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MINI PERSAUD *v.* WINSTON VERBEKE

[High Court (Khan, J.), May 21, 22, 1970; January 11, 1971].

Negligence—Duty of care—Employer's motor vehicle driven by third person with permission of agent in order to assist agent to extricate vehicle from a fastened position—Whether agent acting within the scope of his authority—Whether employer vicariously liable for accident caused by negligent driving of third person resulting in death of pavement vendor.

Damages—Sixty six year old vendor killed in motor vehicle accident—Whether plaintiff a dependant—Accidental Deaths and Workmen's Injuries (*Compensation*) *Ordinance, Cap. 112* (*now Cap. 99:05*) *[G.]—Law Reform* (*Miscellaneous Provisions*) *Ordinance, Cap. 4* (*now Cap. 6:02*) *[G.].*

The deceased, 66 years of age and mother of the plaintiff, was sitting on a pavement when a motor vehicle which was owned by the defendant and operated as a hire car by his agent Johnson mounted the pavement, struck the deceased and pinned her under it. As a result of the injuries received she died within an hour. At the time the car mounted the pavement one Eleazer was driving with the permission of the defendant's agent who had engaged his services in order to assist the agent to extricate the rear bumper of the car which was hooked on to a refuse box and the rear wheel which was fastened in the mud. The defendant admitted that Johnson was employed by him as his agent to drive the car but stated that he was the only person authorised to do so, and that as the defendant did not give Eleazer authority to drive his car the action of his agent in permitting Eleazer to drive was outside the scope of his authority or employment. The evidence also disclosed that the plaintiff had worked jointly with the deceased as a fruit and provision vendor, and it was submitted that the plaintiff was not a dependant.

HELD: (i) the agent Johnson acted within the scope of his authority in obtaining the assistance of Eleazer to extricate the car. It was a joint operation which was negligently performed by Eleazer;

(ii) the defendant was vicariously liable for Johnson's negligence in not ascertaining whether Eleazer was a competent driver. Johnson's act was an improper mode of performing his duties;

(iii) the plaintiff was not a dependant, and was entitled to an award of damages in the sum of $1,800.00 for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Ordinance.

Judgment for the plaintiff.

A. S. Manraj, S.C. for the plaintiff.

B. E. Commissiong for the defendant.

KHAN, J.: The Plaintiff is the administratrix of the estate of Bridgerajie, deceased. She is also the only child of the deceased who died on the 17th October, 1967, from injuries arising out of a motor car accident while she was sitting on the pavement at the corner of James and Calender Streets, Albouystown, Georgetown.

In her aforesaid capacity and for her own benefit the Plaintiff claims damages in excess of $500.00, under the Law Reform (Miscellaneous Provisions) Ordinance Cap. 4, and (b) Damages and pecuniary compensation in excess of $500.00, under the Accidental Deaths and Workmen's Injuries (Compensation) Ordinance, Cap. 112 as amended.

The deceased was a 66 years old fruit and provision vendor. She resided at 22 Callender Street, Albouystown, and carried on business as aforesaid on the pavement at the corner of James and Callender Streets, Albouystown, under the shed of a shop.

On the 17th October, 1967 at about 9.00 a.m. while the deceased was sitting on the pavement and attending her business, motor car HM 112, owned by the defendant and operated by his agent mounted the said pavement and collided and pinned the deceased under it. The deceased sustained extensive injuries resulting in her death, within an hour.

The evidence of Mohamed Haniff—the only eye witness who testified—was undisputed. His evidence disclosed that motor car HM 112, was on the Southern parapet in James Street near to Callender Street. The defendant's rear wheel was stuck in the mud and the rear bumper hooked on the Mayor and Town Council refuse box, which was about 8 feet by 8 feet by 12 inches high on the Eastern parapet of Callender Street, and James Street. Sitting behind the steering wheel with the engine beating heavily was Herby Eleazer. At the same time James Johnson—the admitted agent of defendant—was outside and behind the car lifting the bumper in an effort to extricate it from the refuse

box while the driver was accelerating forward. In the course of this joint exercise, the car moved forward and backward again and again and finally it bounced forward and mounted the pavement where the deceased was, striking, and pinning her under it. Haniff who was looking on at the operation went closer and saw Eleazer leaning against the steering wheel as if he was hurt.

Haniff, James Johnson and one Leacock then lifted the car and the deceased was pulled out from under it. She was bleeding and unconscious. The police ambulance took her away shortly afterwards to the Georgetown Hospital, where she died before 11.00 a.m. The account given by Haniff is uncontradicted. He impressed me as a credible witness and I believe and accept his evidence in its entirety.

Police Constable Shiraj Alli, gave evidence of his investigations and measurements. The witness Haniff related what he saw to P.C. Alli in the presence and hearing of Johnson and Eleazer. Neither Johnson nor Eleazer has given evidence. Photographs of the scene and the position of the car after the accident were tendered.

The defendant's evidence is to the effect that he is the registered owner of the car HM 112. He resides at 107 Henry Street, Georgetown. He is also the President of the Mine Workers Union. In September, 1967 he engaged one James Johnson to drive the car as a hire car, on certain terms and conditions. Defendant from the witness box related the terms and conditions in his own words as follows:—

> "I gave him (Johnson) the car to drive and he was to bring me $15.00 (fifteen dollars) per day. The car was bought from Central Garage by me. Johnson was to pay the hire purchase instalments. Hire purchase Instalments exclusive of the $15.00 per day. All amounts made in excess of $15.00 per day was his (Johnson's). He Johnson was to pay for gasolene and minor repairs. In the case of major repairs, we were to do this jointly Johnson was free to drive wherever he liked. . . ."

Defendant paid the Licence and Insurance. Under Cross-Examination defendant stated inter alia.

> "I did trust him (Johnson) to give him the car to work. . . . I had made a down payment of $700.00, and was to pay the balance of $800.00 in instalments of $95.00 per month. I was liable for the payment of the instalments—but I had arranged with Johnson that he should pay it—Johnson paid on one occasion an instalment—of course in my name.
>
> "He was to take good care of the car—to see it was not damaged. That was part of our arrangement. I did not expect Johnson to break any rules. I did expect Johnson to take care of my car in accordance with my instructions. . . . He had to use his discretion

in certain situations that may arise". On the 17th October, 1967 I was not in Georgetown. . . ."

Defendant declared that he never gave authority to Herby Eleazer to drive the car. Johnson was the only person he authorised to use the car and to drive it. Defendant concluded his evidence—thus:—

"I told him he was the only person to drive the car, as a hire car. He was to operate as a hire car. I tried to get Johnson to come as a witness but I was not successful".

In the course of the defendant's evidence Mr. Manraj for the Plaintiff objected to the line of the defence being led. Having regard to the defendant's admission in his statement of defence that Johnson was his agent. But Mr. Commissiong reassured Mr. Manraj and the court that the defendant is admitting that Johnson was his agent because defendant was enjoying a benefit.

Defendant admitted paras. 1, 2, 3 and 4 of the Plaintiff's claim.

By para. 2 of the statement of the defence, the defendant stated:

"2. As regards to para. 5, the defendant denies that Herby Eleazer was ever the servant or agent of the defendant and will contend that the' action of James Johnson in permitting Herby Eleazer to drive, manage, or control the motor car HM 112, was outside the scope of his authority, or employment, and that the defendant is in no way liable to the plaintiff as claimed".

In the light of the pleadings and the evidence before me, the sole point to be resolved on the question of liability is whether the Defendant is vicariously liable.

Mr. Commissiong for the defendant submitted that in order for the plaintiff to succeed, she must show that the deceased died as a result of the negligence of the defendant's agent Johnson. At the time of the accident Eleazer was the driver, who was not the agent of the defendant. Defendant's contention is that Johnson had no authority to engage Eleazer to drive. Further it was submitted that the employment of Eleazer by Johnson in the circumstances was not within the scope of Johnson's authority, or agency.

Mr. Commissiong submitted authorities in support of his argument. These are noted on the record.

On the other hand it is the submission of the plaintiff that the evidence shows that the moving of the car from the parapet on to the pavement was a joint operation, by Johnson and the driver Eleazer. The car was hooked to the refuse box and a wheel stuck in the mud. It was released only by the lifting of the back by Johnson while the driver accelerated, moreover, Johnson can be described as supervising the operation.

Counsel for plaintiff further submitted that Johnson had the authority to get some one to assist in extricating the car while it was hooked and stuck. This was a minor operation and was within the scope of Johnson's authority—but he might have done it badly in employing Eleazer who did it negligently.

It appears to the court that the situation would have been more involved, had not the defendant admitted that Johnson was his agent. Having admitted that Johnson was his agent the question to be resolved is whether Johnson in engaging Eleazer to assist him in the operation of unhooking the car in all the circumstances was within the scope of Johnson's authority. In *Engelhart v. Farrant & Co.* and T. J. LIPTON 1897, 1 Q.B. p. 240: It was held that—

> "There is no rule of Law to prevent a master being liable for negligence of his servant whereby opportunity was given for a third person to commit a wrongful or negligent act immediately producing the damages complained of: Whether the original negligence was an effective cause of the damage, is a question of fact in each case".

In that case the defendant employed a man to drive a cart, with instructions not to leave it, and a lad who had nothing to do with the driving, to go in the cart and deliver parcels to the customers of the defendant. The driver left the cart, in which the lad was, and went into a house. While the driver was absent the lad drove on and came into collision with the plaintiff's carriage.

In an action to recover for the damage caused by the collision. It was held that the negligence of the driver in so leaving the cart was the effective cause of the damages, and that the defendant was liable:—

Lord ESHER M.R. in the course of his judgment stated inter alia:—

> "If a stranger interferes it does not follow that the defendant is liable; but equally it does not follow that because a stranger interferes the defendant is not liable if the negligence of a servant of his is an effective cause of the accident".

In *Ricketts v. Thomas Tieling Ltd.* 1914: Vol. 112 T.L.R. p. 137:—

> "A motor omnibus belonging to the defendants had just completed its journey and discharged its passengers. It then proceeded to commence its return journey, driven by the conductor, at whose side the defendant's licensed driver was sitting. While thus being driven it suddenly mounted the pavement and injured the plaintiff.
>
> "At the trial the case was withdrawn from the jury on the ground that there was no negligence against the defendants, and judgment was entered for the defendants.
>
> "On Appeal it was held that the driver owed a duty to his employers to see that if he allowed another person to drive the

omnibus, that person drove properly and that it was a question of fact to be left to the jury whether the driver was guilty of negligence if he failed to see that the person whom he had allowed to drive was a competent driver. A new trial was therefore ordered."

In the course of his judgment RICKFORD, L.J. said inter alia:—

"In this case I say it is admitted that the driving was negligent. It is also admitted that the driver was sitting by the man who was driving, and he could see all that was going on. . . . It seems to me by that, that the fact that he allowed somebody else to drive does not divest him of the responsibility and duty he has towards his masters to see that the omnibus is carefully and not negligently driven. I asked Mr. Charles whether there was any case in which the driver was present when the negligent driving went on where the master had been held to be not liable. Apparently there is none".

In *Ilkiw v. Samuels & others:* 1963—2 All E.R. p. 879—The defendant's lorry was driven to the premises of the plaintiff's employers to load bags of sugar. The defendant's driver Waines put the lorry under a conveyor and then stood in the back of the lorry to load bags from the conveyor. When sufficiently loaded the lorry had to be moved. Samuels, a fellow employee of the plaintiffs and not employed by the defendant's, offered to move it. Waines allowed him to do so 'without asking whether he could drive, and after starting the lorry, could not stop it. It crushed the plaintiff—who was working nearby causing him serious injuries. Waines remained in the back of the lorry throughout.

He had been expressly forbidden by his employers to let anyone other than himself drive the lorry—Held (1) Waines was negligent in allowing Samuels to drive without enquiring whether he was competent. The defendants were vicariously liable for his negligence because it was a mode, though an improper one, of performing the duties on which he was employed, namely, to have charge and control of the lorry. It was therefore a negligent act within the scope of his employment.

In the instant case Johnson was entrusted with the defendant's motor car to drive, and to be in charge of it. The defendant admitted that Johnson was engaged in supervising an operation of unhooking the car which was fastened to a refuse box. He engaged Eleazer to assist him in this operation by putting Eleazer at the wheel. Johnson did so without first ascertaining whether Eleazer was competent to drive.

In *Ormrod and another v. Crosville Motor Services Ltd. and another:* 1953—2 All E.R. p. 753—DENNING, L.J. in the course of his judgment stated inter alia:

"The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else no matter whether it is his servant, his friend or anyone else. If it is being used wholly or partly on the owners business or for the owner's

purposes. The owner is liable for any negligence on the part of the driver.

"The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern". (See *Hewitt v. Bonvin*)*:*

In the instant case Counsel for the defendant stated that Johnson was defendant's agent, as defendant was enjoying a benefit.

In all the circumstances it appears to me that Johnson acted within the scope of his authority in attempting to extricate the car which was hooked on the refuse box and fastened in the mud. In carrying out this exercise of extricating the car he obtained the assistance of Eleazer. The exercise was a joint operation. Johnson lifting at the back of the car while Eleazer accelerating forward—Johnson did not ascertain whether Eleazer was a competent driver, Johnson carried out this operation negligently—resulting in the death of the deceased. His principal the defendant is therefore vicariously liable for Johnson's negligence. No question of contributory negligence arises. The deceased death resulting from accident was not disputed.

On the question of the plaintiff being a dependent within the meaning of the Ordinance, I agree with Mr. Commissiong's submission. I find she worked jointly with the deceased, and was never a dependent.

On the question of damages for loss of expectation of life and consequential loss under the Law Reform (Miscellaneous Provisions) Ordinance Cap. 4: I have considered the relevant authorities both local and English. Having regard to the deceased age: she was 66 years old at the time, and other relevant matters: I award the plaintiff damages in the sum of $1,800:00 (one thousand eight hundred dollars) with costs fixed at $750.00 (seven hundred and fifty dollars). Stay of execution granted for 6 weeks.

Judgment for the plaintiff.

THE STATE *v.* RAKHA PERSAUD

[Court of Appeal of Guyana (Bollers, C.J., Cummings and Crane, JJ.A.)
November 25, 26, 1970; February 5, 1971.]

Criminal Law—Evidence—Accused charged with murder—Accused previously charged with rape of deceased—Whether evidence of previous charge was admissible at trial for murder.

Criminal Law—Evidence—Statement made by accused person—Confession—Functions of judge and jury.

The accused was charged with the murder of M.B. During the course of the trial, evidence was led to show that he had been previously charged with raping her, that she had given evidence in that case for the State, and that he had been committed to stand trial for the offence. Put in evidence also was a statement alleged to have been made to the police who were then investigating the death of M.B., which amounted to a confession. Objection was taken to the admission of the statement on the ground that it was inadmissible and highly prejudicial, and also to the manner in which the trial judge left the matter of the statement to the jury.

HELD: [by Bollers, C.J., and Crane, J.A.]:

(i) the challenged evidence must be treated as part of the history of the act of murder itself, and as explanatory of the conduct of the accused;

(ii) whether a statement has been made freely and voluntarily by the prisoner is for the judge who will admit it if he finds it is so made beyond reasonable doubt. When he admits it, the only question then for the jury is to say what weight or probative value should be placed on it; but that the judge did not leave the question of weight or probative value to be placed on the alleged confession or statement;

[By Cummings, J.A.]: in view of the defence and the conflicting medical testimony the judge ought to have invited the jury to consider manslaughter.

Appeal allowed. New trial ordered (*Cummings, J.A., dissenting, and moving for the substitution of a verdict of manslaughter*).

[**Editorial Note**: This case is also reported in (1971) 17 W.I.R. 234].

B. Prasad, S.C., for the appellant.

W. G. Persaud, State Counsel, for respondent.

BOLLERS, C.J.: On November 26, 1968, Mohanie Bhownauth, also called Betty Bud, aged fourteen years, was sent by her sister, Dorothy, at about 6 a.m., to meet a bus at Ma Retraite public road, Berbice, and was never seen alive again. Three days later, her dead body was found floating in the Berbice River at Berestein with its face downwards and tied to a clump of bushes with a rope. The appellant was later charged with the offence of murder. At his trial, the appellant was found guilty and sentenced to death. It is from this conviction and sentence that he now appeals to this court.

The case for the prosecution was based partly on circumstantial evidence and was to the effect that on the day in question the deceased left her sister's home at Ma Retraite at about 6 a.m. with the intention of meeting the bus on the public road. She was then wearing a bright blue dress and a pair of light blue slippers with a black band around her hair. Around that hour, Neville Northe, a farmer who lived at Ma Retraite, was also on his way to the public road, walking on a dam, when he heard a loud scream coming from the western side of the public road which was nearer to the Berbice River. He continued on his way and saw a man coming from that side of the road. The man walked east and then turned back and went into the bush. He was not recognised but he was seen wearing a white shirt.

Jaisingh, another labourer, at about 6.30 a.m. was standing on the bridge at the Ma Retraite public road when the appellant was seen on the river side of the road wearing wet clothes. The appellant then spoke to Jaisingh and enquired if anyone was on the road. He was told, "No", and then he was seen to proceed along the public road in a southerly direction.

Meanwhile, Dorothy Bhownauth, the sister of the deceased, left her home with her husband to go to the Ma Retraite public road in order to look for the deceased, but did not find her. The bus that the deceased was expected to meet arrived, and Dorothy collected her goods from the driver and then she and her husband went in search of the deceased. They found the slippers of the deceased by the riverside near to some bushes about three to four hundred yards from her home. The spot where the slippers were found were near to where the bus had stopped. On her way to the police station she saw the appellant coming out of the bush with his clothes wet at a spot two rods from where the slippers were found.

Three days later, *i.e.*, about 2 p.m. on November 29, 1968, Ramdat, a farmer, was crossing the river by boat when he saw the dead body of the deceased floating face down in the water on the west bank. The body was later that day removed to a mortuary by the police, who found it tied with a rope to a clump of bushes.

In the meantime, on November 26, 1968, the appellant was told by P.C. 6618 Rasheed that Mohanie Bhownauth was reported missing, and he would like him to assist in enquiries. The appellant said he had no objection and was escorted to the police station at Mara. At the police station, the appellant informed Detective-Inspector Chandra Lall that he knew nothing about the deceased Mohanie Bhownauth. The Inspector informed the appellant that he had received information that he (the appellant) was seen with his clothes wet and he asked for an explanation. The appellant's explanation was that he had been to defecate on the dam at the Black Eye Project, and he had fallen into a trench. At the request of the Inspector, the appellant took him to a dam at the Black Eye Project at Mara and showed the police the spot where he had defecated that morning, and he showed them the trench into which he had fallen. The Inspector expressed disbelief at this as grass had covered the area of the trench.

At 6 p.m. that night the appellant made an uncautioned statement to the police when enquiries were being made in which he gave an account of his movements on November 26, 1968, between the hours of 6 a.m. and 6.30 a.m., and in which he did not implicate himself. At about 7 p.m. that might the Inspector discovered a wound on one of the fingers of the appellant, and the appellant was then escorted to New Amsterdam Police Station.

On November 29, 1968, the appellant was brought back to Mara Police Station by the police along with a medical report, and the appellant then stated that he had to be treated for haemorrhoids while in New Amsterdam, and he showed the Inspector some tablets. About ten minutes later, P.C. 6796 Baijnauth told the appellant that he was suspected of the murder of Mohanie Bhownauth. The appellant then said, "Officer, I gon tell you wah happen but leh Mr. Chandra come."

Mr. Chandra, the Superintendent in charge of the Mara Land Development Scheme, was sent for, and the appellant was again cautioned, whereupon he elected to make a statement and signed it as being true and correct in the presence of Chandra and his (appellant's) father, Deokarran. In that statement, the appellant stated that at about 6.30 am. on November 26, 1968, he had seen the deceased standing at the head of the street at Ma Retraite, and he had told her, "Good morning", whereupon she had abused him and he had run and held her, beaten her and thrown her into the river, and his father, Deokarran knew nothing at all about the matter.

At the trial, the admissibility of this statement was objected to by counsel for the appellant on the ground that it was not a free and voluntary statement, and that threats had been meted out to the appellant, and that the statement was taken in breach of the Judges' Rules, and altogether the statement had been taken in circumstances which rendered it unfair to the appellant. This issue was tried on the *voir dire,* and the statement admitted by the learned judge. On the *voir dire* the appellant gave evidence that he had been handcuffed by the police and threatened with a revolver that he and members of his family would be beaten, and as a result, he made the statement saying what the police wanted him to say.

Evidence was also led by the prosecution to show that in February, 1968, the appellant had been charged with the rape of the deceased, Mohanie Bhownauth, and that the deceased had given evidence against him at the preliminary inquiry, and the appellant was subsequently committed to stand his trial on the charge of rape. Dorothy Bhownauth gave the evidence that on the day after the appellant had been committed for trial, the appellant had passed her house and stated that the deceased had told lies when she said that he had raped her. The Field Foreman of the Black Eye Project where the appellant worked, gave evidence that the appellant did not turn out to duty that morning at the correct time but arrived twenty minutes late at 7.20 a.m.

In his defence at the trial, the appellant made a statement from the dock in which he declared his innocence and denied killing the deceased or causing any harm to her. He stated that the police had picked him up at his

workplace and informed him that he had a case with Mohani Bhownauth and he must know her whereabouts. He had told them that he knew nothing, but, nevertheless, they had held him up to the present time and had denied him food and water. They had handcuffed him and beaten him and told him that they would charge his mother, his father and himself for murder, and then they had written out a statement and compelled him to sign it, and the police generally had asked him all kinds of questions.

The father of the appellant Deokarran, gave evidence that on the day in question, November 26, 1968, he and the appellant had worked at the Black Eye Project at the Ma Retraite that morning, and that P.C. Rasheed had come there and told the appellant that he was wanted at the station, whereupon P.C. Rasheed took the appellant away. Later, the police had taken him (the witness) to the station, and about 2.30—3 p.m. at the police station, both he and the appellant had been handcuffed, and the appellant had been beaten and threatened with a revolver by P.C. Baijnauth; that both he and the appellant were told that they would be locked up and charged for the murder; that it was in these circumstances that P.C. Baijnauth wrote out a statement and forced the appellant to sign it, and he (the witness) was forced to sign as a witness.

It will be seen that the case for the prosecution against the appellant was based primarily on the confession statement made to the police and the circumstantial evidence in relation to:

(a) the appellant having been charged for rape and seen on the public road at Ma Retraite about 6.30 o'clock on the morning in question coming from the bushes with his clothes wet, about two rods away from where the slippers of the deceased had been found;

(b) the deceased having been seen on the road during this period of time; and

(c) the appellant arriving for work late that morning;

which latter circumstances were all mere circumstances of suspicion, and the judge so directed the jury. The learned judge correctly directed the jury when he told them that these circumstances by themselves were not sufficient evidence from which they could find the appellant guilty of any offence, but were mere circumstances of suspicion and that the important evidence was the evidence of the alleged confession made by the appellant to the police.

Two main points have now been taken in this appeal. Firstly, that the evidence in relation to the appellant having been charged for the offence of rape on the deceased was highly prejudicial and inadmissible in that the jury may have thought that the appellant was a man of bad character with a propensity to commit crimes of violence. Secondly, the learned trial judge did not direct the jury that he, having admitted the alleged confession made by the appellant, it was still left for them to say what weight should be placed on the statement and whether they considered the confession to be true or not true.

In answer to the first point, I would refer to *Abraham v. Alexander* (1), where the Full Court of the Supreme Court of Judicature, following the English decisions of *Makin v. Attorney-General for New South Wales* (2), *R. v. Bond* (3), *and the local case of Chee-Lan-Loong v. Ramchandar Singh* (4), decided by the Full Court, held that if evidence is otherwise admissible, the mere fact that a prejudicial inference arises from it cannot by itself render it inadmissible. The test is, whether its prejudicial effect is out of all proportion to its evidential value.

In the *Kuruma* case (5), where the Privy Council held that ammunition found upon the accused by an unlawful search was admissible, LORD GODDARD stated ((1955), A.C. at p. 203):

> ". . . the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained."

Again, later in his decision, LORD GODDARD said (*ibid.*, at p. 204):

> "No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused."

The authority of *Murdoch v. Taylor* (6), lays it down that this is so equally when the evidence is admissible by statute as when it is admissible by common law. The discretion of the judge to exclude legally admissible evidence of this kind is, therefore, a general one, though it seems more frequently to have been invoked in cases of similar facts. [See *Noor Mohamed v. R.* (7).]

In *Makin g. A.-G. for New South Wales* (2), which was a case where evidence of similar facts were admitted, LORD HERSCHELL in the Privy Council stated ((1894, A.C. at p. 65):

> "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. On the other hand, 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 were designed or accidental, or to rebut a defence which would be otherwise open to the accused."

The present appeal is not a case based on similar facts where such evidence is admissible to rebut a defence of accident or mistake, etc. Nevertheless, the second portion of LORD HERSCHELL's dictum is of great importance in showing that if the evidence is relevant to an issue before the court, it matters not that that evidence tends to show the commission of other crimes. Twelve years after the Privy Council's decision in *Makin's* case

(2), this statement of the law was approved of by the Court of Crown Cases Reserved in *R. v. Bond* (3), and KENNEDY, J., referred to the dictum of LORD CAMPBELL in *R. v. Oddy* (8), where that learned law Lord stated ((1851), 2 Den. 264).

> "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 perpetrator of the first."

KENNEDY, J., after pointing out the great prejudice that could be done to an accused person by the disclosure to the jury of other misconduct of a kind similar to that which is the subject of the indictment, then went on to make it plain, however, that the existence of certain circumstances had to be recognised in which justice could not be attained at a trial without the disclosure of prior offences, in which case the utmost vigilance should be maintained in restricting the number of such cases. He then made the point later in his decision that the general rule as to the exclusion of evidence of prior offences could not be applied where the facts which constitute distinct offences are at the same time part of the transaction which is the subject of the indictment. The learned judge, in my view, then set out the principles which made the evidence objected to in the present appeal clearly admissible, when he said ((1906), 2 K.B. at p. 400):

> "Evidence is necessarily admissible as to facts which are so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances and so could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible."

