the High Court for bankruptcy purposes including jurisdiction in respect of judgment summons and committal orders and, in this respect, the County Courts (whose jurisdiction can only be exercised by the County Court Judges or their Deputies) have the power not only to direct that judgments of the High Court be paid by instalments but also the power to commit to prison in respect of judgments of the High Court for any amount. The present Act is the County Courts Act 1959 which is a consolidating enactment which repealed and replaced most of the provisions of the County Courts Acts of 1934 and 1955 and the provisions of the Administration of Justice Act 1956 relating to County Courts.

Bankruptcy law is wholly the creation of statute and is now contained almost entirely in the Bankruptcy Act 1914 as amended by the Bankruptcy (Amendment) Act 1926. The principal statutory instrument in force today relating to bankruptcy is the Bankruptcy Rules 1952 (S.I. 1952 No. 2113 as amended) made under sections 107(5) and 132 of the Bankruptcy Act 1914.

Except in the case of an order or judgment made or given in a matrimonial cause, no summons under section 5 of the 1869 Act, may be issued by the High Court unless the judgment creditor first applies for and obtains an order of one of the judges to whom bankruptcy business is assigned for the issue of the summons – Rule 378 of the Bankruptcy Rules 1952.

The procedure for the purpose of obtaining a committal order is regulated by Order 25 Rules 33–35 and 37–66 of the County Court Rules 1936 as amended which apply, with necessary modifications, to all courts exercising jurisdiction in bankruptcy business except the High Court when it exercises jurisdiction in respect of an order or judgment made or given in a matrimonial cause—Rule 383 of the Bankruptcy Rules 1952.

Jurisdiction in matrimonial causes is now governed by the Matrimonial Causes (Judgment Summons) Rules 1952 as amended.

It is clear, therefore, that, in England, the High Court and the County Courts have concurrent jurisdiction in relation to judgment summonses and committal orders.

Today in England, the jurisdiction to commit to prison given under section 5 of the 1869 Act, is almost exclusively exercised by the County Courts, whose jurisdiction as to amount at the present time is unlimited.

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This can be clearly seen from the fact that as long ago as 1905, only 6 debtors were imprisoned by the King's Bench Division whereas 11,427 debtors were imprisoned by County Courts:— note (e) HALSBURY'S LAWS OF ENGLAND, 1st Edition (1908) Volume 11 under title Bankruptcy at p. 339.

In Guyana, there are no County Courts but only (1) the Supreme Court of Judicature divided into (a) the Court of Appeal and (b) the High Court, on the one hand, and (2) the Magistrate's Courts on the other hand, whose civil jurisdiction is normally limited to \$250 and which operate in Judicial Districts whose boundaries are defined by statute.

The procedure in the High Court in this country in relation to applications under the ordinance is contained in Part VI, Rules 343 to 358 inclusive of the Insolvency Rules Chapter 43, Subsidiary Legislation, Volume VII (hereinafter referred to as the Insolvency Rules).

The procedure in the Magistrate's Courts is governed by Part XXIV of the Summary Jurisdiction (Civil Procedure) Rules, Chapter 12, Subsidiary Legislation, Volume VII (hereinafter referred to as the Summary Rules).

The Insolvency Ordinance Chapter 43 (hereinafter called the Insolvency Ordinance) came into force in this country on 25th July, 1900 and is based upon the English Bankruptcy Acts of 1883 and 1890. The Act of 1883 was a consolidating and amending statute, the main previous enactments being the Bankruptcy Act of 1861 and 1869.

The English Bankruptcy Act 1914 and its Amendment Act of 1926 do not, in my opinion, apply to this country.

The Insolvency Rules were made by the then Governor and Court of Policy on 5th September 1901 and were amended on 19th July 1933 and are based upon the English Bankruptcy Rules 1886 and subsequent Rules made under the 1883 Act and the Bankruptcy Rules 1915 made under the 1914 Act.

The English Bankruptcy Rules 1952, as amended, do not, in my opinion, apply to this country.

Part V of the Bankruptcy Rules 1915 relate to judgment debtors and Rule 379 thereof provides as follows:—

"379—The County Court Rules for the time being in force as to the committal of judgment debtors shall, with any necessary modifications, apply to all courts exercising jurisdiction under section 5 of the Debtors Act 1869. . .

The 1915 Rules came into force with effect from 1st January 1915 and the County Courts Rules in force at that time were the Consolidated Rules of 1903 as amended which were reproduced in a consolidated form and were known as the County Court Rules 1914 No. (3). In 1933 when the Insolvency Rules were amended to include the English 1915 Rules, the County Courts Rules in force were the County Court Rules 1903-1932, of which Rules 40—79 inclusive governed the procedure in relation to judgment summonses and committal orders.

The Summary Rules came into force in this country on 20th July 1939 and a perusal of these rules makes it abundantly clear that they are substantially based upon Order 25 of the County Court Rules 1936 which are the operative Rules in force in England today. Thus to take a few examples – Rule 6 Sub-rules (1)(2) and (3) of the former in relation to judgment summonses against firms is clearly rule 35 sub-rules (1) and (2) of the latter; again Rule 10 sub-rules (1), (2) and (3) of the former in relation to witnesses and their expenses is clearly Rules 42 and 44 (1), (2) of the latter; also Rule 11 sub-rules (1) and (2) of the former in relation to orders that may be made by the court is clearly Rule 54 sub-rules (1) and (2) of the latter. And, finally, Rule 14 of the former in relation to the requirements for the issue of a warrant of commitment is clearly Rule 56 sub-rules (3), (4) and (5) of the latter.

What of Part VI of the Insolvency Rules? Here again we can clearly see that they are largely based upon Order 25 of the County Court Rules 1903-1932. Thus for a few examples: Rule 345 of the former in relation to judgment summonses against firms is substantially the same as Rule 42 sub-rules (1) and (2) of the latter; again Rule 346 of the former in relation to adjournments is in almost identical terms with Rule 50 of the latter and finally, Rule 348 of the former relating to the non-committal of insolvents is substantially the same as Rule 58 of the latter.

Order 1 Rule 3 of the 1955 Rules provides as follows: –

"30 Wherever touching any matter of practice or procedure these rules are silent, the Rules of the Supreme Court for the time being in force, made in England under and by virtue of the Supreme Court of Judicature (Consolidation) Act, 1925, or any statute amending the same shall apply *mutatis mutandis*".

Rule 342 of the Insolvency Rules provides that –

"342–When no other provision is made by the ordinance or these rules, the present law, procedure and practice shall, in so far as applicable remain in force and save as provided by these rules or any rules amending them the Supreme Court Rules shall not apply to any proceedings in Insolvency."

This is based upon and is in almost identical terms with Rule 387 of the English Bankruptcy Rules of 1915.

The only rule that I know of in the 1955 Rules relating to the ordinance is contained in Order 36 Rule 29 which provides as follows:–

"29 – An order of commitment under the Debtors Ordinance shall bear date on the day on which such order was made, and shall continue in force for one year from such date and no longer; but it may be renewed in the manner provided for writs of execution by rule 24 of this order."

It seems abundantly clear to me, therefore, that there is no question here of the English Rules of Court being applicable on the ground that our

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1955 Rules are silent. The 1955 Rules apart from Order 36 Rule 29 (vide supra) and the provisions of Order 34 relating to witnesses have no application whatsoever to judgment summonses and committal orders in the High Court of Guyana since the procedure in relation to these matters is expressly laid down in Part VI Rules 343 to 358 inclusive of the Insolvency Rules which are themselves substantially taken from the provisions of Order 25 of the English County Court Rules 1903-1932 relating to judgment summonses. Thus the English County Court Rules are, in effect, our Rules.

Having said all of that let us now look at the provisions of the Ordinance, sections 3 and 4 of which are substantially the same as sections 4 and 5 of the 1869 Act.

Section 3(1) provides as follows: –

"3(1) –With the exception hereinafter mentioned, no person shall, after the commencement of this ordinance, be arrested or imprisoned on process in execution for making default in payment of a sum of money."

Section 3(2) sets out the very same six (6) exceptions as laid down in section 4 of the 1869 Act which I do not propose to set out as they are not relevant for the purpose of this ruling.

Section 4 of the ordinance states as follows:—

"4(1)–Subject to the provisions hereinafter contained, the court may commit to prison, for any term not exceeding six weeks or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of a court for the payment of any sum."

Provided that, the jurisdiction shall not be exercised where it is proved to the satisfaction of the court, that the person making default either has, or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects to pay it.

(4) for the purposes of this section, the court may direct any debt due from any person in pursuance of any Order or judgment of that or any other competent court to be paid by instalments, and may from time to time rescind or vary the direction.

(6) No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt, demand, or cause of action, or deprive any person of any right to take out execution against the movable or immovable property of the person imprisoned, in the same manner as if the imprisonment had not taken place.

(8) The court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, his counsel or solicitor, and on payment by him of any necessary fees make

a receiving order against the debtor and in that case the judgment-debtor shall be deemed to have committed an act of insolvency.

Rule 343 of Part VI of the Insolvency Rules provides as follows:—

"343—All applications to commit to prison shall be made by summons (in these rules referred to as a judgment summons) before the court which shall specify the date of the judgment or order, for non-payment of which the application is made together with the amount due. The summons shall require the judgment debtor to appear and be examined on oath and shall be according to the Form No. 160 in the Appendix. The person issuing the summons shall prepare two or more copies of the summons one or more of which shall be sealed and issued for service.

Rule 344 states: —

"344(1) A judgment summons shall be served in the like manner as is by these rules prescribed for the service of a creditor's petition. The service shall be made at least four days before the day of hearing.

(2) The disobedience to any such judgment summons shall be deemed a contempt of court and shall be punished accordingly.

Rule 346 provides that: —

"346—The hearing of a judgment summons may be adjourned from time to time.

Rule 347 provides: —

"347—Witnesses may be summoned to prove the means of the judgment debtor in the same manner as is provided in the rules of the Supreme Court 1900."

Rule 351 provides:—

"351—An order of commitment made under the Debtors Ordinance shall be according to the form No. 163 in the appendix and shall bear date on the day on which the order for commitment was made but such order shall not be enforced after the expiration of one year from the date thereof unless at any time before or after the expiration of such year the judge shall otherwise order. The fact of the making of such later order shall be endorsed on the order of commitment according to the form in the appendix.

Form 160 of the Appendix of Forms is as follows:—

Form 160

"The plaintiff has obtained judgment against you the said AB upon which there is now alleged to be due the sum of \$ you the said AB are therefore summoned to appear personally before the court at the Court House at on day the day of 19 ,

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at the hour of o'clock in the noon to be examined on oath touching the means you have or have had since the date of the judgment (or order) to pay the said sum in payment of which you have made default and also to show cause why you should not be committed to prison for such default.

Dated this.....day of..... 19.....
(Signed)

Registrar."

Section 4 of the ordinance is the fons et origo of the jurisdiction of the High Court of Guyana in relation to judgment summonses and committal orders in respect of judgment debts just as much as Section 5 of the 1869 Act, from which it was taken, founds the jurisdiction of the High Court of Justice and County Courts in England in relation to these same matters.

In *Barnett v Hammond* (1879) 10 Ch.D 285 BACON, V.C. held that the policy of section 4 of the 1869 Act was not vindictive but this was not followed by JESSEL, M.R. in *Marris v. Ingram* (1879) 13 Ch. D. 388 where the learned Master of the Rolls clearly and succinctly put the intention and effect of the 1869 Act as follows at page 343: –

"Therefore the Act abolishes imprisonment for the debt in the case of an honest debtor, but it is at the same time intended for the punishment of a fraudulent or dishonest debtor. It is in that sense vindictive and intended to be so."

For a proper and thorough understanding of Section 4 of the ordinance it is necessary to consider those English cases which have dealt with the construction, purport and intent of section 5 of the 1869 Act.

The first case I shall refer to is the *Queen v Judge of the Brompton County Court and Reeves* (1887) 18 Q.B.D.). 213, C.A. which went on appeal to the House of Lords sub-nom *Stonor v Fowle* (1888) 13 A.C.–20.

The facts of this rather unique case which even had a criminal sequel, was that judgment having been obtained by the plaintiff against the defendant on the 17th January, 1886 for £57. 2s. 2d. and costs an order was made on the defendant to pay that amount by two instalments, the first of £20. on the 21st January, 1886 and the second of the balance on 21st February, 1886. The defendant made default in the payment of the first instalment and a judgment summons was issued against him under Section 5 of the Debtors Act 1869. This summons was heard on the 4th March 1886 and an order was made upon it for the commitment of the defendant for ten (10) days but this order was suspended for fourteen days and the County Court judge, in accordance with the usual practice then obtaining in County Courts, gave a verbal direction to the Registrar not to issue the warrant at all if the defendant paid off the amount by instalments of £4 per month commencing on 18th March 1886. The Registrar made a note of this direction on a slip of paper as follows – "fourteen days, £4 a month" – but did not enter it as part of the order in the commitment summons book.

The defendant paid the first two instalments but having made default in payment of the third, a warrant for his arrest and commitment was issued against him. It was held by the Court of Appeal that the County Court judge had no jurisdiction under Section 5 of the Debtors Act 1869 to make an order for instalments and at the same time make an order for the committal to prison in default of the payment of any of the instalments. Lord Esher, M.R. said at p. 217.

"When a summons is taken out under the Debtors Act by a creditor he asks the judge to make an order to commit the debtor; and I recollect perfectly well that where a summons was taken out which did not ask for an order of committal, I held that an order made on such summons would be one which the debtor would not be bound to obey and that the summons must ask for an order for his committal. When the summons came on to be heard before the judge if he was satisfied that the debtor had means and that he was defying the courts and the law he might make an order for his immediate committal. I have known such orders made. But instead of making an order of committal, the judge might make a substituted order for the payment of the debt by instalments; and this order, the power to make which seemed obviously given by S. 5 of the Act was frequently made at Chambers without the consent of the parties. Then came the question whether if the judge made an order for payment by instalments he could at the same time make an order for the committal of the debtor if any of the instalments were unpaid. This is what Willes J was asked to do, to make a prospective order contained in the order for payment by instalments. But that is what he decided he had no power to do, holding that he had no jurisdiction to commit in any case unless it was proved that the debtor could have obeyed the order by payment and that when the order was for payment by instalments that doctrine would apply to each instalment; so that he could not make the prospective order asked for."

The House of Lords reversed the decision of the Court of Appeal and held that the order was in reality an order for commitment in respect of the past default in payment of the £20 and not an anticipatory order for committal in respect of any future default; and that this being so the order was perfectly valid under section 5 of the Debtors Act 1869.

It is interesting to note that since this decision, suspended committal orders are often referred to as *Stoner v Fowle* orders.

In *Montgomery & Co. v De Bulmes* (1898) 2 Q.B.D. 420, CA. it was argued for the plaintiffs that under section 5(2) of the 1869 Act, imprisonment under the section for default of payment did not operate as a satisfaction or extinguishment of the debt since the plaintiffs were entitled to levy execution on their judgment in the High Court although they had obtained an order in the County Court for payment of the judgment debt by monthly instalments. CHITTY, L.J. said at p. 423.

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" I think that the Act means that if a party goes to the County Court and accepts an order from the judge there for payment by instalments, he thereby elects to have the judgment of the High Court modified to the extent of that order."

At p. 424 the learned Lord Justice had this to say—

" Then it is pointed out that under S. 5 of the Act of 1869 imprisonment does not operate as a satisfaction of a debt, and that the Act is silent as to the operation of an order for payments by instalments. There is, it is true nothing in the Act about it; but it appears to me that the reasonable construction of the Act is as I have stated."

In *Nesom v Metcalfe* (1920) 37 T.L.R. 111. the Divisional Court held that where a County Court judge has made an order on a judgment summons for payment of the judgment debt by instalments and a subsequent application is made for a committal order for non-payment of the instalments, the effective "order or judgment" is the instalment order and not the original judgment and on the application for a committal order the judge cannot make the order unless he has affirmative evidence of means, since the date of the instalment order and is not entitled to rely on the evidence previously given on the hearing of the application for the instalment order, nor on his disbelief of the debtor's evidence denying means, unless there is reasonably direct evidence of means since the date of the instalment order.

In *Re Blanchard* (1932) 48 T.L.R. 480, the Court of Appeal held, *inter alia*, that although in exceptional cases a court may make an order for immediate committal, the proper course in ordinary cases is, in the first instance, to make an order for payment by instalments, Lord HANWORTH, M.R. said at p. 480—

" It was sought to commit the respondent under Section 5 of the Debtors Act 1869, but in the case of *Reg. v Judge of Brompton County Court* (18 Q.B.D. 213) Lord Esher said (at p. 217)" —

" When the summons came on to be heard before the judge, if he was satisfied that the debtor had means and that he was defying the courts and the law, he might make an order for his immediate committal; I have known such orders made. But instead of making an order of committal, the judge might make substituted orders for payment of the debt by instalments; and this order, power to make which seemed obviously given by Section 5 of the Act, was frequently made at Chambers without the consent of the parties."

Although, as Lord Esher said, in exceptional cases there might be an order for committal at once, yet that was not the practice nor the rightful practice . . .

If the order made was not complied with, then the appellant might have a right to come to the court for an order of committal."

In *re a Judgment Debtor* (1935) W.N. 128, the Judges in Bankruptcy, after consultation, prepared and published a statement which was delivered by LUXMOORE, J. setting out the principles under which the courts acted in making instalment and committal orders under the 1869 Act.

This decision is of such great importance that it should be read by all legal practitioners but for the purposes of this decision I only propose to set out the following passages –

" The jurisdiction of the court on judgment summons depends upon Section 5 of the Debtors' Act 1869, which enables the court to commit to prison any person who makes default in payment of any debt or instalments of any debt due from him in pursuance of any order or judgment; but the court is not at liberty to exercise this jurisdiction unless it is proved to its satisfaction that the judgment-debtor has when the judgment summons comes before the court—or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default. The Section provides that the court may direct any debt due from any person in pursuance of any order or judgment to be paid by instalments, and may from time to time rescind or vary such order.

It was decided in 1872 by the Court of Exchequer Chamber in *Dillon v Cunningham* (1872) L.R. 8 Ex. 23 that it is open to the court, on a judgment summons asking for committal to make an order for payment of the debt by instalments, and that such an order can be made even if the judge is not satisfied of the existence of means.

It is the fact, however, that as Lord ESHER, M.R. states in *Reg v. Judge of Brompton County Court and Reeves* (1886) 18 Q.B.D. 213, 217, the section does not enable the judgment creditor to ask merely for an instalment order. Before the judge can make an instalment order he must have before him an application for committal. It is accordingly the practice of the court, always to require evidence of means to be filed on a judgment summons and not to make a committal order on the first application save in the most exceptional cases: re Lord ESHER M.R. in *Reg. v Judge of Brompton County Court and Reeves*, 18 213, 217, but to give the debtor an opportunity of meeting the judgment by paying instalments adjusted according to his means. . .

The Act merely gives the court jurisdiction to punish the debtor by committal for failing in the present or in the past to apply available means to meet the instalment or instalments in arrears . . .

Since the committal is a punishment for the proved offence of dishonestly using for other purposes funds which the debtor had available to meet the unpaid instalment, there is prima facie no reason why it should not issue forthwith. There may be cases however, in which it is desirable to give a debtor who seems genuinely desirous of making good his default an opportunity of doing so. In such a case the court

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may direct the committal order to lie in the office, and not to issue, if the monies in respect of which it is made are paid within some named period or are paid by named instalments at named dates. The validity of such an order was recognised by the House of Lords in *Stoner v Fowle* 13 App. Cas. 20. . .

It is the practice of the court always to suspend the operation of the instalment order while there is a committal order running; the reason, of course, is that the committal order presupposes a wilful failure to pay the instalments in respect of which it issues. . . ."

In *Barefoot v Clarke* (1949) 1 All E.R. 1039, C.A., the parties lived in adjoining houses and the debtor was found to have trespassed and released two budgerigars, the property of the judgment creditor. On 20th October, 1948, judgment was given in favour of the creditor for £20 and costs £11. 10s. 4d. On 16th December, 1948, a judgment summons was taken out and it came before the county court judge who made a committal order but directed that the order should not be put into force until the debt of £32. 1s. 4d. (which included 1 guinea in respect of the costs of the judgment summons) was paid by instalments of £2 every four weeks. The court of Appeal allowed the debtor's appeal and SOMERVELL, L.J. said at p 1040—

"This is the type of matter in which this court will not interfere with the county court judge unless it is satisfied that he has not applied the right principle of law. In a matter of this kind I would always assume in a county court judge's favour that he is having proper regard to what had happened at the trial and what he had got to know of the parties, and that it would be unnecessary for him to set out in full and in detail every fact which he took into account in coming to the conclusion that he was satisfied under Section 5 of the Debtors Act, 1869, that the debtor has the means to pay.

The leading case on the construction of that section is *Re Judgment Debtor* the judgment in which LUXMOORE, J. has always been accepted as stating the principles which all courts should apply in cases under the section. The first point which is made in that judgment is that it is unusual to make a committal order on the first judgment summons, or except in respect of default on an instalment order. The learned judge said (51 T.L.R. 525)—

"It is the fact, however, that as Lord ESHER, M.R. stated in *R v Judge of Brompton County Court* (19 Q.B.D. 217) the section does not enable the judgment creditor to ask merely for an instalment order. Before the judge can make an instalment order he must have before him an application for committal. It is accordingly the practice of the court always to require evidence of means to be filed on a judgment summons, and not to make a committal order on the first application (save in the most exceptional cases: see per Lord Esher, M.R., in *R v Brompton County Court Judge* but to give the debtor an

opportunity of meeting the judgment by paying instalments adjusted according to his means".

It was common ground between counsel that this is the normal practice in the county court and that the committal order made by the learned judge in the present case on the first application, no previous instalment order having been made, was unusual. The fact that he did make a committal order on the first occasion shows that he took, and, no doubt, rightly took, an adverse view of the debtor and her attitude, but the position when the matter came before the judge was that laid down in a later passage in the judgment of Luxmoore, J. (*ibid*) when he said:

"Accordingly, before making a committal order it is essential (see the observations of Lord HERSCHELL in *Stonor v. Fowle* (13 App. Cas. 30) that the court should satisfy itself that, in respect of the sums for which the committal order is to issue, it can truly be said that since the respective due dates the debtor has had the means of making them available, but has neglected to use those means for the purpose of paying them. It is obvious that the debtor's future prospects of payment have no bearing on this question . . . since the committal is a punishment for the proved offence of dishonestly using for other purposes funds which the debtor had available to meet the unpaid instalments, there is, *prima facie*, no reason why it should not issue forthwith."

"Those passages refer to instalments, but the principle applies in a case like the present one where there has been no previous instalment order."

EVERSHED, L.J. said at p. 1041—

"The liberty of the subject is at stake, and we are bound to look with strictness at all that has been done on the summons."

In *Re Sanders, Ex parte Bentley* (1947) 2 All E.R. 828 VAISEY, J. made an immediate order of committal to lie in the office and not to issue so long as the debtor paid by stated amounts at stated times, even though no previous order for payment by instalments had been made, he being satisfied on evidence as to means of the debtor who was cross-examined that he, the debtor, had the means to pay.

In *J. Cooke & Sons Ltd. v Binding and Another* (1961) 2 All E.R. 693, CA. the judgment creditors obtained judgment against a married woman and the second-named defendant who were ordered to pay in instalments of £5 per month. No instalment was paid and, after three instalments were in arrear, the judgment-creditors applied by judgment summons for committal of the second-named defendant under section 5 of the 1869 Act. A committal order was made committing him to prison for 10 days but suspended on his paying 10/-weekly. This sum was regularly paid. It

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subsequently appeared from a certificate given by the second-named defendant's employers after the date of the committal order that he was earning an average of £15 per week. The judgment creditors then gave notice of their intention to apply for an order to increase to £2 the amount payable as a condition of suspending the committal order. The County Court judge intimated that if he could he would have increased the amount from 10/- to 25/- but held he had no power to do so in view of the decision of the Court of Appeal in *Wiltshire v Fell* (1959) 3 All E.R. 862.

UPJOHN, L.J. (as he then was) after stating the facts said at p. 694—

"The county court judge came to the conclusion that he had no jurisdiction to increase or reduce the instalments payable under a committal order. In that I venture to think he was in error. He appears to have thought that he was precluded from varying the order by a judgment of this court in *Wiltshire v. Fell*.

It is, I think, unnecessary for me to read Section 5 of the Debtors Act 1869, in full, for it is very well-known; I need only read proviso (2) to Section 5 which says—

"For the purposes of this section any court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent court to be paid by instalments and may from time to time rescind or vary such order."

The true ambit of the section was discussed in *Wiltshire v. Fell* which I have just mentioned. The headnote reads as follows:—

"A county court judge who has made an order of committal for debt under Section 5 of the Debtors Act 1869, is *functus officio* and cannot revoke the committal order. . .

HODSON, L.J. was very careful to confine that decision to a question of revoking the committal order itself, and it is interesting to observe that he stated that the term of suspension, until the matter was further reviewed by the judge, would be at the rate of 5/- per week, whereas until the purported revocation of the order it seems that the amount ordered to be paid as a term of the suspension was 2/6 per week. So that the court in that case found no difficulty in doing what the judgment creditors are seeking in this case."

In my considered opinion section 4 of the ordinance cannot be construed in any other reasonable way than has section 5 of the 1869 Act upon which it is based. The English authorities that I have referred to are clearly relevant and applicable to the proper construction and interpretation of section 4. This being so, it is abundantly clear, therefore, that all judges of the High Court of the Supreme Court of Judicature of Guyana have equal power as have all the judges of the High Court of Justice and of the County Courts in England to make any or all of the following orders on a judgment summons:—

(1) a bare instalment order without committal, with or without the consent of the parties and which can be varied by the court at any time by either increasing or decreasing the amount, having regard to all the circumstances prevailing at the time;

(2) an immediate committal order whereby the debtor is ordered to be imprisoned forthwith without any locus poenitentiae and which can only be redeemed by payment of the whole debt or of any instalments accruing where an instalment order has been made, but this drastic step ought only to be taken in exceptional cases which amount to a deliberate defiance or wanton disregard for the courts or the law, and

(3) a suspended committal order which shall lie in the Registry and recorded in a book to be kept by the Registrar for that purpose and which shall not be executed unless and until the conditions imposed therein as to amounts and dates are not complied with.

No committal order, however, whether immediate or suspended, has any validity unless it has been made after satisfactory proof that the debtor has or had the means to pay the judgment or the instalment.

Where a committal order has been made in respect of arrears under an instalment order, the operation of the latter is usually suspended until the committal order becomes spent either (1) by the discharge of the order; (2) by payment, (3) by the debtor's discharge or release from prison and (4) after the expiration of one year unless extended by order of the judge. Upon the happening of any one of these events the instalment order begins to run. No instalments are accruing under the instalment order during the period of suspension – CHANDLER'S JUDGMENT SUMMONSES IN BANKRUPTCY (1936) at p. 26.

Procedure by judgment summons is really a form of execution, being a mode of enforcing the judgment—*Bundy v Motor Cab Owner Drivers' Association* (1930) 143 L.T. 334, D.C.

If the order provided for the payment of the debt by instalments, a fresh right of committal arises upon failure to pay each instalment – *Horsnail v Bruce* (1873) L.R. 8 C.P. 378. But, if the order is to pay in one sum, there is no jurisdiction to commit more than once—*Evans v Wills* (1876) 1 C.P.D. 229. Further, as attachment under the Debtors Act is a punishment, there is no jurisdiction to make a second order for attachment for the same default – *Church's Trustee v Hibbard* (1902) 2 Ch. 784, CA.

On the final analysis, it seems to me, that the preliminary objection in this matter is without merit since it is based upon a false premise. Having regard to the history of the courts having jurisdiction to issue judgment summonses and committal orders and to the state of the law existing since the 1869 Act was passed, it is erroneous to suggest, I think, that a committal order cannot be made without first having recourse to a judgment summons because, clearly, a judgment summons by its very definition (vide Rule 343

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of the Insolvency Rules) is a committal summons and a committal summons is a judgment summons.

Para. 3 of the summons in this matter read as follows: –

"AND WHEREAS the plaintiff (judgment creditor) has required this committal order to be issued against the defendant (judgment debtor)".

Now these words are not part of the format of Form 160 of the Appendix to the Insolvency Rules which is the form for judgment summonses under Rule 343 of the said rules.

In my opinion these words are mere surplusage and are used for emphasis. There is nothing magical about them. They cannot make this court issue a committal order any faster or in any other way than is legally permissible to issue a committal order on the normal form of a judgment summons or at all.

It is to be noted that the last paragraph of this summons is in identical terms with the last paragraph of Form 160 (Q.V.).

The important and operative words of a judgment summons to my mind are "to show cause why you should not be committed to prison for such default". Without these words, any order made by a judge would be without legal sanction since, as Lord ESHER, M.R. took pains to point out in *R v Judge of Brompton County Court and Reeves* any order made on such a summons would be one which the debtor would not be bound to obey.

In my opinion this present summons is a judgment summons despite the words contained in para. 3 thereof and is perfectly in order. As counsel for the creditor rightly points out in his written submissions the title of the summons is immaterial and technicalities as to forms and procedure have long been buried.

As the jurisdiction of the court' to make an order for committal is a discretionary power, I propose to make a monthly instalment order in this matter with or without the consent of the parties. If there is no agreement between them as to the amount of the instalments to be paid then I propose to fix a date when evidence will be taken as to proof of means of the debtor.

(At this stage Mr. Morris states that his client is willing to offer \$35. per month. This is not agreed upon by Mr. Chase who states that his client is willing to accept \$75. per month. The court suggests a compromise figure of \$ 50. per month which is agreed upon by both parties.)

Accordingly by consent, the judgment debtor is ordered to pay to the judgment-creditor the sum of \$50 per month commencing from 1st September, 1969 on the usual conditions. There will be costs to judgment-creditor fixed in the sum of \$ 100 and the judgment-debtor is given six (6) weeks within which to pay same.

*Preliminary objection overruled.
Instalment order made.*

GUYANA INDUSTRIAL & COMMERCIAL INVESTMENTS LTD

v.

THE COMMISSIONER OF INLAND REVENUE

Court of Appeal (Luckhoo, C, (ag.), Cummings, J A. and Crane, J A. (ag.),
November 6, 7, 1968, January 20, 1969.]

Property Tax—Net property—Deduction of debts owing in determining net property—Income tax deducted—Whether income tax a debt owed in year of income—Whether a debt owed only in year of assess-assessment and after assessment.

Section 7 of the Property Tax and the Gift Tax Ordinance 1962 provides for the imposition of a tax in each year of assessment on net property of every person on the corresponding valuation day. The appellants' corresponding valuation day was November 30, 1961. Net property was defined as the amount by which the aggregate value of the property of any person on the valuation date is in excess of the aggregate value of all the debts owed by him on that date. Section 12(3)(b) provides that in the case of debts any deduction from the nominal amount of debts allowed for income tax purposes shall be subtracted from the price or value of any property. The appellants computed their net balance at \$1,861: on November 30, 1961, and claimed this sum to be a debt owed by them as their income tax liability in respect of the year of assessment 1962.

HELD: (Cummings, J.A. dissenting) that the appellants were not entitled to claim the \$1,861: as a debt owed by them as their income tax liability in respect of the year of assessment 1962 because (i) on the valuation date they were not bound to make any payment in respect of their income tax liability for the year of assessment 1962 which had not yet arrived; (ii) income tax becomes a debt owing only upon receipt by the appellant of an assessment and this had not occurred.

Appeal dismissed.

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C. Lloyd Luckhoo, Q.C., with G. M. Farnum, Q.C., for the appellants, Doodnauth Singh, Senior Crown Counsel with C. Dhurjon, for the respondent.

LUCKHOO, C. (ag.): As I find myself so much in accord with what has been said by my brother CRANE, I shall only wish to append some observations. In doing so, I shall bear in mind what LUCKHOO, C.J., with good sense, cautioned in his judgment - that "Care must be taken in applying decisions in cases based on the English income tax legislation to cases which are to be decided under the provisions of the British Guiana legislation."

If the contention of the appellants is correct, then it would be legally permissible in computing the value of net property in any one year, for the purpose of property tax, to act in either of the following ways:

- (1) Anticipate in a property tax return the assessment of income tax due to be made in the following year, and deduct it from the aggregate valuation of assets before the actual determination by the Commissioner of Inland Revenue of the assessment of income tax.

Or,

- (2) Await the assessment by the Commissioner and then apply to have the same deducted accordingly to show the value of the net property of the previous year.

A check, then should be made to see whether these results conflict with, or militate against, what is actually stipulated by law. At once one notices in the provisions of s. 42 of the Income Tax Ordinance, Cap. 299, that the Commissioner is the person solely entrusted with the legal duty of making an assessment, and on him alone is conferred the powers for so doing, which are wide and far-reaching in scope and extent. If he should be minded to accept the return, then he is empowered to make an assessment accordingly. If, on the other hand, he refuses to accept the return, he is empowered, based on his judgment, to determine the amount of the chargeable income of the person and assess him accordingly.

Then it would be seen under s. 8 of the said ordinance that the Commissioner's assessment "shall be for the year immediately preceding the year of assessment". Departure from this provision is authorized elsewhere in the law, but as the present case is not so affected, reference becomes unnecessary.

Finally, the specific nature and restricted meaning of "net profit" appears under s. 3 of Ordinance 19 of 1962 and requires scrutiny. There, debts which are authorized to be deductible from the aggregate value of property to arrive at the net value for tax must be debts owed on a particular date, namely, the valuation date, which in this case is 30th November, 1961. This clear and express provision imports the existence of a debt *at the time of* the valuation date and not *after*.

With the above in mind, I am unable to comprehend how an assessment can be made in anticipation when the effect of doing so would be to allow a person to assess himself without waiting for the Commissioner's assessment, at a time before the assessment is legally due to be made, and when in actuality what purports to be a debt for income tax in the year following, had not yet been computed by the commissioner.

There is nothing automatic about the Commissioner's acceptance of a return; nor is an assessment merely a matter of ascertainment by arithmetical calculations; so much depends upon the reaction of the Commissioner to the return, so much lies within his discretion and judgment. The circumstances of a case may well call for a rejection of the return and a substitution of his own assessment of the chargeable income. The process is unpredictable and becomes more so if recourse is had to the courts when it may be several years after a return is made before it is known what is owed and what must be paid. When the Commissioner makes a fixed and settled assessment, which is accepted, *then* it could be truly said that a *debt* is *owed*. If it is challenged, then the decision of a competent forum will decide the issue.

It is true that liability to pay income tax for a particular year is attracted by the income in the year in which the income is earned, but it is not, in my view, correct to say that the amount is determinable with certainty immediately on the expiration of the year of income. The fact that the rates are fixed would be of little assistance if the figures supplied are not accepted or a difference of view point exists as to what, or, how, principles should be applied in computation.

This essential and material aspect of the Commissioner's responsibility may disappoint the hopes of the most sanguine and render unprecise any previous attempt to quantify. It does not spring from a mere liability to pay tax, but only when the extent of that liability is pronounced upon by him at a time when the law says he must do so, that is, in the following year. Then it could be truly said that an amount is fixed, and remains to be settled after due acceptance.

The last matter which stands in the way of the appellants' contention is the specific requirement that the debt must be owed on the valuation date. As I have said before, the words used are clear in their import. If the debt was not owed on the 30th November, 1961, it cannot be deducted. 'Net property' (as defined) presents the idea of 'net worth' *at a particular date*. It is concerned with the existence of both 'assets' and 'debts' as they *are* at that date. Debts not then owed, but expected (with whatever degree of certainty) to accrue subsequently, cannot be cognisable, and do not qualify for inclusion, if conflict with the statutory definition is to be avoided.

In this case, what purports to be a debt owed was never brought into being until the following year, and as there is no legal provision to make it retroactive, it could only be deducted from the 1962 property tax return, if unpaid, provided it was assessed and assessed as such before 30th November of *that* year.

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I therefore agree with the proposal of my brother CRANE that the appeal should be dismissed with costs.

CUMMINGS, J.A.: The facts, circumstances and statutory provisions giving rise to this appeal are clearly and accurately set out in the judgment of CRANE, J.A. I need only summarize here that the point to be determined is the proper construction to be placed upon the words "debt owed" which appear in s. 3 of The Property and Gift Tax Ordinance, No. 19 of 1962 (hereinafter referred to as "The Ordinance").

Counsel for the appellants urged before us—and indeed in the court below—that:

- (1) If the circumstances disclosed that A was obliged to pay money to B, whether immediately or in the future, and this obligation did not depend upon the occurrence of some event which may or may not happen, then the obligation or liability to pay was a debt owing.
- (2) Ss. 5 and 8 of the Income Tax Ordinance, Cap. 299, conferred on the appellant company a statutory obligation to pay income tax on the chargeable income earned in 1961, and this the company was bound to pay at some time or other.
- (3) The Commissioner's assessment did not create the obligation. It was merely the machinery for determining the accurate extent of the obligation and fixing the time when it should be discharged; and that, consequently, income tax payable on income earned within the company's valuation date—30th November, 1961—was then a "debt owing" within the meaning of the ordinance.
- (4) The Estate Duty Ordinance was *in pari materia* with The ordinance, and the words "debt owing" should be given the same meaning as under that ordinance.

Counsel for the respondent on the other hand urged:

- (1) That a debt owing is a debt payable, and that since income tax is not payable until the Commissioner has assessed, it is not a debt owing until such assessment.
- (2) That the Income Tax Ordinance itself distinguishes between a liability - to pay tax and a debt of income tax.

In support of this, he cited ss. 50, 67(1), 69A and 69C of that ordinance.

A number of English cases were relied upon by the appellants which (with the exception of *The Commissioner of Inland Revenue v. The Port of London Authority*, [1923] A.C. 507) were also relied upon by the respondent. I propose to analyse these later in this judgment.

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 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 this pronouncement as an accurate statement of the law, and now proceed accordingly.

In STROUD'S JUDICIAL DICTIONARY, 3rd Ed., at p. 735, the learned author in his definition of 'debt' states:

"(c) But, speaking generally, 'money in the hands of a man who cannot refuse to pay it somehow or another, is a 'debt', and if so, it can be attached'."

The phrase "debt owing or accruing", occurring in Order XLV(2) of the English Rules of Court, received judicial interpretation in *Webb v. Stenton*, (1883) 11 Q.B.D. 522, where LINDLEY, L.J., said at p. 527:

"Now, let us consider the language of Order XLV, rule 2.I should say, apart from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be a debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in presenti, solvendum in futuro*. An accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation. That appears to me to be the view taken by the judges in the cases under the Common Law Procedure Act, 1854, to which the Master of the Rolls has referred, and I will not allude to it further."

And FRY, L.J., at page 528, said:

"In my opinion the defendants' counsel is right in contending that the words there, 'is indebted' and the words 'debts owing or accruing' refer to the same subject-matter. It appears to me to be plain that to satisfy either of those two expressions there must be an actual present debt. I think further that the debt may be either equitable or legal. No doubt, under the Common Law Procedure Act, 1854, it has

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been held that the debt referred to must be a legal debt, because that statute was dealing only with the Courts of Common Law. But when the word 'debt' is used in the Judicature Acts or Orders, which deal with a new court which has the jurisdiction of both the courts of Common Law and Equity a meaning must be given to the word 'debt' which is co-extensive with such jurisdiction. I have further no doubt that the word 'indebted' describes the condition of a person when there is a present debt, whether it be payable *in presenti* or *in futuro*, and I think that the words 'all debts owing or accruing' mean the same thing. They describe all *debita in presenti*, whether *solvenda in futuro*, or *solvenda in presenti*."

In *Commissioner of Income Tax v. Barcellos*, (1957) L.R.B.G., p. 105 the question for the court's consideration was, whether income tax not assessed at the time when a receiving order was made against the debtor but assessed subsequently on the basis of information disclosed by the debtor during the public examination could be proved as a debt in insolvency.

S. 35 of The Insolvency Ordinance, Cap. 43, provided as follows:

- (1) Demands in the nature of unliquidated damages arising from tort, or otherwise than by reason of a contract, promise, or breach of duty or breach of trust, shall not be provable in insolvency.
- (2) Except as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he becomes subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in insolvency."

STOBY, J., at page 111, said in the course of his judgment:

"There is no contest that the failure to pay income tax would be a breach of duty and consequently an income tax assessment is a provable debt in insolvency. Counsel for the respondent's submission is that it was not an obligation incurred before the date of the receiving order..

"To decide the point, it becomes necessary to advert to the Income Tax Ordinance, Chapter 299.

"Sections 5 and 8 of the Income Tax Ordinance, Chapter 299, provide respectively for the imposition of Income Tax and the basis of assessment of the Tax. *As soon as income is derived in the Colony over and above a certain sum the obligation to pay income tax arises. The taxpayer's liability does not depend on the arithmetical calculations of a Government Official; it is the extent of his liability which is dependent on the ascertainment of his chargeable income. A clear dis-*

inction must be drawn between the liability to pay on the one hand and the amount required to be paid as a result of the liability on the other hand.

"The case of *Pitchford*, (1924) 2 Ch. D. 260, on which counsel for the respondent relied, is distinguishable from the one under review. In *Pitchford's* case, it was held that untaxed costs of an action which had been stayed was not a provable debt. In the judgment of Astbury, J., reference was made to what Cave, J. said *In re Bluck*, (1887) 57 L.T. 419 and 420 -

'If a man brings an action he does not place on himself an obligation to pay the costs, that obligation arises when judgment is given against him.'

"The present case is far stronger than that. Here there was no order of any sort or kind dealing either with the claim or with the costs of the action, and the creditor having chosen, as the respondent in the present case has chosen, to obtain an order staying his action relying on proof in the bankruptcy, it seems to me perfectly hopeless to contend that he is now at liberty to go to the county court, which had no jurisdiction of any sort or kind, to make an order for the costs of the King's Bench action, and ask that he should be allowed to prove for a sum of costs in respect of which he has obtained no judgment and in respect of which there, consequently, can be no taxation.'

"The distinction I draw between *Pitchford's* case and the present one is that in *Pitchford's* case the obligation to pay costs could not arise until judgment and as there was no judgment there was no liability; while in the present case the obligation to pay tax arose as soon as the income was earned."

See also *Phillips v. Inland Revenue Commissioner*, (1963) 5 W.I.R. 304.

In other words, the effect of ss. 5 and 8 of The Income Tax Ordinance create a statutory obligation or liability to pay income tax as soon as it is apparent that there is a chargeable income in a particular year—in the instant case, 1961. In other words, the obligation to pay tax arises in the year the income is earned.

Since the valuation date for the payment of property tax is 30th November, 1961, then this must be taken into account as an existing debt on that date. It exists in law as a debt owing.

It is true that it is not payable until it is assessed and that assessment was not to take place until 1962, but the obligation to pay does not depend upon assessment. As Lord DUNEDIN put it in *Whitney v. The Commissioner of Inland Revenue*, (1924) 10 Tax Cases 88 at p. 110:

"My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly im-
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able that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment, That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly come the methods of recovery, if the person taxed does not voluntarily pay."

In *Re Duffy (deceased). Lakeman v. Attorney General*, (1948) 2 A.E.R. p. 756, in dealing with the meaning of "Liabilities" in s. 55 of the English Finance Act, 1940, Lord GREENE said at page 759:

"Coming back to the body of sub-s. (1) of s. 50, the commissioners are directed to make an allowance 'from the principal value' of the assets (that would be the assets of the company) for all liabilities of the company. It is to be observed that, this process of arriving at the net value being a variant of what I may call the basic process provided for by s. 7(1) of the Act of 1894, one would rather expect - I do not attribute any practical force to this argument, but it is right to point it out—that this new provision for arriving at the net value would not introduce a class of deduction going beyond the sort of thing which was deductible under s. 7(1) - which were debts and incumbrances. It is true that the language used here is different. It does not say 'debts and incumbrances'; it says 'all liabilities of the company.' We are all familiar with the fact that, in speaking of the liabilities of a company which keeps accounts, the word 'liabilities' may be used in two senses. From one point of view, in reference to a particular company, anything that appears on the left hand side of its balance sheet is a liability. In the accountancy sense, it is a liability whether it be a provision for an actual legal liability or whether it be a provision which the directors as businessmen, think is prudent to make for something that may or may not happen in the future. From the accountancy point of view, once these things are properly entered on the left hand side of the balance sheet, they are liabilities. Counsel for the executors repudiates the suggestion that he wished to construe the word 'liabilities' in so extended a sense, but he rejects the suggestion that the word 'liabilities' is to be construed in the limited and narrow sense of legal liabilities existing in point of law, whether under a contract, or under a statute, or in some other way. He says that in the present case you have a sort of half-way house. When the testator died the company had made, and was making, profits in respect of the Exchequer financial year then current which would form the basis of its assessment to income tax for the following finan-

rial year. He then says: 'Notwithstanding the fact that the testator died long before the commencement of that Exchequer financial year, and, therefore, long before the beginning of the period in respect of which the assessment would take place on the basis of those profits, nevertheless those profits"—if I may return to the phrase. I used earlier—"directly they were made carried within themselves, so to speak, *in gremio*, a liability to tax which in every business sense would materialise into a legal liability as soon as the Budget resolutions in the following year were passed.' From the business point of view, I have no quarrel with that statement of the situation. It may well be that a businessman who did not make proper provision for tax payable in the next year would be very unwise, but we have to construe the word 'liabilities' in this context.

"Counsel for the executors says: 'Income tax is a very special thing. It cannot be classed with the sort of apprehended future event which may or may not happen. It is as certain as anything can be.' A glance at the Income Tax Acts makes it clear that income tax will be imposed. Therefore, he says as soon as the profits are earned which are to form the basis of next year's assessment you can say with absolute certainty: 'Those profits will form the basis of next year's assessment, and any prudent businessman will not regard them as spendable save after making proper provisions for that liability which is going to arise in the future.' That is an attractive argument, because to speak of income tax next year as if the question whether it was or was not going to be imposed were a thing at large would be stupid, but, taking the construction of these words, I find it impossible to give them a meaning extending beyond what is always ascertainable without any doubt whatsoever, namely, an existing legal liability - a liability actually existing in law at the relevant date. The words cannot be stretched so as to cover something which in a business sense is morally certain and for which every businessman ought to make provision, but which in law does not become a liability until a subsequent date. That appears to me to be the short answer to this appeal, which, in my opinion, should be dismissed with costs."

In Guyana, however, the liability or obligation to pay income tax goes beyond moral certainty for which every businessman ought to make provision. It is a legally existing liability or obligation as soon as the income is earned, and he is bound to make provision to pay it as he will have to pay it at some time in the future.

In *Winter & Others v. The Inland Revenue Commissioner*, (1963) A.C. 235, when the question for determination depended ultimately on the proper construction of the words "contingent liability", Lord REID said, at p. 247:

"It would seem that the phrase 'contingent liability' may have no settled meaning in English law because, in this case, Danckwerts, J., thought it necessary to resort to a dictionary, and *In re Duffy* (a case

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much relied on by the respondents) the Court of Appeal regarded its meaning as an open question. But the Finance Acts are United Kingdom Acts, and there is at least a strong presumption that they mean the same in Scotland as in England. A case precisely similar to this case could have come from Scotland and your Lordships would then have considered the meaning of this phrase in Scots law. So I need make no apology for reminding your Lordships of its meaning there. Perhaps the clearest statement of the law of Scotland is in Erskine's Institute, 3rd ed. vol. 2, Book III, Title 1, section 6, p. 586, when he says: 'Obligations are either pure, or to a certain day, or conditional Obligations in diem are those in which the performance is referred to a determinate day. *In this kind a debt becomes properly due from the very date of the obligation, because it is certain that the day will exist; but its effect or execution is suspended till the day be elapsed.* A conditional obligation, or an obligation granted under a condition, the existence of which is uncertain, has no obligatory force till the condition be purified; because it is in that event only that the party declares his intention to be bound, and consequently no proper debt arises against him till it actually exists; so that the condition of an uncertain event suspends not only the execution of the obligation but the obligation itself Such obligation is therefore said in the Roman law to create only the hope of a debt. Yet the granter is so far obliged, that he hath no right to revoke or withdraw that hope from the creditor which he had once given him.

"So far as I am aware that statement has never been questioned during the two centuries since it was written, and later authorities make it clear that conditional obligation and contingent liability have no different significance. I would, therefore, find it impossible to hold that in Scots law a contingent liability is merely a species of existing liability. It is a liability which, by reason of something done by the person bound, will necessarily arise or come into being if one or more of certain events occur or do not occur. If English law is different—as to which I express no opinion—the difference is probably more in terminology than in substance."

In *Owen v. Southern Railway of Peru, Ltd.*, (1953-56) 36 Tax Cases, p. 602, under Peruvian law the respondent company was bound to pay its employees in Peru prescribed compensation payments upon the termination of their services with the company subject to the fulfilment by the employee of certain conditions. The amount to be paid depended on (a) length of service and (b) rate of pay at the end of the period of service, except that a reduction in pay would not affect the amount to which an employee was entitled by reference to the period of service already performed.

On appeal against assessments to Income Tax on the company made under Case I of Schedule D for the years 1947-48 to 1951-52 inclusive, it was contended on behalf of the company that upon proper principles of commercial accountancy amounts of compensation calculated to have accrued due to each employee from year to year as deferred remuneration should be allowed as a deduction. The Special Commissioners held that it was a matter of correct accountancy practice to make provision in the accounts for the sums in question, and allowed the appeal.

The Chancery Division held that the deferred payments must be brought into account for Income Tax purposes at the time when they became payable, and not before. The Court of Appeal affirmed this decision.

In the House of Lords (Earl JOWITT and Lords OAKSEY, RADCLIFFE, TUCKER and MACDERMOTT) judgment was given in favour of the Crown. Earl JOWITT and Lords RADCLIFFE and TUCKER were of opinion that, where a number of similar contingent obligations arise from trading, there is no rule of law which prevents the deduction of a provision for them in ascertaining annual profits if a sufficiently accurate estimate can be made; but that the provision claimed by the company throughout the proceedings was not permissible by reason of discount and other factors. Lord OAKSEY agreed with the judgments in the Court of Appeal.

Lord MACDERMOTT, dissenting, favoured a remit to the Special Commissioners to ascertain whether it would be practicable to arrive at satisfactory deductions. He said:

"My Lords, as a general proposition it is, I think, right to say that in computing his taxable profits for a particular year a trader *who is under a definite obligation to pay his employees, for their services in that year an immediate payment and also a future payment in some subsequent year*, may properly deduct not only the immediate payment but the present value of the future payment provided such present value can be satisfactorily determined or fairly estimated. Apart from special circumstances, such a procedure, if practicable, is justified because it brings the true costs of trading in the particular year into account for that year and thus promotes the ascertainment of the 'annual profits or gains arising or accruing from' the trade. As I read the judgments, the substance of this proposition was accepted in the Court of Appeal; and before your Lordships the Crown, without making any formal concession, was not concerned to argue strenuously against it."

The rest of their Lordships appear to have been in agreement with this part of Lord MACDERMOTT'S judgment.

In *Absolam v. Talbot*, 26 Tax Cases, (1942-1945) 166, LUXMOORE, L.J., in the course of his judgment in the Court of Appeal, said:

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"In ordinary parlance 'debt' is the proper description to be applied to money which is owing and remains unpaid, whether the due date of payment has arrived or not, as witness the well-worn phrase '*debitum in praesenti, solvendum in futuro*'.

"With all respect to my brother Scott, I can find nothing in the Acts or Rules to control the meaning of the word 'debts' in Rule 3(i) so as to limit it to debts due and payable. The Rule provides that 'In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (i) any debts, except bad debts proved to be such to the satisfaction of the commissioners and doubtful debts to the extent that they are respectively estimated to be bad.'

"In my judgment the capital sums secured by the second mortgages and promissory notes are debts within this description and are none the less so because they are said to be secured by second mortgages or promissory notes."

In *W. H. Cockerline & Co. v. The Commissioners of Inland Revenue*, 16 Tax Cases (1929-1932), the headnote is as follows:

"Excess Profits Duty - Validity of notice of final determination where liability settled by agreement and no assessments made - Finance Act, 1926 (16 & 17 Geo. V. c. 22), Section 38(3).

"Following upon a special enquiry it was agreed in May, 1928, between representatives of the Inland Revenue and of the proprietor of the Appellant firm that a total amount of £67,076 had been underpaid by him on account of Excess Profits Duty. This amount, in respect of which no assessment was made was duly paid. On 10th December, 1928, the Commissioners of Inland Revenue gave notice under the provisions of Section 38 of the Finance Act 1926, that in their opinion all questions as to the liability in respect of Excess Profits Duty had been finally determined. Upon appeal to the Special Commissioners against this notice it was contended that there was no basis in law for the so-called settlement of May, 1928, and that the liability to Excess Profits Duty had not been finally determined. The Special Commissioners were satisfied upon the evidence that the settlement for £67,076 was intended by the Crown and by the taxpayer to be a final settlement of the liability to Excess Profits Duty and found that all questions as to the liability in respect of Excess Profits Duty had been finally determined before 10th December, 1928. They therefore dismissed the appeal.

"Held, that there was evidence upon which the Special Commissioners could come to their decision, which was not wrong in law."

ROWLATT, J., said at page 9:

"Here they met and came to an agreement with the intention on both sides that it should put an end to the matter, and if the formality had been gone through of putting the assessment on the book as a matter of consent on both sides, I do not see how it would have been possible for me, or any court, to disturb the findings of the Special Commissioners in this case, and I cannot, having regard to the point that has been taken for the Crown, hold that the argument which has been put forward on behalf of the Appellant is one which is entitled to succeed. It seems to me that the point taken for the Crown succeeds, that what was done was exactly what was intended should be done if the assessment had been put on the book. All that is wanting is the assessment, and the Crown is entitled to say: even assuming that assessment had been put on the book in July, when it comes to December there is nothing done, there is no question raised, and this notice is given, and they could have said, and said rightly, that there was no intention to appeal this, that it was settled and it never would be appealed, that it had not been appealed and that the time for appealing was over, and all the rest of it, and nothing more could have been settled. The only thing that is wanting really is this matter of the assessment on the book. I quite agree it would have been very much better if this matter had been regularised by an assessment. Personally, I do not understand how taxes can be collected without there being an assessment corresponding with it on the assessment book, but I do not see how that avails the subject."

In *O'Driscoll & Anor. v. Manchester Insurance Committee*, (1915) 3 K.B. 499; an insurance committee, acting under the National Insurance Acts, 1911 and 1913, and the Regulations made thereunder, entered into agreements with the panel doctors of their district by which the whole amounts received by the committee from the National Insurance Commissioners were to be pooled and distributed among the panel doctors in accordance with a scale of fees; the total amount available for medical benefit so received by the committee was to be the limit of their liability to the panel doctors; and if the total pool was insufficient to meet all the proper charges of the panel doctors in accordance with the scale, there was to be a *pro rata* reduction for each doctor, and, on the other hand, if it should be in excess of the amount required, the balance was to be distributed among the panel doctors.

It was held that where a panel doctor had done work under his agreement with the Insurance Committee, and the Committee had received funds in respect of medical benefit from the National Insurance Commissioners, there was a debt owing or accruing from the Insurance Committee to the panel doctor which could have been attached under Ord XLV r. 1, notwithstanding that as a matter of calculation the exact share payable to him may not yet have been ascertained.

SWINFEN EADY, L.J., said at p. 511:

"In those circumstances I am of opinion that on April 9, 1914, there was a debt owing or accruing from the Insurance Committee to

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the panel doctors. It was not presently payable, the amount that being ascertained, but it was a debt to which the doctors were absolutely and not contingently entitled. The only question was as to the amount of the debt, the debt not being payable until the amount had been ascertained.

"I now come to the first quarter of 1914. The original year included in Dr. Sweeney's agreements ended on January 14, 1914, but we are told that in 1914 a change was made, and that the medical year began on January 1, 1914, and ended on December 31. The first quarter therefore expired on March 31. On April 9 Dr. Sweeney would be entitled to a payment on account of his services for that quarter. The Insurance Committee were bound to make such a payment. By art. 37 of the National Health Insurance (Medical Benefit) Regulations (England) 1913, which are applicable to Dr. Sweeney's contract of January, 1914, 'As soon as may be after the expiration of each quarter the committee shall pay to each practitioner such sum as may be agreed between the committee and the panel committee in advance of the amount due to him.' There is therefore a statutory obligation on the committee to pay to the panel doctors a quarterly sum on account, the amount of which is to be determined as therein provided, and no garnishee proceedings can affect the right of those persons to determine the amount. That being so, Dr. Sweeney had on April 9, 1914, become entitled to a payment on account for work done, and that right was not subject to be divested by any contingency. Rowlatt, J., held that on that date there was a 'debt owing or accruing' from the Insurance Committee to Dr. Sweeney, though not presently payable.

"It is contended, however, that there cannot be a 'debt' until the amount has been ascertained, and in support of this contention cases have been cited to us where it was attempted to attach unliquidated damages. But in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given. Here there is a debt, uncertain in amount, which will become certain when the accounts are finally dealt with by the Insurance Committee. Therefore there was a 'debt' at the material date, though it was not presently payable and the amount was not ascertained. It is not like a case where there is a mere probability of a debt, as, for instance, where a person has to serve for a fixed period before being entitled to any salary, and he has served part of that period at the time the garnishee or order is served. In such a case there is no 'debt' until he has served the whole period".

PHILLIMORE, L.J., said at p. 514:

"I am of the same opinion, and have little to add Therefore both under the Regulations which have statutory force and under

a contract incorporating the Regulations there was a debt due from the committee to Dr. Sweeny. No doubt these debts were not presently payable, and the amounts were not, on April 9, 1914, ascertained in the sense that no one could say what the result of the calculations would be, but it was certain on that date that a payment would become due from the balance of the moneys in the hands of the committee for 1913, and that there was a provisional payment due to the doctors for the first quarter of 1914. Therefore for each of those periods there was a debt owing or accruing from the Insurance Committee to Dr. Sweeny, and it is well established that a debt so payable, though *solvendum in futuro*, is attachable under Order XLV, r. 1. It is not like the case of unliquidated damages which are not a debt until judgment. Directly the learned judge came to the conclusion that there was a balance, though of unascertained amount, in the hands of the Insurance Committee on April 9, 1914, for payment to the doctors for the year 1913, and that there was money in their hands for making a provisional payment to the doctors for the first quarter of 1914, he was bound to find that there were debts owing or accruing due from the Insurance Committee to Dr. Sweeny. As to the form of the order, it will be sufficient if the order which we make follows the canons laid down by Swinfen Eady, L.J., namely that the judgment creditors ought not to be placed in any better position as against the Insurance Committee with regard to the mode of ascertaining the sum due and the date of payment than the judgment debtor himself."

And BANKES, L.J., at p. 516:

"It is well established that 'debts owing or accruing' include debts *debita in praesenti solvenda in futuro*. The matter is well put in the Annual Practice, 1915, p. 808: 'But the distinction must be borne in mind between the case where there is an existing debt, payment whereof is deferred, and the case where both the debt and its payment rest in the future. In the former case there is an attachable debt, in the latter case there is not.' If, for instance, a sum of money is payable on the happening of a contingency, there is no debt owing or accruing. But the mere fact that the amount is not ascertained does not show that there is no debt."

All of these cases, discussing and illustrating as they do debts *in praesenti* and debts *in futuro*, conclude that they are "debts owing" and distinguish between those and liability based upon a contingency. We are not in this case concerned with contingencies. The creation of the liability or obligation does not depend on the happening of any event which may or may not occur, such as the Budgetary Resolutions necessary, as illustrated in the English cases, nor upon the arithmetical calculations of the Commissioner of Inland Revenue - assessment. As soon as the appellants' trading account for the year was settled and disclosed a chargeable income, the provisions of the Income Tax Ordinance were attracted and there was an obligation or liability to pay tax accordingly; and this was a statutory debt owing.

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Principle and authority, in my view, establish that the plain and ordinary meaning of "debts owing" clearly sanctions the deduction made by the appellants in this case.

The learned Chief Justice came to the conclusion.

"That the appellants were at the valuation date, 30th November, 1961, liable to pay income tax for the Year of Assessment 1962 on income earned during the year 1961, seems to me to be without doubt."

But then he proceeded to enquire in the next line: "But was that amount of income tax a *debt due* at the valuation date, 30th November, 1961? and went on to say:

"There was at that date a legal obligation on the part of the appellants to pay income tax for the year of income tax 1961 in the next succeeding year 1962 but there was no legal right in the Commissioner of Inland Revenue at the 30th November, 1961, to enforce payment and in my opinion there was therefore no *debt due* at the valuation date."

And throughout the rest of his judgment he refers to "debt due". It is clear that he misdirected himself as to the scope of his enquiry. He had to find whether or not there was a *debt owing*, not whether or not there was a *debt due*. A debt due is one that is payable now; a debt owing is one that is payable now or in the future.

The case of the *Inland Revenue Commissioner v. The Port of London Authority*, (1923) A.C. 507, relied on by the respondent, dealt with the interpretation of "debt due", and the court held that stock in the hands of a stockbroker did not create a debt due to him by the Authority. That case, therefore, does not avail the respondent, nor do the sections of the Income Tax Ordinance relied upon by the respondent.

Assuming that there is ambiguity as to the plain and ordinary meaning of "debt owing", what was the object of this legislation? It appears in the long title thereof - "An ordinance to provide for the levy of taxes computed by reference to property and gifts."

It was a tax on worth. What was the appellant company worth on 30th November, 1961? Surely, the value of its assets less what it would have to pay to its creditors up to that date, even though the payment could be deferred? The Commissioner of Inland Revenue became a statutory creditor the moment a chargeable income arose for the year 1961.

Section 10 of the Estate Duty Ordinance, Cap. 301 provides that:

"In determining the amount on which the estate duty payable in respect of any property is to be calculated and paid, the following deductions shall first be made from the value of the property —

(b) all debts or incumbrances incurred or created by the deceased *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit:

Provided that no debt shall be deducted in respect whereof, there is a right to reimbursement from any other estate or person."

The practice has always been—and I have never heard this disputed -that the personal representative of deceased, in arriving at the net value of the deceased's estate, deducts the income tax charged on the chargeable income earned during the year in which the deceased died, even though it has not been assessed.

The only difference in the scheme of the two ordinances on this aspect is that in the case of the Estate Duty Ordinance the "valuation date" is the date of the deceased's death, whereas in The ordinance it is a statutory date. They are both ordinances charging a tax on the net value of a person's property at a stated time.

In my view, the two ordinances are *in pari materia* and similar provisions should receive similar interpretations.

Accordingly, I would allow this appeal, set aside the judgment and order of the learned Chief Justice and the verdict of the Board of Review, and order the respondent to pay the costs of these proceedings in all the courts.

CRANE, J.A. (ag.): The charging section of the Property Tax and the Gift Tax Ordinance, No. 19 of 1962 (hereinafter also called The ordinance) provides as follows:

"Sec. 7. Subject to the provisions of this ordinance, and more particularly to the other provisions of this part of this ordinance, there shall be charged, levied and collected for each year of assessment a tax (to be called the Property Tax) at the appropriate rate or rates specified in the first schedule to this ordinance, in respect of the net property, on the corresponding valuation date, of every person."

Sec. 12(3) (b) of the same ordinance makes provision for computing net property. It enacts that in the case of debts any deduction from the nominal amount of debts allowed for income tax purposes shall be subtracted from the price or value of any property. The machinery of both the ordinance and the Income Tax Ordinance, Cap. 299, are therefore inter-related and geared for the collection of revenue.

The valuation date of the appellant company was fixed by the Commissioner of Inland Revenue at November 30, 1961. Accounts were accordingly made up; gains and property computed. After set-offs, to which the company was entitled, were made, a net balance of \$ 1,861 was struck. This, the appellants claimed to be a debt owed by them as their income tax liability

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in respect of the year of assessment 1962, and it was for that reason they deducted it when submitting their return of "net property" owned by them on the valuation date as required by the ordinance. It is their contention that they had a right to do so since the \$1,861 constituted a "debt owed" by them within the definition of "net property" in s. 3 of the ordinance. (See below.)

The Commissioner was, however, of a different view. He held that income tax in respect of the year of assessment 1962 was not a legal debt owed on the 30th November, 1961, the closing date of the company's trading year, a view which was maintained by both the Board of Review and the Chief Justice, from whose judgment this appeal is now brought.

So far as is relevant, the definition of "net property" in the ordinance is as follows:

"S. 3. " 'Net property' means the amount by which the aggregate value, computed in accordance with the provisions of this ordinance, of the property of any person on the valuation date is in excess of the aggregate value of all the *debts owed* by him on that date."

In his decision the learned Judge set out the matter he had to consider, as it was argued before him and previously before the Board of Review, thus:

"The question for determination in this appeal is whether the sum of \$ 1,861 claimed by the appellant's company to be income tax liability for the Year of Assessment 1962 under the provisions of the Income Tax Ordinance, Cap. 299 is a *debt owed* by the appellant company at the valuation date the 30th November, 1961, within the contemplation of definition of the expression 'net property' in section 3 of the Property Tax and Gift Tax Ordinance, 1962."

However, it was contended before us that, notwithstanding the above premises which the Judge had correctly and succinctly laid as the basis for reasoning, he nevertheless went wrong when he considered the matter, not from the viewpoint of the time when the figure of \$1,861 became a "debt owed", but when it became a "debt due" for payment. This, counsel for the appellants has asked us to say, affected his judgment, and alluded to no less than ten instances therein where the judge considered and finally resolved the problem in the light of a "debt due" but not payable by the appellant company to the Commissioner of Inland Revenue until 1962. More particularly, we were referred to the passage on page 44 of the record in which he obviously misdirected himself in thinking that the words "debt due" were contained in the definition of net value (s. 3). It was this error, it is said, which led to the erroneous conclusion, viz., that the Commissioner has no legal right to enforce payment on the valuation date, notwithstanding a clear finding by the judge that there was a legal obligation existing on November

30, 1961, on the part of the appellants to pay income tax in 1962. Assuredly, as we shall see, if correct, this is tantamount to a finding that there was an existing debt to be paid in the future such as would fall within the definition of a "debt owed" in s. 3 of the ordinance, and so rendered the \$1,861 deductible.

No doubt there is an obvious difference, both theoretical and practical, between a debt which is *owed* and one which is *due*. While in both cases the existence of the debt is established, the difference between them is chiefly with regard to time for demanding payment. In the one case the time for demanding payment may or may not have arrived; but in the latter, there can be no dispute that it has. Therefore a consideration of whether a debt has become due must needs involve a consideration of whether, in the first place, it was owed, for a debt cannot become due unless it was first owed.

I believe the solution to this problem must lie in the correct interpretation to be given to the phrase "debt owed" and the words "liability" and "indebted" in the Income Tax Ordinance. In elucidation of it, several authorities dealing with garnishee orders under the Common Law Procedure Act, 1854, s. 61, were cited. This section of that statute (now repealed) authorised the attachment of all debts "owing or accruing" from a garnishee to a judgment debtor. In the old case of *Jones v. Thompson*, 120 E.R. 430, one of the first on that statute, it was held that the words, "owing or accruing", were intended to apply to such cases in which there is a *debitum in presenti, solvendum in futuro*, which CROMPTON, J., explained by saying that there must be an *existing debt* though it need not be yet due for payment, and that it is not enough to show the probability that there will soon be a debt; while FRY, L.J., considered the words "owing or accruing" in *Webb v. Stenton*, (1883) 11 Q.B.D.518 at p. 529, to be identical in meaning.

It is clear, however, that there must exist, in order to be termed a debt, "something which the law recognises as a debt" (*per* BRETT, M.R., at p. 523) before it can be said to be owing and accruing, and in the same case LINDLEY, L.J., is reported as saying at p. 527:

"It must be a debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a *present obligation, debitum in presenti, solvendum in futuro*. An accruing debt, therefore is a debt not yet actually payable, but a debt which is represented by an *existing obligation*."

I consider the above extract to mean that the debt must not merely be a "liability", but an obligation. A debt must originate from a transaction or situation which is creative of the status of debtor and creditor arising either *ex contractu*, or *ex lege*; but it must savour of a legal obligation before it can receive recognition by the courts. This means that, in the present context, the Commissioner must have the powers to assess, demand, sue for and recover the tax before it can be called a debt.

The question to be answered then is: Was there in existence any such legal obligation on the 30th November, 1961, which the law would

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recognise? In considering this matter, both the Property Tax and the Gift Tax Ordinance, 1962, and the Income Tax Ordinance, Cap. 299, must be looked at in order to see whether they are creative at any stage of the status-obligation of debtor and creditor, and whether such acts and duties as are imposed on any one or both of the parties can give rise to any such relationship.

There are three stages which are characteristic of all tax and revenue legislation. (See *per* Viscount DUNEDIN in *Whitney v. Commissioner of Inland Revenue*, [1924] 10 T.C. 88 at p. 110.) These are well-known and are not disputed. They are: (i) the charging; (ii) the assessment, and (iii) the collection stages. Ss. 5 and 48 of our Income Tax Ordinance relate to the charging and assessment aspects of tax imposition; while s. 70 *et seq.* deal with tax gathering and the mode of collecting it after its determination. In his famous dictum, Lord DUNEDIN remarked (*ibid.*) by way of general observation:

"Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That *ex hypothesi* has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

The charging section therefore deals with the taxpayer's liability to tax. This, however, does not depend upon assessment, because it arises quite independently of it; thus, there need not be an assessment or quantification of tax in order to ground *liability* to pay it.

The decision of the Court of Appeal in *O'Driscoll v. Manchester Insurance Co.*, (1915) 3 K.B. 499, is frequently cited as illustrating the point that there need not be assessment or quantification of an amount in order to make a debt owing or accruing, i.e., in order that there should exist a present obligation to pay it now or in the future. But when the facts of that case are analysed, it will be seen that the point it is sought to make about the existence of the power to create the obligation was contained in the relevant articles of agreement. Briefly, the facts as set out in the head note of the case are, that an Insurance Committee, acting under the National Insurance Acts, 1911 and 1913, and the Regulations made thereunder, entered into agreements with the panel doctors of their district by which the whole amounts received by the Committee from the National Insurance Commissioners were to be pooled and distributed among the panel doctors in accordance with a scale of fees. The total amount available for medical benefit so received by the Committee was to be the limit of their liability to the panel doctors; and if the total pool was insufficient to meet all the proper charges of the panel doctors, in accordance with the scale, there was to be a *pro rata* reduction for each doctor, and, on the other hand, if it should be in excess of the amount required, the balance was to be distributed among the panel doctors. It was held that where Dr. Sweeny, one of the panel doctors,

had done work under his agreement with the Insurance Committee, and the Committee had received funds in respect of medical benefit from the National Insurance Commissioners, there was a debt owing or accruing from the Insurance Committee to Dr. Sweeny which could be attached in payment of his debts under Order XLV r. 1 (U.K.), notwithstanding that as a matter of calculation the exact share payable to him may not yet have been ascertained. At page 511 of the report, SWINFEN EADY, L.J., said:

"In those circumstances I am of opinion that on April 9, 1914, there was a debt owing or accruing from the Insurance Committee to the panel doctors. It was not presently payable, the amount not being ascertained, but it was a debt to which the doctors were absolutely and not contingently entitled. The only question was as to the amount of the debt, the debt not being payable until the amount had been ascertained.

"I now come to the first quarter of 1914. The original year included in Dr. Sweeny's agreements ended on January 14, 1914, but we are told that in 1914, a change was made, and that the medical year began on January 1, 1914, and ended on December 31. The first quarter therefore expired on March 31. On April 9, Dr. Sweeny would be entitled to a payment *on account* of his services for that quarter. *The Insurance Committee were bound to make such payment.* By Art. 37 of the National Health Insurance (Medical Benefit) Regulations (England), 1913, which are applicable to Dr. Sweeny's contract of January 1914. 'As soon as may be after the expiration of each quarter the committee shall pay to each practitioner such sum as may be agreed between the committee and the panel committee *in advance* of the amount due to him'. There is therefore a *statutory obligation* on the committee to pay to the panel doctors a quarterly sum on account, the amount of which is to be determined as therein provided, and no garnishee proceedings can affect the right of those persons to determine the amount. That being so, Dr. Sweeny had on April 9, 1914, become entitled to a payment on account for work done, and that right was not subject to be divested by any contingency. Rowlatt, J., held that on that date there was a 'debt owing or accruing' from the Insurance Committee to Dr. Sweeny, though not presently payable."

Far from being contrary to the view I hold that the liability must be legal, i.e. an obligation, I think the *O'Driscoll* case supports it. Whether a legal obligation exists is the all-important thing to look for in determining the existence of a debt. In *O'Driscoll's* case the legal obligation on the Committee to make those payments existed both under the Regulations and under the contract incorporating the Regulations. The Committee were bound to make those payments. So either way there was a debt due from the Committee to Dr. Sweeny notwithstanding it was not yet, although capable of being quantified. In contrast with *O'Driscoll's* case, yet illustrative of the necessity for there to be a legal obligation, is *Seabrook Estates Co. Ltd. v. Ford*, (1949) 2 A.E.R. 94. Here, a debenture holder appointed a receiver, who was to

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realise the assets and then pay off any preferential claims and the principal and interest to the debenture holders, and having done that, to pay the residue to the company. The judgment-creditor of the company sought to attach a certain sum of money in the hands of the receiver before he had paid these other debts, and which was estimated to be the residue that would be left in his hands. It was held that this could not be done as there was as yet no debt owing to the company. In the course of his judgment HALLETT, J., said, at p. 97:

"A time may come when the receiver for the debenture holders will become the debtor to the company, but I do not think that that time had arrived on February 22, 1949."

In the light of the authorities, there can be no dispute about the correctness of this decision, nor about the emphasis it lays on the necessity for a legal obligation to have existed on the part of the receiver to pay the residue to the company before a debt could be said to be owing; but that legal obligation had not yet arisen simply because the condition precedent had not been fulfilled; the receiver had not discharged his mandate to pay off preferential claims and the principal and interest to the debenture holders. Herein lies the distinction between *Ford's* and *O'Driscoll's* cases, viz., in the latter, the Committee were bound to make payments to the doctors, whereas in the former the time for making the payments had not yet arrived.

Support is also, I think, to be found in *Re Duffy (deceased). Lakeman v. Attorney General*, (1948) 2 All E.R. 756, although the words "debt owed" were not used in the relevant sections concerning that case which gave rise to the litigation, but the word "liabilities" instead. Duffy died possessed of shares in three companies to which s. 55 of the Finance Act, 1940 (U.K.) applied. His executors, in computing under that section the value of his shareholdings for the purposes of estate duty, sought to set off against the companies profits for the part of the current year which had elapsed at the date of death, the prospective income tax liability in respect of those profits which would be borne by the companies in the ensuing year. The Court of Appeal held that the word "liabilities" referred to liabilities existing in law at the relevant date and could not be stretched so as to cover something which in a business sense is morally certain and for which every business man ought to make provision, but which in law does not become a liability until a subsequent date. Presently we shall see that though this reasoning was not altogether approved *the* attempt to include anticipated income tax liability which did not exist until the next ensuing year did not succeed Lord GREENE. M.R., at page 759, having been at pains to point out that the relevant section where-from the Commissioner was directed to make an allowance from the principal value of the assets, did not read "debts and encumbrances", but "liabilities", went on to refer to the two senses in which the word "liabilities" is used, viz., in the wider and business sense of anything which appears on the debit side of the balance sheet of a company; and in the narrow and strict sense of legal

liabilities existing in point of law, whether under a contract, or a statute, or some other way, that is to say, legal obligations or debts. It is therefore the finding of the Master of the Rolls that the word "liabilities" in s. 55 of the Finance Act, 1940, means present legal liabilities, i.e., the equivalent of obligations and debts that makes *Duffy's* case of particular importance and relevance to the instant case for it provides the link to the solution of the problem with which we are now confronted, and confirms the view entertained that anticipated income tax liability cannot be considered a debt until 1962 when the Commissioner of Inland Revenue could have lawfully exercised his powers of assessment under the law as an agent for the functions of the State.

Re Duffy was approved by the House of Lords in *Winter v. Inland Revenue Commissioner*, (1961) 3 A.E.R. 855; but not the analysis of Lord GREENE, M.R., concerning what are "liabilities" under ss. 50 and 55 of the Finance Act, 1940. The learned Master of the Rolls thought that only legal liabilities, i.e. those existing, not contingent liabilities, were so included. But by a majority of the House it was held that this view could not prevail, for a liability may be contingent without being an existing legal liability. We are, however, spared from that consideration, having only to consider the meaning of "debts owed" within the definition of s. 3 of the ordinance in relation to the appellants' liability to tax and their indebtedness in the Income Tax Ordinance, Cap. 299.

It was strenuously urged on behalf of the appellant company that the \$1,861 was set down in their books as a current liability and so could not be treated as an asset merely because they have held it in their possession. It was not within the contemplation of the ordinance, so runs the argument, that current liabilities should be treated as part, of assets to be used in the computation of net value. The concept of "net worth" means what a man holds for himself; it does not mean that which he holds to meet a liability which will become due in a few months' time. Property tax, it is said, is a tax levied on net property, not on debts which have to be paid out now or in the future. The sum-total of the appellants' whole argument is directed to show that \$ 1,861 cannot in truth be regarded as their property because they will have to pay it sometime in the future.

I think, however, this argument tends to beg the question and to confuse the concepts of liability and legal obligation since it overlooks the point as to whether there was an existing legal obligation on the valuation date, i.e., whether the \$1,861 could have been lawfully demanded from the appellants on that date. The departure by popular speech from the legal significance of the term "obligation" is one of the misfortunes of legal nomenclature.

In my view, a liability to tax arises from the very moment the subject embarks upon any of the enterprises in s. 5 of the Income Tax Ordinance, but I consider that at that time his is only a mere liability i.e., a duty to account for his gains and profits - his legal obligation only arises after assessment. See s. 69 A (8)(g) where it is positively stated that it is the exercise of a trade, business, profession or vocation or other employment in Guyana which

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renders a person liable to pay income tax. I think that liability can only assume the nature of a legal obligation when the Commissioner of Inland Revenue, in exercising his statutory powers, transforms it into a legal liability, i.e. a debt owed to the Government of Guyana, that is to say, into an obligation to pay by making a lawful assessment on him and notifying him thereof. It seems to me that it was in this sense that Lord REID explained the concept by contrasting its double meaning which we have seen above is inherent in it. See *Winter v. Inland Revenue Commissioners* (above), where he said at p. 858:

"But I cannot doubt that if a statute says that a person who has done something must pay tax, that is a 'liability' of that person" (i.e., in the wide business sense of the word as shown by the use of italics). "If the amount of tax has been ascertained *and it is immediately payable* it is clearly a liability" (i.e., in the narrow sense of the word as meaning an obligation or debt)."

This double significance is also admirably analysed in the following extracts from the "PRINCIPLES OF THE LAW OF CONTRACTS", 2nd Ed. pp. 2-3 by SALMOND & WILLIAMS in terms of the debtor and creditor relationship, a consideration of which I shall endeavour later to show from both the ordinance and the Income Tax Ordinance is relevant in this case:

"In the second place, the Roman term obligation (and the English term obligation itself when used in its strict and legal sense) denotes *not merely the duty, but also the corresponding right*. In other words, it denotes the entire relationship between the parties—the *vinculum juris* as the Roman lawyers called it—which unites, for example, a debtor to his creditor or one contracting party to the other. Looked at from the point of view of the creditor or other person entitled, this *obligatio* or the *vinculum juris* is a right; looked at from the point of view of the debtor, or other person bound, it is a duty and a liability; and the term *obligatio* indicates both of these aspects. A debt is the *obligatio*, not merely of the debtor, but of the creditor also. In the contrasted popular sense, however, the term denotes the duty or liability exclusively. The distinction may be illustrated by the use of the word debt, which to some extent possesses the same double significance as *obligatio*. A debt is the right of the creditor no less than the liability of the debtor. It is a relationship with a double aspect."

The question will therefore be approached from the standpoint of whether on the valuation date, i.e. the date on which the appellants contend that a debt of \$ 1,861 was owed by them to the Commissioner, the latter was empowered to create such an obligation on them; if not, then in the light of the above analysis there could be no existing obligation on that date and

therefore no debt owed on that date even though there was duty on the appellants to account for all gains and profits then.

In considering this question, I will commence by examining s. 9 of the Income Tax Ordinance, Cap. 299, along with s. 8 of the Property Tax and the Gift Tax Ordinance, and by bearing two fundamental observations in mind, viz. (i) that with us, income tax assessment is based on the principle of chargeable income on gains or profits in business for the year immediately preceding the year of assessment (s. 8 Cap. 299); and (ii) that in relation thereto, the "year of assessment means the period of twelve months . . ." (see definition) (s. 2 Cap. 299). Therefore, chargeable income on gains or profits earned in 1961 will be subject to assessment in 1962 and not before, unless power is specifically given to the Commissioner for that purpose in the very year of income.

Under s. 9 of Cap. 299, where the Commissioner is satisfied that any person usually makes up the accounts of his trade or business on a day other than the day immediately preceding any year of assessment, i.e. on the 31st December of that year, he may permit that person to compute his gains or profits for income tax purposes upon income received by him during the year up to that day on which he makes up his accounts; but there is the proviso that where such permission is given in respect of any year of assessment, income tax shall be charged, levied and collected for each subsequent year on the gains and profits for the full year on the same date in the year immediately preceding the year of assessment subject to an adjustment which in the Commissioner's opinion is just and reasonable.