As an illustration of this principle, the learned judge then referred to the cases of trial for murder or wounding with felonious intent in which evidence is admissible to show prior assaults by the prisoner upon the murdered or injured person, or menaces uttered to him by the prisoner; and made the point that the relations of the murdered or injured person to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment, are properly admitted as to proof of integral parts of the history of the alleged crime for which the accused is on his trial. Thus, in the instant appeal, the evidence that the appellant has been charged and committed for trial for the offence of rape on the deceased and his subsequent threats in murder itself, and as explanatory of the conduct of the appellant towards the deceased. This evidence was, in the language of LORD GODDARD, C.J., in *R. v. Simms* (9), "logically probative", and was therefore admissible to show the motive for murder of the deceased by the appellant, or as the learned trial judge put it, ''the animosity" that existed between the accused and the deceased, and it could not then be properly urged that its prejudicial effects outweighed its probative value.

On the second point, I now reproduce hereunder the statement alleged to have been made by the appellant which the learned judge described as a confession.

> "Tuesday about 6.30 a.m. on November 26, 1968, I left home with my breakfast dish where I see Mohani Bhownauth standing at the head of the street at Ma Retraite I told her good morning she said to me let me clear me mudda skunt from near she. I ran and hold her and beat her and throw her in the river, nothing else. Me daddy know nothing about this. Dis is all."

In dealing with the confession, just a little more than half-way in the summing-up, the learned judge stated to the jury:

> "You have the evidence of Constable Baijnauth, and I will couple this evidence of Constable Baijnauth with that of the witness, Chandra, because Baijnauth is the witness who took the statement—the alleged confession—from the accused, if the confession is free and voluntary."

He then directed the jury in the following words:

> "If you are satisfied so that you feel sure that no pressures were brought to bear on the accused, that he was not in any way intimidated, that he was not in any way beaten, that no inducements were held over to him, then this amounts to an issue you may want to feel of guilty, and bearing in mind my direction of law on murder and the law of manslaughter, it is open to you to find him guilty of either one or the other."

There it will be seen that the judge was telling the jury that if they felt sure that the appellant was not beaten or inducements were not held out to him, i.e., that the confession amounted to a free and voluntary statement, then they could infer that he was guilty either of murder or manslaughter, having regard to the directions of law he had already given them in relation to those two offences. It appears then that the judge was leaving the issue of whether the statement was a free and voluntary statement or not with the jury, from which the inference of guilt could be drawn if they found it as a voluntary statement, and did not warn them that they could only convict the accused of either offence if they found the statement to be true.

The law on the question as to the admissibility of a statement by a prisoner is well established, and it is the settled practice for a challenge to be made to the admissibility of a statement alleged to have been made by an accused person at an early stage in the absence of the jury. When objection is taken to the admissibility of a confession, it is the practice for the jury to be directed to withdraw, and after evidence concerning the confession has been given for the prosecution, the accused may give evidence on this point. *R. v. Cowell* (10). If the judge holds that the confession is admissible, when the trial proceeds in the presence of the jury, the accused may give evidence a second time, including evidence as to the circumstances in which the confession was made. *R. v. Bass* (11).

In *R. v. Bass* (11), Mr. JUSTICE BYRNE, who delivered the judgment of the Court of Criminal Appeal, held that when a person who is in police custody makes a confession, the jury should be directed to consider whether the statement was made voluntarily, and in the course of his judgment referred to the famous dictum of LORD SUMNER in the case of *Ibrahim v. R.* (12), where that learned judge stated ((1914), A.C. at p. 609):

> "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."

BYRNE, J., then observed that the court had already pointed out in *R. v. Murray* (13), that while it was for the presiding judge to rule whether a statement was admissible, it was for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the judge he should direct the jury to apply to the consideration of it the principle as stated by LORD SUMNER, and he should further tell them that if they were not satisfied that it was made voluntary, they should give it no weight at all and disregard it.

Thus, it will be seen that the learned judge in the present appeal summed up to the jury on this aspect of the case along the lines suggested by BYRNE, L, in *R. v. Bass* (11), but failed to tell the jury that it was for them to determine what weight should be given to the statement.

In *R. v. Murray* (13) referred to in *R. v. Bass* (11), where it was alleged that the accused had made a signed confession and he denied that it had been made voluntarily, evidence on this point was heard, and the Recorder ruled that the confession was admissible. After the jury returned to court, the Recorder, however, refused to allow counsel for the accused to cross-examine the police officers or to examine the accused as to whether the confession was voluntary, and LORD GODDARD, C.J., who delivered the judgment of the Court of Criminal Appeal, ruled that the Recorder was wrong in the course which he had taken. The learned Chief Justice then stated ((1915), 1 K.B. at p. 392):

> ". . . It was quite right for him to hear evidence in the absence of the jury and to decide on the admissibility of the confession; and, since he could find nothing in the evidence to cause him to think that the confession had been improperly obtained, to admit it. But its weight and value were matters for the jury, and in considering such matters they were entitled to take into account the opinion which they had formed on the way in which it had been obtained. (Counsel) was perfectly entitled to cross-examine the police again in the presence of the jury as to the circumstances in which the confession was obtained, and to try again to show that it had been obtained by means of promise or favour. If he could have persuaded the jury of that, he was entitled to

say to them: 'You ought to disregard the confession because its weight is a matter for you'."

Thus the case of R. *v. Murray* (13) makes it clear that whether confession has been admitted by presiding judge as having been made freely and voluntarily by an accused person, it is still left to the jury to say what weight and value they attach to such statement, and in considering that question they are entitled to take into account the opinion they had formed on the way in which the statement had been taken, and if they were persuaded that the statement had been obtained by means of a promise of favour or violence, then they should give the statement no weight at all and disregard it, for the weight and value of the evidence as the learned Chief Justice pointed out, are always matters for the jury. I would observe here that in the decision in R. *v. Murray* (13), there was no clear statement that voluntariness is not for the jury. This new dimension on the law as to the admissibility of an alleged confession statement was however, clarified in a judgment of the Privy Council in the case of *Chan Wai-Keung v. R.* (14), following the decision of the High Court of Australia in *Basto v. R.* (15). In this decision, the Privy Council set out the respective functions of the judge and jury where the admissibility of a statement is concerned, and held that the question whether a statement was voluntarily made was for the judge who, for this purpose, must decide independently of the jury both the relevant facts and the law; if the statement is admitted, then the question of its probative value or effect, which is a different question from its admissibility, if for the jury, and in order to determine this, it may be necessary to go over before the jury, testimony that the judge has heard when deciding whether the statement was voluntary. *Basto v. R.* (15).

LORD HODSON, who delivered the judgment of the Privy Council, pointed out that the celebrated dictum of LORD SUMNER (already referred to in this judgment) dealt with admissibility and the meaning of the word "voluntary", and that the language of BYRNE, J., in R. *v. Bass* (11) and LORD GODDARD in R. *v. Murray* (13) was susceptible of the construction that a jury must always be told to disregard a confession which was not, in their view, made voluntarily even if they should consider it to be true, and this had caused judges of the High Court of Australia in *Basto's* case (15) to doubt this part of the judgment in R. *v. Bass* (11).

LORD HODSON then cited with approval the dictum of the High Court of Australia in the *Basto* case (15) which is as follows (1954), 91 C.L.R., at p. 628):

> "The jury is not concerned with the admissibility of the evidence; that is for the judge, whose ruling is conclusive upon the jury and who for the purpose of making it must decide both the facts and the law for himself independently of the jury. Once the evidence is admitted the only question for the jury to consider with reference to the evidence so admitted is its probative value or effect. For that purpose it must sometimes be necessary to go before the jury the same testimony and

materials as the judge has heard or considered on a voir dire for the purpose of deciding the admissibility of the accused's confessional statements as voluntarily made. The jury's consideration of the probative value of statements attributed to the prisoner must, of course, be independent of any views the judge has formed or expressed in deciding that the statements were voluntary. Moreover, the question what probative value should be allowed to the statements made by the prisoner is not the same as the question whether they are voluntary statements nor at all dependent upon the answers to the latter question. A confessional statement may be voluntary and yet to act upon it might be quite unsafe; it may have no probative value. Or such a statement may be involuntary and yet carry with it the greatest assurance of its reliability or truth."

Thus the question whether a statement has been made freely and voluntarily by the prisoner is for the judge who will admit it if he finds it is so made beyond reasonable doubt. When he admits it, the only question then for the jury is to say what weight or probative value should be placed on the statement, which I understand to mean that it is for the jury to say whether they consider the statement to be true or not. As LORD PARKER, C.J., put it in *R. v. Burgess* (16) ((1968), 2 All E.R. at p. 55):

"The position now is that the admissibility is a matter for the judge; that it is thereafter unnecessary to leave the same matter to the jury; but that the jury should be told that what weight they attach to the confession depends on all the circumstances in which it was taken, and that it is their right to give such weight to it as they think fit."

Unfortunately, the learned judge in the present appeal in his summing-up did not leave the question of the weight or probative value to be placed on the alleged confessional statement with the jury, but throughout the summing-up appeared to have equated voluntariness with truth, or, on the other hand, seemed to have regarded the truth of the statement as the logical or the unequivocal concomitant of voluntariness, for in his summing-up subsequent to the passage already quoted, he directed the jury as follows:

"In considering whether the State has satisfied you so that you feel sure that the statement was freely and voluntarily given you are entitled to take into account the position which Chandra holds, a position you may want to feel of some trust and importance. You may want to take into account, again it is a question of fact for you, whether or not there is evidence of the existence of any animosity between Chandra, this civilian and the accused. If, after a careful examination, I repeat, you are not satisfied so that you feel sure that this statement was taken with coercion, with force, then say so. And if you say so do not pay attention to the statement. And if you do not pay attention to the statement it means that the accused is not guilty."

And finally,

> "Mr. Foreman and members of the jury, at this point of time I must warn you that if you are left in reasonable doubt as to whether or not this accused was beaten or coerced then you must resolve that doubt in favour of the accused, and if you find or you are left in reasonable doubt that he was coerced or beaten you cannot use the evidence which I may indicate to you as given by Lall against the accused because if he was beaten, coerced, on the 29th from 3.30 to 5, he could well have been acting under the same fear when he spoke to Lall about 5.15 and admitted that he did make the statement, and indeed, even the next morning when Lall says he took him to the spot. So, if he was acting under the same fear of being beaten, or that his parents and family would have all been charged for murder, then what he told Lall later on the 29fh and the morning of the 30th might well have been motivated by that same fear."

It is clear, therefore, that these passages taken from the learned judge's charge to the jury amounted to a misdirection in that he did not leave it fairly and clearly with the jury to say what probative value they placed on the alleged confessional statement and whether they found it to be true or not, for, as pointed out in the Australian case of *Basto* (15), a jury might well find a confessional statement to be voluntary and yet to act upon it might be quite unsafe.

In *R. v. Ovenell* (17), where the trial judge had summed-up in regard to a confessional statement in accordance with the directions laid down by BYRNE, J., in *R. v. Bass* (11), the Court of Appeal followed *Chan Wai-Keung v. R.* (14), and *Basto v. R.* (15) and held that the test of voluntariness was a question for the judge to decide, but the weight attached to the evidence if admitted, was for the jury. Nevertheless, they refused the application for leave to appeal. Had the learned judge in the present appeal addressed the jury's attention to the latter question as to the weight or probative value to be placed on the confessional statement, as appears in the dictum of BYRNE, J., in *R. v. Bass* (11), the conviction might well have been affirmed but, unfortunately, he did not do so. As a result, I would allow the appeal, set aside the conviction and sentence, and order a re-trial as the court is empowered to do.

In the result, the appellant is ordered to stand his trial at the next sitting of the Criminal Sessions in the County of Berbice.

CUMMINGS, J.A.: The appellant was charged with the murder of Mohanie Bhownauth on November 26, 1968, in the County of Berbice. After trial and conviction by a jury at the Berbice Assizes, he was sentenced to death by GEORGE, J., on February 25, 1970.

From this verdict and sentence, he appealed to this court on the following grounds:

(1) The learned trial judge did not direct the jury adequately on the law of manslaughter applicable to the appellant's case and particularly failed to relate the facts of the appellant's case which, if believed, would amount to manslaughter and in particular the legal effects of the alleged confession.

(2) Inadmissible evidence was wrongly admitted and left for the consideration of the jury in that the evidence of Corporal Edward Smartt was wrongly admitted and of very highly prejudicial effect when he testified that the accused (appellant) was committed to stand trial in a case of rape on the deceased, the said Mohanie Bhownauth.

(3) The defence of the appellant was not adequately put to the jury.

(4) The learned trial judge erred in admitting Exhibit "A" having regard to the circumstances under which it was taken.

[HIS HONOUR considered the evidence, and continued:]

On November 26, 1968, the police commenced enquiries concerning the disappearance of the deceased and sought the assistance of the accused. He made a statement on that day in which he denied any knowledge of the manner in which the deceased met her death. He was still "assisting" the police in their enquiries when the deceased's body was discovered. At that state they detained him. He later, after due caution by the police, made a statement which P.C. Baijnauth reduced into writing, read over to him, and he signed. The statement is as follows:

> "Tuesday about 6.30 a.m. on November 26, 1968, I left home with my breakfast dish where I see Mohanie Bhownauth standing at the head of the street at Ma Retraite I told her good morning she said to let me clear me mudda skunt from near she, I ran and hold her and beat her and throw her in the river, nothing else. Me daddy knows nothing about this. Dis is all."

This is, in effect, a confession.

In answer to a question from Inspector Lall as to whether the deceased was dead or alive when he threw her into the water, the accused said, "After me beat she me think she dead and me throw she in the river." This must, of course, be treated as part of the confession and is to some extent explanatory of it.

At the trial the accused challenged the admissibility of the confession on the ground that it was not free and voluntary as the police had obtained it by threats to shoot and beat him and to include his parents in the charge for murder unless he confessed.

The learned trial judge, after conducting a *voir dire* on this issue, found that the statement was free and voluntary and admitted it.

I can see no reason for criticisms of the exercise of this discretion. Ground 4 of the appeal therefore fails. The second ground, in my view, also fails. The learned trial judge was exercising a discretion and cannot be said to have acted on any wrong principle.

All that the learned trial judge told the jury with reference to the confession, however, was as follows:

> "In considering whether the State has satisfied you so that you feel sure that the statement was freely and voluntarily given you are entitled to take into account . . . If, after a careful examination, I repeat you are not satisfied so that you feel sure that this statement was taken with coercion, with force, then say so. And if you say so do not pay attention to the statement. And if you do not pay any attention to the statement it means that the accused is not guilty.
>
> Now the State's case is based primarily on the confession statement alleged to have been given by this accused. The other evidence about the case of rape for which he is indicted; the fact that one of the witnesses heard noises at 6 o'clock in the morning of the 26th; the fact that the accused was seen on the road about 6.30 coming out from the bushes with his clothes wet; the fact that the girl Mohanie Bhownauth was on the road during this period of time; the fact that the accused went to work late that morning; are just circumstances of suspicion. They, by themselves, are not sufficient evidence from which you can find that the accused is guilty of any offence. The important evidence, possibly, you may want to feel, is the evidence of the alleged confession made by the accused to the police.
>
> Then, Mr. Foreman and members of the jury, you have the evidence of Constable Baijnauth and I will couple the evidence of Constable Baijnauth with that of the witness Chandra, because Baijnauth is the witness who took the statement—the alleged confession—from the accused, if the confession is free and voluntary. Mr. Foreman and members of the jury, in other words, if you are satisfied so that you feel sure that no pressures were brought to bear on the accused; that he was not in any way intimidated; that he was not in any way beaten; that no inducements were held over him, then this amounts to an issue, you may want to feel of guilt and bearing in mind my direction of law on murder and the law of manslaughter, it is open to you to find him guilty of either one or the other.
>
> Mr. Foreman and members of the jury, at this point of time I must warn you that if you are left in reasonable doubt as to whether or not this accused was beaten or coerced then you must resolve that doubt in favour of the accused, and if you find or you are left in reasonable doubt that he was coerced or beaten you cannot use the evidence which I may indicate to you as given by Lall against the accused because if he was beaten, coerced, on the 29th, from 3.30 to 5, he could well have been acting under that same fear when he spoke

> to Lall about 5.15 and admitted that he did make the statement, and indeed, even the next morning when Lall says he took him to the spot. So, if he was acting under the same fear of being beaten, or that his parents and family would have all been charged for the murder, then what he told Lall later on the 29th and the morning of the 30th might well have been motivated by the same fear.
>
> If, on the other hand, you regard the accused's behaviour from the moment he struck the girl, if you find the statement is true and he was not coerced, if you find that from the moment he struck her to the moment when he threw her into the river, to be a series of acts designed to cause her death or grievous bodily harm, then he will be guilty of murder."

Counsel for the appellant sought and obtained the leave of the court to argue under ground 1 that this was a non-direction which amounted to a misdirection that may have resulted in a substantial miscarriage of justice in that the jury may well have believed that as far as they were concerned the only consideration with regard to the confession was whether or not it was free and voluntary.

It seems to me that the learned trial judge seems to have misdirected himself as to the jury's function with regard to a confession. He does at one state tell the jury, "If you find the statement is true and he was not coerced", but the whole context seems to indicate that its truth depended on its voluntariness.

The learned trial judge was in effect telling the jury that they were to find whether or not the statement was free and voluntary. If they found that it was, then the accused was guilty; if they found that it was not or they were not sure whether it was or not, then he was not guilty.

It is trite law and has been so from time immemorial that a confession is only admissible if it is free and voluntary, the onus of establishing which is on the prosecution.

In *Ibrahim v. R.* (12), LORD SUMNER, who delivered the opinion of the Privy Council, laid down the law in the following terms (1914—15), 24 Cox,C.C. at p. 180):

> "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority.

That concept has never been abrogated, modified, or in any way altered to this day. In fact, in almost all the cases dealing with this topic—and they are legion—that statement is referred to as authoritative and binding.

It is the duty of the trial judge when this is in issue to consider the evidence upon a *voir dire* and to rule upon it. If he finds that it is free and admits it, then it becomes the function of the jury to say what weight they put upon it, having regard to all the circumstances of the case which must include those surrounding the making of the confession. Notwithstanding a general direction that questions of fact were for them, only to tell them that it was their function to consider voluntariness or involuntariness is to take away from them all other aspects of fact-finding with regard to the confession—and it must be emphasised that this is their special, private, and peculiar privilege and obligation, regardless of the judge's findings of fact for purposes of the admissibility of the confession.

In my view, the learned author of Wills on Circumstantial Evidence put the meaning of the phrase "what weight they should put upon it", accurately when, in his essay on The Principles of Circumstantial Evidence ((3rd Edn.) p. 118), he said:

> "Of credit and effect due to a confessional statement the jury are the sole judges; they must consider the whole confession, together with all the other evidence in the case, and if it is inconsistent, improbable or incredible or is contradicted or discredited by other evidence or is in the emanation of a week or excited state of mind, they may exercise their discretion in rejecting it either wholly or in part, whether the rejected part make for or against the prisoner."

In the instant case the learned trial judge in effect removed all of this from the jury's consideration, and by limiting their consideration to the voluntariness or otherwise of the confession, deprived the appellant of a chance of its rejection by the jury. It is the duty of a trial judge at all times to give full and accurate direction to the jury on the law and facts of the case, but this especially so with regard to the confession of an accused person—*a fortiori* where the judge himself says that conviction or acquittal of the accused depended on the confession—in other words, it was the crux of the case. See *Nina Vassileva v. R.* (18).

In the Australian case of *Basto v. The Queen* (15), DIXON, C.J., has this to say ((1854), 91 C.L.R., at p. 640):

> "The jury is not concerned with the admissibility of the evidence; that is for the judge, whose ruling is conclusive upon the jury and who for the purpose of making it must decide both the facts and the law for himself independently of the jury. Once the evidence is admitted the only question for the jury to consider with reference to the evidence so admitted is its probative value or effect. For that purpose it must sometimes be necessary to go over before the jury the same testimony and material as the judge has heard or considered on a *voir dire* for the purpose of deciding the admissibility of the accused's confessional statements as voluntarily made. The jury's consideration of the probative value of statements attributed to the prisoner must, of course, be independent of any views the judge has formed or expressed in decid-

ing that the statements were voluntary. Moreover the question what probative value should be allowed to the statements made by the prisoner is not the same as the question whether they are voluntary statements nor at all dependent upon the answer to the latter question. A confessional statement may be voluntary and yet to act upon it might be quite unsafe; it may have no probative value. Or such a statement may be involuntary and yet carry with it the greatest assurance of its reliability or truth. That a statement may not be voluntary and yet according to circumstances may be safely acted upon as representing the truth is apparent if the case is considered of a promise of advantage held out by a person in authority. A statement induced by such a promise is involuntary within the doctrine of the common law but it is plain enough that the inducement is not of such a kind as often will be really likely to result in a prisoner's making an untrue confessional statement."

The passage in the case I have just cited was approved and adopted by the Privy Council in *Chan Wai Keung v. R.* (14). See also *Sparks v. R.* (19), *R. v. Burgess* (16), and *R. v. Ovenell* (17).

In my view, this is a serious misdirection and may have resulted in a substantial miscarriage of justice. Consequently, I would allow the appeal on this ground alone.

It is, however, of the utmost importance that other aspects emerging from ground 1 of the appeal should also receive full consideration. These can conveniently be dealt with together.

On the issue of manslaughter which arose from accused's answer to Inspector Lall, the learned trial judge told the jury:

"If, Mr. Foreman and members of the jury, the accused person had the intention to kill this girl and he either chopped her up, as a result of which she died, or threw her into the creek, as a result of which she died, then you may want to feel that he did have the intention either to kill her or to cause her grievous bodily harm.

What would be the reason for the chopping? You remember this regard, if you accept the evidence of Dr. Balwant Singh, that the wounds were the cause of death. Even if you reject that part of Dr. Balwant Singh's evidence; if the intention of the accused person at the time when he threw Mohanie Bhownauth into that creek was to cause her to drown, then he would have the necessary intent and may be properly convicted of murder. This, however, is subject to what I shall now tell you.

The accused is reported as saying to the now Inspector Lall, that he thought that the deceased was dead when he threw her into the water. If, Mr. Foreman and members of the jury, by an unlawful act of violence done deliberately to another person, that other is killed, the killing is manslaughter, even though the accused never intended death

or grievous bodily harm to result. In this case, the accused is saying that he honestly believed that Mohanie Bhownauth was dead when he threw her into the creek. If he had the genuine and honest belief when he threw her into the creek he obviously could not have had the intention to cause her death by the act of drowning, or to do her grievous bodily harm, because she was already dead.

It is said in one case, you cannot cause grievous bodily harm to a corpse. If you believe that at the time when the accused threw this girl into the creek she was alive, but he felt that she was dead, then he would not be guilty of murder if she subsequently died from drowning, but you may proper convict him of manslaughter.

But remember, so far as either offence, murder or manslaughter, is concerned, the burden of proof rests throughout on the State. If, not knowing whether Mohanie Bhownauth was dead or not, and not having taken the trouble to find out whether she was dead or not he threw her body into the creek, you may, if you think fit, come to the conclusion that it was a negligent act done utterly recklessly without regard to danger to life or limb and that death could be caused by it, and that would be a good ground on which to say that the throwing of the body in the river would be manslaughter. But be careful that before you can convict the accused of manslaughter you must be satisfied either that the accused at the time felt that this girl was dead, but in fact she was not dead, and he threw her in. If he honestly felt that she was dead then he cannot have the intention to kill her because he felt that she was dead, or to cause her grievous bodily harm because you cannot cause grievous bodily harm to a corpse.

I repeat the second alternative. If, not knowing whether she was dead or not, and not having taken the trouble to find out whether she was dead or not, he threw her body in, then you may think that he had committed an act of recklessness, without regard to her life or limb and in these circumstances you may properly return a verdict of manslaughter. But if you are satisfied, Mr. Foreman and members of the jury, that the act of chopping her up—if you are satisfied that the accused chopped her up and threw her into the river—and these acts had produced death; if you regard his behaviour from the moment he struck her to the moment when he threw her into the creek as a series of acts designed to cause death or grievous bodily harm, the only verdict, Mr. Foreman and members of the jury, which you can properly return is one of guilty of murder."

On November 30, 1968, around 9.10 am. Dr. Anthony, a registered medical practitioner, performed a post-mortem on the body of the deceased at the mortuary at the Public Hospital, New Amsterdam. He was not in the country at the time of the trial, but a hospital clerk who kept the records of post-mortems performed there was asked on behalf of the defence and he produced the following entry:

HIS HONOUR referred to the post-mortem report, and continued:]

In passing, I feel I ought to express my view that this evidence ought to have been preferred by the State.

The police were apparently not satisfied with this and so on December 8, 1968, at about 2 p.m., Dr. Balwant Singh, a registered medical practitioner and Senior Government Bacteriologist and Pathologist attached to the Central Medical Laboratory, Georgetown, performed another post-mortem on the body of the deceased at the Le Repentir Cemetery in Georgetown. He said in evidence [HIS HONOUR recounted the evidence and continued]:

As regards the post-mortem examination, the learned trial judge said this:

> "The first post-mortem in this case, Mr. Foreman and members of the jury, was by Dr. Anthony who is now out of Guyana and this doctor found no evidence of any external injuries as far as could be made out; dark discolouration of head, neck, chest wall and proximal parts of all the four limbs. He also makes the point that the body was past the stage of decomposition. He could not determine the cause of death due to the advance stage of decomposition of the body. Remember it was as a result of this evidence that the body was taken down to Dr. Balwant Singh.
>
> We do not know the qualifications of Dr. Anthony except we have that he is a registered medical practitioner, therefore he must have had the minimum qualificational requirements."

I must interject here to observe that this is a *non sequitur* and the comment ought not to have been made. It could have been misleading. The learned trial judge continued:

> "We do not know the qualifications of Dr. Balwant Singh except that he is the Senior Government Bacteriologists. But a very junior man could be the Senior Bacteriologist and Pathologist. I do not know, because no evidence has been led as to Dr. Balwant Singh's qualifications. So you have on the one hand Dr. Anthony and on the other hand Dr. Balwant Singh. But Dr. Balwant Singh has said that he could not have ruled out drowning, hence the reason for my directions to you on the question of manslaughter.
>
> If he recklessly threw this woman into the trench whether or not knowing that she was dead and she in fact died by drowning, then you could find him guilty of manslaughter. If he felt that she was dead but in fact she was alive and he threw her in, he could not be guilty of murder. He could only be guilty of manslaughter because this was an unlawful act which he did—unlawful act of throwing a person into the water, a person who had been wounded—if you accept the evidence of Dr. Balwant Singh, and the person dies. The unlawful act, in the circumstances of this case, of throwing a person who he thought to be

dead, but who is alive, into the water, is sufficient evidence on which you could find him guilty of manslaughter."

The accused's answer to Lall's question, that he thought the deceased was dead when he threw her into the water, stands uncontradicted evidence, and tends to negative the intent necessary to establish the charge of murder.

Dr. Anthony could give no opinion as to cause of death.

Dr. Balwant Singh expresses the opinion that the wounds were the cause of death but with the spontaneous reservation in examination-in-chief that he does not rule out drowning as a cause of death.

Consequently, the uncontradicted evidence of the accused can be said to be supported to a certain extent by the medical evidence.

The learned trial judge's direction on the law with respect to manslaughter is, in my view, impeccable and is in full accord with the well-known case of *Thabo Meli & Others v. R.* (20).

In view of this and the absence of any evidence of an intention to cause death by drowning, it was, in my view, essential for the State to establish that she did not die from drowning. If she died from the wounds, then he murdered her, but if she died from drowning, it was not established by the evidence that he had an intention to kill her by drowning because he thought she was dead.

The State must prove that the act was intentional and unprovoked. If drowning was the cause of death, then the only evidence is that he did not intend to drown her.

His evidence is an explanation of the reason why he threw her overboard. There is no other evidence on this aspect of the case.

In putting the defence, the learned trial judge, on the aspect of manslaughter ought to have connected the confession with the medical evidence and highlighted the conflict with the medical testimony and the fact that the uncontradicted evidence did not disclose an intent to kill by drowning, so that if death resulted from the act of his drowning her, it was an unintentional act, or at least they could not be morally certain that it was intentional.

Upon the evidence before them, they ought only to convict of murder if they were sure that the deceased did not die from drowning. The jury should, in my view, have been told that although it was open to them to disbelieve appellant's answer to Inspector Lall, they should approach that question bearing in mind that:

(a) that evidence was elicited by the police and was therefore more likely to be true than if he had volunteered it.

(b) the evidence was uncontradicted.

(c) the evidence was supported by

(i) absence of any finding as to the cause of death by Dr. Anthony;

(ii) Dr. Balwant Singh's view that he could not rule out the possibility of drowning.

Had they been so directed, a reasonable jury may well have found that they could not with moral certainty have found that the act which caused death was intentional.

For this reason also, I allow the appeal.

At the end of the hearing, the court was unanimous that the appeal should be allowed and a retrial ordered.

Now that I have given further consideration to the reason for my conclusion, I find it difficult to see how a reasonable jury could be morally certain, in view of the deceased's uncontradicted answer to Inspector Lall and the medical evidence which does not rule out the possibility of drowning, that the act causing death was intentional.

In the circumstances, I feel bound to record that I ought to have proposed the substitution of a verdict of manslaughter for the verdict of murder.

CRANE, J. A.*:* I agree with the learned Chief Justice that the case be sent back for a re-trial on the capital charge.

Appeal allowed.

WILLIAM FRASER AND OTHERS *v.* THE COUNTRY AUTHORITY OF THE WOODLEY PARK COUNTRY DISTRICT AND BALRAM

[High Court (George, J.), November 13, 16, 26; December 7, 1970; March 13, 1971].

Immovable property—Declaration of ownership—Occupiers claiming to be descendants of owners—occupiers a fluctuating body of persons—Whether capable of obtaining declaration sought—Title to disputed area of land in local authority by virtue of award made under the District Land Partition and Re-allotment Ordinance Cap. 173 (*now Cap. 60:03*)*—Partition officer appointed under District Lands Partition and Re-allotment* (*Special Procedure*) *Ordinance Cap. 174* (*now Cap. 60:04*)*—Whether awards ultra vires the Ordinance—Whether compliance by the plaintiffs with the provisions of the Local Government Ordinance Cap. 150, S. 206 for a valid institution of proceedings.*

The plaintiffs who claimed to be descendants of the owners of land known as lot No. 12 part of Two Friends brought an action against the defendants seeking a declaration that they were the owners of the land, an injunction restraining the defendants from trespassing, and damages for trespass. The facts have been fully set out in the judgment. The plaintiffs' case was that a surveyor Davis had wrongly demarcated the boundary between the land they were claiming and land awarded by a partition officer to the defendant authority, and that title to the disputed area was thus wrongly given to the local authority. The plaintiffs were claiming that they were owners in common or joint owners of lot No. 12. The evidence did not show that they were entitled to succeed to the land either on intestacy or by devise. No evidence was led of any specific or properly defined areas occupied by the residents. It was also submitted that the local authority's title was not valid because the awards made were *ultra vires* as they were made under the District Lands Partition and Re-allotment Ordinance Cap. 1 73 by a partition officer who was appointed under the provisions of the District Lands Partition and Re-allotment (Special Procedure) Ordinance Cap. 174 and the area was included in the Schedule to that ordinance. The defendants also took a point of law that the plaintiffs did not comply with the provisions of S. 206 of the Local Government Ordinance Cap. 150 before they instituted their proceedings. S. 206 of Cap. 150 is set out in the judgment.

HELD: (i) the evidence led by the plaintiffs of separate occupation defeated their claim to a declaration that they were owners of the whole;

(ii) the plaintiffs did not have any common interest in the land to justify the launching of a representative action;

(iii) a person appointed partition officer under Cap. 174 was vested with all the powers of one appointed under Cap. 173 and all the provisions of the latter ordinance would apply to the partition and re-allotment of any area included in the schedule to the former. The awards were therefore not ultra vires and the title of the local authority was valid;

(iv) the occupiers and residents were a fluctuating body of persons and thus could not have acquired title to immovable property by prescription;

(v) the plaintiffs did not have exclusive possession and control of the disputed area as the residents of Woodley Park also used the dam without hindrance;

(vi) there was non-compliance by the plaintiffs with the provisions of S. 206 of Cap. 150.

Claim dismissed.

F. R. Allen for the plaintiffs.

Dr. F. Ramsahoye for the defendants.

WILLIAM FRASER AND OTHERS

v.

THE COUNTRY AUTHORITY OF THE WOODLEY PARK COUNTRY DISTRICT AND BALRAM

GEORGE, J.: The plaintiffs claim to be the descendants of the owners of certain immovable property bearing the following description:—

> "the leeward half of the Plantation formerly called Two Friends or half of the centre one third part of lots Numbers Eleven and Twelve situate on the West Sea Coast of the county of Berbice—the said half lot of land adjoining the land belonging to the late A. D. Bartram and is along the public road fifty rods facade more or less—the depth is according to the course of the side line of Plantation No. 14".

The above description is contained in letter of decree No. 3121 dated the 4th April, 1842 by which the property was passed to the several persons mentioned therein. The area is now known as No. 12 Village as is so described by all the witnesses who have given evidence. It extends from the sea dam westwards to a Crown Dam and is traversed by the public road and a railway line. The adjoining area to the south of No. 12 is known as No. 11 or the Woodley Park and is under the jurisdiction of the first defendant.

On the 6th October, 1952 John Davis, a Sworn Land Surveyor, began to survey Woodley Park for the purposes of a partition under the District Lands Partition and Re-allotment (Special Provisions) Ordinance, Cap. 174. He completed his survey on the 24th March, 1953. In carrying out the survey he used as his guide earlier plans made by two surveyors viz. Rank Fowler and J. T. Seymour. The line which Davis demarcated as being the boundary between No. 12 and Woodley Park is according to him, the same as that laid down by both surveyors. The position of his boundary line places the whole of the dam lying between the two areas on the Woodley Park side.

When he was laying his paals to demarcate this boundary the proprietors of No. 12 objected, claiming that the paals of previous surveys had been laid down along the centre line of the dam. They produced a copy of Seymour's plan which they claimed supported their contention, but Davis states that he pointed out to them that this plan, contrary to their contention, showed that the dam formed part of Woodley Park. He, however, admits that a portion of the boundary, as defined by him, in the vicinity of the public road, passes through an unfenced yard situate in No. 12, He prepared a plan of the area surveyed and it was in accordance with this plan that the Local Government Board on the 30th August, 1961 caused the awards of the partition officer to be published in the Official Gazette. The Woodley Park local authority was awarded certain parcels of land together with "all the sideline and middle walk reserves and all other reserves for streets drains access and drainage in the house and cultivation areas". It is not disputed that these reserves include the dam between No. 12 and Woodley Park.

On the 6th August, 1964, transport in respect of these areas was passed to the local authority.

On the 5th April, 1965 the local authority began to bulldoze the dam and to change its alignment by placing it about one rod west of its existing position, but still within its boundary as defined by Davis. This work was carried out under the supervision of the second defendant, who was then its chairman. The occupiers of No. 12 objected to the works and more particularly the shifting of the line of the dam westwards. They sought the assistance of the District Commissioner who directed a cessation of operations until he could have the matter cleared up. A few days after the local authority re-commenced their works, but as a result of information which the District Commissioner received he took no further action. The present position, therefore, is, that there is a new dam between the sea dam and the public road, which continues westward across the public road up to a point thirty rods east of the railway line. It reappears at point thirty rods west of the railway line and continues on for a distance of about 90 rods.

As a result of the change in the position of the dam the plaintiffs claim that tombs and earth graves on the No. 12 side of the old dam were destroyed and or covered over with earth. In addition, a few coconut trees, a mango tree and about one and one half acres of rice lands have been destroyed and six house lots 'adversely affected'.

Of the seven plaintiffs named in the writ only three viz. Boney Fredericks, Albert Britton and Harold Elcock gave evidence. A fourth plaintiff, William Fraser died after the filing of the writ, but no action has been taken to have a legal personal representative or other person substituted.

It would appear that the land at No. 12, between the sea dam and the railway line, is divided into house lots. For a distance of thirty rods west from the railway line the land is under coconut cultivation and the remainder up to the Crown dam is used for rice cultivation. The inhabitants of No. 12 used the dam which divides No. 12 from Woodley Park as their means of ingress and egress to and from the residential area and the cultivation lots.

Boney Fredericks, the first plaintiff to give evidence, was born in 1884. Although he has been unable to prove it, he claims to be a descendant of Forbes Frank, one of the purchasers of lot 12 in 1842. He states that he has been in sole possession of an area of land measuring 300 rods by 1½ rods, previously occupied by his mother, since her death in the year 1924 and that he lived in the house which she had owned until it fell, presumably from disrepair. He cultivated the whole of the area occupied by his mother from 1924 to 1962 when he was forced to cease cultivation temporarily because of civil disorders which resulted in the death of one of the residents of No. 12. He however, returned to the land and has continued his cultivation of it.

Harold Elcock claims to be a descendant of another of the 1842 purchasers. Her name was Molly Bowman. He states that, except for a short interval during the civil disturbances, he has occupied four house lots, each measuring 4 rods by 12 rods, and cultivated 1½ acres of rice lands from the death of his uncle Thomas Bethune in 1936 up to the present time. It would appear, however, that Thomas Bethune was survived by a wife. He claims that the rice lands have been partially destroyed by the change in the alignment of the dam. Elcock also testifies that the deceased plaintiff, William Fraser, had occupied lands which his deceased mother before him had occupied. He further states that she acquired the lands from her grandfather, Robert Johnnie, another purchaser in 1842. He knows that Fraser's mother died testate but cannot say whether Johnnie also left a will. No evidence has been led as to the contents of Fraser's mother's will.

The third plaintiff who gave evidence, Albert Britton, claims that James and Duncan Bacchus, two of the purchasers in 1842 are his ancestors and that his mother was a cousin of the latter. He claims that from the year 1928 he has been in sole possession of a house spot and three acres of rice lands which he has since continuously cultivated.

As the occupiers of No. 12 were dissatisfied with the manner in which Davis had demarcated the boundary, they obtained the services of another surveyor, D.C.S. Moses. His survey places the whole of the old dam within the boundaries of No. 12. Moses admits that he found no paals marking the boundary between No. 12 and Woodley Park. He says that for the purposes of his survey he consulted the plans of both Seymour and Fowler as well as that of another surveyor named Wahl. Although he concedes that Fowler's plan places the whole of the dam in Woodley Park, he states that he followed Wahl's plan. Unfortunately a copy of this plan was not tendered in evidence. Moses states that he included the dam in No. 12 because by so doing it would more or less equalise the areas of No. 12 and No. 11. He also expressed the opinion that Fowler carried out his survey without reference to the existing dams and trenches and gives as his reason for this conclusion the disparity in sizes of the two villages.

Based on above evidence the plaintiffs claim on their own behalf and on behalf of twenty others, described as the occupiers and residents of No. 12:—

(a) a declaration that they are the owners of the area of land described in letters of decree No. 3121 of the 4th April, 1842.

(b) a declaration that the property as described in the letters of decree is the same as that shown on the plan by Moses.

(c) an injunction restraining the defendants from trespassing and;

(d) damages.

I will deal with the second of the plaintiff's reliefs first. I am asked to hold that the plan by Moses is in respect of the same area of land as that conveyed to the owners named the letters of decree in 1842. The short answer to this claim is that there is no evidence to show the extent or exact boundaries of the land described in the title deed. Indeed, Moses himself makes the obvious point that the area as described in the letters of decree is not related to any plan. There is accordingly no proper evidence from which I can come to the conclusion that the area described in the letters of decree is the same as that defined in the plan by Moses.

With regard to the first of the reliefs sought, although the pleadings would lead to the conclusion that the plaintiffs and those whom they represent are owners in common or joint owners the evidence led, compels a different conclusion. It would appear that, in fact, the residents and/or occupiers of No. 12 have been in possession of definite and distinct portions of the land. This fact in itself defeats their claim to a declaration that they are owners of the whole as distinct from specific portions of it which they occupy. Indeed the evidence of separate occupation must

mean that whatever may be their common interest in the dam as a means of passing and repassing the residents in the area do not have any common interest in this relief so as to justify the launching of a representative action. The claim by these plaintiffs, who gave evidence, to be descendants of certain of the original purchasers in 1842 is obviously hearsay. Indeed, their evidence does not even show that they are entitled to succeed to the holdings they occupy either because of intestacy of some specific or general devise. In the circumstances and having regard to the fact that title to the area in dispute is in the local authority the plaintiffs can only succeed if they can prove that they have prescribed title to it. (See *Barrow v. Benjamin* (1906) L.R.B.G. 260). But even if the evidence led by the three plaintiffs who testified is sufficient to found a claim based on prescription, such a claim has not been pleaded. (See O. 1711. 15). Further, there is no proper description of the several areas which the residents or occupiers, including the plaintiffs claim to occupy or, indeed, the length of time for which these residents or occupiers other than the three plaintiffs who gave evidence and Elcock have occupied their respective areas. As no evidence has been led of any specific or properly defined areas occupied by the residents this in itself would be sufficient reason for refusing a declaration. In this regard LUCKHOO, C.J. said in refusing the petition for a declaration of title in *Hope v. Hope* (1960) L.R.B.G. 105:—

> "Another reason why the petition must fail . . . is that the evidence does not disclose with sufficient certainty what area or areas could be described in an order of the court. From the evidence it is clear that the land was never enclosed nor was there such

occupation on the part of the petitioner that could be referred to the entire land".

With regard to the 1st defendant's title, Counsel for the plaintiffs drew my attention to the fact that the partition officer was appointed by virtue of ss. 2 and 4 of the District Lands Partition and Re-allotment (Special Procedure) Ordinance Cap. 174 and that the area was included in the schedule to that Ordinance by virtue of the former section. Accordingly, he contends that as the awards of the partition officer were made under the District Lands Partition and Re-allotment Ordinance, Cap. 173, they are *ultra vires* and the local authority's title void.

This submission however fails to take into account and give due recognition to s. 3 of the Ordinance which reads as follows:—

> "Any person appointed under the last preceding section to partition and re-allot, or to be re-allot, any one of the areas of land described in the schedule hereto shall be deemed to be an officer within the meaning of the principal Ordinance, and the provisions of that Ordinance (other than ss. 3 and 4 thereof) shall apply to the partition and re-allotment of the area of land aforesaid in the same manner and to the like effect as if a valid petition had been represented and an order in council made under ss. 3 and 4 thereof respectively".

This section means what it says. A person appointed under Cap. 174 is vested with all the powers of one appointed under Cap. 173, and all the provisions of the latter Ordinance would automatically apply to the partition and re-allotment of any area included in the schedule to the former. In publishing the list of awards the Local Government Board was merely acting in compliance with s. 15(4) of Cap. 173. I think that if it has failed to comply with this requirement Counsel would have been in firmer ground.

I gain the impression however that the plaintiffs' most serious contention is with regard to the dam. They strenuously object to the fact that Davis' survey places the whole of the old dam lying between lot 12 and Woodley Park within the boundaries of the latter. They all testify to the fact that their ancestors as well as all the other occupiers of No. 12, as long as they can remember, used this dam as a means of ingress and egress along with the occupiers and/or residents of the Woodley Park. The residents of both villages were responsible for and did upkeep the dam and neither attempted to exclude the other from using it. They however agree that at no time since the change of the line of the dam westward leave the defendants ever prevented or in any way limited the plaintiffs' use of the dam. The plaintiffs allege that paals were to be seen along the centre of the old dam. I do not accept

this part of their testimony. But even if this were so none of them went so far as to say that the residents of the two villages confined their uses of the dam to that side of it which was contiguous to their village. The act of passing and repassing is an equivocal one and does not bear those marks of exclusive possession and control so necessary to found a claim based on prescription; for it is as consistent with its use as a right of way. Accordingly I can see no justifiable reason for elevating it to the level of exclusive user. (See *Littledale v. Liverpool College* (1900) 1 Ch. 19) *Marshal v. Taylor* (1895) 1 Ch. 641. In *re Duffy's estate* (1897) 1 Ir. 307. And the very fact that the residents of Woodley Park also used the dam without hindrance weakens if not destroy the claim by the plaintiffs to exclusive possession.

There is still another reason why the plaintiffs' claim must fail. The occupiers and residents of an area must by very definition be a fluctuating body of persons. Although it may be possible for such a body of persons to acquire a right of way (see *Smith v. Gatewood* 79 E.R. 133), it has been made abundantly clear in *Adams v. Raghubir* (1960) L.R.B.G. 355 that they cannot acquire title to immovable property by prescription. Besides the above objections the plaintiffs have led evidence that No. 12 has been declared a land registration area and individual awards have been made to them and others by the Commissioner of Titles. Therefore whatever common ownership they may have had, must cease on the grant of separate titles.

If the plaintiffs are not entitled to a declaration that they are the owners of Lot 12 I fail to see how they can successfully move for an injunction to restrain the defendants from trespassing in an area, the boundaries of which are not certain. For the same reason their collective claim for damages must fail. In this latter regard the plaintiffs have led evidence to show that six house lots have been adversely affected by the shift of the dam and one and one half acres of rice lands have become unusable. They have also lead evidence that some permanent crops and graves have been damaged. However, there is no evidence of that land crops or graves are owned communally by the residents nor indeed is there any evidence to indicate which of them are the owners. Harold Elcock states that his rice lands have been partially destroyed and are not usable. But he has made no specific claim for damages. What the plaintiffs have done is to claim damages generally in respect of all the acts of trespass. But, in any event, a claim for general damages cannot be made in a representative action where the claims of the parties are in fact several (see *Markt & Co. Ltd. v. Knight SS Co. Ltd.* (1910) 2 KB 1021 and *Wing v. Burn* (1928) T.L.R. 258).

Finally I must make reference to s. 206 of the Local Government Ordinance Cap. 150. This section reads as follows:—

> (1) No process shall be issued against or served on any local authority, or any member thereof, or any officer of a local

authority or person acting in his aid, for anything done, or intended to be done, or omitted to be done, under the provisions of this Ordinance until the expiration of one month after notice in writing has been served on the local authority, member, officer, or person, clearly stating the cause of action, and the name and place of abode of the intended plaintiff and of his attorney or agent (if any) in the cause.

(2) On the trial of the action, the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the notice so served; and, unless the notice is proved, the defendant shall have judgment in his favour.

(3) The action shall be commenced within six months next after the cause of action accrues, and not afterwards.

Under s. 89 of the Ordinance all dams within its boundaries are under the control of a local authority. S. 140 empowers a local authority to "cause to be made the dam and trenches" and to maintain them. In re-aligning the dam therefore the defendants were in my opinion doing or intending to do something under the provisions of the Ordinance. There is no dispute that the provisions of s. 206 have not been complied with.

In the result I have no alternative but to dismiss the claim with costs fixed at $750.00

Claim dismissed.

CLEVENIX McEWAN *v.* CARIBBEAN FINANCE LTD.

[High Court (George, J.) January 25, 26; March 15, 1971].

Contract—Hire purchase agreement—Option to purchase—No time specified within which option to be exercised—Arrears of hire rentals—Waiver—Payment of arrears and other expenses before re-possession—Termination of agreement and sale of vehicle by owners—Repudiation of agreement—Assessment of damages.

Hire purchase—Motor car re-possessed and sold for breach of clause to pay hire rentals punctually—Payment of hire rentals in full before re-possession—Waiver—Whether vehicle validly re-possessed.

On 5th June 1967 the plaintiff and the defendants entered into a hire purchase agreement in respect of a motor car for one year for a total hire of $2,032.70. The plaintiff undertook to pay the rentals punctually and time was to be of the essence of the agreement. Default in making punctual payment entitled defendants to regard the hirer as having repudiated the agreement. The plaintiff fell in arrears with the payment of hire rentals and in May 1968 the defendants sued for the balance due with an amount representing interest. On the 28th August 1968 while the action was pending the plaintiff paid the defendants the arrears due, also interest and costs of the action. On 30th August 1968 an agent of the defendants re-possessed the vehicle. The plaintiff's request for the return of the car was met by a demand by the defendants for an additional sum of $65.00 as a condition for its return. The plaintiff refused to pay and instituted proceedings in detinue. Unknown to him the car was sold by the defendants in May 1969 for $500.00. The defendants contention was that they were entitled to re-possess the car for failure of the plaintiff to pay punctually the hire rentals. They also pleaded that the plaintiff had failed to exercise option to purchase.

HELD: (i) by electing to allow the plaintiff to continue in possession of the car after the date provided for the completion of the hiring, and by accepting the balance of the hire rentals together with interest thereon, instead of terminating the agreement, the defendants must be deemed to have waived that portion of the agreement which had fixed the date for the final payment of the rentals;

(ii) it was not open to the defendants to re-possess the car for failure on the part of the plaintiff to make punctual payment after having waived strict compliance with the terms of the agreement and accepted payment of the arrears together with interest;

(iii) in the absence of any fixed period within which the option to purchase was to be exercised it would be implied that the option should be exercised within a reasonable time after the hiring had come to an end;

(iv) the defendants' insistence on the payment of the sum of $65.00 before the car should be returned, when the plaintiff's only obligation was to pay $1.00 in order to exercise his option to purchase, showed a firm intention on their part to repudiate the agreement;

(v) the defendants had repudiated the agreement as it was reasonable to conclude from the evidence that even if the plaintiff had offered to pay $1.00 to exercise the option to purchase the defendants would have refused to accept it;

(vi) on the valuation of the mechanic the plaintiff would be entitled to damages in the sum of $800.00.

Judgment for the plaintiff.

B. E. Gibson for the plaintiff.

G. S. Gillette, S.C., for defendants.

CLEVENIX MC EWAN *v.* CARIBBEAN FINANCE LIMITED

GEORGE, J.: Most of the facts in this case are not in dispute. On 5th June, 1967 the plaintiff and defendants entered into a hire purchase agreement in respect of a motor car numbered HW 73 for one year for a total hire of $2,032.70. Under this agreement the plaintiff paid a sum of $399.90 on that date and undertook to pay the remainder of the hire price as follows: eleven monthly instalments of $133.30 commencing from the 8th June, 1967 and a final instalment of $166.50 on the 8th May, 1968. Thereafter the plaintiff was given an option to purchase the car for $1.00, but no time was specified within which the option should be exercised. By virtue of para. 2(b) of the agreement the plaintiff agreed to pay the hire rental on or before the due dates and the parties agreed that in relation to such payments time was to be the essence of the agreement. A default in the punctual payment of the hire rentals entitled the defendants to regard the hirer as having repudiated the agreement. It was also agreed that in the event of the hiring continuing despite the plaintiffs failure to make punctual payments he would be liable to pay interest at the rate of ten per centum per annum on any overdue payments.

Between June 1967 and May, 1968 the plaintiff had only paid a sum of $1,025.80 and on 24th of this latter month the defendants filed a specially endorsed writ claiming the balance—$1,006.90 together with an additional sum of $34.46 representing interest due at that date. The date fixed for hearing of this action was the 2nd September, 1968, but on the 28th August the plaintiff paid the defendants the sum of $1,141.36. This sum comprised the $1,006.90 due on the hire, $34.46 by way of interest and costs of the action $100.00. In a letter dated the 30th August, 1968 sent to the plaintiff by the defendants, the latter pointed out that the plaintiffs hire purchase instalments were in arrears in the sum of $1,006.90. It also pointed out that one Carrega had been authorised by the company either to collect from the plaintiff a total sum of $1,071.90 or to take possession of the vehicle. The sum of $1,071.90 consisted of the sum of $1,006.90, interest in the sum of $40.00, and a further sum of $25.00 for "effecting re-possession of the vehicle or payment in lieu thereof." On the same date—the 30th August, 1968—Carrega repossessed the vehicle. The plaintiff made demands for its return but the defendants through their legal adviser, although acknowledging that all the hire rentals had been paid, demanded as a condition for its return a sum of $65.00. This, the plaintiff refused to pay. The sum claimed by the defendants represented $50.00 for what they call repossession expenses and $15.00 for mechanical inspection of the car after its seizure.