Two points are especially worthy of note about this section, (i) permission is only granted the taxpayer *to compute* gains or profits for the purposes of enabling him to fulfil his statutory liability of accounting for income received during the year of business. Permission is not granted him *to assess* the amount of tax due from him for any purpose whatever, nor to obligate himself for the payment thereof; (ii) the principle of assessment on the basis of the chargeable income for the year immediately preceding the year of assessment is maintained.

Under s. 8 of the Property Tax and the Gift Tax Ordinance, 1962, it is provided that when the Commissioner has permitted computation of gains or profits as above on a day other than that immediately preceding any year of assessment, he may permit this day to be *valuation day* for the purpose of Part II of the ordinance in respect of property held for the purposes of such trade or business. It has already been stated above that the Commissioner had in this case fixed November 30, 1961, as the valuation date. In relation to any year of assessment, this date is defined as the last day of the year preceding that year of assessment, and in relation to the Property Tax, the expression "year of assessment" means the period of twelve months commencing on the 1st January, 1962, and each subsequent period of twelve months.

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It will therefore be readily seen from both ordinances that there was a liability on the appellants to both income tax and property tax on November 30, 1961, and hence a liability to assessment in respect of both items in 1962. I stress, however, there was on that date, i.e., November 30, 1961, a mere liability to tax; there was then no "legal obligation on the part of the appellants to pay income tax in the next succeeding year 1962", as the learned Chief Justice thought; there was no certainty they would pay tax, because they may have incurred severe losses in business and so made an imposition impossible. I think so because, on the true construction of the Income Tax Ordinance, there could have been no lawful demand on the appellants as debtors by the Commissioner for payment in whole or in part of either Income or Property Tax on the 30th November, 1961, since the latter had no legal right to make an assessment in the year of income 1961. Any power to assess the taxpayer before the end of his year of income must, of course, have legal sanction. Take, for example, the Commissioner's power to deduct income tax under the P.A.Y.E. system (s. 66A); his power to bring to book absconding taxpayers liable to tax before the end of the year of income (s. 69A (9)); his power to garnish debts (s. 69C); and certain other specified instances; these are all cases where *a priori* legislative authority has to be obtained. In my view, the appellants' liability to tax on November 30, was incapable of being transformed into a legal obligation by reason of the legal incapacity of the Commissioner to assess, demand from and sue the appellants on that date for income chargeable in respect of 1961. The appellants cannot assess themselves and so oblige themselves; there is no power directed in either ordinance to that end.

See ss. 19(1) and 48(1) of the ordinance and the Income Tax Ordinance, respectively. These show that it is the Commissioner who is to make the assessment; it is he who, as we have seen from s. 12(3)(b) of the ordinance, is empowered to allow in the case of debts, deductions from the nominal amount which has been allowed in respect thereof for income tax purposes. Having regard to the fact that in the case of both ordinances the years of assessment are co-incident and co-terminus, viz., 12 months commencing on January 1, 1962, and also to s. 19(4) of the ordinance, I think there is left no room for doubt that the intention is for both to be mutually operative in the respects mentioned therein in the year 1962.

The juridical explanation of an obligation connotes "the relation between two persons one of whom can take judicial proceedings or legal steps to compel the other to do or abstain from doing a certain act". See the *DICTIONARY OF ENGLISH LAW*, 1959, at p. 1256, by Earl JOWITT. In other words, an obligation creates a right *in personam*. This was no doubt the idea which the learned judge had in mind when he sought to show "there was at that date (i.e. November 30, 1961) a legal obligation on the part of the appellants to pay income tax in the next succeeding year 1962", since he gave as his reason for his finding the non-existence of a debt due was the

absence of a legal right to enforce payment of it. Having found that there arose a legal obligation on November 30, 1961, to pay tax in 1962, it is clear that the judge was in effect saying there was an *existing debt* to be paid at a future time. This, assuredly, in the light of what we have been considering above, must be a "debt owed" within s. 3 of the ordinance. But this notwithstanding, he reached the conclusion that the appeal must be dismissed, for the reason that the debt was not yet due.

In my opinion the judge's finding that there was a legal obligation on the valuation date was wrong because there was no debt in existence whatever on the valuation date; nevertheless, his conclusion was right that this appeal must be dismissed. He arrived at the right conclusion through the wrong reasoning. An appeal, however, it is well known, is not from the reasons given in support, but from the decision itself. I find that the decision can be sustained from the evidence, however.

Recapitulating from the foregoing, I have come to the conclusion that on the valuation date the appellants were not bound to make any payment to the Commissioner in respect of their income tax liability for 1962, which had not yet arrived. They' were then under no obligation which the cases show must exist to do so, because there was no right in the Commissioner to create it at that time. The true legal position, it seems to me is this: that before demand is made, the appellants are under a liability to be placed under an obligation to pay tax, i.e. their liability is only a duty to account to the Commissioner for income received during their trade year. An obligation to pay tax is, however, created when the Commissioner serves his notice of assessment under s. 56, which constitutes a demand on them for payment of it, the demand itself being the exercise of a power vested in him obligating the appellants to the payment of the tax.

An examination of his powers will show that s. 48(1) of the Income Tax Ordinance gives him power to assess the appellants as soon as may be after delivery of their returns, which assessment must be in 1962; while s. 56 empowers him to send them a notice stating the amount of their chargeable income, the amount of tax payable by them, and requires him to inform them of their rights in case they are desirous of disputing his assessment. As I have said, notice of assessment is in the nature of a *demand for payment* of the tax which then legally becomes due and payable on its receipt. It is only after that point of time, I believe, that it can be truly said that there is a liability in the strict sense of an obligation to pay the tax; it is only after that time that it can be said that in law the status-obligation flowing from a debtor-creditor relationship arises, which LINDLEY, L.J., referred to as a present or existing obligation. (See *Webb v. Stenton*—above).

What was hitherto merely a duty or liability on one of the parties, viz., the appellants, will now be transmuted into the *vinculum juris* by virtue of the exercise of the corresponding right vested in the Commissioner of Inland Revenue to assess and demand payment of the tax. Such, it is submitted, is the position in this case to be deduced from the authorities, and an analysis

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of the passage quoted from the work of SALMOND & WILLIAMS above, but there never was any excuse of the Commissioner's powers in this case, simply because there was none he could properly exercise on the valuation date.

That it was the intention of the Legislature to create the status of debtor and creditor, there can be no doubt, for the language in those sections of the Income Tax Ordinance establishing that relationship makes it unmistakably clear by the use of the words "liable" and "indebted". This bears, I think, ample testimony to the view which I hold - see, for example, ss. 39(1), 69C (1), 2(2)(a) and (5), and more particularly s. 71 which ought to leave one in no doubt at all as to the true nature of the tax since power is given to recover it from a defaulter in a court of law "as a debt due" to the Government of Guyana.

For the reasons I have endeavoured to give, I would support the conclusion reached in the court below that this appeal be dismissed, though not for the reasons given; and I would accordingly dismiss the appeal with costs.

Appeal dismissed

COMPTON MANICKCHAND v. E. RAMJIT

[In the Full Court on appeal from the Magistrate's Court
for the Berbice Judicial District (Persaud, C.J. (ag.) and Mitchell, J.)
July 28, August 8, 15, 1969.]

*Spirits—Custody of illicit spirits—Unlawful possession of spirits—Proper charge
to be brought—Spirits Ordinance Cap. 319 ss. 89(1), 104.*

The appellant and two other men were charged with the custody of illicit spirits contrary to s 104 (3) of the Spirits Ordinance Cap. 319. A customs and police party raided the appellant's premises and found the other two men sitting under the house with two cups and a bottle between them. One of the men poured liquid from the bottle into one of the cups but upon seeing the raiding party, the other man snatched the bottle and threw it to the ground. The bottle was recovered and the contents were later certified to be bush rum. It was submitted that the appellant ought not to have been charged under s. 104(3).

HELD – The whole purport of ss 102–104 of the Spirits Ordinance was the inspection of authorised distilleries and the seizure of unauthorised distilleries and substances in connection therewith which may include bush rum. If it is intended to charge for the possession of bush rum simpliciter then s 89(1) is the appropriate provision.

Appeal allowed.

S. Mohabeer, for the appellant.

G. A. G. Pompey, for the respondent.

PERSAUD, C.J. (Ag.): The appellant was charged together with two other men with the custody of illicit spirits, contrary to Section 104(3) of the Spirits Ordinance (Chapter 319).

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The evidence discloses that on the day in question, the respondent, who is a Customs and Excise Officer, accompanied by a party of policemen, carried out a raid on the appellant's premises. Under the house, the other two men were sitting down with two cups and a bottle between them. One of these men was seen to pour liquid from the bottle into one of the cups, but upon seeing the raiding party, the other man snatched the bottle and threw it to the ground. The bottle was recovered, and sealed; the contents were later certified to be bush rum. Another bottle containing bush rum was found buried in the ground outside of the appellant's premises, but the magistrate rightly disregarded this bit of evidence. There is no evidence that the appellant did or said anything during the raid.

At the trial, the appellant and one of the other two men maintained that the police had taken the bottle with the bush rum on to the appellant's premises. As he was entitled to do, the magistrate rejected this defence, and held that the bottle with the bush rum was in fact found on the appellant's premises in the circumstances as described by the respondent and the policemen. He convicted the appellant and the other man, holding that 'in order to obtain a conviction under this section, the prosecution only has to prove the presence of the defendants on the premises where the spirits were found'.

The argument before us proceeded on the basis that the bottle containing the bush rum was found on the premises of the appellant, but it was submitted that the charge ought not to have been laid under Section 104(3), in that that section deals exclusively with the distillation of spirits, and with distilleries, and was not intended to cover the possession of bush rum.

To understand the import of Section 104(3) of Chapter 319, it would be necessary to set out those other subsections that are considered relevant to the matter in hand.

Those subsections read thus: –

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

(2) Anyone so authorised may at any time, either by day or by night, but at night only in the presence of a police officer or constable, if he is not a member of the police force, break open and forcibly enter any house or place aforesaid, and seize any distillery apparatus, spirits, or materials for the manufacture of spirits found therein, and either detain them or remove them to a place of safe custody.

(3) All distillery apparatus, spirits, and materials for the manufacture of spirits so seized shall be absolutely forfeited, and the owner of any distillery apparatus, spirits, or materials for the manufacture of spirits, or the person in whose custody they are found, shall be liable for every

house or place in which they are found, and also for the distillery apparatus, spirits or materials for the manufacture of spirits, to a penalty not exceeding one thousand dollars, and, in addition to a penalty, to imprisonment with or without hard labour, for any term not exceeding twelve months.

(6) Anyone found in a house or place where the distillery apparatus, spirits, or materials for the manufacture of spirits are found or in the vicinity thereof, shall be deemed, unless he proves the contrary to the satisfaction of the magistrate, to be the owner or person in charge of the distillery apparatus, spirits, or materials for the manufacture of spirits."

Even though there may be some room for arguing for the proposition that the phrase "or the person in whose custody they are found" in subsection (3) does not bear the same meaning as the words "or person in charge of in subsection (6), we will assume that they do. We will therefore, for the purposes of this case interpret the two subsections to mean that where a person is found in a house or place where distillery apparatus, spirits, and materials for the manufacture of spirits are found, or in the vicinity thereof, he shall be deemed, unless he proves to the contrary to have the custody of such articles, and of course, if he has, then he is liable to the penalty prescribed by subsection (3).

We have examined sections 102 to 104 of the ordinance, and we are of the opinion that these provisions are intended primarily to deal with distilleries, and matters connected therewith, and not with the offence of the possession of the substance known as bush rum which is dealt with specifically by section 89(5). This latter subsection makes the possession of such substance an unlawful possession of spirits for purposes of subsection (1).

Section 102 authorises any officer under the ordinance to enter the premises, house or place used by the distiller, and to examine distillery apparatus, spirits and materials for the manufacture of spirits. A distiller means anyone to whom a licence is granted under the ordinance to have, keep or make use of, any distillery apparatus for the purpose of distilling spirits. Thus it will be seen that this section deals with the authorised distiller, and his premises, and so does section 103.

Section 104(1), on the other hand, makes provision for the entry and search of premises for illicit distillery apparatus spirits, or materials for the manufacture of spirits, and authorises the issue of a search warrant to search such premises upon an officer making the necessary oath. Subsection (2) empowers anyone so authorised to enter premises forcibly, and to seize any distillery apparatus, etc. Then comes subsection (3) which provides that all distillery apparatus so seized shall be absolutely forfeited, etc. And it should not be lost sight of, that subsection (5) enables an officer to seize *the* distillery apparatus etc. without a warrant. So that armed with the necessary warrant, an officer may search premises where he has good reasons to believe

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any distillery apparatus, etc. may be, and even without a warrant, he may seize the articles.

In our judgment, the whole purport of sections 102 to 104 is the inspection of authorised distilleries, and the seizure of unauthorised distilleries and substances in connection therewith, which may indeed include bush rum. But if it is intended to charge for the possession of bush rum simpliciter, then section 89(5) is the appropriate provision. It is idle to contend that the prosecution has a right to elect the section under which they will proceed, and having elected, that is an end to the matter. We cannot accept the proposition that the legislature would have made specific provision for the possession of bush rum in one section, and then make similar provision in another section under the guise of dealing with distillery apparatus, particularly so when both sections are so highly penal. We are of the view that the two sections are intended to deal with two different situations.

No doubt, in this" case, the prosecution elected to proceed in this fashion, because they realised they would have been faced with the situation of having to prove knowledge in the appellant, as has been laid down in such cases as *Baboo Ballack v. Hill* (19.2.1909), *Francois v. Ram* [(1931-37) L.R.B.G. 135], and *Fung v. Murray* [(1941) L.R.B.G. 35], and they might very well have found it difficult, so to do, having regard to the available evidence.

Counsel for the respondent has referred us to *Jaglaloo v. Beramsingh* [(1941) L.R.B.G. 49], where the defendant was found at one and the same time, in the possession of a distillery apparatus and of bush rum. He was charged and convicted for being found in the custody of a distillery apparatus, contrary to what is now section 104(3), and the unlawful possession of bush rum, contrary to what is now section 89(1). His appeal against the first conviction was dismissed, but the second appeal was allowed. As we understand that decision, which was a short one, the prosecution was not permitted to divide the charge and charge two counts on the same evidence. In our judgment, that decision does not go the length suggested by counsel for the respondent.

Jaglaloo's case was the only one referred to us. Counsel for the respondent asked for an opportunity to produce further authorities in support of his submission, and we adjourned the matter. But upon its being called subsequently, he was not in a position to take his arguments any further, but maintained his earlier stand with which we do not agree.

The result is that this appeal is allowed; the conviction and sentence are set aside. Costs to the appellant fixed at \$28.75.

MITCHELL, J.: I have had the opportunity of reading the judgment of the learned Chief Justice concerning this matter and I concur with it.

I would, however, like to add a few observations on the case under review.

To my mind the words "All distillery apparatus, spirits, and materials for the manufacture of spirits" used in Section 104(3) of the Spirits Ordinance, Chapter 319 are all of the same kind and "spirits" in that context would mean and refer to "spirits" related in some way to the distillery apparatus or used in the distillation or manufacture of other spirits. In my opinion it does not seem a reasonable construction of the word "spirits" in that context to make it of such general application as to include all spirits of any description and a substance which has been given specific statutory recognition and definition when the words immediately before i.e. "distiller apparatus" and the words immediately following i.e. "materials for the manufacture of spirits" in Section 104(3) are concerned only with the distillation of spirits. While bush rum is, in the context of Section 89(5) of Chapter 319 recognised as "spirits" it is recognised as "spirits" not because it falls within the general description of spirits of Chapter 319 i.e. spirits of any description—but rather on account of the fact of its special quality. It is a special commodity with special constituents which must be certified as such by the Government Analyst before it could fall within that category of Section 89(5) and thus give rise to the presumption which arises under that same Section 89(5) that:

"Everyone possessing any of the substance known as bush rum . . . shall be deemed to be a person unlawfully possessing spirits *under this section.*"

To my mind there is provision in Section 89 of Chapter 319, for the unlawful possession of spirits of any description. There is also provision in the said Section 89 at subsection 5 for the unlawful possession of the substance or a particular spirit known as bush rum after certification as such by the Government Analyst that it is bush rum. Then there is separate provision in Section 104(3) not for the unlawful possession of spirits, be they bush rum or spirits of any description, but for the unlawful custody of distillery apparatus, spirits used in the distillery apparatus and for the manufacture of spirits, and materials (i.e. including wash which is any liquid from which spirits can be distilled) for the manufacture of spirits.

I am of the view, Section 104 of Chapter 319 is aimed not at the mere possession of spirits but at the *custody of spirits for use in the distillation and manufacture of spirits* and goes further than the provisions of Section 89 in its intention, scope and the penalty which follows as a result of its infringement. Section 89(1) provides for a penalty -

"not exceeding one thousand dollars or to imprisonment with or without hard labour for any term not exceeding six months and the spirits shall be forfeited."

Section 104(3) however provides for a penalty "not exceeding one thousand dollars, *and, in addition to the penalty* to imprisonment with or without hard labour, for any term not exceeding twelve months.

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So it can be appreciated that the penalty for an infringement of Section 104(3) is greater than that in the case of an infringement of Section 89(1) be it for bush rum used in the manufacture of spirits or for any other spirits so used. To my mind it is not compatible with the common-sense which one would normally attribute to the Legislature, in the construction of a statute to avoid absurdity, that the Legislature would have intended that a person could have been prosecuted under Section 89(1) of Chapter 319 for the unlawful possession of "bush rum" requiring the proof of certain elements of law involved in the proof of possession, and that same person could also at the same time have been prosecuted under Section 104(3) of Chapter 319, for the said unlawful possession of bush rum but in this latter case it does not require proof of the legal elements of possession because the custody of the bush rum would be presumed once the person is found in the vicinity of the bush rum unless there is proof to the contrary to the satisfaction of the magistrate, and in the latter case under Section 104(3) the penalty is more severe.

In my opinion, the Legislature intended to deal with two different sets of circumstances—one for the *unlawful possession* of spirits generally and the unlawful *possession* of the bush rum spirit specifically under Section 89(1) and the other for the unlawful custody of distillery apparatus, spirits or materials used in the manufacture of spirits under Section 104(3). Moreover, the legal concept of *possession* with regard to Section 89(1) and of *custody* with regard to Section 104(3) are different and that difference has received judicial interpretation and recognition. The concept of *possession under Section 89(1)* has been explained in the cases *Baboo Ballack v. Hill* (19.2.1909) L.R.B.G.; *Francois v. Ram* (1931 – 7) L.R.B.G. 135; *Fung v. Murray* (1941) L.R.B.G. 35 and concept of "*in charge of*" and "*in custody*" has been judicially interpreted in *Seegobin v. Williams* (1938) L.R.B.G. 317 Full Court.

In so far as the words "or the person in whose custody they are found" in Section 104(3) and the words "or person in charge of in Section 104(6) are concerned the case of *Seegobin v. Williams* (1938) L.R.B.G. 217 (Full Court comprising CAMACHO, C.J., VERITY and LANGLEY, J.J.) is illuminating. The Spirits Ordinance was then Chapter 110 but the wording is the same as that of the present Spirits Ordinance, Chapter 319. In that case referring to Section 108(3) of Chapter 110 which is now Section 104(3) of Chapter 319 VERITY J. who delivered the judgment of the court said in the course of his learned judgment:

"Whether or not the evidence in itself is sufficient to establish that the appelland was found in actual physical custody of the articles it is enacted by subsection (6) of the Section under which he is charged" (subsection 6 of Section 104 of Chapter 319) "that anyone found in the vicinity of any of the things referred to in subsection (3) shall be deemed to be the owner or person in charge of same.

There may be circumstances or contexts in which the meanings of the words "custody" and "charge" are to be distinguished. In their ordinary sense they are not necessarily either different in meaning or opposed in effect. In the Shorter Oxford Dictionary each is given as a definition of the other. In the context of this ordinance they obviously refer to one and the same thing. Anyone deemed to be "in charge" therefore, is deemed to be "in custody". Furthermore, if anyone found in the vicinity of certain articles is to be deemed to be in custody of them, it follows of necessity that he must be deemed to have been found in custody of them."

In so far as counsel for the respondent has referred to *Jaglaloo v. Beramsingh* (1941) L.R.B.G. 49, my comment would be upon the approach of the prosecution in presenting the charge in that case as they have done. That case illustrates that the prosecution after having ascertained that the spirit was the substance known as bush rum thought it fit that the charge should have been brought under what is now Section 89(1) of Chapter 319, and that thinking would have been correct on the part of the prosecution if a charge for the *mere unlawful possession* of bush rum simpliciter was to be sustained. But in the *Jaglaloo case* even though the substance was the spirits known as bush rum, it was found in circumstances which related it to the distillery apparatus and approximated its use to the distillery apparatus and that it was a "spirits" which fell within the scope and purview of the present Section 104(3) and not the bush rum section, that of 89(1). So when the prosecution brought one charge under Section 104(3) for distillery apparatus and another under Section 89(1) for the unlawful possession of bush rum they were really instituting charges under two different sections when both those charges related to Section 104(3) only. It was then right and proper that the appeal on the charge which was prosecuted under section 89(1) should be allowed as it was prosecuted under the wrong section.

I appreciate that the reason which the learned court gave for allowing that appeal was that the "possession of bush rum we consider to be part of the same transaction" but to my mind the defendant was liable to be prosecuted and punished in each case for having in his custody distillery apparatus and also for having spirits for the manufacture of spirits. Each is a separate offence and the items are disjunctive. Moreover, it is trite law that an act could give rise to more than one offence. The distinction to my mind which emerges from the *Jaglaloo case* is that the court considered the custody of the distillery apparatus and the custody of the bush rum as part of the same transaction as distinct from the same act or fact of custody giving rise to two distinct offences under Section 104(3) and the *Jaglaloo case* should be viewed in that narrow light only.

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Accordingly, for the reasons given in conjunction with those stated by the learned Chief Justice, I would allow this appeal with costs to appellant in the sum of \$28.75.

Appeal allowed.

REYNOLDS GUYANA MINES v. AMOS BICKRAM

[In the Full Court on appeal from the Magistrate's Court of the Berbice Judicial District (Persaud, C.J. (ag.) and Mitchell, J.) July 28, 29, August 15, 1969].

Workmen's compensation—Permanent partial disability—After accident workman obtaining employment elsewhere at higher wage—Cesser of that employment—Liability of earlier employer—Workmen's Compensation Ordinance Cap. 111 s. 2.

The respondent who was an employee of the appellant received an injury to his foot in the course of his employment on August 23, 1966. He was paid compensation in a monthly sum from that date until January 31, 1967. On February 13, 1967, the respondent obtained employment at a higher pay with a construction company where he worked until November, 1967, when, upon completion of the work, he was, with others, retrenched.

In March 1968, a surgeon examined the respondent and assessed permanent partial disability at 40% and upon a claim a magistrate awarded the respondent \$3,456: as compensation. On appeal.

HELD: that the question is not whether the respondent received, after the accident, the same or higher wages but whether the accident reduced his chances of obtaining the type of employment he was capable of undertaking at the time of the accident.

*Appeal dismissed.
Award by magistrate upheld.*

M. Churaman for the appellants
S. Mohabir for the respondent.

PERSAUD, C.J. (ag.) delivered the decision of the court: The workman in this matter was employed by the appellants as a labourer to tie barges on a wharf at Everton, East Bank Berbice. On 23rd August, 1966, he suffered an injury in the course of his employment whereby his foot was squeezed between a barge and the wharf. As a result of injuries he suffered, he was

paid compensation by the appellant company at a rate of \$ 110.05 per month from the date of the injury to 31st January, 1967. On 13th February, 1967, he was employed by a construction company which was engaged in doing work for the appellants. In November, 1967, the workman's services were terminated because of the completion of work and he, among others, was re-trenched.

On 10th March, 1968, he was examined by a surgeon specialist who found that he had a clinically united compound fracture of the lower right tibia and fibula; that there was a scar on the site of the fracture and the whole area overlying the fracture was tender; that the skin was adhering to the deep tissues. The surgeon specialist also found that whenever the workman dorsi-flexed the ankle joint the great toe was planta-flexed and that the reverse was the case when the ankle was planta-flexed and that this disability interfered with his walking. The specialist went on to assess a permanent partial disability at 40 per cent, and expressed the opinion that the workman could not perform his normal duties.

In his evidence before the magistrate the workman maintained that when he was employed on the 13th February, 1967, he was given light work and he did not return to his original occupation on the barges; that he continued to perform flight work until he was served with the notice terminating his employment on the 6th December, 1967, after which he did not work. He also maintained that he was still incapacitated by the injury and unable to perform his duties as a labourer.

He also alleged that he was told by the labour relations officer employed by the respondent that he could not be re-employed because of the condition of his foot. This was denied by that officer, but the magistrate found in fact that this was so and also found that, having regard to the un-rebutted medical evidence of the surgeon specialist that the workman's injury resulted in a reduction of his chances of getting work, awarded him compensation in the sum of \$3,456.

The main point in this appeal is that the evidence did not reveal any loss of earning capacity and that the magistrate acted on a wrong premise in law in holding that the workman's entitlement to an award as being based on his chances of obtaining work; and that in any event there is no evidence of an unsuccessful attempt to obtain work.

The claim for compensation in this matter was based on the incapacity of a permanent partial nature, and the point argued on behalf of the employers is that after the 13th February, 1967, the workman was in fact able to secure employment (even though of a different nature) at a rate of pay even higher than that which he had been receiving at the time he suffered the accident, and that in those circumstances it could hardly be the case that the injury affected his capacity to earn.

This point was argued in this court in the *West Bank Estates v. Alexander Phillips* and the point was rejected. The court (BOLLERS, CJ. and CHUNG, J.) referring to *Birmingham Cabinet Manufacturing Co. v. Dudley*

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(1910) 3 B.W.C.C. 169 held that the question was not whether the workman's employers are paying or can pay him at the time of application the same wages as before the accident, but whether the workman is left in such a position that in the open market his earning capacity may, in the future be less than it was before the accident as a result of the accident.

That matter went to the Court of Appeal, but it would appear, reading the judgment of the Chancellor that there was not in that court a challenge to the workman's right to have an award of compensation made to him in similar circumstances. It would appear therefore, that it was accepted by the employer in that the point was not pursued in the Appeal Court that the workman would have been entitled to compensation.

As has been stated in WILLIS'S WORKMEN'S COMPENSATION, 36th Ed. at p. 277:

"The true criterion for the assessment of compensation of partial incapacity is the amount of physical incapacity for work caused by the accident and not the actual loss of wages resulting from incapacity."

There are a number of cases that support this proposition, and we need only refer to those which were cited in the *Alexander Phillips* matter. There is the case of *Birmingham Cabinet Manufacturing Co. v. Dudley*, where it was held (as has already been stated) that the question was not whether a man's employers are paying him or could pay him at the time of application the same wages as before the accident, but whether he is left in such a position that in the open market his incapacity may in future be less than it was before the accident as a result of the accident. The words of FLETCHER MOULTON, L.J. are of some significance and, we believe, applicable to the facts in the instant case. Referring to the meaning of a suspensory award, he said:

"It means that the consequences of the accident have not come to an end, but that for the time being the workman is earning the same wages."

In our opinion, the meaning of that statement must be that after an accident a workman may be able to secure employment but that if at the end of that period of employment it is found that he still suffers from the consequences of the accident, he is not deprived of the right of compensation merely because he was able to secure employment, rather that the right of compensation is only in abeyance.

In *Jackson v. Hunslet Engine Co., Ltd.* (1916) 8 B.W.C.C. 584, a workman was injured by an accident, as a result of, and in the course of employment. Having paid him compensation for nine months, the employer discontinued it on the ground that the man was able to go back to his original work which they offered him, at his old wages. He claimed an award as being still incapacitated but the County Court judge, on the ground that he was physically able to do his own work, dismissed the application although the employer submitted two declarations of liability. The County Court judge

had found that the workman "is able to do his own work, and will remain so, so far as the effects of his accident are concerned." The workman appealed and the matter was referred to the County Court judge for re-consideration.

Commenting on the judge's statement, the Master of Rolls said:

"With great respect to the learned Judge, that is not the material question. He ought to find: Aye or nay, has the man's earning capacity been affected by the results of the accident? I will not say that it is not material, but it is not sufficient to say that he can do his own work . . . and that the fact that the employers will pay him his old wages goes to show that his earning capacity has not been affected."

And PICKFORD, L.J. at p. 591 (*ibid*) said -

"The two things, loss of wage-earning capacity, and at the same time no present loss of wages because work is given to him by the master, may co-exist."

We would also refer to *Parr v. Richard Haworth & Co. Ltd.* (1940) 3, All E.R. 43 merely to indicate that in that case a workman was able to recover compensation for partial incapacity thirteen years after his accident even though he had been in continuous employment for that period of time.

In *Huggins & Co. Ltd. v. James* (1964) W.I.R. 445 it was held that a workman suffering from a permanent partial disablement in consequence of an injury arising out of and in the course of his employment was entitled to be compensated therefor irrespective of his ability or otherwise to gain employment in the same or any other category of employment at his former earnings.

There can be no doubt that in this country (as indeed was the case in the United Kingdom), the question to be determined in matters of this nature is whether the workman has suffered a reduction of his earning capacity, for s. 2 of the Workman's Compensation Ordinance, Cap III, defines partial incapacity to mean:—

"where the incapacity is of a temporary nature, such incapacity as reduces the earning capacity of the workman in any employment in which he was engaged at the time of the accident resulting in incapacity, and where the incapacity is of a permanent nature, such incapacity as reduces his earning capacity in every employment in which he was capable of undertaking at the time."

In *Goordeen v. Demerara Co. Ltd.*, (unreported), the Full Court (HOLDER, C.J., LUCKHOO and DATE, J.J.) said:

"that the law is well settled that if, although the workman has suffered injury by accident, arising out of it and in the course of his employment there is no loss or diminution of the capacity of wages in employment which he was capable of performing at the time of the accident, no case of compensation arises."

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In the case of *Jenny Mohamdool v. Plantation Versailles and Schoon Ord. Ltd.* (1964) L.R.B.G. 717, which has been relied upon by the appellants before us, it was held that an injured workman whose disability was assessed at 5 per cent temporary, was not entitled to compensation under the ordinance. In that case it was again stated that the basis for the reward of compensation in this country is the reduction of the workman's earning capacity. That case seemed to have turned, however, on the fact that there was no proof of loss of earning capacity permanently caused by the appellant's injury nor of the appellant's chances of getting work. In the instant case there is proof, we feel, that the workman suffered a permanent partial incapacity arising out of the course of his employment which reduced his chances of obtaining the type of employment he was capable of undertaking at the time of the accident.

The magistrate found that the workman could not be re-employed because of the condition of his foot, and we can see no reason to upset that finding which is one of fact even though learned counsel for the employers would have us hold that such a finding was unreasonable in the face of the evidence and was really, as he has described it, 'an anxious finding of fact for the purposes of this appeal.' We do not feel that there is any justification for holding that the magistrate was wrong, in the absence of any other circumstances, in preferring the evidence of the workman as against that of the employers' labour relations officer on this particular aspect.

For the reasons we have given we are of the opinion that this appeal ought to be dismissed and that the award made by the magistrate be affirmed. The respondent is entitled to costs of this appeal fixed at \$29.25.

*Appeal dismissed.
Award by magistrate upheld.*

WAVENEY MOSES v. CECELIA KUMAR & ANOTHER

[Court of Appeal (Luckhoo, C., Cummings, Crane, JJ.A.).
July 22, August 22, 1969.]

Appeal—Leave to appeal out of time—Exceptional circumstances—Whether mistake by legal adviser an exceptional circumstance—Undue delay—Federal Supreme Court (Appeals from British Guiana) (Amendment) Rules 1960 O. 2 r. 3(4), 3(5).

Judgment was given against the appellant on June 1, 1968. The time limit for appealing is six weeks. On 12 July, 1968, she applied for leave to appeal *in forma pauperis* which was granted on August 17, 1968. On October

4, 1968 she filed a notice and grounds of appeal without leave and on July 8, 1969 she made a further application asking that the notice and grounds of appeal of October 4, 1968 be deemed to have been filed in time. Order 2 r. 3(4), 3(5) of the Federal Supreme Court (Appeals from British Guiana) (Amendment) Rules 1960 provide as follows:

- r. 3(4) In exceptional circumstances the Court having power to hear and determine an appeal, may on application, extend the time within which an appeal may be brought beyond the period delimited for an application to a judge of the Court under this rule.
- r. 3(5) Every application for enlargement of time when made to a judge of the Court shall be made by summons and when made to the Court shall be by motion. Every summons or notice of motion filed shall be supported by an affidavit setting forth good and substantial reasons for the application and by grounds of appeal which *prima facie* show good cause therefor.

HELD: There was excessive tardiness in making the application. The appellant did not show exceptional circumstances and a mistake by a legal adviser is not such an exceptional circumstance.

Application refused.

A. O. H. R. Holder, for the appellant.

David Singh, for the respondents.

LUCKHOO, C: Before this appeal could be heard, it will be necessary to adjudicate on an application filed on the 8th July, 1969, which asked:

- (a) That the Notice and Grounds of Appeal dated the 4th day of October, 1968, and filed after the application to appeal *in forma pauperis* was granted be deemed to have been filed within the time limited to appeal.
- (b) Alternatively, that the appellant (plaintiff) be granted leave to appeal herein, notwithstanding the time for so doing has elapsed.
- (c) Any further or other relief as may be deemed just and expedient.

Under the Federal Supreme Court (Appeals from British (Guiana) (Amendment) Rules, 1960, O. 2, r. 3(1), it is provided that:

"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."

But under O. 2, r. 3(3):

"A judge of the court may by order extend the time within which an appeal may be brought, provided an application for this purpose is made within one month of the expiration of time so prescribed."

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The decision of the High Court in this matter was delivered on the 1st day of June, 1968. This application is made more than thirteen months after, and it seeks to salvage an appeal, the notice and grounds of which were filed more than eleven weeks after they were due. And so recourse is had to secure the benefit of O.2, r. 3(4) which provides that:

"in exceptional circumstances the court, having power to hear and determine an appeal, may, on application, extend the time within which an appeal may be brought beyond the period delimited for an application to a judge of the court under this rule."

The procedure to be adopted for so doing is laid down under O.2, r. 3(5) which stipulates that:

"Every application for enlargement of time, when made to a judge of the court shall be made by summons, and when made to the court shall be by motion. Every summons or notice of motion filed shall be supported by an affidavit setting forth good and substantial reasons for the application and by grounds of appeal which, *prima facie*, show good cause therefor."

The affidavit sworn to by the appellant for the purpose of discharging the obligation of this sub-rule is bare and unencouraging. The relevant part does no more than state in two paragraphs the following:

"3. That on the 12th day of July, 1968, I filed an *ex parte* application by way of affidavit for leave to appeal *in forma pauperis* which was granted on the 17th day of August, 1968, but in which I did not ask for an order deeming the date on which the order was made to be the date from which the time for appealing commenced.

"4. That on the 4th day of October, 1968, I filed and delivered my Notice and Grounds of Appeal against the decision of the High Court of the Supreme Court of Judicature. This Notice was out of time in accordance with the rules."

This is certainly a far cry from the onus to show (a) the existence of exceptional circumstances by providing good and substantial reasons for the grant sought, and (b) that there are grounds of appeal which, *prima facie*, show good cause therefor.

The appellant's first pitfall arises by the distinct omission of his legal advisers to comply with the specific provisions of this rule. In *Evelyn v. Williams*, (1961-62) 4 W.I.R. 265, "the applicant brought an action in the Supreme Court of British Guiana against the respondent claiming a declaration of title and damages for trespass to land". The action was dismissed with costs on September 8, 1961. The time fixed by O. 2, r. 3 of the rules of the Federal Supreme Court governing appeals from British Guiana for filing an appeal to the Federal Supreme Court expired on October 20, 1961.

The applicant made an application to a judge of the court below for an extension of time, but the application was one day out of time. He then made an application to the Federal Supreme Court. He filed an affidavit in which

he alleged that he was made aware of the time limit for appealing only a few days before October 20, 1961, and that before he could consult his solicitor and realise enough money for fees and expenses, the time limit fixed by O.2, r. 3(3), had expired.

Held: the affidavit did not contain material sufficient to satisfy the court of the applicant's financial circumstances and that they were such as to constitute such an exceptional circumstance as would warrant an extension of time for appealing."

A consideration of the relevant rule was undertaken by LEWIS, J., and he said at page 266:

"This court has on more than one occasion pointed out that under this rule there is not an unfettered discretion to grant extension of time. It is necessary for an applicant who seeks the indulgence of the court to show such circumstances as will satisfy the court that his is an exceptional case and when those circumstances are shown then the court may, and no doubt in the normal course will, grant an extension of time.

"In the present case the applicant has alleged that he was financially embarrassed. It is not necessary for me to draw attention to the fact that para. 4 of his affidavit, which deals with this part of his allegation merely states that before he could travel to Georgetown to consult his solicitor and realise a sum of money to meet fees and disbursements the time limit had expired. It does not set out any circumstances which show that at the time in question there was financial embarrassment or that that financial embarrassment was of such a nature as to prevent the applicant from being able at the time to meet the necessary expenses.

"In my view, it is not sufficient for an applicant to make a bare statement that he was financially embarrassed, as has been done in this case. He must set out in his affidavit sufficient material to satisfy the court of his financial circumstances and that they were such as to constitute such an exceptional circumstance as entitles him to ask the indulgence of the court and that he may be relieved of the legal bar which arises under the rules by lapse of time.

"It was suggested by learned counsel for the applicant that the statement that he was financially embarrassed put upon the respondent the onus of showing that that was not so, and that that fact not having been denied, the court should take it as proof that there was this alleged financial embarrassment. The answer to that, in my view, is twofold. First of all, circumstance's which create financial embarrassment are in the personal knowledge of the applicant and it must, therefore, be for him to allege and prove them; secondly, it is the duty of the applicant to satisfy the court that his allegation is correct and for that reason, as I have said before, it is necessary for him to set out a sufficiency of material. I do not think that the circumstances set.

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out in this case are sufficient. I think that this is an application of the very weakest kind and, in my opinion, this application ought to be refused with costs."

This was supported by MARNAN, J., who stressed the necessity for observing the procedure to be adopted in applying for an extension under O. 2, r.3 (5).

But in this case, counsel had this to say in addition: When the application was made to pursue the contemplated appeal *in forma pauperis*, by mistake or blunder, there was an omission to seek an order which would have entitled the appellant to have the grounds of appeal there stated deemed as the grounds of appeal in the case.

I find it difficult to understand this explanation. An application *in forma pauperis*, according to O.2, r. 16(1) of the Federal Supreme Court (Appeals from British Guiana) Rules, 1959, is, or should be, made "in any cause or matter *pending* before the court". At that stage there was no appeal pending. If it was mistakenly thought that permission was being sought in that application to have the grounds of appeal there stated deemed as the grounds of appeal in the case, then would any grounds have been filed afterwards in the manner as was done? When grounds were actually filed on the 4th October, they were filed independently of any previous application or order. Also it ought to have been manifestly apparent that the prescribed time for so doing, viz., six weeks from 1st June, had long gone by, and that what was being done was in direct contravention of what the rules had stipulated.

A similar situation arose in *Thomas v. Meertins* (Appeal No. 34/68), an appeal which came before this court in which counsel now appearing was counsel for the appellant instructed by the same solicitor who now instructs him. In that case, counsel for the respondent, *in limine*, alluded to the facts which there existed, which showed that the notice of appeal was filed out of time after an application *in forma pauperis* was made. In that case, after hearing both counsel, it was ordered that "this appeal be struck out for want of jurisdiction and that Miss. H. D. Eleazer, Solicitor for the appellant (plaintiff) do personally pay to the respondent (defendant) his costs of this appeal fixed by consent in the sum of \$75.00."

When counsel's attention was drawn to that case, he said that he did not on that occasion have the benefit of the case of *Gatti v. Shoosmith*, (1939) 3 All E.R. 396, upon which he was now relying as an authority which would aid him in overcoming his difficulty. That case showed that owing to a misreading of the rule, the applicant was a few days too late in entering an appeal. The intention to appeal had been notified to the respondent's solicitor by letter sent within the time specified by the rule. The applicant asked that the time might be extended on the ground that the failure to enter the appeal within the time limited was due to the mistake of a legal adviser. It was held (1) There is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though

out of time, and whether the matter should be so treated must depend on the facts of each case. (2) The facts of the case may be one where the discretion of the court ought to be exercised and leave to appeal given.

In the hope that similar submissions may not be persisted in on other occasions, I shall endeavour to examine its validity in relation to the question here posed, which is: Could the mistake of the appellant's legal advisers constitute an *exceptional circumstance* to justify an extension of time in an application which comes within O. 2, r. 3(4)?

Whenever the exercise of a discretion in authorities is examined, it is always vital to examine with care the rule under which it is asked for, in order to fully understand the implications of what is being decided, otherwise the exercise attracts futility. A failing, a blunder or a mistake may be capable of rectification under a certain rule, but not under another. What may be passed through the facility of a discretion under one rule may be balked and hidebound by authority under another. And that is what counsel failed to appreciate when he quoted *Gatti v. Shoosmith*, with misplaced confidence as an authority for relief in his predicament.

That case was decided under O. 58, r. 15, which was recast in 1909. In the year 1888 that rule read thus:

"No appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of *twenty-one days*, and no other appeal shall, except by such leave, be brought after the expiration of *one year*."

Also in existence at that time was another rule dealing with extension of time generally. That was O. 64, r. 7, and read thus:

"The court or a judge shall have power to enlarge or abridge the time appointed by these rules; or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

It was characteristic of the former that an extension was only to be granted "by *special* leave of the Court of Appeal", which virtually meant the existence of *special* circumstances, whilst under the latter there was no such restriction and the exercise of discretion, comparatively speaking, was "unfettered". Any judicial attempt to transport the "unfettered" discretion under O.64, r. 7, to cases under O.58, r. 15, which was specific and stringent in its stipulation, would be neither permissible nor proper. It would be nothing short of an attempt to deprive the latter of its essential feature and character, and this would be within the competence of the rule.

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However, in 1909 it was thought fit to amend it in such a way as to allow O. 64, r.7, to prevail, and when that was done, O. 58, r. 15 from that year read thus:

"Subject and without prejudice to the powers of the Court of Appeal under Order LXIV (64), r. 7, no appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall be brought after the expiration of fourteen days, and no other appeal shall be brought after the expiration of six weeks, unless the court or a judge, at the time of making the order or at any subsequent time, or the Court of Appeal shall enlarge the time . . ."

No longer, then, was it necessary to have "special leave" which would require *special* circumstances, but the liberality of approach inherent in O.64, r. 7, became permissible. The widening, then, of the scope of the exercise of discretion under O.58, r. 15, became a new feature as from 1909. And GREENE, M. R., in *Gatti v. Shoosmith* was at pains to point this out. He said (at page 917):

"Before 1909, Ord. 58, r. 15, which is the order regulating the time for appeals to this court; was in a different form from that in which it is now cast. Under the order as it then stood, the power of this court to extend the time for appealing required some special reason, because the appeal could not be brought except by special leave of the Court of Appeal. . . ."

"On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say 'may be', because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be *in no circumstances a sufficient ground* . . ."

That case, then, far from being an authority in favour of counsel's contention, is decidedly against it. The statement of the Master of the Rolls that under the law before the amendment "such a mistake was considered to be in no circumstances a sufficient ground" is well supported by authority. In *Coles v. Ravenshear*, (1907) K.B. 1, a firm stand was taken by a strong court in establishing this rule. COLLINS, M. R., at page 5, in referring to O.58, r. 15, before it was re-cast in 1909, said:

"But in this case I do not feel myself at large in the matter; for, though the current of authority on the subject has not been uniform, there are certainly one or two, if not more authorities, applicable to the present case which appeared to me to be practically binding upon us in this court and which compel me to arrive at a different conclusion from that to which I might, in the absence of authority, have come."

"Here there are, in my opinion, no special circumstances. A mistake was made by the clerk of the appellant's solicitors. If that is a special circumstance, then in every case in which a blunder has been made about the time for appealing, the time ought to be extended. I do not think that is the meaning of the rule. The notice of appeal was served too late, and I can see no ground for extending the time."

And FARWELL, L.J., at page 8 said:

"A mere slip or blunder on the part of a litigant's legal adviser cannot, in my view, entitle him to anything at all."

Courts have been very charitable at certain periods of time in leaning over backwards to excuse flagrant disregard for rules, but this indulgence and latitude was bound to be affected by the reaction coming from the swing of the pendulum the other way.

In *Revici v. Prentice-Hall Inc. et al*, (1969) 1 All E.R. 772, at p. 773, DENNING, M. R., in dealing with the unfettered discretion for extension of time which now exists under Rules of Supreme Court O.3, r. 5, said:

"Nowadays we regard time very differently from what they did in the 19th Century. We insist on the rules as to time being observed. We have had occasions recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. So here, although the time is not so very long, it is quite long enough

. . . Moreover (and this is important) not a single ground or excuse is put forward to explain the delay and why he did not appeal. The plaintiff had three and one half months in which to lodge his notice of appeal to the judge and he did not do so."

And EDMUND DAVIES, L.J., said:

"The rules are there to be observed, and if there is non-compliance (other than a minimal time) that is something which has to be explained away. *Prima facie*, if no excuse is offered, no indulgence should be granted . . . Substantial delay has occurred, and simply no explanation for it has even now, in my judgment, been offered."

And in *Rathnum v. Cumar-Sammy*, (1964) 3 All E.R. 933, at p. 935, Lord GUEST said:

"The rules of court must, *prima facie*, be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a timetable for the conduct of litigation."

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Even if O. 2, r.3 (4) was not as restrictive as it is, could this court's discretion be properly exercised in the applicant's favour? What Lord GUEST and DENNING, M.R., said above would be pertinent on this aspect of the matter. Here the tardiness was excessive, and application is being made now, over one year after a judgment was delivered, when grounds of appeal were filed without leave four months after the judgment—all without proper explanation or excuse. The indulgence sought could not be granted.

To sum up, therefore: This application was not made in the form and manner required by law, under O.2 r. 3(5). In any event, even if there was such compliance, the mistake of counsel would be unavailing as an exceptional circumstance. And even if it were, the excessive tardiness in approaching the court would hardly induce the exercise of the court's discretion.

I would refuse the application for the reasons above stated, and order the solicitor for the appellant to pay the respondent's costs, fixed by consent at \$ 100.

CRANE, J.A.: I agree that this application should be refused for the reasons given by My Lord Chancellor.

Judgment went against the appellant on the 1st June, 1968, and on the 12th July she filed an application for leave to appeal *in forma pauperis*, which was granted on the 17th August, 1968. The application, at that time, was premature because there was no notice of appeal or grounds of appeal on record. It therefore ought not to have been granted by reason of O.2, r. 16(1) (b) of the Federal Supreme Court (Appeals from British Guiana) Rules, 1959, which says that it should be made "in any cause or matter *pending* before the court", and, at that time, there was no such cause or matter pending before the court. Nevertheless, the appellant seemed to have discovered the defect, for on the 4th October, 1968, she filed her notice on grounds of appeal against the said judgment of the 1st June.

Coming as late as that time, the appellant necessarily had to comply with O.2, r. 3(4). This requires a statement of exceptional circumstances in her affidavit in support. She had to adduce exceptional circumstances in excuse of her being so late, because she did not, in the first place, file her notice of appeal within six weeks after date of judgment, nor, in the second place, file an application for enlargement of time to do so within one month thereafter. Her affidavit merely stated why she did not so ask at the time she was applying for leave *in forma pauperis*. Therein, she was suggesting that she ought to have made an application for leave to appeal at that time.

It is very clear that this application must show, in accordance with O.2, r. 3(4) exceptional circumstances; but, search her affidavit as I may, she has shown none. The approach to that order and rule has been elucidated in the judgment of *Evelyn v. Williams*, (1961-62) 4 W.I.R. 265, which My Lord Chancellor has cited in his decision. The quotation from the judgment of

LEWIS, J., tells us quite clearly the circumstances under which the order operates and the necessity for the disclosure of exceptional circumstances before relief can be afforded to an applicant under that rule. The court does not have an unfettered discretion thereunder to grant an extension of time.

On this ground alone, I would agree that this application be refused, and to the order proposed.

CUMMINGS, J.A.: agreed that the application should be refused, but on the ground that the appeal has no merit.

Application refused.

ESTHER C. BUDHOO v. B & J KHAN AND DAUGHTERS LTD.

[In the Full Court on appeal from the Magistrate's Court for the Georgetown Judicial District (Persaud, C.J. (ag.) and Van Sertima, J.) July 11, August 29, 1969.]

Rent Restriction—Claim for possession of dwelling house for own use by trading company—Consent order—Ejectment order—Jurisdiction to make ejectment order.

Rent Restriction—Appeal—Whether appeal was from refusal to extend date of possession—Or from an order for ejectment—Rent Restriction Ordinance Cap. 186 s. 7(2)(b), 16(1)(2)(3), 26(2), 27(1).

The appellant was the tenant of a dwelling house owned by the respondents, a registered trading company. In possession proceedings by the respondents against the appellant, the appellant consented to give up possession by a certain date, the order reading "By consent of counsel for the defendants (Appellant) Possession own use forthwith". That date having arrived and the appellant still being in possession, the respondents applied for the issue of a warrant of ejectment and the appellant applied for revocation of the order for possession and for an extension of time within which to vacate the premises. The magistrate dismissed the application for revocation of the possession order but made an order for ejectment which he stayed for four months. The appellant appealed against the order for ejectment and argued that (i) the magistrate had no jurisdiction to make an order for ejectment of the appellant from the dwelling house for the purpose of trade or business because there was no evidence that the premises were required for any of the purposes set out in paragraph (e) of s. 16(1) of the Rent Restriction Ordinance Cap. 186 and (ii) the possession order was bad having been made in favour of a trading company in respect of a dwelling house.

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HELD: – that (i) the order for possession was good because the consent order was made on the ground of the owner's own use which is permissible under the ordinance; the order of the magistrate must be read to mean that the appellant consented to an order for possession on the ground that the respondents required the premises (dwelling house) for use by themselves for business trade or professional purposes under s. 16 (1) (e) (iii) of the Rent Restriction Ordinance Cap. 186.

(ii) no appeal lies to the Full Court from the refusal of a magistrate to postpone the date upon which a tenant is required to deliver possession but an appeal does lie from an order for ejectment.

Appeal dismissed.

C.A.F. Hughes for the appellant.

M.S. Fitzpatrick for the respondents.

PERSAUD, C.J. (Ag.) delivered the judgment of the court: The appellant occupied certain premises belonging to the respondents—a duly registered trading company—as a dwelling-house under a contract of tenancy. After serving a notice to quit dated April 1, 1967, the respondents issued possession proceedings on June 7, and the matter came on for hearing before the magistrate on July 28. On that day a consent order was made which read, "By consent of counsel for defendants" (presumably the reference was to the appellant) "Possession own use forthwith". It would also appear that the appellant undertook to vacate the premises by April 1, 1968, as she had had plans to go to England. However, her plans did not materialise, and she remained in possession after that date, whereupon the respondents applied for the issue of a warrant of ejectment. The appellant then applied for a revocation of the order of possession, and for an extension of time within which to vacate the premises. These three applications were heard together on June 3, 1968. On June 6, the magistrate dismissed the application for revocation of the order for possession, but made an order for ejectment which he stayed until November 1, 1968. It is against the order for ejectment that this appeal has been brought.

Before proceeding further, it is necessary to recite the provisions of the Rent Restriction Ordinance (Cap. 186) which are pertinent to the matter in hand. Section 16 (1) provides as follows –

"No order or judgment for the recovery of possession of any premises, being a dwelling-house, to which this ordinance applies, or for the ejectment of a tenant therefrom shall, whether in respect of a notice given or proceedings commenced before or after the commencement of this ordinance, be made or given where the landlord requires such premises for the purposes of trade or business only, but subject as afore-

said, any such order or judgment may be made or given in respect of any premises where –

(e) the premises being a dwelling-house or a public or commercial building, are reasonably required by the landlord for–

- (i) occupation as a residence for himself; or
- (ii) occupation as a residence for any member of his family, or for some person in his actual whole-time employment; or
- (iii) use by himself for business, trade or professional purposes; or
- (iv) a combination of the purposes in subparagraphs (i), (ii) and (iii) above.

To attack the ejectment order, counsel found it expedient to question the legality of the possession order. Counsel's argument went thus. After referring to section 16, counsel submitted that the magistrate had no jurisdiction to make an order for the ejectment of the tenant from a dwelling-house for the purpose of trade or business, because there was no evidence that the premises was required for any of the purposes set out in para. (e) of s. 16 (1) at the time when either the possession order or the ejectment order was made. Counsel further submitted that the possession order was bad, having been made in favour of a trading company in respect of a dwelling-house. The question whether or not the magistrate had power to make the ejectment order is one of jurisdiction, says counsel, and neither estoppel nor the doctrine of *res judicata* can give the magistrate jurisdiction which the ordinance says he shall not have. There can be little dispute that this is so, for it was thus laid down in *J. & F. Stone & Co. v. Levitt* (1947) A.C. 209, and recognised in *Hope & Mansell v. Sagar* (1951) L.R.B.G. 176.

The latter case was one where a consent order for possession was made, upon the landlord agreeing to the tenant's continuing in the tenancy upon the completion of certain repairs. No repairs were in fact carried out; instead the landlord sold to another person. The tenant re-entered the premises without the consent either of the original landlord or of the new owner both of whom claimed a declaration that the tenant was a trespasser. The tenant had already obtained damages against the original owner for breach of the consent order, and the question was whether he, having done so, could still claim to be a tenant under the agreement. It was held that the new owner was entitled to possession, as once the possession order was made, the defendant ceased to be a tenant.

We understand STOBY, J. to have said in *Hope & Mansell v. Sagar* (*supra*) that the magistrate's order was a nullity and unenforceable as such, but that because it was a consent order, it was proof that the parties had agreed that the tenancy would continue after the repairs had been completed. But the learned judge held that even though the order was bad, the defendant in filing

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an action for damages on the ground of misrepresentation, he was acknowledging that he was no longer the tenant, for if he were, his action for damages could not lie, and it is on this ground that the decision really turned.

In *Barton & Mitchell v. Fincham* (1921) All E.R. p. 87, it was held that the court had no power to make an order for the recovery of possession of a dwelling-house to which the Rent Restriction Acts applied, save on the grounds set forth in the Acts. In the case before us, be it remembered, the consent order was made on the ground of the owner's own use, which is permissible under the ordinance. We conceive the dictum of ATKIN, L.J. in the *Barton Mitchell* case as being very pertinent to the instant case. Lord ATKIN said (at p. 91 *ibid*):

"Parties cannot by agreement give the court jurisdiction which the legislature has enacted they are not to have. If the parties before the court admit that one of the events has happened which gives the court jurisdiction and there is no reason to doubt the *bona fides* of the admission the court is under no obligation to make further inquiry as to the question of fact; but, apart from such admission, the court cannot give effect to an agreement whether by way of compromise or otherwise inconsistent with the provisions of the Act."

It seems to us that by consenting to an order for possession, the appellant (tenant) who was represented by counsel, was accepting the respondents' (landlords') claim that they needed the premises for their own use. This is how the matter was put in *Thorn v. Smith* (1947) 1 All E.R. at p. 44 by BUCKNILL, L.J., with which we respectfully agree –

"... in the present case it is, I think reasonably clear that the tenant, in effect, agreed to the order because at the time when the landlord asked the court to make the order the landlord by his own statements had satisfied the tenant that he intended to occupy the house himself and he, the tenant, could not hope successfully to resist the claim. If the tenant had stated this expressly in court the judge would surely have had jurisdiction to make the order on that ground. I think in the events which happened here, the tenant being legally represented; the judge was entitled to proceed on the view that this was the true position. Before making an order for possession the judge is under a duty to satisfy himself as to the truth if there be a dispute between landlord and tenant, but if the tenant in effect agrees that the landlord has a good claim to an order under the Acts, I think the judge has jurisdiction to make the order for possession under the Acts, without further inquiry."

The order for possession, as already been stated, was apart from being a consent order, made on the ground that the premises were for the respondent's company's own use. In our opinion, this is a clear reference to sub-para. (iii) (e), and not to sub-para. (ii), as counsel for the respondents would have us hold. We are of the opinion that the order of the magistrate must be read to mean that the tenant consented to an order for possession on the ground that

the landlords required the premises (dwelling-house) for use by themselves for business, trade or professional purposes. And as it would appear that neither of the provisios to para. (e) is applicable, it seems to us that the order of possession was good.

If the order for possession is good, argues counsel for the respondent, then, the ordinance does not permit of the revocation of an order except under s. 16(2) and (3), and sec. 26(2) and that the procedure adopted by the appellant in coming to this court is invalid, and the appeal should be dismissed on that ground alone. We do not agree.

It is clear from the decision of the Full Court (comprising WORLEY, C.J., LUCKHOO and BOLAND, JJ.) in *Kawall v. Booker Bros. McConnell & Co. Ltd.* (1948) L.R.B.G. 53 that the Full Court may not entertain an appeal against the refusal of a magistrate to postpone the date upon which a tenant is required to deliver possession. In that case, a possession order having been made, the tenant applied under s. 7(2) (b) of the Rent Restriction Ordinance, 1941, (No. 23) (now s. 16(2)(b) of Cap. 186) for a postponement of the date of possession; he did not apply for a re-hearing under what is now section 26(2) of Cap. 186. Had he done so, then he would have had a right to appeal against the decision. Referring to the application of the tenant, LUCKHOO, J. (who delivered the judgment of the. court) said at p. 54 (*ibid.*) in examining the jurisdiction of the magistrate under s. 7(2) (b) of the ordinance

"In the latter case, his original order is still extant but he has a discretion, on an application being made to him, to stay or suspend execution thereof, or postpone the date of possession. That in our view is purely permissive and in no way affects his original order and is not a "proceeding" contemplated by section 15 of the amended ordinance. The magistrate is not in that case called upon to give a decision in respect of any claim or proceeding."

Section 15 of the previous ordinance as amended is now s. 27(1) of Chapter 186 which reads as follows —

"(1) An appeal shall lie to the Full Court of the Supreme Court of British Guiana from the decision of a magistrate on any claim or proceedings (not being proceedings before the Rent Assessor as such) in respect of any premises to which this ordinance applies, and the judgment or order of the Full Court shall be final."

Section 16(1) enables an order or judgment to be made for the recovery of possession of any premises, or for the ejectment of a tenant therefrom. In our judgment, an order for ejectment requires a decision of a magistrate, and can only be made on a claim made on proceedings brought, which makes it subject to appeal to the Full Court. In fact, there was" a hearing in this matter, and we cannot conceive of this situation not giving rise to "proceedings" within the meaning of the ordinance.

We are of the view, therefore, that the appellant has a right of appeal against an order of ejectment (as opposed to an order for extension of time).

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But we hold that the order for possession in this case was properly made, and that no good cause has been shown why the order for ejection should be revoked or varied. The appeal is therefore dismissed with costs to the respondent \$29.32.

Appeal dismissed.

FREDERICK PROSPER v. BALKARAN RAGNAUTH

[High Court (George, J.) January 30, February 15, August 29, 1969.]

Estoppel—Mortgage—Advances in reduction of mortgage capital—Foreclosure ignoring advances, for non payment of instalment—Judgment by consent for sum claimed—Subsequent action for sums advanced—Whether matter res judicata.

The plaintiff bought a property from the defendant and executed a mortgage on the property in favour of the defendant for \$8,000.00. The defendant was short of money and at his request the plaintiff paid the property agent's commission of \$870.00 and rates and taxes of \$928.20 upon the promise by the defendant to deduct these sums from the \$8,000.00 due on the mortgage. Upon failure by the plaintiff to pay the first instalment of capital, the defendant sued for foreclosure of the mortgage of \$8,000.00 and interest, no credit being given for the \$1,798.20. In his affidavit in defence the plaintiff (the defendant in those proceedings) set out the payments made by him but at the hearing consented to judgment in respect of the \$8,000.00. In the present proceedings the plaintiff sued the defendant for the \$1,798.20 advanced on behalf of the defendant. It was submitted on behalf of the defendant that the matter was *res judicata* in view of the former judgment.

HELD: that the plaintiff had withdrawn or abandoned his affidavit of defence before judgment was given in the foreclosure proceedings and that the affidavit of defence was not inconsistent with the statement of claim in the present action and the plaintiff was not estopped from suing for the \$1,798.20 advanced.

Judgment for the plaintiff.

J. R. Hope for the plaintiff.

B. S. Rai for the defendant.

GEORGE, J.: In this case the plaintiff claims by way of a specially indorsed writ the sum of \$1,798.20. The sum consists of \$928.20 claimed to have been paid at the request of the latter as rates and taxes due on his immovable property situate at lot 12 Hogg and James Streets, Albouystown, for the years 1965 and 1966, and \$870.00 paid on the latter's behalf by way of agent's commission for the sale of the said property to the plaintiff.

The defendant in his affidavit of defence, stated that in so far as the rates and taxes are concerned these were paid in consideration for certain stock in trade and utensils which were sold to the plaintiff separately from the sale of the immovable property. With regard to the sum alleged to have been paid by way of agent's commission he denies ever authorising the plaintiff to effect such a payment or that he ever promised to give him credit for any such payment.

On the basis of his affidavit of defence the defendant was granted leave to defend without any pleadings. This order I construe to imply that the affidavit of defence should be treated as a pleading. The day before the matter came up for hearing counsel for the defendant filed a notice to the effect that the defendant intended to submit at the hearing that the cause was *res judicata*. By this I understand him to mean that the plaintiff was estopped by *res judicata* from setting up or recovering on the present claim. Presumably, this plea was intended to constitute compliance with order 17 rule 15 of the Rules of the Supreme Court which specifically requires parties to a suit to plead "all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the other party by surprise, or would raise issues of fact not arising out of the preceding pleadings". It has long been settled that this rule embraces a plea of *res judicata* or estoppel. See *Edevain v. Cohen* (1889) 43 Ch. D 187. Besides omitting to state in the notice any particulars on which the defendant intended to rely in support of his plea, no leave had been sought or obtained to amend the affidavit of defence on which leave to defend was granted. However, despite these objections, which appear to me to be ordinarily insurmountable, counsel for the plaintiff informed me that he was in no way embarrassed and had no objection to the plea being raised in its existing form or manner. So much did this issue thereafter become the central one in the case that both counsel closed their cases after the plaintiff had given his evidence and had been cross-examined.

The evidence led by the plaintiff is as follows: – On the 26th March, 1966 he entered into an agreement of purchase and sale with the defendant in respect of certain immovable property owned by the latter and situate at lot 12 Hogg and James Streets, Albouystown. A building situate on the land had been used by the defendant for the purpose of carrying on a liquor restaurant business; and the agreement provided that in the event of the plaintiff desiring vacant possession of these premises before the passing of transport he would have to purchase all the stock in trade and utensils used in the business. The plaintiff requested and was given vacant possession of the

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premises on the 15th April, 1966 and in keeping with the agreement an inventory was taken. It would appear that the business was in a run-down condition and the value of the stock-in-trade and utensils was placed at \$350.00. This sum, the plaintiff paid to the defendant on the day the inventory was taken.

On the 1st November, 1966 transport was passed to the plaintiff, who in turn and in accordance with the agreement executed a second mortgage in favour of the defendant for the capital sum of \$8,000.00. A few days before this event, the defendant spoke with the plaintiff at the liquor restaurant. He told him that he had owed someone a sum of money unknown to his wife and presumably had made good this indebtedness. As a result he said he had no money with which to pay the agent who had negotiated the sale. He accordingly requested the plaintiff to do so, promising him to deduct the sum—\$870.00—from the capital and interest on the mortgage loan. In pursuance of this agreement the plaintiff states that he did pay to the agent his commission in two instalments after the passing of the transport and the execution of the mortgage deed. After transport was passed the plaintiff learnt that the defendant had failed to pay the outstanding sums due for rates and taxes for the years 1965 and 1966 as provided for in their agreement. He accordingly informed the defendant of this omission and the latter requested that he pay the amount due—\$928.20—and again promised that he would discount this amount from the mortgage debt. The plaintiff later paid the rates and taxes outstanding.

After the mortgage was executed the plaintiff states that at the defendant's request he began paying the mortgage interest on a monthly basis up to May 1967. When the first instalment on the mortgage fell due, the plaintiff caused his legal adviser to write to the defendant setting out the latter's indebtedness to him. He received no reply but the following month, January, 1968, he was served with a writ issued by the defendant for foreclosure of the mortgage for his failure to pay the capital instalment which had become due and payable on the 31st October, 1967 and for arrears of interest up to that date. The total sum claimed was \$8,403.00 comprising the capital sum of \$8,000.00 with the remainder as arrears of interest. He filed an affidavit of defence to this claim setting out the facts to which I have made reference above and particularised the sums of \$928.20 and \$870.00 as amounts owing to him which the defendant had agreed to credit to his indebtedness. By consent copies of the defendant's statement of claim and the plaintiff's affidavit of defence were admitted into evidence. After several-postponements the fore-closure proceedings were finally determined on the 24th April, 1968 when in the defendant's presence his legal adviser consented to judgment in the sum of \$8,000.00. This sum was \$400 less than that claimed, as the plaintiff had sometime after the writ had been served and before the judgment, paid that sum to the defendant through his legal adviser.

As I have already pointed out the only real issue for consideration is whether, counsel for the plaintiff having consented to the plea of *res judicata* being put in issue, the facts before me are sufficient from which I can hold

the plea good. Counsel for the plaintiff argues that the only inference which can be drawn in the light of the affidavit of defence in the foreclosure proceedings is that the latter was withdrawn before judgment was entered.

There is no direct evidence about this and I therefore propose to examine his contention in the light of the facts before me. The affidavit of defence discloses either that there was no breach of the mortgage deed with regard to the payment of capital and interest because of the sums alleged to have been paid or that even if these sums did not disclose a full discharge of the plaintiff's obligation in this regard the foreclosure order should only be in respect of a sum representing the difference between the amount claimed in the statement of claim and that paid by the plaintiff. But the latter is not a good defence to the relief of foreclosure. I am accordingly persuaded to the view that the plaintiff either withdrew or abandoned his affidavit of defence. I therefore propose to examine the effect of this action on the plea of *res judicata*. In *Mondel v. Steele* 8 M & W 858 the plaintiff claimed special damages against the defendant for repairs necessitated by his failure to construct a ship according to specifications. The defendant pleaded that he had sued the plaintiff in a previous action for the balance of the agreed price for its construction and for extra work and that at the trial of the cause the plaintiff had given evidence of the same breach of contract he alleged in his declaration and was awarded some compensation by way of a deduction from the sums claimed by him. On these facts the defendant contended that the plaintiff was estopped from instituting and prosecuting his present suit. The court however held that the plaintiff's defence in the previous action did not preclude him from recovering. The rationale for so-holding was aptly explained in the later case of *Davis v. Hedges* (1871) 6 L.R.Q.B. 687. In this case the plaintiff in previous proceedings brought against him by the defendant for work done by the latter, had settled by paying the whole amount sued for. He had not pleaded or given evidence of, as he could well have done, any non performance or defective performance and now sought to recover both general and special damages in a separate action. Counsel for the defendant pleaded estoppel and relied on a passage by Baron PARKE in *Mondel v. Steele* at page 872 to this effect:

"To the extent that he had obtained or is capable of obtaining an abatement of price he must be considered as having received satisfaction for the breach of contract."

HANNEN, J. at page 690 in explaining the above passage observed that it had reference only to the facts of that case in which the plaintiff (then defendant) had in the previous action in fact claimed and did obtain an abatement of the amount claimed by the defendant (then plaintiff). He went on to observe that the defence of estoppel ought not to prevail as the practice of allowing the defence of inferiority of the thing done to that contracted for to be applied in reducing damages was introduced for the benefit of defendants. It would, he observed, greatly diminish the benefit and in some cases almost neutralise it if the defendant was not allowed an option in the matter. The reason for leaving such an option to the defendant was two-fold:

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- (a) the extent of the breach may be uncertain at the time the contractor launched his suit; and
- (b) the extent of the damage due to repair may not then be ascertainable.

The learned judge however emphasised that the position in this type of suit was anomalous, and at page 691 had this to say:

"We do not mean to throw the least doubt on the cases which establish the general rule that where a party to a litigation has the opportunity to raise some question and does not avail himself of it, he is in no better a position than if he had raised it."

The general rule is well illustrated in the case of *River Ribble (Joint Committee of) v. Croston Urban District Council* (1897) 1 Q.B. 251. In this case proceedings had been taken against the defendants for permitting sewage to flow into a certain non tidal river and neglecting to use the best practicable means to render the sewage harmless. They consented to an order declaring that they had committed the above offence and for the construction of the necessary works to prevent its continuance. At the date of this order they were under the belief that that part of the river into which the sewage flowed was non tidal. They were later summoned for penalties for disobeying the order and sought to show that that part of the river into which the sewage flowed was tidal. It was held that a plea of estoppel was good and that the previous consent precluded them from disputing that the court had no jurisdiction to make the order it had made.

I need only refer to one other case to illustrate the general rule, viz. that of *Cooke v. Hickman* (1911) 2 K.B. 1125. There the defendant omitted to plead lack of consideration for an agreement. The only plea was payment and judgment was recovered by the plaintiff. It was held that he was estopped from afterwards setting up that contention just as much as if he had expressly pleaded it and the specific point had been determined against him.

The general rule to which reference is made in *Davis v. Hedges* seems, however, to be confined to issues which were traversable in the previous proceedings and does not extend to pleas which merely confess and avoid. In *Howlett v. Tarte* (1861) 10 C.B.N.S. 813 WILLIAMS, J. at page 825 had this to say: –

"I think it is quite clear upon the authorities to which our attention has been called, and upon principle that, if the defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration there would be an estoppel. But the defence set up here is quite consistent with every allegation in the former action. The plea admits the agreement, but shows by matters *ex post facto* that it is not binding on the defendant."

There appears to be only one, if any, exception to the principle that a plea which confesses and avoids is not barred in a second action. This concerns a failure to plead the Statute of Frauds in the former action (see

Humphries v. Humphries (1910) 2 K.B. 513). Counsel for the defendant placed great reliance on the case of *In re South American and Mexican Company, Ex Parte Bank of England* (1895) 1 Ch. D. 37. In this case the liquidators of a company sought to challenge the right of one of its creditors, the Bank of England, to prove a certain sum due under an agreement. The creditor pleaded estoppel by *res judicata*, and in support of this plea proved that in previous proceedings brought against the company for a second instalment of £100,000 due under the agreement the latter had denied the agreement and pleaded in the alternative that there had been negotiations but no final agreement had been arrived at. It had also counter-claimed for a return of the first instalment paid to the bank. The matter came up for hearing and after some evidence had been given on behalf of the bank counsel informed the court that a settlement had been arrived at in favour of the bank. This settlement, which was entered as a judgment required the company to pay to the bank the £100,000 sued for. It also provided that execution should be stayed except as to costs and if within three weeks the sum of £50,000 was paid to the bank or £20,000 paid and £40,000 secured by a promissory note, the bank would accept it (when the promissory note was paid) in full discharge of all claim on the company. It further provided that if the sum of £20,000 should not be paid and the £40,000 secured in the manner provided or if the promissory note should not be paid at the due date then the bank should be at liberty to issue execution for the full amount of the judgment debt that is £100,000, and to enforce the payment of the further instalments under the agreement set out in the statement of claim. The company failed to pay any part of the £60,000 and was ordered to be wound up. The bank, after giving credit for the first instalment of £100,000 claimed to prove the balance of £401,592. 5s. 5d. together with interest. The Official Receiver and liquidator rejected the proof, substantially on the same grounds as those alleged by way of defence in the action between the bank and the company. The bank accordingly took out a summons asking that the proof might be admitted as to the whole of the amount claimed by it. It is in the context of the above facts that Lord HERSCHELL, L.C. said at page 50:

"The truth is, a judgment by consent is intended to put a stop to the litigation between the parties just as much as a judgment which results from the decision of the court after the matter has been fought to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments and were to allow questions that were really involved in the action to be fought over again in a subsequent action."

In my opinion the principle set out in this case in no way deviates from those set out in the other cases to which I have made reference. The gravamen of the dispute in the first action was the agreement. The company by its traverses put in issue its very existence, but the final settlement recognises it as subsisting and binding. In this regard the Lord Chancellor said at pp. 49 to 50.

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"It is to be observed that what the plaintiffs are to be at liberty to enforce is further instalments. What does this mean? The instalments of the debt the existence of which is recognised and which is the basis of the judgment—that debt in respect of which judgment is then given for the instalment then due."

In other words the view was taken that the settlement was a compromise freely worked out between the parties and one which recognised the existence of the agreement and the debt due thereunder.

What the plaintiff in the present case did, was to file an affidavit of defence in the foreclosure proceedings. If that affidavit was not a complete defence and there is no evidence to disprove this, its content in my view amounted only to a confession and avoidance as to quantum as distinct from a traverse of the main issue raised in the defendant's statement of claim i.e. foreclosure. He, however, did not proceed to take advantage of what was *prima facie* a triable issue either by seeking leave to defend or to have the affidavit of defence treated as a pleading. On the contrary he consented to judgment and this without any pleading by way of defence being placed on record. In considering whether this action on his part precludes him from now instituting the present proceedings it may be of some help to examine two cases viz. *Bowden v. Home* (1831) 7 Bing 716 and *Jones v. Brassey and Ballard* (1871) 24 L.J. 947. In the former case the plaintiff, after judgment, entered a *nolle prosequi* as to part of it. It was held that such a step on his part was equivalent to a *retraxit* and a bar to any future action for the same cause. TINDAL, C.J. at page 722 drew a distinction between a *nolle prosequi* entered before or after verdict as distinct from after judgment. In the latter case the plaintiff entered the *nolle prosequi* in respect of part of his claim which the defendant had traversed and only signed judgment for the remainder. It was held that this did preclude him from bringing a second action for the balance of his claim which had been subject to be *nolle prosequi* and from recovering thereon.

I see no distinction in principle between the decisions in these two cases and the present one. What the plaintiff did in the foreclosure proceedings seems to me to be the counterpart of what was done in the two cases under reference in that the withdrawal or abandonment of his affidavit of defence, which in any event is not a pleading, must have been before judgment was given.

Besides as I have already pointed out his present statement of claim is not inconsistent with the defendant's claim in the former action. Accordingly having regard to the equivocal result which may have flown from the defendant's affidavit I do not think that a fair and reasonable construction of the previous judgment can lead to the conclusion that it was intended or can be considered as a bar to any subsequent claim by the plaintiff for the amounts paid by him on behalf of the defendant. His consent in the

previous action cannot therefore amount to an estoppel. Having regard to the uncontroverted evidence which he led and which I accept and believe I have no alternative but to enter judgment in his favour for the sum claimed together with costs fixed at \$300.00 (three hundred dollars).

Judgment for the plaintiff.

CHINTAMANIE AJIT v. WALTER RONALD WEBER & ANOTHER

[Court of Appeal (Luckhoo, C., Persaud, C.J. (ag.) and Crane J.A.) January 24, September 4, 1969.]

Appeal—Privy Council—Application for leave to appeal in forma pauperis—Conditional leave granted by Court of Appeal—No jurisdiction in Court of Appeal to grant leave in forma pauperis—British Caribbean (Appeals to Privy Council) Order 1962—Guyana (Procedure in Appeals to Privy Council) Order 1966 s. 4.

Upon an application for leave to appeal to the Privy Council the Guyana Court of Appeal may grant leave under certain conditions but for leave to appeal to the Privy Council *in forma pauperis*, and additional application must be made to the Privy Council itself.

Application refused.

Appellant in person.

No appearance of or for the respondents.

LUCKHOO, C, delivered the judgment of the court: On the 24th day of January 1969 we refused a motion by the appellant which prayed for a variation of an order of a judge in chambers granting conditional leave to appeal to Her Majesty in Council on certain conditions, by allowing him to so proceed *in forma pauperis*.

The history of this litigation is as follows: The appellant appealed to the British Caribbean Court of Appeal from the dismissal of his action in the court below. In that action he claimed the sum of \$95,000 against the respondents, W. R. Weber and Shirun Edun, in the capacities as Commissioner of Police and magistrate, respectively, for alleged wrongful arrest. His appeal was dismissed with costs on the 5th day of August, 1965. Being dissatisfied with that decision, he applied to the British Caribbean Court of Appeal for

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leave to appeal *in forma pauperis* to Her Majesty in Council and for a stay of execution of all costs until the determination of his appeal in the Privy Council.

On the 24th September, 1965, this application came up for consideration before a judge in chambers and an order was made granting conditional leave to appeal to Her Majesty in Council subject to the performance of certain conditions. These conditions were that he enter into a bond for the due prosecution of his appeal in the sum of \$2,400 within ninety (90) days, make appointments for the settling of the record within four (4) months and to apply for final leave within five (5) months.

The appellant then applied to the court on the 29th September, 1965, to set aside the order of the judge in chambers refusing him leave to appeal *in forma pauperis* and to vary the order granting him conditional leave to appeal. In his motion he prayed for leave of this court to appeal *in forma pauperis* to the Privy Council.

He contended before us that this application must be treated as an application before the Privy Council itself as this court represented the Privy Council in considering such an application. He further submitted that if his application was refused, he would have no right to re-apply to the Privy Council.

In considering applications for leave to appeal to Her Majesty in Council, the court has to apply those provisions of the British Caribbean (Appeals to Privy Council) Order 1962, which still remain effective by virtue of s. 10 of the Guyana Independence Order, 1966, and also the Guyana (Procedure in Appeals to Privy Council) Order, 1966. There are no provisions in those Orders which permit the court to grant an appellant leave to appeal *in forma pauperis* to Her Majesty in Council. The conditions applicable when leave to appeal is sought are set out in s. 4 of the Guyana (Procedure in Appeals to Privy Council) Order, 1966. This section reads as follows:

"Conditional 4. Leave to appeal to Her Majesty in Council in pursuance leave to of the provisions of any law relating to such appeals shall, in the appeal. first instance, be granted by the court only –

(a) upon condition of the appellant, within a period to be fixed by the court but not exceeding ninety days from the date of the hearing of the application for leave to appeal entering into good and sufficient security to the satisfaction of the court in a sum not exceeding £500 sterling for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the appellant to pay the costs of the appeal (as the case may be); and

(b) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the

purposes of procuring the preparation of the record and the despatch thereof to England as the court,, having regard to all the circumstances of the case may think it reasonable to impose."

These are the conditions which the court may impose when granting an appellant leave to appeal. A judge in chambers would in our view, be exceeding his jurisdiction if he makes an order in excess of what is specifically set out.

In *Walker v. Walker*, (1903) A.C. 170, the petitioner was seeking leave of the Privy Council to appeal *in forma pauperis* from a decision of the Supreme Court of New South Wales. He did not apply for leave to that court as there was no provisions for granting leave to appeal *in forma pauperis*. In rejecting his application, the Privy Council held that the application should first have been made in the Supreme Court of New South Wales. Lord MACNAGHTEN, in giving the advice of the Privy Council, said at page 171:

"The learned counsel for the petitioner referred their Lordships to a case in New South Wales—*Ex parte Commissioner for Railways*—and stated that that case was understood in New South Wales to have laid down the rule that a litigant desiring to prosecute his appeal to His Majesty in Council *in forma pauperis* ought to 'apply direct to the Privy Council' without applying in the first instance to the Supreme Court for leave to appeal. Their Lordships do not think that the judgment of SIMPSON, J., to which particular reference was made, is open to that construction. All that the learned judge seems to have meant was that the Supreme Court could not authorise an intending appellant to prosecute his appeal before His Majesty in Council *in forma pauperis*."

His Lordship further stated at page 172:

"Their Lordships desire that it should be clearly understood as a rule of general if not universal application, that this Committee will not entertain a petition for leave to prosecute an appeal *in forma pauperis*, where the court below has power to grant leave on the usual conditions, *unless in the first instance an application for leave to appeal has been made within due time to the Court from which it is proposed that the appeal should be brought*.

"The Order in the present case from which it was proposed to appeal was made on May 21, 1901. The time for applying to the Supreme Court for leave to appeal is the period of 14 days only. When the prescribed period has expired without any application having been made for leave to appeal, the successful litigant is entitled to rely upon his decree and to feel assured that the litigation is at an end. The application for leave to appeal and to appeal *in forma pauperis* was not lodged in the Privy Council Office until the expiration of more than 18 months from the date of the order. In these circumstances the applica-

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tion, even if it were not irregular, would be absurd. But their Lordships desire it to be understood that, in our opinion, this petition ought to be refused on the ground that no application for leave to appeal was made within the due time to the Supreme Court in New South Wales."