It is as a result of the foregoing circumstances that the plaintiff filed the present action. He claims the return of the motor car and damages for its wrongful detention. Unknown to the plaintiff, however, the defendants, had, in May 1969, sold the car for $500.00. In view of this circumstance counsel for the parties rightly, in my opinion, agreed that the only issue for consideration was the question of damages.

It is agreed that except for the one dollar required for the exercise of the option to purchase, the car, the plaintiff had fulfilled all his financial obligations under the hire purchase agreement when he paid the defendants the sum of $1,141.36 on the 28th August, 1968. But counsel for the defendants submits that:—

(a) the obligation undertaken by the plaintiff was to complete the payments of the hire rental on or before the 8th June, 1968 and

(b) to exercise the option of purchase within a reasonable time after that date.

It is his contention that neither requirement was fulfilled by the plaintiff. Accordingly, he argues, the defendants acted well within their powers under the agreement to seize the vehicle. In this regard he draws attention to para. 4 of the agreement. This paragraph provides that the hiring is to be deemed to be terminated after the occurrence of any of the events set out in that paragraph upon:—

(a) the defendants sending a letter by registered post to that effect at the last known address of the plaintiff or

(b) upon resuming possession of the vehicle.

In the present case, he argues, the occurrence which justified the defendants in resuming possession was the plaintiffs failure to punctually pay the sums due under the agreement.

There is little room for argument that the terms of a hire purchase agreement as to payments must be strictly construed and it is no doubt with this principle in mind that counsel draws my attention to para. 7 of the agreement. This paragraph provides as follows:—

> "If the owner thinks fit to grant time or other forebearance, their rights or remedies under this agreement against either the hirer or guarantor, shall be in no way affected or prejudiced thereby, in particular no extension shall be deemed thereby to have been made of the periods in respect of which or of the dates upon which any hiring rentals hereunder is payable".

But in my opinion, by electing to allow the plaintiff to continue in possession after the date provided for the completion of the period of hiring, i.e. the 8th May, 1968 and thereafter accepting the balance of the hire rentals, together with the interest due thereon, rather than terminating the agreement under para. 4, the defendants must be deemed to have waived that portion of the agreement which fixed the date for the final payment of the rentals. In other words they granted to the plaintiff the indulgence of an extension of time within which to pay the hire rental. After such payments had been effected on the 28th August, 1968 the plaintiff's obligations to pay hire rentals came to an end by the satisfaction of the amounts out-

standing. The only relevant part of the agreement remaining unfulfilled was the exercise of the option to purchase.

In my opinion, therefore, it is not open to the defendants to contend that the plaintiff breached para. 4(a) of the agreement in that he "made default in punctually paying his instalments". Some support for this view may be had from the cases of *Reynolds v. General and Finance Facilities Ltd.* 107 S.J. 889 and *United Dominions Corp.* (*East Caribbean*) *Ltd. v. Stewart* (1967) 12 W.I.R. 396. In the former case the plaintiff and defendants had entered into a hire purchase agreement with regard to a motor car. Under the agreement the plaintiff was required to pay an initial deposit and thereafter the remainder of the hire rentals in thirty five monthly instalments. By April 1962 he had paid all except the final two instalments which had fallen due and payable in December 1961 and January, 1962. Without any reminder the defendants on the 5th April, 1962 sent to the plaintiff a notice terminating the agreement. On the 9th April the defendants' managing director had a discussion with the plaintiff and on the following morning the plaintiff paid the amount outstanding to a bank which received it for the defendants. On the night of the 10th April, the defendants seized the car. In a suit for conversion, filed by the plaintiff, the trial judge found that the defendants intended to waive the notice of termination provided that all outstanding instalments were paid, and awarded damages to the plaintiff. This decision was upheld by the English Court of Appeal. It does not, however, appear that the hire purchase agreement in question contained a clause requiring the payment of any additional sum over and above the hire rentals in order to entitle the plaintiff to exercise the option to purchase. In *United Dominions Corp. Ltd. v. Stewart* the facts were as follows: In January 1960 the respondent entered into a hire purchase agreement with the appellants in respect of a motor car. The hire rentals for the car totalled $4,863.62 and, in addition, the defendant was required to pay an additional sum of $1.00 in order to exercise the option of purchase. The rentals were required to be paid in twenty four monthly instalments but he completed these payments on the 2nd April, 1962, some three months after they should have been paid off. However, by that date through some faulty accounting, he had in fact overpaid by 30c. All the instalments had been paid into a bank which received them on behalf of the appellants. On the 19th June, 1962 while driving the car, the respondent was stopped by an agent of the appellants, who told him that he owed arrears of $72.00. The respondent protested that he had paid in full, but, nevertheless, the car was immediately repossessed. On checking at the hank where he made his payments he was told that a sum of $72.00 which had been paid by his wife towards the hire rentals had been credited in error to another of its client's accounts and consequently never reached the appellants. The respondent filed an action claiming damages for trespass and conversion, and the decision of the trial judge, who found in his favour, was upheld by the Trinidad and Tobago Court of Appeal. In delivering the judgment of the court FRASER, J.A., had this to say at p. 398.

> "I am reminded that the law must take its course. So let it be. But in its practice and as well in its application it must never be forgotten that the ultimate object of law is justice, so in the administration of law it is necessary to strive always to secure for each man his due as it is to take care to avoid its abuse as a cloak for unconscionable conduct."

Although in that case the respondent did not exercise his option to purchase—he still had to pay 70c. to do so—it would appear that no argument in this regard was advanced either at the trial or on appeal. In dealing with the question of the termination of a hire purchase agreement by performance Goode on Hire Purchase Law and Practice at p. 121 has this to say:—

> "A hire purchase agreement comes to an end by performance as soon as the option to purchase has been exercised . . . . But the cessation of the agreement is not necessarily so-terminous with the end of the hiring, since the agreement may, and nowadays usually does, provide that the option to purchase shall be exercisable by payment of a further nominal sum within a stated period after the expiration of the period of hire. In that event, the hirer becomes bound to return the goods as soon as the period expires but remains entitled to purchase them by paying the balance stipulated by the agreement".

I am in agreement with the view expressed above. In so far as the agreement under consideration is concerned no time had been stipulated within which the plaintiff should exercise his option. What can, however, be implied is that the option should have been exercised within a reasonable time after the hiring came to an end. But two days after the termination of the hiring the defendants re-possessed the car, under the pretext that the sum of $1,006.90 together with interest thereon was still outstanding. They required the plaintiff to pay to their agent these sums together with the expense involved in effecting repossession—$25.00—if he desired to retain the vehicle. As it was not paid the agent repossessed the vehicle. It would appear that the legal adviser to the defendants, who had already received the sums outstanding, on the 28th August, had omitted to communicate this fact to them. In their affidavit of defence the defendants have pleaded, *inter alia*, that the plaintiff failed to exercise the option to purchase. But the defendant was making of him, at the time of the seizure, an unjustified and prohibitive demand, namely the payment of $1,071.90. Later, after representations by or on behalf of the plaintiff, that he had paid off all the hire rentals, they demanded of him $65.00 as a condition for its release. No mention was made of the option to purchase in the several letters which they sent out to him. In my opinion by persisting in the demand for the payment of the sum $65.00, when under clause 3(a) of the agreement, the plaintiffs only obligation was to pay $1.00, in order to exercise his option, the defendants showed a firm intention to repudiate the agreement. And, for whatever right they may have to recover the monies expended in re-possessing and examining the motor car, this does not give them a lien or any right analogous

thereto, if these amounts remain outstanding and unpaid. After committing an act which, I hold, amounted to a repudiation of the agreement, the defendants cannot, in my view, successfully be heard to say that the plaintiff failed to exercise his option. For, it is reasonable to conclude from the correspondence, that, even if the plaintiff had offered to pay the $1.00 in order to exercise the option, the defendants would have refused to accept it, so insistent, were they, on the payment of the larger sum, I have, therefore, come to the conclusion that the plaintiff must succeed.

On the issue of damages evidence was led by both parties. The plaintiff who lived at all material time at Matthew's Ridge, Essequibo knew nothing of the condition of the car when it was repossessed. It was a hire car which to the knowledge of the defendants was operated by the plaintiffs step father. He fell ill on the 9th July, 1968 and died on the 21st of that month without recovering from his illness. From the 9th July the car was kept in its garage until the defendants' agent repossessed it. James Dowridge and the plaintiff's mother gave evidence that when they last saw the car in July and August 1968 respectively, it was in fairly good order. On the other hand the defendants' agent, Carrega and the mechanic who inspected it after it was repossessed, tell a different story. Both say that the car was not in working condition. Carrega gives evidence that he found the car at the back of a yard under a shed near to an oil mill. Behind the car bushes were growing, and, on the other sides of it were wallaba posts, coconut husks and a drum of water. He found the battery and distributor missing. The mechanic gives evidence that he found several vital parts, which he listed, missing. I believe and accept the evidence of Carrega and the mechanic in preference to that of Dowridge and the plaintiff's mother. The latter knows very little, if anything, about motor cars while Dowridge last saw it over one month before it was repossessed. I also accept the valuation which the mechanic places on the car viz between $600.00 and $800.00. Having regard to all the circumstances I would therefore award the plaintiff damages in the sum of $800.00 together with costs fixed at $500.00.

Stay of execution for six (6) weeks granted.

Judgment for the plaintiff.

NEWTON POLEON (EXECUTION-CREDITOR)

v.

K.T.MAINE,

GEORGETOWN STONE AND CONSTRUCTION CO. LTD

(DEFENDANTS),

WINSTON COURTNEY WILLIAMS (CLAIMANT)

v.

NEWTON POLEON

[High Court (Mitchell, J.), March 10, 19, 25, 26, 1971].

Interpleader—Claim to articles of furniture and household goods levied on in satisfaction of judgment—Ownership—Validity of claim—Rules of the Supreme Court 1955 Order 10 Rules 1, 4, 5, Order 41 Rule 2, Order 45 Rules 5, 16, 17.

This was an interpleader issue in which Williams, the claimant asserted that he was at all material times the owner of articles of furniture and household goods which Poleon unlawfully caused to be levied on at 47 Bel Air Springs in satisfaction of a judgment which Poleon had obtained against Georgetown Stone and Construction Co. Ltd. Williams claimed to be owner by purchase from one Alexander and sought a declaration that the levy was wrongful and unlawful, an order that the articles be returned to him, and damages for wrongful levy. The defence was a denial of the claimant's right or title to the items of goods and furniture. Counsel for the claimant submitted in limine that there was no authority for solicitor of the defendant to act in the matter as envisaged under O. 10 r. 5 of the Rules of the Supreme Court 1955. The particular rule is set out in the judgment. The trial judge dealt with what he described as the peculiar procedure of interpleader proceedings and found that the submission in limine was untenable. On the facts.

HELD: (i) the house at 47 Bel Air Springs which was owned by the claimant was rented to the company as an unfurnished house;

(ii) the articles were placed in the house by the company and were owned by the company;

(iii) Alexander had no authority to sell the articles in question to Williams, and thus Williams could not have acquired a valid title to them;

(iv) the orders sought by the claimant would be refused and the claim dismissed.

Claim dismissed.

Doodnauth Singh for claimant.

V. Newton for defendant.

NEWTON POLEON (EXECUTION-CREDITOR) *v.* K. T. MAINE etc.
WINSTON COURTNEY WILLIAMS (CLAIMANT) *v.* NEWTON POLEON

MITCHELL, J.: Winston Courtney Williams, the claimant, has asserted that he was at all material times from 24th March, 1970 the lawful owner of certain articles of furniture and household goods mentioned in his statement of claim and that on 22nd June, 1970, Newton Poleon, the defendant in this particular action wrongfully and unlawfully caused execution to be levied on the said articles which were in the plaintiff's house at 47 Bel Air Springs, East Coast Demerara, Guyana in satisfaction of a judgment which the defendant had obtained against the Georgetown Stone and Construction Co. Ltd.

Accordingly, Winston Courtney Williams claimed a declaration that the levy of 22nd June, 1970 by Newton Poleon is wrongful and unlawful, an order that the several items of furniture and goods levied upon be returned to him, damages in excess of $500.00 for wrongful levy and for trespass and an injunction restraining the said Newton Poleon from conducting my sale at execution.

The defendant Newton Poleon admitted that on 22nd June, 1970, Marshal Jagroop of the Supreme Court, Guyana, had levied on the items of goods and furniture mentioned in that claimant's statement of claim at his instance in satisfaction of a judgment which he had obtained against the Georgetown Stone and Construction Co. Ltd. in the sum of $17,191.28. He, however, denied and disacknowledged the claimant's right or title to the items of goods and furniture taken into execution as mentioned in the statement of claim. The defendant, also, denied that the articles and goods mentioned in the statement of claim and claimed by Winston Courtney Williams were purchased at any time or at all by him and said that assuming that there was a purported purchase of those goods from the Georgetown Stone and Construction Co. Ltd. that purported sale by the company was not properly executed according to law. The defendant, also claimed that at all times the goods levied upon were and still are the property of the Georgetown Stone and Construction Co. Ltd. and were never the property of Winston Courtney Williams, the claimant.

When the matter came up for hearing Counsel for the claimant submitted in limine that there was no authority for solicitor of the defendant to act in this matter as envisaged under O. 10 r. 5 of the Rules of the Supreme Court of Guyana 1955. It must be appreciated that he grounded his submission on O.10 r. 5. Or. 10 r. 5 provides as follows:

> "The Solicitor of a defendant appearing by a Solicitor unless authorised by a general power *ad lites* duly registered or recorded in the Deeds Registry shall, when entering an appearance or within such time after as may be fixed by the Registrar produce an authority in writing signed by the defendant, or his duly constituted attorney, appointing the Solicitor to act for him in the action etc . . . . If this rule is not complied with no memorandum of appearance prepared by a solicitor shall be received".

The entry of appearance under O. 10 r. 5 of the Rules of Supreme Court, 1955 to which Counsel for the claimant referred, however, relates to the entry of appearance in answer to a writ of summons.

O. 10 is generally concerned with "Appearance" and O. 10 r. 1 states:

> "Except as hereinafter provided, a defendant shall enter appearance in the Registry out of which the writ of summons issued.

O. 10 r. 4 further states:

> "A defendant shall enter his appearance to a writ of summons by filing in the Registry a memorandum in writing dated on the day of its filing, and containing the name of the defendant's Solicitor, or stating that the defendant defends in person".

O. 10 r. 5 to which reference has already been made concerns the authority to Solicitor when appearance is being entered to a writ of summons, and follows in the sequence of the procedure imposed on a defendant by O. 10 r. 4 supra and is as a result of it. There is no mention of Interpleader proceedings in O.10.

The nature of a "writ of summons" is set out in O. 3 of the Rules of Supreme Court, Guyana, 1955, and the contents of the writ at O. 3 r. 3 which states:

> "Every writ of summons except a specially indorsed writ shall call upon the defendant to enter appearance within ten days inclusive of the date on which service of the want was effected".

O. 3 r. 5 deals with the form which a writ of summons shall take and O. 3 r. 8 deals with the Authority of Solicitor when presenting a writ of summons to the Registrar. When O. 3 r. 8 is read, compared and contrasted with O. 10 r. 5, it emerges that the obligation placed on a plaintiff by O. 3 r. 8 corresponds with that placed in the defendant by O. 10 r. 5 and that both corresponding obligations relate to a writ of summons. The writ of summons is the common denominator of both plaintiff and defendant with regard to the particular requirement as to the entry of appearance by the defendant in terms of O.10 r. 5.

I have mentioned all that to illustrate that an action commenced by a writ of summons is different from interpleader proceedings and that the requirements of the procedure for each and for entering on "appearance" differ in each case in form and content, and those of one are not applicable to the other and vice versa.

The form and procedure required for an interpleader are set out in O. 45 of the Rules of Supreme Court, Guyana 1955, under the unmistaken heading "Interpleader".

O.45 r. 4 states:

> "Where the applicant is a defendant, application for relief may be made at any time after service of the writ of summons".

To my mind, this rule recognises and accepts the fact that there is a prior writ of summons in existence in the matter and indicates that application in interpleader proceedings will be made in another form other than writ of summons. Accordingly, if the interpleader proceedings are commenced by application other than in the form of a writ of summons, the entry of appearance and obligation which devolves on Solicitor to file authority as is required for an action commenced by writ of summons does not arise under O. 10 r. 5 as Counsel for the claimant has submitted, and one must look to the peculiar procedure of the Interpleader Rules for what is really required in Interpleader proceedings as far as the applicant and defendant and execution creditor are concerned.

Again, the interpleader O.45 r. 5 states:

> "The applicant may take out a summons calling on the claimants to appear etc. . . ."

The application in Interpleader proceedings is, thus, by way of "summons" not "writ of summons".

In O. 41 r. 2 of the Rules of Supreme Court, Guyana, 1955 it is stated:

> "A summons other than an originating summons shall be in Form No. 1 in Appendix R to these Rules etc.

and in O. 3 r. 5 which concerns "Writs of Summons" it is stated that:

> "Writs of summons shall be in such one of the Forms in appendix B to these Rules as may be applicable etc".

The form for the application by way of summons under O. 41 r. 2 differs from that of the form for a writ of summons under O. 3 r. 5 and the

"summons" under O. 45 (Interpleader) is a summons in the action not separate and distinct from it.

The procedure where a claim is made to, or, in respect of any goods, or, chattels, or, movable property taken in execution under the process of the court, as this claim is, is set forth in O. 45 at rr. 16 and 17 and not at O.10 r. 5.

It will be appreciated that in O. 45 (the Order dealing with Interpleader), and particularly rr. 16 and 17, there is no provision for entry of appearance in the technical sense as envisaged by O. 10 r. 5. O. 45 r. 16 sub-rule *inter alia* states:

> "Upon the receipt . . . and the execution creditor shall, within four days after receiving the notice" (i.e. Notice from the Marshal) "give notice to the Marshal that he admits or disputes the claim according to Form No. 2 in Appendix T to these Rules or to like effect".

The execution creditor does not enter an appearance to the Interpleader action in the manner of a defendant under O. 10. He gives a notice of

admission or dispute of title of claimant as the case may be. The form of that notice which the execution creditor gives is significant too and states:

"Take notice that I admit (or dispute) the title of . . . to the goods (or, to certain goods, namely (set them out) seized by you under the execution issued under the judgment in this action".

And the significant words are "execution issued under the judgment in this action" and the most significant against Counsel's argument are "in this action".

If one accepts the full impact of the words used in that context, to my mind, the impression inevitably conveyed by the words is that the interpleader proceedings are for purpose of procedure still an integral part of the initial action under which judgment was obtained, and following on judgment in the initial action execution was issued. That would logically, to my mind, obviate the necessity for another formal entry of appearance for which the Rules in their wisdom and common sense do not make provision in O. 45, and, also, exclude the necessity for another formal authority for Solicitor to appear, in so far as there was an authority in the initial and original action which gave rise to the judgment and subsequent execution.

The notice of Winston Courtney Williams himself claiming the goods taken into execution was issued by him under O. 45 r. 16(1) as the notice itself says. That notice itself signed by Williams himself speaks of "taken into execution by the plaintiff (Execution-Creditor) in the above action". That could refer only to the action on the form of the rubic submitted by the claimant himself i.e. action no. 1610 of 1970, Demerara. He thus, set in motion the Interpleader proceedings in the same action when he made such a claim and when he used that rubic and number. The Marshal of the Supreme Court used the same rubic and number of the claimant's notice in giving notice to the execution creditor Newton Poleon, as is required by O. 45 r. 16(2). Newton Poleon, the execution creditor, to my mind, had no alternative but to use the same rubic and number in giving notice to the Marshal that he disputed the claim of Winston Courtney Williams to the goods taken in execution as is required by O.45 r. 16(2) also.

In my opinion, this is the only form for what may, for the practical purposes of the Interpleader proceedings, be described as an entry of appearance and this is different both in form and content from the entry of appearance required to a writ of summons under O. 10 and there is no requirement under O. 45 for an authority to Solicitor as is required under O. 10 at r. 5 for the defendant, and under O. 3 r. 8 for the plaintiff in an action commenced by a writ of summons.

I hold the view that the documents filed by the execution creditor Newton Poleon, were in accordance with the requirements of O. 45 of the Rules of Supreme Court.

During the hearing of this matter I gave the Solicitor for the execution creditor an opportunity to file and serve the authority to solicitor. I was

of the view then that assuming that there was some merit in the arguments of counsel for the claimant, the claimant himself was not prejudiced by the authority to Solicitor of the execution creditor not being filed and the execution creditor was led into possible further error by the action of the Registrar in accepting all the documents filed by his solicitor and, also, the justice of the case demanded that the execution-creditor be heard and the total effect of the failure to file any authority to Solicitor, if that was necessary, was an irregularity and not a nullity.

I appreciate that there may be opinion in support of the proposition that Interpleader proceedings are a separate and distinct action from the original action which has given rise to the judgment and subsequent execution under consideration in this matter, but having regard to all that I have said previously and to the forms No. 1 and 2 of Appendix T and to the "Title as in Form No. 1 on Appendix "B" of the Rules of Supreme Court, 1955, to which reference is made in Form No. 1 of Appendix T itself, I have come to the conclusion that I cannot agree with that proposition and in terms of Guyana the Rules of Supreme Court, 1955 I do say that as far as the procedure and the rules are concerned Interpleader proceedings are a consequential part but, nevertheless, an integral part of the initial and original action as it proceeds to its final execution in discharging the rights and obligations of the parties under the one and said action.

It was held in *James v. Ricknell* (1888) 20 Q.B.D. 64 that a Solicitor retained in the action has no implied authority to engage in interpleader proceedings. That is understandable and rightly so. Interpleader proceedings do not make provision for Solicitor to engage in those proceedings on behalf of the claimant or execution creditor. The Interpleader proceedings provide that the claimant and execution creditor make the application and give notice (i.e. engage in interpleader proceedings) by themselves.

The head-note in *James v. Ricknell* supra reads "A solicitor who has recovered judgment for a client under an ordinary retainer, has no authority, without special instructions, to engage in proceedings in interpleader. The action, was in respect of a solicitor's bill for £37. 6s. 8d., the principal item being a sum of £22. 13s. 6d. for disbursements in action of *Ricknell v. Coleman* in the Queen's Bench Division. In this action judgment having been recovered for the plaintiff, execution was levied and certain household furniture which had been seized by the sheriff, was claimed under a bill of sale. An interpleader issue was directed and a master at chambers decided in favour of the claimant and made an order that the sheriff should withdraw and that the execution creditor should pay the costs of the claimant and the sheriff's costs and possession money. These amounted to £22. 13s. 6d. and the plaintiff, as solicitor to the execution creditor, the present defendant, paid the sum to the claimant and the sheriff. The jury, in answer to a question put to them by the assistant judge, found that the

plaintiff received no special retainer or instructions from the defendant to engage in the interpleader proceedings.

WILLS, J., in the course of his judgment said:

> "The plaintiff acting as a solicitor under the retainer of his client was authorised to use all ordinary means for the recovery of the debt. This retainer covered the proceedings in the original action up to judgment and execution . . . . When execution has been levied the solicitor has done all that he was employed to do under his retainer"

GRANTHAN, J., concurred with WILLS, J., and said:

> "I think we may very safely declare the law to be that under an ordinary retainer a solicitor is not entitled to engage in proceedings without consulting his client and receiving special instructions. The only authority . . . to the contrary is the dictum of Lord SELBOURNE in *Hamlyn v. Betteley* (6 Q.B.D. 63) to the effect that interpleader is "not an action, but a proceeding in an action". This dictum, however, refers not to the present question but to forms of procedure under the Interpleader Act.

However, in this present matter of *Williams v. Poleon* the question is not the same as that which was considered in *James v. Ricknell* supra that of retainer of Solicitor, but this case is rather concerned with the question of the form of procedure within the rules of procedure as laid down by the Rules of the Supreme Court of Guyana, 1955. Accordingly, I agree with Lord SELBOURNE, C., in *Hamlyn v. Betteley* (6 Q.B.D. 63) when in delivering the judgment of the Court of Appeal he said:

> "Interpleader is not an action either in the strict or any conventional sense . . . it is a proceeding in an action and not an action in itself".

and I prefer to accept and adopt that opinion. The decision of *James v. Ricknell* could, thus, be distinguished from this case and is not applicable.

For the purposes of retainer of a Solicitor Interpleader is a separate action but for the purposes of procedure it is one and the same as the original action, and the forms and contents of Guyana Rules which are applicable support that view as I have previously illustrated.

There is no provision in O. 45 for anything to be done by any Solicitor for and on behalf of any of the parties. In O. 3 and in O. 10 there is provision for Solicitor to appear for the plaintiff and defendant respectively.

The affidavit sworn by the applicant under O. 45 must be an affidavit by himself (see *Powell v. Lock* (1935), 3 A & E 315, *Webster v. Delafield* (1849) 7 C.B. 187; *Plues v. Capel* (1880) 68 L.T. 354) and not by his Solicitor (*Wood v. Lyne* (1850) 4 De G. & Sm. 16; *Nelson v. Barter* (1864) 2 H & M, 334. Under O. 45 the parties do not have to enter an appearance in the technical sense as envisaged under O.10.

So the reasoning behind *James v. Ricknell supra* is correct, but it still does not say or it does not follow by implication or otherwise that an authority to Solicitor must be filed before Solicitor can appear in Interpleading proceedings. *James v. Ricknell* concerns a retainer which is different from the procedural requirement to appeal.

There is nothing in the O. 45 which precludes or prevents a Solicitor from acting in conjunction with the claimant personally, or execution creditor personally, as legal practitioner or legal representative for the specific purpose of appearing for, assisting and advocating the cause of either party in the sphere of professional competence as falls within the scope of the Legal Practitioners Ordinance of Guyana Chapter 30. In my view, that was the purpose served by Solicitor for the claimant on the one hand and Solicitor for the execution creditor on the other in these and other Interpleader proceedings.

Accordingly, I find that the submission *in limine* of Counsel for the claimant is untenable.

It is appreciated that proof of the relevant facts in the circumstances of this case is on the balance of probabilities and in regard thereto one could take into account only what is reasonable and probable in the light of human nature and human experience. Truth may very well be stronger than fiction in this or any other case, but in the final analysis the Court in the person of the trial judge has decided on the human factors before it, having regard to the credibility or lack of credibility of the witnesses and whatever wisdom with which the Court may be endowed.

I find as a fact that the house at 47, Bel Air Springs which was owned by the Claimant was rented at the commencement of the tenancy by the Georgetown Stone and Construction Co. Ltd. from the claimant as an unfurnished house without any furniture and goods. I find, also, as a fact that at the time when the house at 47, Bel Air Springs was initially rented to the Georgetown Stone and Construction Company Ltd., it was not rented with any furniture or goods provided by the claimant Winston Courtney Williams nor did he subsequently place furniture in that house.

I find as a fact that the furniture which was placed in the premises at 47, Bel Air Springs rented from the claimant were placed in those premises by the Georgetown Stone and Construction Co. Ltd., subsequent to the initial letting and were owned by that company and that company remained in actual physical control of those items of furniture up to the material time when they were levied upon and taken into execution by the defendant Poleon.

I find that on the face of the initial ownership and continuous possession of the furniture and goods in the said house at 47, Bel Air Springs, by the Georgetown Stone and Construction Co. Ltd., it is reasonable for anyone to conclude that unless credible evidence to the contrary is forthcoming on

the balance of probabilities the same initial ownership along with the fact of continuous possession was maintained up to the time of the execution of the levy on the said furniture and goods at the instance of Newton Poleon. Whatever I believe and conclude would not necessarily coincide with what others believe but I am, nevertheless, entitled to my belief and conclusions on the evidence having regard to what I have seen and heard and I venture to say that I am in a better position than anyone else to do so if one is concerned with justice in this matter, and not just bigotry.

I find as a fact that up to the time of the levy the Georgetown Stone and Construction Co. Ltd., remained as tenants of the Claimant in respect of the same premises and were liable to pay the said rent of $375.00 per month and no more, which was rent paid from the initial occupation of the premises at the very beginning of the said tenancy by the company.

I find that there was no increase of that rent at any time to suggest a change of consideration involved in the contract of tenancy, and to suggest any diminution in, accretion to, or, change in the initial and continuing contract of tenancy between the Georgetown Stone and Construction Co. Ltd. and Winston Courtney Williams. On the face of the relationship, as evidenced by the said continuous contract of tenancy Williams, the landlord, did not give any more or less than he gave at the beginning of the contract of tenancy, and the company did not have more or less than they had at the beginning of the tenancy when they embarked on the occupation of the premises.

I find that at the time when the levy was made and the items of furniture and goods taken into execution, no claim to those items of furniture and goods was in fact made by the Claimant, or, any other person as being entitled to the ownership or possession of those goods.

The Claimant Williams said that he saw when persons were removing furniture from the house at 47, Bel Air Springs, that he was there when the truck was there. According to him, he told Newton Poleon that the furniture had belonged to him. I do not believe him. According to him, he made no effort to speak to the marshal and the marshal was not present when he spoke to Poleon.

Marshal Jagroop, who was the marshal who executed the levy at the instance of Newton Poleon, gave evidence that the levy was executed at the premises at 47, Bel Air Springs on the morning of 22nd June, 1970 before 10.45 a.m. and not in the afternoon as Courtney Williams would like me to believe. Marshal Jagroop said that Poleon and some porters were there but no one else went there from the time he was there until the time when he left. No one made any claim at the time. I believe the Marshal.

Marshal Jagroop further said that at the time of the execution of the levy at 47, Bel Air Springs, someone who gave a name as Mr. Williams spoke to him on the telephone and said that he was the landlord of the place. Williams the claimant has said that he cannot remember that the Marshal spoke to him on the telephone during the morning of 22nd June, 1970, but

he admitted that he was at home during the morning of 22nd June, 1970 and that he had a telephone at his home on that day.

I appreciate that the evidence of Marshal Jagroop to the effect that he explained the fact of the levy to the Mr. Williams and invited him to the premises and that the Mr. Williams said that he would not come is not legally admissible evidence against Mr. Williams the claimant in this case and I did not use it against him.

I do, however, believe and find that the levy took place in the morning of 22nd June, 1970 as the Marshal said, at a time when the claimant Courtney Williams was at home at 44, Bel Air Springs, approximately four (4) lots away from the premises in question, and was probably in a position to see those premises, and to see what was going on there, but he did not claim the furniture and goods.

I believe Marshal Jagroop, a seemingly impartial officer of the Supreme Court of Guyana, when he gave evidence to the effect that no one claimed the furniture and goods in his presence and when he said that no one apart from Poleon and the porters went to the premises during the time when he was there. I believe him, too, when he said that Poleon left with him, and I accept the probability emerging from his evidence that if Williams had gone to the premises and has spoken to Poleon as Williams said he did he, Marshal Jagroop, would most likely have seen him or heard him. I, also, believe Poleon when he said that the claimant Williams did not speak to him on that morning. Williams was not speaking the truth in my opinion.

I am of the view that if at that moment of time Winston Courtney Williams had already bought the furniture in the house at 47, Bel Air Springs, which furniture was then being levied upon and removed from the premises, and if he had the receipt of purchase Ex. “B” and the inventory of furniture purchased Ex. “C1-2” in his possession, it is reasonable and probable that not only would he have mentioned that fact to the marshal and, or, to Poleon who was there present with the marshal that he had bought the furniture, but, also, he would have produced the receipt Ex. “B” and the inventory Ex. “C1-2” in support of his claim and in proof of his purchase or would have asked for an opportunity to do so.

On Williams’ own evidence all he said that he did was to speak to Poleon and say that the furniture belonged to him. It is true that he did not have to produce proof, but if as he was saying he had purchased these furniture and goods after they were placed there by the company and at that moment of time he already had proof of his purchase one might reasonably expect in support of consistent conduct (if he was at all being consistent) that he would either say that he had a receipt or produce the receipt or ask for an opportunity to produce it. I find as a fact that he did neither of these.

To my mind, his not saying so, or not doing so gives rise to the probability that he, Winston Courtney Williams, had not then bought the

items of furniture and goods, and at that material moment of time had no proof whatsoever or support in terms of the receipt or the inventory that he had bought the furniture and goods.

Those came after the event and are an afterthought.

I do appreciate that it would normally be difficult for anyone in any matter to prove collusion and, as in this case, collusion must usually be reasonably inferred from facts or circumstances proved in evidence, because collusion is the fraudulent, dishonest and deceptive, secret understanding which exists between parties whose interests outwardly and ostensibly do not coincide, particularly in a law-suit. The actions and thoughts evidencing collusion are usually peculiarly within the knowledge of those who practice collusion, and are not normally known or available to others. "Collusion" does not necessarily entail anything morally wrong but means "playing the same game" as the claimant (*Murietta v. South American Co.,* (1893) 62 L.J. Q.B. 396 at pp. 397—398.

In this case it is a fact that the purported receipt of purchase on which the claimant has founded his case was not shown to Poleon, the execution creditor, or to the Marshal of the Supreme Court at the time of the execution of the levy. I believe the marshal when he said that shortly after the levy, in the afternoon of the day of the levy, he and the said execution creditor, Poleon, went to the offices of the Georgetown Stone and Construction Co. Ltd., and there they met and spoke to Williams, the claimant, and Lorrimer Alexander. I believe the marshal, also, when he said that he spoke to Lorrimer Alexander about the execution of the levy at 47, Bel Air Springs, in the presence of the claimant, Williams, and Poleon, and that no one, neither of them, raised the question of the ownership of the articles levied upon at 47, Bel Air Springs, and no one in that office at the time (including Williams) asked him for a list of the items which he had levied upon at 47, Bel Air Springs. I, also, believe the marshal when he said that he had told Alexander then that he (the marshal) had come to levy on the articles in the office and that Alexander had then said that the articles in the office did not concern the Georgetown Stone and Construction Co. Ltd.

In those compelling circumstances which would reasonably evoke the recollection of the receipt of purchase and the inventory of the articles at 47, Bel Air Springs, not a word was spoken of the receipt, or, inventory by either of the only two persons who in the circumstances of this case would peculiarly have known of their existence at the time. The receipt and inventory are not subsequently produced to the marshal of the Supreme Court. Then, literally out of the blue, they make their appearances for the very first time at the actual hearing of this matter, and I am asked to believe that they existed all along even before the levy was made and support a genuine transaction.

I unequivocally say that I firmly conclude and believe that the receipt and inventory did not exist before the levy, at the time of the levy, or, at the time when the marshal visited the offices of the company after the levy.

Accordingly, the production of the receipt and the inventory to support his claim in the circumstances of this case, and the evidence given by Alexander to give the pretence of genuineness to the transaction of the purported sale between Williams and himself are such to lead me to the conclusion that there was probably a common purpose in their doing so, and that even though ostensibly their interests did not seem to coincide they were playing the same "game" with the intention of depriving Poleon of the particular fruits of his judgment. I am satisfied that there must have been collusion between Williams and Alexander for these circumstances as narrated by them to have occurred and I so hold.

The purported transaction, therefore, of the sale of the furniture and goods by Lorrimer Alexander to Williams was in my opinion not a true and genuine transaction, and thus, did not go towards proving that Williams had title to the goods. This burden was assumed by him in proof of his claim and he did not discharge it to my satisfaction. The evidence established that he did not have actual possession of the furniture and goods levied upon at the material time of the levy. I was not satisfied, also, that Williams had a right to possession, or, such title, or, interest in the furniture and goods that they should not have been levied upon.

In arriving at my conclusion, I, also, considered Williams' version of the payment of the full purchase price of the furniture and goods amounting to $3,900.00 at the time when the said company from whom he bought the furniture owed him $550.00 for rent and there was no deduction or "set off of that amount when the company was in a poor financial state, and there was the possibility that he would not have been able to recover the said $550.00 from any other source. I, also, considered Alexander's version and the vague, uncertain, admittedly unreliable evidence which he gave. I saw and heard them and I was satisfied that I could not believe them. My conscience is clear.

I was, also, satisfied that, in law and in fact, Alexander had no authority to dispose of the property of the company in the form of furniture and household goods. Alexander's letter of authority empowered him "to conduct the reorganisation" of the company and "to discharge all management duties related thereto". Any final organisation arrangements were to be agreed upon by Robert T. Moore, Jr. the signatory of his letter or authority.

There is no authority in that letter, in my opinion, to sell the company's property and, to my mind managing a company is not synonymous with selling that company's property as distinct from the company's products.

Accepting for the purposes of the claimant's case that Alexander was a manager of the Stone and Construction company his implied authority (in so far as it was not specifically stated in his letter of authority) would be to con-

duct the particular trade or business, or generally to do acts for this company in matters of the particular nature of "stone and construction" carried on by the company, or, to do acts incidental to the ordinary conduct of the business of "a stone and construction" company, and whatever is necessary for the proper and effective performances of his duties as manager in relation to a "stone and construction company", but not to do anything that is outside the ordinary scope of his employment and duties.

I held the view that selling furniture and household items in a dwelling house had nothing to do with the ordinary conduct of the business of a stone and construction company, nor was it a matter of the nature of "stone and construction", or within the scope of the class of acts that may be referable to a "stone and construction" company, and was outside the ordinary scope of Alexander's employment either as manager of a stone and construction company, or, for the purpose of re-organising the stone and construction company. I held the view that selling the household furniture and household items belonging to the company in a dwelling house did not fall within the scope of his actual or implied authority, or, the ostensible authority of the Company. There can be no argument in this case that Alexander was an apparent owner of the household furniture and goods and had the indicia of title to them. If one carries that argument to its logical conclusion it would mean that by merely being manager of a stone and construction company he had authority to sell anything and everything which the company may own and that could not reasonably be the case in this matter. Accordingly, Lorrimer Alexander had no authority to sell the household furniture and household items of the Georgetown Stone and Construction Co. Ltd. to Courtney Williams and Williams, thus, could not have acquired any valid title to those goods so as to remove ownership from the Company itself and affect the levy on the company's goods at, 47, Bel Air Springs which was executed accordingly to law,

Accordingly, the prayers requested by the claimant, Winston Courtney Williams, are refused and his claim is wholly dismissed.

There will be costs to the execution creditor Newton Poleon, to be taxed certified fit for Counsel.

Claim dismissed.

HAZRAT ALI *v.* ENMORE ESTATES LIMITED

[High Court (Gonsalves-Sabola, J.)
December4, 5, 16, 1970; January 22; February 6, 9; March 30, 1971].

Immovable property—Agricultural land—Contractual tenancy from year to year—Whether valid determination of tenancy by mutual consent or by notice to quit—Notice to quit of less than six months' duration expiring during currency of the yearly contract.

Trespass—Claim for damages for trespass to fruit trees and growing crops—measure of damages.

The plaintiff's claim against the defendants was for a declaration of tenancy, damages for trespass, and an injunction. He pleaded a contractual tenancy from year to year of land which was admittedly agricultural land, and that although the tenancy was not terminated, the defendants had wrongfully trespassed on the land and had done damage to growing crops and fruit trees. The defendants' case was that there was a valid determination of the tenancy agreement by mutual agreement to vacate or by notice to quit.

HELD: (i) the parties did not agree that the plaintiff would surrender his tenement in exchange for another site made available by the defendants;

(ii) the notice to quit was not a valid notice because it expired dining the currency of the yearly contract, and in any event was of shorter than six months' duration.

(iii) the loss claimed was grossly exaggerated. The defendants' counterclaim was dismissed and the plaintiff was entitled to the declaration and injunction sought and damages assessed in the sum of $2,060.00.

Judgment for the plaintiff.

Dr. F. W. Ramsahoye, S.C., and *D. Jagan* for the plaintiff.

J. A. King for the defendants.

GONSALVES-SABOLA, J.: In December, 1969 the Defendants by their servants and/or agents entered a certain piece of land their own property situate at Good Hope Dam, East Coast, Demerara, but which was in the actual possession of the Plaintiff. At that time and place, the Defendants admittedly dismantled the Plaintiff's palings, felled certain trees, and graded the land. The Plaintiff complains of all of that as a trespass and has sued for damages, a declaration of tenancy and an injunction restraining the defendants from further trespass to the said land.

It is common ground that at any rate initially, there was a relationship of landlord and tenant between the parties, the plaintiff I find, holding of the defendants on a tenancy from year to year. Inspired by the cases of *Little v. Wilbanis* (1961) 3 W.I.R. 241 and *Small v. Saul* (1965) 8 W.I.R. 351, there was some discussion of the question whether the plaintiff's tenancy fell within the Rent Restriction Ordinance. Mr. King conceded that the

Ordinance did not apply because the land was agricultural land, but even if the tenement were caught by the Ordinance, the plaintiff was relying on a contractual and not a statutory tenancy to establish his claim to relief; he therefore, had no need to pray in aid, the provisions of the Ordinance. The jurisdiction of this court to entertain this action is undoubted.

The crux of this case is whether there was a determination of tenancy at any time before the destructive incursion of the defendants into the land occupied by the plaintiff. How I answer that question of law will depend on the finding of fact I make on the evidence adduced by the defendants directed to proving that the tenancy was determined by mutual consent prior to December, 1969. I have been urged to hold if I find that there was such mutual consent, that the plaintiff remained on the land as a trespasser or at best a tenant on sufferance who could not therefore enforce any right of possession against the landlord.

The defendants relied on two witnesses, Yassin also known as Gajar and Ganash Deen to prove that there was agreement by the plaintiff to surrender his tenement in exchange for another site made available by the defendants.

Gajar's evidence was that Mr. McTurk, the defendants' Estate Manager, Ganash Deen, the defendants' Bookkeeper and xxx the defendants' Estate Ranger, went to the plaintiff's home where McTurk told the plaintiff that the defendants wanted the land to plant cane. The plaintiff agreed to quit the land and McTurk told him to see Gajar who would give him a new spot to remove his house to. The plaintiff's wife went with Gajar and she accepted a new site at Mon Repos pasture. Ganash Deen said that around 1963 he, McTurk and Gajar went to the plaintiff's home when McTurk told the plaintiff to vacate the land and accept another site. The plaintiff accepted the offer.

The plaintiff strenuously denied any agreement with McTurk to vacate and accept another site.

I find that McTurk did indicate to the plaintiff some years ago, most probably in 1963, that the Estate wanted to regain possession of the tenement, but I do not find that there was any agreement properly so called come to between McTurk and the plaintiff. What on the evidence I believe happened was that the defendants through McTurk positively asserted their need for possession and sought to impose on the plaintiff an obligation to surrender his possession contractually held. I find that his landlord's proposal never engendered much enthusiasm in the plaintiff who never acquiesced in the swop of tenements suggested but intended to maintain possession of the land of which he was already tenant. Two bits of evidence from Gajar's own lips demonstrate Hazrat Ali's mood with reference to the defendant's intended acquisition of his tenement. Gajar says that when the Estate started to plough the back of Good Hope land he invited Hazrat Ali to call at the Estate Office to be considered for compensation for his growing trees on the land. Hazrat Ali's response was that if the Manager

wanted him the Manager must go to his (Ali's) house. It came to pass that neither did Mohammed go to the mountain nor the mountain to Mohammed. Again, Gajar tells of having spoken to Hazrat Ali about 20 times informing him that he was wanted by the Manager at the office and that the land was wanted to plant cane. Hazrat Ali's reply was that when he had time he would go to see the Manager. Hazrat Ali never went to see the Manager.

I find that when Gajar and Ganash Deen testified that Hazrat Ali agreed with McTurk to surrender possession of the land they were giving evidence of a self-serving conclusion which they as servants of the defendants were not unwilling to reach.

Rejecting as I do the evidence of agreement led by the plaintiff, there disappears completely the foundation on which the defendants could argue that the yearly tenant had declined in status to trespasser or even tenant on sufferance.

The plaintiff points to a notice served on him dated 9th April, 1968, Ex. "D", under the hand of McTurk and contends that its contents disavow any earlier consensus between the parties about the surrendering of the tenancy. That notice not merely fails to recite the alleged earlier consensus but is so worded that Hazrat Ali can reasonably be heard to describe it as evidence going to show that the estate was acting unilaterally. Ex. "D", must be dismissed from consideration as a valid notice to quit because according to trite law it expires during the currency of the contracted year, and in any event is of shorter than six months' duration.

For a number of reasons I do regard as a cogent circumstance telling against the continuance of the tenancy the fact that Hazrat Ali had paid no rent for the land after the year 1963. It would appear that the Estate was proceeding in this matter without the benefit of legal advice and might have felt that the non-collection of rent might have been an effective rejection of Hazrat Ali's tenancy. Again, it was the practice of the Estate to send a collector to collect the rents from the tenants, but this ceased at the end of 1963. What the Estate wanted was the land not the peppercorn rent. Further, there was the suggestion put in cross-examination to Hazrat Ali that in 1966 McTurk, Gajar and Ganash Deen went to him and agreed with him that the rent for 1964, 1965 and 1966 should be waived if Ali gave up the land. Incidentally, that suggestion at the end of the case remained suspended in mid-air because evidence was not called by the defendants to support it.

I find that there was in 1963 one visit by McTurk, Ganash Deen and Gajar to the plaintiffs home to require him to vacate, and that in 1968 those gentlemen paid a second visit for the purpose of the delivery of Ex. "D", to the plaintiff, who responded to it by paying up his arrears of rent only to have it rejected by the defendants. I held that the contractual tenancy was never brought to an end either by surrender or by a regular notice to quit, or in any other legal way and so still subsists. It therefore follows ineluctably that trespass was committed on the plaintiff's tenement

by his landlord the defendants when they invaded in December, 1969. In view of the findings which I have made, many interesting legal points debated by counsel with adequate reference to authority regrettably, do not fall to be decided by me. I proceed now to the question of damages—

Para. 10 of the Statement of Claim particularises special damage in respect of the loss of growing trees. The plaintiff gave evidence substantially sustaining his particulars but he also gave evidence that the land was 15 square rods in area and that there was on it a house in which he resided. The agricultural loss alleged is of such enormous proportions that it staggers the imagination, strains credulity and borders on the impossible. Just think of it—80 coconut trees, 60 genip trees, 30 mango trees, 40 banana trees, 50 plantain trees, 20 gooseberry trees, 10 cherry trees, 8 guava trees! The orange, lime, coya, mamee, saydium, semitoo and granadilla trees, are few but imagine added to those, 900 boulanger trees, 500 cucumber trees, 100 pepper trees and 100 ochro trees all compressed within an area of 15 square rods—what a veritable forest of vegetation in the heart of Good Hope, East Coast Demerara! It is a shame that a litigant should so assail the intelligence of the court by essaying on oath a tall story of such altitude. The tendency to exaggerate damages is probably irresistible among a certain class of plaintiffs, but surely, solicitors who receive their instructions from them ought to consider it their duty to restrain the mendacity and optimism of their clients whose inflated Statements of Claim can only be made inevitable perjury at the trial. It is not my opinion that this sort of thing should be regarded lightly by the court; it should be pronounced severely against. But for the difficulties involving the indispensable requirement of corroboration I would not have hesitated to make judicial use of the provisions of the Evidence Ordinance, against the plaintiff for perjury. Reckless exaggeration of special damages on oath is not to be dismissed as being a mere human foible. It is perjury.

Except in so far as Hazrat Ali is supported by the evidence of the defendants' own witness Gajar as to the extent of his loss he will be restricted in his recoupment of special damages. He has only himself to blame that the court cannot rely on his evidence of loss. Accordingly, I find the loss of growing trees to be as follows:—

15	Bearing coconut trees
15	small non-bearing coconut trees
2	genip trees—bearing
30	semitoo vines
2	bearing papaw trees
3	non-bearing papaw trees
1	tamarind tree—not bearing
18-19	banana trees or plantain trees
2	bearing cherry trees
2	small lime trees—not bearing
2	bearing sapodilla trees

1 mango tree—not bearing
1 soursop tree—not bearing
6 bird pepper trees
1 orange tree

I will bear in mind and make allowance as best I can for a vague area of loss suggested by Gajar when he said—

> "I saw no vegetables planted. I now say I saw 1 or 2 boulanger and ochro trees, but the bush was so thick that I could not tell the number of those plants. The number could not reach hundreds because the land was too small".

By far the most difficult question that was raised on the question of damages was the measure of damages proper to a case of this sort, always bearing in mind that the land was a tenement capable of reversion to the landlord after notice to quit, in this case having regard to the tenancy being one from year to year, of a maximum period of one year. Mr. Jagan submitted that the measure of damages should be the value of the produce over the number of years the trees would continue growing and suggested multipliers ranging from 5 to 20 years considering it was leased land.

Mr. Jagan also asked for an award of aggravated damages as part of the general damages to be awarded. I find that the plaintiff for some six years stood between the defendants and the extension of their sugar-cane agriculture. The other tenants had been co-operative. They had vacated. The defendants, refusing to be thwarted by one small man, and either ignoring or ignorant of a tenant's rights of possession, acting manifestly without legal advice or with legal advice based on inaccurate instructions, moved in with their bull dozer to dispossess the tenant and put themselves into possession. An interim injunction was applied for to stay the progress of the defendants as they broke the plaintiffs close, dismantled his palings and threatened the removal of his house. The defendants' self-help, whether inspired by ignorance, bona fides or pressing need was executed with a high hand and the court in stepping forth to the rescue and protection of the humble tenant of at least 25 years' standing, can perceive the landlord's conduct in no other light than as attracting aggravated damages.

Although the case of *Lavender v. Betts* (1942) 2 All E.R. 72 was concerned with the dispossession of a tenant who was a statutory tenant protected by the Rent Acts the principle postulated in that case in which the tenant was held entitled to punitive damages from his landlord, is applicable to the circumstances of the instant case. In *Lavender v. Betts* the landlord had determined the tenancy by notice to quit but after its expiry felt indisposed to suffer the law's delays in getting an order for possession from the County Court. He therefore descended on the tenement with servants and hammers and proceeded to make it practically uninhabitable. It was there held that a trespass had been committed upon the tenancy and that there was wrongful interference with the tenant's quiet enjoyment of the premises. By s. 4(1) of the Land and Tenant

Ordinance it is declared that tenancies defined in S. 3 of that Ordinance, e.g. a tenancy from year to year, shall have the same qualities and incidents as under the English Common Law. There is therefore attaching to the plaintiff's tenancy an implied covenant for quiet enjoyment inherited from the English Common Law. It is the breach of that implied covenant which is the foundation of the plaintiff's action in this case. A high-handed outrage has been committed and I award aggravated general damages in the sum of $500.00:

Mr. Jagan's high-minded approach to the measure of special damages involving the use of a generous multiplier has not found favour with me. A condition of a contract, albeit of tenancy, has been breached and the ordinary principles of damages for breach of contract will apply. I hold that damages will be recoverable in respect only of those consequences which flow directly and naturally from the breach or which may reasonably be supposed to have been within the contemplation of the parties. This approach is referred to in FOA's General Law of Landlord & Tenant, 8th Ed. at p. 307.

On Hazrat Ali's evidence the income from the produce of the land ranged between $30.00: and $45.00: per week. I understood him to mean that that income flowed from the heavy vegetation which I do not find to have existed on the land in the density represented. Since I prefer and substitute Gajar's evidence of loss for the plaintiffs I will proportionately reduce the income lost per week. Using the plaintiff's own figures his mean income would be some $40.00 per week and allowing for imponderables, crops bulldozed in the bushes, and aiming at a round figure I think an income of $15.00 a week is a reasonable estimate of the defendant's loss. Mr. King has convinced me that the measure of damages should have regard to the longest proper period of notice necessary on the facts of this case to bring the tenancy from year to year to an end. He recommended 12 months. To that I will add a further period of 12 months to cover the period of time that would be absorbed by legal proceedings, the making of the Order for Possession by a magistrate as well as the invariable practice of granting a postponement of the date of possession under S. 46(e) of the Landlord & Tenant Ordinance to allow the tenant time to arrange for the removal of his house. It all comes down to saying that in my view compensation for 2 years' loss of income at the commuted figure of $15.00 a week should be the extent of the plaintiff's entitlement to special damages, a sum of ($15 x 104 weeks = $1,560.).