This, of course, must be read to be without prejudice to the jurisdiction of the Privy Council to grant applications for special leave to appeal in a fit case, notwithstanding that an application was not originally made in the country from which the appeal arises. The conditions under which leave to appeal was granted by the Supreme Court of New South Wales at the time of this decision were similar to those now existing under our legislation. There are variations in respect of the circumscribed area of appeal, the amount of security to be lodged and the time for appealing. (See PRESTON'S PRIVY COUNCIL PRACTICE [1900] p. 146). The appellant here obtained leave to appeal on certain conditions unlike *Walker's case*. When he discovered he did not have the means, he should have petitioned the Privy Council seeking leave to prosecute his appeal *in forma pauperis*.

Appeals to Her Majesty in Council are governed by the Judicial Committee Rules, 1957. Rules 3-10, inclusive, deal with petitions for special leave to appeal *in forma pauperis*. Many of these rules, except those governing petitions for leave to appeal *in forma pauperis*, have been enacted in the Guyana (Procedure in Appeals to Privy Council) Order, 1966. If it had been the intention that this court should grant applications for leave to appeal *in forma pauperis*, we feel that those rules governing such applications would not have been omitted from the Guyana (Procedure in Appeals to Privy Council) Order, 1966.

For these reasons we did not vary the order made by the judge in chambers granting conditional leave to appeal, and so the motion was refused.

The court, in an oral judgment, refused a similar application by the appellant on 20th July, 1966, in *Re Chintamanie Ajit v. Patrick Ng-Yow & Henry Andrew James* (No. 4 of 1964).

Application refused.

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[Court of Appeal (Luckhoo, C., Cummings and Crane JJ A.)
July 7, 8, September, 5, 1969.]

Criminal law—Murder—Felony murder—Acting in concert—Circumstantial evidence—Directions to jury thereon—Duty of judge to analyse evidence.

Criminal law—Evidence of child—Corroboration.

Criminal law—Practice—Counsel—Duty to disclose inconsistent statements—Appeal—Evidence Ordinance Cap. 25 s. 71—Federal Supreme Court (Appeals) Ordinance 1958 s. 11(a), 19(a).

The appellants were convicted of murder. The evidence against them consisted principally of statements made by the appellants to the police indicating that a burglary was planned. The judge did not direct the jury on circumstantial evidence or on the inferences that may be drawn from the statements. Two prosecution witnesses B and D gave evidence connecting the No. 2 appellant with the crime. D was an unsworn child witness whose evidence had to be corroborated. At the trial D gave evidence identifying the No. 2 appellant in accordance with a statement he gave to the police to that effect. In the Court of Appeal a statement made by B which had hitherto been undisclosed, in which he said that he did not recognise any of the assailants was admitted in evidence.

HELD: that (i) the statements by the appellants were open to an innocent interpretation and the judge should have so directed the jury and should have explained to them the concept of acting in concert, felony murder and the nature and import of circumstantial evidence.

(ii) per Cummings, J.A. Counsel for the Crown ought at the trial, to have disclosed B's statement.

Appeal allowed.

Retrial ordered.

J.O.F. Haynes, Q.C. for No. 1 and No. 2 appellants.

M. McDoom for the No. 3 appellant.

W.G. Persaud for the Crown.

LUCKHOO, C.: I am in agreement with the conclusions reached by CUMMINGS, J.A., as concerns all three appellants. I would, however, later state my own reasons and views in the appeals of Abdool Samad and Roy Ralph, and now add only this to what was said in the appeal of Abdul Salim, as I agree with the reasons there given. In *Baksh and another v. R.*, 1957, L.R.B.G. p. 81, the court said this:

"We recognise that variations must occur between a witness' statement to the police and his evidence. Changes in time, date, place

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and description do not necessarily mean that a witness is not speaking the truth and once there is no substantial or vital discrepancy there is no obligation for a prosecutor to disclose it to the defence. Where, however, the discrepancy is so startling that it strikes at the very root of the prosecution's case, justice demands that a disclosure should be made and a prosecutor who fails to do so is acting contrary to an established and salutary practice in the administration of justice".

To withhold what possesses or has the semblance of possessing crucial material for testing the genuineness of the prosecution's case, serves indirectly to prejudice the proper determination of issues at the trial and to render acceptable, what might otherwise be discredited.

Explanations or further evidence might well reduce or even nullify the apparent potency of the evidence withheld; but at least there would not have been the denial of an opportunity to test its value.

The appellants were charged and convicted of the murder of Mangri at Roden Rust, Essequibo on the 1st February, 1968, and were sentenced to death. They stood trial with another person, one Cornel Whyte, who was discharged because of an insufficiency of evidence against him. Indeed, if the appellants, Abdool Samad and Roy Ralph had not made statements which in certain ways were incriminating against themselves, the cases against them would not have been easy to sustain.

The first-named appellant comes from Uitvlugt and the second-named from Parika. They are both known by the name of Samad so I shall refer to the first exclusively as Samad and the second exclusively as Salim.

Mangri and Badloo, husband and wife, an aged couple of about three score years and ten, occupied a house at Roden Rust and retired to bed sometime in the course of the evening of the 31st January, 1968 with then grandson, Dharamdeo, aged 12 years. Mangri slept in a bed with Dharamdeo in the bedroom and Badloo slept in the hall eight feet away.

Sometime later in the night, a wall of that house, which was made up of wild cane was ripped away by human agency, and not inconsiderable violence was done to both Mangri and Badloo, as a result of which Mangri died and Badloo was hospitalised.

The injuries which Mangri suffered were: (1) Superficial abrasions outer side of right eye, left side of mouth, right side of mouth and under right side of chin. (2) Six superficial abrasions each measuring 1/4" right and left side of the neck line with the larynx. (3) Abrasions with contusion lower part of both wrists, above both eyes and both ankles. (4) Depression around the upper part of the front of the neck due to pieces of cloth tied around it. A gag was also found in the mouth. The windpipe was congested. All the internal organs showed senile changes.

In the opinion of Dr. Balwant Singh, the cause of death was asphyxia by strangulation which was caused by the cloth which was tied around her neck. He said that a considerable degree of pressure was applied to the neck by the piece of cloth. The injuries under (2) could have been caused by finger

nails and the piece of cloth tied around the neck concealed those injuries. The injuries under (3) could have been caused by pieces of cloth tied around the wrist, knees and ankles. There were no fewer than three pieces of cloth tied around her neck.

Dr. Frederick Wills described the injuries which Badloo suffered as: (1) Contusion with abrasions on the inner aspect of the left side of the upper lip. (2) Contused abrasions on the inner aspect of the lower lip. (3) An abrasion on the left border of the tongue. (4) Abrasions on the inner aspect of the left cheek; all of which could have been caused by finger-nails while the hand was being forced into the mouth. In addition he found: (5) Slight contusion on both sides of neck which could have been caused by the fingers while squeezing the throat. Then there were: (6) A contused abrasion on the back of the right wrist. (7) A contused abrasion on the outer aspect of the left wrist. These could have been caused by the wrist being tied together. And, lastly: (8) A contusion with a small abrasion on the back over the left lower ribs which could have been caused by a blow from the fist.

He was found to be suffering from shock and nervousness and was admitted to hospital.

The dead body of Mangri was found on a beach about 20 rods from the house tied as could be seen from the photographs, in a ghastly and gruesome, if not barbarous manner, with cloth stuffed in her mouth. She and Badloo who was also tied up were found by searchers about 1.30 a.m. that very morning on that beach. Dharamdeo had communicated to a neighbour his experience after the intruders had left the house; a search was promptly undertaken and this led to the discovery of the dead body. The police were called in about 1.30 a.m. and after their investigations, the evidence presented against the appellants showed that Samad, Ralph and Whyte had travelled several miles on Wednesday, 31st January, 1968 to Parika, and went to where Salim lived about 50 rods from Mangri's house. Later that evening they and Salim went to Mangri's home.

In cautioned statements to the police both Samad and Ralph told in detail their movements to Parika, their visit to Mangri's house and what happened there and afterwards.

Independent evidence was led to show that they were seen together and with Whyte at various times and places, not long after the crime was committed, that very morning of 1st February. They were first seen together about 2.30 a.m., and then at various other times up to about 8.30 a.m., travelling away from the scene of the crime.

The trial judge's scheme of summing-up was to remind the jury of what evidence had been given in the course of the trial; read to them the statements made by Samad and Ralph; and proceed to give them what directions in law he thought to be necessary. But nowhere did he attempt

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the exercise of explaining to the jury how to approach the consideration of the evidence; what inference could or might be properly deduced therefrom; and what conclusions may be reached from applying certain aspects of the law to certain findings of facts open to be found from the evidence.

The jury were left to roam at large over the rugged terrain of critical evidence without that guidance and enlightenment which would aid in its estimation or appreciation.

One of the functions of an appellate court is to ensure not only that what is stated by the learned trial judge has been fairly stated, but that what it was necessary and fair to state was not omitted, lest the result of the jury's verdict might be affected thereby. In a complicated case it is incumbent on the judge to assist the jury by dealing with the salient features of the evidence, whilst in a short case, and one in which the issues of guilt or innocence can be simply and clearly stated it is not necessarily a fatal defect on a summing-up that the evidence has not been discussed. (See *R. v. Atfield*, 45, C.A.R., 309).

Now for a closer look at how the learned trial judge was disposed. He was so swayed by the one thought that any person or persons who entered the house with the purpose or joint purpose of killing Mangri or causing her grievous bodily harm would of course be guilty of murder, that he confined his direction in law only to that aspect and omitted other material aspects when he said:

(a) "It is the duty of the Crown to prove that the accused persons when they inflicted the injuries—if you find that they inflicted the injuries—or one of them acting with the others, they had the intent either to kill or to do grievous bodily harm".

(b) "As I told you, the Crown is alleging that the three accused persons were acting in concert, that is to say, that they were acting with a common design, a common purpose; that they were present aiding and abetting each other to commit *the very offence with which they were charged*. . . "

(c) "The Crown is alleging that they were acting in concert with a common design, a common purpose to commit the very offence with which they are charged and that they were there present aiding and abetting each other to commit the offence with which they are charged".

(d) "You will also bear in mind that it is the allegation of the Crown that the three accused were acting in concert; that they acted together with a common design, a common purpose, aiding and abetting each other to commit the very offence with which they are charged".

But was this all that the evidence was capable of conveying? Wasn't it also consistent with an intention to commit the felony of burglary in the course of which violence was used? And should this aspect not have been put? If the purpose of the entry into the house was to commit burglary

with violence, then that intention to kill or cause grievous bodily harm would not be specifically required, for in such a case, it would be murder, upon death ensuing after *any* degree of violence. This was well settled on the high authority of *R. v. Baird*, 26 Cox 573, where the accused was charged with having caused the death of a young girl while committing a rape upon her, and in order to prevent her screaming, he stifled her cries by placing his hand over her mouth and thumb upon her throat, and although there was no suggestion that he intended to kill her—no suggestion that he intended to do grievous bodily harm to her beyond the fact that he was contemplating ravishing her—yet in those circumstances it was held that it would not be right for the jury to be told that they should return a verdict of manslaughter.

The learned Chancellor in that case was of the opinion that the evidence established that the prisoner killed the child by an act of violence in the course of, or in the furtherance of the crime of rape, a felony involving violence, and this would be murder. His Lordship said: "No attempt has been made on your Lordship's house to displace this view of the law and there could be no doubt as to its soundness".

In *The Queen against Franz*, 2 F. & F., p. 581, on a charge of murder, the deceased having been found tied hand and foot and with something forced into the throat apparently to prevent any outcry but which had caused suffocation, and the state of the premises showing that a burglary had been committed, and the evidence against the prisoner being a chain of circumstances tending to identify him as one of the two persons employed in the burglary (the other of whom had not been apprehended) the jury were directed by BLACKBURN, J., that if satisfied that the prisoner was engaged in the burglary and a party to the violence on the person of the deceased they should find him guilty of murder.

And in *Betts & Ridley*, 22 C.A.R., p. 148, a case in which there was a common design to commit robbery with violence, it was held that if one prisoner causes the death while another person is aiding and abetting the felony as a principal in the second degree, both are guilty of murder, although the latter did not specifically consent to such a degree of violence as was in fact used. And so, in this appeal, if there was a common plan to commit robbery with violence, it would matter not if part of the violence was committed in the house and part on the beach, and all were present at one place or the other or not, if at the time they were all engaged in this joint enterprise.

It is true that the way of tying up Mangri and stuffing cloth in her mouth may provoke the argument that the person or persons actually responsible for this act must have had the intention of killing her or causing her actual bodily harm. But the evidence does not go as far as to show that Samad or Ralph actually tied, strangled or gagged her, and so their involvement could only arise through (a) being privy to the deed of killing with that intention or the intention of causing grievous bodily harm or (b) being privy to the felony of burglary with violence.

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In either of these two situations, guilt arises, but first there must be a common plan, design or purpose to which they or either of them had subscribed to bring about the particular result. And the only way of ascertaining this is by entering into an analysis of the available facts to assist the jury in weighing relevant matters for this purpose, instead of reaching a conclusion after groping in the dark. The key lies in a proper consideration of all aspects of the respective statements of both Samad and Ralph as affects each, but merely to read to the jury what was said in those statements and to ask them to weigh the matter for themselves could hardly be satisfactory.

After reading the statement of Samad the trial judge said this:

"The Crown is asking you from his own statement to say that he was acting in concert with the others. He by his own statement has placed himself at the scene. That is what the Crown is asking you to say. Well, it is a question of fact entirely for you. You will have to determine what weight you must attach to the statement—the probative value of this statement—whether he gave this statement; whether a promise was held out to him. Those are questions you must ask yourselves when you are determining the weight you must attach to the statement".

The shortcoming of what here appears lies in this. Being on the scene by itself does not mean and could not mean 'that he was acting in concert with the others'. In what way then was he acting in concert with the others? (That is after determining what weight is to be given to the statement). What is the statement capable of proving? What are fair and proper inferences to be deduced from it? Assuming certain parts are incriminating, has he put forward anything by way of defence which would weaken or lessen the effect, or even nullify what he has said otherwise? Surely these aspects should have been discussed, instead of asking the jury to say whether the statement showed that he was acting in concert, if weight was given to it! And after reading the statement made by Ralph, the trial judge only said this:

"Well, in this statement, members of the jury, the number four accused is seeking to implicate the number one and the number two accused. You will bear in mind what I have told you before, that what the number four accused says in this statement about the number one and number two accused is not evidence whatsoever against them. This statement could only be considered against the number four accused, he, being the maker of the statement".

No effort whatever was made to analyse the respective statements. Nothing was done to separate the incriminating aspects from aspects which might be consistent with innocence, nor to show how inferences could be drawn from them as from other circumstances prior to and subsequent to the crime, including evidence of their conduct. Nothing was ever said of the

nature and import of circumstantial evidence and how the law looks on such evidence.

I must pause here to say that a judge on a re-trial will be required to sum up on the evidence as is presented before him and that responsibility will be his and his alone. Whatever I may now say is said only to seek to demonstrate the shortcomings of the summing-up in the instant case and to try and assist in an understanding of what should be undertaken if the verdict is to be meaningful. As I have said before in some cases, it may be quite sufficient to state principles of law and to state the facts and leave them for the jury to decide without relating one to the other. But in other cases as in this, a little more is required.

For example, in Samad's statement after recounting what had occurred in the course of the evening he said that when himself, Ralph and Whyte were journeying back to their homes he told them that – (a) *If he had known that Salim was going to steal he would not have gone with him.* This was an important aspect to which the trial judge should have called the jury's attention as it went to show that Samad was endeavouring to suggest that his presence was an innocent one and that he had no *mens rea*. (b) In addition to this, in his statement he had said that when at the scene Salim held him and told him to wait; he jerked himself away and went on the road. Was this an act which showed that he was dissociating himself from what was taking place? Ought it not to have been specifically drawn to the jury's attention? (c) Then, again, he said that when he told them he was going away Samad replied: "You are inside. You can't go now". Did that show a partial involvement in what was taking place, and if so, how far did that involvement go?

It was the duty of the trial judge to put each and every favourable aspect which arose or appeared to arise as he would, matters which gave rise to other inferences tending to manifest guilt. As for example he might ask the jury to investigate how far Samad's presence was innocent, by considering these matters: Samad heard Salim say at his (Salim's) house that he, Salim, was told that there was an old man and an old lady who lived in an old house, and who had money hidden in the house. How far did this show the existence of a plan to steal? When he (Samad) took charge of Salim's, Ralph's and Whyte's shoes at Mangri's house, could this be construed as an act of aiding and abetting them in what they were about to do or did at the scene? That when he said he stayed on the road, was he present aiding and abetting with the intention of giving assistance and was he near enough to afford it should the occasion arise, so as to implicate him as a principal in the second degree, watching to prevent surprise whilst his companions were in the house committing a felony? That when he went and peeped to see what they were doing and he saw Salim and Whyte pull out the wild cane wall of the house, if he had really disapproved, would he not have chosen that moment to take his departure? Was there anything to stop him? Why did he wait on sufficiently long to see Ralph and Whyte go into the house? When he saw Ralph run out with the woman and Whyte run out with the man and they said they were carrying them to the dam to tie them

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and leave them there, why did he remain? Was he aware or not of the use of violence or of the intention to use violence? What could he have thought Salim wished to do with the bedsheet Salim was taking with him from the house? Why did he go to the service dam where the occupants of the house were bodily taken? When he took the "shoes" there, did that in any way tend to show any complicity in the crime? After Whyte and Ralph told Samad to help them "hold the old man and old lady foot" so that they would be able to tie them, why did he Samad, go to Salim's house where he was given and received a cutlass? Was the cutlass to afford protection for some of those who had participated in what had taken place so as to allow them to make good their escape from the scene? How does his story of waking up about 7.00 a.m. at the service dam when Ralph and Whyte met him and told him that they had tied up the two people and left them at the service dam as people woke up and they had to run away, square with the evidence that he was seen by three policemen in the company of Ralph and Whyte, on the conservancy dam around 2.30 a.m. that very day, 1st February, with a cutlass and walked at a faster rate of speed and disappeared out of sight through some bushes when they saw him? What is the significance, if any, of what he told the police about the cutlass which he had obtained at Salim's house? When he was told by the police that they had reason to believe that Salim and two others had broken into the home of Mangri at Roden Rust during the previous night and tied and gagged her and had taken her to the Roden Rust beach where she died and that he and others were seen walking on the high level conservancy dam which was some distance away from the scene of the crime, why did he say, "Me go prove that me nah know nothing about this. A bin home. I can give a statement."

These or such like matters if left for a jury to decide upon as they may deem fit in conjunction with whatever is favourable as for example - if he had known that Salim was going to steal he would not have gone with him, and that he "jerked" away himself from Salim and Went on the road, would ensure that the verdict represented a conclusion after the pros and cons had been carefully weighed.

Then in similar fashion an examination of Ralph's statement and the evidence could be looked at. From this, it might appear that: On Wednesday 21st, in the morning he met Cornel Whyte on whose invitation he went to Samad of Uitvlugt where he met Salim of Parika who invited him to go to Parika, where he went. At Salim's house Salim said:

"We ah go get three thousand dollars from a man . . . and he does keep the money in he matrass".

Would this if believed, provide knowledge or not of an enterprise to steal?

After eating and drinking Salim said, "Come leh we go foh the money." He then took them to a little thrash house and pulled out some wattle from the back of the house then the three of them went into the house and one of them opened the front door and he, Ralph, went in.

By going in, was he or was he not identifying himself with the unlawful project?

When he saw that Salim held the old lady and Samad tied her up and they carried her by the water side, did this or did it not show that he was actually aware of the use of violence in the course of the project to steal? What construction then was to be placed on his still remaining in the house until they returned?

He saw Salim and Samad carry the man and they told him that he must look in the mattress for the money but he came out of the house because he became afraid and thought to himself that "this thing ah trouble". How far did this, or could this relieve him of criminal responsibility? Did he or did he not affirmatively and completely withdraw from any conspiracy to commit the felony of burglary with violence before overt acts had been done in that connection? What did his conduct afterwards show?

He said when they were coming back from the water side, Salim from Parika ran in his house and he followed Samad from Uityvlugt and ran down a dam and ran in the bush and came out by the canefield side and met some men with gun and revolver, and Whyte stopped and spoke to them, and he and Samad walked away. Did he remain in company with the others throughout, and did he do anything at any stage to show that he had ceased to be a party before the wrong was done?

The whole of the case against Samad and Ralph, would turn on the view taken of all the circumstantial evidence in the case. And this in itself called for certain directions in law. There was a responsibility to direct them to weigh each circumstance, consider what they believed and what they did not find to be established. The very vital matter would be, whether all the circumstances established led them into such certainty as would make them feel sure that the appellants or either of them were or was so implicated as would make them or him guilty in law. It was required to bring home to them that the cohesion of any such circumstance in the evidence and the rest of the chain of circumstances of which it forms a part, is fundamental, and requires logical accuracy in deducing inferences from the chain of facts; hence the necessity for a thorough examination of the evidence to say whether they were prepared to infer that Samad and Ralph were indeed privy to a burglary with violence.

Further, the jury should have been warned that before drawing the guilt of the accused from circumstantial evidence that they should be sure that there were no co-existing circumstances which would weaken or destroy their inference, (per Lord NORMAND in *Teper v. R.*, (1952) A.C. 480, at 489). Apart from the question: "Did Samad and Ralph participate in a common design to kill or to cause grievous bodily harm?" It was also pertinent to ask: "If there was no common design to kill or to cause grievous bodily harm as such did they share a common design with

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others to commit the felony of burglary with violence in the home of Badloo and Mangri, so that the violence used on these individuals, or either of them was in pursuance of this common design? If there was no common design to commit this burglary with violence, were they present at the moment when violence was used and did they assent or manifest their assent by assisting in the offence?"

Unlike the facts in the case of *R. v. Lovesay and Peterson* (1969) 2 All E.R. p. 77, in this case there was evidence coming from the respective appellants through their statements showing what role each played in a certain setting of circumstances. In that case there was no evidence of what roles the parties played in the crime, and the circumstantial evidence only went to show presence, without showing how violence came to be used. However, the jury must still have proper directions in law and essential guidance, in construing each of the statements as concerns the matter, and the other proven circumstances of the case before reliance can be placed on the verdict.

In this case they were not made aware of so many matters, some pointing one way and others the other way. And so also there was an omission to give necessary directions on circumstantial evidence. A new trial will give the opportunity for a proper presentation of the case to the jury, and an opportunity to investigate the credibility of Badloo whose evidence means so much in the case against Salim.

I would therefore concur in the order proposed.

CUMMINGS, J.A.: The appellants, Abdool Samad, Abdul Salim and Roy Ralph, were indicted along with Cornel Whyte for the murder of Mangri in the County of Essequibo between the 31st January and 1st February, 1968. The trial commenced at the Demerara Assizes on 10th February, 1969, and concluded on 5th March, 1969. At the close of the case for the prosecution on the 25th day of February, 1969, the learned trial judge, after agreeing with a no-case submission urged by defence counsel Mr. Singh Rai on behalf of Cornel Whyte, directed the jury to return a formal verdict of "Not Guilty" in his favour. He was accordingly acquitted and discharged.

At the conclusion of the trial, the other three accused were convicted and sentenced to death. From that conviction and sentence they now appeal to this court on several grounds. Mangri's dead body had been found on the Roden Rust beach, Essequibo on the morning of 1st February, 1968 in circumstances indicating that she was a victim of violence.

The case for the Crown against the three appellants was, that they were acting in concert in pursuance of a common design to commit a felony, that violence was used in connection therewith which resulted in Mangri's death, and that they were present at the time of the commission of the offence, aiding and abetting each other to effect that purpose, and were consequently all guilty of murder.

For the establishment of this allegation, the Crown relied mainly upon the evidence of –

- (1) Witnesses who had seen and spoken with the appellants or some of them together on the evening of the 31st January, 1968, before the incident as the appellants were going in the direction of the *locus in quo* and about three miles therefrom, and after the incident walking on a conservancy dam in a direction away from the *locus in quo* at different points between three and eight miles distant therefrom on the morning of 1st February, 1969.
- (2) Dharamdeo, the grandson of the deceased who slept in the same bed with her. He was, at the time of the trial, 11 years old and was an unsworn witness. He stated that he had seen the No. 2 appellant in the house of the deceased at the material time. He saw him take her out of her bed and heard him threaten to kill her if she "hollered". He pretended to be asleep. He got afraid and hid under the bed.
- (3) Badloo, the husband of the deceased, who slept on another bed in the same room, said he was awakened at the time of the incident, and in a scuffle lost consciousness; that when he recovered he found he was on the Roden Rust beach and that the No. 2 appellant was over him asking where he had his money hidden. He told him in a tree and the appellant left him and went away. He was choked and tied up, but managed to free himself. The appellant ran away as his (Badloo's) son, Mohabir, came up. They later discovered that Mangri's dead body was lying not far from him on the beach, tied up and her mouth stuffed with cloth. At the trial he was quite positive and definite in his identification of the No. 2 accused whom he said he had known for many years.
- (4) The doctor found that death resulted from asphyxia by strangulation.
- (5) The statements of the Nos. 1 and 3 appellants who, on being questioned on the 1st February, 1968, denied any knowledge of, or complicity in, the affair, but later gave statements to the police which revealed their presence in the home of the deceased while an attempt was being made to steal therefrom and knowledge of the tying up of Badloo and the deceased on the Roden Rust beach.

During the hearing of the appeal, Mr. Haynes, Q.C., in arguing the case for the No. 2 appellant, applied, in accordance with the provisions of s. 11(a) and 19(a) of the Federal Supreme Court (Appeals) Ordinance, No. 19 of 1958, as adapted by the Guyana Independence (Adaptation and Modification of Laws) (Judicature) Order 1966, to lay over in evidence

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a statement made by Badloo to the police on the 7th February, 1968, that is, within seven or eight days after the incident. Counsel for the Crown offered no objections and, indeed, quite properly invited the court to consider the statement. Accordingly, we admitted it. In that statement Badloo is recorded as having said:

"After we retired to bed, I cannot say whether Mangri went out as I fell asleep, both beds having netting. Whilst in bed I was aroused by someone who was choking me and pushing his hand into my throat, whilst another one was cuffing me about my abdomen and ribs, I also felt that my hands were tied and my feet also tied, my netting was not there, the place was dark I could not have seen how many persons there were in the house, I was still on the bed, I tried to shout out but no voice was coming, I felt as if I was lifted and taken out of the house to where I don't know. I became dazed, when I came to myself, I felt I was lying on cold sand, and a person was sitting on my chest and forcing his hand into my mouth and asking 'Where is the money and jewellery', I said to him 'The money is under the coconut tree' afterwards I felt as if the person then left; I tried and got up and sit down with both my hands and feet tied, I looked around and realised I was at the beach. I also saw as if a piece of wood or other object lying on the sand about six feet away from me. I then started to open my hands with the assistance of my teeth and managed to open the tie from my hands . . . *I cannot say who are the persons that did that to myself and Mangri, but I knew they were more than one person. I can give no description of them*".

"Later the very 1.2.68, I was brought by policemen to Dr. Wills at Leonora who examined and treated me and I was admitted to the Leonora Cottage Hospital where I am still a patient. I am still feeling pains about my abdomen, ribs and throat."

On the 19th February, that is, 19 or 20 days after the incident and 9 or 10 days after he had made that statement, he made the following further statement:

"On the night of Wednesday, 31st January, 1968, when myself and wife were taken to Roden Rust beach where she subsequently was murdered *I could remember now that the man that was choking me and asking where the money was hidden was Abdool Salim known as 'Samad' who lives not far from me. I am quite certain that it was him. I saw his face clearly. I did not mention this to the police before because I was afraid and confused but everything came back to me clearly now and I am certain that it was 'Samad'*."

The defence of the No. 2 appellant as disclosed in his statement to the police which he adopted at the trial in a statement from the dock, is an alibi. This was supported by his brother Razack who gave evidence on his behalf.

Mr. Haynes submitted that in the circumstances the only direct evidence connecting the No. 2 appellant with the crime was that of Dharamdeo and Badloo. The former was an unsworn child witness, and therefore his evidence had, in accordance with the provisions of s. 71 of the Evidence Ordinance, Cap. 25, as amended by s. 5(b) of The Miscellaneous Enactments (Amendment) Ordinance, No. 29 of 1961, to be corroborated. (See *R. v. Boodram Lall* – Criminal Appeal No. 40 of 1967).

He conceded that if Badloo's evidence were to be regarded as reliable, it would be corroboration of Dharamdeo's, as it would establish the presence of the No. 2 appellant on the beach and thus, in the circumstances disclosed, tend to connect him with the killing of Mangri; but urged that in view of the conflict and contradicting explanations revealed in the statements now admitted by the court, that testimony was too unreliable to provide the necessary corroboration; and that, consequently, the Crown had not proved the case against the No. 2 appellant according to law, the appeal should be allowed, and the appellant set free.

With the first limb of this submission I agree, but the question of the reliability or otherwise of Badloo's evidence is, in my view, one for a jury. Vide *R. v. Carty*, (1967) 11 W.I.R. 107, in which the Court of Appeal of Jamaica, speaking through DUFFUS, P., said at p. 110 letter C:

"Matters of fact arising on the evidence are matters entirely for the consideration of the jury, no matter how unreliable the judge may think that evidence to be, and to remove evidence on a matter of vital importance from the jury amounts to a substantial miscarriage of justice. No question of applying the proviso can therefore arise.

"The court was asked by learned counsel for the appellant to substitute a verdict of man-slaughter for that of murder if it found itself unable to enter a verdict of complete acquittal but on the facts of this case we have decided that this would not be the correct course, for it is impossible to say that if the jury had been properly directed the facts were such that they must have accepted that the applicant was so subject to provocation that a verdict of manslaughter could have been given.

"There were four other grounds of appeal argued on behalf of the appellant, in substance alleging that the applicant had not had a fair trial, but in view of the conclusions we have reached on the first ground, it is unnecessary to say anything about these other grounds.

"We treat the hearing of the application as the hearing of the appeal and we allow the appeal, quash the conviction, set aside the sentence of death, but as the interests of justice so require, we order a new trial to be had during the current sessions of the home circuit court. The appellant will remain in custody pending the new trial."

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With great respect, I consider this a correct statement and application of the law.

The jury in the instant case ought to have had Badloo's statements when considering what weight they should give to his evidence. There was patent conflict in them on a matter of the utmost importance, and counsel for the Crown ought to have disclosed this at the trial. The jury might or might not, upon a proper direction from the trial judge, have come to the same conclusion, but it is impossible for us to tell. Here there might, therefore, have been a miscarriage of justice.

Counsel, in support of one of their grounds of appeal, urged on behalf of Nos. 1 and 3 appellants that —

- (a) since the crux of the Crown's case against them was that they were there aiding and abetting the No. 2 appellant in a common design, the learned trial judge ought to have assisted the jury with a more adequate direction on the law to be applied to the facts of this particular case. Although these appellants admitted that they were present, he ought to have emphasised more clearly that mere presence was not enough, and that even if they were present aiding and abetting, he ought to have directed them to consider whether there was evidence that there was a common design to steal at all costs, using any violence that was necessary to effect that purpose;
- (b) subject to such directions, the statements of the appellants were capable of an innocent interpretation which was a matter for them.

It is convenient to consider the latter submission first. The statement of the No. 1 accused is as follows:

"In the house Samad say that he old man tell he that them gat wan old man and wan old lady live in wan old house they say them got money hide in the house. He say come leh abie go before it got too late, abie go ah the house, about three or four house come back a Parika side. Abie come ah the house. Samad, Surup and Whyte give me them shoes and he stay on the road. The other boy who we meet in Samad house meet abie they and he carry two pieces of cloth. Me go and peep what dem a do and me see Samad and Whyte a pull out the while cane wall ah de house. Surup and Whyte go in the house and me leff the yard and go ah the dam. Samad hold me and tell me foo wait but me jukk way and go ah de road about five minutes after Surup run out wid the woman and Whyte run out wid the man and them say dem ah carry them ah de saavis and tie them and leff them they and then dem ah come back. Me tell them me ah go way and Samad say 'you deh inside, you can't go now'. Samad bring out the bed sheet from the house. Me go wid them ah the saavis dam and me gae them them shoes. Whyte and Surup tell me foo help hold the old man

and old lady foot and let them tie them. Me leff them shoes and me and the next chap who we meet in Samad house go way a Samad house. The chap give me wan cutlass and tell me foo run tru the farm. Me run and meet the saavis dam and me sleep they. When me wake up about 7 o'clock Surup and Cornel Whyte meet me they and them tell me that them tie up the two people and leff them the saavis dam and people wake up and them run away. Me and Surup and Whyte then walk ah the saavis dam and me leff them ah the saavis dam by Uitvlugt and me go home. Them say them ah go ah Leonora. Dem tell me that nah foo tell nobody nothing. Den me tell them that if me know Samad been a go thief me won ah go wid ah. Abid pass some plain clothes policemen ah the saavis dam by De Willem. Me mek out one. Dem does call he 'Red Lip'. Dem police talk to Whyte and Whyte tell the police that dem a catch guana. When them gon, me tell them me a go ah the police station and report. Then dem tell me that if me report me go deh in trouble just like dem. Dem walk foo go ah Leonora and me come home weh me live, then the police come ah me house bout ten half pass and them bring me ah the station"

With respect to this statement, the learned trial judge told the jury:

"The Crown is asking you from his own statement to say that he was acting in concert with the others. He by his own statement has placed himself at the scene. That is what the Crown is asking you to say. Well, it is a question of fact entirely for you. You will have to determine what weight you must attach to the statement—the probative value of this statement—whether he gave this statement, whether a promise was held out to him. Those are questions you must ask yourselves when you are determining the weight you must attach to the statement".

"In his defence the number 1 accused is saying that the first statement he gave to Prabhulall is true but the second statement which he gave to Raghubir is not true, that he was promised to be released and be used as a witness against the other accused and because of that he gave that statement. Well, you will have to consider his story when you are considering what weight you must put on that statement.

"He also told you that he never authorised anyone to take out any person from the house. Indirectly he is telling you that he was not acting in concert with any of the other accused, or any person, to commit this offence with which he is charged. You must pay attention to his defence. Even if you find his defence is a pack of lies, unworthy of belief, this circumstance alone would not entitle you to convict him. Even if you discard his defence as being worthless—of no use—you must still go back and consider the evidence led by the Crown. If the evidence led by the Crown does not satisfy you so that you feel sure of the guilt of the accused, then you must also acquit him. The number 1 accused called no witnesses".

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The No. 3 appellant's statement is as follows:

"Mr. Roberts, on Wednesday the 31st the last day in January, 1968, about 11.30 a.m. Cornel Whyte meet me by Samaroo Dam, Klien Pouderoyen and he tole me leh we tek walk on the West Coast he going by he mother. After dah he seh leh we ride go by his friend Samad at Uitvlugt. When me and Whyte meet at Samad house at Uitvlugt we meet another Samad who come from Parika. Whyte then tell me that them two Samad ha he good friend. Samad at Uitvlugt wife cook food and all ahwee eat. After ah we done eat the Samad from Parika seh he want ah we go tek walk wid am a Parika. Me seh me nah a go that side and Samad from Parika seh leh we go that me and Whyte all ah we go stay at he house. Me ask Whyte wha we going fah and Samad from Parika seh we got some money foo look after. Samad from Parika then seh that he nah gat enough money foo pay foo all ah we go by train and me and Whyte must ride bicycle and go up an he and the other Samad gon go by train. Me and Cornel Whyte lef before them and we ride down and meet a Parika before them and Whyte hide the bicycle in the bush by the train line and ah we wait foo them till about 8 o'clock the night when them come wid the train. Then all ah we walk and go down Parika weh Samad live. When ah we meet a Samad house Samad from Parika seh that we a go get three thousand dollars from a man wha he father bin wid foo draw ah the Bank and he does keep the money in he matrass then wan nather East Indian boy inside Samad house mek lime water and gie Samad and Whyte them fu drink and he buss dry coconut and ghee them fu drink and eat then Samad from Parika seh come leh we go fu the money. Samad from Parika then carry ah we to a lil thrash house and he pull out four fine wattle from the back a the house then the two Samad and Whyte go in the house and one a dem open the front door and me go in. Samad from Parika then hold the old lady and Samad from Uitvlugt tie she up and they carry she by the water-side then dem come back and Whyte and the two Samad carry the man *and tell me that me must look in the matrass fu the money but I come out of the house because me frighten and ah seh in me mine this thing ah trouble den the neighbour dem start come out them house and the same time dem bin ah come back from the water-side and Samad from Parika run in he house and I falla Samad from Uitvlugt and run down a dam and run in the bush and come out by the canefield side* and we meet some men wid gun and revolver and Whyte stap and talk to them and me and Samad from Uitvlugt walk away because Samad seh he want fu meet home. Whyte then come and meet ah we and we walk ah the canefield dam and Samad leff me and Whyte and go way home and me and Whyte walk and go home".

Of this the learned trial judge told the jury:

"If you find that he did not make this statement then you must discard it completely from your minds. If you find that he did make

the statement, then you will go on to consider what weight you should put on the statement – what is the probative value of this statement. He, the number 4 accused, called no witness.

"Well if you accept his defence then you must acquit him. If his defence leaves you in a state of reasonable doubt you must also acquit him. He has not actually told you really where he was. All he dealt with in his statement from the dock is the statement. But if you accept what he has said, then you must acquit him because if you find, members of the jury, that he did not make this statement or that the statement has no probative value, no weight whatsoever, then you must acquit the number 4 accused because, to my mind, the only evidence against the number 4 accused is the statement".

In *R. v. Nina Vassileva*, (1911) 6 Cr. App. Rep. 228, the Lord Chief Justice said at p. 231:

"This is a case of very great importance, one of the most difficult which this court has had to consider. The trial lasted eleven days; there were three prisoners besides the appellant, whose cases had to be carefully distinguished. There was evidence which could not be withdrawn from the jury, and after a long trial the summing-up is criticised from a point of view which very possibly did not present itself so strongly to the learned judge, and was no doubt lost sight of from the way in which the defence was conducted. I repeat what I said in *Stoddart's case*. It is not to be supposed that this court approaches a summing up, especially after a long case, without regard to the way in which the case was carried on in the court below. As Lord Esher said, omission is not of itself necessarily misdirection; it is only when the omission is such as is calculated to mislead the jury that it amounts to misdirection. This court has now been sitting more than three years, and has done useful work at all events in one direction, in pointing out the necessity for calling the attention of the jury to the law bearing upon the issues raised in a case; it does not sit to re-try a question of fact properly left to the jury, as to which there was substantial evidence. There are practically no cases where this court has interfered where evidence has been properly received and left to the jury with a proper direction, and there has been no improper conduct of the trial. We have to be careful that we do not put ourselves in a position of superiority over the judge at the trial and decide on some point that was not really raised before him. If we were merely being wise after the event, we should not interfere. It is only fair to a judge of great experience to say that he may have been misled by a false issue persistently raised by the defence. We do not criticise counsel, who are often misled by false instructions, or by the difficulty of their case, but when it is evident to a defending counsel that he is not going to call the prisoner, it is most unwise to contest every piece of evidence and insist that facts as to which there is clear evidence are not established. *In this case we should not interfere if the summing-*

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up had pointed out the possible alternative of innocent interpretation being put upon the proved facts ".

"But the learned judge said more than once that if the jury believed the facts proved by the prosecution the appellant must be guilty; *there is no sufficient recognition of the fact that there might be an innocent interpretation ".*

See also *R. v. Rosen*, 23 Cr. App. Rep. 70, *R. v. Thomas McGill* (1914) 10 Cr.App.267.

In the instant case it was open to the jury to accept these statements in their entirety and to find upon a proper direction that the Nos. 1 and 3 appellants although present and participating in an affair involving house-breaking with the object of stealing had dissociated themselves as soon as it became apparent that violence was about to take place – a circumstance which might have, in the view of the jury, tended to negative any possible inference that violence had been preconceived. The consideration of an innocent interpretation of the statements ought to have been expressly put and left to the jury.

Counsel for the appellants invited our attention to the following passages of the summing-up in which the learned trial Judge's direction to the jury on the subject of acting in concert, common design, aiding and abetting mainly appears:

"The allegation of the Crown is that the three accused persons were acting in concert, they were acting with a common design, a common purpose to commit the very offence with which they are charged, the offence of murder. The Crown is alleging that they were present aiding and abetting each other to commit the very offence with which they are charged.

"As I have told you, the Crown is alleging that the three accused persons were acting in concert, that is to say, that they were acting with a common design—a common purpose—that they were present aiding and abetting each other to commit the very offence with which they are charged. Well, if you so find that the three accused persons were acting in concert, then the act of one accused person will be the act of the others, and if you find from the evidence that it was one of the accused who inflicted the injuries on the deceased, Mangri, which caused her death, if you find that they were acting in concert, then they will be equally liable. So, please bear that in mind. That is the contention of the Crown, that the three accused persons were acting in concert. It is a question of fact entirely for you whether they were so acting or not.

"If you find that they were merely innocent bystanders, that they happened to be on the scene by chance, then they could not be acting in concert with each other. You must find that they had agreed, they were acting with a common purpose, they were aiding

and abetting each other to commit the very offence with which they are charged.

"You will also bear in mind that it is the allegation of the Crown that the three accused were acting in concert, that they acted together with a common design, a common purpose, that they were there present aiding and abetting each other to commit the very offence with which they are charged".

With great respect, that was not the case for the Crown as I understand it. I understood it as counsel for the Crown in this court stated it: "The Crown based its case upon the felony murder rule, that is,

"Where a person sets out to commit a felony and death results, the perpetrator would be guilty of murder".

Be that as it may, there are, however, other considerations to be taken into account in the circumstances of this case.

In *R. v. Grant & Gilbert*, (1954) 38 C.A.R. 107, the headnote reads as follows:

"Murder—Common design to Commit Felony—Felony not Crime in Itself Involving Violence—Preconceived Intention to use Violence to Overcome Resistance.

"If several persons embark on an enterprise to commit a felony and have also the preconceived common intention to use violence of any degree, if necessary, for the purpose of overcoming resistance, and death results from such violence, all are guilty of murder, even though the felony be one that does not in itself involve violence, such as larceny".

In delivering the judgment of the court, the Lord Chief Justice said at p. 108 et seq.:

"The enterprise was preconceived on their own story, both made full statements on the subject and gave evidence. . . The appellants plotted what they would do with regard to that porter . . . Assuming everything in favour of the appellants that was their scheme and they did not intend to gag the porter, but what they did intend to do was to overcome any resistance that might be offered by him. They therefore started out on this enterprise with a preconceived idea, not merely of committing the felony of larceny but also of using as much force as they found necessary to overcome resistance by the night porter . . . Here there was a preconceived idea to overcome Smart and therefore to use violence towards him. The felony therefore, on which the appellants embarked was a felony to steal from a dwelling-house and knowing there would be a watchman there to offer violence towards him. In those circumstances, as that violence resulted in the death of the unhappy man, the appellants were guilty of murder . . ."

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Were such circumstances unequivocally disclosed in this case?—A question for the jury. I have already referred to the evidence earlier in this judgment. This should have been discussed with them.

In *R. v. Anderson and Morris*, (1966) 2 A.E.R. 644, Lord PARKER, in delivering the judgment of the court, said:

"Counsel for the applicant Morris submits that there was a clear misdirection. He would put the principle of law to be invoked in this form: that where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, that that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but (and this is the crux of the matter) that if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act. Finally he says it is for the jury in every case to decide whether what was done was part of the joint enterprise, or went beyond it and was in fact an act unauthorised by that joint enterprise. In support of that, he refers to a number of authorities to which this court finds it unnecessary to refer in detail, but which in the opinion of this court shows that at any rate for the last 130 or 140 years that has been the true position".

"Be that as it may, this court is quite satisfied that they should follow the long line of cases to which I have referred, and it follows accordingly that, whether intended or not, the jury were misdirected in the present case, and misdirected in a manner which really compels this court to quash the conviction of the applicant Morris".

In *R. v. Lovesay & Peterson* reported in the *Times Newspaper* of May 14, 1969, p. 13, the question of the proper direction in circumstances somewhat similar to those in the present case was considered by the Court of Appeal in England. The judgment of the court, speaking through WIDGERY, L.J., is recorded as follows:

"Mr. Epps was found handcuffed to a railing in the basement of the shop with severe head injuries from which he died. Blood was found on the stairs and the ground floor, the shop was in disorder and valuables stolen. There was no direct evidence of how many men had been involved in the raid or of their individual roles. The appellants denied all knowledge of the affair, but the prosecution sought to implicate them in the crime in several ways. The appellants appealed against their conviction for murder on the ground that the judge failed to direct the jury to consider the two counts separately.

The judge gave the jury an impeccable direction on the ingredients of the offence of robbery with violence and on the guilt of individuals who joined in a common purpose to rob. When considering the offence of murder, he said that if a man was attacked with the intention of causing him really serious physical injury from which

he died, the attacker or any person who became party to the attack, if they joined in for the purpose that he should suffer serious physical injury, were guilty of murder. But finally the judge said: 'Obviously these two offences stand or fall together'".

"The two offences did not necessarily stand or fall together. As neither appellant's part in the affair could be identified, neither could be convicted of an offence which went beyond the common design to which he was a party. There was clearly a common design to rob, but that would not suffice to convict of murder unless the common design included the use of whatever force was necessary to achieve the robbers' object (or to permit escape without fear of subsequent identification) even if that involved killing, or the infliction of grievous bodily harm on the victim.

If the scope of the common design had been left to the jury in that way, they might still have concluded that it extended to the use of extreme force. It was clear that the plan envisaged that the victim's resistance should be rapidly overcome. The attack bore the hallmark of desperate men who knew that they had to act quickly, and the jury might have thought it utterly unreal that such men would make a pact to treat the victim gently, however much he struggled, and however long it took to subdue him. The jury had also had the advantage of seeing the appellants, and might have formed their own views as to whether the appellants would have scruples of that character. There must have been many cases where the jury felt driven to the conclusion that the raiders' common design extended to everything which in fact occurred in the course of the raid, but the question should be left to the jury, even if the defence had not raised it.

"Mr. Buzzard had invited their Lordships to consider substituting a verdict of manslaughter for murder under s. 3 of the Criminal Appeal Act, 1968. It was clear that a common design to use unlawful violence, short of the infliction of grievous bodily harm rendered all the co-adventurers guilty of manslaughter if the victim's death was an unexpected consequence of the carrying out of the design. Where, however, the victim's death was not a product of the common design but was attributable to one of the co-adventurers going beyond the scope of the design, by using violence which was intended to cause grievous bodily harm, the others were not responsible for that unauthorised act: *R. v. Anderson* (1966) 2 Q.B. 110.

In the present case, the degree of violence used against the victim showed a clear intention to inflict grievous bodily harm, and if that was within the common design, the proper verdict against all concerned was murder. But their Lordships could not say that the jury must have reached that conclusion, and they quashed both convictions for murder.

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Verdicts of manslaughter could not be substituted since, if a common design to inflict grievous bodily harm was excluded, the jury might well have concluded that the killing was the unauthorised act of one individual for which the co-adventurers were not responsible at all."

In my view, the circumstances of the instant case as detailed in the evidence of the witnesses cited earlier in this judgment, called for the kind of direction to the jury indicated in the judicial discussions and pronouncements in those cases; and it was then for them to decide whether what was done was part of the joint enterprise or went beyond it and was in fact an act unauthorised by that joint enterprise.

I have carefully examined the summing-up of the learned trial judge and have come to the conclusion that both on principle and authority it is, with great respect, inadequate in this regard. Here also the jury might have, upon a more adequate discussion and direction by the learned trial judge, come to the same conclusion; but it is impossible to tell.

Having regard to the view I take on the grounds I have analysed and discussed, I consider it unnecessary to express any opinion on the other grounds urged on behalf of the appellants, and conclude that the interests of justice would, in the circumstances, be best served by a re-trial of all three appellants.

Accordingly I would allow the appeals of all three appellants set aside the convictions and sentences, and order a re-trial of the appellants at the next sitting of the Demerara Assizes, pending which the appellants will remain in custody.

CRANE, J.A.: I agree with the judgment of the learned Chancellor. It is very helpful in showing the kind of directions which were necessary at the trial. I am sure it will be of inestimable assistance to the judge at the re-trial.

It is clear that the summing-up was one-sided in that it emphasised only one of the aspects of the case presented by the Crown which the evidence revealed viz., that the accused were necessarily acting in concert to commit the crime of murder and only murder; whereas the evidence was equally consistent with the view that the accused were originally bent on a common design to commit burglary without violence and that some one or more of them acted without the scope of their common purpose. In fact, nowhere in the summing-up have the defences of the accused Abdool Samad and Roy Ralph have been adequately left to the jury. The summing-up was defective because in the cautioned statements of both these accused which constituted the only admissible evidence of their participation in the crime, there is the statement by both of them that when they saw the old man Badloo and the deceased Mangri being tied and gagged, they intimated to the others that they wanted to leave the house and to dissociate themselves from what was going on in it. Abdool Samad said he told the

accused Abdul Salim that he wanted to leave, while the accused Roy Ralph said he actually left the building telling himself that the "thing" had trouble. What then was the effect of what these accused persons were saying in their statements which were also part of their defences? It seems to me they were clearly saying that they wanted no part in what they saw going on in the house; that they did not bargain for that; and that sort of thing was not within the scope of their concerted action. This, it appears to me was their defence which ought to have been thus fashioned and left to the jury: that though they had bargained to break and steal from the house at night, they did not bargain to kill, but the judge only left it to the jury to consider whether they had, in fact made the cautioned statements they gave which they denied making. The judge left to the jury to find out as a fact whether they did make them or not. Here was the vital part of the defence which I think, the judge missed. This rendered the trial unsatisfactory so far as the accused Abdool Samad and Roy Ralph are concerned.

With respect to the accused Abdul Salim, My Lord Chancellor has already given the reasons why his appeal succeeds. I agree with them and to the order of re-trial he proposes.

*Appeal allowed.
Re-trial ordered.*

HARRY PERSAUD, BHOLONAETH AND DOODNAETH v R.

[Court of Appeal (Luckhoo, C., Cummings, Crane JJ.A)
July 29, September 12, 1969.]

Criminal law—Robbery with violence—Acting in concert—Proper directions thereon.

Criminal law—Identification of accused—Primary means of identification facial—Whether need to resort to identification by gait.

The appellants were jointly charged with robbing Y with violence and in addition the appellant P was charged with indecent assault on Y. At an identification parade Y picked out the three appellants. Their defence was an alibi. The prosecution case was that at about 12.55 a.m. Y saw a man with a handkerchief tied on the lower part of his face, climb through her eastern bedroom window. She shouted and the man jumped on her bed demanding money and jewellery. Upon being told that she had none the man demanded "wife"—which she understood to be sexual intercourse. A struggle ensued and the man choked Y and began pulling down her panties. Y pulled the handkerchief from his face and recognised the man to be the

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appellant P whom she had known for three years. P pulled Y through the bedroom door where she was able to put on a light switch and was again able to see P's face. P immediately put off the light forced her down the steps and called to another man who came and Y recognised him as the appellant D. P handed over Y to D and went into the house and returned some thirty minutes later with loaded bags. P and D then made their escape through a paling and as they did so were joined by the appellant B who Y recognised, and who was, during the episode, standing beneath the window through which P entered the house. All the appellants were convicted of robbery with violence. On appeal it was argued (i) that the identification parade was not properly conducted because all members were in a sitting position whereas as Y had said that B was lame in gait, the members should have been made to walk and B identified in that manner, and (ii) that the jury ought to have been directed that mere presence of B did not necessarily lead to the conclusion that he had agreed to participate in a robbery with violence because he may have agreed to have been party only to a common design to steal.

HELD: — that (i) the identification parade was properly conducted. Y's identification of the appellants rested on facial characteristics. There was no need for her to resort to evidence of B's gait which was the secondary means of identification.

(ii) B's presence at the scene was not necessarily consistent with the view that his intention was to participate in the crime of robbery with violence. His presence may have been with the intention only to burgle the house and this question ought to have been left to the jury in the light of the evidence.

*Appeal of the second appellant allowed.
Appeal of first and third appellants dismissed.*

J.O.F. Haynes Q.C. for the appellants.

W.G. Persaud for the Crown.

At the invitation of LUCKHOO, C, CRANE, J.A. delivered the first judgment.

CRANE, J.A.: In the early hours of the morning of the 2nd May, 1968, Iris Young of Mon Repos, East Coast, Demerara, was indecently assaulted and robbed. It was about 12.55 a.m. when she saw an East Indian man climbing through her eastern bedroom window. A handkerchief was tied on the lower portion of his face and he was clad in a shirt and a pair of short pants. She shouted "thief and simultaneously the man jumped into her bed, held her mouth and warned her not to shout or shoot. In the course of the ensuing struggle, the man demanded money and jewellery, and when Young told him she had neither, he pulled at a Chinese type bangle she was wearing, expressing the opinion that it was valueless and that if he could not get jewellery he wanted "wife". Meanwhile, as the struggle continued the

man began to pull down her panties, to choke her, insisting he wanted "wife", by which she understood him to mean he was desirous of sexual intercourse, particularly as his penis was out of his pants.

Young and the man fell off the bed on to the floor where she managed to pull the handkerchief from the covered face. It was then that she recognised the man as the first appellant Harry Persaud, whom she had known for some three years, though not by name, and whom she had seen drinking beer in company with the second appellant in her shop premises below on the day before. The struggle continued all over the room, for Young was not easily to be overcome. Persaud then pulled her through the bedroom door near to where there was a light-switch which she put on. This enabled her to see his face again; but Persaud immediately extinguished it before forcing her by the neck down the steps leading to her yard, where he called for one Baba whom she recognised as the third appellant, Doodnauth. Persaud told Baba to bring a pipe-gun which he, Persaud, forced into her ribs and left her in Baba's care while he went back upstairs. Some thirty minutes later he returned carrying some heavy objects looking like a pillow-sack in one hand, and a parcel in the other. Both men then made their escape through the northern paling of the compound and, as they did so, were joined by the second appellant, Bholonauth, who was standing all the while beneath the same eastern window through which Persaud had secured entry into Young's house.

In view of the common defence of *alibi* which has been raised by all three appellants, with its concomitant mistaken identity, it is important to observe that Young insisted that she had seen the faces of all three appellants on the morning of the robbery.

After the three appellants left with their booty, Young reported what occurred to her neighbour Seecharran Premasukh, whose speedy action it was that led to the arrest, first, of the appellants Persaud and Bholonauth, who were found together in the same house some 21/2 hours later, and, secondly, of Doodnauth on the following morning, and their joint arraignment on the count of robbery with violence, and of Harry Persaud on the count of indecently assaulting Iris Young. Premasukh was, in fact, almost an eye-witness to what took place, because it was while sitting in a parked car on the public road on the night in question he saw the three appellants standing at first on the Mon Repos bridge next to Young's residence about 25 minutes before the robbery took place. Shortly after, he heard shouts of "Thief and saw them running out from the northern fence of Young's yard across the road in front of him. Premasukh's evidence, which the jury appeared to have accepted, is thus corroborative of the complainant Young's in two most important respects: (a) the identity of the appellants, and (b) the fact that they ran out of her northern fence.

As I have indicated, the defence of mistaken identity is common to all the appellants. This springs from the fact that they all led alibis with a view to showing they were not at the scene of the crime at the time of its

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commission, coupled with the fact that each was picked out at an identification parade held on the afternoon of the day following the robbery. Objections were made that the parade was unfairly conducted, by the appellants at the trial, and by counsel on their behalf before us. At the trial, the appellants complained that no attempt was made to insulate them from the identifying witness, Iris Young, at the police station before the parade, but that they were exposed to her full view just before it was conducted. Moreover, as they were on their way to the parade room, their respective identities were revealed by the police loudly and derogatively referring to their sobriquets, "Rice Dust," "One-Eye" and "Limpy" in the presence of Iris Young, who was fully acquainted with those names and so could have easily identified them thereby. Before us, counsel for the appellants contended that the parade was not conducted in such a manner as likely to lead to the detection of the persons whom the evidence properly described as the perpetrators. For example, the appellant Bholonauth was described by Iris Young as lame in gait, yet the parade was conducted with all members in a sitting posture, the suggestion being that Bholonauth ought to have been made to walk and so identified in that manner. Here, I would only observe that Young saw the faces of all three appellants at the time; so that if her identification of them rested on facial characteristics, then, so far as she was concerned, what need was there for the members who composed the parade to stand? The predominant feature in the identification was the facial characteristic. That was the mode that would surely take precedence over all other methods. Bholonauth's facial appearance was the primary means of identification. There was no need, it seems, for her to resort to evidence of his gait which was secondary.

Moreover, counsel drew to our attention what appears to be a material conflict in the evidence in the testimony of prosecution witnesses Young and Preamsukh on the point of identification. He asked us to say that the verdict was unreasonable because it is evident that Young did not speak the truth, and that she was trimming her evidence to suit Preamsukh's. It will be recalled, Young definitely recognised all the appellants as the men who were concerned with robbing her, and that Preamsukh saw their faces before and after the incident as they ran out from Young's northern paling. However, Preamsukh, to whom she had first reported the matter, is positive that Young did not tell him how many persons she recognised, though she told him she recognised only the appellant Persaud. It is clear, however that what Preamsukh meant was that Young had described to him only the appellant Persaud, because Young told the jury she did not know the names of the appellants. There was consistency on this, we must observe, because she had told the police that the man she saw in her room was one from whom she was accustomed to buy 'rice dust'. She was describing him as "Rice Dust," quite distinctly from his real name which was unknown to her. In other words, Young was explaining to the jury that she gave the police a description of the man whom she saw in her room that night, in the same way as Preamsukh said she had given it to him very shortly afterwards – "that the 'rice dust' man who was drinking beer at her shop the day before went into

her house and robbed her along with two other persons." So that when Premasukh on his recall told the jury that "Iris Young did tell me that she 'recognised' only the No. 1 accused," it must have been clear to them that Young, in the light of the evidence led, must have meant by using the word "recognised" that she was only able to "describe" one appellant, viz., Persaud. But the learned trial judge, in dealing with this aspect of the matter, left it to the jury this way:

"Premasukh was recalled and he said that Iris Young did not tell him how many persons she recognised. Iris Young did tell him that she recognised only the number one accused. Well, if Young said she recognised the number one accused, is she speaking the truth now when she says that she recognised all three accused? "

The judge simply left the matter to the jury as an issue of fact as to whether Young was speaking the truth or not, and a unanimous verdict of "Guilty" was the answer to that specific question. So that in arriving at that verdict, it is reasonable to suppose that they must have been instilled by a belief in the truth of what Young said concerning the identity of the appellants as her robbers. Without speculating on the reason for their verdict, we think the jury must have felt sure there could have been no mistake by her whatever in that regard, and that they could properly rely on the foundation of the Crown's case, which the evidence supported, namely, that Harry Persaud was the actual perpetrator of the crime, which was the result of a joint enterprise in which the two others assisted him with a common intention of bringing it to fruition in the manner described.

In our opinion, there is no substance in either the contentions of mistaken identity and the improper conduct of the identification parade on which the appellants were arraigned. We think there can be no valid ground of complaint in the point made that Premasukh did not identify the appellants at the parade but from the dock, for if indeed the prosecution accepted, as they appeared to have done, the fact that Premasukh knew the three appellants for about three years before the incident and recognised them at the scene of the crime, there was no need, as there was in the case of the woman Young, for him to have attended the parade as a witness. Whether or not a man is properly identified will always remain a question of fact for a jury to decide, being a question of fact. [See per Lord PARKER, C.J., in *R. v Roads*, (1967) 2 All E.R. pp. 84, 85].

The judge, at p. 81 of the record, informed the jury of the reason why such a parade becomes necessary and that its purpose was to strengthen Young's testimony on the point of identification; but he quite properly left it open to them to disregard it if they thought it was a farce, i.e., if they believed the evidence of the appellants as to the manner in which it was conducted. We can find no fault with this direction nor with the conduct of the parade which, from the evidence led, was conducted in the prescribed manner.

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On behalf of the appellant Bholonauth, it was contended that there was no direct evidence that he participated in the robbery with violence as a principal in the first degree; that his conviction can only be justified on evidence which showed that by his presence in the yard he aided and abetted the robbery with violence; and there was no evidence of this. Even if the jury accepted that he was present at the scene under the eastern window they ought to have been directed that his mere presence did not necessarily lead to the conclusion that he had agreed to participate in a robbery with violence, because he may well have agreed to have been party only to a common design to steal from the house and was prepared to aid and abet only to that extent. The contention is that the jury ought to have been so informed, but were not, and that they were entitled to find him guilty of the crime charged only if they felt sure he was party to a common design to rob with violence; and there was no evidence of this.

Briefly, it will be recalled that the evidence against Bholonauth is that he was seen by Young under her eastern window, that he joined the other two appellants as they ran off through her northern fence with their booty, and that he was seen by Premasukh in company with them both immediately before and after the crime, to emerge from the same northern fence with the other two. Without doubt, Bholonauth's position is correctly classified as a principal in the second degree, that is to say, an aider and abettor, "the man in whose mind lay the latest blameable mental cause of the criminal act." As Professor KENNY so fittingly puts it:

"A man may effectively aid and abet a crime, and at the very moment of its perpetration without being present at the place where it is perpetrated. Thus, when 'A' is inside a house, committing burglary, 'B' and 'C' may be waiting outside, ready to help him in carrying off the plunder or to protect him by giving warning of the approach of the police." ("OUTLINES OF CRIMINAL LAW," 15th Ed., p. 99).

The question which arises, however, is whether from these facts Bholonauth can properly be said to have been acting in concert, i.e., with the agreed purpose of committing the crime for which he was convicted, even if the jury's verdict in relation to the appellants Persaud and Doodnauth can be sustained. It seems to us that for this to be so, a careful direction to the jury on this aspect was very essential if injustice was not to be done, particularly, as Bholonauth had elicited from the complaint in his cross-examination of her that he, personally, had done her nothing. There is the fact, too, that the evidence does not reveal that he gave any active assistance or encouragement by words or conduct, to either Persaud or Doodnauth, who was violently holding Young while Persaud rifled her bedroom above of its personal effects. All that is revealed is that he remained a passive spectator who entered the premises with the other two and who ran out behind them through the northern fence, limping as he did so. There were no overt acts or words manifesting any criminal intention, or other indications of any

tendency towards the accomplishment of any criminal object other than to assist in the burglary of Young's house, which does not essentially involve violence to the person as does robbery.

On this very vital matter of acting in concert, the trial judge directed as follows:

"As I understand the case for the Crown, what is being said is that the three accused were acting in concert, that is, that they were acting together with a common purpose or design in the case of the first count of the indictment to rob this woman Young.

"If you find they were so acting, that they had a common design and a common purpose to rob Young, then despite the fact that one or more played a minor role he is as guilty as the others because if they are acting in concert, if they are acting together with the common purpose, common design—to rob, if they were acting together to rob this woman Young, then, I repeat, it does not matter if one of them played a minor role. If, from the evidence in this case, if you accept it, you may want to come to the conclusion that the second-named accused person did in fact play a minor role. But this by itself is no reason to acquit because if you find that the three of them were acting together with this common purpose to rob this woman Young, altogether one of them, to wit, the number one accused, played the most active part then all of them would still be guilty."

In our view this passage contains the germ of a serious misdirection. There has been no attempt by the judge to explain to the (jury the concept of "acting in concert" in relation to the factual background and realities of the case. The theory of so acting was only explained from one angle, namely, from the standpoint of the offence of robbery with violence. We find the summing-up is deficient in the respect that it over-looked another possibility, a consideration of which, the evidence clearly invited, namely, that Bholonauth's presence at the scene was not necessarily consistent with the view that his intention was to participate in the crime of robbery with violence. This was not the only interpretation that could reasonably be put on his presence there, for though it is impossible to put an innocent interpretation in the circumstances upon his trespassing on Young's premises in the dead of night, the possibility was not canvassed before the jury that Bholonauth's participation in the crime may have been limited to the crime of burglary simply, and not burglary with violence or robbery with violence. We think this is not altogether outside the realm of possibility because, although quite close at hand when it was needed, he gave no assistance to Doodnauth during the struggle which continued while Young was being held in the yard; and although the judge appeared to have recognised the "minor role" played by Bholonauth, we feel it was clearly a non-direction amounting to a misdirection for him to have told the jury they would not be justified on that account in acquitting him once they found he was acting in concert

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with the others to rob Young without leaving it to them to say whether Bholonauth's mere presence, which was the minor role played by him, was sufficient to sustain the verdict.

It was only last week in the case of *Abdool Samad et al v R.* (Criminal Appeals Nos. 24 – 26 of 1968, dated 5th September, 1969) (see elsewhere in this volume) that this Court had occasion to deal with the question of what constitutes the proper direction to the jury in a case where a principal in the second degree aids and abets by his presence. I think what LUCK-HOO, C., said about the trial judge's duty in directing the jury to investigate the innocence of an accused person's presence at the scene of the crime is most relevant here. His Lordship said:

"It was the duty of the trial judge to put each and every favourable aspect which arose or appeared to arise, as would matters which gave rise to other inferences tending to manifest guilt. As for example, he might ask the jury to investigate how far Samad's presence was innocent by considering these matters."

In like manner, we think it was the judge's duty, at least so far as the appellant Bholonauth was concerned, to direct that before it could be said that he acted in concert to the crime of robbery with violence, it had to be shown by the evidence that he either specifically or by reasonable inference, agreed to the use of such force or violence as was used, that he had knowledge that force or violence was going to be used, or was reasonably anticipated. See *R. v Smith*, (1963) 3 All E.R. 597, where knowledge by one accused of the possession of a knife and its use by another accused was a circumstance which, from the evidence, could have been reasonably anticipated, and, hence, to have been within the scope of the concerted action.

It was very necessary for the prosecution to prove a common design to do the very act which forms the subject-matter of the charge, or that Bholonauth could have reasonably anticipated the robbery with violence, before it can be said he was properly convicted. By way of example: Suppose Harry Persaud had succeeded in criminally assaulting Young in her bedroom that night, a joinder of the other two appellants on such an assault charge could hardly have been justified. This must be so, for the evidence does not permit of the drawing of any legitimate inference that they had knowledge of or the likelihood of Harry Persaud's intention to assault Young. Such assault would have been entirely without the ambit of the concerted action. If they had, or could be deemed to have had, only then their joinder would have been proper and permissible. It was this principle that the prosecution appeared to have realised when it charged Persaud alone on the second count of the indictment for indecently assaulting Young on which charge the jury were disagreed.

If, therefore, on this hypothesis there can be no justification for saying that Bholonauth acted in concert to the indecent assault, how can it be

reasonably said that by his mere presence he has acted in concert with the two others to rob her with violence? Whence did he acquire the requisite knowledge that a crime of violence was contemplated? Where can evidence of it be inferred? The position is wholly different in the case of the appellants Persaud and Doodnauth. The roles played by each are clearly discernible. The evidence is that they were directly involved in doing violence to Young; theirs was not mere presence at the scene of the crime, but active participation in it with a will that its purpose, come what may, would not be frustrated. Not so Bholonauth, who the complainant herself had to admit, did nothing to her at any time. So that the question is of paramount importance: Was his participation with an intent merely to burgle the house, i.e., to commit a non-violent crime as far as the person was concerned, or to break in at night-time and steal therefrom, or to perpetrate burglary with violence or any other crime of violence? This was the question which the trial judge ought to have left to the jury in the light of the evidence. As WIDGERY, L.J., in the very recent case of *R. v Lovesay & Peterson*, (1969) 2 All E.R. at p. 1079 so capably expressed it:

"There must, in our view, be many cases of this kind where the jury feel driven to the conclusion that the raiders' common design extended to everything which in fact occurred in the course of the raid, but the question must be left to the jury because it is a matter for them to decide, and this is so notwithstanding that the point was not raised by the defence."

The trial judge's failure to do so is, we consider, a fatal misdirection, and, in the result, the appeal will be allowed and the conviction and sentence set aside with respect to the appellant Bholonauth.

The appeals of Harry Persaud and Doodnauth are dismissed and their convictions and sentences will stand affirmed.

LUCKHOO, C.: I concur.

CUMMINGS, J.A.: The three appellants were indicted for the offence of robbery with violence. No. 1 appellant was also indicted for indecent assault.

The evidence adduced by the prosecution revealed that the virtual prosecutrix, Iris Young, retired to bed at about 10.15 p.m. on 1st May, 1968. She had a kerosene lantern burning in the bedroom near to the eastern window thereof, which she had left open. At about 12.55 a.m. she heard a rustling at the open window and saw an East Indian man wearing a handkerchief on the lower portion of his face and clad in a shirt and short pants, come through the window. She shouted for "thief but simultaneously the man jumped into her bed and held her mouth and hand saying, "Don't shout or shoot." She struggled with him. He asked for jewellery, she said she had none, and after pulling at a bangle she had on which he said was worth nothing, he said he wanted "wife".

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A struggle ensued during which he took out his penis and tried to pull down her panties. She managed to get up, took the handkerchief from his face and recognised the No. 1 appellant. She said she saw his face several times during the struggle which continued. He pulled her downstairs and then called the No. 3 appellant who came to his assistance and held her. She recognised the No. 3 appellant. No. 1 then returned upstairs. She recognised No. 2 appellant coming from a spot under the eastern window. The three appellants later made good their escape, No. 1 carrying with him some loaded bags. When she returned upstairs and checked her things, she found over \$1,500 in cash and a quantity of jewellery missing.

One Preamsukh gave evidence in support of the virtual prosecutrix who said she had gone over to his place and told him of the incident. He said he chased the appellants in his brother's car and clearly recognised them, but he said that Young had said at the time that she had only recognised the No. 1 appellant.

At an identification parade held shortly after the incident, Young picked out all three appellants.

The jury found all three appellants guilty of robbery with violence, and the Nos. 1 and 3 appellants were sentenced to eight years' imprisonment and a whipping of twelve strokes, and No. 2 to five years' imprisonment. The Crown entered a *nolle prosequi* in respect of the second count against the No. 1 appellant.

The appellants appealed on the grounds that the verdict of the jury was unreasonable having regard to the conflict of evidence on identification, and that the trial judge's direction with regard to aiding and abetting in a common design was inadequate.

It is true that on the important question of identification, the evidence established that the virtual prosecutrix did not tell the witness Preamsukh how many persons she had recognised and did, in fact, say that she had only recognised the No. 1 appellant. The learned trial judge put this to the jury in the following manner:

"Preamsukh was recalled and he said that Iris Young did not tell him how many persons she recognised. Iris Young did tell him that she recognised only the No. 1 accused. Well, if Young said she recognised the No. 1 accused, is she speaking the truth now when she says that she recognised all three accused? This is the evidence led by the prosecution."

Even if there was room for doubt on this aspect of the case, having regard to the conflict in the evidence of these two witnesses, leaving the impression that the jury's verdict was unreasonable, the fact that an identification parade was held and that the virtual prosecutrix Iris Young identified the three appellants positively and definitely, must have weighed heavily on the minds of the jury.

I have carefully examined the evidence of the witnesses who testified with respect to the identification parade, and cannot agree with the submission of counsel that the identification parade was a farce. Also Young referred to certain physical characteristics of the appellants in her evidence as to recognition on the night in question. At the parade of the appellants it is clear that her recognition then was based on facial characteristics. It was clearly open to the jury to find on all the evidence, notwithstanding the conflict, that Young was positive about her identification of the appellants.

No doubt, the jury must also have taken into consideration the manner and the demeanour of the witnesses Young and Premasukh, elements which this court can never recapture. The question of identity is one of fact, and the learned trial judge put this issue fully and clearly to the jury. Although, perhaps, a different conclusion could be reached by another tribunal, I can see no reason, in these circumstances, for arriving at the view that the verdict of the jury is unreasonable.

With regard to the case against the No. 2 appellant, he ought only to have been found guilty if the jury, upon an adequate direction of the law relating to participation in common design, had come to the conclusion that the common design was not only to steal but to accomplish that purpose by using all force that became necessary, and that No. 2 appellant participated. To establish this, there must be evidence, circumstantial or direct, indicating that the use of such force had been preconceived as part of the design with the concurrence of the No. 2 appellant. What, then, was the evidence against the No. 2 appellant? He was seen in company with the No. 1 and No. 3 appellants earlier during the same day, shortly after the incident to come from under a window of the house in which the incident took place, to leave the premises in company with the other two appellants, and was also seen running away with them. All that this established is his presence, but whether or not more was established was, upon a proper direction, a question for the jury. The learned trial judge told the jury:

"As I understand the case for the Crown what is being said is that the three accused were acting in concert, that is, that they were acting together with a common purpose or design in the case of the first count of the indictment to rob this woman Young.

"If you find they were so acting, that they had a common design and a common purpose to rob Young, then despite the fact that one or more played a minor role he is as guilty as the others because if they are acting in concert, if they are acting together to rob this woman Young, then, I repeat, it does not matter if one of them played a minor role. If, from the evidence in this case, if you accept it, you may want to come to the conclusion that the second-named accused person did in fact play a minor role. But this by itself is no reason to acquit because if you find that the three of them were acting together with this

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common purpose to rob this woman Young, altogether one of them, to wit, the number one accused, played the most active part then all of them would still be guilty."

Nowhere did he tell them that mere presence was not enough, that it was open to them to find that he was present through curiosity, or that he was participating in a common design to steal but may not have had knowledge of and was not participating in the use of violence, and that if they so found he was entitled to acquittal on the charge as laid. This topic was discussed at length in this court in the recent case of *Abdool Samad et al v R.* (Crim. Apps. Nos. 24, 25 & 26 of 1968). See also *R. v Anderson & Morris*, (1966) 2 All E.R. 644 and *R. v Lovesay & Peterson* reported in the *Times Newspaper* of May 14, 1969, p. 13.

In the instant case I am satisfied that it was not open to a reasonable jury upon a proper direction to return a verdict of "Guilty" against the No. 2 appellant. Consequently, I would allow the appeal of No. 2 appellant and set aside his conviction and sentence. For the reasons set out above, I would dismiss the appeals of Nos. 1 and 3 appellants and affirm the conviction and sentence of the learned trial judge.

*Appeal of the second appellant allowed.
Appeal of the first and third appellants dismissed.*

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[Court of Appeal (Luckhoo, C, Cummings, Crane JJ.A.).
July 2, September 12, 1969.]

Appeal—Summary jurisdiction—Failure to file notice of grounds—Preliminary objection—Extension of time sought to comply—Must be considered on merits—Summary Jurisdiction (Appeals) Ordinance Cap. 17 s. 13(2), 14—Summary Jurisdiction (Appeals) (Amendment) Ordinance 1955 No. 29.

Appeal—From Full Court to Court of Appeal—Power of Court of Appeal to remit matter direct to magistrate from whom appeal brought—Federal Supreme Court (Appeals) Ordinance 1958 s. 33 (3).

The appellant was convicted by a magistrate of fraudulent misappropriation and appealed to the Full Court where the respondent took the preliminary objection that the appellant had failed to comply with s. 13 (2) of the Summary Jurisdiction (Appeals) Ordinance in that he had not included his notice of grounds of appeal in the two additional copies of the record he

had lodged for the use of the Court. The appellant thereupon sought an extension of time within which to comply, but the Full Court refused this, upheld the preliminary objection, and dismissed the appeal, holding that an extension of time will not be granted if the application is made after the appeal has been entered on the hearing list. On appeal.

HELD: (i) that an application for an extension of time or for leave to perform an act may be made at any stage of the proceedings, either before or at the hearing and each application must be treated on its merits.

(ii) that the Court of Appeal has power to remit the matter direct to the magistrate without the intervention of the Full Court.

Appeal allowed.—Matter remitted to magistrate to be tried de novo.

P. S. Britton for the appellant

J. C. Gonsalves-Sabola for the respondent.

CRANE, J.A., delivered the judgment of the court: This appeal raises a point of much practical importance in relation to appeals before the Full Court. It is concerned with the true consideration of s. 14 of the Summary Jurisdiction (Appeals) (Amendment) Ordinance, 1955. What is the position of an applicant thereunder? Is he entitled to be considered for the grant of an extension of time within which to do an act or leave to perform one if he makes an application therefor for the first time in court when his default is brought to attention by an objection *in limine* from the respondent?

In *Wieting & Richter Ltd. v. Paul & Abrams* (Civil Appeal No. 36/1968, dated November 15, 1968), we have already expressed our views somewhat on this matter, though only *obiter*. In that case, after considering s. 14 of the principal ordinance in relation to the amended provisions and applying the theory of non-abrogation of the vested right in subsequent statutes *in pari materia*, we expressed the view that the right of an applicant to an enlargement of time was extended under the amended ordinance to include acts required to be done after the launching of an appeal when an applicant became an appellant *stricto sensu*. On that occasion we were compelled to refuse the appellant leave to apply for the grant of an extension of time to deposit security of \$3 for the due prosecution of the appeal for the reason that no application had been made therefor to the Full Court, as is provided by s. 14 (1) of the ordinance. In truth, even though we have it in our power to make any order which the Full Court ought properly to have made, we are not empowered to exercise its discretion, and so could not make the grant. It is only in a case like the present where the Full Court has improperly refused or failed to exercise its discretion to make the grant or give leave, could we ourselves do so. However, now there has been indeed such an application before that court which has been rejected, the question of the present appellant's right to be considered for the grant properly arises for our consideration.

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On November 2, 1968, the Full Court of the High Court dismissed an appeal from the decision of a magistrate convicting the appellant of fraudulent misappropriation, contrary to s. 92 (1) (b) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14.

The Full Court did not decide the matter on its merits. It did so on a preliminary objection of the respondent. The objection was that the appellant had failed to comply with s. 13 (2) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, in the respect that he had not included his notice of grounds of appeal in the two additional copies of the record for use of the court. Under that sub-section it was obligatory on him to lodge two additional copies of the record containing such notice with the Registrar within ten days of being notified to that effect.

Replying to the preliminary objection, the appellant thereupon sought and obtained leave to file a motion seeking an extension of time within which to comply. This request was granted, but in the view which the Full Court subsequently expressed on the matter, one wonders why it did allow the application to be made at all, for at a resumed hearing that court "had no hesitation" in refusing it. Its reason for refusal are best set out *verbatim*.

"This court had no hesitation in refusing the application for an extension of time, as this court held on a number of occasions that section 14 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 17, as repealed and re-enacted by Section 2 of the Summary Jurisdiction (Appeals) (Amendment) Ordinance, 1955 (No. 29) was never intended to cover cases of this kind where an act in relation to an appeal has already been performed out of the required time, or not in the prescribed manner, and then after a preliminary objection taken, counsel for the appellant seeks to do what he should have done in the first instance. It is the view of this court that section 14 of ordinance No. 29 of 1955 contemplates and was intended to cover cases where an appellant, in the preparation of his appeal, has failed to perform an act in relation to the appeal within the required time or in the prescribed manner because of some genuine reason or excuse, which would result in the appeal being deemed abandoned under section 16 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 17. In such a case the appellant could then approach the court and make application for an extension of time to perform the act within the required time or in the prescribed manner, in respect of the appeal which is sought to be brought and not an appeal which has already been brought, having been already entered on the hearing list by the Registrar.

This court conceives it as its duty to say that it is no part of the function or duty of an appellate Court to encourage appeals which do not comply with the provisions of the Summary Jurisdiction (Appeals) Ordinance and the direction given therein. That function must be reserved for the Legislature."

We must, however, respectfully dissent from these reasons. We consider them erroneous, and that is why we hasten to correct what is so patently expressed in the excerpt above as the view consistently held and applied by the Full Court to applications for extensions of time within which an act can be performed or for leave to perform one in a prescribed manner.

Before approaching the determination of this matter, I will commence with the observation that, as its short title indicates, ordinance No. 29/1955 is an amending statute.

"1. This ordinance may be cited as the Summary Jurisdiction (Appeals) (Amendment) Ordinance, 1955, and shall be construed and read as one with the Summary Jurisdiction (Appeals) Ordinance, hereinafter referred to as the principal ordinance, and any ordinance amending the same.

2. Section 14 of the Principal Ordinance is hereby repealed and the following substituted therefor –

"14. (1) Notwithstanding the provisions of section sixteen of this ordinance, any person who has failed to comply with any of the provisions of the ordinance limiting the period of time within which, or prescribing the manner in which any act shall be performed, may apply to the court for an extension of the period of time within which such act shall be performed or for leave to perform such act in the prescribed manner and in his application shall state fully the reason for his failure to comply with such provision or provisions and the grounds on which he considers he should be given such extension of the period of time or leave.

"(2) If satisfied that in all the circumstances it would be just and proper so to do, the court may grant such extension of the period of time or leave on any terms and conditions it may think just, including terms and conditions as to the payment of costs:

"Provided that no such extension of the period of time or leave shall be granted unless the opposite party has had an opportunity of being heard on the application and, if the court thinks fit, of adducing evidence against the granting of the application.

"(3) In exercising its discretion whether to grant or to refuse an application under this section, the court shall have regard to the following matters and circumstances –

- (a) whether *prima facie* the appeal sought to be brought has merit;
- (b) whether the exhibits, documentary or otherwise, admitted in evidence in the case by the magistrate which in the opinion of the court are necessary for the determination of the appeal sought to be brought, if already returned by the

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magistrate to the parties entitled to the possession thereof, can be returned to the magistrate for the purposes of the appeal;

- (c) such other matters or circumstances as the court thinks just and proper to take into consideration in the exercise of such discretion."