I recoil from Mr. Jagan's multiplier of 15 or 20 years, which would have produced a comparatively astronomical figure. It is significant that S. 46 sub-s. (2) of the Landlord & Tenant Ordinance empowers a Magistrate to direct that the landlord as a condition precedent to obtaining an Order for Possession, deposit with the clerk of court the value of growing crops. The conception there quite understandably is that the tenant's equity in

the demised land is the value of growing crops at time of Order for Possession and not the value of produce in future. It seems to be inconsistent with the essential nature of a tenancy from year to year that the tenant should claim to have continuing rights to the produce of the land commensurate in years of value with the durability of trees planted, when the landlord by two relatively rapid strokes—notice to quit and action for possession—could lawfully dispossess him and as reversioner enjoy full dominium over the trees forming part of the land.

The plaintiff's action for trespass succeeds and the defendants' counterclaim stands dismissed. Damages are awarded against the defendants in the total sum of $2,060. The Declaration of tenancy and injunction sought are granted and the plaintiff will have his costs fixed in the sum of $1,200.

Stay of execution for six weeks granted pending appeal with a further stay of execution until the determination of the appeal if brought.

Judgment for the plaintiff.

JOHN LEONARD *v.* STANLEY ERSKINE

[Court of Appeal (Bollers, C. (ag.), Cummings and Crane, JJ.A.) January 15, March 31, 1971]

Legal business—Touting—Police trap—Feigned legal business—Legal Practitioners (Amd.) Ord. 1966 (No. 20) [G], SS. 20A, 20B, 20C, 20D, 20E.

Section 2 of the Legal Practitioners Ordinance defines a "tout" to mean:

> "a person who procures in consideration of any remuneration moving from any legal practitioner or from any person on his behalf, the employment of such legal practitioner in any legal business, or who proposes to any legal practitioner to procure, in consideration of any remuneration moving from such legal practitioner or from any person on his behalf, the employment of the legal practitioner in such business, or who for purposes of such procurement frequents the precincts of the court or any court subordinate thereto and includes a person declared by the Registrar to be a tout in pursuance of s. 20B of this Ordinance."

Pursuant to a trap laid by the respondent, a sergeant of police, a police constable was given a marked $20 note, and sent to the appellant with certain instructions. The constable pretended to the appellant that he had been charged by the police with the offence of larceny from the person, and was seeking to engage the services of a Mr. B., a barrister, to represent him. The appellant after making certain disparaging remarks about Mr. B's ability, offered the constable the services of Mr. M., also a barrister. He conducted the constable to the chambers of Mr. M. where he was introduced to him.

The constable repeated to Mr. M. what he had told the appellant, whereupon Mr. M. told him not to worry, and charged him a fee of $40. The constable paid $20 on account with the marked note. The trap was then sprung, and the appellant taken to the police station where he admitted that he was a part-time clerk to Mr. M. receiving a salary of $10 per week.

The appellant was charged and convicted with the offence of acting as a tout by procuring in consideration of remuneration moving from Mr. M., a legal practitioner, the employment of the said legal practitioner in legal business.

HELD on appeal (and reversing a decision of the Full Court) (Crane, J.A., dissenting) that the expression "legal business" contained in the definition of "tout" means genuine legal business, and not pretended or fictional business, for to construe legal business to mean pretended legal business would be to give it a loose and inexact meaning.

Appeal allowed. Conviction and sentence set aside.

J. O. F. Haynes, S.C., for the appellant.
W. G. Persaud and *J. Kissoon* for the respondent.

BOLLERS, C. (ag.): In the Magistrate's Court the appellant was convicted of the offence of touting, contrary to section 20(2) of the Legal Practitioners Ordinance, Cap. 30, as amended by the Legal Practitioners (Amendment) Ordinance, 1966, No. 20 of 1966. The particulars of offence were, that the appellant, on the day in question, acted as a tout by procuring in consideration of remuneration moving from Mr. M., a legal practitioner, the employment of the said legal practitioner in legal business.

The facts were not in dispute and showed that the prosecution for the offence arose out of a police trap set by the respondent, a sergeant of police who handed a decoy, i.e., a police constable, a marked $20.00 note, gave him certain instructions and sent him to the appellant. The constable pretended to the appellant, who was standing near to the legal practitioner's chambers, that he had been charged by the police with the offence of larceny from the person and was then in search of another legal practitioner, a Mr. B., whose services he wished to engage to represent him. The appellant made disparaging remarks about this legal practitioner and then stated to the con-

stable that he "had a lawyer who could fix him up". He then conducted the constable to the chambers of Mr. M., a barrister-at-law, who practised his profession in the courts of this country. The appellant introduced the constable and another man to the legal practitioner who enquired of the constable what his mission was. The constable repeated the account as to the circumstances of the offence in respect of which he was charged, which was a completely false story, and claimed that he was innocent as he was in another place when the offence was alleged to have taken place. The legal practitioner informed the constable that he should not be worried because it was a case of mistaken identity.

The constable agreed to pay the practitioner $40: as his fee, $20: of which he paid on account, for which he was given a receipt. The trap was then sprung by the respondent, the senior police officer who arrived on the scene and the legal practitioner was informed that it was a trap and that the money was marked. The police took the money, which was a $20: note, and the receipt into their possession.

Later at the police station, the appellant made a voluntary statement in which he admitted that he had taken the constable to Mr. M., the legal practitioner, and that he was clerk to the practitioner but did not work whole-time for him and his salary was $ 10: per week.

On these facts the appellant was convicted of the offence as stated above, and on appeal to the Full Court of the High Court of the Supreme Court of Judicature, his appeal was dismissed.

In the Magistrate's Court and in the Full Court it was argued by counsel on behalf of the appellant that the decoy, the constable, did not in fact have any legal business, but merely pretended questions of a legal nature on which he sought advice, and for the appellant to be caught by the statute there must have been actual or existing legal business and not fictional or pretended legal business, as was the case. Counsel conceded that if in truth and in fact the constable had been charged with the offence of larceny from the person and had been conducted to the legal practitioner by the appellant, then it could be properly said that the constable had real existing legal business, in which case he could be properly convicted of the offence of Touting.

The learned magistrate, in his memorandum of reasons, stated that the facts indicated that Mr. M., the legal practitioner, was under the impression that he was taking instructions from the constable with a view to appearing for the constable in court and, as a result, he failed to see how those circumstances could be anything other than legal business, and that where a legal practitioner was required to exercise his legal expertise, it must be said that he had been employed in legal business.

The Full Court approved of this dictum of the learned magistrate and considered that he had answered the legal problem rather nicely. The Full Court, in its decision, referred to the dictum of JESSEL, M.R., in *Smith v. Anderson* 15 Ch. D. 258 where that learned judge stated: "Anything which occupies the time and attention and labour of a man for the purpose of profit is business", and also to the Canadian case of *re Pzson* (1964) 2 D.L.R., at p. 11 where Laidlow, J.A., in dealing with a matter under the Bankruptcy Act of Canada is credited with having said that the word "business" as used in various statutes, involves at least three elements: (1) The occupation of time, attention and labour; (2) the incurring of liabilities to other persons; and (3) the purpose of a livelihood by profit; and held that it was clear that when the legal practitioner received the $20: note from the constable, the legal practitioner was in fact engaged in his business, namely, the practice of his profession which was not limited to an appearance in court.

This submission is now repeated in this court, that is to say, that there was no proof by the prosecution that the legal practitioner had been employed by the constable in any legal business as the business (if any) in which he had been employed was fictional and pretended, and therefore he had not been employed in any legal business within the meaning of the provisions of the Ordinance. Counsel argued that under the section under which the appellant was charged, the words "legal business" must be given their strict legal meaning, and the prosecution would have had to prove that the appellant procured the employment of the legal practitioner in legal business which was genuine. Counsel urged that there must be shown a contract of employment brought into existence between the legal practitioner and a client operating on a subject-matter of some legal business which the practitioner is required to do or become under an obligation.

Counsel for the respondent, on the other hand, urged that the words "any legal business" appearing in the particular section meant any legal business whatever and should be construed to mean any questions of a legal nature, genuine, fictional or otherwise, upon which the practitioner is called to exercise his legal expertise.

An analysis of the Legal Practitioners (Amendment) Ordinance, No. 20 of 1966, discloses that under s. 20A any person who acts as a tout is guilty of an offence and is liable to a fine not exceeding $250: or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment. Thus it will be seen that the section is highly penal.

The definition of "tout" which is given in the Ordinance is as follows:

> "'Tout' means a person who procures in consideration of any remuneration moving from any legal practitioner or from any person on his behalf, the employment of such legal practitioner in any legal

> business, or who proposes to any legal practitioner to procure, in consideration of any remuneration moving from such legal practitioner or from any person on his behalf, the employment of the legal practitioner in such business or who for purposes of such procurement frequents the precincts of the court or any court subordinate thereto and includes a person declared by the Registrar to be a tout in pursuance of section 20B of this Ordinance."

Under s. 20E:

> "Any person who procures any legal business for a legal practitioner shall, unless he proves to the contrary, be deemed to have procured such legal business in consideration of remuneration moving from the legal practitioner if that person is employed by and is in receipt of emoluments of any kind from the legal practitioner."

As I understand the operation of these sections, it must be that where a person is charged for acting as a tout by procuring in consideration of remuneration moving from a legal practitioner the employment of the legal practitioner in legal business, the prosecution would have to prove that the defendant acted as a tout by procuring for a consideration which must move from the legal practitioner, the employment of the legal practitioner in legal business. But where the conditions in s. 20E are proved to have existed, that is to say, if the defendant is employed by, and is in receipt of emoluments of any kind from the legal practitioner, then the consideration of remuneration moving from the legal practitioner to the defendant is presumed, and the onus is then cast on the defendant to prove on a balance of probability that no consideration of remuneration moved from the legal practitioner to him.

This was indeed done in this case, as the prosecution had not proved affirmatively that the appellant had received any remuneration from the legal practitioner, but in the circumstances, this was presumed as he had admitted in his statement that he was employed as a clerk by the legal practitioner and was in receipt of a salary.

S. 20B makes provision for the publication by the Registrar in the Gazette the name of any person who he is satisfied has acted as a tout, and by such publication shall declare that person to be a tout. No person, however, shall be declared a tout by the Registrar unless he has been given an opportunity to show cause to the Registrar why such a declaration should not be made. Under this section the Chief Justice may then by order prohibit any person who has been declared a tout from entering the precincts of the court or any other subordinate court except: (a) for the purpose of attending proceedings to which he is a party or a witness; or (b) with the written permission of the Chief Justice for any purpose specified in such permission. If any person, who has been declared a tout in the manner as already stated, enters the precincts of any court which he is prohibited from entering, he

becomes guilty of an offence and liable to a fine not exceeding $250: or to imprisonment for a term not exceeding six months, or to both imprisonment and fine.

Under s. 20C there is provision for any person who has been declared a tout by the Registrar to appeal from the decision of the Registrar to a judge in chambers.

Thus it will be seen that if any person is convicted of the offence of touting and declared a tout by the Registrar, the consequences must be grave and serious, and the offences under the Ordinance severely and highly penal. The law is clear that where such legislation exists, the statute must be strictly construed.

In the case of *Attorney General v. H.R.H. Prince Ernest Augustus of Hanover* (1957) A.C. at p. 461 Viscount SIMONDS laid down the principles which should guide the court in the consideration of a statute when he said (p. 461):

> ". . . words, and particular general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes *in pari materia*, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy."

When, therefore, I read the whole of the Ordinance, that is to say, the Legal Practitioners (Amendment) Ordinance, 1966 which is to be construed and read with the principal Ordinance, that is, the Legal Practitioners Ordinance, Cap. 30, and the objects and reasons of the 1966 (Amendment) Ordinance, it appears to me that the object of the Ordinance was to prevent touting, and the mischief that was sought to be corrected was to prevent persons from way-laying and interfering with possible litigants and enticing them to take their cases to a particular legal practitioner whose services they may not have wished to engage. It must mean, therefore, that the persons who are interfered with and conducted to legal practitioners have genuine legal business and not pretended or fictional business.

With great respect to the Full Court, the judicial interpretations of the word "business" quoted by them must be considered to be taken out of context as in those cases the learned judges were seeking to define the word business in relation to genuine and not false transactions that had taken place.

I would add that the object of the statute was also to protect persons with genuine legal business from being diverted to legal practitioners not of their original choice. To my mind, it could hardly be said that the Legislature envisaged persons having pretended or assumed litigation and being diverted to legal practitioners not of their original choice.

In *Abley v. Dale* (1850) 20 L.J.C.P. 33, 35, JARVIS, C.J., said:

> "It is clear that if the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used merely because we see or fancy we see an absurdity or manifest injustice from an adherence to their literal meaning."

And more recently, FINNEMORE, J., in *Holmes v. Bradfield* R.D.C. 1949 2 K.B. l at p.7:

> "The mere fact that the results of a statute may be unjust or absurd does not entitle this court to refuse to give it effect, but if there are two different interpretations of the words in an Act, the courts will adopt that which is just and reasonable and sensible rather than that which is none of those things."

To my mind, the words "legal business" are plain and unambiguous, and in its ordinary sense must mean legal business of a genuine nature. If it is to be argued that the words mean both genuine legal business and pretended or fictional legal business, then, in accordance with the dictum of FINNEMORE, J., I would adopt the meaning which is just, reasonable and sensible, and that is, genuine legal business, for, as I have said, the legislature could hardly have envisaged persons with legal business other than genuine legal business, which in reality is no business at all being diverted to legal practitioners not of their choice. It could not properly be then said that there was a diversion of legal business to the legal practitioner by the appellant, for had the police constable gone to the legal practitioner of his choice he would have had no legal business requiring the professional services of that practitioner; nor could the proposition be sound that because the appellant believed that the police constable had legal business and the legal practitioner believed he had obtained legal business it made the transaction entered into between the practitioner and the constable legal business, for the law is clear that if I give a man sweets under the belief that it is poison (whereas in truth and in fact it is not poison) with the intention that it should cause his death and death ensues as a result of a poison administered by another, I am guilty of no offence, as my action is unrelated to his death.

As Lord HEWART, C.J., said in *Spillers Ltd. v. Cardiff Assessment Committee* (1931) 2 K.B. 21, 43, quoted with approval by Lord MACMILLAN in New Plymouth *Borough Council v. Taranak Electric Power Board* (1933) A.C. 680 at p. 682:

> "It ought to be the rule, and we are glad to think that it is the rule, that words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken, the burden of establishing their proposition lies heavily and they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning is to be preferred."

I would submit, therefore, that to construe legal business to mean pretended legal business would be to give it a loose and inexact meaning.

In my view, the most telling argument produced by counsel for the appellant is the argument that if the words "legal business" are to be given the same meaning wherever these words appear in the definition of "tout", it would lead to a manifest absurdity and a defendant could be convicted of an offence under the section if he proposes to a legal practitioner to procure legal business for him which is merely pretended and not of a genuine nature. It is clear that a person, under the definition, can act as a tout in three ways: (1) Where he procures for a consideration moving from the legal practitioner the employment of the legal practitioner in any legal business; or (2) where he proposes to any legal practitioner for a consideration of remuneration moving from the legal practitioner the employment of the legal practitioner in such business; (3) who, for the purpose of procuring employment of the legal practitioner in legal business frequents the precincts of the court. In which case, if the words "legal business" are to be construed as meaning pretended legal business, it would mean that if he proposes to the legal practitioner to procure for him pretended legal business for a remuneration, he will be guilty of an offence. One only has to state that proposition to see how absurd the result would be; for no reasonable person would agree to pay another person remuneration for legal business which did not exist. In *Courtauld v. Legh* (1869) L.R. 4 Ex. 126, 130, CLEASBY, B., stated:

> "It is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament."

Unless, of course, it could be shown that sufficient reason may be assigned to construe a word in one part of an Act in a different sense from that which it bears in another part of the Act, the rule will not apply.

However, I can see no reason in this case for suggesting that the words "legal business" must bear some other meaning in the second limb of the definition of "tout" to that which it bears in the first and third limbs.

I should also refer to s. 20D of the 1966 (Amendment) Ordinance, whereby the Chief Justice may, with the concurrence of the other members of the rule-making authority, constituted under s. 33 of the Ordinance, make rules of court for regulating the conduct of barristers and solicitors in relation to touts, and such rules may include provision with respect to the application of s. 20 of the Ordinance to such barristers or solicitors. And s. 20 of the principal Ordinance confers power on the court upon petition or

motion, for reasonable cause to suspend a barrister or solicitor from practising within the colony during any specified period or to order his name to be struck off the court roll.

Thus it would appear to me that the rule-making authority could make a rule in respect of which the legal practitioner could be called upon to show cause why he should not be suspended or struck off the court roll and/or disciplined where a person, being his clerk or otherwise, is convicted of the offence of touting under s. 20A of the Amendment Ordinance by procuring in consideration of remuneration moving from the legal practitioner the employment of the legal practitioner in legal business. It would seem to me contrary to the principles of natural justice and fairplay that a legal practitioner should be called upon to show cause in relation to these matters in respect of legal business which was only pretended and, in effect, no business at all. The circumstance of being called upon to show cause may well affect his reputation, even though the court after enquiry might well dismiss the proceedings.

I have no doubt in my mind that the police could set traps in relation to s. 20A of the Amendment Ordinance, but only in respect of litigants with genuine business.

From the practitioner's point of view, it would appear to me that he could maintain an action in deceit for the false representation practised upon him by the decoy of the police, and the question arises whether it is right that a tort should be committed on the legal practitioner for the purpose of exposing an offence under the Ordinance.

In *Brannan v. Peek* 1 K.B. 68 Lord GODDARD emphasised that unless an Act of Parliament provides for such a course of conduct it was wholly wrong for a police officer to be sent to commit an offence in order that an offence by another person may be detected; and it was not right that police authorities should instruct, allow or permit detective officers or plain clothes constables to commit an offence so that they would prove that another person had committed an offence. While it is true that no criminal offence was committed by the police constable in the present appeal, and his evidence was clearly admissible, for evidence, no matter how illegally obtained, is always admissible [*Kuruma v. R.* (1955) A.C. 197], by analogy however, I would say that his conduct by the misrepresentation which he practised on the legal practitioner to secure the commission of the offence by the appellant was undesirable and would lead me away from the construction of the words "legal business" as contended for by counsel for the respondent. Indeed, the Royal Commission of Police Power and Procedure 1928 recommended that as a general rule the police should observe only without participating in an offence, except in cases where an offence is habitually committed in circumstances in which observation by a third party is *ex hypothesi* impossible. No such situation arises here as the police in laying the trap can secure a person with genuine legal business and then observe the transaction between that person and the legal practitioner.

The case of *Sneddon v. Stephenson* (1967) 2 A.E.R., at p. 1227, which was a case of a prostitute being charged for soliciting and loitering for the purpose of prostitution, and the police officer merely placed himself and his car in such a position that if the appellant desired to solicit, there was full opportunity to do so, the Divisional Court upheld the conviction, but Lord PARKER, C.J. who delivered the judgment of the court, expressed the opinion that the conduct of the police officer never got near a case of aiding and abetting, inciting or encouraging or anything of the sort. There is therefore a clear distinction to be drawn between *Sneddon v. Stephenson* and the present appeal, for it cannot be suggested that the police constable in the present appeal did not aid and abet and encourage the appellant in the commission of the offence.

In all the cases that I can think of where a decoy is sent with marked money to enter into a transaction with a defendant with a view to securing the defendant's conviction of a criminal offence, the decoy enters into a genuine transaction with the defendant.

Finally, I must pay cognisance to the words of Lord HOBHOUSE in *Simms v. Registrar of Probates* (1900) A.C. 323, 335, when in giving the advice of the Judicial Committee he said:

> "Where there are two meanings, each adequately satisfying the meaning (of a statute) and great harshness is produced by one of them, that has a legitimate influence in inclining the mind to the other . . . it is more probably that the Legislature should have used the words in that interpretation which least offends our sense of justice."

At the same time, being guided by the well-known principle that where an enactment imposes severe penalties for a criminal offence and the liberty of the subject is involved, a person against whom it is sought to enforce the penalty is entitled to the benefit of any doubt which may arise on the construction of the enactment.

In the result, I am satisfied that the words "legal business" appearing in the definition of "tout" in the Amendment Ordinance, 1966 must, in fact, and can only mean genuine legal business and not pretended legal business.

Having had a look at the comparable legislation in Ceylon, i.e., Ord. No. 11/1894, I am more than ever fortified in my views. The long title to the Ordinance speaks of "An Ordinance to suppress Intermeddlers with Suitors in Courts of Justice", and the preamble states: "Whereas it is expedient to provide against the mischiefs caused by touts and vagrants meddling with parties who seek redress in Courts of Justice . . ."

S. 2 creates the offence of touting and enacts:

"Any person who—

(a) Solicits or receives from any legal practitioner any gratification in consideration of procuring or having procured him employment as such legal practitioner. . ."

S. 5 also creates an offence in relation to a person who, without lawful excuse accosts or otherwise meddles with any suitor or other person having business in any court. Thus the object of the statute was to prevent touting in respect of those persons who had business in court and not persons who pretended to have such business. In *Peris v. Gunesekera* (1916) N.L.R. 63, PEREIRA, J., in the Supreme Court of Ceylon, held that the word "suitor" in s. 5 of the Ordinance meant a party to a suit in Court who for the time being had business in court.

It is obvious to me that the Legislature would not promulgate an ordinance to suppress touting in relation to litigants who had no cases in court or no genuine legal business to be done but only pretended legal business.

I would, therefore, allow the appeal and set aside the Order made by the Full Court and the Magistrate.

CUMMINGS, J.A.: The facts in this appeal are fully set out in the judgment just read. There is, consequently, no need for me to repeat them here.

S. 2 of the Legal Practitioners (Amendment) Ordinance, 1966, provides that:

> "Tout" means a person who procures in consideration of any remuneration moving from any legal practitioner or from any person on his behalf the employment of such legal practitioner in any legal business or to propose to any legal practitioner to procure in consideration of any remuneration moving from such legal practitioner or from any person in his behalf the employment of the legal practitioner in such business or who for purposes of such procurement frequents the precincts of the Court or any court subordinate thereto and includes a person declared by the Registrar to be a tout in the pursuance of s. 20B of this Ordinance.

The sole point for determination by this court is whether in that definition the phrase "legal business" could be so construed as to include "pretended business".

It is therefore necessary to examine the Legal Practitioners Ordinance, Cap. 30, as amended by Ordinance No. 20 of 1966, hereinafter called "The Ordinance" in accordance with the well established canons of construction. For the sake of convenience, I set out hereunder the other relevant provisions thereof.

Suspension and striking of Roll

"20. The Court shall have power, upon petition or motion, for reasonable cause to suspend a barrister or solicitor from practising within the Colony during any specified period, or to order his name to be struck off the Court Roll.

Touts

"20A. Any person who acts as a tout shall be guilty of an offence and shall be liable on summary

thereof to a fine not exceeding two hundred and fifty dollars or to imprisonment for a term not exceeding six months or to both such fine and imprisonment.

Publication of names of touts and their removal from the precincts of courts

"20B. (1) Subject to the provisions of subsection (2) of this section, the Registrar shall publish in the Gazette the name of any person who he is satisfied, whether on evidence of general repute or otherwise, has acted as a tout and shall by such publication declare that person to be a tout.

(2) No person shall be declared a tout by the Registrar under the preceding subsection unless he has been given an opportunity to show cause to the Registrar why such declaration should not be made with respect to him.

Rules

"20D. The Chief Justice may with the concurrence of the other members of the rule making authority constituted under s. 3 of this Ordinance make rules of Court for regulating the conduct of barristers and solicitors in relation to touts and such rules may include provisions with respect to the application of s. 20 of this Ordinance to such barristers or solicitors."

Quite clearly the mischief that the Ordinance was enacted to prevent was a procurement by some person of "legal business" for a practitioner. Far-reaching penalties embracing such persons as well as legal practitioners are provided. The Ordinance is therefore a penal statute.

The mode of construction of such statutes was stated by Lord TRURO in *Stephenson v. Higginson,* (1852) 3 H.L.C. 638 (at page 686) as follows:

> "In construing an Act of Parliament, every word must be understood according to the legal meaning, unless it shall appear from the context that the legislature has used it in a popular or more enlarged sense. That is the general rule, but in a penal enactment, where you depart from the ordinary meaning of the words used, the intention of the legislature that those words should be understood in a more large or popular sense must plainly appear."

And in *Dickenson v. Fletcher,* (1873) L.R. 9 C.P. 1, 7, BRETT, J., put the rule thus:

> "Those who contend that a penalty may be inflicted must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty."

In *Rumball v. Schmidt,* (1882) 8 Q.B.D. 603, HUDDLESTON, B., said (at p. 608):

> "Where there is an enactment which may entail penal consequences, you ought not to do violence to the language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it by express language."

The word "business" ordinarily connotes something real: it is business, not pleasure or fun; it is fact, not fiction. Legal business consists of something concerning the rights or obligations of a person, his relationship with the State and/or individuals or other States in the light of the laws to which he is subject. To concoct a certain legal situation is not to create legal business within the ordinary meaning of the phrase.

In *R. v. Stone,* (1854) 23 L.J.R., the Court for Crown Cases Reserved held that a person cannot be indicted for perjury for false statements in an affidavit in a suit in a Court of Admiralty sworn before a Master Extraordinary in Chancery since the latter has no authority to administer an oath in a cause before the Court of Admiralty.

It is clear that the accused had gone through the motion of swearing, but since the Master in Chancery cannot in law administer such an oath, it was not a real oath but only a pretended one, and therefore the offence was not committed.

Suppose a person went through a form of marriage conducted by a person who was not an authorised marriage officer and later went through another marriage ceremony conducted by an authorised celebrant, he could not be convicted of bigamy. The mischief the statute was intended to prevent was dual legal marriages, but although there was a *mens rea,* there was no *actus reus.*

The *actus reus* provided by the Ordinance is the procurement of "legal business". If there is no legal business, there can be no procurement thereof and, consequently, no *actus reus.* The concoction of a situation calling for legal expertise—pretended legal business—followed by a procurement of that concoction for a legal practitioner would be evidence of disposition or even an intention to procure legal business, i.e. of *mens rea*; but the mere presence of *mens rea* cannot transform the procurement of the concoction into a procurement of "legal business" so as to create the necessary *actus reus.* The maxim actus *non facit reum nisi mens sit rea* is trite law; and the converse is true; so here is a situation in which there is a *mens rea* without an *actus reus.* There is, therefore, no offence. Such would be the position if the phrase were given its ordinary meaning.

Moreover, to construe legal business as including pretended legal business would be to impute to the Legislature the intention of indirectly invoking the serious penal consequences to legal practitioners provided by the Ordinance through the procurement by a suspected tout of fictitious legal business—a situation from which widely mischievous consequences are likely to ensue.

In *R. v. Skeen,* (1859) 28 L.J.M.C. (at p. 91) the majority of the Court held that:

> "If the language employed admit of two constructions and according to one of them the enactment would be absurd and mischievous and according to the other it would be reasonable and wholesome, we surely ought to put the latter construction upon it as that which the legislature intended."

Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to regulate—see *Shannon Realities Ltd. v. Ville de St. Michael,* (1924) A.C. 185 (at p. 192) and *L.T.C. v. Gibbs,* (1942) A.C. 402 (at p. 414), Lord SIMON, L.C.

While I quite agree that in construing the Ordinance consideration of its purpose is apposite, yet in the circumstances of this case when regard is had to the plain meaning of the words and the absurd and inconvenient results likely to flow from including "pretended legal business" within the meaning of "legal business", I am impelled to the conclusion that the intention of the Legislature is that legal business means real and not pretended legal business.

Accordingly, I agree that this appeal should be allowed and the judgments and Orders of the Full Court and the learned Magistrate be set aside with the usual order as to costs.

CRANE, J.A.: Mine is the misfortune to differ from the views expressed by my learned brethren on this matter of vital importance to the legal profession. I must, however, maintain a dissenting opinion fully conscious that I have tried my utmost to see their point of view, but failed.

The mischief of touting in our legal profession is considered such an evil that Parliament of Guyana saw fit to impose measures for its suppression. It did so by the Legal Practitioners (Amendment) Ordinance, 1966 (No. 20 of 1966), s. 2 of which defines the word "tout" in the following manner:

> "'Tout' means a person who procures in consideration of any remuneration moving from any legal practitioner or from any person on his behalf, the employment of such legal practitioner in any legal business, or who proposes to any legal practitioner to procure, in consideration of any remuneration moving from such legal practitioner or from any person on his behalf, the employment of the legal practitioner in such business or who for purposes of such procurement frequents the precincts of the Court or any court subordinate thereto and includes a person declared by the Registrar to be a tout in pursuance of section 20B of this Ordinance."

Legislation of this type is unique and as far as we have been informed and my own researches have extended, I have been unable to discover any comparable measure in England. In Ceylon, however, there exists a provision somewhat similar to ours—Ordinance No. 11 of 1894. It is aimed at suppressing "the mischiefs caused by touts and vagrants meddling with parties who seek redress in courts of justice". There is, however, no definition of "tout", nor any mention of the expression "legal business" in it, and for that

reason, it is considered of very little assistance to us. Under the Ceylonese measure, unlike ours, both tout and legal practitioner may be convicted arid fined, and the latter being "liable to be removed or suspended from office by the Judges of the Supreme Court, on the motion of the Attorney-General or Solicitor-General".

The matter which now engages our attention may therefore truly be said to be *res integra* since it is governed neither by any decision nor by any rule of law, but must be decided upon principle.

The defendant was convicted in the Magistrate's Court for acting as a tout, contrary to s. 20A of the abovementioned Ordinance, the particulars of the offence being that he, "on Thursday, the 24th July, 1969, at Georgetown, in the Georgetown Judicial District, acted as a tout, by procuring in consideration of remuneration moving from Mr. M., a legal practitioner, the employment of the said legal practitioner in legal business."

On appeal to the Full Court his conviction was affirmed on the following facts that were undisputed and established before the magistrate: On divers days before the 14th July, 1069, the appellant's conduct had been under observation by the police. He had been suspected of touting clients for lawyers and it was resolved to entrap him. On the 14th July, 1969, he was seen standing, as was his custom, in front of Wharton's Building in Croal Street, by four members of the Police Force under Sgt. Erskine, and by arrangement two of their number approached him and asked to be shown the chambers of barrister B. who, they stated, was recommended to them as a good lawyer to conduct the defence of one of them on a criminal charge. The appellant did not agree that Mr. B. was good. He spoke derogatorily of his ability saying he was no good and that the enquirer would certainly be jailed if he were to engage Mr. B. "Come," he said, "I have a lawyer. He gon fix you up." Thereupon, the two policemen, who presumably were in plain clothes, were taken by the appellant to the chambers of Mr. M., Barrister-at-Law, and introduced to him there. In chambers, barrister M. was told by the decoy, Police Constable Tyrell, that he had been charged by the police with larceny from the person, having snatched the sum of $60 from an East Indian woman. This story was, of course, feigned, the object of the police being to ensnare the appellant in the meshes of the trap they had laid for him.

After listening to the decoy's story and advising him not to worry as his case seemed one of mistaken identity, the barrister enquired how much he was willing to pay. The decoy suggested $40 of which he would pay $20 at once and the balance later in the day. An agreement to that effect having been struck, the other policeman left the lawyer and the decoy in chambers and went outside. This was the pre-arranged signal for the two other policemen to enter the chambers where they were in time to see the lawyer give his receipt to, and receive from the decoy the sum of $20 which had been secretly marked beforehand. At that moment the trap was sprung. The police revealed their identity and the appellant was taken into custody along with the receipt and the marked money and charged as stated.

At the close of the case for the prosecution in the Magistrate's Court, Counsel for the appellant made submissions of law substantially similar to those made before us and thereafter closed his client's case without leading a defence. It was submitted that the evidence did not establish the offence charged for the reasons that:

(i) "The evidence does not establish that the defendant procured the employment of the legal practitioner.

(ii) "The evidence does not establish that any consideration moved from the legal practitioner to the defendant.

(iii) "The evidence does not establish there was any employment of the legal practitioner in any legal business."

In prefacing his contentions before us, counsel for the appellant, quite rightly in my view, stressed the importance of the outcome and the far-reaching effect of this case on the practising profession of Guyana. The Bar, he said, will only be satisfied with a decision at this level, notwithstanding there has already been the decisions of the two courts below on the matter. His main objection to those decisions is that they were not reached, as indeed they ought to have been, on any analysis of the relevant sections of the Legal Practitioners Ordinance, Cap. 30, as amended. It is the contention of counsel that the procuring of the employment of a legal practitioner in legal business must be given its strict or literal legal meaning in the light of the evidence led by the prosecution, i.e., the appellant's procuring of the legal practitioner's employment must result in the formation of a contract between the legal practitioner and the client; it must operate on a subject-matter of some business in the strict legal sense of the term, which business the legal practitioner is under obligation to do. In this case, however, there could be no such obligation having regard to the fact that the alleged charge of which the police spy spoke was a feigned one, for a feigned charge is no business at all, let alone legal business. There must be, it is urged, actual and not imaginary or pretended business. Lastly, it is suggested, this being an exercise on interpreting the legislative intent, we might approach the solution of the problem in the light of the preamble to the amending Ordinance on which the charge was instituted since, as it seemed to counsel, "the mischief sought to be corrected was to prevent persons from way-laying possible clients by enticing them away and prevailing on them to take their cases to particular lawyers whom they may not spontaneously wish to consult."

But I am afraid the matter is not as simple as that.

It seems to me that for the prosecution to bring home the charge of acting as a tout to the appellant, they must base it on one or other of the three alternative limbs of the definition "tout". On the facts led, the charge is obviously framed under the first limb where it is apparent that there must be established an arrangement between the alleged tout and the legal practitioner whereby the former, motivated by some reward, monetary or otherwise from the latter, engages the service of the legal practitioner in relation to

a matter which would normally be done by the practitioner in his legal capacity.

S. 20E of the amending Ordinance provides that:

> "Any person who procures any legal business for a legal practitioner shall, unless he proves to the contrary, be deemed to have procured such legal business in consideration of remuneration moving from the practitioner if that person is employed by and is in receipt of emoluments of any kind from the legal practitioner."

There can be no doubt, in view of the presumption arising from the above section in the light of the appellant's caution statement, that he was employed as clerk to Mr. M. at a salary of $10 per week, together with the unrebutted evidence of the police decoy, as confirmed by the other police witnesses, that the conclusion was justified that the appellant, in consideration of a reward from the legal practitioner, engaged the services of the latter in a matter which required the exercise of his professional skill and attention. This is made clear when it is shown that the practitioner actually took oral instructions from the decoy, albeit on a feigned charge, gave him advice and expressed the opinion that his was a case of mistaken identity. In these circumstances, it was conceded that the only question that really arises is whether the services of the lawyer were really engaged on "legal business". For my part, I cannot doubt that the true interpretation of the expression "legal business", in the context, relates to such matter whether genuine or feigned, on which the legal practitioner is engaged and required to exercise a legal mind.

But it is said that the second limb of the above definition of "tout" is against this view because it would be absurd to suppose that an alleged tout would propose to procure the employment of the legal practitioner on a feigned charge and that the latter would agree to accept and remunerate him for so doing. This is why it is urged that procuring his employment on none but a genuine charge is contemplated, and why the phrase "such business" which appears in the second limb, referring as it does to "legal business" in the first limb, must necessarily bear the same meaning and relate to none other than Mr. M's engagement on a genuine charge. I answer this by saying that while it must be admitted it is inconceivable that the legal practitioner in this case would agree to remunerate the alleged tout for any other business than a genuine charge of larceny from the person, I hold the view that the feigned charge became legal business just as soon as the practitioner brought to bear his legal knowledge and learning on the matter by giving an opinion on it and receiving therefor a fee of $20 on account. This is why I consider that the business he was engaged onwards was legal, albeit feigned. It is the risk every tout must run that matters on which he, for reward, procures or proposes to procure the employment of a legal practitioner will turn out to be feigned and lead him into police traps.

I entirely dissent from counsel's submission that it makes a decisive difference in the proof of guilt whether the business the practitioner is engaged

on is feigned or genuine in determining whether it is legal. According to counsel, genuine business is legal, but feigned business is not; in fact, he says, the latter is no business at all. The dichotomy, I think is whether the business introduced is legal as opposed to non-legal. An example will perhaps make this clear: Suppose the services of the legal practitioner were engaged by the appellant to write a letter giving a character to someone, or to recommend him for a job or, let us say, to sign his application form for a passport, I would consider such non-legal business because services like those do not fall within the scope of things done by the legal practitioner in his capacity as a lawyer, for those are the sort of acts many laymen perform; on them no legal expertise is required to be exercised; they are not legal business, and so, in that case, there can be no procuring the employment of the legal practitioner contrary to law.

Again, supposing Constable Tyrell were not a policemen in disguise, but an ordinary civilian on a genuine charge of larceny whose co-operation the police had secured in setting their trap, it is not disputed in such a case that the conviction would have been proper. This, in fact, was conceded at the hearing of this appeal before us. But I entirely fail to see, bearing in mind the object of the legislation which is criminal in nature, what material difference it can make when the charge is feigned. In my view, to constitute legal business, it did not matter whether Tyrell was on a genuine or feigned charge. Let us, however, for the sake of argument, suppose he was on a genuine charge of larceny from the person, the fact remains that the ulterior intention of the police will have been the same—the obtaining of evidence of touting to be used against the appellant. Their purpose will have been disguised in the same way as when the charged is feigned, because the evidence will have bee procured by a pretence that was false, since it was never really intended that Mr. M. should be employed on any legal business, i.e., in the defence of any kind of charge—whether genuine or feigned.

The chief objection, however, seems to be to a policemen himself feigning a charge to ensnare a tout; but, for myself, I can see no valid objection to the use of evidence secured by such an *agent provocateur*; it is not evidence requiring corroboration and certainly in step with well-established modes of crime detection; it in no way transgressed the law. Evidence of much the same nature certainly not rejected as irregularly obtained when policemen feigned affiliation to a subversive organisation in order to entrap a suspect in the New Zealand court-martial case of *R. v. Murphy*, (1965) N.I. 138 [referred to with the apparent approval of Lord PARKER, C.J., in *Sneddon v. Stevenson*, (1967) 2 All E.R. 1277 (below)]. There, the appellant Murphy was convicted, contrary to s. 60(1) of the Army Act, 1955, of disclosing information useful to the enemy. The evidence against him was given by police officers who, posing as members of a subversive organisation, obtained evidence from him that he was sympathetic to that organisation. The information was elicited from him by asking questions on the security of his barracks. The appellant's conviction by court martial was affirmed by the Court Martial Appeal Court on the ground that the court martial which heard

the case was entitled in its discretion to admit the evidence of the police officers and, in the circumstances, it had been right in so doing.

I have, however, seriously considered whether the intention of Legislature ought to be interpreted as permitting a police officer who is a spy to invade the privacy of a lawyer's office with a view to entrapping touts, and, indirectly, legal practitioners to commit offences on feigned charges; also whether such license would not lead to an abuse of the powers of the police. For my part, I do not think it ought necessarily to lead to abuses of this kind, for once it is shown that the decoy is himself committing no offence in his endeavours to procure the required evidence, I would be inclined to accept the following safeguards suggested by Lord PARKER in *Sneddon v. Stevenson*, (1967) 2 All E.R. 1277 (at p. 1280), when he was considering the need for such in the case of a police officer-spy who entrapped a prostitute on the pretence that he was interested in her solicitations to do "business". Lord PARKER, C.J., said:

> "No doubt this court does frown on the practice of police officers being employed to commit offences themselves, or indeed to encourage others to commit offences. Here, of course, it cannot be said, as I have already indicated, that the police officers were employed themselves to commit offences. In my judgment, the respondent did not commit an offence; in so far as it can be said that he did act so as to enable others to commit offences by making himself available if an offence was to be committed, it does seem to me that, provided a police officer is acting under the orders of his superior and the superior officer genuinely thinks that the circumstances in the locality necessitated action of this sort, then, in my judgment there is nothing wrong in that practice being employed."

And at p. 1281:

> "No doubt action of this sort should not be employed unless it is genuinely thought by those in authority that it is necessary having regard to the nature of the suspected offence or the circumstances in the locality. If, however, it is done for one or other of these reasons, then I myself can see no ground for setting aside a conviction obtained on such evidence. . ."

The necessity for action in the locality of which Lord Parker speaks, seems to me to be in suppression of the self-same type of mischief as in the earlier case of *Smith v. Hughes*, (1960) 2 A.E.R. 859, particularly as he was considering in both cases prosecutions against prostitutes under s. 1 of the Street Offences Act, 1959.

In the case under review, we see that both safeguards of the learned Chief Justice are indeed present, viz., (i) the circumstances (i.e., touting) in the locality necessitated the kind of action taken, and (ii) the police officer who acts as *agent provocateur* must have acted under the orders of his superior officer. Safeguard (i) is discernible from the aim and object of the amending legislation itself, which, as we have seen, is to eliminate touting

in the legal profession. Safeguard (ii) was also present since the decoy, P.C. Tyrell, was acting under the orders of his superior, Detective-Sergeant Erskine, who, no doubt acted, I presume, with the concurrence of yet higher authority.

Now to deal with the point made by counsel on the necessity for a contract between the practitioner and the client . . . I hold the view that the principles of the law of contract have no relevance to the present situation, for the policy of the law of contract, as contrasted with that of the criminal law, is vastly different. While the one is concerned with the making of valid agreements between two or more parties with a view to effecting binding legal relationships, the other is concerned with the detection and the suppression of crime. This is why I think the argument for the existence of a valid contract between legal practitioner and client before it can be said that business becomes legal business, or, to express the same thing contrariwise, that there can be no valid contract to do something which is feigned, though highly attractive, is a fallacious one. The principles of contract are irrelevant to a criminal offence which the Legislature has enacted with the clear intention of endeavouring—to adopt the words of the Full Court—"to eliminate touting in the legal profession" and, I might add, to discipline those persons concerned in that shameful practice. I need only cite the following passage from the judgment of VERITY, C.J., in the Full Court in the case of *Ho and Luck v. Octave*, (1942) L.R.B.G. 384 (at p. 386), with a view to showing how unjuristic it is to import the principles of the law of contract as an aid to interpreting the intention of the Legislature in price control regulations, i.e., criminal legislation:

> "The learned magistrate in determining this matter was not required to consider the ordinary law of contracts for the sale of goods. He was required to interpret an order made under the Defence Regulations, an edict of a different nature and promulgated for a different purpose. It is always dangerous to attempt the interpretation of one edict, whatever its form, by reference to the terms of another unless the two are specifically related, and where they are brought into force for different purposes and with a different intent any argument based upon such a reference may indeed be entirely fallacious. The Sale of Goods Ordinance was enacted for the purpose of clarifying the law by which was defined the nature of a contract for the sale of goods as between buyer and seller and of the rights and liabilities of the parties thereto under the many and varying conditions which may affect the working out of such a contract between party and party. It partakes therefore of a highly technical and at times almost artificial nature. An order such as that to which this charge relates made under Defence Regulations is not concerned with and does not necessarily affect any such rights but is intended to secure for the benefit of the community as a whole in time of war that those articles which come within its control shall not bring to the seller or take from the buyer a higher price than that fixed by the competent authority."

When I reflect on the true object of the amending legislation, I see how different it is from the view which is contended for. In my judgment, the object which the Legislature had in mind was not merely, as has been pressed on us, to prevent the waylaying of unsuspecting clients whose cases are enticed from them by touts in favour of particular legal practitioners. Indeed, that is only one aspect of the mischief sought to be suppressed. Like the judges of the Full Court, in whose judgment I concur, I consider the clear object of the law in enacting this salutary and long-awaited piece of legislation is to clean up the malpractice of touting in the profession, an evil which every lawyer knows had been progressively assuming alarming proportions and besmirching the name of the honourable profession of the law for many years now. In pursuance of this object of suppressing the mischief and advancing the remedy, provision is made in the one case for the prosecution of touts, and in the other, for the disciplining of those legal practitioners who encourage the practice of employing touts, it being fully recognised there would be no touts if touts were not encouraged by legal practitioners.

For my part, I would also call in aid the mischief rule of interpretation as a means of elucidating the term "legal business" in just the same manner as did Lord PARKER, C.J., in the case of *Smith v. Hughes & Others*, (1960) 2 All E.R. 859 (at p. 861), when he was engaged on the somewhat similar exercise of interpreting the expression "in a street or public place" in s. 1(1) of the Street Offences Act, 1959, where it is enacted that—

> "It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution."

Though that was not a case of touting in the legal profession, but one of soliciting "in a street or public place for the purpose of prostitution", in my view it is helpful, bearing as it does a close analogy to the case now under review in that it vividly demonstrates the court's approach to matters of this kind, viz., that legal technicalities must not be permitted to defeat the intention of the Legislature so long as the intent is clear. The above case concerned prosecutions in the Magistrate's Court of certain common prostitutes in Curzon Street, London, who had solicited from a building men walking outside in the street. In one case they did so from the balcony of the building; in another, from behind the closed or open ground floor or first floor windows of the house which was adjoining the street. In concluding that it was immaterial for the purposes of the mischief which the Legislature intended to suppress that the women were not physically in the street itself, the learned Chief Justice had this to say:

> "Observe that it does not say there specifically that the person who is doing the soliciting must be in the street. Equally it does not say that it is enough if the person who receives the solicitation or to whom it is addressed is in the street. For my part, I approach the matter by considering what is the mischief aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited

by common prostitutes. Viewed in that way, it can matter little whether the prostitute is soliciting while in the street or is standing in a doorway or in a balcony, or at a window, or whether the window is shut or open or half open; in each case her solicitation is projected to and addressed to somebody walking in the street. For my part, I am content to base my decision on that ground and that ground alone. I think that the magistrate came to a correct conclusion in each case, and that these appeals should be dismissed."

To the same effect is *Mc Quade v. Barnes*, (1949) 1 All E.R. 154, which was a case of touting from the forecourt of a shop there being no physical division between the shop and the street. Lord GODDARD, C.J., said

> "The appellant stood on the forecourt of his shop and touted to people in the street to come in and have some fish and chips. If the true construction of the by-law is that persons in the street shall not be touted, then the appellant committed an offence although he did not actually stand in the street, and, in my view, that is the obvious meaning of the by-law. It is possible to read it in one of two ways—either, that the tout must be standing in the street or that he must be touting people in the street. We must so construe a by-law as to give effect to the intention of the authority which made it just as we must construe a statute so as to give effect to the wishes of Parliament, and if we gave to this by-law the meaning for which the appellant contended it would mean that to a great extent the by-law would be waste paper."

Adopting the same approach and arriving at the same conclusion with respect to the problem in hand, I have also paid due consideration to s. 20 of the Legal Practitioners Ordinance, Cap. 30, which confers upon the High Court the power to suspend from practice or to strike the name of legal practitioner from the Court Roll on reasonable cause being shown on petition or motion, alongside the fact that that section was amended to include five new subsections including the charge on which the appellant stands. Subsecs. 20A and 20D of the amending Ordinance without doubt show how the Legislature intends touting should be dealt with, i.e., not merely within the Summary Conviction (Offences) Ordinance, Cap. 14, but within the scope of the disciplinary provisions of s. 20 of the principle Ordinance, so that both tout and legal practitioner may be prosecuted and disciplined, respectively. That is why, it seems to me that section was amended to include those five new subsections of the amending Ordinance, and why I consider no objection can properly be taken to the manner in which the police have conducted this prosecution.

So that with the lawgiver's intention so clearly expressed on the face of the principal and amending Ordinances when read together it seems to me there is no need to have resort to any preamble with a view to discovering the aims and objects of the Legislature as we have been invited to do; although I will observe they are to the same intent as I have interpreted them to be.

I would dismiss this appeal with costs and affirm the conviction and sentences expressing my full concurrence with the opinion of the judges of the Full Court that there is no merit in the arguments that were advanced on behalf of the appellant.

Appeal allowed.

Conviction and sentence set aside.

RAMBEHARRY *v.* RESSOUVENIR ESTATES LIMITED

[Court of Appeal of Guyana on appeal from the Full Court (Luckhoo, C., Cummings and Crane, JJ.A) November 13, 1970; April 15, 1971].

Workmen's Compensation—Evidence—Medical evidence—Conflict of medical testimony—Evidence of specialist available—Whether such evidence should be called by the court suo motu—Evidence Ordinance Cap. 25 s. 88—Workmen's Compensation Ordinance Cap. 111.

In a claim for workmen's compensation, the medical evidence called on behalf of the workman conflicted with that given on behalf of the employer. It was disclosed at the trial, however, that the employer's doctor had referred the workman to a specialist for treatment, and that at the time of his giving evidence, the workman was still being treated by the specialist; but neither side sought leave to call the specialist. The magistrate before whom the matter was being heard did not see fit to call the specialist, but gave judgment on the medical evidence then before him.

HELD on appeal (Cummings, J.A., dissenting):

(i) in the interest of justice, the magistrate ought to have exercised his power under the Evidence Ordinance s. 88 and called the witness, provided that an opportunity was given to cross-examine him;

(ii) the matter will be referred to the magistrate for that purpose under s. 11 of the Federal Supreme Court (Appeals) Ordinance, 1958.

Appeal allowed. Matter referred to the magistrate.

[**Editorial Note**: This case is reported in (1970) 18 W.I.R. 5]

D. Jagan for the appellant.
G. M. Farnum for the respondents.

LUCKHOO, C.: In this case the appellant/workman claimed compensation from the respondent/employer for incapacity alleged to have ensued from the bursting of a hose used in the course of his employment for spraying weedicide, thereby causing the weedicide to affect his head and face. When this happened he was able to wash his head and face in a nearby trench but, nevertheless, experienced headaches the next day and a "swinging" sensation. Despite earlier efforts, he was not successful in having medical attention from his employer's medical adviser, Dr. Brahman, until some eight days afterwards, that is, on November 14, when he said he was able to bring to this doctor's attention a peeling of his face and hands.

Dr. Brahman, however, was positive that when he saw the appellant on November 14, 1964, he never had any such condition. What Dr. Brahman saw were patches of missing hair on his head, which were attributed to alopecia, and had nothing to do with weedicide getting on his head.

If the evidence of Dr. Brahman is to be believed, then the workman's claim was bound to fail. But that was not the only medical evidence in the case. The workman called Mr. H. C. Hugh, a Fellow of the Royal College of Surgeons, as his witness. Mr. Hugh's evidence was that he did not see the workman until some seven months afterwards, that is, in June, 1965, when he observed a peeling of the hands and face and also the "falling-off" of hair. This was, in his view, a form of dermatitis caused by an inflammatory condition of the skin, manifested by "red spots".

But, again, Dr. Brahman's earlier examination had not revealed to him any inflammation of the skin, nor were there any "scabs" to indicate a previous inflammatory condition. When this doctor was actually giving his evidence before the magistrate, he made a further examination of the workman which apparently confirmed his original opinion.

Obviously then, there was a clear and irreconcilable conflict in the medical testimony, which was of such a nature as to make it desirable under normal circumstances to refer the matter to a medical referee under the Workmen's Compensation Ordinance. The necessity for indulging such a course of action was fully discussed by this court in *Agnes Butler v. Versailles Estate, Ltd.* (1).

The Full Court, although adverting its attention to this aspect of the matter, was content to say:

> "We did not consider this a matter fit to be referred to a medical referee under s. 34(2) of the Workmen's Compensation Ordinance, Cap. 111, as we were of the view that the evidence of Mr. Hugh was of little or no weight at all and therefore as the learned magistrate did not find that Dr. Brahman gave false evidence and nothing turned on the demeanour of witnesses, we consider we would be in the same position

> as the magistrate to determine whether or not in the exercise of his discretion the matter should have been referred to a medical referee. In our view this course was unnecessary in the circumstances of the case."