It amends by repealing and re-enacting section 14 of the Principal Ordinance which dealt with applications for "special leave to appeal", and substitutes therefor a broader based and entirely reconstructed s. 14. The questions will immediately arise: Why was the repeal and re-enactment necessary? What were the motivating factors that inspired legislative reform? The solution is obviously to be found in the construction of the enactment in the light of its historical antecedents. It therefore appears that the four questions in *Heydon's case*, 1584 3 Co. Rep. 7b, bear relevance, viz.:

- (1) What was the law before the Act was passed?
- (2) What was the mischief or defect for which the law had not provided?
- (3) What remedy Parliament had appointed, and
- (4) The reason of the remedy?

Accordingly, it is in this vein and with the following precautions which JESSEL, M.R., had in mind in *Holme v. Guy*, (1877) 5 Ch. D. 901, 905, that I will attempt to elucidate the matter.

"The court is not to be oblivious . . . of the history of law and legislation. Although the court is not at liberty to construe an Act of Parliament by the motives which influence the legislature, yet *when the history of law and legislation tells the court; and prior judgments tell this present court; what the object of the legislature was*, the court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view to finding out what it means, and not with a view to extending it to something that was not intended."

When one compares the substituted section with its predecessor, one sees right from the start that it is a more remedial and detailed provision; one that accords the court greater scope and freedom to do equity in the individual case than had hitherto existed. There is today a discretion to grant or refuse an extension where formerly there was none; particularly that given the court if it is satisfied that in all the circumstances of the case the application is a just and proper one. The court may now do so on any such terms as is considered just, including the payment of costs. Without doubt, this is an extremely wide provision because, under the repealed section, relief was restricted to the applicant's ability to show he was "unavoidably prevented" from appealing in the manner or within the time specified. The *onus* was of course on him to do so, but there was no power in the court to grant him an extension because, under the repealed section, a person "entitled to appeal"

was not *ex jure* an appellant; his entitlement to "special leave to appeal" was only granted if he showed he was unavoidably prevented from giving notice of appeal, i.e., from taking the very first in the chain of steps necessary for invoking the jurisdiction of the Full Court. Before he took that step, i.e., gave notice of appeal, he was only a person entitled to appeal. In short, relief under the repealed section was not then open to an appellant. This is how the majority judgment in *Sharples v. Lawrence*, (1951) L.R.B.G. 36 interpreted the repealed section, and, I think, quite rightly, because a person only becomes an appellant "when he formally gives notice to the opposite party of his intention to appeal although he does not in fact comply with the conditions precedent required to bring the appeal on for hearing." There was positively no relevance between the grant of special leave to appeal and the grant of an extension of time to appeal, because the latter simply did not exist under the repealed provision.

Not so, however, under the revised section. All that an applicant (who now includes an appellant) has to do thereunder is to state fully his reasons for failure to comply, or the grounds on which he considers he should be given such extension of time or leave which he seeks, and it will then be left to the Full Court to exercise its statutory discretion, within the spirit and along the lines set out in s. 14 (3). Under the repealed section the court has no discretion whatever to grant relief to cases falling outside of what amounted to being "unavoidably prevented" from appealing. There was no power to grant an extension of time. It was this backward state of affairs which called for remedy and was often the lament of judges in times gone by when they saw themselves unable to apply the principle of "the equity of a statute" to s. 14 just because it did not exist.

A case of hardship very much akin to the facts of the present appeal was the notorious *Slater v. Wieting & Richter*, (1942) L.R.B.G. 420. There, an appellant filed a motion for an extension of time to lodge with the Registrar the two additional copies of the record for the use of the court at the hearing of the appeal, as required by s. 13 (2). It was held by no less a judge than VERITY, C.J., that the appellant had made default in the due prosecution of his appeal and by virtue of s. 16 (1), he was deemed to have abandoned it. However, the learned Chief Justice thought it proper to express these sentiments in the ultimate paragraph of his judgment:

"We have come to this conclusion with reluctance and regret. Statutory provision for the supply of additional copies of the record within a specified and limited time for use of the court as a condition precedent to the prosecution of an appeal is, we believe, unusual and is, in our view, undesirable. While it is convenient and desirable that such should be supplied before hearing, the court may, by its rules, prescribe the time within which the step is to be taken and where such time is so prescribed may always for sufficient cause grant an extension.

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It is otherwise when the time is prescribed by statute and no provision made for its extension. We would draw this aspect of the matter to the attention of the proper authorities for we are of the opinion that it is most undesirable that an appellant should lose his right of appeal by reason only of failure to comply with a requirement aimed solely at securing the convenience of the court."

Slater's case was cited with approval on this point in *Sharpies v. Lawrence*, (1951) L.R.B.G. 36, 37, by WORLEY, C.J., than whom there is no more respected authority locally on questions of legal principle and the Civil Law. Obviously, the view taken by these distinguished judges was that an appellant's failure to file the two copies of the record after having complied with the ordinance in every other respect could hardly be properly considered a default in the due prosecution of his appeal. They considered those two extra copies of the record were intended merely for the "convenience of the court". It is important to note, too, that in both those cases the judges attracted the attention of the "proper authorities" (the law officers) to the inequity of the situation. There were besides, several other unreported judicial appeals calling for legislative intervention. Relief eventually came. The result was the enactment of ordinance No. 29/1955.

I have thus reviewed the position in which the law stood with its attendant defects in the year 1955 and prior thereto. S. 14, as remodelled and re-enacted, was the means granted by the Legislature to suppress the mischief and advance the remedy.

Now, with the history of the legislation and judicial outcries for ameliorating the situation in mind, coupled with the clear discretion given the court in the matter at the present day, it is obvious, I think, that the Full Court's approach was the wrong one. It is evident that we have moved a long way away from *Slater v. Wieting & Richter*. It is obvious, too, that today other things being equal, first and foremost we look to see whether the appeal which it is sought to have entertained by the court has merit. There was, however, no such approach to the matter by the Full Court which considered that it was a condition precedent to the entertaining of the application that it should be made "before the appeal is entered on the hearing list". In other words, the view of that court clearly is that the application can in no circumstances be entertained in court after an objection *in limine*. I believe, however, that this is where error was made, because there is really no such restraint imposed by s. 14(1) as revised and re-enacted. In the absence of very clear words in the section to that effect, I would be very hesitant so to hold, for that would be repugnant to the very spirit and intendment of that section. Be it noted that both the historical and case law aspects of interpretation which I have reviewed strongly suggest that the purpose of the amending ordinance, No. 29/1955, was intended to remedy the injustice revealed in the case of *Slater v. Wieting & Richter*. But if, indeed, that case did lay bare a genuine case of hardship worthy of remedy, the instant case is an *a fortiori* one. I think so because while in *Slater's case* the appellant's default

was a failure to file the two copies of the record, in the instant case the default is a failure to file merely a part of those two copies, namely, the notice of grounds of appeal. It seems to us that all the appellant was asking in his motion, which the Full Court, despite its preconceived view in the matter, allowed him to move, was to be allowed to file two copies of his grounds of appeal; but the court would not permit it. The Full Court had no hesitation in refusing his application for a reason which appears to be a *chose jugée*, viz., that "on a number of occasions" the court held that the ordinance was never intended to cover such cases. If this was so, one wonders why that court did give leave to the appellant to file his motion in the first place.

But we have already indicated this is an erroneous view. We think the correct approach to a matter of this sort is to treat each application under s. 14 on its merits, and to construe it in the spirit which brought about its enactment, due regard being had to the merits of the appeal which it is sought to have reviewed. Whether the application is for an extension of time or for leave to perform an act, it may be made at any stage of the proceedings. This is so irrespective of whether it is made before or at the time of hearing, i.e., whether the applicant knew of the defect it is sought to have remedied before he came to court, or whether he knew of it for the first time in court at the hearing. In such a case the court, in considering whether to grant it, may have regard to any terms and conditions it thinks proper to impose, including the payment of costs.

There is one final observation we would wish to make. At the conclusion of the day's hearing, we took the seemingly unusual course of allowing the appeal from the conviction and sentence of the magistrate and remitting the case of him with the direction to adjudicate afresh after he ensures that the appellant is made aware of the nature of the offence he will be called upon to answer, and thereafter to allow him an opportunity of making his defence. We adopted this course, notwithstanding the Full Court did not hear the appeal on its merits as we considered it was necessary to do so in the interest of justice in the light of the confused state of the record.

On the 27th November, 1967, the magistrate, after hearing submissions, adjourned to the 11th December, 1967, when he called for a defence to a case of larceny by reason of s. 41 (1) of Cap. 15, which directs that he endorses on the complaint the charge established [s.41 (7)]. He however seemed to have recalled that amendment to the charge, but without making any annotation to that effect. The only indication of the offence for which he convicted the defendant is to be found in his memorandum of reasons for decision. We are obliged to say that we considered this highly unsatisfactory because we could not feel sure that the defendant was informed that the offence which he was called upon to answer was fraudulent misappropriation under s. 92(1)(b) of Cap. 14 for which the magistrate stated in his reasons for decision he convicted him.

We are fully aware that this appeal is from the judgment of the Full Court, and, ordinarily, we would not by-pass that court by issuing directions

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directly to the Magistrate's Court. This case, however, is an unusual one in the respect that we have all the facts before us. The record clearly reveals a course that is inevitable. There is nothing further, at least for the time being, to be done by the Full Court in the matter; there is positively no discretion to be exercised by it, should we take the normal course of sending the case back thereto with directions. Accordingly, the course we have already taken of allowing the appeal and setting aside the conviction and sentence was one which, in any event, the Full Court was bound to take in the circumstances; there was no alternative. The confusion which reigned in the magistrate's mind, as revealed by the record, made it inevitable that the Full Court would have remitted the defendant for re-trial before the magistrate. Therefore, in order to save time, expense and an unnecessary multiplicity of trials, which is really the object of s. 33(3) of ordinance No. 19/1958, we considered it fitting to remit the case directly to the magistrate, with the directions aforesaid.

If authority is wanted for this course, it is right that we record that we have exercised our powers under s. 33(3) of the Federal Supreme Court (Appeals) Ordinance, 1958, which reads as follows:

"Upon the determination of an appeal under this section, the Federal Supreme Court may affirm or set aside the order of the Full Court and where any such order is set aside, the Federal Supreme Court *may make any order which ought to have been made at the trial or make such other order as justice requires.*"

Millar v. Toulmin, (1886) 17 Q.B.D. 603, is a case under O. 58, r. 4, the English equivalent of our s.33 (3); it shows that the Court of Appeal is possessed of an undoubted power, if all the facts are before it, to adjudicate and give judgment for the party in whose favour a verdict ought to have been given instead of directing a new trial. In this case it was held, *per* Lord ESHER, M.R., that the words of O. 58, r. 4, viz., ". . . make such further or other order as the case may require", which appear with slight modification in our s. 33(3) of ordinance No. 19/1958 above, ". give power to give the judgment which ought to follow from the evidence produced at the trial." The evidence before the Full Court shows that that court must necessarily have recalled the conviction and sentence and remitted the case to the magistrate for re-trial. It was on this analogy that we considered we were empowered to order the magistrate directly, since it appeared from the record before the Full Court that, had it not misdirected itself with regard to the matter of the grant of the extension of time, it would have been bound, in any event, to remit the cause for retrial to the learned magistrate.

*Appeal allowed.—Matter remitted to the
magistrate to be tried de novo.*

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[Court of Appeal (Luckhoo, C., Persaud, C.J., (ag.), Cummings, J.A.)
July 16, 24, September 15, 1969].

Appeal—Appellant charged before magistrate with embezzlement—Charge dismissed—On appeal to Full Court magistrate directed to call for defence to larceny—Appeal from this order to Court of Appeal—Powers of Court of Appeal—Appellant found guilty of embezzlement by Court of Appeal and fine imposed—Federal Supreme Court (Appeals Ordinance 1958, No. 19, s. 33(3).

Warrant of Arrest—Need not have specific constable's name endorsed on warrant—Summary Jurisdiction (Magistrates) Ordinance Cap. 12, s. 56(1), 57—The Police Ordinance No. 39 of 1957, s. 23.

The appellant was charged before a magistrate with embezzlement but the matter was dismissed by him without calling for a defence. The respondent appealed to the Full Court which ordered that the matter should be remitted to the magistrate with a direction that he calls for a defence to larceny on the facts found. From this order the appellant appealed to the Court of Appeal and argued that although the magistrate's finding might not be justifiable in law the Court of Appeal was powerless to correct any such error since (a) there was no appeal by the respondent from the order of the Full Court and (b) the appellant had not in his motion sought to ask for any further order other than that the Full Court's order sending the matter back to the magistrate to call for a defence to larceny be quashed.

HELD: (i) that the charge of embezzlement was proved and that the Court of Appeal had power under s. 33(3) of the Federal Supreme Court (Appeals) Ordinance 1958 No. 19 or 1958 to convict the appellant and would convict him.

(ii) that where a warrant is addressed to the Superintendent of Police or any other constable, the authority of any constable to perform duties thereunder will depend on his *de facto* assignment by the officer-in charge and it is not necessary to have a specific constable's name endorsed on the warrant.

*Appeal allowed. Order of Full Court set aside.
Appellant convicted of embezzlement and fined \$500.00.*

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

W. G. Persaud, for the respondent.

LUCKHOO, C: The appellant, a police constable, was charged indictably with the crime of embezzlement by a public servant, contrary to s. 191 of the Criminal Law (Offences) Ordinance, Cap 10, the allegation being that on the 5th June, 1965, whilst being employed in the Guyana

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Police Force he embezzled the sum of \$13 received by him by virtue of his employment from one Nathaniel Bollers. The prosecution applied for a summary trial on the ground of the adequacy of punishment, and upon the appellant consenting, the magistrate proceeded to hear the case on a plea of "Not Guilty."

The matter arose in this way: The appellant was the complainant in a charge against one Nathaniel Bollers for behaving disorderly. He was convicted by the magistrate and fined \$ 10 in October of 1964. The fine was not paid and on the 20th May, 1965, the magistrate of the Berbice Judicial District issued a warrant of commitment addressed to the Superintendent of Police or any constable. That warrant commanded the constable to take Nathaniel Bollers and convey him to the prison and deliver him to the keeper for one month unless the sum of \$10 and further charges of \$3, totalling \$13, should be sooner paid. This warrant was sent to the police station at Sisters, East Bank, Berbice, where the appellant was stationed. It was received at the station on the 2nd June, 1965, and so endorsed. Cpl. Clowes, the subordinate officer in charge of Sisters Police Station was in control of commitment warrants. His evidence showed that all serving members of the Force are permitted to execute warrants; that when this particular warrant, which is numbered No. 454 of 1965, was received at the station, it was taken out for service on four occasions, all of which are endorsed at the back of the warrant in the appellant's handwriting, duly signed by him on 20th June, 1965, 8th August, 1965, 20th March, 1966, and 24th June, 1966, with the remark on each occasion—"Defendant not located." Cpl. Clowes further said that the appellant never handed him any sum of \$13 collected from Nathaniel Bollers on that warrant; and that no cash transaction was recorded in the book kept for that purpose showing that a commitment warrant was executed on Bollers.

It was explained that when constables went out to execute commitment warrants, they should take with them the receipt book, and after giving the duplicate to the defendant, return the original and triplicate copies to the station with the number of the warrant endorsed thereon. No receipt was so issued for warrant No. 454/65, and if the appellant had collected \$ 13 from Bollers; at least he did not record it officially.

In September 1966, Bollers was arrested for non-payment of the amount due under this commitment warrant, but was able to produce a receipt, given to him and signed by the appellant, which showed that the appellant had actually received from him the amount of \$13 which was due. That receipt was tendered in evidence and marked Ex. "A". It is undated and shows that Nathaniel Bollers had paid \$13 as revenue on a commitment warrant which was executed. It was initialled by the appellant as the officer preparing the receipt, and signed by him for the Accountant General.

Bollers related the following account as to how he came to pay this sum to the appellant: Some time in 1965 the appellant met him and said, "Bollers, man, the thing come out." He understood him to mean that a

Warrant was issued for his arrest for non-payment of the fine. The appellant actually showed him "the warrant" but he did not read it, neither did the appellant read it to him. He, however, begged him for some time to pay, and the appellant promised to withhold the warrant for a few days. He saw the appellant a few days after and told him that he had got the money and gave him \$13 current money of Guyana. The appellant said that he had no receipt to give him then, but about five days afterwards handed him the aforesaid receipt (Ex. "A") which was given to the police on the 15th September after his arrest for non-payment of the fine.

William Gordon, Detective-Inspector of Police, after receiving this receipt told the appellant that Nathaniel Bollers had reported that he had paid him \$13 on the commitment warrant No. 454/1965, and showed him the said receipt which he (the appellant) had given to Bollers, and a book from which that receipt form could have been taken. The appellant, however, did not say anything in reply. It was significant that Ex. "A" did not come from a book of receipts used in connection with the payment of sums due under commitment warrants. It came from a general receipt book which was kept at the station for all pound transactions, and, on the circumstantial evidence, was likely to have been removed from that receipt book some time between the 5th and 6th June, 1965, when the appellant was charged with the duty of acting as pound-keeper and had the custody of that book in the absence of Cpl. Clowes from the station. It transpired that Cpl. Clowes had given the appellant instructions to sell a certain animal at the pound which was advertised for sale, and when the Corporal returned to the station on 6th June, 1965, he having left the station on the 5th, he discovered that the appellant had duly sold the animal and informed him that this was done on Saturday, 5th June, 1965, at about 11.30 a.m. when the purchaser, Harry Persaud, paid him 25c. Cpl. Clowes checked the general receipt book in which the original and triplicate of receipt No. 82182 showed this to be so. It was written up and signed by the appellant. A carbon sheet was used to reproduce the writing of the original on to the triplicate. The duplicate should have been given to the purchaser and would not be expected to be in the book. Ex. "A" is exactly of the same form and size as the original and triplicate of the receipt No. 82182 which show the sale of the animal to Harry Persaud. And what is more, it was stamped with the same number 82182 and after the number it bore the word 'duplicate', which clearly identified it as coming from the pound receipt book. This meant that the appellant, in writing up the original receipt, No. 82182, must have deliberately seen to it that there was not a carbon between original and duplicate, but that the carbon was only between the duplicate and triplicate, so that the duplicate of the original would not positively record what was written on the original. This enabled him to have the use of a blank duplicate receipt form which he subsequently filled up and signed and gave to Bollers as though it were a genuine Government receipt in acknowledgement of the payment of the \$ 13 which Bollers had made to him.

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It was then well established that the appellant, a police constable and public officer, had received \$ 13 from Nathaniel Bollers; that this was the sum due on a commitment warrant which was signed in May and which was received at the station on the 2nd June; that this money was not paid over to the subordinate officer or accounted for in any way; that the receipt issued by the appellant acknowledging payment of that sum was irregularly obtained and demonstrated an intention to retain the proceeds of the amount so collected. But before the appellant could be convicted, it was necessary to show: (a) that he had received that sum of money by virtue of his employment as a member of the Guyana Police Force, and (b) that at the time of so receiving that amount, he was authorised to do so under a commitment warrant.

The case for the defence was closed without any evidence being led.

The magistrate found that there was no warrant for Bollers' arrest at any time in May 1965; that Bollers could not have been properly arrested at any time prior to the 2nd June, 1965; that it was some time in May 1965 that the appellant met Bollers and indicated to him that a warrant was out for his arrest for non-payment of a court fine; and that the \$13 which he received was received contrary to his employment, and so the charge of embezzlement was not made out. Then he went on to consider whether the appellant ought not to be called upon to answer a charge of larceny, but concluded that on the evidence he could not find that the appellant stole the money on the 5th June, 1965, since the only incident that apparently took place on the 5th June, 1965, was that a receipt bearing that date was given to Bollers.

An appeal was lodged against this decision and the grounds of appeal sought to convey these aspects: (a) that the offence of embezzlement was established in law, and (b) that the decision was unreasonable or could not be supported having regard to the evidence. The Full Court endorsed the magistrate's findings of fact and went on to say:

"We agreed with the finding of the magistrate that the charge of embezzlement had not been proved for the reason that there being no warrant of commitment at the station at time of the respondent's receipt of the money from Bollers, he could not be said to have embezzled it in the sense that he took it into his possession by virtue of his employment as a member of the Police Force."

That court was further of the opinion that the proper inference to be drawn from the facts did not bring the offence within the ambit of false pretence, because Bollers never intended to pass the property in the \$ 13 to the appellant, who got hold of the amount by falsely representing that an authority to collect it then existed, and, further, that Bollers' clear intention was to pass only the possession of the money to the appellant but the property in it to the Government of Guyana. The appellant, therefore, having taken possession of the money by a false representation as to an existing fact, namely, that the commitment warrant existed, *prima facie*,

committed the offence of larceny by a trick, which amounted to larceny within the meaning of s. 41(1) of Cap. 15; and so the Full Court ordered that the sentence of the magistrate be set aside and remitted the matter to him to call for a defence for the offence of larceny under and by virtue of s. 41(1) of Cap. 15 of the Laws of Guyana, which provides that:

"Where embezzlement, or the fraudulent application or disposition of anything, is charged, and the evidence establishes the commission of larceny of any kind, the defendant shall not be entitled to have the complaint dismissed, but he may be convicted of the larceny and punished accordingly."

From this order there was an appeal to this court when counsel for the appellant argued that if the offence disclosed was not embezzlement, it was false pretence and not larceny, in which case there was no jurisdiction to call for a defence to false pretence, and so the order of the Full Court remitting the matter to the magistrate for him to call for a defence to larceny, which did not appear, could not be upheld. Counsel submitted a large number of authorities in support of his contention, and argued this matter very convincingly and with a great deal of logic, but before it would become necessary to look at or decide this aspect, consideration must first be given to the question as to whether embezzlement had been proved or not at the trial, and so the crucial point for determination would be, whether it was established that at the time Bollers tendered the \$13 to the appellant, he (the appellant) was under a duty to receive it, because (a) a commitment warrant was out for Bollers' arrest, if the amount due was not paid, and (b) the appellant was charged with the execution of the said warrant. On this, counsel contended that the prosecution did not prove that a warrant had been issued or properly issued when Bollers paid the appellant the money, and, further, that the appellant was not in fact charged with the duty of executing the warrant, when any sum was paid to him. Only recourse to the evidence and its implications and an examination of what findings could be properly made therefrom would answer the relevant questions.

In my view, the evidence was not subjected to any satisfactory scrutiny either in the Magistrate's Court or before the Full Court. Two very serious errors were committed by the magistrate in construing the evidence. The first was, that it was some time in May 1965 that the appellant indicated to Bollers "that a warrant was out for his arrest for non-payment of a court fine"; and the second was, that after the money was paid, the appellant handed Bollers a receipt dated 5th June, 1965. If these findings could be justified on the evidence, then indeed the charge of embezzlement was not made out; for the payment of money on the 5th June on the strength of a warrant which never left the station before the 20th June could not have been received under that authority—so essential to the commission of this crime.

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In my view, due note was not taken of certain aspects of the evidence. It was overlooked that Bollers was unable to fix the time when the appellant indicated that a warrant was out for his arrest. He said in examination-in-chief, "It was in 1965 that the defendant spoke to me"; and under cross-examination, "I cannot remember on what date defendant told me that the thing had come." As Bollers could not remember when the conversation took place, and as the appellant gave no evidence, the only way to ascertain the time would be to see whether the circumstances afford any help. The following facts cannot be disputed: The warrant was signed in May; it was received at the station on the 2nd June and was in the custody and under the control of Cpl. Clowes until 20th June, when it left the station. On that date it was sent out for the first time for execution. It was the appellant who took it out on that date. It was he who endorsed at the back of the warrant: "Enquiries made on 20.6.65. Defendant not located."

Now one approaches the crucial question: When was it that the appellant told Bollers, "Bollers man, the thing come out", meaning the warrant? If this occasion could be ascertained, and if it was after the appellant was authorised to execute the warrant, then very little could be said in justification that the charge of embezzlement was not made out.

Four matters appear to be of significance:

- (a) The words, "The thing come out", seem to suggest that an announcement was being made for the first time by the appellant indicating the fact that the warrant was out.

This evidence was not challenged and came from an individual who would know whether the warrant was out or not. It must therefore be taken from this utterance that when it was made the warrant had already come to the station and that it would be on or after the 2nd June.

- (b) The sum received was the sum due on the warrant, which was not only for the fine imposed by the magistrate, but for other charges. This would indicate that when the money was collected, at least the warrant had reached the station.
- (c) The appellant did not merely tell Bollers that the warrant was out, he went on to demonstrate the fact by showing him a document which was available to be read or checked.

This representation came from one who would know whether what he showed was indeed the warrant or not. There was neither challenge nor contradiction of this evidence and so I am unable to see how it could be taken otherwise than to be the warrant in question which the appellant must have had with him and which he showed Bollers. It is known that he took the warrant for the first time from the station on the 20th June. Was

this then not the time that it was shown to Bollers, bearing in mind the announcement, "The thing come out? "

- (d) The appellant himself acknowledged in the receipt Ex. "A" which he issued, that the amount received from Bollers was for "revenue C.W. executed", which meant that the commitment warrant was executed and so satisfied by the payment made. Could it have been made clearer that it was on the very warrant which was in existence that the collection was made? Was there anything to the contrary?

I find the circumstantial evidence to be wholly consistent with the inference that when Bollers was first approached by the appellant was when he (the appellant) had the warrant with him, viz., on the 20th June. I can find no circumstance to weaken or lessen this inference.

The magistrate's findings that payment was made on the 5th June did not arise from any evidence on the record or from any inference which could properly be drawn. The receipt was undated. The 5th June was the date when the appellant, in all probability, removed the duplicate receipt No. R 82182 from the pound receipt book of which he had the custody and possession, but it would be wrong to think that he received payment on that day because he procured the receipt, presumably for that purpose then. He would have to await the time when the warrant which had arrived on the 2nd June was released for service by Cpl. Clowes. It was no more than a matter of convenience to secure on the 5th June what would be utilized to represent a genuine receipt for subsequent use in the collection of the amount due under the warrant which was known to exist.

Counsel for the appellant contended that if the offence of embezzlement was made out on the evidence, this court would only have jurisdiction to find that the Full Court ought not to send the case back to the magistrate to call for a defence to larceny. He alluded to the fact that he had amended his motion after the case came on for hearing in this court. Originally he had asked in his motion for "an order that the decision of the Full Court be quashed and the decision of the magistrate be affirmed", but in the amended Notice of Motion, he sought "an order that the decision of the Full Court be quashed in so far as the matter is ordered to be sent back to the magistrate to call for a defence to the charge of larceny". The argument then proceeded that although the magistrate's finding might not be justifiable in law, yet this court was powerless to correct any such error since (a) there was no appeal by the respondent from the order of the Full Court, and (b) the appellant had not in his motion sought to ask for any further order other than that the Full Court's order sending the matter back to the magistrate to call for a defence to larceny be quashed. If counsel's contention is right, then this court cannot invoke the wide powers given under s. 33(3) of the Federal Supreme Court (Appeals) Ordinance, No. 19 of 1958, which says:

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"Upon the determination of an appeal under this section the Federal Supreme Court may affirm or set aside the order of the Full Court, and where any such order is set aside, the Federal Supreme Court may make any order which ought to have been made at the trial or make such other order as justice requires."

To interpret this provision in the way put forward in argument would be to restrict and qualify its scope and encumber what it embraces. Does the language permit of any such diminution? There are no words to indicate that the provision is only to apply upon an appeal which directly or expressly raises the question which the court might be minded to determine. On the contrary, by its very nature it allows for orders to be made which were not contemplated by the appeal, but which justice requires and which the evidence at the trial could fully justify. On this basis, therefore, it appears to be quite competent for this court to order a conviction for embezzlement if on the evidence at the trial the magistrate should have done so, and justice so requires. But to do this would necessitate an amendment to the charge to read "in the month of June" instead of "on the 5th of June". I can find no difficulty in the way of doing this. The date did not materially affect the subject-matter of the charge. The charge was confined to a specific offence which concerned the receipt of \$13 on a specific warrant (No. 454 of 1965), and if the said sum was embezzled at some time towards the end of June, and not on the 5th of June, it is difficult to visualise how any prejudice could arise. At the close of the case for the prosecution, the submissions made certainly gave no hint of this.

In *The Mayor of Exeter v. Heaman*, (1877) 42 J.P. at page 503, there was an information that the respondent had sold on the 12th January within the limits of the Exeter Market Act 3 & 4 Vict., Cap. 122, certain carcass meat. The evidence was that in pursuance of an agreement on the 5th January to buy three carcasses at 10/- per score to be delivered on the 12th, the respondent on the 12th delivered two whole carcasses and two half carcasses. The carcasses were weighed when received on the 12th and paid for on the evening of that day. The Justices were of opinion that the sale was on the 5th and not on the 12th, and dismissed the information. It was held that they were wrong, and ought to have convicted, for it was clear that there was a sale either on the 5th or 12th, and they should have amended the date of the sale and the information according as they found the fact. LINDLEY, J., said:

"The question is whether the justices were right in dismissing the information which charged the offence to have been committed on the 12th of January. There was a sale without doubt of certain carcasses of pork within the city of Exeter . . . It appears therefore clear that the justices were wrong in dismissing the information. I cannot help thinking that the justices would have amended and altered the date in the information if they had been asked to do so. It was

clear that the Act had been infringed on the 5th or the 12th, and this question ought not to have come before us at all."

Counsel argued, further, that a warrant should have been addressed to a particular constable, and that merely to address the warrant to the Superintendent of Police or any other constable was not in conformity with the requirements of the law. I am unable to find anywhere any such stipulation which requires a commitment warrant to bear the name of a particular constable before it could be effective. The very nature and purpose of such warrants would be ill served by the introduction of any such notion, not to mention the impracticability which would arise. It is provided under s. 56(1) of the Summary Jurisdiction (Magistrates) Ordinance, Cap. 12, that:

"All summonses, warrants, orders, judgments, writs of execution, or other process or proceedings, whether civil or criminal, issued or taken by or by the authority of any magistrate respecting any matter within his jurisdiction shall have full force and effect, and may be served or executed, anywhere within the colony by a bailiff of the court, by the police or other constable to whom they are directed, or by any other police or other constable, as the case may be."

But counsel referred the court to s. 23 of the Police Ordinance, No. 39 of 1957, which is as follows:

"When any writ, warrant, order, or summons of any magistrate or justice of the peace is delivered or given to a constable, he shall if time permits, show or deliver it to the officer, inspector or subordinate officer of the - force under whose immediate command he then is, and the officer, inspector or subordinate officer shall, if necessary, nominate and appoint by indorsement thereon, any assistant or assistants to him, the officer, inspector or subordinate officer thinks proper, to execute the writ, warrant, order, or summons; and every constable or other constable whose name is so endorsed, and every assistant aforesaid, shall have all the same rights, powers and authorities for and in the execution of the writ, warrant, order, or summons as if it had been originally directed to him expressly by name."

This section is not intended to prejudice the generality of s. 56(1) above quoted. When the occasion requires or calls for the issue of a warrant in the name of a particular constable, or when this is done, then s. 23 of the 1957 Ordinance merely allows for the opportunity, and confers the power of extension to enable others to join in the performance of duties incumbent thereunder. When, however, a warrant is addressed merely to the Superintendent of Police or any other constable, the authority of any constable to perform duties thereunder will depend on his *de facto* assignment by the officer in charge who must await the availability of personnel and convenience of the moment (which is variable) without necessarily being tied down to the restriction of having a specific constable's name endorsed on the warrant.

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Any such limitation in the service of large numbers of commitment warrants would cause a confusion and disruption never intended or spoken of by the relevant section. In my view, it ought not to be implied.

It is my view that the warrant was properly issued, duly received at the station, placed in the custody of the appellant, taken by him for service on 20th June, when he not only made Bollers aware that he was possessed of a committal warrant against him, but showed the warrant to him and obtained payment thereunder five or six days afterwards, and subsequently gave a forged receipt to him and retained the money for himself. This evidence clearly sustained the offence charged, and there should have been a conviction for that offence.

The appeal, as relates to the order made by the Full Court, will therefore be allowed, and the order set aside.

But by virtue of the provision of s. 33(3) of the Federal Supreme Court Ordinance, No. 19 of 1958:

- (a) the order which ought to have been made at the trial and which justice requires, viz., that the appellant be convicted of embezzlement, is now made;
- (b) with an amendment to the charge to have the date read "June" instead of the "5th June"; and
- (c) with penalty that he should for such offence pay a fine of \$ 500 or serve six months' imprisonment.

I would not wish the occasion to go by without saying this:

The incidence of crimes of fraud by public officers appears to be on the increase. If the appellant did not have this matter (which only came to this court in July of this year) hanging over his head for a considerable time, which is most unfortunate and to be regretted, I would have had no hesitation in imposing a period of pre-emptory imprisonment. It is so distressing and at times sickening to observe the fraudulent devices and schemes adopted by the unscrupulous to enrich themselves at the expense of the public revenue. The tendency seems to be to want to plunder the revenue instead of using their particular offices to protect it, and to steal instead of securing what is entrusted to their care. If this ugly trend continues unabated, it will not only affect the fabric of morality generally, but depress the economy of the country. Until the consciences of individuals respond to the call of duty, it will be necessary to be vigilant in maintaining an unrelenting and courageous pursuit to uncover the lid of such vice wherever it exists, to ensure that progress is not encumbered by persons, whoever they may be, bent on helping themselves in despoiling the public revenue of its monies.

PERSAUD, C. J., (ag.): For the reasons given by the learned Chancellor, I agree that this appeal ought to be allowed in the circumstances set out, and with the order he proposes.

However, I wish to add a few observations of my own as regards the interpretation of s. 23 of the Police Ordinance, 1957 (No. 39), which, argues counsel, means that unless the warrant in the instant case had been endorsed with the appellant's name (and it was not), it could not be said that he was authorised to receive the amount mentioned therein from Bollers, in which case one of the ingredients which go to make up the offence of embezzlement would be missing.

S. 56(1) of the Summary Jurisdiction (Magistrates) Ordinance, Cap. 12, permits a police or other constable other than the one to whom they are directed to serve or execute all summonses, warrants, orders, etc., issued or taken by or by the authority of a magistrate, while s. 57 authorises and requires all police and other constables to obey the warrants, orders and directions of a magistrate. It is, in my opinion, clear from these two sections that a warrant may be executed by any police constable even though he is not mentioned by name therein; indeed, he is required to do so. The question is whether s. 23 of the 1957 ordinance has made any inroads into ss. 56(1) and 57 of Cap. 12.

Subsection (1) of s. 22 of the 1957 ordinance enables *any* member of the Police Force to execute a warrant lawfully issued to a member of the Force for the apprehension of a person charged with any offence. And subsection (2) authorises the execution of any other warrant by a member of the Force which has been issued to *any* member, provided the member executing the warrant must have it in his possession at the time of execution, and must show it on demand of the person affected thereby. This section clearly contemplates the execution of a warrant issued to one member of the Force by any other member, so it cannot be said that it reduces the effect of s. 56(1) of Cap. 12.

S. 23 of the 1957 ordinance, be it noted, does not speak of warrants being directed, as does s. 56(1) of Cap. 12 nor does it use the expression "issued" as does s. 22. The words used are—"Where any writ, warrant, order or summons of any magistrate or justice of the peace is delivered or given to a constable, etc.". In my judgment, s. 23 merely completes and is a corollary to s. 22, for one can well think of a situation where a warrant is delivered or given to a member of the Force other than the one to whom it is issued, for execution, and in such a case by virtue of the provisions of s. 56(1) of Cap. 12 and s. 22 of the 1957 ordinance, he must carry out the directions contained in the warrant. But, if time permits, he must show the warrant to his superior officer who, if necessary, shall endorse the name of a constable on the warrant and then the latter may act under the authority of the document as though he had been originally directed by name to do so. The reading of this section leads me to the conclusion that it really deals with the position of that member of the force whose name is endorsed on a warrant (if it is endorsed) and does not affect in one iota the powers of execution by a member whose name is not endorsed, but who is entrusted with the execution of a warrant.

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In my view, therefore, s. 23 of the 1957 ordinance has no application to the situation in hand, as it does not detract from the meaning and impact of the earlier sections already referred to.

CUMMINGS, J.A., orally expressed doubt but did not dissent from the opinion expressed.

*Appeal allowed. Order of Full Court set aside.
Appellant convicted of embezzlement and fined \$500.00*

PAULETTE BRAITHWAITE v. WINSTON PORTER

[High Court (Mitchell, J.) June 3, 13, September 22, 1969.]

Practice and Procedure—Stay—Civil action for indecent assault—Defendant not prosecuted for crime—Reasonable excuse for non-prosecution—Whether action maintainable.

The plaintiff brought a civil action against the defendant for indecent assault. It was argued on behalf of the defendant that the action should not have been brought until and unless there was a criminal prosecution of the defendant. The incident giving rise to the action was reported to the police who advised the plaintiff to obtain the services of a lawyer. There was no evidence that the police contemplated prosecuting the defendant.

HELD:— that (i) an act amounting to a felony cannot be made the foundation of a civil action until the felon has been prosecuted or a reasonable excuse shown for his non-prosecution.

(ii) the action was maintainable because a reasonable excuse for non-prosecution was shown.

Judgment for the plaintiff.

The plaintiff in person.

C.W. Hamilton for the defendant.

MITCHELL, J.: Paulette Braithwaite was fifteen years old at the time of the incident which has given rise to this claim for assault. She was then a virgin. She had left home on the afternoon of 25th September, 1967 and had gone to the cinema at Diamond. According to her, she had actually gone into the cinema and sat down when the defendant Winston Porter came into the

cinema and sat down beside her. He spoke to her, and as a result of what he told her, she left the cinema with him and he took her in a car which he was driving, to Georgetown. He took her to a shop and bought four (4) beers. He drank two of them and according to her, he forced her to drink two of them. Her head began to turn, i.e. to become dizzy. She then found herself on the sea-wall, Georgetown. Winston Porter then took hold of her and started to loose her garments. She fought with him because she did not agree for him to do what he was doing. Then he had sexual intercourse with her without her consent, as a result of which she suffered injuries. She was examined by a doctor who gave evidence on her behalf. He found that on 30th September, 1967 when he examined her that she had the following injuries: –

- (1) A small tear on the left side of the vaginal orifice bleeding moderately;
- (2) Signs of recent rupture of the hymen;
- (3) Tenderness and rigidity of the inside of the thighs.

Following on the incident which has given rise to the action, the plaintiff went to Brickdam police station with her mother (she was 15 (fifteen) years old at the time) and she gave a statement to the police. She herself did not make the report to the police. Her mother, guardian and next friend, Dorothy Munroe, had done so, first at Providence police station on the East Bank Demerara, then at Brickdam police station in the City of Georgetown to which she was taken by the police from Providence police station.

The police at Brickdam police station sent her, and her daughter, because the daughter was the person really concerned, to the Georgetown Hospital but she did not see the doctor there because it was late. She subsequently, went to Dr. Sagar, the Government Medical Officer of the area where they lived, and he examined her daughter. Paulette Braithwaite, the plaintiff said that after her mother and herself had gone to the police, the police had advised them to take a lawyer. There was no evidence elicited either in examination-in-chief or in cross-examination that the police had taken any action as a result of the report made by the plaintiff, or as a result of the statement which she gave. There is no evidence that the police contemplate taking action against the defendant.

The evidence is that the very police who are to take action if a criminal offence is disclosed to them have advised the plaintiff to use her own words "to get a lawyer".

As a result, the plaintiff brought this claim for \$2,500. (two thousand five hundred dollars) as damages for indecent assault.

In the statement of defence filed in this matter, the defendant admitted that he did have intercourse with the plaintiff on the said day 25th September, 1967, but said that he was contending that it was with the full consent of the plaintiff.

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After the plaintiff had given evidence as to the circumstances of the alleged indecent assault, and after her sister Waveney Knights had given evidence as to her complaint to prove consistency in the conduct of the plaintiff, and after the plaintiff's mother had given evidence as to the steps she had taken after she was informed of the incident, the plaintiff closed her case.

The defendant then declined to lead any evidence in this defence or in rebuttal of any aspect of the plaintiff's case, and relied wholly on the legal submissions made by his counsel.

Counsel for the defendant submitted firstly that the action should have been brought in the form of an action for seduction.

Counsel produced no authority to support his proposition. I am constrained to the view that no person is personally precluded from bringing a particular action in a particular form if the process of bringing the action is procedurally correct, in so far as the action is brought in accordance with the Rules of Court in force at the time, and the right which the person seeks to enforce is one which is recognisable either by the common law or statute as being a right which could be enforced in the courts by the person himself or herself. To my mind, an action for assault, whether it is qualified by an act or an element of indecency is an action which is recognised and maintainable in these courts by the person assaulted, and in the circumstances of this case, there was no apparent or disclosed non-compliance with any of the Rules of Court so as to make the action and the plaintiff's right involved in the action, unenforceable. Moreover, if there are two alternative courses of action open to a plaintiff, a plaintiff is not precluded from resorting to one as against the other, but it may mean that a plaintiff will have to rely on the particular form or course of action taken. So, I do not agree with counsel for the defendant that the claim should have been brought as a claim for seduction. I would not go into the merits or demerits as to whether that is sustainable on the evidence.

Counsel for the defendant further contended that this action should not have been brought until and unless there was a criminal prosecution of the defendant.

Counsel for the defendant referred to *Smith v. Selwyn* (1914) 3 K.B. 98 and *Midland Insurance Co. v. Smith* 6, Q.B.D. 561 and also to some unreported decisions of the Guyana High Court in support of his contention.

The case of *Midland Insurance Company v. Smith* deals with several authorities and propositions and is earlier in time than *Smith's* case so I shall deal with that first.

In that case, an insurance company granted a fire policy to Smith, and during the currency of the policy Smith's wife feloniously burnt the property insured. The company, not admitting any claim on the policy, brought an action against Smith and his wife for the damage done by the act of the wife. It was held that the action for the felony, if it were maintainable, was maintainable without showing that the felony had been prosecuted.

WATKIN WILLIAMS, J. in the course of his learned judgment on this particular aspect of the case at p. 568 said and I quote,

"The history of the question shows that it has at different times and by different authorities been resolved in three distinct ways. First, it has been considered that the private wrong and injury has been entirely merged and drowned in the public wrong, and therefore no cause of action ever arose or could arise. Secondly, it was thought that, although there was no actual merger, it was a condition precedent to the accruing of the cause of action, that the public right should have been vindicated by the prosecution of the felon. Thirdly, it has been said that the true principle of the common law is that there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon, but that there is a duty imposed upon the injured person not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law. In my opinion this last view is the correct one."

He then referred to authorities in support of each view.

In the course of referring to cases where an action was maintained for a felony, WATKIN WILLIAMS, J. referred to *Stone v. Marsh* 6 B & C 551, which was an issue out of Chancery directed to try the right of the plaintiffs, the proprietors of some bank stock against the defendants, who had innocently received the proceeds through a power of attorney, forged by one Fauntleroy for the transfer of the stock. Lord TENTERDEN, in giving judgment in the plaintiff's favour, said "Can the House set up this felony, as an answer to the plaintiff's claim? In general a man cannot defend against a demand by showing on his own misconduct, according to the maxim '*Nemo allegans suam turpitudinem est iudicudus*'.

In the case of *White v Spettigue* 13 M & W 603, Lord CRANWORTH in expressing his dissent from a previous ruling in *Gimson v. Woodfull* 2 C & P. 41 as being too general said "I think the true principle is that where a criminal and consequently an injurious act towards the public has been committed, which is also a civil injury to a party, this party shall not be permitted to seek redress for the civil injury to the prejudice of public justice, and to waive the felony and go for the conversion."

Reference was also made to the case of *Ex parte Bell, In re Shepherd* 10, Ch. D. 667. In the course of his learned judgment in that case, which was a case in which the debt which it was sought to be proved arose from the felonious act of the bankrupt in embezzling the monies of his employers, BRAMWELL, L.J. said at p. 672.

"There are difficulties then in all the possible ways in which one can suppose this impediment to be set up to the prosecution of an action (i.e. to an action arising from a felonious act").

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Continuing he asked "What is to happen when he (the felon) dies a natural death, when he goes beyond the jurisdiction, when there is a prosecution and an acquittal from collusion or carelessness by some prosecutor other than the party injured? " All these cases create great difficulties to my mind in the application of this alleged law..."

Ex parte Bell, In re Shepherd above referred to, was mentioned in the case of *Midland Insurance Co. v. Smith* by WATKIN WILLIAMS, J. as the case in which the doctrine that it was a condition precedent to the enforcing the civil remedy that the felon should have been first prosecuted, if it ever had any solid foundation, was finally exploded.

In *Smith and Wife v. Selwyn* (1914) 3 K.B. 98 in which the cause of action was based on a felonious act on the part of the defendant committed against the plaintiff, KENNEDY, L.J. in the course of his learned judgment said at p. 103 —

"It is in the power of the court to grant a stay, and it is the duty of the court to consider in each case whether in the circumstances it will grant a stay, if it sees that the claim for damage is based upon a felony committed by the defendant."

SWINFEN EADY, L.J. in the course of his judgment said at p. 105 -

"Where injuries are inflicted on an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured, against the person who inflicted the injuries until the latter have been prosecuted or a reasonable excuse shown for his non-prosecution."

SWINFEN EADY, L.J. continued his judgment and said at p. 106 —

"it is the duty of the person who is the victim of a felonious act on the part of another to prosecute for the felony, and he cannot obtain redress by civil action until he has satisfied that requirement; but by what means that duty is to be enforced we are nowhere informed" ... The proper course is... to stay the action"....

PHILMORE, L.J. added the force of his judicial opinion to the judgments of KENNEDY and SWINFEN EADY, L.J.J. and said at p. 106 -

"the defendant has been prosecuted or a reasonable excuse has been shown for his not having been prosecuted."

The total effect of the consideration of the authorities referred to, and of other cases I have mentioned, leads me to the conclusion that the principle to be deduced from those cases is that an action for damages resulting from an act of felony is maintainable without showing that the felon has been prosecuted. Another principle is that a party shall not be permitted to seek redress for the civil injury and to waive the felony and go for the conversion, and finally that an act amounting to a felony cannot be made the foundation of a civil action until the felon has been prosecuted or a reasonable excuse shown for his non-prosecution. The court may

exercise a discretion to stay the proceedings dependent on the circumstances. The circumstances envisaged by BRAMWELL, L.J. in *Ex parte Bell*, In *re Shepherd* (supra) when the alleged felon dies or goes beyond the jurisdiction of the court so that he cannot be criminally prosecuted, indicate that there are circumstances which will make the prosecution of the felon impossible or impracticable and consequently affect the bringing of civil actions.

To these circumstances, in my opinion, may be added the circumstances where the State, or the law enforcement agency of the State in the form of the police, or some other competent authority, is indifferent, or, reluctant to bring about the prosecution of the alleged felon, or has taken no step to bring about the prosecution of the alleged felon perhaps, on good legal ground after a report has been made to it. What is the person who has been injured by the act of the alleged felon to do in these circumstances? Should he or she just wait and run the risk of the action being possibly barred by the Limitation Ordinance, Chapter 26?

The State is supposed to be the vindicator of the public wrong and the public law and if the State through the police does nothing with the material or evidence at its disposal, what is the injured person to do? Should the injured person then start criminal proceedings against the alleged felon on his own, incurring expense in a public cause only so that he or she may be able to say that he or she has first prosecuted the felon before incurring further and additional expense in a civil action because the prosecution of the alleged felon is a prerequisite? It is, also, to be appreciated that in course of the public prosecution as we know it in Guyana the Director of Public Prosecution has power to intervene and cause the prosecution started by a private person to be discontinued if he thinks it desirable. Such an attempt at prosecution by a private person, however, well-meaning will, thus, be abortive and inconclusive as to its result. What then is the person injured by the act of the alleged felon to do? What course of action is open for him or her.

In my opinion, the requirement that an injured party should not resort to the prosecution of a private suit to the neglect and vindication of the public law will be satisfied if the injured party has reported the matter to the police or competent authority and placed at the disposal of the police or authority what confirmation he or she has. It must not be presumed that the injured person would know what the police would require as evidence in any particular matter, and it is for the police, in my opinion, trained as they are to ask and enquire of the injured person for other evidence or sources of evidence, if available, and investigate, rather than for the injured person to supply all the necessary evidence. And if the police (as the state agency) care not to prosecute, or, are indifferent in prosecuting, the injured person would have done his or her duty in an attempt at the vindication of the public law, and ought not to be called upon to do more, or to wait longer before having recourse to the civil law.

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When I consider the facts of evidence, I find that the mother of the injured Paulette Braithwaite made a report to the police after she had made a complaint to the grandmother of the defendant. In the context of our Guyanese society and how ordinary people live and behave in Guyana, especially in the rural areas of our country, elderly people have a way of communicating in this manner over problems and especially problems that concern their children and grandchildren before having recourse to the police or the court. Significantly, she did not take Paulette Braithwaite with her when she went to make the complaint to the grandmother of the defendant.

After she had gone to the police first at Providence Police Station, the Police station nearest to where she was living at Grove Housing Scheme, she was taken by the police to Brickdam police station, the police station in Georgetown which would most probably have jurisdiction over the area where the alleged incident occurred. Then Paulette Braithwaite gave a statement to the police. She was then sent by the police to the hospital to see the doctor. She did not see the doctor then because, according to her, it was too late and so she went home. On the next morning she went to the probation officer, another government agency. She was told something. I find that she did nothing in collusion with the defendant. After having waited for some time she took her own steps to redress the wrong which she believed was done to her daughter, and there is no evidence that any step was taken by any public agency or that any such step was contemplated before she did. Moreover, there is the evidence of Paulette Braithwaite herself that the police advised them (i.e. her mother and herself) to get a lawyer. This advice which stands un rebutted and which I accept in the circumstances of this case as having been given, tends to indicate, and in my opinion would indicate, to persons as Paulette Braithwaite and her mother that they should seek legal advice and take their own course of action. If the police themselves advise that course of action, and in addition to that advice they take no step to initiate or bring about the prosecution of the alleged felon what is the injured person to do? The injured person could do no more than seek the vindication of his or her right by way of civil action. And that is what Paulette Braithwaite and her mother and next friend did in this case. In my opinion to force these people in the circumstances of this case to wait until Winston Porter was prosecuted (if he was ever prosecuted at all) for the alleged rape on Paulette Braithwaite would be to deny them the opportunity of having the justice of their cause investigated in a court and their rights, if any, determined. Their bringing of a civil action before the criminal prosecution of the alleged felon is excusable in these circumstances. I would not stand in their way and stay these proceedings, but the law being as it is there may be others who would think otherwise. Suffice it to say that in the circumstances of this case I did not find that the non-prosecution of Winston Porter for the felony of rape, was an impediment to the plaintiff's bringing and maintaining the present action for indecent assault because the circumstances provide a reasonable excuse for his not having been prosecuted.

On the facts in support of the action, I concluded on the balance of probabilities that at the time of the incident which has given rise to this claim Paulette Braithwaite was a virgin. I concluded, also, that at the time of the incident she had suffered the injuries which Dr. Sagar, Government Medical Officer found on her when he examined her shortly afterwards. He had seen signs of a recent rupture of the hymen. I accepted the opinion expressed initially by the doctor that all the injuries he found on Paulette Braithwaite and of which he spoke were due to sexual intercourse. I accepted also, the opinion of the doctor that the injury of tenderness and rigidity of the inside of both thighs of Paulette Braithwaite indicated that some force was used in opening the legs. This is consistent with a lack of consent in opening the legs, and carrying it to its logical conclusion to a lack of consent to the exercise of sexual intercourse which in the circumstances would not unnaturally follow the opening of the legs.

I concluded that the injuries which Paulette Braithwaite received were the result of sexual intercourse with the defendant. In this regard, I warned myself that there was no corroboration of her evidence implicating the defendant but I was satisfied by her demeanour, by her manner and apparent simplicity and all the circumstances of this case that she was to be believed and that she was speaking the truth and I did believe her. I also, appreciated that in his defence, in the pleadings at paragraph three (3) the defendant admitted that he did have intercourse with the plaintiff on the said 25th September 1969 but was contending that it was with the full consent of the plaintiff. So, the fact of his having sexual intercourse with her was not a fact in issue between the plaintiff and defendant in the circumstances of this case.

I concluded, also, on the balance of probabilities that the plaintiff did not give her consent for the said sexual intercourse to take place. To my mind, her lack of consent was consistent with the doctor's findings, and her complaint to her sister and mother. On this aspect, she also impressed me by her demeanour, and her simplicity that went along with it, as a person who was speaking the truth. She seemed rather unsophisticated.

I concluded, also, that it was the defendant and no other person who inflicted that injuries by the use of force on the plaintiff.

The defendant led no evidence in rebuttal and, accordingly, apart from the legal submissions of counsel for the defendant, the matter had to be decided on the credible evidence of the plaintiff.

As far as the third submission of the defendant's counsel that the defendant is a minor is concerned, it is not necessary I think to go into the merits or demerits or such a submission, as there is no evidence on *record* to support it. I rejected it as being untenable by mere mention of counsel, when there is no evidence to support it.

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Accordingly, I concluded that the defendant was liable in assault to the plaintiff in the circumstances of this case.

On the question of damages the plaintiff's chance in the marriage market seemed not to have been lessened materially in any way for she seemed to have been married not long after the incident. However, this act of the defendant cannot but be construed as a serious violation of the person and chastity of the plaintiff. In the circumstances then there will be judgment to the plaintiff in the sum of \$500.00 (five hundred dollars) with costs fixed in the sum of \$500.00 (five hundred dollars) to be paid personally to Dorothy Munroe, the next friend of the plaintiff, as the counsel and solicitor of the plaintiff gave no assistance to the plaintiff in this case and at the time when she needed it most.

Judgment for the plaintiff.

ABDOOL GAFAR v. VIBERT HARMON

[In the Full Court on appeal from the Magistrates Court
for the West Demerara Judicial District
(Persaud C J. (ag.) and Khan, J.) September 12, 22, 1969.]

Criminal Law—Unlawful possession of ammunition—Mens rea in statutory offence—Findings by magistrate not justifying conviction—National Security (Miscellaneous Provisions) Act 1966, s. 22(1).

Following a search in which ammunition was found in a cupboard in the appellant's room in a house where he lived with his mother and brother the three were charged and the appellant and his brother were convicted by a magistrate for unlawful possession of ammunition contrary to the National Security (Miscellaneous Provisions) Act 1966. The appellant's defence was that he did not know that ammunition was in his cupboard. There was evidence that the other occupants of the house could have had access to the cupboard. On appeal.

HELD: that on a charge of unlawful possession of ammunition under this statute it must be established that the appellant knew that the articles were in his cupboard and that the magistrate had made no finding of fact as would justify such a conclusion.

Appeal allowed.

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

J. Kissoon for the respondent.

PERSAUD, C.J. (Ag.): delivered the judgment of the court: This appeal arises out of a complaint in which the appellant was charged jointly with his mother and a brother, all of whom occupy separate bedrooms in the same house, with the unlawful possession of ammunition, to wit, eight 16-bore cartridges and four .22 bullets, contrary to s. 22(1) of the National Security (Miscellaneous Provisions) Act, 1966.

As a result of a search carried out on the premises by the police, six complaints were laid against the appellant and his brother Mohamed Jabar, and their mother Khatoon. Five of these charges related to the possession of firearms and ammunition other than those mentioned in the sixth charge in respect of which this appeal arises. In one of the five, the brother, Mohamed Jabar was convicted for the unlawful possession of two shot guns, one rifle and one gun stock, and was sentenced to 18 months' imprisonment. The remaining four were dismissed. On the sixth charge, both the appellant and Mohamed Jabar were convicted of the unlawful possession of eight 16-bore cartridges and four .22 bullets, and each sentenced to 18 months' imprisonment; the mother was discharged.

The evidence led by the prosecution which was accepted by the magistrate was to the effect that the police search party visited the premises during the early hours of the morning while all the occupants were still at home. They found nothing in the mother's bedroom or in the brother's bedroom, but in a locked medicine cupboard in the appellant's room, was found the ammunition, the subject matter of this charge together with a pair of broken gold bangles and some aspirin tablets. The appellant produced the key for the cupboard from his pocket. The police asked the appellant where he had got the ammunition from, but before he could reply, his brother said: "They belong to me; a find dem and bring them home".

Continuing their search, the police found in other parts of the house (not the brother's bedroom) and a disused kitchen for which the brother had the key, parts of guns, and ammunition. Upon being cautioned, the brother said: "Me find them and bring dem home", and later: "All dem thing dis belong to me; me find dem a water side a pasture and me bring dem home". The mother confirmed this, while the appellant said he knew nothing about the articles.

The defence was that the ammunition was found in the cupboard in the appellant's room, but he did not know they were there; that although the cupboard is locked the appellant leaves the keys on a ring which is hung on a nail in the brother's room—keys belonging not only to his cupboard, but also to his mother's and brother's; and that he had last gone to that cupboard about three months before the police carried out their search.

There was some conflict between the evidence for the prosecution and that led on behalf of the defence, and the magistrate resolved those conflicts in favour of the prosecution. For instance, the magistrate found that the brother never admitted (as has been alleged by the appellant) that he (the brother) had placed the ammunition in the appellant's cupboard,

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and further that to open the cupboard at the request of the police, the appellant took the key from his pocket, and not that he received it from his mother who in turn was given it by his brother. Dealing with this aspect of the case, the magistrate said –

". . . there was also no mention by No. 2 (the brother) in his unsworn statement as to where he placed the articles. Indeed this aspect of the case was never put to any of the witnesses for the prosecution. I do not believe that No. 2 defendant told the police that he placed the ammunition in the cupboard; I believe that No. 3 defendant (the appellant) did take the key from his pocket. I therefore find as a fact that both Nos. 2 and 3 were in joint possession and No. 3 was in control of the ammunition".

It would appear from the above that the magistrate's conclusion as to the possession and control in the appellant was based on two findings of fact; firstly, that the appellant's brother did not tell the police that he had placed the ammunition in the cupboard, and secondly, that during the search, the appellant had the key to the cupboard on his person. From the nature of the evidence, the magistrate was entitled to make these two findings, and there can be no quarrel with them. The question is, however, whether he could in all the circumstances, have properly convicted the appellant on these findings.

It is accepted that the Full Court, as a court of rehearing, can itself examine the evidence to see if the prosecution has proved its case. As was said by this court (comprising of LUCKHOO, C.J. and BOLLERS, J.) in *Sooknanan v. McLean* (1961) L.R.B.G. at p. 37:–

"We are entitled to look at the specific findings of fact made by the magistrate together with other unchallenged and unrebutted evidence not adverted to by the magistrate in his memorandum of reasons for decision to see if the decision reached by the magistrate can be supported".

See also the dictum of VERITY, J. in *Gonsalves v. Chairman, Poor Law Commissioners* (1939) L.R.B.G. at p. 68.

The arguments before us proceeded on the basis that to find the appellant guilty of the offence charged, the magistrate must have had to find that he had knowledge of the presence of the ammunition in the cupboard, and therefore we ourselves must approach our decision on this premise.

The relevant portion of s. 22(1) of the National Security (Miscellaneous Provisions) Act, 1966, provides thus –

". . . any person who, without lawful authority, the burden of proof of which shall lie upon him purchases, acquires, or has in his possession any firearm, ammunition or explosive shall be guilty of an offence. . ."

With some slight modification, this section is the same as s. 49A(1) of the Emergency Powers Regulation, 1964 which was considered by the Court of Appeal in *Reg. v. Mohan Lall & Ors.* (Criminal Appeals Nos. 81–84 of 1966) where it was held that the position was no different from that in *Lockyer v. Gibb* (1966) 2 All E.R. 653 in that the statute created an absolute prohibition. In both cases, there was in the respective statutes (unlike the present case) what has been described as a "deeming provision", that is to say, a person was deemed to be in possession of the prohibited article in certain situations. In the *Mohan Lall case*, the appellants were found in possession of a bag containing explosives. Their defence was a complete denial of this fact, so that if it was found that they were in possession of the bag, in the absence of any explanation (and there could be none having regard to the defence) they were deemed to be in possession. Therein, we believe, lies the distinction between that case and the matter now in hand: in this case the defence was a denial of the knowledge that ammunition was in the cupboard.

Even though it was held in *Lockyer v. Gibb* (supra) that the statute created an absolute liability, we find LORD PARKER, C.J., saying in the course of the judgment (at p. 655 *ibid*):—

"In my judgment, before one comes to a consideration of a necessity for *mens rea* or, as it is sometimes said, a consideration of whether the regulation imposed an absolute liability, it is of course necessary to consider possession itself. In my judgment, it is quite clear that a person cannot be said to be in possession of some article which he or she does not realise is, or may be, in her handbag, in her room or in some other place over which she has control. That, I should have thought, is elementary; if something were tipped into one's basket and one had not the vaguest notion it was there at all, one could not possibly be said to be in possession of it".

This dictum was cited with approval in *Reg. v. Warner* (1968) 2 W.L.R. 1303 where the question for determination was the meaning of the word 'possession' in a statute which provided that:—

"It shall not be lawful for a person to have in his possession a substance for the time being specified in the Schedule to this Act unless . . ."

and then followed certain exceptions.

In that case the appellant was charged with the possession of a quantity of amphetamine sulphate tablets which were found in a box in a van driven by him. He had collected that box together with another box containing scent, and the defence was that he believed that the offensive box also contained scent. On the question of possession, the jury were directed that if the appellant had control of the box which turned out to be full of amphetamine sulphate, the offence was committed, and it was only mitigation that he did not know of the contents. It was held that the act

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came within the class of Acts in which the offence prescribed therein was absolute; that the Act forbade possession of certain scheduled drugs, and whether an accused possessed these with an innocent or guilty mind or for a laudable or improper purpose was immaterial since he is not allowed to possess them, and if he did possess them without lawful authority he was guilty of an offence under the Act.

But here again, it was necessary to devote attention to what is meant by possession, and LORD MORRIS OF BORTH-Y-GEST treated the matter thus referring to *Lockyer v. Gibb* and the "deeming" provision in the statute in that case (at p. 1329 *ibid*):—

". . . the question now raised concerns the validity or the applicability of the reasoning which was thus expressed in the judgment in that case:

'While it is necessary to show that the defendant knew she had the articles which turned out to be a drug, it is not necessary that she should know that in fact it was a drug or a drug of a particular character'.

"In my view, the approach denoted by those words is applicable in the present case. The question resolves itself into one as to the nature and extent of the mental element which is involved in 'possession' as that word is used in the section now being considered. In my view, in order to establish possession the prosecution must prove that an accused was knowingly in control of something in circumstances which showed that he was assenting to being in control of it: they need not prove that in fact he had actual knowledge of the nature of that which he had".

In the instant case it comes to this. Did the appellant know that the articles were in his cupboard? There is no evidence that the ammunition were in a container, or anything of that sort. So that if he entered the cupboard, he would have been aware of their presence, and would be presumed to have been exercising control of them either alone or jointly with his brother who had placed them there.

It has been conceded that the evidence is that the appellant had control of the cupboard of which he had a key, but counsel for the respondent has expressed some reservation as to the manner in which the magistrate approached the defence. Counsel concedes that it did not appear from his reasons for decision that the magistrate considered the defence raised, that is, whether the burden resting on the defence had been discharged on a balance of probabilities, at least he has not said so. But, argues counsel, it is to be taken that by inference, the magistrate must have rejected the testimony of the appellant in all its material aspects.

As has already been stated, the magistrate made two findings of fact on which it would appear he based the conviction of the appellant—the fact that the appellant's brother did not tell the police that he had put the

ammunition in the appellant's cupboard, and the fact that the appellant took the key for the cupboard from his pocket.

It seems to us that to find that the appellant's brother had possession and control of the articles found in other parts of the house, including the disused kitchen, he must have accepted at least that part of his story that he had found the articles (including those found in the cupboard) and had stored them in the house. If this is so, then it is not beyond the realm of possibility that he also placed the ammunition in the cupboard, and the fact that he did not tell the police this is of no moment. Had he said so, then that bit of evidence might have been regarded as being in favour of the appellant; but his failure to say so is, in our opinion, not evidence against the appellant, and this is particularly so when the principle is borne in mind that where several persons are jointly charged, the case against each must be considered separately.

The fact that the appellant took the key from his pocket would normally raise a strong *prima facie* case against him if that was the only key. But the evidence is that there is more than one key for that cupboard, as there is for the other two cupboards, which would suggest that the other occupants of the house can have access to all the cupboards. Unfortunately the magistrate does not appear to have made a finding of fact as regards this important aspect of the case. The evidence of the appellant on this matter stands un rebutted, and while it is conceded that evidence of this nature—true or false—will come from the defence (the prosecution having no knowledge of these matters) it is incumbent on the magistrate to make a positive finding of fact. Applying *Sooknanan v. McLean* (supra), it appears to us that there is a vital lacuna in the magistrate's reasons for conviction.

We are therefore constrained to allow this appeal quashing the conviction and sentence, with costs to the appellant fixed at \$36.76.

Appeal allowed.

MOHAMED HANIFF KHAN v. MEER MUNTAZALLY RAHAMAN

[High Court (George, J.) August 27, September 3, 5, 25, 26, 1969.]

Immovable property—Sale of—Note or memorandum in writing—Memorandum showing proposed sale not sufficient—Civil Law of Guyana Ordinance Cap. 2 s. 3(D) proviso (d).

The proviso (d) of s. 3(D) of the Civil Law Ordinance Cap. 2 provides that any contract for the sale, mortgage or lease of immovable property or

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any interest in or concerning immovable property shall not be enforceable unless the agreement or some memorandum or note thereof is in writing and signed by the party to be charged or some other person thereunto by him lawfully authorised. The plaintiff entered an oral agreement with the defendant to purchase land from him. The defendant wrote the following letter to the Guyana Credit Corporation and the plaintiff relied on it as a sufficient memorandum to satisfy the section:

"I am the owner of lot 211 Stanley Place Kitty, by transport No. 427 dated 20th March, 1950. I am selling a portion of the above known as subplot F measuring 33.5 x.69' to Mr. Mohamed Haniff Khan of lot 211 Stanley Place Kitty for the sum of \$3,600.00. Transport to be advertised at a date to be agreed upon after the proposed sale".

HELD: that the letter was not a sufficient note or memorandum to satisfy the section because the whole tenor of the letter suggests a proposed sale rather than an agreement which had already been completed.

Judgment for the defendant.

B. S. Rai and K. Bhagwandin for the plaintiff.
F. Ramprashad Q.C., for the defendant.

GEORGE, J.: This action arises out of an opposition to the transfer by the defendant of his right, title and interest in and to a lease for 999 years in respect of sub-lot F part of lot 211 Alexanderville, in the Kitty and Alexanderville Village District, to one Mohamed Haniff Khan of Novar, Mahai-cony. The advertisement of the transfer appeared in the Official Gazette of 22nd June, 1968, and is numbered 137. The ground of the opposition is that the defendant had entered into a prior agreement with the plaintiff for the sale to him of his leasehold interest in the land for \$3,600.00. The defendant relies *inter alia* upon the provisions of proviso (d) of section 3(D) of the Civil Law of Guyana Ordinance, which provides that "any contract for sale or lease of immovable property, or any interest in or concerning immovable property shall not be enforceable unless the agreement or some memorandum or note thereof is in writing and signed by the party to be charged, or some other person thereto by him lawfully authorised".

The plaintiff in his evidence states that he lived continuously in the house situate on sub-lot 'F' since the year 1958, during which he had purchased the house from its previous owner. Before doing so, he had informed the defendant, who was then the owner of the land on which the house is situate, of his intended purchase, and had enquired whether he had any objection to the transaction. The defendant intimated that he had none, provided the plaintiff was prepared to purchase the land on which the house stood if he at any time decides to sell it. The plaintiff thereupon told the defendant that he was prepared to do so.

In the year 1966 the defendant did make an offer to sell the area now in dispute to the plaintiff for \$3,600 but informed him that the conveyance would be by way of a lease for 999 years, as the transport in respect of sub-lot 'F' and the adjoining sub-lot would be held by the purchaser of the latter. It would appear that the defendant was the owner of two adjoining lots in that area and had divided them into several sub-lots.

After some discussion about the price the plaintiff agreed to purchase the sub-lot for the sum required by the defendant. This agreement, albeit oral, is a good executory contract. But is it enforceable?

The day after it was made, and in keeping with a discussion which the plaintiff had had with the defendant, he and the latter went to the Guyana Credit Corporation, a mortgage institution, as the plaintiff desired to apply for a mortgage on the sub-lot. To this end the defendant gave to a clerk employed by the Credit Corporation, a letter addressed to its secretary. This letter reads as follows:

"I am the owner of lot 211 Stanley Place, Kitty, by transport No. 427 dated 20th March, 1950.

I am selling a portion of the above known as sub-lot "F" measuring 33.5 x 69' to Mr. Mohamed Haniff Khan of lot 211 Stanley Place, Kitty for the sum of \$3,600.00 (three thousand six hundred dollars).

Transport to be advertised at a date to be agreed upon after the proposed sale."

This application, which appears to have been treated as one for a mortgage in respect of transported land was later approved and a loan of \$3,000: offered.

The plaintiff informed the defendant of this and on the latter's advice he sought and obtained a change in the description of the holding to be mortgaged to one of a lease for 999 years. He again communicated with the defendant, who there and then reneged and told the plaintiff that he was no longer prepared to sell at the price of \$3,600: Nothing further transpired between the parties until some time during the year 1968, when the plaintiff heard that the defendant was about to sell the land to someone else. He spoke to him and the defendant denied it. But on the 22nd June the plaintiff read the publication in the Official Gazette in respect of which the notice of opposition has been entered. In the meanwhile, on the 15th June, the plaintiff paid to the Corporation the sum of \$ 600: which was required as a condition precedent on his obtaining the loan of \$3,000:.. Although he denies in cross-examination that if he had not obtained the mortgage he could not have paid the defendant, I do not believe him. I prefer to believe his earlier statement that he did not have sufficient money to pay for the land and this was his reason for making the application.

At the close of the plaintiff's case counsel for the defendant chose to close his case and rely on the legal submission that there was not sufficient note or memorandum to satisfy the proviso of section 3(D) of the Ordinance

to which I have already referred. The note or memorandum relied upon by counsel for the plaintiff is the letter which the defendant gave to the clerk of the Corporation.

As I understand the legal position, in order that an oral agreement may be enforceable under the proviso it must be evidenced by some note or memorandum; and the note or memorandum must expressly contain the names of the parties, the property to be sold and the price at which it was to be sold. All these things appear in the letter to the Credit Corporation on the reference. Despite this, however, it appears to me that the letter is not a sufficient note or memorandum to satisfy the section. I come to this conclusion because the whole tenor of the letter suggests a proposed sale rather than an agreement which had already been completed.

If a person were to say that he intends to sell or proposes to sell to a particular person at a particular price, then this, to my mind, is not an indication that he has in fact sold. The note or memorandum is required to evidence the agreement but that on which the plaintiff relies does not speak, to my mind, or an agreement, but merely of a proposed agreement of sale.

In this regard, some assistance can be had from the case of *Maundy v. Asprey*, 1880, 13 Chancery Division, 855 in which FRY, J. held *inter alia* that an engrossment of conveyance which recited that the vendor had contracted with the purchaser for the sale to him of land at a certain price and which was accompanied by a signed letter referring to the agreement and the purchase money, was not a sufficient memorandum within the contemplation of the comparable English legislation. I understand the learned judge to be saying that the documents when read together amounted to a mere statement of an expectation of a future contract. Support for this view can be had from the case of *Parker v. Clark* (1960) 1 All E.R. 93. DEVLIN, J., at pp. 102-103 had this to say in considering *Maundy v. Asprey*:

"In that case the purchaser's solicitors sent the engrossment of a conveyance to the vendor's solicitors together with a letter in which they sought an appointment to complete. Those documents were held not to be sufficient memorandum since they were a statement of an expectation of a future contract. Counsel particularly relied on the following dictum of FRY, J.

'The statute requires that a concluded agreement existing at the time when the memorandum is signed would be proved by the plaintiff, whereas the document, as I have said, shows no actual existing agreement.' I think, with great respect, that whether the case was rightly or wrongly decided this dictum cannot be supported. It is contrary to a number of authorities - two of which *Smith v. Neale* (1857) 2 C.B.N.S. 67 and *Rouss v. Picksley* (1866) L.R. 1 Exch 342 were cited by counsel for the plaintiffs—which show that a written offer is capable of being a good memorandum although the agreement cannot come into existence until after the offer has been accepted. I agree that a document which contains no more than a statement of all the terms of

a proposed agreement would not be enough; and it may be that that is the way in which an engrossment ought to be regarded."

In the circumstances I have no other alternative but to dismiss this case. The opposition is accordingly illegal, unjust and not well founded. There will be costs to the defendant fixed at \$500: from which by agreement would be set off the sum of \$75: already awarded to the plaintiff as costs in any event.

Judgment for the defendant.

A. & A. SANKAR v. RAMKISSOON, MAHADAI AND MANGAL

[High Court – In Chambers (Mitchell, J.) May 16, September 26, 1969.]

Rice lands—Determination of basic rent—At figure less than the maximum basic rent—Rice Farmers (Security of Tenure) Ordinance 1956, ss.2, 4, 11, 18, 23.

Under the Rice Farmers (Security of Tenure) Ordinance, 1956, the maximum basic rental per acre for pegasse soil land in Zone V Area No. 5 was \$6.60 per acre. The Rice Assessment Committee for the area, after considering the quality of the soil, fixed the rent of holdings in the area at \$3.50 per acre. The committee had power to fix a maximum rent by the addition of certain permitted increases to the basic rent. On appeal by the landlord it was argued that the Rice Assessment Committee had no authority to award less than the maximum basic rent of \$6.60 as set out in the Ordinance.

HELD: that the Rice Assessment Committee was entitled to fix a basic rent at a figure less than the maximum basic rental set out in the Ordinance.

Appeal dismissed.

B. S. Rai for the appellant.

M. C. Young for the respondent.

MITCHELL, J.: This is an appeal from the decision of a Rice Assessment Committee for the Demerara-Berbice area whereby on an application of the respondents to have the rent of thirty-four (34) acres – sixty-two (62) square rods of rice land situate at Lowlands, Hope and Nooten Zeil, East Coast Demerara assessed, the Rice Assessment Committee fixed the maximum rent for the thirty-four (34) acres of rice land at \$9.50 (nine dollars and fifty cents) per acre for the years 1959 to 1963.

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The Rice Assessment Committee heard evidence from persons they considered experts and with some reluctance classified the soil of the rice lands under consideration as pegasse. They considered the soil as a very poor type of pegasse.

Accordingly, the members of the Committee thought that they would not award the maximum basic rent for pegasse soil under the First Schedule of the Rice Farmers' (Security of Tenure) Ordinance, No. 31 of 1956, and having considered Subsection (1) of Section 4 of the said ordinance, the basic rent from the pegasse soil was fixed at \$3.50 (three dollars and fifty cents) per acre.

The rice lands under consideration in this matter fell within Zone V Area No. 5, and according to the Rice Farmers' (Security of Tenure) Ordinance 1956, the maximum basic rental per acre for pegasse soil for land within that zone was \$6.60 (six dollars and sixty cents).

The sole point that came up for determination in this appeal was as to whether the Rice Assessment Committee had authority to award less than the maximum basic rental as set out in the First Schedule to the Rice Farmers' (Security of Tenure) Ordinance, No. 31 of 1956. Alternatively, it was the contention of the appellants that the Rice Assessment Committee acted unreasonably in doing so.

Mr. Rai, counsel for the appellants contended that the landlord is entitled to charge rent, but not exceeding the amount of the maximum basic rent as set out in the various categories of soil in the First Schedule of the ordinance. He argued that the discretion to charge less than the maximum set out in the First Schedule of the ordinance was that of the landlord only and not that of the Rice Assessment Committee, and that there was nothing in the ordinance to indicate that the Rice Assessment Committee had a discretion to reduce. There was specific provision in the proviso to section 4(1) of the ordinance for the Assessment Committee to vary the basic rent in certain circumstances i.e. in respect of land intended to be used for the cultivation of paddy according to normal agricultural standards. There was express provision to fix the basic rent from time to time during the first five years after the commencement of the tenancy. Thereafter, the Rice Assessment Committee had no power to vary the basic rent. Thus, they could not do so in the circumstances of this case.

Mr. Rai further referred to the classification in the First Schedule of the ordinance, and said that there were not grades of pegasse soil. The soil was referred to as "pegasse" only. He also referred to Section 11(a) of the ordinance which states that: "a committee shall have in relation to the area in respect of which it is appointed the following powers and duties: –

- (a) to *assess, fix* and *certify* the maximum rent to be paid and received in respect of any holding to which this ordinance applies".

He said that the ordinance has given a discretion to the Rice Assessment Committee so far as estate charges are concerned in the Fifth Schedule, but not as far as the basic rent is concerned in the First Schedule of the ordinance.

Mr. Young for the respondents urged that the Rice Assessment Committee had power to fix the maximum rent and, therefore, had power to fix the basic rent with the limit of the First Schedule.

It is, therefore, necessary to examine the ordinance to appreciate the purpose of the ordinance, and also, the powers conferred on the Rice Assessment Committee, to see which contention is tenable.

There is a preamble to the ordinance which states the facts for which it is proposed to legislate by the ordinance. The preamble states, and I quote,

"An ordinance to provide better security of tenure for tenant rice farmers; to limit the rent payable for the letting of rice lands, and for purposes connected with the matters aforesaid"

An "Assessment Committee" or "committee" according to the Interpretation section, Section 2 of the ordinance means:

"An assessment committee constituted under the provisions of section 8 of this ordinance for the area in which the holding in question is situate."

Section 11 of the ordinance provides that the

"Committee shall have in relation to the area in respect of which it is appointed the following powers and duties: –

- (a) to *assess, fix* and *certify* the *maximum rent* to be paid and received in respect of any holding to which the ordinance applies.

and *inter alia*

- (c) to *assess, fix* and *certify* the amount to be paid as *damages* by a landlord to his tenant for non-observation of any of the conditions of good estate management in respect to any holding to which this ordinance applies."

It is to be appreciated that the amount of damages in any circumstances is an amount that has to be ascertained by a consideration of a number of unfixed, undetermined and varying factors and the words used are "to assess, fix and certify" the same words used in the ordinance with reference to the fixing of the *maximum rent*".

"Maximum rent" means the sum obtained by the addition to the *basic rent* of any holding to which this ordinance applies, of the increases permitted under section 23 of the ordinance. Section 23 of the ordinance permits the following amounts to be added to the basic rent: –

- (a) an amount equivalent to the amount per acre payable by the landlord in respect of the holding by way of rates providing for local government.

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- (b) an amount equivalent to the amount per acre payable by the landlord in respect of Drainage and Irrigation rates.
- (c) an amount equivalent to the amount per acre payable by the landlord by way of rates under the Water Conservancy Ordinance or the Boeraseri Creek Ordinance,
- (d) an amount in respect of estate charges if any which *shall not exceed the appropriate amount set out in the fifth schedule to this ordinance.*

So in fixing the maximum rent there is the basic rent and certain permissible additions, and these make up the maximum rent payable.

It is significant that in arriving at the amount permitted under section 23(d) of the ordinance—the amount in respect of estate charges – the committee has a discretion and it is stated and I quote,

"an amount . . . which *shall not exceed the appropriate amount set out in the fifth schedule to this ordinance.*

The case of *Rayman v. Bridgelall* (1959) L.R.B.G. page 10 supports that proposition, and it is appreciated that in the fifth schedule there is a differentiation between the types of maintained estate, giving rise to a different estate charge for a different type of maintained estate. However, if one is to accept the reasoning of the learned trial judge in *Rayman v. Bridgelall* (*supra*) the committee has a discretion to fix a rate of estate charge in respect of a holding at an amount less than the maximum stated in the fifth schedule in relation to a particular type of maintained estate. It is to be appreciated that if that reasoning is correct, and I agree with it as correct, it involves the Committee's determining the degree or extent to which they will apply the particular charges as set out in the Fifth Schedule to the particular estate and the maintenance of the estate holdings may vary.

In the words of the learned trial judge, LUCKHOO, J.

"It is after regard is had in respect of a holding to the existing amenities or the lack of amenities as the case may be that the amount (if any) of estate charges can be fixed under the provisions of Section 23(1) (d) of the ordinance."

It should then be asked, if there is evidence as to the existing quality or the particular type of soil, and if the evidence is that the soil is of a poor or very poor quality, why should the Committee not be in the same position to exercise a discretion in fixing the basic rent in terms of the First Schedule of the ordinance? Should the Committee then fix the same maximum basic amount for a category of soil as set out in the First Schedule of the ordinance after it is made aware by accepting evidence, that the soil is of poor or very poor quality in one area of an estate, and also fix the same maximum basic rent for another holding in the same estate where the soil of the same category is of a better or higher quality, or of the highest quality.

It strikes me as being manifestly unreasonable and unfair that two persons who have holdings of different qualities of soil should have fixed for them, the same maximum basic rent when the Committee knows, and that is the operative factor, that the soil for which each has to pay is not the same as the other, that one is of poorer quality than the other.

Adopting Mr. Rai's argument that it is for the landlord to fix the basic rent within the maximum limit set by the First Schedule, it would also mean that the landlord in the exercise of his peculiar discretion could then charge the same maximum basic rental for both holdings even though there is this disparity in soil quality which would inevitably affect the production of rice of the respective holdings, or the quality of the rice produced and the Committee would be powerless to do anything about this unfair dealing.

This, to my mind, could not have been the purpose and spirit of the ordinance as set out in the preamble to the ordinance in which it is stated that it is "An ordinance . . . to *limit the rent payable for the letting of rice lands*.

The limiting of the rent payable for the rice lands must bear some reasonable relationship to what lands the tenant has rented; whether the soil is poor clay soil, or poor pegasse soil or not, and the Committee must take into account the evidence of the quality of the type of soil before it, once there is evidence of such quality. If there is no evidence as to the quality of the soil, then the Committee could fix only the limit (i.e. the maximum basic rental) of the rent to be paid for the particular category of soil of the particular holding.

Again, in Section 4(1) of the ordinance it is stated and I quote,

"the *basic rent* chargeable in respect of rice lands . . . shall . . . not exceed the appropriate amount set out in its third, fourth and fifth columns of the said schedule" i.e., of the first schedule".

The wording of that portion of Section 4(1) is similar to the wording of Section 23(1) (d) in connection with estate charges to which I previously referred.

So, if similar words are found to confer a discretion on the Committee in relation to estate charges where there is evidence of a difference in the maintenance of the estate, giving rise to the Committee's being able to assess and fix an amount for estate charges less than the maximum set out in the Fifth Schedule, by a corollary similar words should confer a discretion on the Committee in relation to basic rent where there is evidence to a difference or depreciation in the quality of the category of soil.

It is the duty of the Committee to assess, fix and certify the maximum rent payable in respect of any holding, and this maximum rent is made up of a basic rent for the soil and the permitted increases.

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The ordinance does not say by specific mention, or otherwise, that the Committee should assess only the permitted increases under Section 23(1) (d) of the ordinance, nor does that arise by implication. The assessment is applicable to all the elements which go to the making up and the fixing and the certifying of the maximum rent payable, and all the evidence in relation to all elements which go to make up the maximum rent ought to be considered if the Committee is to carry its powers and duties to their logical conclusion.

Section 18 of the ordinance states, and I quote,

"Where the committee has *ascertained, assessed and fixed* the maximum rent of any holding, the chairman shall

(a) cause a certificate of the maximum rent. . . to be completed.

So, the completing of the certificate involves . . . not a mere acceptance of what is stated in the First Schedule, in addition to the other permitted increases but an ascertaining generally, a finding out, an inquiry into the subject-matter and incidental matters and following on that finding out an "assessing", involving the sifting and weighing of evidence, to estimate the value in terms of quality, quantity and productivity of the rice lands, and thereafter a fixing of the maximum rent payable.

Accordingly, I am of the opinion that the Rice Assessment Committee has the right to exercise a discretion if it so desires, in relation to any amount it desires to fix, in any of the categories of soil set out in the first schedule, once there is evidence on which it could act and so exercise its discretion, and once that discretion is exercised judicially I would not interfere with it.

Mr. Rai in questioning the Committee's exercise of a discretion (if they were found to have the right to exercise a discretion) said that there was no evidence to show that it was a poor type of soil. But this is not so, for in the record of proceedings, Harold Ramdin who said that he was a Bachelor of Science in soil science, said about the physical characteristics of the soil that it was "poor soil". He said so while indicating that all his samples were of pegasse soil. The only reasonable inference to be drawn from those two propositions of fact was that it was poor pegasse soil, and that is what the Committee accepted. The landlord through his agent had contended that the soil was clay, not pegasse, and had charged a rent based on the assumption that the soil was clay. The members to Committee were, thus, right in finding that the tenants were paying for something which they did not get and apart from, and in addition to the fact that the soil was poor pegasse soil, considered this fact as reasonable for a reduction in the rent to \$3.50 (three dollars and fifty cents) per acre, so as obviously to try to do justice as far as they can between the parties, and redress the balance between the parties.

Accordingly, I could find nothing wrong judicially with the Committee's exercise of its discretion to fix the basic rent in relation to the categories of soil as set out in the First Schedule of the ordinance as they did in the circumstances of this case.

This appeal will, thus, be dismissed and I think it appropriate in this case that each party bear his own costs.

Appeal dismissed.

RE APPLICATION BY GERRIAH SARRAN

[Court of Appeal (Luckhoo, C., Cummings, and Crane, J.J.A.),
June 18, September 30, 1969.]

Certiorari—Dismissal from office—Refusal of order nisi by judge—Appeal therefrom—Prima facie case—Direction that writ should issue—Constitution of Guyana arts. 96, 119, 125(8). Crown servant—dismissal.

Art. 96 of the Constitution of Guyana provides that power to remove public officers vests in the Public Service Commission with power to delegate its functions under certain conditions. The applicant was dismissed from her post and applied to the High Court by *ex parte* motion, supported by affidavit for a writ of *certiorari* to quash the order of dismissal. Her affidavit set out a letter signed by an assistant secretary in the Ministry of Health informing the applicant that an inquiry would be held and a letter signed by the Permanent Secretary of the same Ministry dismissing the applicant. Before dismissal an inquiry convened by the said assistant secretary had been held. A judge refused an order *nisi* of *certiorari*. On appeal.

HELD: (i) art. 125(8) of the Constitution of Guyana preserves the supervisory jurisdiction of the High Court to issue the writ of *certiorari*.

(ii) proceedings relating to the removal from office in the public service are judicial in nature and *certiorari* will lie in appropriate cases.

(iii) the matter should be remitted to the judge with a direction that the order *nisi* should issue because the correspondence on the affidavit in support does not disclose compliance with the mode of delegation provided by the Constitution and *ex facie* shows a want of jurisdiction.

Appeal allowed.

B. E. Gibson for the appellant.

M. S. Rahaman amicus curiae.

CUMMINGS, J.A.: The applicant, an employee of the Ministry of Health as a maid attached to the Public Hospital, Georgetown at a salary of

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\$1,014 per annum, was, on the 18th January, 1968, charged by the Permanent Secretary of the Ministry of Health as follows:

"That you, being a maid attached to the Georgetown Hospital, on the 20th July, 1967, while on duty were under the influence of alcohol to such an extent which rendered you incapable of performing your duties to the prejudice of discipline and the proper administration of the service."

She replied to this charge on the 15th January, 1968, and on 9th March, 1968, received the following communication:

"9th March, 1968.

Madam,

I am directed to inform you that I have been appointed by the Permanent Secretary to hold an Enquiry into the charge against you conveyed to you in letter of even number dated 12th January, 1968. Please note that I have fixed Wednesday, 20th March, 1968, at 1.30 p.m. as the time and date of the Enquiry when you are requested to be present at the doctor's common room.

2. You may bring any person you wish to give evidence on your behalf.

I have the honour to be,
Madam
Your obedient Servant,
?
Assistant Secretary."

That enquiry, the convenor of which was the said Assistant Secretary, a Mr. Charles Byass, was duly held on the 6th May, 1968, and thereafter the applicant received the following letter:

"6th May, 1968

Madam,

I wish to refer to my confidential letter of even number dated 12th January, 1968, transmitting the charge appearing in the Schedule thereto below, and to your written explanation dated 17th January, 1968, and to inform you that after careful consideration of your explanation and the report of the enquiry set up to investigate the matter, it has been found that the charge has been proven against you.

2. In the circumstances, it has been directed that you should be dismissed and you are dismissed from the Public Service with effect from 4th May, 1968, inclusive.

3. You will receive no further salary as from the 4th May, 1968, inclusive.

I have the honour to be,
 Madam,
 Your obedient servant,
 ?
 Permanent Secretary."

The effect of all this is that the appellant was charged departmentally with an offence. She replied to the charge, the matter was investigated by an Assistant Secretary of the Ministry of Health, appointed by the Permanent Secretary to the Ministry of Health to hold an enquiry, as a result of which she was dismissed from the public service.

In the circumstances she applied to the High Court by *ex parte* motion, supported by affidavit, for a writ of *certiorari* to quash the order of dismissal—on the grounds set out in her affidavit—that the enquiry was not conducted in accordance with the provisions of Art. 96 of the constitution, and that the said Assistant Secretary was, by virtue of his executive position, sufficiently interested in the matter against her that he should not have been appointed convenor of the enquiry.

The learned High Court judge before whom the matter came on for hearing, dismissed the application holding that —

- (i) Merely being in an executive position was not by itself a fact supporting bias or interest for an order of *certiorari* to be made as the Assistant Secretary was not the person determining the issues in this matter.
- (ii) The applicant did not set out in her affidavit, facts to support her contention that the procedure set out in Section 96 of the Constitution had not been followed.
- (iii) No order was made by the person holding the enquiry.
- (iv) The motion not being one to have the order of the enquiry or of the Permanent Secretary removed to the High Court, but rather to remove to the High Court the said "enquiry for the purpose of being quashed"; in these circumstances the High Court could not do so.
- (v) The enquiry had no civil or criminal jurisdiction.
- (vi) The enquiry was a purely administrative exercise and not a judicial or a quasi-judicial process, and was in the exercise of administrative as distinct from any judicial or quasi-judicial authority or power. The decision was not made by the tribunal of enquiry, it was made by the Permanent Secretary alone; and this could not be said to be a judicial or quasi-judicial act as he exercised no judicial powers.

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From this judgment the appellant appealed to this court on several grounds which, in total effect, urged that the learned trial judge, having misconceived the true nature of the proceedings, did not apply the right principles, and, consequently, failed to exercise his discretion judicially. This court allowed the appeal, set aside the judgment of the learned trial judge, and decree that an order *nisi* should issue.

I now give my reasons for concurrence with that decision. No question was raised before the High Court or in this court as to the jurisdiction of the High Court to make an order in a proper case upon application for *certiorari*, but as it appears that there have been little or no local judicial pronouncements on the topic, it might be helpful if, as a judge of this court, I recorded my views as to the availability of this process to the citizens of Guyana, and then to discuss its application to the facts in the instant case.

The writ of *certiorari*, one of the three prerogative writs—*certiorari*, *prohibition* and *mandamus*—is the process by action which the King's (now Queen's) Bench Division of the High Court of Justice in England, in the exercise of its superintending power over inferior jurisdictions, requires the judges or officers of such jurisdictions to certify or send proceedings before them into the King's Bench Division whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the court below.

Until the enactment of the Administration of Justice (Miscellaneous Provisions) Act in 1938, the procedure for the issue of the writ was governed generally by paras. 12 – 31 of The Crown Office Rules, 1906 – vide SHORT & MELLORS "THE PRACTICE ON THE CROWN SIDE", 2nd Ed., 1908, pp. 1-83.

The Supreme Court Ordinance, No. 7 of 1893 which established The Supreme Court of British Guiana enacted by s. 3:

"(2) The court shall be a Superior Court of Record, and shall have and may exercise all the authorities, powers, and functions belonging or incident to such a court according to the Law of England. . . ."

Section 3(B) of the Civil Law of British Guiana (now Guyana) Ordinance, Cap. 2, provided that from and after the 1st day of January, 1917:

"The common law of the colony shall be the common law of England. . . ."

And s. 24 of this Ordinance expressly saves the Royal Prerogative.

S. 3(2) of the Supreme Court Ordinance, Cap. 7, provides:

"The court shall have and may exercise all the authorities, powers, and functions belonging or incident to a court of that character according to the law of England, and all the authorities, powers and functions which, when the colony came under the dominion of the British Crown, belonged or were incident to the High Court

of Justice of Holland and to the National Court of Holland, or other courts then possessing and exercising in Holland or in this colony the jurisdiction of superior courts, and, subject to the provisions of this ordinance, all the authorities, powers and functions conferred upon and exercised by the Supreme Court as constituted by the Supreme Court Ordinance, 1893."

There can be no doubt, therefore, that the High Court of Justice of the Supreme Court of Judicature of Guyana, having as it does by virtue of the Guyana Independence (Adaptation and Modification of Laws) (Judicature) Order, 1966, all the powers, etc., of the Supreme Court of British Guiana, has jurisdiction to maintain applications for the prerogative writs.

The procedure for the invocation of the issue of such a writ by the High Court in Guyana is, however, notwithstanding the statutory changes effected by the 1938 Act in England still in accordance with the English Crown Office Rules of 1906. That is so because the local rules are silent on the topic – see *Coghlan v. Vieira*, (1958) L.R.B.G. p. 108 at p. 120, where the matter was considered by STOBY, J., with regard to the kindred writ of *mandamus*.

The application for the writ of *certiorari* was, therefore, properly before the court, and the only question for consideration is whether the learned trial judge exercised his discretion judicially in refusing to make an order *nisi*.

Art. 96 of the Constitution provides as follows:

"(1) Subject to the provisions of this Constitution, the power to make appointments to public offices and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Public Service Commission.

"(2) The Public Service Commission, may, by directions in writing and subject to such conditions as it thinks fit, delegate any of its powers under the preceding paragraph to any one or more members of the Commission or, with the consent of the Prime Minister, to any public officer or, in relation to any officer on the staff of the Clerk of the National Assembly, to the Clerk."

And Art. 119 provides that:

"(1) Save as otherwise provided in this Constitution, in the exercise of its functions under this Constitution a Commission shall not be subject to the direction or control of any other person or authority.

"(2) Subject to the provisions of this Constitution, a Commission may regulate its own procedure and, with the consent of the Prime Minister or of any Minister designated by the Prime Minister for the purpose, may make rules for that purpose or for conferring powers or imposing duties on any public officer or on any authority of the Government of Guyana for the purpose of the discharge of the Commission's functions.

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"(6) Any question whether –

(a) a Commission has validly performed any function vested in it by or under this Constitution;

(b) any member of a Commission or other person has validly performed any function delegated to such member or person by a Commission in pursuance of the provisions of this Constitution; or

(c) any member of a Commission or any other person has validly performed any other function in relation to the work of the Commission or in relation to any such function as is referred to in the preceding subparagraph;

shall not be enquired into in any court."

Art. 125(8) that:

"No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law."

Let me at the outset say that s. 6 of Art. 119 does not, in my view, present any difficulty. It means no more than that there can be no enquiry by a court into the validity of an act that the Commission is legally authorised to do; this does not mean that if the Commission or person does something which it has no jurisdiction to do, or which is beyond its or his power, as defined in the Constitution, that act cannot be enquired into by the courts. I am reinforced in this view by the express provisions of Art. 125(8) of the Constitution cited earlier in this judgment.

Professor de SMITH in his eminent treatise "JUDICIAL REVIEW OF ADMINISTRATIVE ACTION" deals with the topic in the manner following:

". . . .it may be said that the courts may award relief where an administrative body has acted without authority or has stepped outside the limits of its authority or has failed to perform its duties; that bodies exercising 'judicial' functions will be required to observe the rules of natural justice – those basic principles of fair procedure which demand a deciding authority free from interest or bias and the right to a fair hearing for those who are immediately affected by its decision; that a statutory discretion may be held to have been invalidly exercised if its repository acts in bad faith, capriciously, in furtherance of an authorised purpose, without regard to relevant considerations or on the basis of irrelevant considerations, or if he fails to exercise an independent discretion in a particular case; but that in the absence of statutory provision for appeal, errors of law and fact committed by an administrative body do not, in general afford grounds for relief unless they have caused it to go outside its jurisdiction or to misconceive the

scope of its discretionary powers, or unless an error of law is disclosed by the 'record' of the determination issued by it."

With great respect I accept this as an accurate statement of the law as I apprehend it.

In *R. v. Paddington Valuation Officer, ex parte Peachey Property Corporation, Ltd.*, 1965 2 All E.R. 836, a company owning a large number of properties within the Paddington rating area, sought a *certiorari* to quash the whole of the valuation list prepared for that area. In the course of his judgment in the Court of Appeal, Lord DENNING, M.R. discussed the various points that had to be established before this remedy could be granted, and these may be summarised as follows:

- (1) Is *certiorari* a proper remedy in the circumstances, or is there some other remedy provided by statute for the particular case?
- (2) Is the plaintiff a 'party aggrieved'?
- (3) Is *certiorari* available? Is the respondent under a duty to act 'judicially'?
- (4) Are the consequences of granting *certiorari* such that the court ought not to exercise its discretion in favour of granting the remedy?
- (5) Can some ground be established on the basis of which *certiorari* can be granted? In other words, has there been some error of law? I would say that, if a tribunal or body is guilty of an error which goes to the very root of the determination, in that it has approached the case on an entirely wrong footing, then it does exceed its jurisdiction' . . .

Questions 1-3 were answered affirmatively in favour of the applicants for *certiorari*; on question 4, it was argued that if the entire valuation list were quashed before a new one could be prepared, 'chaos' would result and that therefore, as *certiorari* was a discretionary remedy, it should not be granted. Lord DENNING was prepared to avoid the chaos by suspending the operation of the *certiorari*. SALMOND, L.J., however, roundly observed that—

"Whatever inconvenience or chaos might be involved in allowing the appeal, the court would not be deterred from doing so if satisfied (the valuation officer) had acted illegally."

In the instant case the Constitution expressly vests the power to remove persons holding or acting in public offices in Guyana in the Public Service Commission. It makes provision for delegation of those powers, but such delegation must be to specified persons and in a specified manner.

The illuminating judgment of Lord PEARCE in the House of Lords in *Anisminic v. Foreign Compensation Commission & anor.*, (1969) 1 All E.R. p. 208, is germane to this aspect of the case. At p. 233 he said:

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"My Lords, the courts have a general jurisdiction over the administration of justice in this country. From time to time Parliament sets up special tribunals to deal with special matters and gives them jurisdiction to decide these matters without any appeal to the courts. When this happens the courts cannot hear appeals from such a tribunal or substitute their own views on any matters which have been specifically committed by Parliament to the tribunal. Such tribunals must, however, confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament. It would lead to an absurd situation if a tribunal, having been given a circumscribed area of enquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandate to enquire and decide as set out in the Act of Parliament.

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity. Further it is assumed, unless special provisions provide otherwise, that the tribunal will make its enquiry and decision according to the law of the land. For that reason the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction comes to an erroneous decision through an error of law. In such a case the courts have intervened to correct the error."

See *R. v. Bolton*, (1841) 1 Q.B. 66 at p. 74.

The judgment of the learned trial judge does not disclose that he gave any real consideration to the question of the jurisdiction of the Permanent and/or Assistant Secretary to perform a duty reposed in the Public Service Commission.

In so stating I am not unmindful of the learned trial judge's distinction between the enquiry conducted by the Assistant Secretary and the dismissal by the Permanent Secretary, but both of these acts fall within the jurisdiction of the Public Service Commission and can only come within the jurisdiction of those officers if there is due delegation by the Public Service Commission. The Permanent Secretary in his letter to the applicant states: "It has been directed that you should be dismissed and you are dismissed." Who directed? Who delegated the power to dismiss?

All that was before the learned trial judge upon the hearing of the motion was the *ex parte* affidavit in support thereof. It is upon that that a court must act.

The correspondence therein set out between the Ministry and the appellant (applicant) does not disclose compliance with the mode of delegation provided by the Constitution and *ex facie* shows a want of jurisdiction. It seems to me therefore quite clear that the Permanent Secretary must now satisfy the court that the powers he purported to exercise were delegated to him in accordance with the provisions of the Constitution and were exercised within the ambit of such delegation—*delegatus non delegare potest*.

The inference I draw from the manner in which these letters emanating from the Ministry of Health were written is that there is a strong probability that there had been no *due* delegation by the Public Service Commission of the powers purported to be exercised by the Assistant Secretary and himself or the letters would have so stated. In any event, they do not disclose a due delegation.

In the circumstances I hold that the appellant has shown *ex facie* that there was a want of jurisdiction and the respondent must now show cause why an order absolute should not issue.

In exercising their powers of removal and discipline under the Constitution the Public Service Commission perform judicial or quasi-judicial acts—they enquire into charges in accordance with rules of procedure which provide for the hearing of both sides and a finding of fact upon a consideration of the evidence after which they make decisions and orders. See *Ridge v. Baldwin*, (1963) 2 W.L.R. p. 935

Lord DENNING'S five questions set out in *R. v. Paddington Valuation Officer ex parte Peachey Property Corporation Ltd.* (*supra*) must in this case be answered in the affirmative.

All that the learned trial judge said about this was that the applicant did not set out in her affidavit facts to support her contention that the procedure set out in art. 96 of the Constitution had not been followed.

In the circumstances an order *nisi* should issue as prayed.

I therefore concurred, as indicated earlier in this judgment.

CRANE, J.A.: A motion for an order *nisi* heard in the High Court of the Supreme Court of Judicature provides the background to this appeal. In that matter an order was prayed on the Permanent Secretary of the Ministry of Health to show cause why a writ of *certiorari* should not issue "to remove an enquiry into the High Court for the purpose of being quashed."

The enquiry referred to concerned the appellant, Gerriah Sarran, a wardmaid employed by the Ministry of Health. She was, on the 18th January, 1968, charged with the following offence:

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"That you, being a maid attached to the Georgetown Hospital, on the 20th July, 1967, while on duty were under the influence of alcohol to such an extent which rendered you incapable of performing your duties to the prejudice of discipline and the proper administration of the service."

Her affidavit in support of the motion shows that she duly replied to the above charge; that on the 9th March, 1968, she received a letter from the Assistant Secretary to the Ministry of Health to the following effect:

"9th March, 1968.

Madam,

I am directed to inform you that I have been appointed by the Permanent Secretary to hold an enquiry into the charge against you conveyed to you in letter of even number dated 12th January, 1968. Please note that I have fixed Wednesday 20th March, 1968, at 1.30 p.m., as the time and date of the enquiry when you are requested to be present at the doctors' common room.

2. You may bring any person you wish to give evidence on your behalf.

I have etc.

?

Assistant Secretary."

Meanwhile, the appellant was formally interdicted from duty pending the enquiry. This was duly held, and on the 6th May, 1968, the Permanent Secretary intimated to her by letter that the charge had been proved and that he had been directed to say that she was dismissed from the service with effect from 4th May, 1968.

After hearing argument on the necessity for the issue of the writ, the trial judge in an oral reserved judgment refused to do so. In reasons for decision, which are somewhat diffuse, he found in several instances that the appellant's affidavit did not depose to facts within her knowledge, but rather to what he considered to be matters of opinion. To quote him, he said he was in no position to "speculate or guess upon the facts or the probability of the facts which may go to support that opinion. So, what are the facts, as distinct from opinion, on which the court is asked to grant an order *nisi*?"

Some other grounds on which the order sought was refused and on which I shall briefly comment are: That the High Court could not "remove the enquiry" into the High Court, as asked and quash it there after hearing it. Here, I would only observe that this seems to be too narrow and literal a view to take of the matter. What is obviously sought is an order that the proceedings be brought up and quashed for excess of jurisdiction. The judge also considered that an action for a declaration by the appellant as to her rights might have been the more appropriate course to take, and that the enquiry was not a tribunal vested with judicial or quasi-judicial powers.

Para. 6, together with paras. 7, 10 and 11 of the appellant's affidavit, which are referred to as constituting matters of opinion and not facts, are most important and must be set out:

"6. That the Permanent Secretary of the Ministry of Health cannot hold an enquiry into disciplinary charges against me unless he was authorised by the public service Commission as set out in Sec. 96(2) of the Constitution of Guyana.

"7. That even if the said Permanent Secretary was authorised by the Public Service Commission to hold the said enquiry he cannot further delegate his authority to hold the said enquiry to the Assistant Secretary, Mr. Charles Byass.

"10. That the permanent Secretary to the Ministry of Health cannot remove me from the public service in view of Sec. 96 of the Constitution of Guyana.

"11. That since the procedure as set out in Sec. 96 of the Constitution was not followed the enquiry is void and must be set aside for excess of jurisdiction."

I think it will readily be seen that the main point in the allegations above is the complaint, particularly from para. 11, that the procedural requirements as prescribed by the Constitution of Guyana were not followed, a point which, if sound, will render the enquiry *ultra vires* and void. In the light of the Assistant Secretary's letter to the appellant above, it is very clear to me that what is being deposed to therein are not matters of opinion as the judge thinks, but matters of a constitutional significance. These paragraphs in the affidavit in fact contain the identical submissions made at the hearing before the learned judge, viz., that the Permanent Secretary had no authority to appoint his Assistant Secretary to hold the enquiry, and that by so doing he acted without his jurisdiction. It seems quite plain this cannot be a mere matter of opinion, so long as there is revealed in the appellant's affidavit a sufficient substratum of fact in support of her assertion that the Permanent Secretary acted in excess of jurisdiction.

Art. 96(1) and (2) of the Constitution is as follows:

"(1) Subject to the provisions of this Constitution, the power to make appointments to public offices and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Public Service Commission.

"(2) The Public Service Commission may, by directions in writing and subject to such conditions as it thinks fit, delegate any of its powers under the preceding paragraph to any one or more members of the Commission or, with the consent of the Prime Minister, to any public officer or, in relation to any officer on the staff of the Clerk of the National Assembly, to the Clerk."

It is therefore lawful for the Public Service Commission with the Prime Minister's consent, to delegate its function of removing public officers from

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the service to the Permanent Secretary of the Ministry of Health and, consequently, quite competent, within the doctrine of implied powers, for the latter to hold an enquiry with respect thereto. But was it also competent for the Permanent Secretary to delegate that function to another, as the Assistant Secretary's letter above has disclosed? In short, is the maxim "*delegatus non potest delegare*" applicable? If so, is it a bar to the Assistant Secretary's appointment as convenor of that enquiry? In other words, is the exercise of the power to remove from office and its concomitant power of holding an enquiry inextricably linked to only one person, viz., the Permanent Secretary? Are they severable? It must be conceded that the Assistant Secretary has no powers of removal or discipline, so it must follow he would have no incidental power to hold an enquiry.

I am afraid these are questions which can only properly be resolved by argument when the other side is put on notice, which is all that was sought in the motion for the order *nisi*.

It is suggested that herein lies the pith and substance of the matter on which the trial judge ought to have focussed attention. It is conceded that he had only heard argument on the merits of granting the writ, from the appellant's side, but in my view there was enough before him at that stage to cause him to put the Permanent Secretary on notice. Undoubtedly, by Art. 119 (1), in the exercise of its functions the Public Service Commission is not subject to the direction or control of any other person or authority; it is also the law that it may regulate its own procedure; and that

"Any question whether –

- (a) a Commission has validly performed any function vested in it by or under this Constitution;
- (b) any member of a Commission or any other person has validly performed any function delegated to such members or person by a Commission in pursuance of the provisions of this Constitution;

shall not be enquired into in any court." [Art. 119 (6)]

But, notwithstanding para. (b) above would appear to envisage the total exclusion of judicial review of the powers delegated by the Public Service Commission to the Permanent Secretary, I believe the purport of Art. 125(8) is quite clear. As I understand the matter, that article operates as a proviso to Art. 119(6). It is in the nature of a proviso, I feel, because it preserves, by excepting out of Art. 119(6), the ancient supervisory jurisdiction of the High Court in fit cases "to enquire and be informed", which, but for Art. 125(8), would not exist in view of that aspect of finality which appears in Art. 119(6) *Certiorari*, then, as a means of invoking the supervisory jurisdiction of the High Court, is thus not excluded as a remedy once it is manifest on the record that what is really being questioned is the constitutionality or other legality of the exercise of functions delegated to the Permanent Secretary for a jurisdictional defect. This seemingly exclusionary jurisdictional clause in Art.

119(6) is clearly designed to achieve non-interference by the judiciary in matters of appointment to, and discipline in the Public Service – matters which the framers of the Constitution think, and rightly so, properly to be within the Administration's normal sphere of competence. The idea is that administration must not be unnecessarily impeded by resort to the courts to which, in this case, there is no right of appeal. Administrative law and procedure, together with administrative discretion, are thus given free scope for development; they are left unfettered to function within their own province, save for the right of the subject to the writ of *certiorari*, the constitutional safeguard provided in Art. 125(8).

It is true that Art. 125(8) does not, like s. 11(1) of the Tribunal and Inquiries Act, 1958, contain an express provision conferring the right to the writ of *certiorari* in cases where legislation embodies a general finality clause against the calling into question before the courts of any order or determination such as the Permanent Secretary's, but "this supervisory jurisdiction, inherited from the court of King's Bench, has been of particular constitutional importance in relation to administrative tribunals; and it could not have been effective except on the hypothesis that certain of the questions committed to an inferior tribunal demarcated the limits of its jurisdiction and that the decisions of the tribunal on those questions were reviewable otherwise than on appeal." (See DE SMITH'S 'JUDICIAL REVIEW OF ADMINISTRATIVE ACTION', 1961, at page 68). But our Constitution has clearly demarcated those limits to administrative exercise in Art. 125(8) which reads thus:

"No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with the Constitution or any other law."

So that no sooner it became apparent to the judge that the appellant's affidavit disclosed that the Permanent Secretary had appointed his Assistant Secretary to hold the enquiry, I should have thought that here was disclosed a jurisdictional defect on the face of the record, which ought to have adverted his attention to the enabling power under which the Permanent Secretary purported to act. Under Art. 96, no domestic tribunal is directed; but implied in the power to remove from office is the power to hold an enquiry in fulfilment of that power of removal. This must necessarily be so, I think, because natural justice demands that a man may not properly be removed from office unless he is given an opportunity to be heard. Of course, the Public Service Commission itself cannot hold the enquiry but in exercise of that power it may quite lawfully delegate it in writing, either to any one or more of its members by name, or to a specified public officer, provided in the latter case the Prime Minister's consent is obtained. [Art. 96(2)].

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But the question arises: Can the Permanent Secretary delegate the holding of the enquiry to someone else? His power was classified and described by the judge as being "a purely administrative exercise, not a judicial or a quasi-judicial process, and was in the exercise of an administrative as distinct from any judicial or quasi-judicial authority or power." The penultimate paragraph of the judgment reads:

"I was fortified in my conclusion of fact and law that the enquiry in this matter could not be construed as a court of judicial proceeding or tribunal of civil or criminal jurisdiction for the purpose of *certiorari* proceedings nor could the decision of the P.S. be so construed."

It is also in this respect that I believe the judge erred, for, having correctly adverted his attention to the law on the issue of *certiorari* as stated in Vol. II HALSBURY'S LAWS OF ENGLAND, 3rd Ed., p. 128, para 239, to the effect that –

"*Certiorari* lies at common law to remove, for the purpose of quashing such proceedings, the proceedings of inferior courts of records or other persons or bodies exercising judicial or quasi-judicial functions",

he went on to find that the enquiry did not have the "trappings" of a court because it did not exercise judicial or quasi-judicial power.

No doubt, there are certain clearly defined instances where, e.g. by judicial self-limitation, the High Court will not interfere by *certiorari* with the exercise of a disciplinary power. See *R. v. Metropolitan Police Commissioner ex parte Parker*, (1953) 2 All E.R. 717; also *Ex parte Fry*, (1954) 2 All E.R. 118, where it was sought to have reviewed and set aside the exercise of disciplinary powers of a chief officer over a member in the fire brigade service. Lord GODDARD, C.J., said *ibid* at page 119:

"It seems to me impossible to say, where a chief officer of a force which is governed by discipline, as is a fire brigade, is exercising disciplinary authority over a member of the force, that he is acting either judicially or quasi-judicially. It seems to me that he is no more acting judicially or quasi-judicially than a schoolmaster who is exercising disciplinary powers over his pupils *Certiorari* goes to a court or something which can fairly be said to be a court"

It is submitted that though *Ex parte Fry* is not unlike the appeal before us in the respect that both enquiries concern the domestic matter of discipline of a member of a particular institution, the distinguishing feature, I think, is with respect to the nature of the power from which the judicial element can be inferred. (See *per* Lord REID in *Ridge v. Baldwin*, [1963] 2 All E.R. 66 at page 78, whose historical analysis I respectfully accept - that the essential thing to regard in distinguishing the ministerial from the judicial function is the nature of the power the exercise of which has been called in question. If the exercise of the power involves what Lord UPJOHN referred to in *Durayappah v. Fernando*, (1963) 2 All E.R. 152,156, as the well-known

cases of dismissal from office, deprivation of property and expulsion from clubs, then there can be no doubt that the judicial element is clearly present. In *Ex parte Fry*, the nature of the power involved was the administration of a mere caution; in the present case it involves *dismissal from the public service*, which makes all the difference.

In considering further this vexed question, the opinion of a distinguished textwriter is called to mind. Professor ROBSON in his 'JUSTICE AND ADMINISTRATIVE LAW', 3rd Ed. (1951), at page 15, offers these helpful suggestions when treating on the subject of domestic tribunals:

"Farther down the scale we find yet another series of authorities exercising a jurisdiction over a whole, mass of controversial matters relating to the membership of clubs, friendly societies, trade unions and professional or vocational associations. In this realm we shall also find the agricultural marketing boards and other bodies of a similar type set up under statutory authority. These we may call *domestic tribunals*. They also, we shall find, perform duties which partake to a marked degree of the nature of judicial functions, though they do not possess the features which we expect to find in a formal court of justice.

With so delicately graded a scale of authorities it is scarcely surprising if we find it difficult to discover an infallible test which shall immediately tell us which functions are judicial and which administrative. It is, however, necessary for practical purposes to have some kind of a classification; and we may accordingly suggest that the primary characteristics of 'pure' judicial functions, by whomsoever exercised, are:

- (1) The power to hear and determine a controversy.
- (2) The power to make a binding decision thereon (sometimes subject to appeal) which may affect the person or property or other rights of the parties involved in the dispute."

Now, to consider the above in the light of the problem in hand, it is to be observed that the Permanent Secretary has (1) power to hear and determine the charge against the appellant, and (2) power to make a binding decision affecting the appellant's "property". Here, the term "property" is of a wide significance; *it includes the right to practice an occupation*, and where property rights are involved, it has been held that the attitude of the courts towards the proceedings of domestic disciplinary tribunals (such as Art. 96 embraces), are "in the nature of judicial proceedings, although the forum is a domestic one". (See per BOWEN, L.J., in *Lesson v. General Council of Medical Education*, (1890) 48 Ch. D. 366, at page 383). Therefore, no one ought to be left in any doubt that proceedings relating to removal from office in the public service are by nature judicial, or that it was this power which the Assistant Permanent Secretary exercised.

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The letter of dismissal purports to have been issued under the hand of the Permanent Secretary, but the validity of his decision to dismiss the appellant will certainly depend on the answer to the first question above which I here pose in alternative form – whether a person who has been delegated the power to remove another from office (and so impliedly to hold an enquiry), can do so without having himself seen and heard him in defence, i.e., without having himself perceived him and his witnesses and evaluated their testimony in proceedings which are shown to have the primary characteristics of the 'pure' judicial function, merely on the strength of a report of the holder of an enquiry to whom he has delegated that function. It must be borne in mind that there is one noteworthy characteristic of the judicial function, and it is the fact that the work of the judge is essentially personal to himself. In this connection, advocating intellectual continuity as a necessary element in the judicial process, the following excerpt from Professor ROBSON'S book, *op. cit.*, at page 591, though only of persuasive authority, may prove helpful:

"In all judicial functions, the person who inquires into the facts should also decide the issue. The formation of sound judgment seems to require that the preliminary survey of the ground should be undertaken by the same mind that subsequently evaluates the facts and determines the issue. When the judicial function is disintegrated and spread over several individuals in a large department, this cohesion between the related psychological processes of inquiring into facts and evaluating those facts in the final decision is lost, and the whole function deteriorates. The only certain way of maintaining essential intellectual unity is by establishing definite tribunals manned by one or more individuals who are responsible for the decision in all its stages.

"The knowledge that the mind which inquires is also the mind which decides may be an important asset in securing that feeling of confidence in the authority of a tribunal which is an important requisite for the satisfactory administration of justice."

But we must be careful not to say too much at this stage, except that we consider the learned judge was in error in refusing the order *nisi*. I say, with respect, his reasons for so doing are misconceived. They are based on matters which were of lesser moment and which were not raised by anyone else save himself. All that was sought and required of him was an order *nisi* in circumstances which disclosed a clear *prima facie* case of excess of jurisdiction in the Permanent Secretary to delegate his constitutional powers to another. If the Permanent Secretary can lawfully delegate his powers, why cannot his Assistant Secretary do so in like manner, and so on? Where is delegation to stop? Where is the line to be drawn? There was enough to put the judge on enquiry and to convince him that *prima facie* there was a violation of constitutional provisions calling for the application of the principle of *audi alteram partem*.

For these reasons we allowed the appeal with costs in the cause and remitted the matter to the learned judge with the direction that the writ should issue.

LUCKHOO, C.: I agree.

Appeal allowed.

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[Court of Appeal (Luckhoo, C., Cummings, Crane JJ.A.).
July 10, September 30, 1969.]

Certiorari—Crown servant—Disciplinary proceedings—Jurisdiction to grant writ—Constitution of Guyana Arts. 19, 125.

Crown servant—Disciplinary proceedings—Public Service Commission—Powers of P.S.C. vis-a-vis powers in Hospital Regulations—Public Hospitals Regulations Cap. 139 reg. 190.

Crown servant—Disciplinary proceedings—Trivial departure from procedural rules—Refusal of order nisi.

The appellant, a dispenser, a public officer, employed by the Ministry of Health was charged departmentally by the Public Service Commission with insubordination, interdicted from duty, and put on part pay. After an inquiry at which the appellant was represented by counsel the charges were found to be proved and the appellant was re-instated but by way of penalty the part pay withheld amounting to \$456.00 was not paid to him and his incremental date was deferred. The appellant applied for a writ of certiorari to quash the proceedings on the inquiry on the ground (i) that documentary evidence used against him was not made available to him before the day on which the inquiry commenced as required by Colonial Regulations and General Orders but was only made available at the beginning of the inquiry and (ii) that the regulations for Public Hospitals provided for the imposition of a fine of only \$2.00. The trial judge refused an order *nisi of certiorari* holding that he had no jurisdiction as the matter was administrative and not judicial or quasi judicial. On appeal.

HELD: (i) (Cummings J.A. concurring) that the P.S.C. under the Constitution was required to act in a judicial manner and art. 125(8) of the Constitution empowered the courts to exercise a supervisory jurisdiction to ensure that the P.S.C. acted within its jurisdiction and observed the rules of natural justice.

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(ii) (Cummings J.A. dissenting) that the appellant, who was represented by counsel had, by taking part in the inquiry without objection, waived his right to object to the late delivery of the documentary evidence. Administrative action will not be invalidated merely by reason of an ostensibly trivial departure from the rules governing procedure and form unless it is shown that the error has caused the individual affected to suffer substantial detriment.

(iii) per Luckhoo C., that under the Constitution of Guyana the P.S.C. has power to dismiss or impose any lesser punishment in its discretion. The Regulations: Public Hospitals merely say what should happen when the Resident Surgeon finds it necessary to impose a fine.

Appeal dismissed.

B. E. Gibson for the appellant

M. S. Rahaman, amicus curiae.

LUCKHOO, C.: There is a jurisdiction erected by the Constitution of Guyana which establishes in certain Commissions the power to remove and exercise disciplinary control over persons holding offices within their purview. The Public Service Commission (hereinafter referred to as "The Commission") exercises jurisdiction over public officers; the Judicial Service Commission over judicial and legal officers; and the Police Service Commission over members of the Police Force.

John Ewart Langhorne, a dispenser holding public office by virtue of his employment with the Ministry of Health, was interdicted from duty on part pay by the Commission until the determination of certain charges which were preferred against him to show cause why he should not be dismissed. This order was communicated to him by letter dated 3rd January, 1968, in this way:

"That you, being a dispenser attached to the Ministry of Health, committed acts of gross insubordination. Particulars of such insubordination are as follows:

- (1) You refused and/or failed to report for duty at the Essequibo Boys' School on 1st December, 1967, thus contravening the instructions of the Permanent Secretary, Ministry of Health, your superior officer, conveyed to you in a letter dated 20th October, 1967.
- (2) On the 1st December, 1967, you refused to accept a memorandum dated 1st December, 1967, from the Government Pharmacist, your superior officer, requesting you to submit a written explanation for your failure to carry out certain instructions."

He duly replied to these charges and an enquiry, which lasted for four days, was held on the 3rd April, 1968, after which a letter was sent to him by the Commission stating that, after careful consideration of the report on the enquiry into the charges, it had found them to be proved, and he was informed as follows:

"The Commission has ordered that you should be reinstated in your post as dispenser, that the portion of salary withheld from you during the period of your interdiction from duty should not be refunded to you, and that payment of this increment of salary which fell due to you on the 11th January, 1968, should be postponed for a period of six months from the date of your reinstatement and restored at the end of that period, subject to a report that your work and conduct have been satisfactory."

The portion of salary withheld from him during the period of interdiction amounted to \$456. His punishment then was to deprive him of this amount, and to postpone his increment.

Judicial intervention was sought mainly on two grounds, viz.:

- (a) That in being deprived of this sum of money, he was, in effect; being subjected to a fine in that sum, whereas, under Regulation 190 of the Regulations for Public Hospitals, Chapter 139, he could only be fined the sum of \$2.00; and because it was not competent for the Commission to impose a penalty in excess of \$2.00, its action was in excess of its powers.
- (b) That he was not accorded his rights when certain documents which were used against him at the enquiry were not placed at his disposal before the day on which the enquiry was commenced, although he was made aware of their contents before the enquiry actually began. This was said to be in breach of what was just to him under Colonial Regulation 58(4) and General Governmental Order in Chapter 5 of General Orders, 1957, at 80(e).

The relevant regulation (Reg. 190 of Cap. 139), which provoked the argument under (a), said:

"Any nurse or other employee may, for misconduct or disobedience of the Regulations or instructions, be punished by fine, suspension or dismissal in the discretion of the Resident Surgeon with the approval of the Director of Medical Services. The fine for any such offence shall not exceed the sum of \$2.00."

The said Colonial Regulation which originated from the "mother country" in the colonial days of this country, and which apparently is still invoked at such enquiries, reads:

"No documentary evidence shall be used against the officer unless he has *previously* been supplied with a copy thereof or given access thereto."

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While the governmental directive under Order 80(e) is as follows:

"If disciplinary action with a view to dismissal is decided upon, the Head of the Department shall prepare charges in consultation with the Legal Department. The charges when approved, and a copy of any documentary evidence which may be used as evidence, are communicated in writing by the Chief Secretary through the Head of the Department concerned to the officer who is called upon to state in writing within a given time, any grounds upon which he may rely to exculpate himself. The expression 'documentary evidence' does not include the statements of witnesses or the actual reports of the alleged misconduct which is the subject of the charge."

In consequence, an application was made to a judge of the High Court for an order or rule *nisi* calling on the Commission to show cause why a writ of *certiorari* should not be issued to remove into that court the entire proceedings of the enquiry for the purpose of being quashed. The trial judge, however, refused this application on the basis that there was no jurisdiction for him to enquire into and pronounce upon the matter, and, that the matter was purely administrative and not judicial or quasi-judicial.

With respect, I do not find myself in agreement with the way in which he proceeded to his conclusions. The crux of the matter lies in the construction of Articles 119(6) and 125(8) of the Constitution which were not analysed by the learned trial judge. These articles appear to possess contrasting tendencies. Whilst the former gives the impression of shutting the door to any form of judicial intervention by the courts, the latter specifically allows for some inlet for the court's participation. Under Art. 119(6) it is provided that:

"Any question whether –

- (a) a Commission has validly performed any function vested in it by or under this Constitution;
- (b) any member of a Commission or any other person has validly performed any function delegated to such member or person by a Commission in pursuance of the provisions of this Constitution; or
- (c) any member of a Commission or any other person has validly performed any other function in relation to the work of the Commission or in relation to any such function as is referred to in the preceding subparagraph;

shall not be enquired into in any court."

And under Art. 125(8):

"No provision in this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions shall be construed as precluding a court from exercising jurisdiction in relation to any question

whether that person or authority has exercised those functions in accordance with this Constitution or any other law."

The crucial question then will be: How far does Art. 125(8) permit of any adjudication forbidden under Art. 119(6)?

Whether the appellant is entitled to the remedy which he seeks would depend on the construction of these articles. If there is jurisdiction to adjudicate, then the further question for consideration will be: Has he made out a *prima facie* case for its grant?

When Art. 96(1) vested in the Commission the power to remove and exercise disciplinary control over public officers, it gave to that body the legal authority to do so, but of necessity it is required to act within the area of a jurisdiction subject to qualifications and conditions of exercise specified under the Constitution. If it does not act within the jurisdiction there delineated, then the protection afforded by Art. 119(6) to prevent any enquiry into the validity of functions performed, would be unavailing, since the functions will not have been performed with due authority of law. The very language of Art. 119(6) emphasizes this when it bars an enquiry by the courts on those occasions when any "function" is "vested" in the Commission "by or under the Constitution". The jurisdiction of the courts, therefore, is only shut out under that article if the particular function purported to be performed is truly vested in the Commission "by or under the Constitution". It is in the nature of a condition precedent that the function must so vest before the courts cease to have the right to enquire under this article. If, then, a question is raised as to whether in a particular case a function is or is not vested, this goes to the root of the Commission's jurisdiction and so is properly justifiable by the courts without the aid of any other enabling provision. The words of Art. 119(1) lend support to this conclusion, when examined. It says:

"Save as otherwise provided in this Constitution, in the exercise of its functions under this Constitution a Commission shall not be subject to the direction or control of any other person or authority.

The interpretation which arises, naturally, from this is, that a commission "shall not be subject to the direction or control of any other person or authority", but (as the words which precede these show) this specification only applies when the Commission is acting "in the exercise of its functions under the Constitution". By reason, then, of the wording of Art. 119(1) and (6), if there is an usurpation of jurisdiction, the courts will not, in my view, be precluded from enquiring into the matter, whereas, if there was a wrong exercise of jurisdiction, which might affect the validity of the function performed, it would be otherwise. To illustrate these two concepts: Under Art. 125(5), it is stated, references to the public service shall not be construed as including service in four different categories of offices, and then the further provision appears, "or to such extent as Parliament may prescribe as including service as a teacher in a school or other place of education".

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If a person against whom discipline has been exercised by the Commission claims to be included in one of the offices stipulated under Art. 125(5), or to come within any provision prescribed by Parliament under that article, he would be entitled to ask a court, without the aid of any other provision, to enquire whether jurisdiction exists in the Commission to take steps against him, for this would be usurping a jurisdiction which does not exist. To give another example: Under Art. 96(6): –

"A public officer shall not be removed from office or subjected to any other punishment under this article on the grounds of any act committed by him in the exercise of a judicial function conferred on him unless the Judicial Service Commission concurs therein."

If then a public officer was disciplined for an act committed by him in the exercise of a judicial function without the concurrence of the Judicial Service Commission, then, in my view, it would be competent for that officer to seek the assistance of the court to quash the result of an enquiry on the sole basis that there was a failure to observe a condition precedent for the doing of an act under the Constitution, thereby usurping a jurisdiction which was not conferred.

But once the jurisdiction to act has been properly assumed, the validity of the discharge of the function cannot be questioned under Art. 119(6), although the Commission may have come to its conclusions without sufficient evidence or by applying principles not countenanced by law. In cases of that kind, the courts are expressly prohibited from interfering. The Constitution obviously did not wish to ascribe an appellate jurisdiction to the courts where facts may have been wrongly construed or wrong interpretations given to matters involving legal questions.

Lord SUMNER'S well-known judgment in *R. v. Natbell Liquors Ltd.*, (1922) 2 A.C. 129, draws the distinction clearly between a matter of jurisdiction and an error in adjudication, when he said:

"It has been said that the matter may be regarded as a question of jurisdiction and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. But want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however great, is a wrong exercise of a jurisdiction which he has, and not a usurping of a jurisdiction which he has not."

PARKER, L.J., in *Davis v. Price*, (1958) W.L.R. at page 442, went on to say, after quoting that passage:

"That principle applies, whether it is a question of lack of evidence or, as it seems to me, of misconstruing a statute."

The Commission, then, is in the nature of an arbitral tribunal, and a court of law, as in this case, would have no jurisdiction, under Art. 119(6), to hear "appeals" from it, providing the function exercised was vested in it by or under the Constitution. Resort then must be had to Art. 125(8) to see whether its scope would permit the appellant to have a judicial review based on his allegations that an order was made beyond its competence, and that he had been denied the opportunity of having the benefit of documentary evidence used at the enquiry supplied at a particular time. This much I would say now: At least Art. 125(8) brings to the aid of an aggrieved person certain remedies which the common law has resolutely maintained to ensure (a) that steps without or in excess of jurisdiction, or, (b) in violation of the principles of natural justice would not go unheeded, especially when the particular wrongful assumption of jurisdiction or breach of natural justice would result in the loss of property of some kind to the party prejudiced.

In *Osgood v. Nelson*, (1872) L.R. 5 H.L. 636, the Lord Chancellor endorsed the view of the court's power to correct any body of men who may have a power of removing a person from an office if it should be found that they have disregarded any of the essentials of justice in the course of their enquiry before making that removal.

Whether the requirements of natural justice are met by the procedure adopted in any given case must depend on the circumstances of the case, the nature of the enquiry, the way in which it is being conducted, the subject-matter which is being dealt with, etc. The Commission would be under a duty to act in good faith and to listen fairly to both sides, always giving a fair opportunity to the parties in controversy to correct or contradict relevant statements of a prejudicial nature, and must do its best "to act justly and to reach just comments by just means". (*Per* Lord SHAW of Dumferline in *Local Government Board v. Arlidge*).

Otherwise, as BANKES, L.J. said in *R. v. Electricity Commissioners*, (1942) K.B. at page 198:

"On principle and on authority it is, in my opinion, open to this court to hold, and I consider that it should hold, that powers so far-reaching, affecting as they do individuals as well as property, are powers to be exercised judicially and not ministerially."

In this case there can be little doubt that the Commission was, at common law, enjoined to act judicially. Did it fail in this duty in not seeing to it that the appellant had the benefit of what documentary evidence there was at the time the charges were preferred against him, instead of at the very commencement of the enquiry? It must be noted that the appellant had counsel in attendance at the enquiry, and that no application was made for an adjournment. If any prejudice could or might arise from not disclosing the documents

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before the actual day of the enquiry, was it not incumbent on counsel who appeared at the enquiry to have asked for an adjournment? When none was asked for and the enquiry proceeded, is it not to be inferred that no necessity existed or arose for an adjournment? And even if an adjournment was asked for and refused, could it be said that any prejudice could have arisen when the enquiry lasted for four days, which gave the appellant adequate time to make full use of what he was made aware of on the day of the enquiry?

Are the proceedings capable of being rendered void because of non-compliance of a regulation or general administrative direction when the appellant himself, with counsel in attendance, treated the matter as inconsequential, and was prepared to proceed with the enquiry? Can he now be heard to say that the omission might have prejudiced him? Has he discharged the onus of making out a *prima facie* case for a rule *nisi* without any reference to the nature of the documentary evidence, and how it could have led to prejudice?

There are occasions when omissions of a kind could cause serious prejudice and disturb the very foundation of the enquiry. If this is sufficiently made out, then further investigation may be necessary to decide whether the result of the enquiry should be pronounced to be invalid or a nullity. But certainly not in the circumstances of this case. There was a readiness and preparedness to carry on with the enquiry, obviously because there was no wish to take any objection. The effect of this conduct amounted to a waiver of whatever rights might have been available to stall the enquiry.

Administrative action will not be invalidated merely by reason of an ostensibly trivial departure from the rules governing procedure and form, unless it is shown (and I repeat *shown*) that the error has caused the individual affected to suffer substantial detriment. Nothing of this kind has been shown in this case, apart from a bare statement that the appellant has suffered prejudice. As I have said, there is no condescension to particulars of any kind to show how the alleged prejudice might have arisen. On the contrary, the conduct in going on with the enquiry for four days, without any objection, shows that what was done was not considered to be prejudicial in consequences.

In *Kilduff v. Wilson*, (1939) 1 All E.R. 429 (which was applied in *Noakes v. Smith & Others* [1943] 107 J.P. 101), the judgment was approved by the Court of Appeal, with the commendation by MACKINNON, L.J., that it was "most careful, accurate and impeccable". At page 441, TUCKER, J., said (in referring to non-compliance of Police Regulations):

"I do not think that non-compliance with such matters as these could possibly be said to go to the root, to go to the foundation, of the jurisdiction of the tribunal I think that the breaches of these regulations, or the non-compliance with these regulations, were mere procedural matters, which did not go to the root of the jurisdiction of the watch committee, and that it would be almost absurd to think that the slightest deviation in any one of these procedural matters could or should render void the substantive decision on the merits by the watch

committee. Furthermore, with regard to the failure to give an opportunity for any explanation, I am satisfied that the plaintiff was fully aware of his rights in the matter and that he did not insist upon them, and that he appeared before the chief constable and took no point with regard to it and thereby waived any non-compliance with the regulation."

The appellant was given a reasonable opportunity of being heard and stating his case. There was no malversation of any kind, and nothing appears to have been done contrary to the essence of justice. (See *Shakman v. Plumstead Board of Works*, [1885] 10 A.C. 229). The point is devoid of merit.

The only other point for consideration is whether there was power in the Commission to mete out the punishment imposed. I fail to see how it can be said that the particular regulation limits the scope of authority of the Commission. It does no more than say what should happen when the Resident Surgeon, dealing with certain categories of employees, finds it necessary to impose a fine. But the Commission's power is in no way related to that regulation. It is independently established and embraces a much wider jurisdiction. Its power could reach out to the limit of removal from office, and in so doing, under Art. 119(2), it is provided that the Commission "may regulate its own procedure, etc." What other punishment should be imposed, if not removal from office, would be a matter within the discretion of the Commission. If the appellant had been found not guilty of the charges against him, then his right to a refund of the deductions made would be beyond question. The regulation cited is wholly irrelevant, and there is absolutely no trace of any excess of jurisdiction. Had there been, the High Court would have been possessed of jurisdiction to look into the matter.

I agree with CRANE, J.A., when he said in the matter of an application by Gerriah Sarran for a Writ of *Certiorari* (Civil Appeal No. 80 of 1968):
(See elsewhere in this volume).

"I believe the purport of Art. 125(8) is quite clear. As I understand the matter, that article operates as a proviso to Art. 119(6). It is in the nature of a proviso, I feel, because it preserves, by excepting out of Art. 119(6) the ancient supervisory jurisdiction of the High Court in fit cases 'to enquire and be informed' which, but for Art. 125(8) would not exist in view of that aspect of finality which appears in Art. 119(6)."

ATKIN, L.J., in *R. v. Electricity Commissioners (supra)* at page 171 has clearly stated the position when he said:

"The operation of the writs (of prohibition and *certiorari*) has extended to control the proceedings of bodies which do not claim to be and would not be recognised as courts of justice. Whenever any body of persons having legal authority to determine questions affecting the

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rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

To sum up the matter: The courts would have no jurisdiction to pronounce upon the validity of what the Commission does, but since from the nature of its power must be inferred the necessity to act judicially in accordance with common law precepts, courts are entitled to examine the way in which the enquiry was conducted, and the jurisdiction exercised to see whether it was in accordance with what the law demanded. This may involve such considerations as whether the enquiry was conducted in conformity with the principles of natural justice. For, if in the process of exercising that jurisdiction there was any contravention of accepted principles of the common law as to how such judicial functions should be observed", then corrections may be called for by causing the enquiry to be brought into court for the other party to show cause why it should not be quashed. But the appellant's complaints were hollow and lacked substance, and so the order refusing the application must be sustained.

Again, whilst it is fully open to question in court the Commission's jurisdiction to enquire and inflict the particular punishment, yet nothing was shown which was remotely capable of disturbing what was authorised constitutionally and exercised accordingly.

I would therefore dismiss the appeal and confirm the order made by the trial judge.

CUMMINGS, J.A.: This is an appeal from a decision of a High Court judge dated 18th January, 1969, refusing an application by the appellant (applicant) for an order *nisi* for a writ of *certiorari*.

The appellant's affidavit in support of the motion discloses that at the material time he was employed as a dispenser by the Ministry of Health of the Government of Guyana at a salary of \$228 per month. He was informed by the Secretary of the Public Service Commission by letter dated 3rd January, 1968, that certain charges stated in a schedule thereto had been preferred against him and that he should show cause why he should not be dismissed. He replied to the charges. An enquiry was conducted after which he received the following letter:

"Sir,

With reference to my letter No.S.1 F.L. 357/2 dated the 3rd January, 1968, transmitting charges of gross insubordination to you, I am directed to inform you that the Public Service Commission, after careful consideration of the report on the enquiry into those charges, has found that the charges against you have been substantiated.

"The Commission has ordered that you should be re-instated in your post as dispenser, that the portion of salary withheld from you during the period of your interdiction from duty should not be re-

funded to you and that payment of this increment of salary which fell due to you on the 11th January, 1968, should be postponed for a period of six (6) months from the date of your reinstatement and restored at the end of that period subject to a report that your work and conduct have been satisfactory.

I am to request you to report to the Government Pharmacist for duty forthwith.

Please acknowledge receipt of this letter in writing immediately.

I have the honour to be,

Sir,

Your obedient servant,

?

The affidavit further sets out that "This \$456.00 is in excess of the sum of \$2.00 prescribed by law that is Chap. 139 Sec. 190."

It appears from the affidavit that the appellant was prior to the enquiry, unaware of the disciplinary procedure adopted by the Public Service Commission, but was informed by the convenor at the hearing that he was being tried under Colonial Regulations Nos. 42-68. I infer from his affidavit that he subsequently learnt that the disciplinary procedure adopted by the Public Service Commission was set out at s. 80 of the General Orders of British Guiana, 1957, which provides as follows:

"If disciplinary action with a view to dismissal is decided upon, the Head of the Department shall prepare charges in consultation with the Legal Department. The charges when approved and a copy of any documentary evidence which may be used as evidence are communicated in writing by the Chief Secretary through the Head of the Department concerned to the officer who is called upon to state in writing within a given time, any grounds upon which he may rely to exculpate himself. The expression 'documentary evidence' does not include the statements of witnesses or the actual reports of the alleged misconduct which is the subject of the charge."

The learned trial judge came to the conclusion that –

"There is nothing to support a finding 'that any order binding on the applicant or operative was made by the enquiry or by the Public Service Commission or anyone else' . . . The enquiry had no civil or criminal jurisdiction . . .

"Accordingly on the facts stated in the affidavit in support of the application I thought it was not desirable that an order *nisi* should be made . . .

"The purported offences (if they could be so described) which gave rise to charges being laid against the applicant were purported to be created by way of statute and a special jurisdiction out of the course of

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the common law was prescribed, and the purported 'offences' do not fall within the prescribed jurisdiction of the criminal or civil court of Guyana.

"I hold the view that an enquiry in the circumstances of this matter was a purely administrative and not a judicial or quasi-judicial process and was in the exercise of strictly administrative as distinct from any judicial or quasi-judicial power. . .

"The Commission exercised no judicial power, nor did it pretend to do so. There was nothing mandatory, obligatory or having the consequence of penalty or sanction if the applicant in the course of the enquiry failed to carry out any of its requests, or the request of the officer who held the enquiry . . .

"I hold the view that the enquiry in this matter was not a tribunal at all, nor did it have the trappings of a court, nor was the Public Service Commission in the performance of whatever it did in this matter a court I was fortified in my conclusion of fact and law that neither the 'enquiry' nor the Public Service Commission could be construed as a 'court' or judicial proceedings or a tribunal of civil or criminal jurisdiction for the purpose of *certiorari* proceedings.

Accordingly, I decided that the application should be refused and that it was not desirable or necessary in the circumstances that an order *nisi* should be made against the Public Service Commission."

The grounds of appeal, as amended by leave of the court, are as follows:

1. That the learned trial judge did not give the full meaning to a "court" for purpose of *certiorari* and prohibition.
2. That the learned trial judge has a discretion whether or not to make the order *nisi*, but his discretion must be exercised judicially.
3. That the learned trial judge erred in law when he held that the proceedings before Mr. V. B. Singh were not "judicial proceedings" for purposes of *certiorari* "

The Constitution of Guyana provides as follows:

<p>Art. 96: (1) Subject to the provisions of this Constitution, the power to make appointments to public offices and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Public Service Commission.</p>	<p>Appointment, etc. of public officers</p>
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(2) The Public Service Commission may, by directions in writing and subject to such conditions as it thinks fit, delegate any of its powers under the preceding paragraph to any one or more members of the Commission or, with the consent of the Prime Minister, to any

public officer or, in relation to any office on the staff of the Clerk of the National Assembly, to the Clerk.

Art. 119:

<p>"119. (1) Save as otherwise provided in this Constitution, in the exercise of its functions under this Constitution a Commission shall not be subject to the direction or control of any other person or authority.</p>	<p>Powers and procedure of Commissions.</p>
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(2) Subject to the provisions of this Constitution, a Commission may regulate its own procedure and, with the consent of the Prime Minister or of any Minister designated by the Prime Minister for the purpose, may make rules for that purpose or for conferring powers or imposing duties on any public officer or any authority of the Government of Guyana for the purpose of the discharge of the Commission's functions."

Art. 125(8):

"(8) No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law."

Counsel on both sides agreed that the procedure adopted by the Public Service Commission in accordance with Art. 119(2) of the Constitution for the exercise of its disciplinary powers is laid down in para. 80 of Cap. 5 of The General Orders of British Guiana (*supra*).

Such adoption endows this procedure with constitutional force. Its effect is that a public officer has a constitutional right to strict compliance. It is a condition precedent to the embarkation upon a disciplinary enquiry. The enquiry tribunal has no jurisdiction until this condition has been performed.

There are several authorities which clearly establish the power of the court to enquire into and correct errors of tribunals which conduct enquiries that may result in removal from office or other disciplinary action being taken against employees. See *Osgood v. Nelson*, (1872) L.R. 5 H.L. p. 636. It is also well established that tribunals performing such functions are exercising judicial and not ministerial powers—*R. v. Electricity Commissioners*, (1941) 2 All E.R. 686.

With great respect, therefore, I do not agree with the learned trial judge's finding that the enquiry was not a tribunal and was not acting judicially.

The Public Service Commission created as it is, acting by itself or through or together with its delegates in exercising its disciplinary powers is a special tribunal with a duty to act judicially and if it does not do so the High Court can, upon a proper application, intervene to correct an injustice.

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In *Anisminic v. The Foreign Compensation Commission and anor.*, (1969) 1 All E.R. p. 208, Lord PEARCE in his illuminating opinion in the House of Lords at p. 233 laid down the principles as follows:

"My Lords, the courts have a general jurisdiction over the administration of justice in this country. From time to time Parliament sets up special tribunals to deal with special matters and gives them jurisdiction to decide these matters without any appeal to the courts. When this happens the courts cannot hear appeals from such a tribunal or substitute their own views on any matters which have been specifically committed by Parliament to the tribunal. Such tribunals must, however, confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament. It would lead to an absurd situation if a tribunal, having been given a circumscribed area of enquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandate to enquire and decide as set out in the Act of Parliament . . .

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity. Further it is assumed, unless special provisions provide otherwise, that the tribunal will make its enquiry and decision according to the law of the land. For that reason the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the courts have intervened to correct the error."

It is true that the court has a discretion whether or not *certiorari* should issue, but that discretion must be exercised judicially.

In *R. v. Paddington Valuation Officer, ex parte Peachey Property Corpn. Ltd.*, 1965 2 All E.R. 836, a company owning a large number of properties within the Paddington rating area, sought a *certiorari* to quash the whole of the valuation list prepared for that area. In the course of his judgment in the Court of Appeal, Lord DENNING, M.R., discussed the various points that had to be established before this remedy could be granted, and these may be summarised as follows:

- (1) Is *certiorari* a proper remedy in the circumstances, or is there some other remedy provided by statute for the particular case?

- (2) Is the plaintiff a 'party aggrieved'?
- (3) Is *certiorari* available? Is the respondent under a duty to act 'judicially'?
- (4) Are the consequences of granting *certiorari* such that the court ought not to exercise its discretion in favour of granting the remedy?
- (5) Can some grounds be established on the basis of which *certiorari* can be granted? In other words, has there been some error of law? 'I would say that, if a tribunal or body is guilty of an error which goes to the very root of the determination, in that it has approached the case on an entirely wrong footing, then it does exceed its jurisdiction.'

Questions 1-3 were answered affirmatively in favour of the applicants for *certiorari*; on question 4, it was argued that if the entire valuation list were quashed before a new one could be prepared, 'chaos' would result and that therefore, as *certiorari* was a discretionary remedy, it should not be granted. Lord DENNING was prepared to avoid the chaos by suspending the operation of the *certiorari*. SALMOND, L.J., however, roundly observed that:

'Whatever inconvenience or chaos might be involved in allowing the appeal, the court would not be deterred from doing so if satisfied (the valuation officer) had acted illegally,'

In my view in the instant case all five questions are answered in the affirmative by the appellant's affidavit in support of the motion.

I would allow this appeal, set aside the judgment and order of the learned trial judge and issue an order *nisi* as prayed, with the usual order as to costs here and below.

CRANE, J.A.: I agree with the judgment of the learned Chancellor. I have nothing to add.

Appeal dismissed.

RAJARAM v. JOSHUA GILES

[In the Full Court on appeal from the Magistrate's Court for the East Demerara Judicial District (Bollers, C.J. and Mitchell, J.) October 3, 1969.]

Criminal Law—Summary jurisdiction offence—Unlawful possession—Articles found in locked room of house—Appellant in possession of keys but disclaims knowledge—Reasonable suspicion—Summary Jurisdiction (Offences) Ordinance Cap. 14 s. 94(1).

The appellant was charged with the unlawful possession of a motor car radio and transformer reasonably suspected of having been stolen or unlawfully obtained. When questioned by the police the appellant said that he had no car parts other than those on his car. The door which led to the bottom flat of the appellant's house was secured by means of a padlock. In the bottom flat was another room also secured by means of a padlock. The keys to both doors were in the appellant's possession. In the room, under a quantity of jute bags, the police saw a car radio and transformer the number of which was scratched and indecipherable. Asked where he had obtained the radio the appellant said he did not know who put it there. He was convicted. On appeal.

HELD:— that (i) there was clear evidence upon which a jury could have found that the appellant was in possession of the articles in the room.

(ii) reasonable suspicion existed in the police officer's mind at the time of the appellant's arrest and arose both in relation to the thing itself and to the conduct of the appellant.

Appeal dismissed.

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

G. A. C. Pompey for the respondent.

Judgment of the court. On Tuesday, 15th April, 1969, Detective Constable 6974 Joshua Giles, acting on information received, executed a search warrant on the home of the appellant in connection with a search for car parts, car radio and other articles. On his arrival he spoke to the appellant and read the warrant to him. The appellant replied that he had no car parts other than those on his car. The search then began and the constable entered the bottom flat of the building. The door which led to the bottom flat was secured by means of a padlock, the keys to which were in the possession of the appellant. In the bottom flat there was another room, the door to which was secured by a padlock and the appellant also had the keys to this lock in his possession. The appellant was asked to open that door and when he did so a search was made. A quantity of articles was found and while searching under a quantity of jute bags the constable saw a Phillips car radio with transformer, the number of which he could not make out as the figures were scratched. The officer became suspicious and enquired of the appellant where he had obtained the radio. The appellant replied "Officer I don't know who put it there." The officer then informed the appellant that the radio

might have been stolen or unlawfully obtained, and he then arrested the appellant and cautioned him.

The appellant was escorted to the police station where he was again cautioned, after which he elected to make a statement. In his statement to the police the appellant said that he did not know who had brought the radio and transformer to his house and it did not belong to him. The radio bore scratches all over it.

In his defence the appellant did not give evidence but his son did so on his behalf. The son stated that he lived in the same house with his father and mother and that he had purchased from one Rayman of Dundee, Mahacony, a radio and transformer along with a car engine for the sum of \$240.00. In an adjoining room a car engine was found and seized by the police who were later satisfied that the engine was sold in a car and registered in the son's name. He produced a receipt in the name of the appellant for a secondhand radio with transformer which purported to be signed by the aforesaid vendor. He stated that he kept the radio and transformer in the bottom flat of the building in the storeroom which had one padlock. The keys to the padlock hang on a nail in the house. He had never used these articles and had not told his father where he kept them, and the radio had a lot of scratches on it at the time of purchase.

Under cross-examination, however, this witness, in flat contradiction to what the appellant had said to the constable at the time the articles were found and what he had said in his statement to the police, stated that when his father came back late in the afternoon on the day of the purchase, he showed him the engine and the transformer. He also showed him the receipt but his father did not know how to read and write. He then proceeded to say "We installed the engine in the car about two days later. I left the transformer in the storeroom. My father saw it the day I purchased it but he did not know where I put it."

In relation to the receipt, the witness stated that when he spoke to the Police and gave them a cautioned statement on 21st April, 1969, he told them that he could not put his hand on the receipt but he found it one week later but did not take it to the police station.

On this evidence the learned magistrate arrived at the conclusion that the suspicion of the officer was well grounded and most reasonable. He was of the view that this was especially so after the appellant had already said that he had no car parts in his possession. He also found that as the appellant had the keys to the locks of both the outer and inner doors, possession of the articles was clearly proved in him. He rejected the explanation given by the appellant as being both unreasonable and untrue and convicted the appellant of the offence as charged i.e. the unlawful possession of a motor car radio and transformer reasonably suspected of having been stolen or unlawfully obtained contrary to section 94(1) of the Summary Jurisdiction (Offences) Ordinance, Chapter 14.

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It is from this conviction that the appellant now appeals to this court, firstly on a submission that counsel made in the court below at the close of the case for the prosecution that there was no evidence of possession at the close of the case for the prosecution, and indeed at the close of the case for the defence. On the second ground argued by counsel under his amended grounds of appeal, counsel argued that the magistrate had erred in finding that the respondent's suspicion concerning the articles was reasonable at the time of the seizure of the articles, and finally that the magistrate had erred in rejecting the appellant's explanation as unreasonable and untrue.

On the first submission we are of the firm view that at the close of the case for the prosecution there was *prima facie* evidence of possession of the articles by the appellant. Where stolen property is found in a man's house it is a question of fact for the jury whether it was found in his possession, that it to say, whether it was there with his knowledge and sanction: *R. v. Savage* 70 J.P. 36 and *R. v. Lewis* 4 Cr. App. R. 96. When it is considered that the articles were found in the appellant's house in a room in a flat, both secured by means of a door with a padlock, the keys to which were in his possession, there was clear evidence upon which a jury could have found that he was in possession of the articles in that room. There was the further evidence that the appellant was saying that he did not know who put the articles there, whereas his son who was claiming to be an inmate of the house stated that he had shown the appellant the said articles. At the close of the case for the defence it was then open to the magistrate to draw the inference that the articles were there with the knowledge and sanction of the appellant and that he had control over the said articles.

We have not overlooked what was said in *Meerza v. Harding* A.J. 16.12.05 and that is to say, it is well established that where there are several inmates of same premises any of whom may have placed the thing found in the place where it was found, the inference of knowledge on the part of the householder is easily rebutted, but this principle applies where the evidence of the finding of the thing is unsupported by other evidence. This is not the position in the present case where all the circumstances suggested control of the articles by the appellant. See also *Finey v. Rajcoomar* (1961) L.R.B.G. 167.

On the second point, we are convinced that the magistrate was right in finding that there was reasonable suspicion existing in the mind of the officer in relation to the articles at the time of the appellant's arrest, as these articles were found locked up in a room covered by jute bags after the appellant had said that he had no car parts other than those on his car, and in the case of the radio the serial number was disfigured. The reasonable suspicion existing in the officer's mind at the time of the appellant's arrest arose both in relation to the thing itself and to the conduct of the appellant. See *Langevine v. Dyal Singh* (1945) L.R.B.G. 88 and *Rudradeo v. Dwarkanand* (1959) L.R.B.G. 154. In *Boodoo v. Joseph* (1964) 7 W.I.R. 373, PHILLIPS, J.A. in the Trinidad Court of Appeal went further than the dictum of VERITY, C.J., in *Langevine's case* and stated:

"For example, a person's conduct may sometimes be a more reliable basis on which to found a suspicion than information given about him by someone else . . . Such information, which *ex hypothesi* would be of self-incriminating character, is in reality merely one species of conduct indicative of guilt; and there accordingly appears to be no valid reason for the exclusion of such other indication."

In respect of the third point raised in the appeal, the magistrate saw and heard the witness who gave evidence for the defence and rejected his evidence, and in our view gave a good ground for this finding when he pointed out in his memorandum of reasons that the witness had said that when he purchased the engine and the transformer he showed them to his father and whereas the father had stated that he did not know who had brought the radio and radio transformer into his house. Indeed, it would have been surprising to us had the learned magistrate reached any other conclusion, for the evidence as to the receipt suggested that it had been manufactured for the purpose of the defence.

For these reasons we dismissed the appeal and affirmed the conviction and sentence with costs to the respondent fixed at \$24.00.

Appeal dismissed.

ATTORNEY-GENERAL FOR GUYANA v. CECILE NOBREGA

[Privy Council (Lord Hodson, Viscount Dilhorne, Lord Donovan, Lord Pearson, Sir Garfield Barwick) July 7, 8, 9; October 6, 1969].

Crown servant—Dismissal at pleasure—Appointment rescinded but re-employment at reduced salary.

On December 4, 1964, the respondent was appointed a Grade 1 Class 1 teacher at Lodge Government School at a salary of \$251.00 a month. On March 17, 1965, she was requested in writing by the Ministry of Education to send them promptly, her birth and academic certificates. Two days later on March 19, 1965, the Ministry sent the respondent another letter saying that because of her failure to submit the certificates her appointment as a Grade 1 Class 1 teacher has been rescinded and that she would be paid as an unqualified mistress pending submission of the documents requested, when her status will be determined and a new letter of appointment sent her. The respondent sent the required documents and continued to teach but found that her salary was reduced to \$92.00 a month. She instituted an action against the

ATTORNEY GENERAL FOR GUYANA v. CECILE NOBREGA

Crown and alleged that the purported reduction of her salary and status was effected without lawful authority.

HELD: that the Crown had the right to dismiss the appellant at pleasure and that she was in fact dismissed by the letter of March 19, 1965.

Appeal allowed.

The Solicitor General (Sir Arthur Irvine Q.C.), J.G. Le Quesne Q.C., and Mervyn Heald for the Crown.

K. M. McHale and F. H. W. Ramsahoye (of the Guyana Bar) for the respondent.

VISCOUNT DILHORNE delivered the judgment of the Board: On October 15, 1964, a letter was sent to the respondent in London from the Ministry of Education, Co-operatives and Social Security, British Guiana, signed on behalf of the Permanent Secretary to that Ministry in the following terms:

"Dear Madam,

Mrs. Cecile Nobrega – Employment

I am directed to refer to previous correspondence on this subject and to inform you that the Ministry had wished to offer you a position on its staff. The constitutional machinery which must be involved in this process is not now functioning and, regretfully, arrangements to create this new post had to be deferred to 1965.

2. In the meantime however, the Ministry is prepared to offer you, on your return to the country, a temporary appointment as a primary school teacher at the salary of about \$250 per month pending the creation of a suitable post.
3. Meanwhile, the Ministry will utilise your services in the field in which you have been trained."

On December 4, the respondent returned to Guyana and on December 11, 1964, the following letter was sent from the same Ministry signed on behalf of the Chief Education Officer to the Manager, Lodge Government School:

"Dear Sir,

Lodge Government School – Staffing

The appointment of Mrs. Cecile Nobrega as Grade 1 Class 1 mistress is approved with effect from 4th December, 1964, subject to medical examination by a Government Medical Officer. Mrs. Nobrega will be informed later about the date of her medical examination by the Ministry of Health.

2. Details of age, qualifications, etc., should be entered on the attached Statement of Particulars and returned to this office as early as possible.

Salary at the rate of \$251 p.m. in the scale \$118x7 – \$195/211x10 – 251x7 – 258x10 – \$288. Mrs. Nobrega is seconded to the Ministry of Education."

Although this letter was not addressed to the respondent, in her evidence she referred to it as her letter of appointment, and she duly entered upon her duties thereunder.

On March 17, 1965, a letter was sent to the respondent by the Ministry of Education, Youth, Race Relations and Community Development, signed on behalf of the Chief Education Officer in the following terms:

"Dear Madam,

With reference to a letter dated 11th December, 1964, from this Ministry appointing you a Mistress at Lodge Government School with effect from 4th December, 1964, I am to request that you send to this Ministry your birth and academic certificates (if possible by the Ministry's Messenger or by return mail).

Your prompt attention to this request will be greatly appreciated."

Two days later on March 19 a further letter was sent to her from the same Ministry again signed on behalf of the Chief Education Officer. It read as follows:

Dear Madam,

Because of your failure to submit to this Ministry your birth and academic certificates as requested so to do in my letter dated 17th March, 1965, I have to inform you that your appointment as a Grade 1 Class 1 teacher has been rescinded as from today, 19th March, 1965.

2. The effect of such rescission is that you will be paid as an unqualified assistant mistress pending the submission of the documents asked for by me. Upon receipt of those documents your status as a teacher will be determined and a new letter of appointment issued to you."

The same day the respondent sent the required documents to the Ministry. She received no further letter after March 19 and continued to teach; but when she went to receive her salary, she found that her payslip showed one salary of \$251 a month up to March 19 and thereafter another salary of \$92 a month. She did not accept that reduction but did so later without prejudice to her rights.

On April 9, 1965, the respondent started an action by writ against the appellant. In her Statement of Claim she alleged that "the purported reduction of her "salary and status was effected without lawful authority" and she claimed the following declarations:

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- (a) That the purported rescission of her appointment as a Grade 1 Class 1 teacher was *ultra vires* and of no effect.
- (b) That she was entitled to receive from the Government of British Guiana in respect of her services as a teacher at Lodge Government School salary at the rate of \$251 per month.
- (c) That the purported reduction of her salary by the Government of British Guiana from \$251 per month in respect of such services to \$92 or any other sum was *ultra vires* and of no effect.

In his defence the present appellant alleged that the respondent's certificates were evaluated and that on March 25, 1965, she was appointed as an unqualified assistant mistress at the Lodge Government School with effect from March 20, 1965, at a salary of \$84 a month with two increments; and it was contended that she was not entitled in law to the declarations she claimed "in that the questions of the plaintiff's appointment and/or reduction of salary are matters which are exclusively within the discretion of the Crown".

At the hearing no evidence was called for the appellant. There was consequently no proof of this allegation that she had been appointed an unqualified assistant teacher at the salary alleged following upon the evaluation of her certificates.

It was argued on the respondent's behalf that while the Crown could dismiss at pleasure, such dismissal must involve a dispensation with service and that there could not be a dismissal if a person continues to perform the same job.

In the Supreme Court of British Guiana CHUNG, J., dismissed the respondent's claim. In the course of his judgment he said:

"Both counsel for the plaintiff and counsel for the Crown agree that there was a contract of service and the Crown could dismiss at pleasure. The only issue, then, in the present case is whether or not the Crown can, without dismissal, reduce the salary of its servant."

It is apparent from the context and from a later passage in his judgment that CHUNG, J., was here using "dismissal" as meaning, a dispensation with service. CHUNG, J., cited the following passage from Professor Glanville Williams' book CROWN PROCEEDINGS:

"The Crown has a right to reduce its servant's pay. In the case of Civil Servants that right follows as a logical consequence from the right to dismiss at will. If the Crown can dismiss at will it can offer to mitigate the exercise of its legal right by continuing the contract of service at a lower rate of pay"

He went on to say that the letter of March 19:

"clearly communicated that the plaintiff's appointment as a Grade 1 Class 1 teacher has (? had) been rescinded as from the 19th March, 1965, and a new appointment was offered to her. She could have exercised her right in leaving the service, but having not done so it must be

taken that she accepted that new appointment, subject to her rights being determined by the court. She can still refuse to serve if she wishes."

He thus treated the letter of March 19, 1965, as terminating her appointment as a Grade 1 Class 1 teacher and as in effect offering her a new appointment as an unqualified assistant teacher. He then repeated part of the passage he had cited from Professor Glanville Williams' book and said:

"In the present case the Crown mitigated the exercise of its legal right of dismissal by rescinding the plaintiffs appointment as a Grade 1 Class 1 teacher and continuing her service as an unqualified assistant mistress at a lower rate of pay."

It would appear that CHUNG, J., accepted the passage cited from Professor Glanville Williams' book as a correct statement of law; and if that be a correct interpretation of his judgment, then there were two distinct grounds given by him for his decision: (1) That the letter of March 19 terminated the respondent's appointment and offered her a new appointment and (2) That the Crown had the right in any event to reduce her pay.

In the Court of Appeal of the Supreme Court the Chancellor, SIR KENNETH STOBY, gave judgment in favour of allowing the respondent's appeal. He thought he had to decide whether the Crown had the right to vary a contract of service unilaterally without the consent of the Crown servant, and held that it had not. "If the Crown," he said, "instead of dismissing can reduce salary there is no limit to which contractual terms can be changed."

He said that counsel for the Crown did not contend that the Crown had dismissed the appellant and entered into a new contract: further that counsel for the Crown had specifically rejected the court's suggestion "or at least did not adopt it" that the letter of March 19 could be treated as a dismissal. He then went on to say that it could be appreciated why counsel took this line for, he said, the course of conduct showed that there was no dismissal and no re-employment.

"If," he said, "she was dismissed and not re-employed then why has she been teaching in the school and receiving a salary? If she has been re-employed then why was a letter not sent to her stating the terms of her employment and the duties expected of her?"

While one would, in view of the terms of the letter of March 19, have expected a letter of appointment to have been sent to the respondent after her certificates had been evaluated, the omission to take that step does not establish that she was not in fact re-employed.

The reasons advanced by the Chancellor for the line taken by counsel for the Crown show that he regarded "dismissal" as meaning a dispensation with service.

Before the Board it was said on behalf of the appellant that the contention that the letter of March 19 terminated the respondent's appointment while offering her employment as an unqualified assistant teacher had not been abandoned.

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CUMMINGS, J.A., was also in favour of allowing the appeal. He too was of the opinion that the word "dismissal" in relation to the Crown's right to dismiss at pleasure connoted a dispensation with service and he inferred from CHUNG, J.'s, judgment that counsel for the Crown had conceded that the Crown had not exercised its right to dismiss, using that word in that sense. He too held that the Crown could not unilaterally vary a contract of service.

LUCKHOO, J.A., on the other hand, thought that the appeal should be dismissed. He said that three questions fell to be considered: (1) Does the Crown have the right to dismiss the appellant at pleasure; (2) Was she in fact dismissed; and (3) Did she suffer in any way an infringement of any legal rights. His answer to the first two questions was in the affirmative and to the third in the negative. The third question was not raised on the hearing of the appeal before their Lordships.

With regard to the second question he assumed that a contract of service with the appellant did exist. He said that such a contract could only be found in the letter of December 11, 1964, which contained the terms which the appellant accepted.

"Put shortly, it could only have been: on the part of the promisor, 'I will employ you as a Grade 1 Class 1 teacher at a certain salary, on a certain scale': on the part of the promisee 'I will serve you as such on those terms and conditions'; this (of course) subject to the promisor's right at law to dismiss at pleasure."

He then said "If for any reason this appointment should cease to subsist, the contract must necessarily cease to exist" and also that the right to rescind the appointment was a logical consequence of the Crown's right to dismiss at will.

In the opinion of their Lordships LUCKHOO, J.A., was right. There is not in their Lordships' view any ambiguity or doubt as to the meaning to be given to the first paragraph of the letter of March 19. By that paragraph her appointment as a Grade 1 Class 1 teacher was rescinded as from March 19. The appointment she had been given was terminated. The respondent is not therefore entitled to the declarations she has claimed. The rescission of her appointment was not *ultra vires* of and no effect and from March 19 she ceased to be entitled to a salary of \$251 a month.

The second paragraph of that letter was not correctly expressed. The effect of the rescission was not that she would be paid as an unqualified assistant teacher. Its effect was to terminate her appointment and her right to the salary which went with that appointment. Misstatement of the effect of paragraph one of the letter does not, however, in any way alter or affect the clear meaning of that paragraph.

The respondent can have been left in no doubt by that letter that her appointment as a Grade 1 Class 1 teacher had come to an end and that she had

ceased to be entitled to the salary which went with that appointment. The second paragraph makes it clear that she could continue as an unqualified assistant teacher pending the evaluation of her documents. She could have refused to do so but she did not.

In this case in view of the clear terms of the first paragraph of the letter of March 19, 1965, no question arises as to the right of the Crown to reduce or vary the terms of a contract of service unilaterally.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed, the order of the Court of Appeal set aside and the order of the Supreme Court restored. The respondent must pay the costs of proceedings in both courts below and of this appeal.

Appeal allowed.

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v

HECTOR AUGUSTUS THOMAS

[Court of Appeal (Luckhoo, C, Cummings and Crane JJ.A.)
September 10, 22, October 14, 1969.]

Will—Onus of proof where beneficiary propounding will—Suspicious circumstances—Not so regarded by trial judge.

Counsel—Counsel as witness—Will prepared by barrister acting as solicitor—Power of Court to require counsel to relinquish brief and give evidence—Evidence Ordinance Cap. 25 s. 88—Legal Practitioners Ordinance Cap. 30 s. 19.

In 1962 the testator made a will under which he left everything to his wife, but in 1965 he made another will under which a son of the testator and his wife benefited to a greater extent than the wife. The will was prepared by a barrister who appeared for the son in his subsequent action to prove the will in solemn form. Despite suggestions by the trial judge that he should relinquish his brief in order, it seems, that he may be free to give evidence in the matter, the barrister either refused or declined to do so. The judge found in favour of the son.

HELD: – that (i) (Cummings J.A. dissenting) on the evidence suspicious circumstances existed and were not removed by the trial judge.

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(ii) per Luckhoo C, and Crane J.A. in a case of this kind "A court of Appeal is entitled to know on a review of a judge's decision what were those discrepancies in the evidence of the witnesses which he thought existed. A judge must lay bare his thought processes by revealing how he arrived at his findings . . ."

(iii) per Luckhoo C, and Crane J.A., Since the barrister had acted as a solicitor when he prepared the will, the court had power to forbid his appearance in the case as counsel and to compel him to give evidence in the matter.

*Appeal allowed.
Retrial ordered.*

C. A. F. Hughes for the appellant.
S. A. Brotherson for the respondent.

CRANE, J.A.: The appellant and respondent are respectively mother and son. In this appeal the contest relates to the validity of a will propounded by the son, dated 10th September, 1965, as the last will and testament of his father, Alexander Benjamin Thomas, aged 86 years, late of W1/2 lot 29, Hadfield Street, Freeburg, Georgetown. Under this will the son stands to benefit to a much greater extent than his mother, for under an earlier will dated the 28th December, 1962, she is the sole beneficiary of the estate of her husband.

In the High Court where the trial took place, there was no competition between these two wills for admission to probate. Only the 1965 will was, in fact, in issue. The mother insisted she was unaware of this later will, in the same way as the son denied knowledge of the existence of the earlier will. That was why the mother defended on a number of grounds, the chief of which is tantamount to an allegation of fraud, namely, that the 1965 will was never really executed by the deceased, he having already made one in which he appointed two persons his executors. The son was thus put to proof of its due execution, and of the fact that his deceased father knew and approved of its contents. In the view of the trial judge, he was entitled to succeed and to the sentence of the court on the force and validity of the 1965 will, which was accordingly pronounced in solemn form of law. Hence this appeal.

There was an alternative plea of undue influence of which evidence was lacking – that the deceased was very ill and infirm by reason of old age, and unable to attend his affairs without his son's assistance; that the son took advantage of this fact and so forced his father to make a will contrary to his wishes.

Evidence of the due execution of the will was given by the son, the respondent, Hector Augustus Thomas, and its two attesting witnesses, both of whom are registered law clerks. The account given by the son on this

aspect of the matter substantially accords, save for details as to the extent of the disposition of property, with that of the law clerks. It is to the effect that towards the end of May 1965, he having retired as a pensioner from the Prison Service in which he worked in New Amsterdam, went to reside at his father's property at lot 29, Hadfield Street. There, he occupied at a monthly rental one of the three cottages situate at the rear of the lot, his brother the middle, and his father and mother the front cottage. During the ensuing months he held several discussions on various topics with his father with whom he always got on well, in contrast with his other brothers and sisters. It was he who, as he says, looked after the old man, cared for him, and paid off the arrears of a mortgage debt on the property amounting to over \$900, together with certain outstanding sums for rates and taxes. In September 1965 the old man expressed the desire to make his will. He was asked to arrange with a lawyer to bring this about. This was how he came to consult barrister Hanoman to whose office he took his father. There, in Croal Street, instructions were taken and recorded on paper by the lawyer who ordered his clerk to type them. These were, it is said, that in addition to a bequest of the back cottage in which he lived, the respondent was to take the residue of the testator's estate on the termination of a life interest to his mother in the front and middle cottages. The clerk typed the will and the typescript was given to his father who read the document and expressed satisfaction with it, whereupon the two attesting witnesses, Marcus and Parmanand, bore witness to the testator's signature by duly appending theirs after the testator had affixed his.

At the trial of the action, the respondent identified the will as the one signed by his father and shown to him on their return home, i.e., on the very day of its execution. He did not know where the will was kept afterwards, but when his father gave it to him at a later date he himself took it to lawyer Haynes' office so that it may be lodged. But why this course was at all necessary has not been explained. Surely, Mr. Haynes's office was not the proper place to have a will lodged, nor a place from where the will could for any reason have been lodged! What was indeed the significance of this? I attach no consequence to the fact that one of the attesting witnesses, Marcus, was employed there. This fact, counsel for the appellant has asked us to take cognisance of, but I would only remark at this stage that out of the very mouth of the respondent, who was deeply concerned in the events leading up to the preparation and execution of the will, there is conflicting evidence as to the whereabouts of the will after its execution in the face of the very clear and reliable account of a senior Registry Officer, George Craigen, that "the will was *originally* lodged for safe custody in the Registry on October 10, 1965 (i.e. one month after its alleged execution) by one Jane Das, clerk to Mr. Hanoman, Barrister-at-Law." How then did the will get from Mr. Haynes's to Mr. Hanoman's office? The respondent had never claimed that he took it back to Mr. Hanoman's. Yet, it was Mr. Hanoman who lodged it. Surely, though a subsequent circumstance to the execution of the will, in the light of the dispute and the allegation of forgery,

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this called for an explanation! But whatever else may be said about the will, the undisputed evidence is that Mr. Hanoman was directly concerned with its preparation and lodgment in the Registry. This fact would, unless explained, certainly exclude the intervention of both the respondent and Mr. Haynes's office from being concerned with its lodgment at the Registry, which was what the respondent had led the court to believe. I think it is proper to mention this matter here as a probable suspicious circumstance relevant to the execution of the will, in view of the burden which the appellant had undertaken to establish by her pleadings, and in support of which she had led expert evidence, viz., that the 1965 will was not really executed by her deceased husband. This, as I have already indicated, can only mean that it is impugned as a forgery.

As I said, the learned judge upheld the validity of the will and pronounced in its favour in solemn form of law. His judgment is attacked on some ten points, many of which overlap. It is contended there is disclosed suspicious circumstances surrounding the preparation and execution of the will; it is urged that the proper inferences of fact were not drawn from the evidence led, that the correct principles of law were not applied in the approach to a case of this nature, and that the judge did not appreciate that the *onus* of establishing the righteousness of the will, which rested on the respondent, had not been discharged. It is also argued that the judgment was, for these reasons, erroneous, and that the judge had been misled in concluding that the will was executed by a testator who knew and approved of its contents.

Following on a review of the evidence in the case, the learned trial judge said:

"Having seen and heard the parties and their witnesses and after a careful consideration of all the evidence led in particular taking into consideration the discrepancies in the evidence of the plaintiff's witnesses as well as the evidence of the defendant and the witness Hinds, I came to the conclusion that the will Ex. "A" was in fact signed by the deceased in Mr. Hanoman's office in the presence of the two attesting witnesses. With regard to its contents I feel satisfied that those were known and assented to by the deceased. This view is fortified by certain portions of the defendant's conversation with the deceased, sometime in September 1965, the month of the making of the will Ex. "A" with regard to his life insurance policy and her occupation of the matrimonial home. Both of these matters are mentioned in the will for the benefit of the defendant. Besides, it is to my mind not without some significance that nothing appears to have been said by the deceased to the defendant about the disposal or otherwise of his other assets. I do not believe that the deceased told the defendant that he intended to wipe off his indebtedness to the plaintiff by allowing him to live rent free in the house occupied by him for a period which would reflect total rental payment, which would otherwise be due, as would equal the amount of such indebtedness.

"I came to this conclusion not unmindful of the fact that the plaintiff had at first stated in his evidence that he was in fact paying a rental after his retirement.

"In the result I am of the view that the testator did have the capacity and in fact did execute the will sought to be propounded.

"With regard to undue influence I agree with counsel for the defendant that the evidence discloses no coercion or importuning of any kind, nor do I feel that the circumstances, including the somewhat surprising presence of the two attesting witnesses, are such as to excite any suspicion and vigilance and thus warrant a finding against the validity of the will.

"I accordingly pronounced for the force and validity of the will sought to be propounded by the plaintiff in solemn form and order taxed costs to be paid to him out of the deceased's estate."

It will be observed from the judgment that nothing really has been said on the point whether there was anything sufficient to excite his suspicion, except that the judge did not feel there was any which arose in the circumstances of the case. This seems to mean he did not consider it a suspicious circumstance that one of an aged couple like the appellant and her husband who, it is admitted, led such closely-knit lives, could dress himself for such an important mission to a lawyer's office, return with his will without showing it to her, and without breathing one word where he had gone to. This aspect of the evidence was accepted, yet passed by without comment from the trial judge. Notwithstanding what the appellant has stated, for myself, I think it reasonable to assume that, although she may not have known where he was going before he left home in the morning with the respondent, from her conversation with him on his return home, she knew fully well that he had been to a lawyer's office, and that he had just made his will there. Although she did not see the will, was unaware in whose custody it was and has denied knowledge of it, I consider her admissions in cross-examination showed that the testator's intimation to her, just after his return from the lawyer's office, that he had left her \$1,200, representing the proceeds of his insurance policy, and the right to a life interest in the front and middle cottages, are very important disclosures. I think this is the strongest point in the respondent's case, because these two dispositions are, in fact, contained in the will, and should go towards proving that the testator knew and approved of the contents of the will, one of the two points on which the onus of proof rests on him.

But the crucial point, having regard to the documentary evidence, the contradictory evidence of the respondent on the whereabouts of the will subsequent to its execution, and the incompetent evidence of Marcus and Parmanand, is whether that will was the one which the testator in fact executed in lawyer Hanoman's office. The respondent's evidence is that the will signed at that office was not left there, but was taken home by the testator and shown to him there. In what circumstances, then, was it

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returned to Mr. Hanoman's office for lodgment in the Registry when it was left at Mr. Haynes's? This could only have been explained by Mr. Hanoman, whose persistent refusal to relinquish his brief as counsel on the judge's advice, left a void in the case.

Very important, too, in view of the above, were the marked differences in characteristics between the signature on the disputed will and those proven or admitted to have been in the undoubted handwriting of the testator. The judge also appeared to have regarded of no moment the fact that in the 1962 will, which is undisputed and proved to have been made by the deceased, was signed in the accustomed manner and style of the testator, viz. "A. B. Thomas," whereas, in the will of 1965 the deceased is alleged to have signed in an infirm hand—"Alexander Benjamin Thomas". The explanation of Ivan Hinds, the handwriting expert whose minute analysis of the undisputed and disputed handwriting of the deceased for these differences and infirm state of the signature was that the whole affair was a forgery because the line quality, as evidenced by the pen stops or dots, showed that the writer of the signature paused from time to time to look at another document, i.e., was copying from another document, was again passed by without serious reflection by the judge who appeared to rest content with Hinds's admission that the infirm signature could have been produced by a writer pausing or taking his pen away from the paper from time to time.

On another point of suspicion, I am inclined to agree with counsel for the appellant (and with the judge who considered it "somewhat peculiar"), that it was for sure a suspicious circumstance to find two law clerks from other offices present in the inner room of the office of a solicitor at the time when he was taking instructions from a client with a view to the preparation and drafting of a will. I think anyone will agree that questions asked and answers given concerning persons and dispositions of property in such circumstances would be highly confidential in nature and not of the kind any responsible solicitor would permit strange clerks, to overhear, or any self-respecting client would normally feel disposed to reveal in such circumstances. Let it be conceded they were present to attest the will, this fact would not render their presence necessary at the time of the giving of such instructions, and it is suggested that the reason why they gave such incompetent evidence concerning the testator's dispositions is because they were not present and did not really overhear them. True, the judge did appear to view this with some misgiving, but yet, strangely, he did not think it had any material bearing on the case.

Above all, there was the very suspicious circumstance of the absence of Barrister Hanoman from the witness-stand. At the trial, Mr. Hanoman appeared as counsel for the respondent in a matter in which his presence in the witness-stand was vitally necessary to clear up both the circumstances attending the execution of the will and the dispositions made thereunder, since both were in dispute. This was all the more necessary because both attesting witnesses, Marcus and Parmanand, were vague and uncertain on these matters. While all the help Marcus could give on the matter of the

testator's dispositions was that he was sure that the testator gave instructions about leaving property to the respondent, and that the testator also said something about his wife which he, Marcus, could not recall, Parman and said nothing at all on the matter. Both were unable to say anything specific about what it concerned. The fact remains that Mr. Hanoman took the testator's instructions on a sheet of paper which he might possibly have preserved and have been in a position to produce had he been called as a witness. I think this was likely because it is well-known that in every well-conducted solicitor's office such instructions are usually filed away in the event they are needed in the future.

Concerning Mr. Hanoman's appearance in the case, there appears this note on the judge's record:

"Court draws attention of Mr. Adams to the fact that it had on two occasions during the trial suggested to Mr. Hanoman, then counsel, that he should relinquish his brief and advise his client to consult other counsel. This he *refused* or declined to do."

I am forced to say, however, that the learned judge did not display that firmness which is desirable in dealing with a matter of this kind. It did not seem to appear to him that when Mr. Hanoman drafted the will he was at that time a barrister acting as solicitor; that at that time he was practising as an English solicitor whose usual task it is to take instructions from and draft wills on behalf of clients in non-contentious probate business. (See ss.41&46, Cap. 30). S. 19 of the Legal Practitioners Ordinance, Cap. 30, provides that in so far as he so practises, he is to be deemed a solicitor and an "officer of the Supreme Court." The significance of this is that being such a one, he is subject to the inherent summary jurisdiction which the Supreme Court has over solicitors; a jurisdiction which continues to exist, notwithstanding he may have long ceased to be an officer of the court. This position was made very clear by PATTESON, J., who once said:

"If a man becomes an attorney, he cannot get rid of the summary jurisdiction of this court with respect to what he has done while an attorney, by ceasing to be an officer of the court. The rule is, once an attorney always an attorney *for that purpose*." (See *Simes v Gibbs*, 6 Dowling 310-311).

The above authority is cited to show that at the time of the trial of the action before the High Court when Mr. Hanoman appeared on behalf of the respondent in respect of such acts as he had hitherto performed *qua* solicitor, he was still responsible and answerable, notwithstanding he had ceased acting as solicitor, and the taking of instructions for the preparation of and drafting the will for the testator was a *fait accompli*. This means that the judge possessed the inherent summary jurisdictional control over him as an officer of the court for all acts done by him in that capacity, though he was now appearing in another, i.e., as a barrister-at-law. Because of this, the judge may have even, by virtue of s. 88 of the Evidence Ordinance, Cap. 25, ordered him to testify as a "competent person." At any rate, it

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seems to me, whatever may have been the privileges Mr. Hanoman enjoyed, *qua* barrister, of not being compelled to testify, since competency is not synonymous with compellability—some persons are competent but not compellable (and about these the judge seemed to have been in doubt) -he could, from the time it became apparent, have quite properly said to him: "I am not giving you leave to appear before me in this case as a banister since I can see from the pleadings that the will which you have prepared while solicitor is being questioned on the ground of fraud, and the probability is that you may be called upon to testify. My inherent jurisdiction in disciplinary matters over officers of the Supreme Court, of which you are one, *pro hac vice*, is based on my right to see that a high standard of professional etiquette is maintained."

The following excerpt from the speech of Lord ATKIN in *Myers v Elman*, (1939) 4 All E.R. 484, at page 497, ought to leave no doubt about the position:

"From time immemorial, judges have exercised over solicitors, using the phrase in its now extended form, a disciplinary jurisdiction in cases of misconduct. At times the misconduct is associated with the conduct of litigation proceeding in the court itself. Rules are disobeyed, false statements are made to the court or to the parties by which the course of justice is either perverted or delayed. The duty owed to the court to conduct litigation before it with due propriety is owed by the solicitors for the respective parties whether they be carrying on the profession alone or as a firm."

In this way, it is suggested Mr. Hanoman's appearance could have been compelled or denied in the case and his "*refusal*" to relinquish his brief, which the judge recorded, treated as contempt of court. But it is evident that the judge missed the point and, by his attitude, obviously considered he had no power to deny him audience or procure his testimony since he was a barrister-at-law, it being well-known that "Barristers are not, as solicitors are, officers of the Supreme Court, and the court has no special control over them, and although it has been said that the Superior Courts have, by virtue of their inherent jurisdiction, power to suspend from practising before them particular barristers who have been guilty of misconduct, which renders them unfit to practise, there is, it is believed, no reported instance in recent times of the exercise of such a power in England." (See 'BARRISTER-AT-LAW' by J. R. V. MARCHANT, 1905, at p. 30).

The Annual Statement of the General Council of the Bar, 1911, at page 11, is most appropriate here, I think, because it is clear authority that a barrister ought not to accept a retainer in a case in which he has reason to believe he will be a witness, and, if being engaged in a case it became apparent that he is a witness on a material question of fact, he ought not to continue to appear as counsel if he can retire without jeopardizing his client's interests; although, it is conceded, this statement represents only a ruling on a matter of professional etiquette and has no binding authority outside the profession. So that even if it was doubtful, as it did indeed appear to

the judge, what powers of control he could properly exercise to prohibit the appearance of counsel before him, he clearly had control over Mr. Hanoman as an officer of the court and could thus have forbidden his appearance and compelled him to give evidence as a competent person.

Had this course been taken on the day it first became apparent, it is felt that counsel could not have grasped the opportunity to shelter behind judicial indecision by remaining in the case until the defence was closed before relinquishing his place to another legal practitioner. It was in this way the ends of justice were defeated by Mr. Hanoman's absence from the witness-box. On the state of the evidence, he was the only person who could have cleared up matters relevant to the execution of the will. In view of the quality of the evidence led in that regard by Marcus and Parmanand, about whose presence in Mr. Hanoman's office at the time the judge expressed some misgivings, and also in view of the very heavy burden cast on the respondent to prove the righteousness of the will created by the undoubted suspicion which exists in the case that had not been removed by him, I think it was injudicious to have entered judgment on his behalf without hearing what Mr. Hanoman had to say.

It seems to me the facts of this case so teemed with suspicious circumstances that they ought to have arrested the attention and excited the mind of any reasonable court of trial. The situation which the evidence unfolded called for the utmost vigilance and jealousy in subjecting what had been told the court to the closest scrutiny, for it is evident from the excerpt extracted above, that the judge approached the consideration of this case in the same manner as was done in *Straker v Luke*, (1947) L.R.B.G., and in *Wintle v Nye*, (1959) 1 All E.R. 552, i.e., the judges in these cases approached the matter just as if it were a contest to be decided mainly on the perception of the evidence of witnesses. Clearly it is not sufficient for a judge merely to say he has seen and heard the parties and their witnesses and that he has given careful and thoughtful consideration to all the evidence in the case. A Court of Appeal is entitled to know on a review of his decision what were those discrepancies in the evidence of the witnesses which he thought existed. A judge must lay bare his thought-processes by revealing how he arrived at his findings, particularly where, as here, an *onus* rests in law on one of the parties, namely, the respondent who had been instrumental in the preparation of a will under which he took "the lion's share". He must remove such suspicious circumstances as may exist and show the righteousness of the transaction. In this regard, I respectfully concur with what was said by Viscount SIMONDS in *Wintle v. Nye* (above) at p. 558:

"In such a case as this, complicated as it was by many documents not easily understood, it was not enough for the judge to say to the jury that, if they believed the respondent, whom they had seen and heard, they could decide in his favour. It was imperative that he should at least point out the considerations, which were not lacking, for them to bear in mind in deciding whether they should, or should not, believe him."

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For the above reasons I have endeavoured to give, namely, that the entire conduct of the case has been unsatisfactory, owing particularly to counsel's absence from the witness-box, I would allow this appeal with costs, by setting aside the decision of the trial court. I would remit the case to the High Court with the direction that there be a re-trial before another judge of that court.

LUCKHOO, C: After consideration of the facts in this appeal, I wish to concur with the words of my brother Crane.

CUMMINGS, J.A.: This appeal concerns the validity of the will dated 10th September, 1965, of Alexander Benjamin Thomas, who died on the 18th November, 1965. The respondent (plaintiff), a son of the testator, propounded the will as executor and asked the High Court to pronounce in its favour. The claim was resisted by the testator's widow who alleged that the testator had made an earlier will in 1962, which he had not revoked. She set up the defences that the will propounded was never executed by the deceased, put the plaintiff to proof that the deceased knew and approved of its contents; and, in the alternative, undue influence.

The trial judge, having seen and heard a number of witnesses, decided that the will was duly executed by the testator who knew and approved of its contents, that there had been no undue influence, and that the circumstances—including the somewhat surprising presence of the two attesting witnesses—when fully examined and analysed, were not such as to excite any suspicion and vigilance and thus warrant a finding against the validity of the will. He, accordingly, pronounced in favour of the will.

The testator was a retired civil servant who, at the time of his death, was 86 years of age, and had been married to his wife, with whom he lived in harmony for 60 years. They had eight children with whom they got on well.

At the time of his death he owned a property situate at and being the W1/2 of Lot No. 29, Hadfield Street, Freeburg, Georgetown, which comprised two cottages in front and one at the back. The appellant and himself occupied one of the front cottages, another member of the family the other, and the respondent the back cottage.

It was clearly established that he had made a will on 12th December, 1962, and that that was a valid will and contained his wishes as they were at that time. It was a simple document in the following terms:

"THIS IS THE LAST WILL AND TESTAMENT of me ALEXANDER BENJAMIN THOMAS, of Lot 29 Hadfield Street, Werk-en-Rust, in the city of Georgetown, county of Demerara, hereby revoking and making null and void all previous Wills, Codicils and other instruments of a Testamentary nature heretobefore made by me.

1. I desire that all my just debts, funeral and testamentary expenses be paid as soon as possible after my death.

2. The rest, residue and remainder of my estate of whatever nature or kind and wheresoever situate I leave and bequeath the same to my wife SARAH MEHITABEL THOMAS for her sole use and benefit.

3. I nominate, constitute and appoint JOSEPH de SOUZA GASPAR and SYBIL BEATRICE THOMAS, both of Lot 83, St. Stephen Street, Charlestown, Georgetown, Demerara, to be the Executors hereunder, giving and granting unto them all powers and authorities given granted by law.

THUS DONE AND SIGNED at the city of Georgetown, County of Demerara and Colony of British Guiana this 28th day of December, 1962, in the presence of the subscribing witnesses.

A. B. Thomas.

Signed and acknowledged by the Testator as and for his Last Will and Testament in the presence of us both who in the presence of each other have signed our names as witnesses hereto.

1. A Massay,
331 Cummings Street,
Georgetown.
2. A. E. Chase,
80 Cowan Street,
Kingston."

The will which the respondent (plaintiff) propounded is as follows:

"LAST WILL AND TESTAMENT OF ALEXANDER BENJAMIN THOMAS, residing at West 1/2 Lot 29, Hadfield Street, North Freeburg, Georgetown, Demerara.

1. I, ALEXANDER BENJAMIN THOMAS, male hereby revoke all former wills and codicils, made by me and declare this to be my last Will.
2. I give and bequeath the back cottage with all the land attached to it with the right of entry in Hadfield Street, to my son HECTOR AUGUSTUS THOMAS.
3. To my wife SARAH MEHITABEL THOMAS, a Life Interest in the remaining property West 1/2 29, Hadfield Street, North Freeburg, Georgetown, to be held by her for her life and on her death *the remainder to my son HECTOR AUGUSTUS THOMAS.*
4. My Life Insurance Policy which is fully paid up with the Barbados Life Insurance Company to be paid to my wife SARAH MEHITABEL THOMAS.
5. My funeral and testamentary expenses are to be borne by my Estate.

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6. To the rest of my children I leave nothing as I made ample provision for them during my life time.

IN WITNESS WHEREOF I have hereunto set my hand this 10th day of September, 1965.

Alexander Benjamin Thomas.

Signed by the abovenamed ALEXANDER BENJAMIN THOMAS as his last Will and Testament in the presence of us present at the same time who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

1. Name: Alvin Marcus
Address: 664 East Ruimveldt Scheme,
Georgetown.
Description: Clerk.
2. Name: Parmanand
Address: Triumph Village, E.C. Dem.
Description: Clerk."

The appellant (defendant) in her evidence said that the respondent (plaintiff) had taken the deceased *out one day about two months before his death*, but that he (the appellant) did not tell her where he was taking him. When the deceased returned, he appeared exhausted. He told her that the plaintiff had paid off his mortgage debts and the property was free from debt, that she was to receive \$1,200 of his life insurance policy. She asked him whether, as the respondent (plaintiff) had paid off his mortgage, he would give him the house in which he (the plaintiff) was then residing. Deceased told her, "No, the plaintiff would live in the house as a paid-up tenant and when the amount paid as mortgage had been offset he must pay me a monthly rental." She said further in her evidence:

"The plaintiff's rental was \$21.73. The next day the plaintiff came to our home. I told him that the deceased had told me he had paid off the mortgage debt. He confirmed this saying it was \$925. He then left. After the death of my husband the plaintiff brought a will to me. I had not seen it before. Ex. "A" is the will. I was surprised because I knew my husband made a will in 1962. The signature of the testator on Ex. "A" does not appear to be that of the deceased, my husband."

The testator did in fact die two months and eight days after the purported date of the execution of the will. There is no evidence of his going out with the respondent or going out alone on any other occasion within a few months of his death. It seems therefore reasonable to infer that the conversation with the deceased to which the defendant referred, took place on the deceased's return immediately after he had completed some trans-

action which had effected what he told her. A further reasonable inference is that the transaction was the execution of a will with such provisions.

At the trial, a clerk in the registry produced the will propounded, the attesting witnesses gave evidence of its due execution and the testator's knowledge of the contents thereof, the respondent (plaintiff) as to the circumstances surrounding the execution of the will and, supported by his brother and the appellant (defendant) herself, as to his cordial relations with the testator and the appellant (defendant); a dispenser as to the testator's testamentary capacity, and a handwriting expert as to the testator's signature.

The learned trial judge, after analysing the evidence, which is fully detailed in the judgments of my learned brothers and need not be repeated, commented thereon as follows:

"Having seen and heard the parties and their witnesses and after a careful consideration of all the evidence led in particular taking into consideration the discrepancies in the evidence of the plaintiff's witnesses as well as the evidence of the defendant and the witness Hinds, I came to the conclusion that the will Ex. "A" was in fact signed by the deceased in Mr. Hanoman's office in the presence of the two attesting witnesses. With regard to its contents I feel satisfied that those were known and assented to by the deceased. This view is fortified by certain portions of the defendant's conversation with the deceased, sometime in September, 1965, the month of the making of the will Ex. "A" with regard to his life insurance policy and her occupation of the matrimonial home.. Both of these matters are mentioned in the will for the benefit of the defendant. Besides, it is to my mind not without some significance that nothing appears to have been said by the deceased to the defendant about the disposal or otherwise, of his other assets. I do not believe that the deceased told the defendant that he intended to wipe off his indebtedness to the plaintiff by allowing him to live rent free in the house occupied by him for a period which would reflect total rental payment, which would otherwise be due, as would equal the amount of such indebtedness.

"I came to this conclusion not unmindful of the fact that the plaintiff had at first stated in his evidence that he was in fact paying a rental after his retirement.

"In the result I am of the view that the testator did have the capacity and in fact did execute the will sought to be propounded.

"With regard to undue influence I agree with counsel for the defendant that the evidence discloses no coercion or importuning of any kind, nor do I feel that the circumstances, including the somewhat surprising presence of the two attesting witnesses, are such as to excite any suspicion and vigilance and thus warrant a finding against the validity of the will."

He then concluded:

"I accordingly pronounced for the force and validity of the will sought to be propounded by the plaintiff in solemn form and order taxed costs to be paid to him out of the deceased's estate."

Before this court, counsel for the appellant concluded that there was no evidence of undue influence, but argued that the following were suspicious circumstances which ought to have excited the vigilance of the court and that the court ought not to have pronounced in favour of the will unless those suspicions were dispelled by the evidence:

1. Taking the deceased to make a will without informing the wife of the deceased that he was doing so, taking into consideration the close and friendly relationship which existed between the respondent, the appellant and the deceased.

2. The fact that deceased left the matrimonial home that morning without informing the appellant as he was accustomed to do whenever he was leaving home.

3. The unsatisfactory explanation of the presence of the two attesting witnesses at the time of execution of will.

4. The uncertainty of what were the exact details of instructions which deceased is alleged to have given to Mr. Hanoman.

5. The marked difference between the signature on the will and the signatures of the testator on the former will and on other documents produced.

6. The marked departure from previous testamentary disposition.

7. Absence of any independent advice being given to deceased.

8. Fact that on the same day respondent had either paid or made arrangements for paying off of mortgage debt made by the deceased.

9. The fact that respondent concealed existence of will until after death of the deceased.

10. There was no enquiry by Mr. Hanoman as to extent of deceased's property or the details of his previous testamentary disposition.

Counsel further urged that although, perhaps, even if each of the circumstances set out was not in itself suspicious, the cumulative effect was such that the court ought not to have pronounced for the validity of the will.

With great respect this argument reveals a complete misconception as to what is meant by 'suspicious circumstances' in the context of the propounding of a will. Counsel cited a number of cases but in my view, none support the manner in which he seeks to extend the rule. Each case must be

determined upon the facts of that particular case. It is, in my view, pellucidly clear that the circumstances must be circumstances attending the preparation or execution of the will and not extraneous and/or subsequent surrounding circumstances.

In *Re R.*, (1950) 2 All E.R. 117, WILLMER, J., in an exhaustive examination of the rule said at p. 121:

"The rule in *Barry v Butlin* was approved and applied by the House of Lords in *Fulton v Andrew*, which was, again, a case in which the will was prepared by persons who took a substantial benefit under it. In that case Lord HATHERLEY took the opportunity of restating the rule in the following terms (L.R. 7 H.L. 471):

'There is one rule which has always been laid down by the courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will, as these two persons undoubtedly were, and who obtains a bounty by that will, is placed in a different position from other ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory, and capable of comprehending it. But there is a farther onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining the will. They have thrown upon them the onus of shewing the righteousness of the transaction.'

With one exception, to which I will presently refer, in all the subsequent cases in the reports in which the rule in *Barry v Butlin* has been applied, the circumstance giving ground for suspicion has been the fact that the will was prepared, or its execution produced, by a person taking a benefit under it. The exception is *Tyrell v Painton*, where the will was prepared by the son of the defendant, the defendant being the person in whose favour the will was made. In that case the Court of Appeal held that the rule, in *Barry v Butlin* is not, to quote the words of LINDLEY, L.J. (*ibid* 157):

'... confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the court.'

LINDLEY, L.J., however, goes on to make it clear that the circumstances to which he was referring must be circumstances attending the preparation or execution of the will, for he goes on to say (*ibid* 157):

'Here the circumstances under which the will of the 9th was prepared and signed are such as to cause the gravest suspicions.'

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In a previous passage (ibid 156) he had said substantially the same thing. A L. SMITH, L.J., speaks of (ibid 158):

'... the grave suspicions surrounding the will.'

and a little lower down the page uses the significant phrase;

'... especially a will brought into existence as this will was.'

DAVEY, L.J., neatly and concisely sums up the rule which the Court of Appeal were laying down in the following words [(1894) p. 159]:

'... the principle is that whenever a will is prepared under circumstances which raise a well grounded suspicion that it does not express the mind of the testator, the court ought not to pronounce in favour of it unless that suspicion is removed.'

"The conclusion which I draw from these authorities is that in dealing with a question of knowledge and approval of the contents of a will in the circumstances which are held to excite the suspicions of the court must be circumstances attending, or at least relevant to, the preparation and execution of the will itself. This view is, I think, confirmed by the decision of the Court of Appeal in *In the Estate of Musgrove*, where it was held that a suspicion engendered by extraneous circumstances, arising subsequent to the execution of the will, was not a sufficient reason for rebutting the presumption of due execution of a will regular on its face. In the course of an exhaustive judgment, Lord HANWORTH, M.R., said [(1927) P. 280]:

'What of the suspicion? It is not such as attaches to the document itself in the sense in which Sir James Wilde uses the term in *Guardhouse v Blackburn*, or as it arose in *Tyrell v Painton* in the preparation of the will. The wide definition of suspicion stated by LINDLEY, L.J., in the latter case, that it 'extends to all cases in which circumstances exist which excite the suspicion of the court' appears to have been used in reference to the preparation of the will, its intrinsic terms, and the circumstances surrounding its preparation and execution, and DAVEY, L.J., seems to have had the same matters in mind. Their judgments were not intended to alter, but to affirm the principles laid down in the cases I have cited.'

There is some authority in MORTIMER ON PROBATE LAW AND PRACTICE, 2nd Ed., p. 76, for the proposition that in some circumstances matters extraneous to the preparation and execution of the will may properly be held to excite the suspicion of the court whether the deceased knew and approved of its contents. It is there stated:

'Again the following circumstances may require satisfactory explanation, especially where the person who prepared the Will

was a beneficiary thereunder; the fact that the testator gave no instructions for the will, and was without independent advice, legal or otherwise; that persons who benefited assumed authority over him, while he was weak or debilitated; excluded his relations and friends; obtained the money from him; and assumed control of his affairs. Any one of these circumstances standing alone, may admit of explanation, but their cumulative effect would be to raise a strong suspicion that the testator was a mere passive instrument in their hands.'

It is with hesitation that I venture to criticise an authority which is entitled to such well-deserved respect, but if the author means by this passage that circumstances such as he refers to, if not in some way concerned with, or shown to be relevant to, the preparation and the execution of the will are such as ought to excite the suspicion of the court, I doubt whether the views expressed are consistent with the rule as defined in *Barry v Butlin* and the subsequent cases to which I have referred. It is to be noted that all the authorities cited in support of the proposition in the text are anterior in date to *Barry v Butlin*.

Turning to the allegations in this case to which exception is taken, there is nothing to show that the beneficiary, R.F., or any of his family, had any part whatsoever in the preparation of this will. On the contrary, as I have already stated, it would appear that the will was prepared by solicitors. The allegations are not connected in any way with the preparations and execution of the will. In these circumstances, is counsel for the defendants well founded in contending that the matters alleged are such that they will have to be brought to the attention of the court? The answer must be: Only if they are relevant in some way to the preparation and execution of the will, that is, only if they go to show that the will was prepared in circumstances capable of raising a well-founded suspicion that it did not express the mind of the testator, to quote the phrase used by Davey, L.J., in *Tyrell v Painton*."

See also *Prescod and James v Elaine Reece*, Civil Appeal (1962) L.R.B.G. 103, and the judgment of the Privy Council in that case appearing at page 170 of Vol. 2 of the Court of Appeal Judgments. Cf. *Harwood v Baker*, 3 Moore P.C. 282, and *Battan Singh v. Aminchan*, (1948) 1 All E.R. 152.

Counsel for the appellants cited a number of cases in support of his argument, but all turned upon the facts in the particular case. In none of them do I find any departure from the principle so clearly elucidated in the passage I cited earlier herein from the judgment of WILLMER, J., in *Re R.* (loc cit.).

The will of the testator which the respondent (plaintiff) sought to pro- pound in this case is regular on the face of it. The learned trial judge saw and heard the attesting witnesses, and believed them; he carefully analysed the evidence of the handwriting expert and came to the conclusion that the

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signature was that of the testator. The defendant admitted that subsequent to the testator's going out and returning home with the respondent (plaintiff) the testator told her what was to be left to her and that that coincided with the bequest in the will. There was ample reason for the testator to have revoked the earlier will and for the bequest to the respondent in the later will, as the latter had paid off the mortgage debt on the property which was the subject-matter of the bequest. In my view, the only circumstances urged which might be recognised as suspicious that are relevant to the preparation and execution of the will are items 3, 5 and 6 listed on pages 6 and 7, i.e.:

3. The unsatisfactory explanation of the presence of the two attesting witnesses at the time of execution of will.

5. The marked difference between the signature on the will and the signatures of the testator on the former will and on other documents produced.

6. The marked departure from previous testamentary disposition.

In addition to these, even if there were other circumstances which fell within the ambit of those which can be regarded as suspicious within the rule as I apprehend the authorities—a view which I do not hold—they were found to have been dispelled after the learned trial judge had carefully analysed the evidence.

I can see no reason for interfering with the learned trial judge's findings and ultimate conclusion, and although for purposes of this review the judicial approach must not be what I would have myself decided, but rather whether the learned trial judge was unreasonable, I cannot but observe that I take the same view as he did on the evidence adduced in this case.

For these reasons I would dismiss the appeal with costs in this court and affirm the judgment and order of the learned trial judge.

*Appeal allowed.
Retrial ordered.*

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v.

GEORGETOWN ASSESSMENT COMMITTEE

[Court of Appeal (Persaud, Cummings, Crane J.J.A.)

June 11, 13, October 14, 1969].

Rating—Occupation—Part of floor intended for warehousing used as such for short periods before floor complete—Whether whole floor occupied and from what date.

Rating—Each storey of a two storeyed building intended for different use—Whether rateable as one occupation—Georgetown (Valuation and Rating) Ordinance Cap. 154 s. 25.

The appellant started constructing a two-storeyed building on a lot in 1961. It was intended that the ground floor should be constructed as a warehouse and the first floor as a hotel. The ground floor was completed in May 1966, and rented in June, 1966, but before completion, parts of it were let and used as a warehouse for periods amounting to nine months between 1961 and 1964. The first floor was completed in February 1965, but had been rented from November 1964. S. 25 of the Georgetown (Valuation and Rating) Ordinance, Cap. 154 provides that the assessed value of a lot shall have effect from the date when the lot "comes into occupation". The respondents assessed the entire building as a warehouse with effect from 1961, and the Full Court on appeal from a magistrate restored the respondents assessment. On appeal.

HELD: (i) that the whole of the ground floor came into occupation as a warehouse in 1961 and was rateable from that time.

(ii) that the ground and first floors were two distinct entities intended for two separate purposes and that the first floor first came into occupation in November, 1964 and was rateable from that time.

*Appeal allowed in part.
Decision of Full Court varied.*

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

C.A.F. Hughes for the respondents.

PERSAUD, J.A.: delivered the judgment of the court: The respondents are the rating authority for the city of Georgetown under the provisions of the Georgetown (Valuation and Rating) Ordinance, Cap. 154 (hereinafter in this judgment referred to as the ordinance), and the appellant is the owner of certain premises situate at Lot A3, Holmes and Queen Streets, in the city of Georgetown.

It would appear that when acquired by the appellant, the premises comprised of several buildings, including one which it was intended

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to demolish, and in its place was to be erected the building which is the subject-matter of this appeal. The plan of this latter building—a two-storeyed building—was prepared in 1958, and building operations commenced early in 1961. A second plan was prepared in 1965, but this concerns the upper floor which, originally intended to accommodate a number of offices, was converted into a hotel. In the 1959 plan, the ground floor was to be constructed as a warehouse, and the evidence of the appellant's attorney is that the first floor was completed in February, 1965, but had been rented in November, 1964, while the ground floor was finished in May, 1966, and was first rented in June of the same year.

In June, 1961, there was a proposal to increase the assessed value of the property in accordance with s. 20 of the ordinance. This proposal was finally heard by the respondents in February, 1964, after an inspection of the premises. The respondents determined the assessed value of the entire premises to be \$5,100.00 with effect from July 1, 1961. In arriving at this value both storeys of the new building were assessed as a warehouse, and the assessed amount was \$4,350.00; the land it occupied was assessed at \$97.00, making a total of \$4,447.00. The other buildings and land remained at \$642.00. The total was thus \$5,089.00, and when taken to the nearest \$100 the value would be \$5,100.00. This assessment was confirmed by the Mayor and Town Council. The appellant challenges the assessment of the new building.

The method of assessment has been described as the 'contractor's basis', the basis used for all warehouses in the commercial area, as this building was. The floor area of the building was 7,102 sq.ft. At \$7.00 per sq.ft. this would give a capital value of \$49,714.00. Thus the annual rental is arrived at by taking 83/4% of the capital value, and this gives \$4,350.00. The area of the land occupied by the building was 100ft. x 45ft., i.e. 4,500 sq.ft. which when taken at 36 cents per sq.ft would yield the figure of \$1,620.00. The annual rental at 6% would be \$97,000.

Counsel for the appellant takes no exception to the method of valuation, but, contends he, each flat should be regarded as a separate entity as would be the case for purposes of rent assessment. Counsel argues that the first floor should have been assessed separate and apart from the ground floor, as the former was not beneficially occupied until November, 1964, as a result of which, and if s. 25 of the ordinance were to be applied, the effective date would be January, 1965. The magistrate had amended the assessment made by the respondents to take effect from January 1, 1964, and not as from July 1, 1961, as was fixed by the respondents; while the Full Court restored the date of the new assessment to July 1, 1961.

The questions now before us are whether when the building was occupied in, 1961, it was occupied as a warehouse, and whether the

occupation of the ground floor in 1961 and then in 1962 was occupation of the whole building.

It is clear that the intention was that the ground floor was to be used as a warehouse, both from the oral evidence of the appellant's attorney and from the plan. The appellant's contention, however, is that the building was incomplete in 1961 and could not have been used as a warehouse. The fact is that it was rented for two months in 1961 to the Rice Marketing Board, and to the Guyana Graphic on two occasions—for four months in 1961-1962, and again from November 1963 to January 1964. On each occasion that it was rented, rice and then paper were stored, and the appellant was paid for the facilities offered. Again, when the premises were inspected by members of the Assessment Committee, it was found that articles such as zinc sheets were being stored there. The question is whether these circumstances amount to the premises being occupied, for s. 25 of the ordinance provides as follows:

"Subject as hereinafter provided, an amendment of an assessed value inserted in a supplemental list in relation to any lot in the valuation list current at the date when the proposal, in pursuance of which the amendment was made, was served on the committee, shall be deemed to have had the effect as follows –

- (a) if the proposal is made on or before the 30th June – from the 1st July in the year in which the proposal was made; and
- (b) if the proposal is made after the 30th June – from the 1st January in the year next following that in which the proposal was made,

and any such amendment shall, subject to the provisions of this ordinance, also have effect in all subsequent years during the continuance in force of the current valuation list so amended.

Provided that, in the case of an amendment consisting of the inclusion in the supplemental list either of a newly-constructed or newly-erected lot or an altered lot which has been out of occupation on account of structural alterations, or in the case of the insertion in the supplemental list of an amendment of the assessed value of any lot where the value thereof has been affected by the making of structural alterations or by the total or partial destruction of any building or other erection by fire or any other physical cause, the amendment shall have effect only as from the date when the new or altered lot comes into occupation, or as from the happening of the event giving rise to the amendment of the value of the lot, as the case may be".

It has been argued that as the ground floor was not rented until 1966, the assessment should commence to run from that year, but the fact is that the ground floor was rented—albeit for short periods – from 1961, even

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though it would appear that it was then far from completion, and it was rented to be used as a warehouse, precisely the purpose it was intended for.

In JOWITT'S DICTIONARY OF ENGLISH LAW (at p. 1251) it is stated:

"In the law of rating, occupation signifies actual use and enjoyment, as distinguished from mere enjoyment To constitute rateable occupation, it must be exclusive as well as beneficial".

And even though our position is different from that which obtains in England, in that under the English rating system, the rate is a tax on the occupiers in respect of their occupation, whereas in Guyana it is a charge on the rateable hereditament thus rendering the owner liable [see *Port-of-Spain Corp. v. Gordon Grant & Co. Ltd.*, (1955) 2 W.L.R. 723, and *Georgetown Assessment Committee v. Seth*, (1961) L.R.B.G. 447], by reason of the proviso to s. 25 of the ordinance (recited above), in the case of an amendment of the assessed value, it is important to ascertain when the premises came into occupation. Hence the English authorities will be of great assistance in resolving this issue.

Before examining the English authorities, however, we wish to make the point that according to our law, it matters little who is in occupation of the hereditament; once it comes into occupation it is rateable in accordance with the terms of the proviso.

In *Reg. v. The Assessment Committee of St. Pancras*, (1877) 2 Q.B.D. 581, it was said by LUSH, J. (at p. 588):

"It is not easy to give an accurate and exhaustive definition of the word 'occupier'. Occupation includes possession, but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession and may maintain trespass against anyone who invades it, but as long as he leaves it vacant he is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year".

And again at p. 589 (*ibid.*):

". . . a transient, temporary holding of land is not enough to make the holding rateable. It must be an occupation which has in it the character of permanence; a holding as a settler not as a wayfarer".

In that case it was held that a person who had affixed with the owner's permission and paying therefor, hoardings for advertising purposes, was not rateable as an occupier of an "advertising station".

And in *Westminster Corp. v. Southern Ry. Co.*, (1936) 2 All E.R. 322, LORD RUSSELL OF KILLOWEN expressed similar views, when he said (at p. 326):

"Rateable occupation . . . must include actual possession, and it must have some degree of permanence: a mere temporary holding of land will not constitute rateable occupation".

No doubt, the views expressed by LUSH, J., in *Reg. v. The Assessment Committee of St. Pancras* (supra) and the decision in *Arbuckle Smith & Co. Ltd. v. Greenock Corp.*, (1960) 1 All E.R. 568 have influenced the magistrate's mind when he spoke of transient periods of renting, referring, of course, to the renting of the lower flat to the Rice Marketing Board and the Guyana Graphic.

In the *Arbuckle Smith's case*, it was held that during the period where premises, intended to be used as a bonded store for spirits were being altered to accommodate the purpose for which they were intended, the owners of such premises were not rateable.

VISCOUNT KILMUIR, L.C., expressed himself thus (at p. 570 *ibid.*):

"Yet activity carried on in relation to premises, the sole object of which is to make the premises fit for the only use which is contemplated, does not amount to the kind of actual user as is essential to rateable occupation. So long as the activities were confined to making the premises fit for a contemplated purpose, the premises were not serving the appellants' purposes as warehousemen. The premises were not being applied to the purpose for which they existed but were in an antecedent stage. It must be remembered that, under rating law, it is open to the owner to sterilise a property—whether by leaving a house without furniture or otherwise—which is perfectly capable of being let for a valuable rent. If, therefore, there is no use of premises according to their nature, I find it difficult to see how there is occupation attracting liability for rates".

LORD REID had difficulty in seeing on what reasonable principle the making of the alterations in that case could be held to constitute occupation, while LORD KEITH OF AVONHOLM held the view that the premises could not be entered in the valuation roll unless they were capable of beneficial occupation. [See also *London County Council v. Hackney Borough Council*, (1928) 1 All E.R. Rep. 614].

The distinction between the *Arbuckle Smith's case* and the case now in hand is easily discernible. In the former, the only form of occupation, if it can be so called, was that necessary to effect certain repairs; in this case, while it is true that the repairs were not complete, there was, in the words, of LORD KEITH OF AVONHOLM, beneficial occupation as early as June 1961. And if premises are once beneficially occupied, the law having been settled that the lot and not the occupier is exigible, even where there is

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no occupier, the fact that the premises were no longer occupied subsequently, does not, in our judgment, remove the liability once created.

In *Hampstead B.C. v. Associated Cinemas*, (1944) 1 All E.R. 436 also it was said that to constitute occupation there must be use and enjoyment of the hereditament. DU PARCQ, L.J., said (at p. 437 *ibid.*):

"When the hereditament is a house, it is not rateable unless it is occupied as a house, unless, that is to say, it is used for one of the purposes for which a house may be used".

In the instant case the ground floor was in fact used as a warehouse—the purpose for which it was originally intended—and therefore would be rateable.

Another case worthwhile noting is *Liverpool Corpn. v. Chorley Union Assessment Committee & Ors.*, (1913) A.C. 197 where a municipal corporation owned certain reservoirs and water-works and received into their reservoirs the water which flowed from an adjoining gathering ground. In order to prevent pollution of the water flowing from it to their works the corporation purchased the gathering ground, which consisted of agricultural land and moorland. They thereupon demolished certain farmhouses on the land, abolished certain rights of pasturage and turf cutting thereon, and limited the user of the land to purposes of sporting and afforestation. They planted a portion of the land with trees, converted another portion into nurseries, and let the sporting rights over the land to a lessee for a term of years, but they did not exercise any other acts of occupation over the land – Held, that the corporation were in rateable occupation of the whole of the land as a gathering ground.

Having regard to the authorities referred to, we are of the view that at least the ground floor was in beneficial occupation as from June 1961, and would be rateable accordingly, and in this regard agree with the Full Court.

The next question is whether the Full Court was right in holding, though not without some hesitation, as they expressed it, that the letting of the ground floor represented a sufficient 'coming into occupation' of the whole building for the purposes of the proviso. Said the Full Court, in dealing with this aspect of the matter:

"In our opinion 'occupation' must be construed to mean a significant or substantial occupation and that a rental of one half of the building represents occupation of such a nature as to be considered significant or substantial. If occupation is to mean only full and complete occupation then the owner of a building can defeat the assessment of the building and consequently the payment of rates and taxes by keeping empty one room in a building".

With great respect, while the reasoning of the Full Court may be logical, it loses sight of the facts of this case. We agree with the reasoning in so far as it affects the ground floor, and consequently hold that the whole of that floor is rateable, even though only a part was let. But the first floor stands on a different footing. First of all, it was never intended that both floors were to be used for the same purpose, nor is there even a suggestion that persons using the ground floor would necessarily have access to the floor above. We do not agree that the first floor came into occupation in 1961 when the ground floor was let, for the simple reason that they were two distinct entities intended for two separate purposes. According to the evidence of the appellant's attorney, the first floor was rented for the first time in November 1964, and this, in our judgment, is when it came into occupation.

The question is: Can the occupation be separated in these circumstances? We think it can, and authority for this point of view is to be found in the cases of *Curzon v. Westminster Corpn.*, (1917) 86 L.J.R. 198 and *Allchurch v. Assessment Committee and The Guardians of Hendon Union*, (1891) 2 Q.B.D. 436. In the latter case, a house not structurally severed was let partly to one tenant and partly to another, and each had the exclusive occupation of the part let to him. There was a staircase leading from the front door to the upper rooms, and a joint user of the front garden and the back yard, in which was a closet. The tenants were jointly assessed in respect of the whole house, and rated as joint occupiers. The rate was confirmed by the respondents. On a case stated by quarter sessions:—

Held, affirming the judgment of the Queen's Bench Division that the tenants could not be rated as joint occupiers, but that each was the occupier of a separate tenement capable of being rated, and each should be rated separately.

And in the *Curzon case* a theatre was demised to a tenant under an agreement with the exception of the refreshment rooms, bars, cloak-rooms, and wine cellars, which, by the agreement, were to remain the property of the landlord. The landlord had access to the portions reserved at all times when the outer doors of the theatre were open quite independently of the tenant, but he could not reach them without passing through one of the entrances to the theatre. The theatre was opened and closed at the unfettered discretion of the tenant. The tenant had no right to enter the parts reserved to the landlord, nor did he exercise any control over them. The refreshment rooms, bars, cloak-rooms, and cellars were capable of being separately occupied and assessed from the remainder of the theatre premises. A distress warrant was served upon the tenant for the rates in respect of the whole of the theatre premises.

Held, that the tenant was not in exclusive occupation of the whole of the theatre premises, and that therefore he was not liable for the rates in respect of the whole of the theatre premises, and the distress warrant had been wrongly issued.

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If, therefore, the first floor can be separated from the rest of the premises for purposes of rating, and if it came into occupation in November 1964, then it seems to us that that date (1st November, 1964) should be the relevant date from which the new assessment ought to take effect, having regard to the language of the proviso to s. 25 of the ordinance that "the amendment shall have effect only as from the date when the new or altered lot comes into occupation . . ."

There are two additional matters that require some examination before we leave this case. Counsel for the appellant urged that it was incumbent on the Assessment Committee to fix the annual rentals first in respect of each flat before arriving at an assessment of the entire building, and that this ought to have been done in accordance with the rules set out in the second schedule to the ordinance. Rule 1 prescribes that the Committee shall fix the annual rent of premises to be rated, which annual rent is defined by r. 2, and r. 3 stipulates the matters to be taken into account in fixing the annual rent. As we understood the submission, counsel was not attacking the mode of assessment (indeed he particularly said he was advancing no argument as to whether the method used, viz., the contractor's basis, was the correct one); rather, he was advancing this argument in support of his proposition that each flat ought to be assessed separately.

The next matter is the objection *in limine* which counsel for the respondents took to the effect that it was not competent for the appellant to argue certain grounds of appeal for the reason that there was no appeal from the decision of the magistrate to the Full Court in respect of the matters set out therein. The fact is that this court had on a previous occasion given leave to argue those grounds, after hearing counsel for both sides. We are of the view, therefore, that it is not now open to the respondent to challenge the appellant's right to argue those grounds.

In the result, we would allow this appeal in part. We affirm the Full Court's decision that the ground floor came into occupation in June 1961, but we are of the opinion, having regard to the language of the proviso, that the effective date would be June 1, 1961. We feel, however, that the effective date as regards the first floor should be November 1, 1964. The assessment should be adjusted accordingly. Each party to bear his own costs in this court.

*Appeal allowed in part.
Decision of Full Court varied.*

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[Court of Appeal (Persaud, Cummings, Crane J.J.A.)
September 24, 25, October 14, 1969]

Criminal law—Murder—Murder of wife and child—Statement by wife about attack on child—Whether part of the res gestae.

Criminal law—Evidence—Attack on third person after attack on deceased over—Whether part of the res gestae—Whether admissible to rebut defence of accident—Similar offences.

The appellant was indicted for the murder of his wife and infant son. He lived with his wife and child in the bottom flat of a two-flat building, the top of which was occupied by the wife's parents. The case for the prosecution was that the wife's father heard the wife shout "Ah ma, run, he ah kill the picknie." The wife's parents ran downstairs and saw the appellant's son lying wounded on the floor and the appellant hitting at the wife, first with a cutlass and later with an axe. The wife's father ran away, pursued by the appellant who struck another child, Gobin (who did not die) with the axe as he ran past Gobin. The appellant in a statement to the police said that it was the wife's father who had attacked him with the axe and that blows aimed at him hit the wife, child and Gobin.

HELD: (i) the statement by the appellant's wife was admissible as part of the *res gestae* and so too was the evidence of the attack on Gobin.

(ii) the evidence of the attack on Gobin was also admissible to rebut the defence of the appellant set up in his statement to the police.

Appeal dismissed.

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

C. Kennard for the Crown.

PERSAUD, J.A.: I agree with my brother Crane that this appeal ought to be dismissed and the conviction be affirmed.

For the reasons already given, I agree that the statement alleged to have been made by the deceased wife as regards the child was admissible as being part of the *res gestae*. The circumstances show that the appellant was present when the words were used. In my opinion there can be no other inference, and if this view is correct, then the inevitable conclusion to which a reasonable jury would have arrived is that it was he and no one else who inflicted the injuries on the child, thus causing its death.

The question of the admissibility of evidence of this nature was considered in *Teper v. The Queen*, (1952) 2 All E.R. 447. There it was a

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matter of whether a witness could properly have given evidence of what was said by another person (not available as a witness) regarding an individual thought to be the appellant. In the course of his judgment Lord NORMAND said (at p. 449 *ibid.*) –

"The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost. Nevertheless, the rule admits of certain carefully safeguarded and limited exceptions, one of which is that words may be proved when they form part of the *res gestae*. The rules controlling this exception are common to the jurisprudence of British Guiana, England and Scotland. It appears to rest ultimately on two propositions—that human utterance is both a fact and a means of communication, and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of truth."

And again –

". . . . it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement."

In my judgment, the statement attributed to the deceased Poonwattie falls squarely within the description set out by Lord NORMAND above, and would be admissible.

Counsel further complains that the evidence relating to the attack on Gobin (who was not killed) the brother of the deceased woman, was not admissible as the main transaction, the attack on Poonwattie and Rajendra, had already been completed, and the affair, so far as they were concerned at any rate, finished.

I agree that the evidence as regards the attack on Gobin is admissible as being part of the *res gestae*, even though it was after the attack on the deceased was over. As was said by the Court of Criminal Appeal in *Beegan v. The Queen*, (1955) L.R.B.G. at p. 161:

"Whenever a court or jury has to arrive at a conclusion regarding a fact in issue or regarding a fact relevant to a fact in issue (either of which is of course always admissible) it is important and indeed essential to have a complete picture of those facts so that if certain other facts are so interwoven with the fact in issue as to become a part of it then the evidence is admissible."

But this apart, I am of the view that this evidence is admissible to rebut a defence which the appellant was setting up in a statement he had made to the police to the effect that his father-in-law had inflicted the injuries on the deceased persons as well as on Gobin in an attack on him. The issue as to whether it was the father-in-law who had done the killing having been clearly raised by the appellant, it was then open to the prosecution to destroy the defence by any legitimate means at their disposal, and in doing so, and in these particular circumstances, they could not be said to use the language of Lord SUMNER in *Thompson v. R.*, (1918) 13 Crim. App. R. at p. 78, to be crediting the appellant with a fancy defence.

Then there is the statement the appellant is alleged to have made to his mother-in-law after the incident was over: "Lady I take three for you." The three referred to obviously were Poonwattie, Rajendra and Gobin—the daughter, grandson and son, respectively, of the mother-in-law Etwarie. "Taking three for her" must mean that he was saying that he had killed three members of her family. This was an unsolicited statement of guilt, and I cannot see any rule of law which would render it inadmissible. This also would, if believed, put paid to the defence raised. Counsel has submitted that if the evidence relating to the attack on Gobin is inadmissible, then this evidence should have been ruled inadmissible also, but we have already indicated that we are of the opinion that that evidence was properly admitted.

CRANE, J.A.: In April last the appellant was convicted and sentenced to death at the Berbice Assizes for the murders of his wife, Poonwattie, and infant son, Rajendra Ramoutar. The murders were committed in circumstances alleged by the prosecution to have been part and parcel of one and the same transaction, and it was on this basis that evidence was led and the trial conducted.

The scene of the gruesome double murder was No. 43 Village on the Corentyne Coast. There the appellant lived with his deceased wife and child in the bottom flat of a two-flat building, the top of which was occupied by his in-laws, Ramcharran and his wife Etwarie, the parents of the deceased woman.

It was about 8 or 9 o'clock on the morning of the 26th May, 1968, when Ramcharran saw the appellant "staggering" home. He was carrying some bora and a musk-melon. As he got into his room the appellant began to quarrel with his wife. He told her she had wasted his money buying squash instead of water-melon and, as if to compare his purchases with hers, showed her those he had made. Their quarrel lasted some three hours, for when Etwarie came home around noon, she advised the appellant not to quarrel and gave him \$1.00 to make amends for her daughter's mistake in purchasing squash. The appellant, after receiving a further 25 cents from Etwarie, left the house for the public road from where he returned in about half an hour's time. Some minutes thereafter, Ramcharran overheard the appellant, who was evidently still in a quarrelsome mood, telling his wife

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that the child of which she was *enceinte* was not his, but one Harold's. "Shortly after," Ramcharran said, he heard Poonwattie shout, "Ah ma, run; he ah kill the picknie."

Ramcharran and Etwarie ran downstairs. Rajendra Ramoutar was lying wounded on the kitchen floor. He was apparently dead. His head was covered with blood. There was no other person in the room save the appellant who was some 12 feet away from Rajendra. The appellant was holding Poonwattie by the hair stabbing her about the head with what Ramcharran described as a "cutlass knife". Poonwattie was pulled out of the house and, as the appellant did so, he threw away the cutlass and picked up an axe from the kitchen floor with which he chopped Poonwattie on the head. Ramcharran ran away pursued by the appellant who felled another infant called Gobin (the brother of Poonwattie) with a blow of the axe as he ran past the child. The appellant then took refuge at his mother's house where he was shortly afterwards arrested by the police.

In his defence the appellant maintained his love for his wife and child, and having denied chopping them up, rested his case on the caution statement he gave to the police on the day following his arrest. In view of the points raised on this appeal, I think it appropriate that statement, which was taken in his own vernacular, should be set out verbatim, lest any attempt at refinement might result in some important parts of it escaping our attention.

"Yesterday Sunday 26th May, 1968, about 1 o'clock to 2 o'clock in the afternoon me go home after me drink one beer ah Latch shop. When me meet home me wife say me got to go ah back. Me tell she me nah go. Me and she get mouth talk and me gie am one slap ah she face and she fall. Me mother-in-law and me father-in-law run from upstairs. Me father-in-law had one axe in he hand. He hold the axe and carry one lash pon me, ah just pull off meself and the axe ketch me wife. Me hold she up and when me father-in-law carry one next lash, me bar with me right hand and the axe stick ketch me near me wrist, and then ah left me wife and run outside. Me run and he pelt the axe pon me and the axe ketch me wife brother and me run go way ah me dady home and me wait for the police because plenty body ah run with stick and bottle ah pelt me. When me father-in-law pelt the lash pon me wife with the axe me wife bin ah hold me son Rajendra pon she hand and the one lash me father-in-law pelt with the axe get me wife and son."

There are three significant features of this statement, the first two of which accord with the account given by the prosecution witnesses. First, there is the quarrel between him and his wife, as to which fact both Ramcharran and Etwarie testified; secondly, the fact that they both ran downstairs to the room of the appellant; and, thirdly, the appellant's own version of how the fatality occurred, viz., that it was not he who perpetrated the act but his father-in-law, Ramcharran. Thus considered, the situation appeared to call for a clear direction and invitation by the judge to the

jury to accept or reject one or the other of the two versions told them. The prosecution must, of course, prove that the accused was the person who committed the offence charged. No one else was present at the scene of the crime save those on whom it was committed, so the prosecution had to rebut the account given by the accused as to how it was committed by establishing the identity of the accused as he who perpetrated it. This, indeed, was the view taken by the learned trial judge on this aspect of the matter when he charged the jury thus:

"So, this is the evidence led by the prosecution. We now come to the defence. Mr. Foreman and members of the jury, if you believe the statement given to the police by the accused then he cannot be guilty. He is saying that his father-in-law did this act. If you are left in doubt as to whether what he is saying is true or not then he cannot be guilty on either of the two counts because they would leave you in doubt as to whether or not his father-in-law did it. It means that the Crown has not discharged the burden of proof, the Crown has not satisfied you so that you feel sure.

"If you feel that his defence is untrue—a tissue of lies, it does not mean that you must convict him because, Mr. Foreman and members of the jury, you do not convict on the weaknesses of the defence. You convict on the strength of the prosecution's case. If you feel that the accused's statement is a tissue of lies, you will then look at all the evidence led in this trial—the evidence led by the prosecution and indeed, the lying testimony of the accused - you so find. Take all of it into consideration and ask yourselves in respect of the first count whether the Crown has satisfied you so that you feel sure of his guilt. Then go on to the second count and ask yourselves whether the Crown has satisfied you so that you feel sure of his guilt."

And, further on in his analysis of the caution statement he said:

"You may want to feel, Mr. Foreman and members of the jury, that the father-in-law has a very bad aim, that every time he were to aim at the accused he were to strike somebody else—his daughter and his son.

"Ask yourselves whether you accept this testimony, whether you believe this story—the accused's statement. You will have to ask yourselves whether he has indeed accounted for the wounds found on the deceased whether this statement has satisfied you or whether from this statement you can say that four wounds were inflicted on Poonwattie and two wounds on Rajendra.

"The accused has only given evidence of one striking which he says struck Poonwattie as well as Rajendra, and another one which he says struck Gobin. We are not concerned with Gobin. But in effect Dr. Luck has found six wounds. How were these wounds inflicted, or

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is it that Ramcharran turned back and inflicted the other wounds on people against whom he had nothing?

"If you accept the evidence of the accused or if you believe his statement that Ramcharran attacked him because he was quarrelling with his (the accused's) wife, then, members of the jury you may want to ask yourselves—it is a question of fact for you—how did he get the axe if he ran away? Of course, this depends on whether you accept and believe the evidence of Kamie and Rudolph.

"But as I say, even if after an examination of the statement of the accused you believe he is telling lies it does not mean that you must convict him. I repeat, you do not convict on the weaknesses of the defence but on the strength of the prosecution's case. If you feel that his statement is a pack of lies—the accused's statement—you examine all the evidence led by the prosecution and this lying statement by the accused, because it might well be that in these circumstances the lying statement—if you so find—could assist you in determining whether or not the prosecution has satisfied you so that you feel sure. So you take all into consideration and say on the first count: 'Am I satisfied so that I feel sure?' and on the second count 'Am I satisfied so that I feel sure?' "

It is, however, contended in this appeal that a miscarriage of justice might have occurred by the wrongful admission in evidence of those words (already referred to) in Ramcharran's version when he heard Poonwattie say—"Aw ma run he ah kill the picknie", and in Etwarie's—"Oh, mi mama run, me picknie dead." The alleged inadmissibility of this evidence relates to count two which charges the accused with the slaying of his son Rajendra. The argument is founded on an alleged insufficiency of circumstantial evidence which would show that the appellant and his wife were together at the very moment when the words were heard to be spoken. There is no direct evidence, runs the argument, that the appellant was present and within hearing at the time when the prosecution witnesses overheard them; and the conclusion that they were so spoken is based on the presumed presence of the appellant from circumstantial evidence. It was therefore, argued counsel, incumbent on the trial judge to have directed the jury that before they could properly make use of what Ramcharran and Etwarie said as evidence in the case, they had to satisfy themselves beyond reasonable doubt of the appellant's presence at the time Poonwattie spoke those words, and that the appellant at that time by his conduct admitted what she said. It was very necessary that the jury should be told that if they had any reasonable doubt whether he was present and heard them, then they ought to discard the evidence from their minds on both counts. It was stressed that the prosecution ought to have excluded those offending words, and the failure of the trial judge to have properly directed the jury with regard to them was a fatal misdirection which affected both counts of the indictment.

No doubt the law on the point of statements or accusations made in the presence of accused persons as admissions against them has been accurately stated by counsel; but the important question is, its relevance to the facts of the case under review. Ever since the case of *R. v. Christie*, (1914) A.C. 545, it has been held that a statement or accusation made to or in the presence of a prisoner may be evidence against him although he actually denied or repudiated it at the time, if by his conduct or demeanour he may be held to have admitted it or, apparently, if it be relevant otherwise to his conduct or demeanour at the time it was made, although it could not be held admitted, either by words, conduct or demeanour.

Christie was convicted of indecent assault on a small boy called Butcher, who gave his evidence, without being sworn, under s. 30 of the Children's Act, 1908, describing the assault and identifying the prisoner, but he was not questioned as to previous identification, nor was he cross-examined. The boy's mother then gave evidence that, shortly after the act alleged, she and the boy went towards the prisoner, and the boy said, "That is the man," and described the assault; and that Christie said, "I am innocent." She was not cross-examined. The constable was then called and he confirmed the mother's story. He was cross-examined, but his evidence on this point was not affected. The House of Lords held:

(i) That the first part of the boy's statement but not the second describing the assault, was admissible as part of the act of identification.

(ii) That the second part was admissible, as made in the presence of the accused and in view of his demeanour; but that, in general, where the evidence of a prisoner's assent to the truth of such statements is very slight, the judge should exclude them.

(iii) That the second part was not admissible either as part of the *res gestae*, or to corroborate the boy's testimony.

In this appeal, the principle by which it is sought to attack the offending statements of Ramcharran and Etwarie is the ground of inadmissibility due to non-direction by the learned judge on the limited use to which such statements could be put. This principle is above stated in *Christie's*, and other cases like *Percy Wm. Adams*, (1923) 17 Cr. App. 277, 278, cited by counsel. But it seems to me the language in which the words were spoken with regard to time, place and circumstance in the instant case, obviously distinguishes the instant case from *Christie's*, as seen from the resumed of the facts above. The boy Butcher's statement, "That is the man" when he touched Christie's arm, did not identify Christie immediately upon the hurt that Christie is alleged to have done him. The boy's was not a spontaneous statement, but one prompted by the investigating officer's query as to who was the man who assaulted him. The boy's reply was therefore not part of the *res gestae*. As Lord Reading so fittingly expressed the position:

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"The statement under review formed no part of the incidents constituting the offence. It was not made whilst the offence was being committed or immediately thereafter. It took place after Christie had left the boy, and the mother had found him and taken him across the fields, and had spoken to another man. In my view, it was not so immediately connected with the act of assault as to form part of the *res gestae*."

And, Chief Justice COCKBURN, in *Reg. v. Bedingfield*, 14 Cox's C.C. 1879, in a passage, the last sentence of which I think is most germane to the appeal we are now considering because it represents what actually occurred here, said:

"It was not part of anything done, or something said while something was being done, but something said after something done. It was not as if, while being in the room, and while the act was being done, she had said something which was heard."

In the instant case the situation is quite contrary to that in *Christie's case* because the relevance of the words as part of the *res gestae* is to be seen from the very fact of their spontaneity and contemporaneity with the physical acts of which the jury from the directions they received must have considered they formed a part.

On this matter, the learned judge directed as follows:

"Now, as I said, on the second count there is no direct evidence and it is based on circumstantial evidence, and the prosecution is asking you to say if you are satisfied so that you feel sure, that it was the accused who murdered Rajendra Ramoutar. These are the circumstances as it appears to me from which the prosecution is asking you to come to this conclusion: (1) He questions the paternity of the child with which she was pregnant—if you accept the evidence of Etwari and Ramcharran—and (2) He said that the child Rajendra was not his. If you accept the evidence of Etwarie he also threatened to kill the child who, on that day for all practical purposes so far as anyone knew, was alive. Then soon after the querying of the paternity and/ or the threat to kill there was the shout from Poonawattie, 'Aw ma, run! He ah kill the picknie!'—if you accept the evidence of Ramcharran and also Etwarie 'Aw me mumma, run! Me picknie dead!'—the running downstairs, the seeing of the boy Rajendra in a pool of blood and the accused holding on to the wife, Poonawattie."

The fact or transaction in issue of which the court was seised was whether the appellant had murdered his wife and child. The words overheard by the prosecution witnesses, Ramcharran and Etwarie, from their very nature can leave one in no doubt they were both spontaneous and contemporaneous with those physical acts of which the prosecution complained. Although hearsay, those words can leave no one in doubt that at the time they were overheard, the appellant, who was the only other person in the room below, was present, and while engaged in the act of chopping up

Rajendra, heard them at the time they were spoken. They were words which constituted, accompanied and explained the fact or transaction in issue, and they were therefore within the doctrine of *res gestae* as they served to identify the appellant with the fell deed of murder on his wife and child.

The headnote to *Teper v. Reg.*, (1952) 2 All E.R. 447, adequately expresses the rationale of the admission into evidence of hearsay as part of the *res gestae* which I think is very relevant here.

"The rule that in a criminal trial hearsay evidence is admissible if it forms part of the *res gestae* is based on the propositions that the human utterance is both a fact and a means of communication and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement. Where the words are sought to be proved for the purpose of identification in a criminal trial the action or event with which the words must be associated is the commission of the crime itself, and the evidence shall only be admitted if it satisfies the strictest test of close association with the crime in time, place and circumstances."

This being so, it appears to me there was no need for the learned judge to have directed the jury, as suggested, in the light of the principles of *Christie's case*. These clearly had no relevance. *Christie's case* is distinguishable from that under review, and, as I have observed, the doctrine of *res gestae* did not apply in that case. In my view, the evidence of Ramcharan and his wife Etwarie was properly admissible and I must accordingly find there is no substance on this ground.

The other ground relates to the attack by the appellant on the infant child Gobin with the axe he picked up from the kitchen. The contention here is that this incident was quite distinct and severable from the assault on his wife and child, having occurred after the transaction in which they were involved. It was the sort of evidence, it is contended, that a jury, unless directed, could use to the prejudice of the appellant, because the fact that the appellant felled Gobin with the axe was not admissible to prove he used it on his wife and child. With respect, I do not agree. The clear evidence is that the appellant knocked Gobin down with the axe immediately after he had administered two chops with it to his wife. The assault on Gobin then, following so closely after the attack upon the wife in the yard, would appear on principle to render the incident part of the *res gestae*, though counsel contends to the contrary. But even so, it seems to me there is yet another principle under which this evidence dealing with the assault on Gobin is relevant and admissible. I refer to its introduction as "similar fact" evidence

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relative to misconduct on other occasions, with a view to rebutting the defence of alibi in the sense that another person and not he was responsible for the killing which the appellant strove to establish at the trial.

It will be recalled that the appellant rested his defence on his caution statement. In that statement, he said his father-in-law Ramcharran had possession of the axe and struck at him with it. He slipped the intended blow. The axe caught his wife and son and so killed them. The appellant was thereby asserting his innocence. He was asserting that it was not he who killed his wife and child, but that his father-in-law did so by accident. In other words, the appellant was pleading mistaken identification in defence, that is, "I am innocent. You've got the wrong man." The fact then that it was not Ramcharran but the appellant who possessed the axe, and what he had in fact done with it, was a highly relevant fact; it was one very necessary for the prosecution to establish at the trial. Thus, the prosecution knew in advance something of what would probably be the defence of the appellant at the trial. Therefore, they were not, when they introduced into evidence the incident relating to the infant Gobin, to use the words of Lord SUMNER in *Thompson v. R.*, (1918) A.C. 232, by any means "crediting the accused with fancy defences" adducing *a priori* any sort of evidence to rebut any old defence the appellant might chance to conjure up. The prosecution were fully cognisant of what they had to establish by evidence in rebuttal to what he had already said in his caution statement, which was a part of his defence and on which he rested his case; that is to say, the prosecution had to keep in view the denial in that statement of his possession of the axe, and the placing of possession of it in his father-in-law. The prosecution knew it was incumbent on them to establish possession of the axe in the appellant and the purpose for which he used it through the testimony of witnesses who saw him use it; and even if, by so doing, they were disclosing the fact that he committed a similar type of crime by assaulting Gobin with it, I think, both on principle and authority they were justified in so doing.

In *Thompson v. R.* (above), the accused was convicted of gross indecency with two boys. The acts of which complaint was made were alleged to have occurred on March 16, and the person who committed them was alleged to have made a further appointment with the boys for the 19th. The police were informed in the meantime, and they kept watch with one of the boys at the rendezvous—a public lavatory. The boy pointed the accused out to the police and, from the first, the only defence raised was mistaken identity. It was held that, having regard to the special nature of the defence, evidence had been rightly admitted of the discovery of powder-puffs on his person and indecent photographs in the accused's room. If *Thompson's case* shows that the possession of incriminating material is a highly relevant fact which may be proved against the accused although there is no question of its having been used in the commission of the crime charged, provided it tends to negative mistaken identification, *a fortiori*, how much more will possession of an axe which has been actually used in the crime not be relevant?

For my part, I entertain no doubt whatever about the admissibility of such evidence. There is, likewise, no substance on this ground.

I would accordingly dismiss this appeal and affirm the conviction and sentence.

CUMMINGS, J. A. I concur.

Appeal dismissed.

SHUKRAM

v.

NEW INDIA ASSURANCE CO. LTD.

[High Court (Vieira, J.) January 30, March 8, 24, November 29, 1969.]

Insurance—Motor vehicle—Third Party insurance—Transfer of policy on sale of which—Agent acting for assurance company—Arbitration—Arbitration clause in policy—Defendant denying existence of policy—Whether plaintiff precluded from recourse to courts—Motor Vehicles Insurance (Third Party Risks) Ordinance Cap. 281.

In January 1960, one J bought a car but it was not registered in his name until July 1, 1960 on which day too he took out a policy of insurance with the defendants in respect of third party risks. On July 5th 1960, J sold the car to the plaintiff to whom the registration was transferred the same day. On July 7, 1960 J and the plaintiff attended at the office of M, the defendant's agent in New Amsterdam, seeking to have the insurance policy on the car transferred from J to the plaintiff. Forms were filled up by the parties. These together with J's certificate of insurance and the receipt for the one premium he had paid, were retained by M who, after ascertaining that the plaintiff's son would be the driver of the car, said that the car could be used and that he would send the insurance policy later. It was never sent. On October 22, 1960 the plaintiff's son was involved in an accident while driving the car and later pleaded guilty to careless driving. The accident was reported to M on October 23. In 1963 the person injured in the accident sued the plaintiff for damages for injuries received by her. The plaintiff left the writ with M and later the defendants wrote the plaintiff saying that they repudiated all liability under the policy under which the car was insured

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on the ground of non-compliance with certain conditions. Damages were awarded against the plaintiff in the action by the injured woman and were paid in full by him. In the present action the plaintiff seeks to recover from the defendants the sums so paid. It was argued on behalf of the defendants that (i) there was no assignment of the policy from J to the plaintiff, that in any event there should be a new contract between the plaintiff and the defendants and (ii) the plaintiff should not have brought an action but should have gone to arbitration in accordance with clause 9 of the defendants' policy of insurance.

HELD:— that (i) there was a valid transfer of the policy by the defendants to the plaintiff because (a) their agent M had led the plaintiff into the reasonable belief that he had authority to accept and approve of the transfer, (b) the defendants by their letter to the plaintiff had recognised him as a policy holder and had repudiated liability only on the ground that he had committed breaches of the policy.

(ii) since the defence of the defendants was that there was no contract between them and the plaintiff they cannot both approbate and reprobate and insist on the observance of an arbitration clause embodied in that contract.

Judgment for the Plaintiff.

R.P. Rawana for the plaintiff.

C.A. F. Hughes for the defendant.

VIEIRA, J.: The only evidence adduced in this matter is that of the plaintiff and his witness Walter Jagdeo. No evidence was led on behalf of the defendants who closed their case at the end of the case for the plaintiff.

Having regard to the oral and documentary evidence adduced, I accept and believe, on the balance of probabilities, the story as related by the plaintiff and Jagdeo.

I consider that what really happened was as follows: —

(1) In January 1960 Walter Jagdeo, a spirit shop-proprietor of Adelphi, Canje, Berbice, purchased a second-hand Morris Minor car P7300 from one Allen of Rose Hall Estate, Canje, for an undisclosed amount. This car, which was registered in the name of one Carlton James, was not used for 6 months and it was not until 1st July, 1960 that the registration was changed to Jagdeo's name on which date, he took out a policy of Insurance with the defendants (hereinafter called the company) in respect of third-party risks.

(2) Just 4 days later, i.e. 5th July, 1960, Jagdeo sold the car to the plaintiff for \$450.00 and he received \$250.00 on account that very day leaving a balance of \$200.00. The registration was then changed to the plaintiff's name at Central Police Station, New Amsterdam and a certificate of registration (Ex. "A") issued therefor.

The two men, accompanied by the plaintiff's 30 year old son Gobin, then went to the Strand office of one George Moonsammy, the company's representative in Berbice but he was not in. They returned on 7th July 1960 and this time they were fortunate enough to find Moonsammy in office.

Jagdeo told Moonsammy (hereinafter called the agent) that he had sold P7300 to the plaintiff and he wanted the insurance policy transferred to the plaintiff's name. As the plaintiff could not read or write but merely sign his name, his son, Gobin, then filled up two forms which his father and Jagdeo signed. These forms were retained by the agent.

Jagdeo had not received any insurance policy up to that time but he had a certificate of insurance as well as a receipt for the one and only premium paid by him. He then handed over these two documents to the agent who was heard to remark that "everything would be in order."

The agent then asked the plaintiff who would be driving P7300 and the plaintiff replied that his son Gobin would be the driver. The agent then said that would be all right and that the car could be used and he would send the insurance policy later. The parties then left the office.

(3) Gobin began to drive the car from 7th July, 1960. He was employed at, the Rose Hall Estate and was a licensed driver of 3-4 years experience at the time.

(4) On 22nd October, 1960, P7300 driven by Gobin was involved in an accident with a pedestrian by the name of Chanderdai Adam on Port Mourant public road, Corentyne.

(5) Some time between 7th October and 22nd October, 1960 the plaintiff paid the agent the sum of \$30.00 after the agent intimated that he wanted that sum to get the policy.

(6) On the 23rd October, 1960, the plaintiff, accompanied by Jagdeo and his son Gobin, went to the agent and made a report about the accident. Some forms were filled out by Gobin who drew a diagram of the accident.

Jagdeo then asked the agent where was the insurance policy and he replied that it had not come from Georgetown as yet. The agent then said that the plaintiff would have to pay some money as this has to be done whenever a car is first involved in an accident and he mentioned the sum of \$100.00. The plaintiff said that he had not got the money with him and asked the agent to reduce the amount but the agent said that was the usual amount. The plaintiff then promised to bring the \$100.00 the next day which, in fact, he did not do.

(7) Later, Gobin appeared at Whim Magistrate's Court where he pleaded guilty to a charge of careless driving and was fined \$30.00. I accept that the agent had told the plaintiff that he must get a lawyer and fight the case.

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(8) In 1961 Jagdeo seized P7300 as there was still the outstanding balance of \$200.00 remaining to be paid on it and in 1963 he gave it away to a friend of his by the name of Junor.

(9) In 1963 Chanderdai Adam filed a writ (No. 343/63) against the plaintiff claiming damages in excess of \$500.00 for the injuries received by her on 22nd October, 1960 when she was struck down by P7300.

The plaintiff took the writ and showed it to the agent who told him to leave it with him and that he would "fix up the matter with the company." The plaintiff then paid the agent the sum of \$100.00 which he had promised to pay 3 years previously.

(10) On 21st November, 1963 the company, through their attorney (Eric S. Stoby & Co. Ltd.) wrote a letter (Ex. "A") to the plaintiff informing him that they had received a copy of the writ and that there was no record of P7300 ever having been insured with them. He was asked to call at the office and bring any receipt or certificate of insurance as proof that the car was in fact insured with the company and he was also requested to fill out enclosed claim forms.

(11) Either on 25th or 28th November 1963 (there is a superimposition in relation to the figures '25' and '28') the plaintiff signed a claim form (Ex. "G") made out by the agent.

(12) On 4th December, 1963 the company wrote a letter to the plaintiff (Ex. "J") informing him that they were in receipt of his claim form. He was again reminded to forward his certificate of insurance, premium receipt and insurance policy and they noted that he had enclosed Jagdeo's old certificate of insurance.

(13) On 13th December, 1963 Mr. Hardyal, of counsel, wrote a letter (Ex. "E") to the company on the plaintiffs behalf informing the company that no insurance policy had been sent to his client although the transfer had been effected in their office.

(14) On the said 13th December 1963 Mr. Dabi Dial, the company's solicitor, wrote a letter to the plaintiff (Ex. "K") in which he intimated that the company had passed a copy of the writ for his attention and that he was willing to act for the plaintiff in his defence and he forwarded an authority to solicitor for signature. Mr. Dial then requested that he should forward the insurance policy or certificate of insurance if he had them or any of them.

(15) On 15th April, 1964, Mr. C.A.F. Hughes, of counsel, sent a letter (Ex. "F") to the plaintiff informing him that the company had given instructions to repudiate all liability under the insurance policy under which P7300 was insured on the ground of non-compliance with certain conditions contained in the policy which he proceeded to set out. It was intimated that if the company were made to pay any sum of money whatsoever they would seek to recover same from him. The company had already

filed a defence in the action but were prepared to offer \$350.00 without prejudice.

(16) On 29th May, 1964 Mr. Dial sent a telegram (Ex. "L") to the plaintiff referring to Ex. "K" and reminding him that he had received no instructions and unless he saw him by Monday 1st June he would apply to the court for leave to withdraw from the action.

(17) On 1st June 1964, Mr. Dial wrote a letter (Ex. "M") to the plaintiff informing him that having seen him and his son Gobin that very day in his office and having discussed with them the action brought by Chanderdai Adam, he had no option but to repudiate any liability on behalf of the company. The plaintiff was then informed that as he had sent no proof of his having been insured with the company then he must sign the enclosed notice of intention to act in person and solicitor would accordingly withdraw from the action.

(18) On 16th July, 1964, Mr. Dial again wrote a letter (Ex. "N") to the plaintiff reminding him about the discharge of solicitor and he noticed, with some trepidation, that the matter was fixed for call over before CHUNG, J. in New Amsterdam on 17th August, 1964 at 1.00 p.m.

(19) On 27th August, 1964 Mr. Dial wrote a letter (Ex. "O") to the Registrar informing him that he had ceased to act as solicitor for the plaintiff and requested that he be relieved as Solicitor on the record.

(20) On 22nd September, 1964, CHUNG, J. gave judgment against the plaintiff in the sum of \$1,000.00 together with costs fixed in the sum of \$275.00. A certified copy of this order was tendered as Ex. "B".

(21) On 29th October, 1964 Mr. Hardyal wrote a letter (Ex. "C") to the company requesting them to pay the judgment and costs amounting to \$1,275.00 awarded against his client in Action 343 of 1963.

(22) On 20th April, 1965 the plaintiff paid Mrs. Adam \$1,275 in full satisfaction and discharge of the judgment and costs (including the levy costs) (he having been relieved of the payment of \$200.00 which was waived in his favour) and a receipt was issued therefor (Ex. "D").

(23) On 14th April 1966 this present action was filed.

(24) The agent died sometime during 1968.

It is submitted by counsel for the plaintiff that there are two (2) main issues before the court, viz:—

(1) Whether there was a valid contract of insurance between the plaintiff and the company, not whether there was an existing policy in relation to the motor car which was originally owned by Jagdeo;

(2) Whether the court would have jurisdiction in view of the conditions of the policy, reference being made to paragraph 7 of the defence which relates to reference of a claim to arbitration.

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It is submitted that it is admitted in paragraph 3 of the defence that on or about 7.7.60 a policy of insurance was in force in favour of Walter Jagdeo in relation to car P7300 although it is true that it is denied that there was an effective transfer to the plaintiff.

There is evidence that there was an oral agreement between the plaintiff and the company's agent and that the agent accepted the application for transfer from Jagdeo to the plaintiff and that there was an approval of the transfer by the agent when he told the plaintiff that he could go ahead and use the car which would be driven by his son Gobin and that the policy would follow in due course.

The agent's conduct has led the plaintiff to the reasonable belief that there was a valid contract in existence and the company would be estopped from denying that there was no policy of insurance in force in relation to the plaintiff, the third-party. The fact that the agent may have been negligent does not cancel the contractual relationship between the company and the insured.

Further, the contents of the letter Ex. "F", clearly implies that the company considered the plaintiff as an insured person and does not repudiate liability that there was no contract in existence but merely that there was a breach of certain conditions contained in the policy.

The conduct of the agent clearly supports the contention that the contract was a good and valid one and his conduct is such as to amount to an estoppel or a waiver.

Finally, there was good consideration for the transfer since no money was ever refunded.

Counsel for the company, in reply, submits that there is no contract of insurance in existence between the parties on the following grounds, viz:—

(1) A policy of motor insurance is a contract of personal indemnity and is not assignable in law without the express approval of the company;

(2) this is a purely unilateral act on the part of Jagdeo and his intention to assign the policy does not operate as a valid and binding assignment since such an assignment can only come about if the company accepts the plaintiff as a policy holder.

(3) there is no evidence of the terms and conditions of the alleged policy and no secondary evidence has been led concerning such terms and conditions. This being so, this court: cannot make a declaration in relation to a policy of insurance which is not before the court;

(4) there is evidence that there is a contract of insurance between the company and Walter Jagdeo and that an application was made by Jagdeo to transfer the policy to the plaintiff which, in law, does not have the same effect as an actual transfer having been made;

the burden of proving that a transfer has actually been effected rests upon the plaintiff. There is no evidence to show that the application for transfer was ever granted by the company. The evidence is that no policy was ever in fact issued by the company to the plaintiff;

(5) this is a case of a third person claiming to have stepped into the shoes of Walter Jagdeo and there must, accordingly, in view of the fact that a policy of motor insurance is a contract of personal indemnity, be novation and not assignment;

(6) there was a complete and effective discharge of Jagdeo's policy as soon as the sale of P7300 was complete and possession was handed over to the plaintiff even though in fact there was a balance of \$200.00 outstanding on the purchase price;

(7) estoppel cannot create a cause of action but is merely a rule of evidence which has to be specifically pleaded. The plaintiff would have to establish the existence of a contract on the balance of probabilities, which it is submitted, he has not done.

In Guyana, as in many other countries, users of motor vehicles, with certain exceptions, must be insured against third party risks. Section 3(1) of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Chapter 281 provides as follows: –

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

A policy of motor insurance is not effective for the purposes of compulsory insurance unless it is issued by an "authorised" insurer as defined by section 2 thereof.

Under section 8(1) of the ordinance it is the duty of insurers to satisfy judgments against persons insured in respect of third party risks subject to certain qualifications laid down in section 8(2) only one of which is relevant for the purposes of this decision viz:

"8(2)(a) – in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the authorised insurer had notice of the bringing of the proceedings."

Under section 16 it is the duty of the policy holder to surrender the certificate of insurance issued under section 4(4) on cancellation of the policy, to the authorised insurers within 7 days from the effective date of the cancellation.

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Under section 9 of the Motor Vehicle and Road Traffic Ordinance, Chapter 280, on the change of possession of a motor vehicle otherwise than by death, the registered owner and the new owner are required within 7 days after the change of possession, to make an application in writing signed by both of them to the licensing officer, giving the name and address of the new owner and the date of the change of possession and the licensing officer shall thereupon enter in the register and the certificate of registration, which accompanies the application, the name and address of the new owner and the date on which the entry is made and from that date the new owner is considered, for the purposes of the ordinance, the registered owner of the motor vehicle.

In this case there can be absolutely no doubt or dispute that Walter Jagdeo was the registered owner of car P.7300 on 1st July, 1960 and that that registration was effectively transferred to the plaintiff on 5th July, 1960 in accordance with section 9 of Chapter 280.

There can equally be no doubt whatsoever that at the time of the transfer of the registration there was a valid policy of insurance in force in favour of Jagdeo in relation to the said car P7300. This is admitted by the company in paragraph 3 of the defence. Having regard to this admitted fact it is rather difficult to understand how the then attorneys of the company, Eric S. Stoby & Co. Ltd., could have written on 21.11.63 (Ex. "H") –

"We have no record of your vehicle No. P7300 having been insured with us."

It is abundantly clear that no policy of insurance was ever issued in this matter, either to Jagdeo or to the plaintiff.

It seems to me that the first and most important question that has to be considered here is whether there was a valid assignment of Jagdeo's policy to the plaintiff by the company. If the answer is in the negative then I consider that this matter is at an end and must necessarily be dismissed because the company would clearly not be liable in such circumstances to pay the judgment and costs in Action 343 of 1963. If the answer, however, is in the affirmative, then I consider that a second question has to be asked and that is—has the plaintiff a right to bring this action or is he debarred from so doing in view of the arbitration clause as contained in condition 9 of policy, the terms of which are set out in paragraph 5 of the Defence? As regards the question of assignment I accept as a true proposition of law the following statement at page 264 of Professor HARDY-IVAMY'S excellent book "GENERAL PRINCIPLES OF INSURANCE LAW (1966) viz:

"Before the assignee of the subject-matter can in his own name enforce the contract contained in the policy it is necessary that the policy should be validly assigned to him. To constitute a valid assignment the following conditions must be fulfilled: –

(a) Where necessary, the consent of the insurers must be obtained; and

(b) the assignment of the policy must be contemporaneous with the assignment of the subject-matter.

The policy may contain an express prohibition against its being assigned without notice to the insurers and without obtaining their consent. Unless the condition provides otherwise, the insurers may give or withhold their consent at pleasure—per NEVILLE, J. in *Re Birbeck Permanent Benefit Building Society, Official Receiver v Licencing Insurance Corporation* (1913) 2 Ch. 34, a case of mortgage insurance.

There are certain contracts of insurance, however, which, because of their very personal nature are not and never were, either at common law or in equity, assignable without the express approval of the insurers and an express condition is and was not necessary in such contracts. Such contracts include fire insurance, employers' liability insurance and motor vehicle insurance (*vide Peters v General Accident Fire and Life Assurance Corporation Ltd.*) (1938) 2 All E.R. 267, C.A.

In this matter no policy was ever in fact, issued and, consequently, we do not know whether there was any express condition forbidding assignment without the consent of the company. But this really makes little difference since it is clear having regard to the fact that this is a case of personal indemnity, that the plaintiff must prove that the company consented to the purported assignment.

If the company did in fact consent to the assignment then, it seems to me, no suggestion of novation arises as was submitted on their behalf, since the consent would effectively transfer the subject-matter of Jagdeo's policy, viz: — the liability of the company to indemnify third parties in case of injury or damage that may result from an accident caused by the insured or any person driving with his consent or permission.

On completion of the assignment the rights and duties of the original assured devolve upon the assignee who becomes, to all intents and purposes, the assured under the policy which he may accordingly enforce in his own name—*Western Australian Bank v Royal Insurance Co.* (1908) 5 C.L.R. 533 cited in HARDY-IVAMY *ibid* at p. 269 note (18).

An important factor that has to be considered in relation to this question of assignment is whether Jagdeo's policy was effectively discharged as soon as the sale of P7300 was complete and possession handed over to the plaintiff, even though in fact there was still an outstanding balance remaining of \$200.

In *Rogerson v Scottish Automobile and General Insurance Co. Ltd.* (1931) All E.R. Reprint 606, a policy of motor insurance, which covered, inter alia, claims against the assured for bodily injury "caused to any person or persons by a motor-car described in the schedule hereto," further provided that "this insurance shall cover the legal liability as aforesaid of the assured in respect of the use by the assured of any motor car (other than a hired

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car), provided that such motor car is at the time of the accident being used instead of the insured car." The assured part-exchanged the motor car described in the schedule for a new car of the same make, but his brokers, despite his instructions to them to do so, failed to transfer the insurance. On a claim by a person injured by the new car, the assured contended that the new car was "being used instead of the insured car."

Lord BUCKMASTER said at p. 608 –

"The contention for the assured is that any car which, during the period of the insurance, is in fact taking the place of the insured car, within the meaning of the phrase and that an accident caused by its use is an accident the liability in respect of which is covered by the policy. That is not my view of the matter. To me this policy depends upon the hypothesis that there is, in fact, an insured car. When once the car which is the subject matter of this policy is sold, the owner's right in respect of it ceases and the policy so far as the car is concerned is at an end."

This case was followed in *Tattersall v Drysdale* (1935) All E.R. Rep. 112 where GODDARD, J. (as he then was) said at p. 115 –

"I now turn to the question whether the plaintiff's policy was in force at the time of the accident. It is argued that it was not, because he had sold the car referred to in the policy and the company had not yet accepted the Riley which he was then using. The answer to the question mainly depends, on whether the case is governed by *Rogerson v Scottish Automobile and General Insurance Co.* The words of the extension clause in this policy are different from those used in *Rogerson's* case and Mr. Croom-Johnson argues that the latter case really turned only on the construction placed on the phrase "instead of the insured car" which do not appear in the clause under consideration. But, in my judgment, that view is too narrow. I think that in both the Court of Appeal and the House of Lords the decisive factor was that the subject matter of the insurance was the specified car, and that, as the assured had parted with it, he no longer was interested in the policy. The true view, in my judgment, is that the policy insures the assured in respect of the ownerships and user of a particular car, the premium being calculated, as was found in *Rogerson's* case partly on value and partly on horse power. It gives the assured by the extension clause a privilege or further protection while using another car temporarily but it is the scheduled car which is always the subject of the insurance. Though the words differ in the two policies, the effect and intention seem to me to be the same, and express provision is made for what is to happen when the assured parts with the car. To construe this policy otherwise would be to hold in effect that two distinct insurances were granted, one in respect of the scheduled car, and another wholly irrespective of the ownership of any car. It may be that a person who does not own a car can get a policy which would

insure him against third-party risks whenever he happens to be driving a car belonging to someone else, but the clause I am considering is expressly stated to be an extension clause, that is, extending the benefits of their policy, and, accordingly, if the assured ceases to be interested in the subject matter of the insurance the extension falls with the rest of the policy."

Rogerson's case was also considered in *Peters v General Accident, Fire and Life Assurance Corporation Ltd.* (1938) 2 All E.R. 267, C.A. although not mentioned by name. In that case the vendor of a motor car insured by the defendants handed over the insurance policy with the car to the purchaser. The policy contained the usual clause extending the cover to any person driving with the consent or permission of the insured. The plaintiff, who had been injured by the van after the sale had been completed, obtained a judgment against the purchaser, and in the present action sought to recover the damages he had been awarded from the present defendants under the provisions of section 10 of the Road Traffic Act 1934. The motor van was sold for £10, of which only £5 was paid when the van was handed over and the balance of £5 was not paid until after the accident.

Held – (1) at the time of the accident the purchaser could not be said to be driving the van by the order or with the permission of the vendor, as the van was then the purchaser's own property.

(2) the insured was not entitled to assign his policy to a third party. An insurance policy is a contract of personal indemnity, and the insurers cannot be compelled to accept responsibility in respect of a third party who may be quite unknown to them.

Sir Wilfred GREENE, M.R. said at p. 269 –

"It is said that the contract between Mr. Coomber and the insurance company constituted by that document is assignable. It appears to me to be as plain as anything can be that a contract of that kind is in its very nature not assignable. The effect of the assignment, if it were possible to assign as stated by Mr. Comyns-Carr to be that, from and after the assignment the name of Mr. Pope, the assignee, would have taken the place of that of Mr. Coomber in the policy, and the policy would have to be read as though Mr. Pope's name, were mentioned instead of Coomber's. In other words the effect of the assignment would be to impose upon the insurance company an obligation to indemnify a new assured, or persons ordered or permitted to drive by that new assured. That appears to me to altering in toto the character of the risk under a policy of this kind. The risk that AB is going to incur liability by driving his motor car, or that persons authorised by AB are going to cause injury by driving his motor car, is one thing. The risks that CD will incur liability by driving a motor car, or that persons authorised by CD will incur liability through driving a motor car, is, or may be, a totally different thing.

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This point, I must confess, I did not find an easy one, but I considered that I had to approach it in this manner. The car was sold on 5th July, 1960 but the transfer was not effected until 7th July, 1960, i.e. two days' later. But I consider this a sufficient contemporaneity because when the plaintiff and Jagdeo went to the agent on the 5th July when the registration was transferred to the plaintiff, the agent was not in office. In my opinion the policy was effectively transferred on the 7th July by the agent's words and conduct which were subsequently ratified by the company, albeit not until some 3 years afterwards. This being so if a policy had in fact been issued it would and should have borne the date 7th July, 1960 as being the effective date when the plaintiff stepped into Jagdeo's shoes. As Professor HARDY IVAMY points out an assignment does not depend upon form for its validity but upon the consent of the insurers -GENERAL PRINCIPLES OF INSURANCE LAW (1966) at p. 267.

Where the consent of the insurers is required, an assignment of the policy without their consent renders the policy voidable only – per *Lord ELLENBOROUGH, C.J. in Doe d Pitt v. Laming* (1814) 4 Camp. 73 at p. 75.

Now the company, for the first time, avoided the policy on 15th April 1964 (vide Ex. "F").

In my considered opinion the plaintiff is entitled to the declaration sought in paragraph (a) of his indorsement of claim and this is so even though no policy has been produced in this matter because what has got to be decided, firstly, is whether there was in existence a valid contract of insurance between the plaintiff and the company on 22nd July, 1960, when the accident took place between P7300 driven by the plaintiff's son Gobin and Mrs. Chanderdai Adam on Port Mourant public road and not what were the terms of such a policy which would be relevant to the second question that has to be decided in this matter, viz., whether the arbitration clause as set out in para. 5 of the defence is a condition precedent preventing the plaintiff from bringing civil proceedings in a court of law.

In *Scott v Avery and Others* (1843-60) All E.R. Rep. 1 the House of Lords effectively laid it down that parties cannot by contract agree to oust the jurisdiction of the courts to deal with their rights under the contract, but a term in a contract which provides that, in the event of a dispute arising, it shall be referred to arbitrators whose award shall be a condition precedent to any right of action in respect of the matters agreed to be referred, is valid. This is so not only where the provision for arbitration relates merely to the question of damages due from one party to the other, but also where it is stipulated that other matters, e.g. liability, shall be determined in the first instance by arbitrators.

In *Jureidini v National British and Irish Millers' Insurance Co. Ltd.* (1914-15) All E.R. Rep. 328, the appellants, insured stock of textiles, hardware and other non-hazardous merchandise, their property, on the premises of a certain store at Port Limon, Costa Rica, Central America,

for the sum of £800. A fire broke out and damaged the appellants' stock ' and they made a claim under the policy which was resisted by the respondents on the ground that the loss was occasioned by the felonious acts of the appellants and that the claim was fraudulent. The appellants then brought an action before DARLING, J. and a special jury. The respondents contended that the condition as to arbitration in the policy had to be fulfilled before an action could have been brought. The jury did not find the case of fraud and arson proved and judgment was given in favour of the appellants for the sum of £3,000. The Court of Appeal set aside the judgment of DARLING, J. On further appeal the House of Lords unanimously reversed the decision of the Court of Appeal. Viscount HALDANE, L.C. said at pp. 330-31 –

"No doubt it is true that the policy contained an arbitration clause with a very stringent addition to it to the effect that the going to arbitration is a condition precedent to the right to sue; and if that had been all, and if an action had been brought upon a policy containing such a clause and no more had happened, then, on principle and on authority, the claim could not have been maintained without fulfilling the condition precedent, because by the law of this country you can make most contracts which you desire, and, among others, a contract that you will not come under liability under a contract unless that liability is defined in a particular way, if necessary, by an arbitrator and *Scott v Avery* is a decision of this House to the effect that that is the law. But in *Scott v Avery* the action was brought upon a contract containing such a clause, and to the declaration a plea was put in raising this term of the contract, that the action could not be maintained because the plaintiff had contracted he should have no cause of action unless there had been a previous arbitration, and that the plea was demurred to, and this House ultimately decided, after consulting the judges, who differed very much in opinion (the decision was a final decision), that the demurrer was not a good demurrer, that the plea was a good one, and that the action could not be maintained. That was, in effect, a decision upon a demurrer. But the present case, as I have already pointed out, is different. There has been in the proceedings throughout a repudiation on the part of the defendants of liability based upon charges of fraud and arson, the effect of which is that the right to all benefit under the policy is forfeited, but one of the benefits is the right to go to arbitration under this contract and to establish your claim in the way which may to some people seem preferable to proceedings in the courts, and accordingly that is one of the things which the appellants have according to the respondents forfeited with every other benefit under the contract. Speaking for myself, I do not see now the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced. As I have said, this is not a case like *Scott v Avery*. It is a case in which the consequences with which we are dealing arise from the fact of the

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The insurance company in this case, as in every case, make inquiries as to the driving record of the person proposing to take out a policy of insurance with them. The business reasons for that are obvious, because a man with a good record will be received at an ordinary rate of the premium and a man with a bad record may not be received at all, or may be asked to pay a higher premium. The policy is, in a very true sense, one in which there is inherent a personal element of such a character as to make it, in my opinion, quite impossible to say that the policy is one assignable at the volition of the assured. That is all I need say upon that branch of the argument."

Now the facts of this case are not on all fours with the three cases cited above. There is no question here of another car or of an extension clause but certain principles can be extracted and applied to the facts of this case as found by me.

When Jagdeo sold P7300 to the plaintiff the property in that vehicle immediately passed to the plaintiff despite the fact that there was an outstanding balance remaining to be paid on the purchase price. In so doing Jagdeo divested himself of all interest in the said vehicle and, unless there was a valid assignment to the plaintiff, the policy would have come to an end. There could not have been a valid assignment by the mere unilateral action of Jagdeo and, the plaintiff, in such circumstances, would have no right in law to claim indemnity from the company until and unless the company had expressly approved of the transfer.

Was there such approval in this matter? In my opinion clearly yes. I consider that not only did the agent accept the transfer but impliedly approved of it by telling the plaintiff that 'everything was alright' and that his son Gobin could go ahead and drive the car and that the policy would follow in due course. It seems to me that by his very words and conduct the agent not only led the plaintiff into the reasonable belief that he had authority to accept the transfer but also to approve of same. But stronger than this, to my mind, is the tenor of the letter (Ex. "F") which is as follows:

CLARENCE A.F. HUGHES,
L.L.B. (Hons.) (Lond.),
Barrister-at-Law,
Dial 4978.

CHAMBERS
62, Hadfield & Cross Streets,
Georgetown, Demerara,
British Guiana.
15th April, 1964.

Mr. Shukram,
Cumberland Village,
Canje, Berbice.

Dear Sir,

Re: Chanderdai Adam v Yourself

I am writing on behalf of my clients, Messrs. New India Assurance Company Limited.

My clients have instructed me to repudiate as I hereby do, all liability under the policy of insurance, under which your vehicle No. P7300 was insured

This repudiation of liability is made on account of failure to comply with the conditions of the policy.

You were guilty of non-compliance, when you failed to inform them of the accident within a reasonable time thereafter, and also when you failed to notify them of the criminal proceedings which were preferred against you, without giving my clients the opportunity of defending you if they so desired.

I am to inform you, further, that if my clients are made to pay any sum of money whatsoever to the plaintiff, they will seek to recover such monies from you.

I have been instructed to inform you further that my clients have filed a defence in this matter, and have also offered the sum of \$350.00 to the plaintiff without prejudice.

All for your information and guidance.

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

C. A. F. H: nk.

I entirely agree with counsel for the plaintiff that this letter clearly implies that the company recognised the plaintiff as a policy holder and they repudiated liability not on the grounds that he was not a policy holder or that there was no effective transfer of Jagdeo's policy to him, but on the rather technical ground that he had committed breaches of two conditions in the policy, viz. (1) failure to notify them of the accident and (2) to notify them of the criminal proceedings at Whim Magistrate's Court.

It may well be that the agent not only did not send the transfer of 5th July, 1960 to head office in Georgetown but never reported to his principals that the plaintiff had reported about the accident and also the fact that his son was on a criminal charge in relation to the said accident. Here again, I entirely agree with counsel for the plaintiff that the agent's undoubted negligence does not in any way cancel the contractual relationship between the company and the plaintiff in view of their subsequent ratification.

It seems to me that by accepting the plaintiff as a policy holder, the company must be taken to have ratified the agent's acceptance and thus, accordingly, expressly approved of the transfer which should have been effected since 3 years previously.

But for there to be a valid assignment they must not only be express approval of the company but also contemporaneity of the assignment of the policy and the subject matter, to wit car P7300.

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repudiation. When the case went to trial, it was heard by DARLING, J., and a special jury, and the jury found that the case of fraud and arson had broken down and for the plaintiff upon those issues, and the learned judge gave judgment, not that the case should go to arbitration, but for £3,000 and I think that was probably right, the arbitration clause having gone with the repudiation."

In *Woodall v Pearl Assurance Company Limited* (1911) 120 L.T. 556, BANKES, L.J. had this to say at p. 558.

"In considering this part of the case I think it very necessary to draw a clear and sharp distinction between two separate classes of cases. There is a case where a person or an insurance company repudiating a contract in the sense that it is disputing the existence of any binding contract at all. That is one class of case and that was Jureidini's case. The other class of case is where a person or an insurance company is repudiating any liability under a contract, but accepting the existence of the contract as a binding contract. That is the second class of case, and that is the case of which an instance may be found in the case to which we have been referred, in the Divisional Court, of *Stebbing v Liverpool and London and Globe Insurance Company Limited* (117 L.T. Rep. 247; (1917) 2 K.B. 433)."

In *Toller v Law Accident Insurance Society Ltd.* (1936) 2 All E.R. 952, C.A. the plaintiff signed a proposal form for motor car insurance with the defendants on 15th August, 1935. The premium was not fully paid and no policy was issued but 3 cover notes were issued, the first covering up to the end of August, the second was for 14 days from August, 31st and the third one was issued on 16th September. On 2nd October, after the expiration of the third cover note, the plaintiff was involved in an accident and incurred certain liabilities. On 29th October, 1935 the plaintiff paid off the balance of the premium and the company issued a policy back-dating it to 29th October, 1935. The plaintiff issued a writ claiming, *inter alia*, a declaration, that a binding contract of insurance existed between the insurance company and himself on October, 2nd 1935, the date of the accident. The company applied for a stay of the action on the ground that the issue fell within the arbitration clause. GREENE, L.J. said at p. 956 –

"Now the classes of case where the defendant insurance company is denying the existence of a contract is totally different from the class of case where the defendant, while admitting the existence of a contract, is relying on some clause in it to escape liability. It is very important in my view that language should be accurately used and there is a great danger in the use of such words as "repudiation;" repudiation of a contract may mean that, having admittedly made a contract, you decide to break it and break it in such a way that you intend not to proceed with it. Another use of the word "repudiation" is where you say. "There never was a contract at all between us."

SCOTT, L.J. said at pp. 957-58 –

"I agree with the whole of what GREENE, L.J., has said and only desire to add this: that the word "repudiation" is somewhat ambiguous. It may mean repudiate the original existence of the contract. It may mean: disclose an intention to disregard it *in toto* and refuse to be bound by its terms altogether. Or it may mean: a mere contention that under the terms of the contract the defendant is completely free from liability by reason of some fact. Where the repudiation is to either No. 1 or No. 2, I think the principles upon which *Jureidini's* case was decided entitled the plaintiff to say: "You cannot impose upon me an arbitration clause as a written submission in a contract which you either say never came into existence or have wholly repudiated." If the defendant relies on any terms of the contract to escape liability, whether partial or total liability, then the arbitration clause applies. I do not think that *Jureidini's* case goes any further than that."

In *Heyman v Darwins Ltd.* (1942) 1 All E.R. H.L. 337, the House of Lords referred to certain judicial dicta and in particular that of Lord LOREBURN, L.C. in *Johannesburg Municipal Council v Stewart* (1909) S.C. (H.L.) 53, Viscount HALDANE, L.C. in *Jureidini's* case (*ubi supra*) and Lord SUMNER in *Hirji Mulji v Cheong Yue S.S. Co. Ltd.* (1926) A.C. 497, a judgment of the Privy Council. Lord MACMILLIAN said at p. 345—

"of recent years, however, certain views have been advanced and have received considerable judicial encouragement which have tended to introduce an unfortunate element of perplexity as affecting the application and efficacy of arbitration clauses in cases in which the contract is said to have been repudiated. Dicta of high authority have caused doubts which subsequent explanations cannot be said to have successfully removed. The arguments at the bar in the present case have illustrated the persistence of this uncertainty.

I may clear the ground by disposing of one or two simple cases. If it appears that the dispute is as to whether there has ever been a binding contract between the parties such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been as part of it an agreement to arbitrate, the greater include the less. Further, a claim to set aside a contract on such grounds as fraud, duress or essential error cannot be the subject matter of a reference under an arbitration clause in the contract sought to be set aside."

In *Arjune Gopie v New India Assurance Co. Ltd.* (No. 400 of 1966) (unreported decision No. 38/68) the defendants issued a policy of insurance in respect of the plaintiff's car P.T. 271 for the period 11th January, 1966 to 11th January, 1967. On 9th April, 1966, PT 271 was damaged in an accident beyond repairs. On 12th April 1966 the plaintiff submitted his claim to the defendants who by letter dated 21st May, 1966 repudiated liability on the ground of several breaches of the terms of the policy. This was denied by the plaintiff on whose behalf a letter was written dated 7th

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June, 1966. On 6th January, 1966 the defendants agreed to go to arbitration as suggested by the plaintiff and submitted the name of Mr. D. Hoyte, of counsel (now Minister of Home Affairs) as arbitrator. Without proceeding to arbitration the plaintiff filed an action. KHAN, J. held that the plaintiff was precluded from bringing civil proceedings in view of the terms of the arbitration clause (no. 9) which were a condition precedent to the bringing of any such action and he dismissed the claim with costs.

Now it seems quite clear to me, having regard to this set of authorities quoted above, that the defence in this matter is that there was never any contract at all between the company and the plaintiff. Yet both agent and the company led the plaintiff into the reasonable belief that he was a policy holder, there being a valid assignment of Jagdeo's policy to him in my opinion.

Now the principle known as to approbate and reprobate, which is equally applicable to insurance as to other contracts, occurs where a party to a contract, who has refused his obligations under it, will not be permitted at the same time to insist on the observance of an arbitration clause embodied in the contract.

In my considered opinion what the defence is saying here is this—'Look we have no contract at all with you, Mr. Shukram, but as you have seen fit to sue us, we will plead the arbitration clause.' This being so I cannot possibly see how estoppel can arise in this matter. How can the plaintiff be bound by terms and conditions contained in a policy that he has never received?

In my considered opinion this is more properly a case where the principle of approbation and reprobation applies.

To my mind the whole attitude of the defendants in this matter has not only been harsh but most reprehensible in that they are attempting to evade their liability to satisfy the judgment in action 343/63 under the cloak of - no policy, no liability. This company, and, indeed, all insurance companies carrying on business in Guyana, would do well to follow the lead given by the British Insurance Association and Lloyds whereby it was agreed that their members would, in general, refrain from insisting on the enforcement of an arbitration clause if the assured seeks to have a question of liability, as distinct from the amount of claim, determined by the courts in the United Kingdom – note (g) vol. 22 HALSBURY'S LAWS OF ENGLAND (3rd ed. para. 346 at p. 179).

On a final analysis, therefore, for the reasons given above, I am satisfied that the plaintiff was the assignee of a valid policy of insurance in force on 22nd October, 1960 in relation to car P. 7300 which struck down Mrs. Adam and that, by repudiating the contract *in toto*, any arbitration clause that may have been embodied therein is null and void and of no effect and they are accordingly liable under section 8 of Chapter 281 to indemnify the plaintiff in the sum of \$1,275 paid by him to Mrs. Adam in satisfaction of the judgment and costs (including levy costs) in Action 343/63.

Accordingly, the plaintiff is hereby declared to be lawfully insured with the company under the provisions of Chapter 281 in respect of motor car P. 7300 and there will be judgment in his favour in the sum of \$1,275 with costs to be taxed certified fit for counsel. There will be a stay of execution for six (6) weeks.

Judgment for the plaintiff.

NUR ALI

v.

ASHUN ZAMAN AND KARIMAN NEISHA

[High Court (Bollers C.J.) March 19, 20, 27, April 29, May 5, 6, June 7, October 18, 25, December 15, 1969.]

Will—Proof in solemn form—Right to begin—Illiterate testator—No suspicious circumstances.

Will—Costs—Whether costs of unsuccessful party to be paid out of the estate—Allegations of fraud and undue influence not proved—Successful party to recover costs from unsuccessful party or upon failure, out of the estate.

The testator by his will left all his property to his widow, the defendant and probate in common form was granted to her. The plaintiffs, sons of the testator and the defendant, put the defendant to proof of the will in solemn form alleging that at the time of the making of the will the testator was not of sound mind, memory and understanding, that the execution of the will was obtained by undue influence and fraud and that the will was not duly executed.

HELD:— that (i) the defendant had the right to begin.

(ii) on the facts, the plaintiffs had no reasonable ground for opposing the grant to the defendant, the allegations of fraud and undue influence were not proved, and so they were not entitled to costs out of the estate.

(iii) the defendant was entitled to recover her taxed costs against the plaintiffs, failing which her costs were to be recoverable out of the estate.

Judgment for the defendant.

C. Lloyd Luckhoo Q.C. for the plaintiffs.

B.O. Adams Q.C. for the defendant.

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BOLLERS, C.J.: In this action, the plaintiffs who are the lawful sons, heirs *ab intestato*, and two of the persons entitled on an intestacy to the estate of Abdul, B.R. No. 378 of 1906, also known as and called Abjal, deceased, who died on the 29th day of July 1964, seek revocation of the probate of a will alleged to have been made by the deceased on the 14th day of September, 1960, which was granted to the defendant, the wife of the deceased as sole executrix on 22nd December, 1964, and they also put the defendant to the proof of the said will alleging that the said will was not duly executed in accordance with the Wills Ordinance, Chapter 47 of the Laws of Guyana, and that the deceased at the time of the execution of the said will was of unsound mind, memory or understanding and the execution thereof was obtained by the undue influence and fraud of the defendant. It is the further allegation of the plaintiffs that the deceased, at the time the said will purports to have been executed, had not known or approved of the contents thereof. The plaintiffs therefore claim that the court shall pronounce against the validity of the said will and revoke the probate thereof and will decree that the deceased died leaving a will made and executed by him during the month of December 1958 whereby the plaintiffs are entitled to one-half of the estate of the said deceased.

The defendant in her defence maintains that the said will, dated 14th September, 1960, was duly executed in accordance with the Wills Ordinance, Chapter 47, and at the time of the execution of the said will the deceased was of sound mind, memory and understanding and denies the allegations of fraud, undue influence and want of knowledge or approval on the part of the deceased at the time of the said execution. The defendant, by way of counterclaim, claims that the deceased executed his true and last will of the 14th September, 1960, whereby she was appointed executrix, and further claims that the court shall pronounce for the said will in solemn form of law and direct that the probate of the said will which was granted on the 22nd day of December, 1964, be handed out to the executrix.

The plaintiffs, aged 39 years and 25 years, respectively, are two sons of four children of the deceased, the two other children being daughters, Mymoon, aged 40 and Nila being about 35 years, and the defendant is the wife of the deceased and the sole beneficiary under the will, dated 14th September, 1960. The plaintiffs are therefore persons entitled to succeed in the event of an intestacy.

The evidence which I accept reveals that on the 14th September, 1960, the deceased went to the office of the solicitor, Mr. E.A. Gunraj, and told Mr. Leonard McKoy, the solicitor's clerk, that he would like Mr. Gunraj to make his will. The deceased was then put to sit in the outer office and after a little while called in to Mr. Gunraj's private office. About three-quarters of an hour later, McKoy was called into the private office of Mr. Gunraj where he found that the will, Exhibit "B2," had already been typed out, and in his presence Mr. Gunraj read out the will to the deceased and asked him if this was what he wanted, and he replied, "Yes", and then the deceased testator signed and duly executed the will in the presence of

McKoy and Mr. Gunraj, and then Mr. Gunraj signed as number one witness in the presence of the deceased and McKoy, and McKoy signed the will in the presence of the deceased and Mr. Gunraj. The signature of the testator on the will was admitted by the second-named plaintiff to be that of his father, the deceased. The original copy of the will was then taken by the deceased to his home and locked up in his safe. A copy of the will was kept in the solicitor's office and later produced at the trial.

The background to the making of this will and the reason for the testator making his wife the sole beneficiary under the will is not perhaps difficult to untangle. The deceased, aged 58 years, had been a farmer and a cattle dealer for the greater part of his life and was a man of some wealth owning estates, cattle and a butchery in which his two sons greatly assisted him and were paid moderate salaries. In 1961 he purchased Pln. Waterloo, being the property of Pln. Maryville Estates Ltd., for the sum of \$35,000 and transported the said immovable property to the plaintiffs. The agreement of sale and purchase in respect of this transaction was signed by the plaintiffs as purchasers and a Mr. Nasir Khan and Azeez Khan as directors of Maryville Estates, Ltd., and Mr. Jainarine Singh as secretary of the company, as vendors and when the deceased paid the final instalment of \$20,000 he did so in cash and small cheques and informed Mr. Jainarine Singh that it was in his interest to keep large sums of money in cash as bargains would appear from time to time and unless he had cash in hand he could not carry out those transactions. Previously, in 1958, the deceased had purchased Pln. Wallaphai for \$22,000 from Maryville Estates Ltd., which was adjacent to Pln. Waterloo, and transported it to his wife, the defendant, who subsequently, in the lifetime of the deceased, transported the land to her daughters.

Meanwhile, in 1955, six years before the purchase of the two plantations from Maryville Estates, Ltd., the deceased was showing signs of ill-health and was becoming a sick man. He had consulted Dr. Alli Shaw who diagnosed cirrhosis of the liver. The patient had sustained an attack of nervousness and mild heart failure, and on the doctor discovering that his liver was enlarged, the patient admitted that he was a heavy drinker of high wine. Dr. Alli Shaw treated him from time to time up to February or March 1960, when he referred the deceased to Dr. da Costa to carry out an E.C.G. test to the heart, as Dr. da Costa was the only practitioner in the country with such a machine. It appears from the records of the Practitioners Medical Centre that the deceased in 1957 was admitted a patient in this hospital for 11 days when he was found to be suffering from dermatitis on his hands, legs and waist. From March 1960, Dr. da Costa comes into the picture as the deceased became his patient from that time up to the date of his death in July 1964. From March 1960 the deceased saw Dr. da Costa on an average of once per month. In 1960 he informed the doctor that he had had a heart attack, i.e., coronary occlusion, and later he developed angina pectoris and was treated for it. In 1961 the deceased was treated for sexual impotence and was kept in surveillance for his heart.

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In March 1962 he had an attack of gastritis and an occasional drop-beat and was treated for this, and in June 1962 he complained of pain in the liver and was treated for it. He also complained of breathlessness and pains in the stomach. In August 1962 he complained of shortness of breath and symptoms of mild heart failure. Later he complained of pains in the joints of the feet. In October water was discovered in his lung and in October 1962 he was treated for sexual impotence. In November 1962 he had a pain in the knee and slight shortness of breath and he was treated and in December 1962 his heart condition was much eased. In 1963 the deceased was clearly a sick man and was treated with injections of hormones for sexual impotence. There was also a routine check carried out on his heart and he complained from time to time of pains in his joints. In December 1963 he was found to have suffered a coronary thrombosis and he was admitted a patient in the Practitioners Medical Centre where he spent nine weeks. In April 1964 he complained that he was jumpy in his sleep and there were signs that his heart was weakening. In April 1964 he vomited and looked toxic when for the first time he showed signs of confusion in speech and thought and was unable to carry out simple orders. He was then admitted a patient in the Practitioners Medical Centre from 18th to 27th April. His kidneys began to show signs of uraemia, and in May he looked thin and drawn and had no appetite and there was albumen in the urine. He was hesitant in replying and on the 11th May, 1964, he complained of vomiting, nausea and cough and there was more albumen in the urine. Eventually he died on the 29th July, 1964.

In the opinion of Dr. da Costa, in the year 1960, i.e., the vital year when the will was made, the deceased was not suffering from any symptoms of senile dementia and did not appear to be suffering from any disorder of the mind and was very lucid. At all times he could carry on a rational conversation and he was a very brisk and active man. According to the doctor, the deceased had perfect understanding until about three months before his death and his memory was very good.

On the 14th September, 1960, the same date as the making of the will, the deceased paid Dr. Alli Shaw, who had just returned to the country, a visit at his home. The object of that visit, it appears, was the purchase of this doctor's estate at Wakenaam. The deceased offered the doctor the sum \$165,000 in cash for this estate at Good Success and Sans Souci, Wakenaam, which the doctor considered a reasonable offer but did not accept. This offer the doctor refused as he considered that the deceased was boasting and it was not rational conduct. The deceased also mentioned that he wanted to make a will but the doctor advised him against making a will as he told him he was not well enough to do so. It was then that the deceased left Dr. Alli Shaw's residence and went to Mr. Gunraj's office and made the will of that date. Two days later, i.e. on the 16th September, 1960, the deceased entered the hospital of the Practitioners Medical Centre and remained there up to the 28th October, 1960. The records of the hospital disclosed that the deceased was a sick man and was suffering with swelling of the legs

and kidneys and with his heart and blood pressure. The records show that from time to time he had injections of mersalyn to dispense with the swelling, morphine to soothe him and serpasil for blood pressure. He also had from time to time fits of vomiting and coughing and was given injections of cytamin which is a vitamin. He was also given sonoryl to put him to sleep and colubarb to soothe his stomach. He complained of pain all over his body. Towards the end of October there was some improvement in his condition and he was discharged on the 28th October, 1960.

In spite of his illness, however, *it is the evidence of Dr. Bissessar, the doctor in whose handwriting the records were made, that during the patient's stay in hospital he would converse with him and at all times he found his conversation rational and the patient impressed him as being always clear in his mind and he spoke to him about his wife and children and his business as a cattle dealer and told the doctor that he had an angel for a wife and if it were not for her he would not have been anywhere and that he was worried about his two sons who were doing his business as he had not heard from them.* The will which was made on the 14th September, 1960, was subsequently lodged in the safe at the home of the deceased and removed by him and read to the family and then put back in the safe.

It is clear to me, therefore, that although the deceased showed signs of not keeping good health from the year 1955, and that from the year 1957 it could be said that his health was failing him, yet he always remained clear in his mind and carried on rational conversations and was always thinking of his business in which he bought and sold cattle and purchased large portions of land in which he conducted the negotiations right up to the year 1961, and in 1960 was actually seeking to purchase Dr. Alli Shaw's estate for \$165,000 which was considered a reasonable sum. In fact, the evidence reveals that the deceased had litigation against one Sookrajie in 1961 which was settled, and executed in his own favour a mortgage on the property of John Nagreadie, and right up to his death continued to conduct his business generally.

After the death of the deceased in July 1964 the will was removed from the safe by the defendant and taken to the office of Mr. Laurie Persaud, solicitor, by her, accompanied by the first-named plaintiff, and there it was handed over to Mr. Laurie Persaud by the first-named plaintiff. Mr. Laurie Persaud agreed to handle the application for probate of the will and the particulars, which the defendant confirmed, relating to the estate were supplied to him by the first-named plaintiff. It was then discovered on the admission of the first-named plaintiff, that he had withdrawn the sum of \$16,000 from the account of the deceased at the Royal Bank of Canada and the defendant and the first-named plaintiff were then advised by Mr. Laurie Persaud that the sum would have to be brought into the estate and the Royal Bank of Canada was accordingly so informed. The first-named plaintiff proceeded to take an active interest in the application for probate of the will and he actually brought the valuer of the various properties to the solicitor for the purpose of supplying the valuation of the properties for estate duty. The second-named plaintiff also attended the office of the solicitor and at no

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time did they complain that there was a previous will under which they stood to benefit. The will was later, on the 14th August, 1964, deposited by the defendant in the Registry and on the 16th of December, 1964, was removed from the safe in the Registry and placed with the application for probate which was made on the 16th December, 1964. Probate of the said will was then granted on the 22nd December, 1964. Although it is the practice in the Registry that, where the testator can only sign his name but cannot otherwise read and write the attesting witnesses are asked to swear to an affidavit stating whether the will was read over and explained to the testator and whether the testator understood the contents of the will, this, however, was not done.

Under rule 11 of the English Non-contentious Probate Rules, 1954, before admitting to proof a will which appears to have been signed by an illiterate testator or which for any other reason gives rise to doubt as to the testator having had knowledge of the contents of the will at the time of execution, the Registrar shall satisfy himself that the testator had such knowledge. This is done by way of affidavit of the subscribing witness in form 7 in the Appendix to the Rules. There being no local Probate Rules, the English practice is followed and in this case this was not done. The reason is not difficult to find. The testator had signed the will and the subscribing witness was unaware that he could not read and write. In my view this would only affect the credibility of the subscribing witness McKoy, but could not prove fatal to the validity of the will. In any case the subscribing witnesses in the attestation clause to the will had already certified that the will had been read over and explained to the testator who appeared perfectly to understand and approve of the contents.

After the death of the deceased, the parties were, therefore, on good terms and as a result of the drift and conduct of the case, I gained the impression that the defendant had either promised the plaintiffs that they would in some way benefit from the estate or by her conduct generally gave them that feeling, for she actually attended the wedding of the second-named plaintiff when there was a family gathering. Meanwhile, the plaintiffs proceeded to erect houses on the land which was the property of their mother, the defendant, rendering an account to her showing that they had spent the sum of \$12,000 on the houses. They also purchased an estate near to Pln. Waterloo which had been bought for them by their father in his lifetime for the sum of \$20,000, transport for which they have not yet received. They purchased three cars and the second-named plaintiff admitted that it was the defendant's money that was used to purchase the estate.

The trouble between the parties arose when in 1967 the defendant proceeded to transport the land on which the plaintiffs' houses stood to her two daughters which they had purchased for \$5,000 and refused to supply any more money to the plaintiffs to finish off the erection of their houses. Dissatisfaction also came about when she sought to pass transport of land at Wake-naam, the property of the estate of her husband, and also proceeded to sell the estates at Eagle's Roost and Arthurville for \$7,000 each to her

daughters, which were the property of the estate, and sought to pass transport to her two daughters. It is clear from the evidence that all or most of the property of the estate of Abjal, deceased, and which was devised to the defendant under the will, she now seeks to transfer to her two daughters and this is resented by the sons.

It will be seen from my findings that I have accepted more or less all the evidence of the defendant save and except that I considered she was mistaken when she said that the will was read on the Sunday by the deceased after his return from Georgetown after the execution of the said will. This could not have been so as the evidence shows that at that time the deceased was a patient at the Practitioners Medical Centre in Georgetown. I would, however, brand this portion of the defendant's evidence as a mistake rather than a lie, as I am satisfied that the will was read by the testator to the family and that there was no other will, and there was never at any time any talk of a previous will.

I have also accepted the evidence of Dr. Bissessar and Dr. da Costa, even though Dr. da Costa did not give any evidence of the deceased being under his care at the Practitioners Medical Centre in September 1960. It may well be that the doctor completely overlooked this circumstance because of his failure to keep records in relation to those events. Nevertheless, this highly qualified medical expert who was treating the deceased from March 1960 up to July 1964, in my view was in the best position to speak of the health of the deceased and his capacity for making a will in September 1960, and this was admitted by Dr. Alli Shaw who expressed a contrary opinion. *I have also accepted the evidence of Mr. Jainarine Singh, Barrister-at-Law, who stated categorically that when the deceased purchased Pln. Waterloo from Pln. Maryville Estates Ltd. in 1961, he signed the agreement of sale in his capacity as secretary of the company and formed the opinion that the deceased was a sound and reasonable person.* He also saw the deceased in 1962/1963 and the deceased struck him as being a normal reasonable human being. *Mr. Stanley Persaud, Barrister-at-Law, whose evidence I regard as honest, confirmed that he saw the deceased up to January 1961 and spoke to him on several occasions and he gained the impression that his mental faculties were sound and that the deceased was engaged in litigation up to that date.*

On the other side of the picture, I did not accept the evidence of Dr. Alli Shaw when he stated that on the 14th September, 1960, Abjal did not appear to him to be coherent and to be well enough to make a will. His reason for so thinking was, in my view, flimsy and not at all sound, and that was because the deceased was wrangling in relation to the purchase of his estate and offered a price of \$165,000 which he said he would pay in cash.

In my view, there was nothing unreasonable in this statement of the deceased as he was a man accustomed to keeping large sums of money in his home and probably kept a safe in his home for that purpose. The subsequent act of this doctor in selling the estate for \$180,000, i.e., \$150,000 in cash and \$30,000 in book debts, showed that the offer of

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\$165,000 was reasonable. It may well be that the possibility of subsequent events (failure to collect debts) may have shown that the offer made by the deceased was the better one.

The evidence of the second-named plaintiff, Ashun Zaman, was largely self-serving, and I did not accept his statement that there had been a previous will, which he did not produce and gave no details of what had become of it, and I do not believe him when he said that after his father returned from hospital in 1960 he jumped out of the window on to the kitchen shed and held on to the genip tree and it was then that the carpenter, John Nagreadie, put expanding metal on to the window. This was not supported by Dr. da Costa who stated that in 1960 the deceased was not suffering from any disorder of the mind. It will be noted that Ashun Zaman, the second-named plaintiff, stated that this event took place in August 1960 after the deceased had returned from hospital, whereas the clear evidence is that the deceased did not go into the hospital before the 16th September, 1960. A reasonable inference to draw from this evidence is that the mesh was put on to the windows at the time of the racial disturbances in 1962 when, also at that time, the deceased was a very sick man.

The evidence of Insanally Habibullah I considered vague and unsatisfactory, and I did not believe him when he said in 1960 he visited the deceased at the Practitioners Medical Centre and found the defendant sitting in a chair in a room and the deceased lying down strapped to the bed. It may be that in 1958 the deceased was strapped to the bed, but not in 1960, and Dr. Bissessar who was in a position to support this evidence did not do so.

The evidence of Nasir Khan as to the purchase of Pln. Waterloo in September 1961 by the plaintiffs was completely defeated by the evidence of Mr. Jainarine Singh, who stated that he had signed the agreement of sale and that the deceased was present, and in any event all that Nasir Khan could say was that he did not think that the deceased had anything to do with the transaction.

The evidence of John Nagreadie as to nailing mesh on to the windows of the bedroom of the deceased between 1959 and 1960 was very vague as he did not appear to know when the racial disturbances took place. He had thought that this was in 1958, but admitted that he had protected the window at the time of the racial disturbances. This witness, however, stated that the deceased was doing business with him and actually passed a mortgage in his favour for the sum of \$1,000 and this could have been in the year 1960, and at the time of the passing of the mortgage the deceased was not sick and talked sensibly. Nagreadie's evidence was weakened by his admission that he occupied rice lands, the property of the plaintiffs, for which he paid no rent.

On the whole, the evidence led by the plaintiffs I considered unsatisfactory and could place no reliance on it, and I was satisfied that this was but a vain attempt on the part of the plaintiffs to deny the defendant her

beneficial interest under the will of the 14th September, 1960, because she was seeking to transport all that interest to her two daughters. It may be that the plaintiffs felt that they had worked hard for many years for their father for moderate salaries assisting in the management of his business, and expected that he would leave them the greater portion of his estate and were greatly disappointed when they found that their mother was the sole beneficiary under the will. Nevertheless, it appears to me that the deceased, having seen that estates were transported to his sons and daughters in his lifetime, sought to protect his wife whom he considered to be an "angel".

After a careful and anxious consideration of the whole of the evidence led by the parties to this action, I was satisfied that the deceased, Abjal, on the 14th day of September, 1960, in the presence of the witness, Mr. Leonard McKoy, and solicitor, Mr. E. A. Gunraj, who drafted the will, signed and executed the will, dated 14th September, 1960, in the presence of these witnesses and after doing so the execution thereof was witnessed by McKoy and Mr. Gunraj, who each signed as a witness to the will in the presence of the deceased testator and each other, and that the said will was the genuine last will and testament of the deceased, and that at the time of the execution thereof the deceased was well aware of its contents and approved of them and was of a sound testamentary disposition.

At the trial of this action I ruled that in the circumstances of the case in the state of the pleadings, the defendant who was put to the proof of the will had the right to begin and must do so. The party upon whom the burden of proof lies has the right to begin. Therefore the party propounding the last will begins, "if the due execution, the testamentary capacity or the knowledge and approval of the testator are in dispute."—*Hutley v Grimstone*, (1879) 5 P.D., 24. As long ago as in the year 1838, PARKE, B., in *Baker v. Batt*, (1838) 2 Moo. P.C. at pp. 319 and 320, laid it down that in the Probate Court where the *onus probandi* must undoubtedly lie upon the party propounding the will if the conscience of the judge, upon a careful and accurate consideration of all the evidence on both sides is not judicially satisfied that the paper in question does contain the last will and testament of the deceased, is bound to pronounce his opinion that the instrument is not entitled to probate. For if the party upon whom the burden of the proof of any fact lies, either upon his own case where there is no conflicting testimony or upon the balance of evidence where there is, fails to satisfy the tribunal of the truth of the proposition which he has to maintain he must fail in his suit.

Then again this learned judge in a subsequent decision of the same year, i.e., in *Barry v. Butlin*, (1838) 2 Moo. P.C. at p. 482, stated that there are two rules of law in cases of this nature which do not admit of any dispute. Firstly, that the *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The burden of proof thus cast upon the person propounding the will is in general discharged by proof of capacity and the fact of execution, and when these

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have been proved, the court will, under ordinary circumstances assume from them the knowledge of an assent to the contents of the instrument by the deceased, and without requiring further evidence will pronounce for the will.

The second rule of law propounded is that if a party prepares a will under which he takes a benefit, that is, a circumstance which ought generally to excite the suspicion of the court and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased.

This principle, in the second rule of law, was maintained and acted upon in *Mitchell v Thomas*, (1847) VI Moore's P.C. Cases, p. 137, and *Fulton v. Andrews*, (1875) L.R. 7 H.L. 448, and *Brown v. Fisher*, 63 L.T. 465 where it is laid down in these cases that where a testamentary disposition is propounded under circumstances of suspicion or the testator was of doubtful capacity, there is a further onus upon those who take for their own benefit after having been instrumental in preparing or obtaining a will, and they must discharge this onus of showing the righteousness of the transaction. Eventually, in *Terrell v. Painton*, [1894] P. 151 it was settled that the rule throwing upon the party propounding a will prepared by a person who takes a benefit under it, the burden of showing that the paper propounded expresses the true will of the deceased is not confined to cases where the will is prepared by the person taking the benefit under it, the true rule to be deduced from the cases already mentioned being, that wherever a will is prepared and executed under circumstances which raise the suspicion of the court, it ought not to be pronounced for unless the party propounding it deduces evidence which removes suspicion and satisfies the court that the testator knew and approved of the contents of the instrument.

In *Terrell v Painton*, the facts of the case clearly disclosed circumstances of suspicion, i.e., in 1880 and 1884 the testatrix had made a will in favour of the defendant. The defendant then fell out of favour with the testatrix, and on November 7, 1892, the testatrix made a will leaving her property to the plaintiff. Two days later a son of the defendant brought to the testatrix a will prepared by the defendant leaving the property of the testatrix to the defendant. This will was executed by the testatrix in the presence of and attested by a young friend of the defendant, no one else being present, and the existence of this will was not known to anyone else till after the death of the testatrix. The only evidence adduced by the defendant, who was the party setting up the later will, was that of the attesting witnesses to such will who were orally examined and deposed that the will was so read over to the testatrix and that she appeared to understand it and approve of it. On appeal, it was held that the evidence of the attesting witnesses was not sufficient to remove the suspicion arising from the

circumstances under which the later will was prepared and executed, and the former will must be established.

In the present case there are no such circumstances of suspicion such as a previous will or wills made in the favour of the plaintiffs. There is no question of the sole beneficiary, i.e., the defendant, the wife of the testator, falling out of favour with him, and no question of any will being prepared by the defendant being taken to the testator to sign. As LINDLEY, L.J., said in *Terrell v Painton*, where there were grave circumstances of suspicion as already stated, "Wherever such circumstances exist and whatever their nature be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew of the contents of the document, and it is only where this is done that the onus is thrown upon those who oppose the will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the will." I am of the view, therefore, that the circumstances of the execution of the will of the 14th September, 1960, in this case do not fall within the principle enunciated in *Terrell v Painton*, and there are no circumstances of suspicion and therefore in the ordinary way the case falls within the first rule of law laid down by PARKE, B., in *Barry v Butlin*. There being an absence of special circumstances which excite the vigilance of the court, the burden was discharged by the defendant by proof of capacity and of the fact of execution from which knowledge and approval of the contents of the instrument are assumed. [See *Guardhouse v Blackburn*, (1866), 1 P. & D., p. 116].

In the West Indian case of *Lucky v Tiwari & Another*, (1965) 8 W.I.R., p. 363, the Privy Council held that although in order to raise a case of suspicion it is not essential that the will should have been prepared by a person taking a benefit under it, yet where this is not so and the will had been prepared by a person who took no benefit thereunder, the evidence of facts giving rise to suspicion must be such as to create a real doubt that the testator did not know or approve of the contents of the will. Following that decision by the Privy Council, I can find in the present case no evidence of facts to create any doubt in my mind that the testator did not know or approve of the contents of the will. If I am wrong in my assessment that the circumstances of this case do not fall within the second rule of law enunciated in *Barry v Butlin*, then without invoking the principle laid down in *Guardhouse v Blackburn* that where the will has been read over to a capable testator on the occasion of its execution that is a sufficient proof that he approved of as well as knew the contents of the will, I am prepared to hold on the evidence that the defendant in this case discharged the burden of proof placed on her and showed affirmatively that the will of the 14th September, 1960, was executed by the testator in accordance with the Wills Ordinance, Cap. 47, and that at the time of the execution of the will the deceased was of the necessary testamentary capacity and was of sound mind, memory and understanding, and knew and approved of the contents of the said will. I have not overlooked the submission by counsel for the plaintiffs that this is a will executed by an illiterate person, and a strict onus

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of proof lies upon the defendant to show that the testator knew and approved of the contents of the will. In the 19th Edition of TRISTRAM AND COOTES PROBATE PRACTICE at p. 543, it is stated that the court must always be satisfied that a testator who is either blind or illiterate knew and approved of the contents of the will, and I am so satisfied.

In *Fincham v Edwards*, (1842) 3 Curt. 63, 74, where the testator was blind, it was held that if the will is proved to be in conformity with instructions of the testator that will suffice, even though the will may not have been read to the testator. When therefore in this case the solicitor read over the will to the deceased testator and asked him if that was what he wanted and the testator replied "yes," from the mere simplicity of the terms of the will I would deduce that the will was made in conformity with instructions from the testator and that he approved of its contents.

The question whether the plaintiffs should have their costs borne by the estate remains to be considered, and in this connection it must be borne in mind that the plaintiffs in their statement of claim did not merely put the defendant to the proof of the will and insist on the will being proved in solemn form and give notice it was simply their intention to cross-examine the witnesses, but they went further and alleged fraud and undue influence of which there was absolutely no evidence. In other words, allegations of a grave nature were made but no attempt was made to sustain these allegations.

In *Mitchell v Gard*, (1863) 3 S. & T., p. 278, Sir. J.P. WILDE laid down the principles which should guide the court in the exercise of its discretion in granting the unsuccessful opponent's application for his costs to be paid out of the estate and those were, *firstly*, if the litigation results from the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate; *secondly*, if there be sufficient and reasonable ground looking into the knowledge and means of knowledge of the opposing party; *thirdly*, unless the circumstances of the case bring it within one of the foregoing exceptions, the general rule that costs should follow the event ought to prevail.

The learned judge's comment on these principles was that it was hardly in the nature of discretion that its exercise should be adjusted by exact rule, but by acknowledged method and general classification, the suitor may in some measure be enabled to assume the prospect before him and to foresee the penalties under which he launches into action. On the evidence I cannot find that the plaintiffs had reasonable ground for opposing the probate of the will of 14th September, 1960, and seeking a revocation, as I have already found there were no circumstances of suspicion surrounding its execution. After the death of the deceased the plaintiffs appeared to have recognised that the will of the 14th September, 1960, was the true will and last testament of the deceased as they supplied the necessary particulars in relation to the application for probate to the solicitor, and the first-named plaintiff was audacious enough to withdraw the sum of \$16,000 from the account

of the estate of the deceased at the Royal Bank of Canada, and it was only after the defendant made clear her intention of passing the property of the estate, to which she was entitled as a beneficiary, to her daughters, that dissatisfaction arose.

The other aspect of the matter is that the plaintiffs alleged fraud and undue influence which they were not in a position to substantiate. In *Spiers v. English*, (1907 P.) p. 122, the defendant, the person who obtained the will and was merely interested under it was a relieving officer. His character could not be impeached and Sir GORELL BARNES held that the plaintiff, who had alleged undue influence and fraud, had shown no ground on which the court ought to interfere with the ordinary rule that costs follow the event. Thus, in this case, I can find no ground on which I can properly order that the plaintiffs' costs be borne by the estate.

I therefore dismiss the plaintiffs claim and enter judgment in favour of the defendant, and on the counterclaim I declare and order accordingly that the deceased executed his true last will and testament dated the 14th September, 1960, whereby he appointed the defendant his executrix, and I pronounce in favour of the validity of the said will in solemn form of law, and direct that the probate granted of the said will on the 22nd day of December, 1964, be handed out to the executrix.

The defendant is to recover her taxed costs against the plaintiffs both on the claim and counterclaim, failing which the defendant's costs are to be recoverable out of the estate of Abdul, B.R. No. 378, also known and called Abjal, deceased.

Six weeks stay of execution granted.

Judgment for the defendant.

RE APPLICATION BY ROBERT SOOKRAJH

[High Court (Chung, J.) January 30, 1969].

Constitutional law—Freedom of Movement—Applicant committed for trial—Before trial applicant desirous of leaving country temporarily—Prevented by police—Whether applicant entitled to leave country—Constitution of Guyana arts. 14, 19—Criminal law (Procedure) Ordinance Cap. 11 ss 2, 64(2), 71, 77, 78, 79(4), 84, 88, 116.

S. who was charged with forgery was committed by a magistrate to stand trial in the Supreme Court and was admitted to bail. Before any indictment was presented S wanted to leave the country temporarily on business but was told by police and immigration officers that he would not be allowed to do so. S, by motion sought a declaration that he had the right to leave Guyana under Art. 14. of the Constitution which provides that "no person shall be deprived of his freedom of movement, that is to say . . . the right to leave Guyana".

HELD: (i) Arts. 14(3)(d) and (h) recognise that where a law makes provision for the imposition of restrictions on a person's right to leave Guyana (a) for the purpose of ensuring that he appears before a court at a later day for trial or (b) that are reasonably required in order to secure the fulfilment of any obligations imposed on that person by law, such a law is not in contravention of Art. 14.

(ii) the restrictions are imposed by ss 71 and 84 of Cap. 11 under which S cannot leave the country without the leave of the Supreme Court acting in its criminal jurisdiction.

Application dismissed.

CHUNG, J.: This is an application by way of Originating Notice of Motion, filed on the 2nd January, 1969, for —

- (a) a declaration to be granted that the applicant has a right to leave Guyana without interference from the Commissioner of Police, whether in his capacity of Chief Immigration Officer or otherwise;
- (b) such further or other orders, such writs and such directions be made, issued or given, as the court may consider appropriate for the purpose of enforcing or securing the enforcement of this writ;
- (c) such other relief as the court may seem just.

The applicant filed an affidavit in support of motion stating:

- (1) that he is a businessman and cinema proprietor;
- (2) on or about the 14th day of November, 1968, he was committed by a magistrate of the Georgetown Judicial District to stand trial at the January Assizes on a charge of forging of certain documents purporting to be cinema returns with intent to defraud, contrary to section 279 of the Criminal Law (Offences) Ordinance, Chapter 10, Laws of Guyana, and was admitted to bail in the sum of two thousand dollars and the recognisance of bail was also signed by a surety.
- (3) he has not yet received a copy of the depositions taken at the preliminary inquiry as he understands it is not yet completed and available and so far as he is aware no indictment has been presented against him by and in the name of the Director of Public Prosecutions.
- (4) he is desirous of travelling to the United States of America and to the United Kingdom for urgent business transactions which require his personal attention but he has been informed by the Assistant Commissioner of Police (Crime), and by the Immigration Officer at Atkinson Field Airport and verily believe that the Immigration Officers at Atkinson Field have been authorised to prevent him from leaving Guyana.

RE APPLICATION BY ROBERT SOOKRAJH

- (5) that he holds several transports of immovable property in Guyana to the value of \$1,204,000.
- (6) that their market values are within the vicinity of \$3,295,000.
- (7) that all the transports, with the exception of one, are presently lodged with the Commissioner of Inland Revenue who was ordered by the High Court of the Supreme Court of Judicature in or about September, 1968, to issue him a tax exit certificate.
- (8) he desires to leave Guyana for a period of six weeks in order to transact urgent and important business and promises and undertakes to return to Guyana for the purpose of standing trial at the Demerara Assizes if he is indicted, and that he is willing to lodge security with the court, if necessary, for this purpose.
- (9) from and since 1957 he has left Guyana on numerous occasions, sometimes as often as sixteen times a year, and travelled to the United States of America, the United Kingdom, Central and South America, India and the West Indies in connection with his cinema business.

In 11, 12, and 13, he refers to Articles 14 and 19 of the Constitution of Guyana, stating that under Article 14 of the Constitution of Guyana he cannot be deprived of his freedom of movement, including his right to leave Guyana as no order has been made under the authority of any law for his lawful detention and that adequate means of redress are or have not been available to him under any law other than the provisions of Article 19 of the Constitution of Guyana. He makes this application to the court under Article 19 of the Constitution of Guyana for the relief sought under originating notice of motion.

Article 14(l) reads:-

"No person shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Guyana, the right to reside in any part of Guyana, the right to enter Guyana, the right to leave Guyana and immunity from expulsion from Guyana.

- (2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this article.
- (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question makes provision -
 - (d) for the imposition of restrictions, by order of a court, on the movement or residence within Guyana of any person or on any person's right to leave Guyana either in consequence of his having been found guilty of a criminal offence under

the law of Guyana or for the purpose of ensuring that he appears before a court at a later date for trial for such a criminal offence or for proceedings preliminary to trial or for proceedings relating to his extradition or lawful removal from Guyana;

- (h) for the imposition of restrictions on the right of any person to leave Guyana that are reasonably required in order to secure the fulfilment of any obligations imposed on that person by law."

The question is, can the applicant who has been committed on bail to stand trial at the January Assizes, at this stage, complain that his right to leave Guyana is being interfered with by the Commissioner of Police, in contravention of Article 14 of the Guyana Constitution.

No authority has been cited and it seems there is no authority on this point. The only case referred to is the case of *Sawhney v. Assistant Passport Officer Government of India* - Supreme Court of India decision reported in the Times Newspapers, April 15, 1967. In that case the court held that a person resident in India has a fundamental right to travel abroad and the refusal by the government to issue him a passport is a denial of the rights to personal liberty and equality before the law guaranteed by the Constitution of India. But in that case the person was not charged with a felony and committed on bail to stand his trial and it is no authority to say that the applicant's right to leave Guyana is being interfered with.

Article 14(3)(d) recognises the fact that where the law in question makes provision for the imposition of restrictions, by Order of Court, on any person's right to leave Guyana for the purpose of ensuring that he appears before a court at a later date for trial, for such a criminal offence is not in contravention of Article 14.

Article 14(3)(h) recognises the fact where the law makes provision for the imposition of restrictions on the right of any person to leave Guyana that are reasonably required in order to secure the fulfilment of any obligations imposed on that person by law, is not in contravention of article 14.

Section 71 of Chapter 11 states:

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

In *R. v. Reid* 1959 L.R.B.G. 306 at p. 318, LUCKHOO, J., as he then was, stated:

"In my view the words 'commit him for trial to the next practicable sitting of the court for the County in which the inquiry is held' in section 71 of the ordinance mean 'commit him to prison or on bail,

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where bail may be lawfully granted, to await his trial at the next practicable sitting of the court for the County in which the inquiry is held."

In this instance, the applicant is committed on bail. He and his surety have signed a recognisance as required under Section 84 of Chapter 11.

Section 84(2) of Chapter 11 states:

"The condition of the recognisance shall be that the accused person shall personally appear before the Supreme Court at its next practicable sitting, . . . there and then, or at any time within twelve months from the date of the recognisance, to answer to any indictment that may be filed against him in the said court, and that he will not depart the said court without leave of the court, and that he will accept service of the indictment at the Magistrate's Court nominated by him in pursuance of Section 115 of this ordinance."

Under Section 2 "the court" means the Supreme Court acting in the exercise of its criminal jurisdiction.

Counsel for the applicant have submitted that even though the applicant has been committed to stand trial at the January Assizes, 1969, as he is on bail, he is free to leave Guyana if he so wishes, provided he returns in time for his trial, and for the police to stop him, or threaten to stop him, is in breach of Article 14 of the Guyana Constitution.

They have submitted that Section 84(2) means (1) that only if indicted he is to appear before the court, and (2) only after he appears in court is it necessary for him to have the leave of the court to depart from the court.

Counsel for the Commissioner of Police has submitted that there are three distinct conditions on the recognisance, according to Section 84(2) of Chapter 11 —

- (1) He must appear before the Supreme Court at the January Assizes, there and then, or at any time within twelve months from the date of the recognisance to answer to any indictment that may be filed against him in the said court.
- (2) That he will not depart the said court without leave of the court.
- (3) That he will accept service of the indictment at the Magistrate's Court.

He has submitted that the applicant cannot leave the jurisdiction of the court without leave of the court and all the conditions took effect on the signing of the recognisance.

If Section 84(2) is to be interpreted as submitted by counsel for the applicant, that only after an accused appears before the court then it becomes necessary for him to have leave of the court in order to depart there-

from, it would mean that a surety would not only be responsible for the appearance of the accused person at the Assizes to answer an indictment, but he would also be responsible for his appearance day after day until the case is concluded. In other words, the recognisance would not be fulfilled until the case is concluded.

It has long been recognised by the courts, that once the accused person appears and pleads to an indictment the recognisance entered into by the surety and the accused is fulfilled and a fresh recognisance has to be entered for the appearance of the accused from day to day at the trial, otherwise the accused is remanded to prison until his trial is concluded. Similarly, a prisoner who has been committed to prison to stand his trial, once he appears in court to answer and plead to the indictment, the committal warrant ceases and a remand warrant is then made out to ensure his appearance from day to day.

It is interesting to note that section 84(2) reads:

"The condition of the recognisance shall be that (then follow the words 'the accused person shall personally appear before the Supreme Court') and that (then follow the words 'he will not depart the said court without leave of the court') and that (then follow the words 'he will accept service at the Magistrate's Court) and that the condition of accepting service at the Magistrate's Court comes last."

It seems to me that section 84(2) imposes three conditions in a recognisance:

- (1) The accused person, *at all times* from the beginning of the Assizes to which he had been committed, to within twelve months from the date of the recognisance, has to make himself available to appear before the Supreme Court to answer to any indictment that may be filed against him.
- (2) Not to depart from the Supreme Court without leave of the said court. This condition covers the period from the date of committal to his appearance before the court. This simply means that he must not depart from within the reach of the court without leave of the court from the date of committal to the date of his appearance before the court, and
- (3) To accept service of the indictment of the Magistrate's Court.

The applicant by order of a court, in accordance with Section 71 of Chapter 11, was committed on bail on the condition mentioned in Section 84(2), to stand his trial. He therefore is compelled to make himself available at all times from the beginning of the January Assizes, to within twelve months from the date of his recognisance to appear before the Supreme Court to answer to an indictment that may be filed against him.

In order to satisfy this condition he has to be *at all times* within reach of the court. Moreover, if I am right in my interpretation as to 'not to depart

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the said court without leave of the said court', then the applicant cannot leave the jurisdiction of the court without leave of the court, so that both conditions (1) and (2) restrict him from leaving Guyana. That being so, how can he complain that his right to leave Guyana under Article 14 is being interfered with? His restrictions to leave has been made under Sections 71 and 84(2) of Chapter 11.

Counsel for the applicant have submitted that even if there is a law to prevent him leaving, the police have no right to stop him. They can only stop him if a warrant of apprehension has been issued. They ask the court to make a declaration that the police cannot do so, but the court cannot make a declaration if he has no right to leave Guyana, having been committed on bail to await his trial.

Moreover if the applicant cannot depart without leave of the Supreme Court, acting in its criminal jurisdiction, then it follows that he can make an application to the said court for such leave. That being the case, this court, cannot entertain this application.

Article 19(1) states:

"Subject to the provisions of paragraph (6) of this Article, if any person alleges that any of the provisions of Articles 4 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

(2) The High Court shall have jurisdiction —

(a) to hear and determine any application made by any person in pursuance of the preceding paragraph 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."

I am fortified in my view as to the interpretation of Section 84(2) by Sections 88, 77, 79(4) and 116 of Chapter 11. These sections infer that a person who has been committed for trial on bail has to be within the jurisdiction of the courts, and taken along with Section 84(2) he may depart therefrom with leave of the Supreme Court acting in its criminal jurisdiction.

Section 88 reads as follows:

"When an accused person has been bailed in manner aforesaid, the magistrate by whom he has been bailed, or any other magistrate or justice of the peace, if he sees fit, on the application of the surety or of either of the sureties of the person, and on information being laid in writing, and upon oath by that surety, or by some person on the surety's behalf, that there is reason to believe that the person so bailed is about to abscond for the purpose of evading justice, may issue his warrant for the apprehension of the person so bailed"

Section 77(1) reads:

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

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

Section 78 reads:

"If, after the receipt of any documents mentioned in this Title, the Director of Public Prosecutions is of the opinion that the accused person should not have been committed for trial but that the matter should have been dealt with summarily, the Director of Public Prosecutions may, if he thinks fit, at any time after that receipt, remit the cause to the magistrate with directions to deal with it accordingly ..."

Section 79(4) reads:

"When the Director of Public Prosecutions directs that an inquiry shall be re-opened under Section 77, or that a matter shall be dealt with summarily under Section 78 of this Ordinance, the following provisions shall have effect, that is to say —

- (b) Where the accused person is on bail, the magistrate shall issue a summons for his attendance at the time and place when and where the proceedings are to be held; and
- (c) thereafter the proceedings shall be continued under the provisions of this ordinance "

Under Section 64(2), the evidence of those witnesses shall be given in the presence of the accused person; and the accused person shall be entitled to cross-examine them.

Section 116 reads:—

"Where any person against whom an indictment has been duly presented and who is then at large does not appear to plead thereto, whether he is under recognisance to appear or not, the court may issue a warrant for his apprehension."

If a person committed for trial on bail is allowed to leave the jurisdiction of the court, as he wishes, then all these sections would be stultified.

"Commit him for trial" in Section 71 of the ordinance means commit him to prison or on bail to await his trial. In both instances it is to ensure the appearance of an accused at his trial. If he is allowed to leave the juris-

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diction of the court, how can his appearance for trial be ensured? If he cannot leave the jurisdiction of the court, then this court cannot make a declaration that his right under Article 14 is being interfered with.

The applicant has mentioned in his affidavit that he is the owner of several immovable properties to the value of over \$3,000,000, but he has not mentioned his liabilities. He mentioned that by Order of the High Court all his transports, except one, are now lodged with the Commissioner of Inland Revenue, who was ordered by the said court to issue him a tax exit certificate. This shows that the Commissioner of Inland Revenue is not satisfied with the applicant's tax returns, but this court is not concerned with the financial position of the applicant or the dispute between himself and the Commissioner of Inland Revenue.

In the circumstances, this originating notice of motion is dismissed.

Application dismissed.

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[Court of Appeal (Luckhoo, C., Persaud, Crane JJ.A.)
December 6, 12, February 4, 1969.]

Crown lands—Use as rice lands—Whether Crown bound by ordinance protecting tenancies.

Rice lands—Bequest of—Procedure for securing transfer to beneficiary.

Magistrates Court—Jurisdiction to award damages—Rice Farmers (Security of Tenure) Ordinance 1956 ss 3, 5(1), 11(k), 23, 37, 51(1), 58—. The Interpretation Ordinance Cap. 5 s 23—The Crown Lands Ordinance, Cap. 175 s 5—The Crown Lands Regulations Cap. 175 reg. 86.

The respondent's husband was the appellant's tenant in respect of rice lands which the appellant held upon a demise from the Crown. The respondent's husband died on March 13, 1964 and by his will bequeathed the tenancy to the respondent. S 37 of the Rice Farmers Security of Tenure Ordinance 1956 required the executor or legatee to notify the landlord of the bequest within 21 days of the death, unless unavoidably prevented, and to request the landlord's consent of a transfer of the tenancy which consent shall not be unreasonably refused. Upon refusal the landlord must state his

reasons and the legatee may appeal to the assessment committee whose decision shall be final. On March 14, 1964 the appellant re-entered the rice lands and re-ploughed them, destroying the growing crop thereon and excluded the respondent. On March 25, 1964, the respondent sent the notice required by s 37 then sued in the Magistrate's Court for damages for loss of crops for 1964 to 1966, where she was successful. An appeal to the Full Court was dismissed. On appeal.

HELD: (i) that s 3 of the Rice Farmers (Security of Tenure) Ordinance 1956 binds Crown Lands by necessary implication once those lands are let as rice lands.

(ii) that a claim for damages arises out of the Ordinance and must be instituted in the magistrates Court.

(iii) that the respondent did not pursue her rights under s 37 to have the tenancy transferred to her and since the tenancy was one from year to year, it expired in 1964 and the damages would be restricted to loss in that year.

Appeal dismissed. Order of Full Court varied.

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

M. Poonai, with C. Pawaroo for the respondent.

PERSAUD, J.A.: This appeal raises two important points of some substance affecting the interpretation of the Rice Farmers (Security of Tenure) Ordinance, 1950. The first is, generally speaking, whether or not the ordinance applies to Crown lands in Guyana, that is to say, whether the Crown is bound by the ordinance; and the second is, what interest in a tenancy of rice lands passes to a legatee and what steps should be taken under the ordinance by the latter to give effect to such a bequest. This second point also involves the jurisdiction of the Magistrate's Court to award damages in a case such as this, that is, whether the respondent ought to have appealed to the Assessment Committee for an order for the transfer of a tenancy of rice lands to her, under s. 37(d) of the Rice Farmers (Security of Tenure) Ordinance, 1956, or, as she in fact did, to have filed a claim in the Magistrate's Court for damages.

The facts in this case briefly are as follows:

Prior to 1962 the respondent's husband became the appellant's tenant in respect of 10 acres of rice lands situate at Dingwall, Corentyne, which the appellant held upon a demise from the Crown. Upon an application of the tenant, the maximum rent of the holding was assessed, fixed and certified by the Rice Assessment Committee for that area under the provisions of the Rice Farmers (Security of Tenure) Ordinance, 1956 (No. 31), hereinafter referred to as "the ordinance."

The respondent's husband died on the 13th March, 1964, and under his last will and testament he bequeathed the tenancy to the respondent. The latter obtained probate on December 15, 1964; but before doing so, on

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March 25, 1964, the respondent's solicitor addressed a notice to the appellant purporting to comply with s. 37(a) of the ordinance notifying the appellant of the bequest and of the respondent's intention to continue in occupation of the lands. But prior to this—on March 14, the day after the respondent's husband died—the appellant and her servants and agents entered upon and re-ploughed the land thereby destroying the crop which had been sown by the respondent's husband and which was then growing on the land. As a result of the appellant's action, the respondent has been deprived of the use of the land for the years 1964 to 1966.

In June 1966, the respondent, in her capacity as the executrix of the estate of her late husband, lodged an action against the appellant in the Magistrate's Court claiming the sum of \$12,000 for the loss of crops for the three years mentioned, alleging that the value of the crop lost for the year 1964 as a result of the wrongful acts of the appellant and her agents was \$4,000. The magistrate found for the respondent and awarded the sum of \$4,800 as damages in respect of the years 1964 to 1966. That judgment was affirmed by the Full Court of Appeal, and it is against the judgment of the Full Court that this appeal has been brought.

Before embarking on the discussion of the points of law raised in this matter, it is necessary and important to state that the lands in question were Crown lands subject to the provisions of the Crown Lands Ordinance, Cap. 175, this being the basis on which this matter was argued before the other two courts, and in this court.

It should also be mentioned that before the action was filed in the Magistrate's Court, the respondent had instituted an action in the High Court and that one of the points raised for the defendant in the Magistrate's Court action was the fact that there was then pending an action in the High Court which had the effect of ousting the jurisdiction of the Magistrate's Court. The latter action was withdrawn, but in any event, the contention was rejected by the magistrate, and was not pursued either in the Full Court or in this court.

It has for some time now been well settled that where certain remedies are being sought under the ordinance in respect of land protected by the ordinance, such a claim must be brought in the Magistrate's Court. See s. 51 of the ordinance, and *White v. White*, (1962) L.R.B.G. 316, and *Ramkissoon v. Sankar*, (1962) L.R.B.G. 411. As has been pointed out by LUCKHOO, J. (as he then was) in *Hicken v. Ohab*, (1958) L.R.B.G. 98, and approved by the Federal Supreme Court in *Khan v. Rahaman* (Civil Appeal No. 41 of 1961), the principles to be applied in respect of an application under the ordinance [meaning the Rice Farmers (Security of Tenure) Ordinance, 1956] are much the same as those applied under the Rent Restriction Ordinance and the Rent Restriction Acts of the United Kingdom. In fact, so far as premises protected under the Rent Restriction Ordinance are concerned, the decisions in *Small v. Saul*, (1966) 8 W.I.R. 351, and *Lee-Hong-Gat v. Hardeen*, (1956) L.R.B.G. 158 have also so decided.

To return now to what I regard as the main submission of the appellant, viz. that Crown lands in the hands of a sub-tenant are not subject to the terms of the provisions of the ordinance.

With his accustomed industry, counsel for the appellant has adverted this court's attention to a number of English cases which dealt with this question arising out of the Rent Restriction Acts, and has submitted that those authorities establish that Crown property in the hands of a sub-tenant are exempt from the Acts, and are directly applicable to the case in hand.

As expressed in BACON'S ABRIDGMENT (7th Ed. p. 462), the general rule is "that where a statute is general, and thereby any prerogative, right, title or interest is divested or taken from the King, in such a case, the King shall not be bound, unless the statute is made by express terms to extend to him".

But cases later in time have developed the rule that the Crown may be bound not only expressly, but by clear implication. Thus in *Attorney General v. Hancock*, [(1940) 1 All., E.R. at p. 34], it is said:

" the true rule is probably, as has been put in argument, more likely that it is not that the Crown merely legislates for its subjects but that very often the Crown legislates for itself and its subjects, and that, when the legislation in question is one which would otherwise affect, or which would affect, the Crown's rights, interests and prerogatives, then the Act does not apply to the Crown unless the Crown is specially named in that sense, and it is only a short step from that proposition to the further one that the Crown is again to be regarded as being party to the Act of Parliament which affects itself when it is shown that the Crown was to be affected by necessary implication from the language of the statute."

Again in *Stewart v. Conservators of the River Thames* 5 T.C. 303, BRAY, J., stated the rule thus:

"There is no doubt that there is a very good rule with regard to the construction of all statutes, that the Crown is not affected unless it is named; but it is not necessary that the Crown should be named expressly if it be named impliedly and if it is made quite clear by the words used that the Crown is intended to be affected, the mere fact that the Crown is not expressly mentioned will not prevent that provision from having effect."

And as recently as 1946, the Privy Council in dealing with the argument that whenever a statute has been enacted for "the public good", the Crown though not expressly named, must be held bound, said per Lord DUPARCQ in *Province of Bombay v. Municipal Corporation of Bombay*, (1947) A.C. at p. 63:

"If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms

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that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound. Their Lordships will add that when the court is asked to draw this inference, it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words."

The rule therefore apparent from the decisions is that the Crown is not bound by the provisions of a statute unless it is expressly so stated, but that the Crown may also be bound, even though not named, by clear implication.

As I have already stated, we have been referred to a number of cases, instances where the Rent Restriction Acts of the United Kingdom have been held not to be binding on the Crown.

In *Clark v. Downes*, (1931) All E.R. Rep. 157, for example, ROMER, L.J., expressed the view (at p. 160 *ibid*) that "the Acts (meaning the Rent Restriction Acts) not binding the Crown, it is the duty of the courts so to construe the Acts that the Crown and its property are in no way prejudicially affected by the Acts." The view was also expressed—and much has been made of this in argument before us—that if the Acts applied to the houses in question the moment they passed out of the ownership of the Crown, it follows that the reversion, while the houses were in the possession of the Crown, would be worth considerably less than it would have been worth but for the Acts.

In my opinion, *Clark v. Downes* does not offer any assistance in determining whether or not an Act applies to the Crown, because in that case it was so assumed, and the arguments were based on that assumption. But it is authority for saying that where premises originally owned by the Crown are sold subject to existing tenancies, and a lease is granted by the new owner also subject to existing tenancies, the premises will not be subject to the Rent Restriction Acts once the "existing tenancies" subsists, and also for the proposition that the Acts operate *in rem* and not *in personam*.

Similar views were expressed in *Rudler v. Franks*, 63 T.L.R. 109—a case which concerned Crown property, and in which it was held clearly that the Rent Acts did not apply to Crown property—the Court therein reiterating the opinion expressed in *Clark v. Downes* that the Acts apply *in rem* and not *in personam*.

Assuming that the relevant legislation is silent on this point, I accept the proposition that Crown property must not be affected so as to prejudice the Crown's rights, interest or prerogatives. As was stated in *Clark v. Downes* and *Rudler v. Franks* in the case of premises owned by the Crown, the Crown's right to the reversion in the case of those premises must not be prejudiced. And it is clear that the reversion referred to must be the reversion upon an existing tenancy and not when the original tenancy has been terminated, and a new tenancy created. [See *Wirral Estates, Ltd. v. Shaw*, (1932) All E.R. Rep. 43],

The Full Court held the view that *Critchley v. Clifford*, (1961) 3 All E.R. 388 is analogous to the instant case. With great respect, I do not agree with that view insofar as the facts are concerned, as in that case the question of the rights and privileges of the Crown did not arise for consideration. In that case a farm of some 200 acres, including a cottage, was let to the plaintiff. The farm was subject to the Agricultural Holdings Act, 1948 (U.K.). The plaintiff sub-let the cottage which was within the limits of rateable value of dwelling-houses to which the Rent Restriction Acts (U.K.) applied. The sub-tenant was not, however, connected with work on the farm, and accordingly the exemption under the 1948 Act from the application of the Rent Restriction Acts would not apply to the sub-letting of the cottage if viewed separately as a letting of its own. The plaintiff sought to recover possession of the cottage from the sub-tenant, arguing that by virtue of the Increase of Rent and Mortgage Interest (Restriction) Act, 1920 (U.K.) which excluded from the Rent Restriction Acts the letting of a farm with a cottage to the plaintiff as 'a house let together with land other than the site of the house' placed the cottage outside the protection of the Rent Acts.

It was patent that the plaintiff would have been entitled to possession if the Agricultural Holdings Act applied, but not if the Rent Restriction Acts did. It was held that the word 'let' in the 1920 Act referred to the subtenancy, and therefore the Rent Acts applied. It is to be observed that it was conceded that the occupying sub-tenant would not have been protected by the Rent Restriction Acts as against the superior landlord, if the tenancy of the farm had been determined.

But the principles enunciated in that case can with profit be borne in mind, provided it is remembered that once the relevant statute is held not to bind the Crown, those principles would be of little avail to a sub-tenant. It was argued in that case that because the cottage formed part of the holding of the 200 acres which had been originally let for agricultural purposes, the holding of each and every part of it was irretrievably stamped with the agricultural exemption from the Rent Acts which occurred on that letting. And in dealing with that argument, DANCKWERTS, L.J., said (*ibid* at p. 298):

"Admittedly, if the landlord's tenancy of the farm came to an end, the tenant would find that he was not protected against the superior landlord: *Cow v. Casey*; *Baron Sherwood v. Moody*; *Knight v. Olive*. But support can be found for the view that a tenant might be protected against his lessor, though not protected against the title paramount, in *Dudley and District Benefit Building Society v. Emerson*. It seems to me that it is necessary, in applying the Rent Acts, to ascertain in any given case who is the landlord and who is the tenant and which is the letting to which the provisions of the material Act are referring. . . ."

DANCKWERTS, L.J., referred to *Lloyd v. Cook* [(1928) All E.R. Rep. 212], and to *Prout v. Hunter*, [(1924) All E.R. Rep. 58]. In the former

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case, GREER, L.J., when considering the meaning to be attributed the word "landlord" in s. 2 of the Rent Restriction Act, 1923, said that that term must mean the immediate landlord of the occupying tenant. And in the later case, SARGANT, L.J., in dealing with the status of a dwelling-house under the Rent Acts said (*ibid* at p. 58):

"If the status of the house as regards the rent is to be ascertained by looking at the position of the occupying tenant, it seems to me that here there is quite as much reason, perhaps more reason, to determine the status of the house with regard to whether the tenant can be evicted by considering the position of the occupying tenant."

And to revert to *Critchley v. Clifford* (*supra*), DANCKWERTS, L.J., had this to say at p. 297 (*ibid*):

"It has been said that the Acts apply to houses, not persons; that they operate *in rem* and not *in personam*; and that they operate on property. I must confess that I find these expressions more confusing than helpful; nor do they seem to me to be really accurate descriptions of the operation of the Acts. Of course, the Acts deal with houses below a certain value, and, for a tenant to gain the benefit of the Acts, the house in question must come within the class of dwellings to which the Acts apply. But it is a letting which brings the operation of the Acts into effect."

There is no dissent from the opinion expressed in the cases hereinbefore referred to as regards the application of the Rent Acts in England, and if the ordinance does not bind the Crown, then, to use the language of the Full Court "the sub-tenant of a lessee of Crown land so long as the lease between the Crown and the lessee is in existence or so long as the land remains Crown land could not claim the protection of the ordinance."

It is therefore now time to examine the local cases in which provisions of the ordinance came up for interpretation.

A useful starting point would be, I think, *Khan v. Rahaman* (Civil Appeal No. 41 of 1961)—a decision of the Federal Supreme Court—where GOMES, C.J., discussed the object of the ordinance. GOMES, C.J., said:

"The main object of the ordinance, as its long title indicates, is to give security of tenure to tenant rice farmers. It achieves that object by imposing restrictions on the common law rights of landlords and tenants of rice lands by the constitution of assessment committees in whom it vests powers and authority to adjudicate upon matters arising out of the relationship of landlord and tenant and to make orders and give directions in relation thereto."

In fact the long title of the ordinance recites thus:

"An ordinance to provide better security of tenure for tenant rice farmers; to limit the rent payable for the letting of rice lands; and for purposes connected with the matters aforesaid."

It has been contended that the point now being canvassed was never argued before the Federal Supreme Court in *Bishundyal v. Ross*, (1962) L.R.B.G. 299. In that case Crown lands had been rented by the appellant from the respondents for the purpose of cultivating rice. The respondents claimed to be entitled to cultivate the lands both by virtue of their ownership of the front lands, and also by right of a permission to occupy granted by the Commissioner of Lands and Mines to certain named proprietors of the front lands including two of the respondents. After the appellant had ploughed and cultivated the land he held under lease from the respondents, the latter re-entered and ploughed. The question was whether, having regard to s. 3 of the ordinance, the respondents could seek to terminate the tenancy except as provided by the ordinance and it was held that they could not. It is true that there is no specific finding by the Federal Court that the ordinance applied to Crown lands; but there is the fact that counsel for the respondents applied for and was granted leave to argue that the judge had erred in finding that the appellant's possession was protected by the ordinance (see p. 301 *ibid*). When regard is had to the finding of the court after it had given due consideration to the contention that even if the appellant had disclaimed his landlord's title, thereby forfeiting its contracted tenancy, he still remained a person protected by the ordinance, it is my opinion that the court was in truth deciding that the Ordinance applied to the tenancy even though the lands concerned were Crown lands. I can see no other interpretation of that decision.

In *Chattergoon v. Outar*, (1961) L.R.B.G. 251, ADAMS, J., expressed the opinion that the ordinance did not apply to Crown lands. The learned judge based his conclusion upon the combined effect of s. 58 of that ordinance and s. 23 of the Interpretation Ordinance, Cap. 5. My understanding of the decision in *Bishundyal v. Ross* (*supra*) is that *Chattergoon v. Outar* has been dissented from by implication. Even if this were not so, I regret my inability to accept the dictum of ADAMS, J., if it were intended to mean that in a case of a sub-lease of Crown lands for the cultivation of rice, that sublease is not protected under the ordinance.

As is well known, every case must turn on its own facts, and as has been pointed out by Lord UPJOHN in the Privy Council in *Ogden Industries Pty. Ltd. v. Heather Doreen Lucas*, (P.C. No. 12 of 1968), an appeal from the High Court of Australia:

" in a Common Law system of jurisprudence which depends largely upon judicial precedent and the earlier pronouncements of judges, the greatest possible care must be taken to relate the observation of a judge to the precise issues before him and to confine such observations, even though expressed in broad terms, to the general compass of the facts before him, unless he makes it clear that he intended his remarks to have a wider ambit. It is not possible for judges always to express their judgments so as to exclude entirely the risk that in some subsequent case their language may be misapplied

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and any attempt at such perfection of expression could only lead to the opposite result of uncertainty or even obscurity as regards the case in hand.

These general principles are particularly important when questions of construction of Statutes are in issue.

"It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself."

In dealing with the effect of s. 58 of the ordinance and s. 23 of the Interpretation Ordinance in *Chattergoon v. Outar*, ADAMS, J., expressed himself thus:

"In my view, the combined effect of these two last sections is that grants, leases, licences and permissions under the Crown Lands Ordinance in relation to rice lands are exempted from the restrictive provisions of the Rice Farmers (Security of Tenure) Ordinance. There is nothing in this ordinance that abrogates the Crown's rights as prescribed in the earlier ordinance, either expressly or by necessary implication. To hold otherwise would mean not merely putting a wrong construction on the various ordinances but to invite inconvenient, embarrassing and absurd consequences in the relations between the Crown and applicants. For example, at the termination of a lease through effluxion of time, unless the Crown can put forward one of the statutory grounds for possession, a lessee of rice lands might be able to remain indefinitely in occupation."

In that case, the lessees of Crown lands sub-let certain portions to the plaintiff without the consent of the Commissioner of Lands and Mines. The head lease expired and was not renewed, but the plaintiff remained in occupation. The plaintiff then applied to the District Commissioner for a lease of the areas he had been occupying, and paid fees and one year's rent in advance. The plaintiff alleged that he was told that he could continue his occupation, but admitted that he was not given permission in writing so to do by the Lands and Mines Department. The defendants in the meantime applied to the Commissioner of Lands and Mines (the officer who is vested with the authority to grant permission to occupy Crown lands) who gave them permission to occupy 15 acres of the land hitherto occupied by the plaintiff. The defendants then entered upon the land, ploughed it, and sowed a crop of rice, as a result of which the plaintiff claimed damages for trespass and an injunction.

It was in these circumstances, and after the plaintiff had urged that he was entitled to the protection of the ordinance, that the judge expressed the point of view referred to above.

It will be recalled that the action was one in trespass, and as I apprehend the situation, the defendants were able to show that they were in occupation by virtue of the authority of the Commissioner of Lands and Mines, i.e., they were able to set up a title in themselves which destroyed the plaintiffs action for trespass. This, in my opinion, was the true *ratio* in that case.

My view of the matter is that s. 3 binds Crown lands by necessary implication once those lands are let as rice lands. To put it another way, the ordinance would govern any agreement of tenancy of whatever land provided that agreement of tenancy is one contemplated by the ordinance, that is, a tenancy of rice lands as defined by s. 3 of the ordinance. The ordinance may be regarded *in rem* in that limited sense, that is, limited to the use to which the land is put. After all, this is the whole object of the ordinance.

S. 3 of the ordinance provides:

"Anything in any law or in any agreement in respect of the letting of rice lands to the contrary notwithstanding every agreement of tenancy, whether written or oral, shall be deemed to be an agreement of tenancy from year to year and no such agreement, whether made before or after the commencement of this ordinance, shall be terminated by the landlord or by the tenant, except as in this ordinance provided."

And s. 58 provides as follows:

"Except as in this ordinance expressly provided, nothing in this ordinance shall prejudicially affect any power, right or remedy of a landlord, or tenant, or other person, vested in or exercisable by him by virtue of any other ordinance or law, or under any custom of the country, or otherwise in respect of any agreement of tenancy or other contract, or of any fixtures, tax rate, rent or other thing."

In my opinion, s. 58 is not applicable, as that section saves the power, right or remedy of landlord, or tenant or other person, vested in or exercisable by him by virtue of *any other* ordinance, or except when it is otherwise provided in the ordinance. And s. 3 expressly provides for the security of tenure of rice lands—precisely what the long title suggests. Having expressed the view that s. 3 of the ordinance binds the Crown by necessary implication, it must follow that s. 23 of the Interpretation Ordinance (Cap. 5) will not apply.

Counsel has referred us to the Crown Lands Ordinance (Cap. 175) and the Crown Lands Regulations (Sub. Leg. Cap. 175), particularly Reg. 86, and has submitted that the whole scheme of the legislation is to preserve the control over Crown lands, their disposition, and possession, and that control over such lands is maintained by the Crown even after a licence, lease or permission has been granted. For example, s. 5 of the Crown Lands

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Ordinance reserves the right to minerals, and s. 15 provides that when a grant, licence or permission is determined, all buildings and erections on the land at the time shall belong to Her Majesty - all provisions pre-eminently in support of the appellant's contention, it might be said. There can be no doubt but that the Crown Lands Ordinance and Regulations do have the effect of providing for the control of Crown lands, but in the face of such clear language as is contained in s. 3 of the ordinance, which is a statute much later in time than the Crown Lands Ordinance, I am impelled to the conclusion which I have already expressed.

When the ordinance was enacted in 1956, it was the case that persons held leases of rice lands from freehold owners as well as from occupiers of Crown lands, and it must be assumed that the Legislature was cognisant of this fact. Nowhere in the ordinance is there an attempt to differentiate between these two categories of tenancies. It could hardly be contended in the circumstances that the ordinance, as comprehensive as it is, could have been enacted only for the benefit of those persons who were tenants of freehold owners in particular areas only. In fact, the entire ricegrowing areas were zoned and the maximum basic rental per acre was prescribed in respect of each zone by the ordinance. It is clear, to my mind, that the Legislature by enacting the ordinance was attempting to deal with a socioeconomic problem affecting the entire country which it must have felt its duty to solve, and in my judgment it is idle to contend that tenancies of Crown lands would have been excluded in such an exercise.

Further, s. 23 of the ordinance makes provision for the addition to the basic rental of local authority rates, drainage and irrigation rates and conservancy rates—all rates which are appraisable in respect of Crown lands. See, for example, s. 118(2) of the Local Government Ordinance (Cap. 150).

In my judgment, therefore, the scheme of the ordinance makes it abundantly evident that s. 3 protects all tenancies of rice lands even though those lands may belong to the Crown. To use the language of Lord DU PARCQ in the *Province of Bombay case*, it is apparent from the terms of the ordinance "that its beneficent purpose must be wholly frustrated unless the Crown were bound."

Now to the second point which concerns the nature of the interest passing upon a bequest, the steps to be taken to give effect to such a bequest, and the jurisdiction of the Magistrate's Court.

It is submitted that there is no automatic right in a legal representative of a deceased tenant to have the tenancy transferred to him. Counsel's approach to this question is this: Before there can be transfer, the landlord must consent to such a transfer, and if the landlord refuses his consent, then the Assessment Committee must so order. But in the absence of any of these events, if the lease to the appellant includes the sub-tenancy which the respondent's testator held, then by virtue of Reg. 10 of the Crown Lands Regulations, Cap. 175 (Sub. Leg.), upon the death of the sub-tenant, the sub-tenancy will have reverted to the respondent for the unexpired portion

of the current year (the sub-tenancy being an annual one), in which case, the respondent would be entitled to the crops then growing on the lands. Alternatively, if the head-lease does not include the sub-tenancy, then upon the death of the sub-tenant, the sub-lease automatically comes to an end with the same results.

Reg. 10 which provides that "Every grant, lease, licence or permission shall descend to the heirs and assigns of the holders for any unexpired term thereof after the death of such holder", refers, in my opinion, to a grant, etc., to original holders, and not to sub-tenants. In any event, the submissions advanced by counsel are grounded on the premise that the Crown Lands Ordinance and Regulations apply to leases of rice lands. I have already expressed the opinion that they do not, and, therefore, I must reject the submissions.

It will be necessary, however, in order to obtain a satisfactory answer to this question, to consider in some detail s. 37 of the ordinance, which provides for the bequest of agreements of tenancy. That section enacts as follows:

"Where a tenant of any holding, by will or other testamentary writing, bequeaths his interest in any agreement of tenancy to any person (in this section referred to as the legatee), such bequest shall be subject to the following provisions —

- (a) the legatee or the executor shall notify the landlord in writing of the testamentary bequest within twenty-one days after the death of the tenant, unless they are prevented by some unavoidable cause from notifying him within that time, and in that event they shall notify him as soon as possible thereafter;
- (b) the transfer to give effect to the bequest shall be subject to the consent of the landlord which said consent shall not be unreasonably refused;
- (c) if under this section a landlord refuses to grant his consent he shall, in writing, so inform the legatee and shall state the reasons for his refusal of consent;
- (d) any legatee who is aggrieved by any refusal of consent by a landlord under this section may appeal to the assessment committee of the district in which the holding is situate and the decision of the said committee be final."

The respondent's testator died on March 13, 1964, and on March 25, she caused a letter to be written to the appellant purporting to comply with para. (a) above. The evidence is that there was no response from the landlord in accordance with para. (c). The only indication that the landlord was unwilling to consent to the transfer of the tenancy, was the entry upon the land by herself, her servants and agents, on March 14, just one day after the death of the tenant. But such action is not within the contemplation of

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the ordinance, which requires, instead, not only that the refusal to grant consent must be in writing, but also that the landlord shall state his reasons for such refusal. The object of these provisions is, to my mind, to give the legatee or executor notice of the reasons upon which the landlord has refused consent in order that the former may present his appeal to the Assessment Committee based on the latter's reasons. If there are no reasons forthcoming, it can hardly be said that there has been a compliance with the section whereby the legatee or executor has been alerted to the grounds of opposition. In these circumstances, I am of the view that the jurisdiction of the Assessment Committee has not been invoked, at least not within the period of twenty-one days after the death of the tenant.

Even if it could be said that the act of the landlord of entering on to the land on March 14 can be regarded as sufficient notice to the legatee that the landlord was withholding her consent, the landlord is, in my opinion, precluded from doing so before the expiration of twenty-one days after the death of the tenant, as by virtue of para. (b) the legatee or executor is given that period of time (or as soon as possible thereafter if prevented by some unavoidable cause) within which to notify the landlord of the bequest. My interpretation of that paragraph is that until that time at least has expired, a landlord may not enter upon the demised premises; and after the expiration of that period, the legatee or executor may approach the Assessment Committee for an order transferring the tenancy, where the landlord has refused his consent to such a transfer. In other words, a landlord is not entitled to take the law into his own hands and terminate the tenancy in a manner other than in accordance with the ordinance. See s. 5(1) (d) where it is provided that a landlord shall not evict a tenant or give him notice to quit or otherwise terminate the tenancy except as is provided in the ordinance, and *Bishundyal v. Ross* (supra). In my view, s. 37 is so heavily weighed in favour of the tenant, that to hold that a landlord can, as the landlord did in this case, terminate a tenancy by entering upon the land by force and against the consent of the tenant (and 'tenant' would include a legatee of a tenant under the ordinance), and notwithstanding a notice under para. (a), would, in my opinion, tend to make nonsense of the ordinance, and to derogate from one of its primary aims and objects, that is, to provide better security of tenure for tenant rice farmers.

The jurisdiction of the Assessment Committee, not having been invoked under s. 37 by reason of the action of the landlord, what then is the proper forum in which the tenant must seek his remedy? It must not be lost sight of that s. 37 enables the legatee or executor to seek only a transfer of a tenancy, and no other remedy; not, for example, damages. Therefore, any proceedings instituted in the circumstances for the recovery of damages would not be "proceedings before the Assessment Committee as such" but would, nevertheless, arise out of the ordinance, and consequently s. 51(1) would apply. That section provides as follows:

"Subject to the provisions of sub-s. (3) of 3 of the Summary Jurisdiction (Petty Debt) Ordinance, any claim or other proceedings

(not being proceedings before the assessment committee as such) arising out of this ordinance shall be made or instituted in the Magistrate's Court."

There is no difference between the language of s. 51(1) and that of s. 26(1) of the Rent Restriction Ordinance (Cap. 186), and there are at least two cases which decided that an action for damages in respect of premises protected by the Rent Restriction Ordinance should be brought in the Magistrate's Court. In *Evelyne v. Latchmansingh*, (1960—1961) 3 W.I.R., LUCK-HOO, C.J., held that if it was necessary for a plaintiff to rely on any provision of the Rent Restriction Ordinance in order to establish his claim, the claim is one arising out of the ordinance, and that the claim in that case should have been instituted in the Magistrate's Court. Similarly, in *Small v. Saul* (supra)—another case involving the interpretation of s. 26(1) of the Rent Restriction Ordinance, Cap. 186—the British Caribbean Court of Appeal held that an action for damages arose out of that ordinance which gave a specific remedy, and therefore exclusive jurisdiction lay in the Magistrate's Court.

In this regard, I am not unmindful of s. 5(i) of the ordinance which vests in the Assessment Committee the power and duty to hear applications for the transfer of tenancies. Had there been due compliance with s. 37, there can be no doubt that the proper forum to hear an application for a transfer of the tenancy would have been the Assessment Committee. But I need to stress there is nothing to prevent a tenant from electing to pursue a claim for damages rather than to seek a transfer of a tenancy if he so desires. A tenant may decide for reasons best known to himself that he no longer wishes to continue as a tenant of a particular landlord, but I fail to understand why he should be prevented from recouping any losses he may have suffered as a result of the landlord's breach of the ordinance.

Para, (k) of s. 11 vests the Committee with "any other power or duty conferred by this ordinance or under any other ordinance" and para. (1) with "any power or duty incidental to the carrying out of any *such* power and duties". The rest of s. 11 vests specific powers and duties in the Committee. These powers and duties include the assessing, finding and certifying "the amount to be paid as damages by a landlord to his tenant for non-observance of any of the conditions of good estate management". I can find no power or duty either in s. 11 or in any other section which authorises a committee to assess damages in other circumstances, such as where a landlord seeks to put an end to a tenancy other than in accordance with the provisions of the ordinance. For these reasons, I hold the view that the proper forum for a claim such as the one which is now engaging our attention would be the Magistrate's Court.

I pass on now to deal with the question of damages. As has been noted, the magistrate awarded damages to represent the loss incurred over a period of three years, and this award has been affirmed by the Full Court. But counsel for the appellant has raised the question whether the respondent

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would not be entitled only to her expenses incurred in ploughing and planting as opposed to profits, having regard to the fact that under the ordinance the tenancy would have expired at the end of April, and the crop, if allowed to grow, would not have been ready for reaping until October. S. 31 of the ordinance provides that a committee shall, when making an order for the termination of a tenancy on the application of a landlord, not require the tenant to quit the holding until the crop then growing thereon has been reaped, or until after the date when the crop would normally be reaped in that zone. Thus it will be seen that the ordinance contemplates the tenant being allowed a reasonable time within which to reap his crop, even where an order terminating his tenancy has been duly made. How much more would the tenant not be entitled where no order has been made? But s. 31 apart, the fact that the respondent's husband had sown his crop in March (before the trespass took place) is, to my mind, evidence that the intention was to continue the tenancy for at least the next crop year which would have ended on April 30, 1965.

Therefore the respondent would be entitled to damages for the loss of the crop for that year at least, which I would place, as the magistrate did, at \$ 1,600.

But she would not, in my opinion, be entitled to damages in respect of 1965 and 1966. The fact that the tenant took no legal steps in relation to her testator's tenancy for a period of three years, would, in my view, be evidence that she treated the tenancy at an end after the current year. In fact her evidence is that she did not plant either in 1965 or 1966.

I would therefore affirm the judgment of the Full Court for the reasons I have given, but amend the amount awarded to \$1,600. The costs in the Magistrate's Court will remain as they are, but the fee will be reduced to \$166. As the legal points argued have been decided in the respondent's favour, she would be entitled to her costs in this court, but having regard to the fact that the damages have been substantially reduced, I feel that justice will be done if she gets two-thirds of her costs here and of her costs in the Full Court.

LUCKHOO.C: I concur.

CRANE, J.A. (ag.): One Shewnarain died a tenant of the appellant in possession of 10 acres of Crown lands situate at the second depth of Plantation Dingwall, Corentyne.

At all material times during his lifetime and right up to the date of his death on March 13, 1964, the deceased held those lands under rice cultivation; he had them assessed by the Assessment Committee for the zone in which they were situate and the maximum rent fixed and certified under the Rice Farmers (Security of Tenure) Ordinance, 1956 (hereafter also called the ordinance).

By his will Shewnarain bequeathed his interest in the tenancy to his wife and executrix, the respondent Munia, thus enabling her to sue in that capacity and as beneficiary, in both the Magistrate's Court and the High Court of the Supreme Court; in the former, to recover damages from the appellant in the sum of \$12,000 as losses incurred in respect of trespass to rice crops for the year 1964, 1965 and 1966; in the latter court, for a declaration and injunction that she had lawfully succeeded Shewnarain as a legatee and tenant of the 10 acres in question, and damages in the sum of \$3,000 for trespass thereto.

In the Magistrate's Court the defence of *lis alibi pendens*, i.e. of being twice vexed for the same cause of action, was raised, and the jurisdiction of the magistrate impugned. It was objected firstly, that the provisions of the ordinance do not apply to the reliefs claimed by Munia, which are of the common law; and, secondly, the land being Crown land, the ordinance does not apply, i.e. the Crown is not bound by the provisions of the ordinance.

It appears from a statement of facts admitted by the parties in the lower court, that on the election of the respondent, the suit in the High Court was withdrawn since 14th October, 1966; so that at the commencement of the hearing there on May 31, 1967, the only proceedings in relation to the matter were those in the Magistrate's Court.

After hearing submissions *in limine*, which he overruled, and evidence on oath, the learned magistrate gave judgment in favour of the plaintiff/ respondent in the sum of \$4,800 with costs. An appeal to the Full Court followed.

In that court both points before the lower court were raised in the grounds of appeal, though in the judgment of the Full Court nothing was said about whether common law reliefs, i.e., damages, were within or without the scope of the ordinance, so it did not appear that this ground held any appeal to it. Nevertheless, the Full Court dismissed the appeal and affirmed the judgment of the lower court. Aggrieved by those two successive reverses, the appellant now appeals to this court.

The amended grounds of appeal were five in number. Of these, the fifth was by far the most keenly contested. It related to the specific finding of the Full Court that the Rice Farmers (Security of Tenure) Ordinance was applicable to the case, that is to say, the finding that Crown lands are by s. 3 *ibid.*, subject to the terms and provisions of that ordinance in the hands of a sub-tenant, such as is Munia, who sues in a representative capacity. I do not think the correctness of this finding of the Full Court is open to any doubt, for despite the well-known rule of construction that the Crown is not bound by statute unless specially named or by clear implication (which finds statutory expression in s. 23 of our Interpretation Ordinance, Cap. 5), it is very clear from the wording of s. 3 of the ordinance that it is the intention that the Crown should be bound thereby. Admittedly it is not expressly named in s. 3, but I think the words "*anything in any law . . . notwithstanding*",

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are wide enough to carry the implication that the Crown intended that it should be bound.

I believe that the only matter on which any real complaint may be made in the appeal is the principle on which damages have been awarded. This would appear to be somewhat obliquely involved in the first ground with which the Full Court did not deal relative to common law remedies being without the scope of the ordinance.

In the Magistrate's Court the claim for \$ 12,000 was based upon the loss of value of ricecrops for three successive years (1964—1966) at \$4,000 per year. The magistrate found a yearly loss of \$ 1,600 and gave judgment for \$4,800, with costs \$14.80 and fee \$450. It is clear, however, that this was an erroneous assessment in view of the fact that by s. 3, the deceased's tenancy being one from year to year, will have come to an end on April 30, 1964 (save in respect of his common law right to emblements), unless Munia had attracted the provisions of s. 37 of the ordinance so as to obtain a transfer to herself of the agreement of tenancy that had been bequeathed her by will. This she appeared to have attempted to do, but to have abandoned the idea by not following up her notification in writing under para, (a) *ibid*, to the landlord/appellant, and by not applying as an aggrieved person to the assessment committee. She appeared to have abandoned recourse thereto in favour of preferring an action for damages in her representative capacity in the Magistrate's Court, which course, I will observe, she has every right to prefer. But by adopting it, Munia necessarily restricted the quantum of damages recoverable on behalf of the estate of Shewnarain to the loss of the 1964 ricecrop, and at the same time, her own right to recover damages by not seeking a transfer of the agreement of tenancy into her name.

I would accordingly vary the decision of the Full Court by setting aside the award of the judgment, costs and fee, and substituting the sum of \$ 1,600 being the loss of 200 bags padi from the 10 acres at \$8.00 per bag, fee \$ 166.00 with costs as proposed in the leading judgment.

Appeal dismissed. Order of Full Court varied.

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v.

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[High Court—In Chambers (Vieira, J.) June 27, July 29, August 12, 25, September 4, 6, October 28, November 25, December 29, 1967, February 24, March 16, April 25, May 11, 18, 20, 1968, February 8, 1969.]

Insurance—Motor insurance—Compulsory third party Insurance—Authorised insurer—Statutory deposit not made—Policies issued—

Repudiation of liability on policies by company—Motor insurance authorised by Articles of Association.

Declaration—Proper defendants—All not served with writ—Court can make declaration notwithstanding—Who bound by declaration—Declaration—Theoretical questions—Possible not existing actions—Declaration refused.

Ultra vires—Company seeking declaration that its acts ultra vires its powers—No question of ultra vires or compromise raised in proceedings when liability incurred—Declaration refused.

Equity—Maxims—Seeking equity with clean hands—Profiting from one's own wrong—Motor Vehicles Insurance (Third Party Risks) Ordinance Cap. 281—Rules of the Supreme Court 1955, 0 14 r.14, 0 23 r.3, 0 30, 0 36 r.34, 36, 52(1), 0 42, 0 43.

In October 1963, the plaintiff company was incorporated as a limited liability company and immediately began to do motor insurance business and issued motor insurance policies under the Motor Vehicles (Third Party Risks) Ordinance Cap. 281. In October 1966 the Registrar of Joint Stock Companies informed the plaintiff company that they had not deposited the sum of \$50,000.00 or approved securities to the like amount with the Accountant General as prescribed by s 2(b) of Cap. 281. The plaintiff company acknowledged that this was so and undertook to stop doing motor insurance business and to refund premiums already collected.

In December 1966 M sued G, a policy holder of the plaintiff company in respect of motor insurance, and obtained a judgment by default and called upon the plaintiff company, as the insurers of G, to pay the judgment. The judgment was not paid and M sued the plaintiff company and obtained judgment against it by default. This judgment was not paid and a levy was executed on the property of the plaintiff company but the articles levied upon were released by consent.

In the present proceedings the plaintiff company sought a declaration on a summons that stated in paragraph (a) that it was not an authorised insurer under Cap. 281, in paragraph (b) that the insurance policies issued by it are illegal, void and ultra vires its powers, in paragraph (c) that it is not liable to indemnify persons against whom judgments have been given and who seek indemnity on the basis that they are holders of motor insurance policies issued by the plaintiff company, and in paragraph (d) that the levy executed on its property to satisfy the judgment was irregular and bad in law. M, G and 13 others who, it was thought, might be affected by any declaration were made defendants, but only nine were served with writs.

HELD:—that (1) Although in general all persons who appear to have a real interest in objecting to the grant of a declaration should be made defendants, the court is competent to proceed to hear and grant or refuse the declarations sought even though only nine of the fifteen defendants have been served with the writ, but any such declarations will only bind those nine defendants.

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(ii) with respect to the relief sought at paragraph (d) the plaintiff company was empowered to carry on the business of motor insurance under its Memorandum of Association and no question of ultra vires arises in respect of any policy issued by it in respect of motor insurance. This being so, the plaintiff company cannot approach the court for a declaration because no question of ultra vires or any compromise thereof was raised in the action upon which the levy was based.

(iii) with respect to the relief sought in paragraphs (a) and (b) advisory opinions are sought, and the court in its discretion would refuse the declarations because theoretical questions are raised and any opinion given might embarrass judges before whom subsequent proceedings involving the same subject matter are brought.

(iv) with respect to the relief sought in paragraph (c) the declaration would be refused because what was sought was a negative declaration in relation to possible and not existing actions.

(v) in any event, the plaintiff company is in breach of the maxims "He who comes to equity must come with clean hands" and "No one can gain an advantage by his own wrong" and relief would be refused on these grounds.

Declarations refused.

S.E. Brotherson with Mrs. Shirley Patterson for the plaintiff.

R.H. McKay for the first and second named defendants.

B.S. Rai for the 12th named defendant.

VIEIRA, J.: On 18th October, 1963 the Plaintiffs (hereinafter called the company) were incorporated as a limited liability company under the Companies Ordinance Cap. 328, by the name of the 'Guyana National Motor Insurance Company Limited' with an authorised share capital of \$100,000 divided into 100 shares of \$100 each.

Immediately on incorporation the company began issuing motor insurance policies under the Motor Vehicles Insurance (Third Party Risks) Ordinance Chapter 281.

By resolution of the Directors and with the approval of the Governor-in-Council on 21st October, 1964, the name of the company was changed to its present form and security in the form of a debenture bond in the sum of \$67,800 was deposited for the purpose of carrying on life insurance.

On 17th October, 1966 the Registrar of Joint Stock Companies wrote the company informing them that they had not deposited the sum of \$50,000 or approved securities to the like amount with the Accountant General as prescribed by section 2(b) of Chapter 281 and he asked them to take immediate steps to rectify this default, failing which he would request the Attorney General to take appropriate action.

On 19th October, 1966 one S.R. Mohan, then Managing Director of the company, replied informing the Registrar that they had been misinformed by the then Registrar that the statutory deposit of \$50,000 was not required to transact motor insurance and when in fact the company deposited the sum of \$ 67,800 in respect of life insurance under the life Assurance Companies Ordinance, Chapter 329, they were further informed that that amount would apply to all types of insurance including motor insurance. The company regretted the misinformation but assured the Registrar that no motor insurance would be transacted by the company as from that very date.

On 5th November, 1966 the Registrar replied instructing the company to cancel all motor insurance policies that had been issued and return all premiums received, failing which, the Attorney General would be instructed to take appropriate action.

On 10th November, 1966 Mohan replied that since the Motor Department had ceased to transact any business the company had been refunding premiums and would continue to do so.

On 10th December, 1966 No. (1) defendant Michael Huggins in Action No. 1970 of 1966 obtained judgment by default before KHAN, C.J. (ag.) against the No. (2) defendant, Donald Griffith, a policy-holder of the company in respect of motor insurance, in the sum of \$ 1,217.06 with taxed costs.

Later the company, in Action No. 2467 of 1966 summoned Griffith for a declaration in terms of section 8(3) of Chapter 281. This matter was discontinued and costs were against the company in the sum of \$400.

On 3rd March 1967 Mr. Vibert Lampkin, solicitor for Huggins, wrote a letter to the company referring to the judgment against Griffith in Action 1970 of 1966 and pointing out to them that as Griffith's car was insured with them at the time of the accident with his client, the company was liable to pay the judgment and costs under section 8 of Chapter 281. Reference was also made to Action 2467 of 1966 having been withdrawn by the company and they were expected to send their cheque for \$2,087.60 within 3 days, failing which, legal proceedings would be instituted for their recovery.

On 16th April, 1967 Huggins, through his attorney, Reginald Moore, summoned the company in Action 747 of 1967 for failure to satisfy the judgment and costs in Action 1970 of 1966 and on 22nd May, 1967, he obtained judgment against the company by default in the sum of \$2003.10 inclusive of costs.

On 9th June, 1967 the company caused a circular to be issued repudiating all liability arising from any motor insurance claim.

On 12th June, 1967 a levy was executed on the property of the company at its head office at 23 Brickdam, Georgetown, to satisfy the judgment and costs in Action 747/67.

On 29th July 1967 the articles levied upon were released by consent.

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The company now seeks the following orders: –

a) A declaration that the company in its present name or under its former name was never an authorised insurer under Chapter 281 between 18th October, 1963 when it was incorporated and 19th October, 1966 when it ceased to carry on motor insurance business.

b) A declaration that all motor insurance policies issued by the company during the period 18.11.63 to 19.11.66 are illegal, void and ultra vires the said company.

c) A declaration that the company is not liable to indemnify any person or persons against whom judgments have been delivered and who seek indemnity on the basis that they are holders of motor insurance policies issued by the company during the period it purported to carry on the business of motor insurance.

d) A declaration that the levy executed on the company's property on 12th June, 1967 to satisfy the judgment and costs in Action 747/67, is irregular and bad in law, and

e) Such further or other order or orders and/or relief as the court thinks just.

The declaratory judgment is a product of English Law which has spread to many common law countries including Guyana. It was a child of equity and was nurtured by the Courts of Chancery which, before 1852, would not give declaratory judgments unless at the same time it gave consequential relief. This practice restricted its growth and it was only really of minor importance.

By section 50 of the Chancery Procedure Act, 1852, Parliament introduced the declaration of right as an independent remedy which, however, was narrowly interpreted by the courts to mean that such a remedy could not be given unless consequential relief could also be given, although in fact it was not.

The exclusive jurisdiction of the Courts of Chancery was abolished by the Judicature Acts of 1873 and 1875, whereby all Divisions of the new High Court of Justice had power to make declarations in all matters previously exercised by courts of equitable jurisdiction only.

It was not until 1883, however, by virtue of Order 25 Rule 5 of the new Rules of the Supreme Court, 1883, that the courts, for the first time, could grant declaratory relief without the necessity of granting consequential relief.

Despite these statutory provisions the declaratory judgment developed slowly and the judges were extremely cautious in granting relief since they were rather suspicious and, indeed, hostile, towards making mere declarations where no right had been violated and no damage had occurred.

But as people began to realise that here was a remedy of a speedy and inexpensive nature that did not suffer from the technicalities of the prerogative writs, more and more recourse was had to it and, after a time, even the judges themselves overcame their reluctance and quickly acknowledged the expediency and efficiency of this remarkable remedy.

The official stamp of approval, so to say, was given by FLETCHER MOULTON, L.J. in *Dyson v Attorney General* (1912) 1 Ch. 158 at p. 168 -

"I think that an action thus framed is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions. Such questions are growing more and more important and I can think of no more suitable or adequate procedure for challenging the legality of such proceedings."

The real high-water mark in the development of the declaratory judgment, however, was the decision of the Court of Appeal in *Guaranty Trust Co. of New York v Hannay & Co.* (1915) 2 K.B. 536 C.A., where it was held by a majority of the court that declarations could be made by the courts at the instance of plaintiffs although they had no cause of action against defendants and that Order 25 Rule 5 so construed was merely an extension of the practice and procedure of the courts and was not ultra vires.

BANKES, L.J., said at p. 572-

"It is essential, however, that a person who seeks to take advantage of the rule must be claiming relief. What is meant by this word relief? When once it is established that relief is not confined to relief in respect of a cause of action, it seems to follow that the word itself must be given its fullest meaning. There is, however, one limitation which must always be attached to it, that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the court to grant or contrary to the accepted principles upon which the court exercises its jurisdiction. Subject to this limitation, I see nothing to fetter the discretion of the court in exercising a jurisdiction under the rule to grant relief, and having regard to general business convenience and the importance of adopting the machinery of the courts to the needs of suitors I think the rule should receive as liberal a construction as possible."

The Guaranty case thus finally settled that Order 25 Rule 5 validly empowers a court to declare on any sort of legal relationship whether or not a cause of action in the traditional sense exists.

Is the declaratory judgment an equitable remedy or not?

In his authoritative monograph, the DECLARATORY JUDGMENT I, ZAMIR contends that declaratory relief is neither an equitable nor a common law remedy or even a purely statutory remedy but should be re-

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garded as *sui juris*. He refers to the dictum of YOUNGER, L.J. in *Gray v. Spyer* (1921) 2 Ch. 549 where the learned Lord Justice said at p. 557 –

"In truth these abstract declarations, whatever else they may be, are neither law nor equity."

He also refers to *Chapman v Michaelson* (1908) 2 Ch. 612 affirmed (1909) 1 Ch. 238 where COZENS-HARDY M.R. said at pp. 241–242–

"It is said that because the plaintiff comes to the court seeking equitable relief he must do equity; and Parker J's decision in *Lodge v. National Union Investment Co.* is cited in support of that contention. The simple answer is that this is not equitable relief. It is a mere accident that the judgment has been given in the Chancery Division and not the King's Bench Division, since this action might perfectly well have been brought in the Common Law Courts."

FLETCHER MOULTON, L.J., said at p. 242 –

In my opinion the considerations which affect an action for the equitable relief such as was asked for in *Lodge v National Union Investment Co.* do not necessarily apply to an action for a mere declaration of rights".

ZAMIR, however, is careful to point out that this decision may need qualification as there are some declarations so closely related to equity that they may possibly be regarded as equitable, whilst others are only ancillary to some other equitable relief which may also have to be treated as equitable – *ibid p.* 190 note 36.

In *Re Emery's Investments Trusts, Emery v Emery* (1959) 1 All E.R. 577, the plaintiff brought an action against his wife, an American citizen, in which he claimed that certain shares in American companies standing in her name were held by her in trust for them jointly and he asked for a declaration accordingly. WYNN-PARRY, J. held that, in these circumstances, a Court of Equity would not help the husband to rebut the presumption of advancement – and founded his decision on the assumption that the declaration sought was equitable relief.

In *Barnard v National Dock Labour Board* (1953) Q.B.D. 18, DENNING, L.J. (as he then was) interrupted Gilbert Paull Q.C. (now PAULL, J.) in his arguments and said at p. 31 –

"You should look at the modern cases, for a declaration, which is an equitable remedy, is a modern remedy."

Order 25 Rule 5 is negative in form and does not delimit the declaratory power, or any principles governing the extension of it. In consequence, the extent to which this power was to be utilised was largely left to the discretion of the courts.

In *Hansam v Radcliffe Urban District Council* (1922) 2 Ch. 490 Lord STERNDALE, M.R. (formerly PICKFORD, L.J., one of the judges who gave the majority judgment of the Court of Appeal in the Guaranty Case) stressed the discretionary nature of the remedy which is a mark of its equitable origin. The learned Master of the Rolls said at p. 507 –

"In my opinion, under Order 25 Rule 5, the power of the court to make a declaration where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide."

With all due respect to ZAMIR, therefore, I cannot agree that the declaratory judgment is *sui juris*. I consider it a modern equitable remedy bred and nurtured in the pure stream of equity.

Unlike executory judgments, declaratory judgments merely proclaim the existence of a legal relationship and do not contain any orders which may be enforced against defendants.

The declaratory judgment is not only important in all fields of private law but of increasing importance within comparatively recent times in the realm of public law, especially administrative law, where the citizen can challenge administrative acts and decisions which he claims to be unlawful.

Order 25 Rule 5 (now Order 15 Rule 16 of the 1965 Rules) provides as follows: –

"No action or other proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."

Order 23 Rule 3 of the local Rules of Court 1955 is in identical terms with Order 25 Rule 5.

Order 25 Rule 5 is the most important rule concerning declaratory relief, which has the widest application. It does not prescribe any special procedure nor is it limited to any specific matter. It applies to all proceedings for a declaration whether instituted by writ or by originating summons and whether brought under a particular statute or under the general declaratory judgment of the court. ZAMIR at p. 24.

Where no special procedure is laid down, the claim for a declaratory judgment is normally brought by way of a writ. In certain cases, however, both under the Rules of Court and by statute, a declaration may be sought by originating summons. Another way is by case stated on questions of law and also by way of inter-pleader proceedings.

Declarations on originating summons can be brought in this country under the following rules of the Supreme Court, 1955 -

1) Order 42 Rule 1 in relation to the construction of any deed, will or other written instrument;

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- 2) Order 42 Rule 2 in respect of the construction of any statute;
- 3) Order 43 Rule 2 in relation to applications under section 45 of the Supreme Court Ordinance, Chapter 7;
- 4) Order 43 Rule 3 in relation to the determination of any question relating to express trusts or the administration of the estates of deceased persons.
- 5) Order 43 Rule 4 in relation to orders for the administration of express trusts or the administration of the estates of deceased persons.

Special cases stated, which are exceedingly rare, both in this country and in England, are governed by Order 30 Rules 1 and 2. Interpleader proceedings are governed by Order 45 Rule 9.

In this action the company has come by way of originating summons under Order 42.

When this case originally started there were no defendants. By leave of this court, Reginald Moore was made a defendant and the rubric was amended accordingly. Later, leave was granted to join the other 14 defendants as added defendants, an assurance having been given that there were the only persons, as far as the company were aware, who might be affected by the declarations sought. Leave was also granted to join the directors of the company as added defendants, but, subsequently, the court, after mature consideration, rescinded this order.

Of the 15 defendants in this matter only 9 received summonses, viz., the first, second, fifth, sixth, eighth, tenth, eleventh, twelfth and fifteenth named defendants. Of these only 4 have entered appearance properly on the record, viz., the first, second, twelfth and fifteenth defendants. During the course of the hearing Mr. Bishop stated that he appeared for the tenth-named defendant instructed by Mr. T.A. Morris. It was only, however, when I was writing this decision that I saw that there was no entry of appearance on the record or no authority to solicitor by the said tenth-named defendant. Accordingly on Saturday 18th January, 1969 I sent for both Mr. Brotherson and Mr. Bishop and informed them what the position was. Mr. Bishop requested leave to correct the irregularity and I gave him leave to have an entry of appearance filed with authority to solicitor, within 10 days. I now see that only an entry of appearance has been filed without any authority to solicitor. There were no returns of service in respect of the fourth, ninth thirteenth and fourteenth-named defendants and the third and seventh-named defendants were not located.

It is well settled that, in general, all persons who appear to have a real interest in objecting to the grant of a declaration should be made defendants. This is based on two grounds, viz:—(1) it is only just and proper that all persons having a real interest should be given an opportunity to

present their arguments, and (2) declarations made in the absence of such persons will not bind them and, consequently, they may, in new proceedings, raise questions already decided thus giving rise to multiplicity of actions –ZAMIR at p. 282.

In *London Passenger Transport Board v Moscrop* (1942) 1 All E.R. 97 Viscount MAUGHAM said at p. 104: -

"I also think it desirable to mention the point as to parties in cases where a declaration is sought. The present appellants were not directly prejudiced by the declaration and it might even have been thought to be an advantage to them to submit to the declaration; but, on the other hand, the persons really interested were not before the court, for not a single member of the Transport Union was, nor was that union itself, joined as a defendant in the action. It is true that in their absence they were not strictly barred by the declaration, but the courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the union in their absence, and that, except in very special circumstances, all persons interested should be made parties whether by representation, orders, or otherwise, before a declaration, by its terms affecting their rights, is made."

Although, therefore, courts will only proceed in the absence of parties "in very special circumstances" nevertheless, by virtue of Order 14 Rule 14, it would appear that the courts are not bound to have before them all persons whom the declaration may affect in their legal rights. Order 14 Rule 14 provides as follows: -

"14—No action shall be defeated by reason of the mis-joinder or non-joinder of parties, and the court may in every action deal with the matter in controversy as far as regards the rights and interests of the parties actually before it."

ZAMIR has expressed the same opinion with reference to the English Order 16 Rule 11 (now Order 15 Rule 6 of the 1965 Rules) which is in identical terms with our Order 14 Rule 14.

He refers to the case of *Vienit Ltd. v W. William & Son (Bread Street Ltd.)* (1958) 1 W.L.R. 1967 where WYNN-PARRY, J., in an application by originating summons under Order 54A Rule 1 (the local order 42 Rule 1) for the construction of a lease proceeded to determine the main issue, i.e., the reasonableness of the refusal by the lessors, in the absence of the superior lessors. He points out that the ratio of this case in relation to order 54A is that the court is not bound to have before it all persons interested in the document before it. He further points out that only rarely will the court refuse a declaration solely on the ground of non-joinder of interested persons – *ibid* at p. 283 note 8.

It seems to me, therefore, that it is quite competent for this court to grant or refuse the declarations sought even though only 9 of the 15 de-

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pendants have been served with copies of the writ. Of course, it is abundantly clear, that whatever my decision, it can only bind those 9 persons and nobody else.

It is contended on behalf of the company that this is really a matter of company law and not general principles.

It is submitted that (1) as regards the declaration sought in para (a) of the summons, it is clear that the company by its failure to deposit and keep on deposit with the Accountant General the sum of \$50,000 was never an 'authorised insurer' within the meaning of section 2 of Chapter 281 and since the company itself, which is a distinct legal person from its shareholders and directors, had never assumed the capacity nor the status of an 'authorised insurer' then the directors cannot enter into any binding obligation on behalf of anyone who has no capacity to so bind himself. The court is being asked to declare whether the company in its corporate capacity can be liable on motor insurance policies purported to have been issued on its behalf by the directors when the company was never an authorised insurer under Chapter 281.

(2) as regards the declaration sought in para (b) of the summons, it is submitted that the company can only carry out motor insurance business in this country under the laws of Guyana, and, under section 4 of the Companies Ordinance, Chapter 328, the company has stated as one of its objects the business of motor insurance but the company never acquired the power to embark or execute the object in that the ordinary power of incorporation cannot empower the company to issue motor insurance policies under Chapter 281. By doing so the company over-reached its powers. It is conceded that all policy holders would be entitled to the refund of all premiums paid by them.

(3) As regards the declaration sought in para (c) of the summons reference is made to section 8 of Chapter 281 which relates to the duty of insurers to satisfy judgments against persons insured in respect of third party risks. It is submitted that a contract that is *ultra vires* the company is not binding on the company and cannot give rise to rights in a third party even if there had been a judgment of the court provided that the question of *ultra vires* did not form part of the judgment. Further, estoppel or consent by the company cannot transform into *intra vires* what is inherently *ultra vires*, and

(4) As regards the declaration sought at para (d) of the summons it is submitted that the contract was *ultra vires* the company and, inasmuch as the company never had the capacity to execute these policies and the directors' ignorance of the capacity of the company, could not, in any way, render *intra vires* acts which were *ultra vires* the company when they were performed. It is clear that Moore is relying on the validity of Griffith's policy.

Both Mr. Mc Kay and Mr. Rai have strongly urged this court that the declarations sought by the company ought not to be granted but for different reasons.

Mr. Mc Kay bases his arguments in relation to the declarations sought at paras: (a), (b) and (c) of the summons mainly on the ground that there are theoretical and/or advisory as regards the future rights and/or liabilities of the company. He contends that what the company is really seeking here is a declaration on a contingency which is a mere theoretical issue. As regards the declaration sought by the company at para (d) of the summons, he contends that this court is not the proper forum in which to make an application for a declaration that the levy is bad. On the company's own case, the levy was made in respect of a debt due on a judgment of the court which has not been questioned and for this court to grant this declaration it would mean invalidating that former judgment, which it has no power to do.

Mr. Mc Kay submits that the original name of the company was the 'Guyana National Motor Insurance Company Limited'. The Memorandum of Association specifically gives power to the company to do motor insurance. What is necessary is a deposit to become authorised insurers. In this country Chapter 281 does not compel a company to pay a deposit before it carries out motor insurance. All it says is that in order to be an 'authorised insurer' there must be a deposit. He contends that these are 2 different concepts. Further, there is a hiatus in our law. There is no comparable provision in Chapter 281 to section 36(3) of the English Road Traffic Act 1930. There is no penalty for failure to deposit the sum of \$50,000 under section 2 of Chapter 281. He argues that the company is not caught by the penalty section under Chapter 281 but by common law or by statute such as cheating, false pretences, public mischief. To grant the declarations asked would show that the company have been committing a fraud upon the public.

Mr. Rai submits that this is an application under order 42 and is so intitled. Nowhere in these proceedings is there any mention of any document, instrument, etc., calling for the construction by the court. Further, there is no document forming part of these proceedings which could be the subject-matter of construction. No policies of insurance have been tendered or referred to in these proceedings. Further no copy of the Memorandum and Articles of Association of the company have been laid over and consequently there is no material before the court which would entitle it to decide whether the acts are either *ultra* or *intra vires*.

He also submits that the company has not claimed any legal right under any ordinance calling for construction. There is nothing in Chapter 281 which says an applicant can come for a declaration under the said Chapter 281. The company is not claiming any legal right but is asking to be absolved from all liability which is of a negative nature.

Further, if someone holds himself out as a person authorised to issue policies of insurance under Chapter 281 but has not complied with the

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provisions of the said ordinance then that person is subject to certain criminal penalties and a court, cannot in those circumstances, make a declaration whether such a person has or has not committed a criminal offence. The company has not come to court with clean hands. They cannot accept thousands of dollars from persons and now come to this court to absolve themselves from liability for hundreds of criminal offences committed by them for which they are liable to pay hundreds and hundreds of dollars.

Further, the issuing of the policies was not *ultra vires* because in para 4 of the affidavit of Theodore Harvey in support of the application one of the objects of the Company has been set out as 'motor insurance' which shows that the Company was clearly authorised to do motor insurance business.

I shall deal firstly with the declaration sought at para (d) of the summons i.e. the levy of 12th June 1967.

Order 36 of the local Rules of Court 1955 deal with the topic 'Execution'. Rule 34 provides as follows: –

"34. Any judgment or order against a corporation wilfully disobeyed may, by leave of the court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property."

Rule 36 provides as follows: –

"36. In the event of any irregularity being committed in any process in execution or in the event of there being an excess in execution the person against whom or against whose property the process has issued may apply to the court or a judge to stay proceedings in the execution until such irregularity shall be amended or such excess remedied; and the court or judge may make such order as will divest such proceedings of all irregularity or excess, reserving to the party aggrieved his remedy by action against all parties concerned for any injury or damage he may have sustained by reason of such irregularity or excess".

Under Rule 52(1) it is provided –

"52(1) – Within fourteen days after the first advertisement of the sale of any immovable property, any person having a right to oppose such sale may enter or cause to be entered in a book to be kept for that purpose by the Marshal, an opposition to such sale."

In *Great North-West Central Railway Company v Charlesbois* (1899) A.C. 114, the company sued Charlesbois for breach of an *ultra vires* contract and two days later Charlesbois sued the company to recover the balance due to him under the contract and to establish a lien. The question of *ultra vires* was not raised. By consent there was a judgment against the company

for a large sum and a declaration of lien. The company brought a suit to set aside the contract and judgment. The Chancellor of Ontario at first instance found on the evidence that the contract and the consent to the judgment were *ultra vires* in respect of sums of money of large amounts not chargeable to the company and that the total amount of the judgment should be reduced by the said amounts and that the lien and charge granted by the contract to Charlesbois was *ultra vires*.

The Court of Appeal of Ontario affirmed the decree of the Chancellor but the Supreme Court of Canada reversed the decree of the Court of Appeal. The Supreme Court sustained the Chancellor's findings of fact and his view that the contract was *ultra vires* but they held that, notwithstanding the contract was *ultra vires*, the impeached judgment was a conclusive estoppel against the company and the other plaintiffs. The Privy Council held 1) that the contract was *ultra vires* and 2) that a consent judgment obtained on the contract declaring the respondent's lien on the company's railway and other property, the question of *ultra vires*, not having been raised either in the pleadings or on the facts stated, was of no greater validity than the contract.

Lord HOBHOUSE said at pp. 123–124 –

"But the difficulty is to reconcile an opinion that the contract is *ultra vires* with an opinion that a judgment obtained on this was a binding judgment. The authorities referred to by the Supreme Court do not relate to contracts *ultra vires*. It is quite clear that a company cannot do what is beyond its legal powers by simply going into court and consenting to a decree which orders that the thing shall be done. If the legality of the act is one of the points substantially in dispute, that may be a fair subject of compromise in court like any other disputed matter. But in this case both the parties, plaintiff or defendant in the original action and in the cross action, were equally insisting on the contract. The president, who appears to have been exercising the powers of the company, had an interest to maintain it, and took a large benefit under the judgment. And as the contract on the face of it is quite regular, and its infirmity depends on extraneous facts which nobody disclosed, there was no reason whatever why the court should not decree that which the parties asked it to decree. Such a judgment cannot be of more validity than the invalid contract on which it was founded."

Charlesbois' case was followed and applied in England in *Re Jon Beauforte (London) Ltd. (1953)* 1 All E.R. 634 where ROXBURGH, J. held that no judgment founded on an *ultra vires* contract was inviolable unless it embodied a decision of the court on the issue of *ultra vires* or a compromise of that issue; any compromise made on the footing that the contract was *intra vires*, or any judgment in which the defence of *ultra vires* is not raised, could be set aside.

Now in this case, the name of the company on incorporation and up to the change to its present form in 1964, was the 'Guyana Motor In-

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insurance Company Limited'. Clause 3(a) of the Memorandum of Association provides as follows: –

"3(a) –To carry on in British Guiana and elsewhere the business of Motor Insurance in all its phases; also to carry on Life Insurance and other kinds of *Insurance if and when* the company thinks fit and expedient so to do, and after it will have obtained permission to do so in British Guiana and elsewhere".

Now it seems quite clear to me that, if this company had issued policies of insurance in relation to third party risks in respect of motor vehicles, and it was not so empowered to do by the Memorandum of Association, then such policies would be *ultra vires* the powers of the company and judgments obtained in respect of such policies, whether by consent or by default, could be successfully challenged in the courts and be set aside. But this is obviously not the position here. The company was clearly empowered to carry on the business of motor insurance under its Memorandum of Association and its original name was to this effect. This being so, it seems to me quite clear that no question of *ultra vires* arises here in respect of any policy issued by the company in respect of motor insurance and, this being so, the company cannot now come to this court for a declaration that the levy is bad since no question of *ultra vires* or any compromise thereof arose or was raised in Action 747/67 upon which the levy was based.

If the company was not satisfied with the judgment by default in Action 747/67 then it could have applied for a re-hearing. If it was not satisfied with the levy or considered it in any way irregular, as is alleged, then it could and should have utilised the procedure laid down in Order 36 of the Rules of Court 1955 (vide Rules set out above).

No question of *ultra vires* being involved in the issuing of motor insurance policies by the company therefore, it would, in my opinion, amount to an excess of jurisdiction for this court to interfere in any way with the judgment delivered in Action 747/67. For these reasons, therefore, the declaration sought at para (d) of the Summons is hereby refused.

Paragraphs (a), (b) and (c) of the Summons raise issues of an important and rather complex nature. It seems to me, however, that my task will be made far easier if these issues amount to hypothetical or theoretical questions or are by way of seeking the advisory opinion of this court or amount to negative declarations since it is now well-established that these are issues upon which the courts will hardly, if ever, grant declaratory relief.

IN LAW AND ORDERS 2ND EDITION (1956), SIR CARLETON KEMP ALLEN has this to say at p. 266 –

"It is a principle of our jurisprudence – and, it is to be supposed of most systems of law – that courts will not entertain purely hypo-

thetical questions. They will not pronounce upon legal situations which may arise, but generally only upon those which have arisen."

In *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd.* (1921) A.C. 438, Lord DUNEDIN said at p. 448 –

"The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought."

Now Lord DUNEDIN was speaking of Scottish law but the same principle has been consistently applied by English courts. Thus in *Re Clay (1919) 88 Ch. D 40* a man undertook the sole executorship of an involved estate upon the beneficiaries executing a deed of indemnity in his favour. Some of the beneficiaries subsequently took proceedings for the administration of the estate, and in these proceedings the executor was ordered to pay certain costs. He paid the costs but said that he reserved any rights he might have under the deed of indemnity. The beneficiaries thereupon applied to the court under Order 54A Rule 1 and Order 25 Rule 5 for an order declaring that the executor was not, upon the construction of the deed, entitled to be repaid these costs—Held, there was no jurisdiction to make the declaratory order asked for under the Rules of Court, as there was no claim to any right by either party.

SWINFEN EADY, M.R. said at p. 44

"The petitioners had not been attacked. No claim has been made against them, but they launched these proceedings to have it determined that some one who has not made any claim or asserted any right has no claim and has no right. In my opinion they are not entitled to do that".

DUKE, L.J. said at p. 45 –

"I regard this defendant as a defendant who has done nothing which warranted the petitioners making him a defendant in an action; and I do not myself believe that in the ordinary case of possible controversy between parties it is open to one of the parties, because he apprehends a claim, to serve a writ or other process upon the other party in order to obtain a decision that the claim could not be made. It seems to me to go far beyond anything which has existed in the past history of litigation in this country and to open up a vista—a great danger—of needless and costly controversy between parties fomented by those who delight in litigation."

In *Lever Bros. & Unilever Ltd. v Manchester Ship Canal Co.* (1945) 78 Lloyds L.R. 507 the plaintiff company sought a declaration that, under a certain private Act, the permissible user of the dock was not restricted to its user by the plaintiff company and its two subsidiaries named in that Act. The Act was admittedly obscure, and the rights it conferred on the

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plaintiffs were indeed in doubt. The defendants—two companies which had a practical interest in limiting the user of the dock—contended that the plaintiffs did not have the right they claimed. VAISEY, J. said at p. 50—

"The truth, as it seems to me, is that it is not within the province of the court to expand obscure provisions in Acts of Parliament merely by way of commentary, and this perhaps applies especially to private Acts. . . . I can imagine circumstances in which the court would be compelled to construe (the Act in question) that is to say, in litigation properly instituted between proper parties upon a definite issue. In the present proceeding the plaintiff company is in substance asking me to make it a more useful weapon for use in future hypothetical hostilities with hypothetical opponents, and this I do not see my way to do."

In *Re Barnato, Joel and Another v Sanges and Others* (1949) Ch. 258, C.A. the question for determination was whether the plaintiffs in an originating summons, who were the trustees of a settled legacy, had power to make the Inland Revenue Commissioner party to a summons raising the hypothetical question of whether, in the event of the person entitled to a life interest in the legacy, dying within five years from the date of an advance made by the trustees to the children of that person, the trustees would be liable to pay estate duty on the amount of the advance. HARMAN, J. decided that the trustees had no power to make the Inland Revenue Commissioner a party to the summons. The trustees appealed but the Court of Appeal dismissed the Appeal and affirmed the decision of HARMAN, J.

COHEN, L.J. said at p. 265 —

"The Master of the Rolls asked counsel for the appellants to cite any case in which a purely future and hypothetical question had come before the courts and the courts had held that they had jurisdiction to consider it. Counsel could not put forward any such case, but founded his argument on the cases of *Dyson v Attorney-General*, *Esquimalt and Nanaimo Ry Co. v. Wilson* and *Re Chamberlain's Settlement*".

The learned Lord Justice then analysed the said three cases mentioned in the passage above and then said at p. 267 —

"It seems to me that all those cases are very different from the case which we have before us. In the present case, as I see it, there is no immediate question between the plaintiffs and the Crown and no justification for the suggestion that the Crown's rights will be affected if the advance which the plaintiffs are desirous of making to Mrs. Sanges is made. The right of the Crown will remain the same as

it was before; that is, a right in a certain event (which may never occur) to make a demand for payment of duty".

ZAMIR defines an advisory opinion of the court as follows at p. 45–

"An advisory opinion may be described as a pronouncement made by the court not in the course of actual litigation at the request and for the guidance of a public body as to its rights, powers, duties, etc. in a particular matter. As such, the advisory opinion is a species of theoretical adjudication.

At pp. 49–50 the learned editor states: –

"On the other hand, the courts are still quite often confronted with requests made mainly by individuals for declarations on theoretical questions. These are not treated by the courts any more than requests for advisory opinions were, and not merely because of the affinity between the two. The courts, it is suggested, have substantial reason for discountenancing any theoretical or hypothetical proceedings. These reasons may be briefly indicated. First, the possibility of getting declarations of right not based on actual disputes may greatly and unnecessarily increase litigation. Secondly, if the hypothetical facts upon which the declaration is to be based do not occur at all, lengthy and expensive proceedings may have been of no use. Thirdly, if the actual facts, when they occurred, happened to be somewhat different from the hypothetical facts, the binding effect of the declaration would be uncertain."

Originally, the courts were very reluctant to declare future rights due to its affinity with hypothetical rights but this attitude changed considerably when the judges became more acquainted with the use and merits of declaratory relief and came to realise the practical importance of declaration of future rights. Order 25 Rule 5 by allowing declarations to be made without the necessity of claiming any consequential relief, remained the last legal obstacle to a full employment of the declaratory power in respect of future rights. In *Re Berens* (1880) W.N. 95, CHITTY, J. said:–

"The effect of Order 25 Rule 5 of the Rules of the Supreme Court, 1883, is to give the court power to make declarations regarding future rights, but whether the court will exercise the discretion depends on the circumstances of the particular case."

As ZAMIR points out at p. 203 it is important to distinguish between future and hypothetical rights. Rights which depend for their coming into existence on the happening of a Contingency may be described as hypothetical. Rights which, though not existing yet, are certain to come into effect, either on a certain date or on the occurrence of some specified event, may be properly called future rights. As certainty, however, is impossible to predict, the courts consider a practical certainty of occurrence as sufficient. But as ZAMIR further points out at p. 204 –

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"The courts, it must be admitted, are not yet entirely at ease when asked to declare future rights. They are inclined to exercise, more carefully than in other cases, whether the declarations will serve a present interest of the plaintiff and will not be productive of embarrassment, inconvenience or injustice to other persons. But if the court is satisfied on both points, it will be disposed to declare in favour of the plaintiff.

A negative declaration is a declaration of no right, that is to say, of the absence of right or power in the defendant, or which amounts to the same thing, the absence of duty or liability in the plaintiff—ZAMIR at p. 207.

It would appear that the term 'negative' declaration has not been adopted by the English courts—*ibid* p. 207 note 6.

Negative declarations were hardly possible under the Chancery Procedure Act 1852, but since the passing of Order 25 Rule 5 in 1883, they readily granted such declarations especially where the defendant has already committed an unlawful act and probably intend to continue or repeat it or where he threatens to act unlawfully. But the courts have adopted a more cautious attitude where the plaintiff is not in fact threatened with any unlawful act.

In general, declaratory relief will not be granted by the courts in cases where persons are threatened by civil proceedings. In *Guaranty Trust Co. of New York v Hannay & Co.* (1915) 2 K.B. 536, PICKFORD, L.J. said obiter at p. 564, 565 –

"I think that a declaration that a person is not liable in an existing or possible action is one that will hardly ever be made, but that in practically every case the person asking it will be left to set up his defence in the action when it is brought (see per the Master of the Rolls in *Dyson v. Attorney-General* and per JOYCE, J. in *North Eastern Marine Engineering Co. v Leeds Forge Co.* but taking the large view that I do of the effect of Order 25 Rule 5, I am not prepared to say that it is beyond the power of the court in a very exceptional case to make such a declaration and that the fact of its being asked for a purpose which the court, does not approve does not take away the power to make it, but only gives reason to refuse it."

In *North Eastern Marine Engineering Co. v Leeds Forge Co.* (1906) L.J.R. 178, affirmed (1906) 2 Ch. 498, the plaintiffs, who were alleged to have infringed a patent of the defendants, were sued for damages. Subsequently, the proceedings in that action were discontinued. Thereupon, the plaintiffs, apprehending that they would be proceeded against by the defendants at a later date, brought an action claiming declarations that the said patent was invalid and that they had not infringed any legal right of the defendants.

JOYCE J. in dismissing the action said at p. 180 –

" . . . it appears to me that the present defendants have broken no contract. They have committed no tort, it is not a case of conflicting claims to real and personal property, there are no disputes as to the rights or obligations of the respective parties under a will, or other instrument, the true construction whereof requires to be found by the court, or anything of that kind. Speaking generally, in a simple case not within section 28 of the Act of 1883, the mere fact that A is supposed to contemplate bringing an action against B, or that A may have stated that he has grounds for such an action, does not, in my opinion, entitle B to institute an action against A to have it declared that A has not a good cause of action against B. I think that is so whether the result depends merely upon questions of law, or upon facts as to which there would, or might be, a conflict of evidence with a protracted trial."

In relation to criminal proceedings ZAMIR succinctly puts the position as follows at p. 224 -

"To sum up: where a person acts or intends to act in a certain way, which is not *malum in se*, and is confronted with the threat of criminal prosecution, he may bring an action for a declaration to the effect that that act is not illegal. The court will not generally be inhibited from making such a declaration by the mere fact that the matter could be criminally adjudicated. Where, however, the criminal jurisdiction has been vested in another tribunal, the court may examine whether that tribunal is more appropriate than the High Court for the determination of the issue. When the answer is in the affirmative, the court will be reluctant to exercise its declaratory power."

Having said all of this what is the position in this matter, as regards paragraphs (a), (b) and (c) of this summons?

Both paras: (a) and (b) to my mind, seek advisory opinions of this court which, in the exercise of my discretion, I am not prepared to give, if for no other reason, apart from their theoretical nature, than that whatever opinion I may give would tend to be embarrassing to other judges of the High Court who may not agree with my opinion in cases where subsequent proceedings involving the same subject-matter may be brought before them.

Para (c) is clearly seeking a negative declaration in relation to possible and not existing actions. In *Re Clay (ubi supra)* DUKE, L.J., said at p. 78 –

"I do not myself believe that, in the ordinary case of possible controversy between parties it is open to one of the parties, because he apprehends a claim will be made against him, to serve a writ or other process upon the other party in order to obtain a decision that that claim could not be made."

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Assuming, but not admitting, that I am wrong in considering that paras (a), (b) and (c) of this summons involve theoretical issues seeking the advisory opinion of this court for which only negative declarations are sought, it seems to me that under, either the equitable maxim "He who comes to equity must come with clean hands" or under the Common Law maxim *Nullus commodum capere potest de injuria sua propria* (no one can gain an advantage by his own wrong) the declarations sought must equally be refused.

In my opinion, equity will not permit this company, after having received no doubt thousands and thousands of dollars as premiums for policies issued in respect of third party risks in relation to motor vehicles, between 18th October 1963 and 19th October, 1966, a period of exactly 3 years, to now come before this court, and piously raise their hands to the heavens and boldly disclaim all or any liability and ask this court, sitting as a court of both law and equity, to countenance such disgraceful conduct, by granting them this modern equitable relief.

With all due respect, all the other submissions to my mind, are not necessary for the purposes of my decision.

In conclusion, therefore, the declarations sought at paragraphs (a), (b), (c) and (d) of this summons are all refused for the reasons that I have given.

There will be costs to the first, second and twelfth-named defendants certified fit for counsel. As the fifteenth-named defendant, Kenneth Joseph is not represented by counsel, there will be costs to him fixed in the sum of \$500.00; Although there is no authority to solicitor in respect of the tenth-named defendant, nevertheless, as he appeared personally, I will award him costs fixed also in the sum of \$500.00.

Declarations refused.

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SUPREME COURT OF JUDICATURE OF GUYANA

1969

COURT OF APPEAL

THE HON. SIR EDWARD LUCKHOO	—	Chancellor
THE HON. SIR HAROLD BRODIE SMITH BOLLERS	—	Chief Justice
THE HON. MR. JUSTICE GUYA LILADHAR BHOWANI PERSAUD	—	Justice of Appeal
THE HON. MR. JUSTICE PERCIVAL AUGUSTUS CUMMINGS	—	Justice of Appeal
THE HON. MR. JUSTICE VICTOR EMMANUEL CRANE	—	Justice of Appeal (appointed 19.3.69)

HIGH COURT OF GUYANA

THE HON. SIR HAROLD BRODIE SMITH BOLLERS	—	Chief Justice
THE HON. MR. JUSTICE AKBAR KHAN	—	Puisne Judge
THE HON. MR. JUSTICE ARTHUR CHUNG	—	Puisne Judge
THE HON. MR. JUSTICE VICTOR EMMANUEL CRANE	—	Puisne Judge (appointed Justice of Appeal 19.3.69)
THE HON. MR. JUSTICE GEORGE AUBERT SYDNEY VAN SERTIMA	—	Puisne Judge
THE HON. MR. JUSTICE DHANESSAR JHAPPAN	—	Puisne Judge
THE HON. MR. JUSTICE CHARLES JOHN ETHELWOOD FUNG-A-FATT	—	Puisne Judge
THE HON. MR. JUSTICE HORACE MITCHELL	—	Puisne Judge
THE HON. MR. JUSTICE FRANCIS VIEIRA	—	Puisne Judge
THE HON. MR. JUSTICE KENNETH GEORGE	—	Puisne Judge
THE HON. MR. JUSTICE RALPH MOWBRAY MORRIS	—	Acting Puisne Judge (appointed 19.3.69)

LAW OFFICERS OF THE CROWN

THE HON.

SHRIDATH S. RAMPHAL, Q.C.

— Attorney-General

M. SHAHABUDEEN, ESQ., Q.C.

— Solicitor-General

METHOD OF CITATION

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CORRIGENDUM

p. 553 — *Attorney General for Guyana v. Nobrega*. Counsel for the Crown: read 'The Solicitor-General for Guyana (M. Shahabuddeen Q.C), J.G. Le Quesne Q.C. and Mervyn Heald' instead of as printed.

(See Corrigenda in (1970) 1 All E.R. at p. (iii)).