With respect, I do not agree, since the help of another opinion would have assisted in the ascertainment of truth. But it is now too late in the day to think of such a course in view of the time which has since elapsed.

How best then could the interests of justice now be served? Happily, there was another medical opinion which was available at the time but which, curiously, neither party sought to make use of, although the appellant's counsel did ask for an adjournment at one stage of the proceedings to consider whether he would wish to call that evidence. It was evidence which could have been had from the only skin specialist in the country, who had seen and treated the workman when his alleged "ailment" was manifest; for Dr. Brahman had referred the workman to Dr. R. C. Nauth-Misir, attached to the Public Hospital, Georgetown, for treatment at his request. This was at a were any signs evidencing an inflammatory condition of the skin, Dr. Nauth-Misir could hardly have missed the diagnosis and perhaps would be in the best position to ascertain whether it was a straight-forward case of alopecia, or whether the condition then obtaining was the result of weedicide causing an inflammatory condition of the skin and dropping of hair.

And what is even more heartening when one contemplates the potential of that evidence, the workman himself said,

> "After Dr. Brahman referred me to Dr. Nauth-Misir, he gave me a letter to take to Dr. Nauth-Misir. I saw Dr. Nauth-Misir who examined me and treated me. I am still taking treatment from Dr. Nauth-Misir."

And that last sentence is not without significance in that when the workman gave his evidence, it was as late as August 26, 1965, two months after Mr. Hugh had given evidence. If neither party wished to call Dr. Nauth-Misir, then the magistrate could have done so, because of the inherent value which his evidence was capable of providing, coming as it would from the only skin specialist in this country, who had the opportunity of seeing the workman at the time of his alleged "suffering".

Section 88 of the Evidence Ordinance, Cap. 25 [G.], provides that:

> "The judge may, of his own motion, call or recall any competent person as a witness and examine the person in any manner he thinks fit, and may call for and compel the production of any document or other evidence, and may impound any document or other thing he considers material."

The marginal note reads: "General power of judge as to calling for evidence." And, in s. 2 of the said Ordinance, "'judge' includes all persons authorised to take evidence, either by law or by consent of parties". The magistrate then had it within his discretion to call Dr. Nauth-Misir as a witness. That discretion was of a kind which should have been exercised judicially, according

to what the law "permitteth" and the present case "requireth" (See *Agnes Butler's* case (1) *supra*). In my opinion, the opportunity should not have been missed to seek the advantage and aid of Dr. Nauth-Misir's available point of time long before Mr. Hugh's examination, and, therefore, if there evidence in this case which would or might have made all the difference in the world in estimating the true value of the evidence of Mr. Hugh and/or Dr. Brahman.

Before the Evidence Ordinance was enacted giving to a judge (as defined) the power to exercise his discretion to call a witness not called by either party, the matter was (as far as I have been able to ascertain) considered at common law in two cases. First, there was *Coulson v. Disborough* (2), a decision of the Court of Appeal, in which two eminent judges participated—LORD ESHER, then Master of the Rolls, and A. L. SMITH, L.J. LORD ESHER there said ([1894] 2 Q.B. at p. 318):

> "If there may be a person whom neither party to an action chooses to call as a witness and the judge thinks that that person is able to elucidate the truth, the judge, in my opinion, is himself entitled to call him; and I cannot agree that such a course has never been taken by a judge before. When a witness is called in this way by the judge, the counsel of neither party has a right to cross-examine him without the permission of the judge. [And this is the important part, in my view of what this judge has to say in the matter.] The judge must exercise his discretion whether he will allow the witness to be cross-examined. If what the witness has said in answer to the questions put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers."

That dictum of LORD ESHER was questioned in the case of *Re Enoch & Zaretzky, Bock & Co.* (3). There, two also eminent judges—FLETCHER MOULTON, L.J., and FARWELL, L.J.—were somewhat concerned about the "extent" of that dictum. FARWELL, L.J., put it very concisely when he said ([1910] 1 K.B. at p. 337):

> ". . . if LORD ESHER meant to say only that which was relevant to the facts of the case before the court, 'If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, and neither party objects, the judge, in my opinion, is himself entitled to call him', I should not dissent."

And the concern of FLETCHER-MOULTON, L.J., was expressed in this way [*ibid.* at p. 332]:

> ". . . I am satisfied that the Court of Appeal would never have given in the form of a mere dictum a decision so wide-reaching and so destructive of the fundamental principles of our laws of procedure. It does not purport to be based on any course of reasoning, and no authority was cited for it. I say that it would be destructive of the

> fundamental principles of our laws of procedure for the reason that if, according to the dictum, witnesses were called against the will of one of the parties, the civil rights of a man might be decided by evidence given by persons whose personal credibility and the accuracy of whose statements he would have no right to test by cross-examination; because the Court of Appeal laid down that if a judge calls a witness, neither party can cross-examine him as of right."

In my view, with respect, there was a tendency to overlook what LORD ESHER was at pains to point out, *viz.,* that the judge must exercise his discretion whether he will allow the witness to be cross-examined; if what the witness has said in answer to the questions put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers. In other words, if a judge calls a witness and adverse answers are given and the party affected applies for the opportunity to cross-examine the witness and the judge refuses, I would say that an improper use of a discretion would arise, and on the dictum of LORD ESHER it would be permissible for a Court of Appeal to send back the matter to the judge to direct him to allow the cross-examination necessary in the circumstances. But in this case, in view of the clear language of s. 88 of Cap. 25 [G.] it is unnecessary to decide how the matter stands at common law.

There is one further matter to be considered. Does this court have the power to send the case back to the magistrate with directions to take the evidence of Dr. Nauth-Misir? Under the Federal Supreme Court (Appeals) Ordinance, 1958 [G.], s. 11, on the hearing of an appeal from any order of the Supreme Court (which includes "the Full Court"), the Federal Supreme Court, in any civil cause or matter may, if it thinks fit, do a number of things, and under (d) has the power to

> "remit the case to the court of trial for further hearing, with such instructions as regards the taking of further evidence or otherwise as appears to it to be necessary".

That being so, I would propose the Order that this matter should be remitted to the magistrate who heard the claim in the first instance, namely, the learned magistrate MR. PREM PERSAUD of the East Demerara Judicial District, with direction that he do summon Dr. R. C. Nauth-Misir, dermatologist attached to the Georgetown Hospital, to give whatever relevant evidence he may be able to provide on the issues in the case, and particularly as to his examination, treatment and opinion of the workman's condition at all material times, and thereafter to permit such cross-examination as either party may have a right to undertake having regard to that evidence and the circumstances of the case, and thereafter to adjudicate afresh on the whole case.

I have deliberately refrained from commenting on any aspect of the evidence already taken by the magistrate, for he must be free to assess the

evidence in his own way after receiving the further evidence of Dr. Nauth-Misir, and not be influenced by anything else.

I would further order that the Order of the Full Court be set aside, and that each party bear its own costs in the Full Court and in this court.

CUMMINGS, J.A.: This is an appeal from a judgment of the Full Court of the High Court allowing an appeal to that court from a decision of a magistrate of the East Demerara Judicial District awarding judgment with costs in favour of the applicant/workman (appellant) and ordering periodic payment at the rate of $100 per month from November 6, 1964, during the period of incapacity, based on an agreed monthly wage of $160, for injuries resulting from an accident which occurred during the course of his employment with the respondents as a "sprayer" at Pln. La Bonne Intention, East Coast, Demerara.

[HIS HONOUR examined the evidence, and continued;] the Full Court, speaking through BOLLERS, C.J., took the view that the magistrate's finding was unreasonable, and allowed the appeal, but held that this was not a fit case for reference to a medical referee and commented:

> "The magistrate misdirected himself when in the course of his decision he seemed to have relied on the evidence of the respondent as to overseer telling him that he was suffering from skin disease. The evidence was clearly hearsay and self-serving and came from a person not qualified to give such an opinion . . . This misdirection may very well have led the magistrate to have reached a wrong conclusion on the matter."

The applicant (appellant) appealed to this court on numerous grounds. However, the determination of this appeal turns solely on the question whether the Full Court was wrong in finding that the magistrate was unreasonable.

In considering this question, it is important to bear in mind the duty of an appellate court in relation to such a ground of appeal. This court pronounced upon the subject in the case of *Sugrim Jeaman v. Ressouvenir Estates Ltd.* (4). I adhere now to what I said there ((1969), 14 W.I.R., at p. 98):

> "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.* (5) and regarded that its functions in such circumstances were as set out by LORD SHAW ((1914) 7 B.W.C.C., at p. 913): 'In regard to the merits of the case, I must 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 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 orders 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. . .'"

That is what the Full Court ought to have done, and precisely what this court has to do now.

It is trite law that the admissions of an agent made to third persons are receivable against his principal: (1) when the agent is expressly authorised to make them; and (2) when the agent is authorised to represent the principal in any business and the admissions are made in the ordinary course of such business (see Phipson on Evidence, 10th Ed., at p. 730). The overseer is the company's agent—indeed, in so far as a matter of this nature is concerned, he is, in relation to the work and workmen, the company. He is its spokesman. Consequently, the Full Court obviously misdirected itself by holding that the overseer's statement, as alleged by the applicant, was hearsay. Moreover, that statement is also admissible as circumstantial evidence. If A tells B he is suffering from skin disease, it tends logically to establish the fact that A noticed that something was unusual about B's skin, which fact tends to corroborate Mr. Hugh's evidence that there was peeling of the appellant's skin. It is a link in the chain.

As pointed out earlier in this judgment, the learned magistrate premised his preference for Mr. Hugh's evidence as against Dr. Brahman's: "Having regard to (a) all the circumstances of the case, and (b) all the evidence".

Although the respondents in their answer denied the accident, they called neither Seo Singh, the gang foreman, nor the overseer to contradict the appellant. It was also open to them to call Dr. Nauth-Misir to whom Dr. Brahman, the estate doctor, had by letter referred the appellant.

In my view, therefore, the magistrate had abundant evidence to support his finding. Indeed, although this is not the test, I find it difficult to see how he could have reached any other conclusion. Consequently, I am of the view that the Full Court erred in holding that the magistrate's finding was unreasonable and could not be supported by the evidence.

Accordingly, I would allow this appeal, set aside the judgment and order of the Full Court and re-affirm the judgment and order of the learned magistrate.

I feel I ought to record my emphatic disagreement with the proposal to remit the matter to the learned magistrate to hear the evidence of Dr. Nauth-Misir and apply it as he thinks fit. In so doing I am not unmindful of the powers conferred upon the courts by s. 88 of the Evidence Ord., Cap. 25 [G.], but in my opinion it would be wrong and dangerous to invoke the power in a case of this nature where the respondents well knew at the time of, and even before the hearing of the application by the magistrate, that Dr. Nauth-Misir had treated the applicant—indeed the latter had been referred to the specialist by letter from the respondents' medical employee. It was, therefore, most necessary and desirable for the respondents in pursuance of their case, as set out in their answer, to have called Dr. Nauth-Misir as a witness. Both parties were aware of Dr. Nauth-Misir's role. Neither elected to call him. This is a civil case. Why should the learned magistrate, who adjudicated in favour of a workman "in accordance with well-established principles upon the evidence proferred by the parties, now be directed by an appellate court to descend into the arena? Where will this end? Moreover, the disturbing feature should be observed that although the grounds of appeal to the Full Court were filed by the applicant on July 18, 1965, his appeal did not come on for hearing in that court until April 18, 1969—four years later. This proposal was neither raised nor argued before us. In these circumstances, I can see no juristic basis whatever for the course proposed.

CRANE, J A.: I agree with the judgment of the learned Chancellor, but would like to say a few words on the matter of the reference back to the magistrate to take the evidence of Dr. Nauth-Misir.

In my view, there is no reality in the alleged conflict of evidence between Dr. Brahman, the estate doctor, who first examined the injured workman in November 1964, and Mr. Hugh, who examined him in June 1965, some seven months after the incident, because the conflict, having been self-induced by the magistrate, was only apparent. Dr. Brahman was very clear that the workman made no complaint to him about a hose having burst

causing chemicals to fall on his head; although he did complain about a bald patch about 1" in diameter at the back of the head. From Dr. Brahman's diagnosis the malady from which he suffered was alopecia areata, a condition which caused the hair on the head to drop off in circular patches.

Mr. Hugh's evidence was entirely different. He said the workman suffered from a dermatitis evidenced by the peeling of his hands, face and head injuries, and that this was consistent with the appellant's complaint of a burst hose causing chemicals to be thrown across his face and the injuries alleged; and, contrary to Dr. Brahman, Mr. Hugh opined that the condition he saw was decidedly not alopecia areata.

There was, however, another doctor who examined the workman. He was Dr. Nauth-Misir who, everyone knows, specialises in skin diseases. He did so on a reference from Dr. Brahman during and after the interval between the latter's examination and Mr. Hugh's. Dr. Nauth-Misir's examination was, in fact, being conducted during the very time the case was in progress before the magistrate. That was why, after both doctors testified, it became evident to counsel for the appellant, and, I have no doubt, also to counsel for the respondents and the learned magistrate, that Dr. Nauth-Misir's evidence could probably resolve the matter, and it was clearly for this reason that counsel sought and obtained an adjournment to summon him, when the magistrate adjourned court for his attendance. However, on the resumption all the court was told was that counsel had decided not to call further evidence. Immediately thereafter, both parties closed their cases, and, on an adjourned date, the magistrate gave judgment for the plaintiff.

The question arises: What was the proper course for the magistrate to take when, as he himself said in his memorandum of reasons for decision, it seemed to him "there was a conflict of medical evidence"?

In *Agnes Butler v. Versailles & Schoon Ord. Estate, Ltd.,* (1968) 13 W.I.R. 23, this court pointed out that when a magistrate is placed in a predicament occasioned by a conflict of testimony, he is obliged to observe the requirements of s. 34(2)(1) of the Workmen's Compensation Ordinance by exercising a judicial discretion whether or not he would submit the matter to a medical referee for report. The paragraph of that subsection says:

> "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."

What was the question arising before him which was material? Evidently, it was the determination of the nature of the injuries suffered by the workman and the taking of an opinion whether they could have been caused by the medium attributed by the workman, namely, the bursting of a hose containing weedicide. This would enable the matter of the liability of the employers for compensation in the course of employment to be determined.

Indeed, when a genuine, as distinct from an apparent, conflict arises, a magistrate is in duty bound to consider resolving it by means of a medical referee; but on the evidence as recorded by the magistrate, can it be said that a real conflict existed in this case? For myself, I do not think so. I think the conflict was merely apparent in the sense that it was brought about by the magistrate's neglect to exercise his discretion to place on record evidence that was absolutely necessary to the solution of the problem with which he was confronted.

As it turned out, the evidence revealed there was a possible third opinion from another medical man who examined the workman. He was Dr. Nauth-Misir who did so at the instance of Dr. Brahman. It became evident to both counsel for the appellant and the magistrate that Dr. Nauth-Misir was probably holding the key to the solution of the question. That evidence was, however, not procured, and this is where I feel the magistrate erred. He never seemed to consider the evidence of that doctor of any value whatever in assisting him with the task in hand, whereas, it is clear that evidence is the nexus between Dr. Brahman's and Mr. Hugh's evidence or the missing link in the chain of medical testimony in the history of the case. To me, Dr. Nauth-Misir's evidence is absolutely necessary, and without it is impossible for the magistrate to arrive at a just conclusion in the matter. In fact, so little importance did he seem to attach to it that he never thought it desirable to record any explanation why the doctor's presence was not available in court when, on the previous occasion, the opposite party had offered no objection and had, in fact, practically acquiesced in the doctor's being called to testify.

How then, is justice to be achieved in this case? The judgment of the Chancellor, in which I fully concur, indicates it would be met by the magistrate's fulfilling what was not done at the hearing, by putting Dr. Nauth-Misir's evidence on record, and making such use of it as he thinks fit. In the circumstances, it is considered that the authority for him to do so is to be found in s. 88 of the Evidence Ordinance, Cap. 25, which says:

> "The judge may, on his own motion, call or recall any competent person as a witness and examine the person in any manner he thinks fit, and may call for and compel the production of any document or other evidence, and may impound any document or other thing he considers material."

This section has been used from time to time by our magistrates and judges; in fact, by all persons empowered to take evidence by law or by consent (s. 2 Cap. 25). I remember ADAMS, J. (ag.) in *Samuels v. Bowman*, (1961) Full Court 133/61, unreported, had occasion to use it. In the judgment of LORD ESHER, M.R., in *Coulson v. Disborough*, (1894) 2 Q.B.D. 316, there is the dictum that a judge may himself call as a witness a person whom neither party wishes to call if he thinks the interests of justice could thereby be served; but in that case, the witness is really the judge's, and neither party has the right to cross-examination as of right. However, in *Enoch v. Zaretzky, Bock & Co.*, (1909) All E.R. Rep. 625 at p. 627, doubts were cast on that dictum by FLETCHER-MOULTON, L.J., who considered

that a judge has no such right if it is against the wish of the parties that the witness be called. It, however, seems quite clear that there is no implication to that effect in the dictum, and it appears that all that is meant by Lord Esher is that though a judge, *suo motu,* has the right to call a witness, he is obliged to exercise his discretion in ascertaining whether he would permit cross-examination of the witness if the circumstances demand it; and I think it is reasonable to conclude that since the right to cross-examine the witness was conceded by Lord Esher, he could hardly be held impliedly to convey the impression that the witness's testimony is to be taken against the wishes of the parties.

So that if a witness is called and he testified adversely in respect of one or other of the parties, clearly, such a situation calls for cross-examination by the party affected by the testimony given. In such a case the judge ought, in fairness, to allow cross-examination; but, as I see it, nowhere in Lord Esher's dictum, nor in s. 88 above, is it suggested that a judge has the power to call a witness if objection is taken to that course by the parties.

In my view, the facts of this case reveal a classic example of the extent to which the power of a judge to call a witness may be exercised. Before a Judge can properly make use of the power to call a witness, *suo motu*, he must firstly satisfy himself on two points: (i) the evidence must reveal the need for the testimony of a particular witness who, the facts show, is actively concerned in the matter under investigation (ii) that both parties either consent or do not object to the judge calling that witness. But a judge can never be justified in saying, when trying a case, that he would like to hear "Professor X's" opinion on the matter merely because the judge thinks the world of that opinion when "Professor X" is altogether unconnected with the evidence in the case. In such a case, I think that even if the parties were to consent to' "Professor X's" call, it would be improper for the trial judge to call him, for he would thereby be "descending into the arena". The proper thing to do, it seems, would be for the judge to invite one or other of the parties to call the professor as a witness. This is why I say this case affords a classic example of the limitation on the power of a judge to call a witness himself, and to this extent, I consider, must s. 88 be read.

I mention all this to show that at the hearing the magistrate had a limited discretionary power, because both parties had practically acquiesced in Dr. Nauth-Misir's giving evidence in the case; only he did not advert his mind to it when both the context and the interests of justice demanded that his attention should have been so adverted. It seems to me the magistrate was in the position of a "judge" in whom the law reposed a power to the intent that it be exercised, not merely with a view to satisfying his own curiosity, but in the interests of attaining justice in the solution of individual rights. The power in s. 88 above is conferred on him to meet the demands of those rights and to prevent a failure of justice, for it was a power that was coupled with a duty which made its exercise imperative. [See per Lord Cairns, L.C., in *Julius v. Bishop of Oxford*, (1880) All E.R. Rep. 43 at p. 47].

These are the reasons why I consider that no question of an absolute discretion to call the doctor was left to the magistrate, but only a duty in him to receive and to evaluate Dr. Nauth-Misir's testimony. From the context, it is my view that s. 88, conferring, as I have endeavoured to show above, only a limited discretionary power on the magistrate in the due course and administration of justice to call a witness on his own motion, that discretion is subject to judicial review if it is not exercised for the purpose for which the legislature intended it to be. [See per Lord Pearce in *Padfield v. Ministry of Agriculture*, (1968) 1 All E.R. 694 at p. 715, where the trilogy of concepts of discretion/power/duty were minutely analysed; also *Village Council of Craig Village District v. Local Government Board* (Civil Appeal No. 9 of 1968 dated 13th January, 1969)].

But I must not conclude before respectfully acknowledging what was said by Lord Justice Fletcher-Moulton in *Zaretzky's* case, *viz.*, that it is the parties who should call the evidence because "a judge his nothing to do with the getting up of a case". But it is right that I emphasize this is not an instance where the magistrate was desirous of hearing the testimony of a witness who is altogether unconnected with the case, because at the time of the hearing before him, Dr. Nauth-Misir was actually examining the workman on reference to him by Dr. Brahman whose evidence the magistrate considered to be in conflict. It is my firm opinion, however, that until he heard all medical testimony which the case could possibly have afforded, there could be no reasonable justification for the magistrate's saying that a conflict of medical evidence existed in the case.

Apart from this, I can usefully add nothing else, save that it must be clearly understood that when the magistrate receives Dr. Nauth-Misir's evidence, he must not consider himself tied to any particular course of action. He must understand he is entirely free to act as he pleases: sift and weigh the evidence in the whole case, and make such use of it as he thinks desirable and adjudicate afresh in the interests of justice.

For these reasons I agree with the order proposed.

Appeal allowed. Matter referred to the magistrate.

THE STATE *v.* JABEZ CARLTON McRAE

[Court of Appeal of Guyana (Luckhoo, C., Persaud and Crane, JJ.A.)
April 27, 1971]

Appeal—Application for an extension of time within which to appeal—Whether merit in the appeal.

The case for the State was that the applicant, a postmaster, had falsified certain accounts being a record of stamps which he, as postmaster, had received from time to time from the General Post Office. The evidence was clear that the stamps had been received by the applicant and taken into stock by him. He did not sign the two orders for the stamps and did not return them to the General Post Office as he was required to do. When his books were checked it was found that the entries relating to the two quantities of stamps had not been made by him as he was required to do. On conviction and sentence for falsification of accounts he made application to the court for an extension of time within which to appeal.

HELD: there was no merit in the appeal as the evidence had clearly proved the applicant guilty of the offence and the summing up was fair. The application for extension of time was refused.

Application for extension of time within which to appeal refused.

F. R. Wills, S.C., for the applicant.

G. A. G. Pompey, Deputy Director of Public Prosecutions, for the State.

LUCKHOO, C.: I, too, would like to support what has been said by my brothers Persaud and Crane.

It has become all too evident, from the cases of reported fraud, especially within relatively recent times, that its prevalence calls for serious attention. Too many people seem to be on the lookout to dip their hands in the public coffers and line their pockets with ill-gotten gains. This disposition to get rich quickly is a plague on our young nation, which should be provided with a better example on the part of those who, like the appellant, occupy positions of trust.

As my brother Crane has pointed out, the sum involved is not an insignificant one. In two transactions alone it was sought to create a loss to this country of over $10,000. This is shocking and disgraceful: In my view, on the facts, the plan was not only daring, but revealed a certain measure of disquieting neglect in the operation of the system employed.

What my brother Crane has said on the question of punishment should be noted by judges who have to deal with situations of this kind. Clemency could be sometimes misplaced by the imposition of inadequate sentences in cases of serious fraud. If the appellant had appealed against

his sentence and this appeal was properly before the court, I might, on the facts before me (and subject to what was said), have found it difficult to restrain myself from increasing the sentence; for not only is the offence of a heinous nature, but the prevalence of such like offences involving public officers and servants in a position of trust is not a matter to be lightly glossed over. And, moreover, the device used indicated a great deal of premeditation.

I would like at this stage to repeat what I said in a similar case of falsification of accounts—the case of *The Queen v. Peter Richard Osborne* (Criminal Appeal No. 55 of 1968)—in the hope that those responsible for looking after the systems which operate in the various departments of revenue, might exercise a greater vigilance to ensure, as my brother Persaud pointed out, that they are faithfully operated and not be allowed to break down through carelessness or improper motivations. In the case of *Osborne,* I said these words:

> "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, sometimes 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 persons who actually worked were names of persons which were put on the paylist for payment. He checked the time-slips of workers against what was recorded on the paylists. 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 agree with the Order proposed by my brother Persaud, and in the result leave to appeal will be refused and the conviction and sentence affirmed.

PERSAUD, J.A.: This court has, for some time now, viewed with a great deal of alarm the number of convictions and accusations made against public officers, of fraud committed in the course of their employment. This court—and we are sure others will agree with us—is of opinion that the State is entitled to expect honest and conscientious service from its employees, and we feel that any employee of the State who is guilty of fraud commits not only a breach of trust against his office or department, as the case may be, but against the entire country; for he is employed in a position of trust, and he is expected to so conduct himself that the State would have implicit faith in him.

The way things seem to be moving would indicate that there are less and less people in the public service on whom the State can rely. We hope this state of affairs can be remedied and public officers, in whatever station they are employed—whether as postmasters, or civil servants, or policemen—will come to appreciate that it is of no avail to them to perpetrate fraud on the country, because they must know that in proper cases courts will see to it that they receive punishment appropriate to their crime.

In this case the appellant was a postmaster employed in a certain post office in the country and, very simply, the case for the State was that he had falsified certain accounts, the accounts being a record of stamps which he, as postmaster, received from time to time from the General Post Office. These two counts relate to two instances: one where he is said to have received stamps to the value of $2,200, and the other where he is said to have received stamps to the value of $8,040—quite substantial sums of money, in our opinion.

The system which obtained at that time in relation to the issue of stamps to postmasters in outlying districts was that the postmaster was required to send a signed order for stamps to that department of the General Post Office whose function it was to issue stamps. The stamps were then got out, checked by the supervising officer with the assistance of one of the juniors, put in a bag, sealed and taken to the dispatch section where it was put in another bag, also sealed, and sent to the postmaster concerned.

In this particular case, there was quite clear evidence that the stamps, subject-matter of these counts on the indictment, had been requisitioned, checked and posted to the appellant. There was some suggestion, rather vague, however, that perhaps these stamps had never arrived at their destination, but the evidence disclosed that there was no doubt that the stamps had arrived. Suffice it to say there was enough evidence on which it was clear that the stamps had been received by the appellant and taken into stock by him. What was not done was

that the appellant did not sign the two orders and did not return them to the General Post Office as he was required to do. When his books were checked, it was found that the entries relating to these two quantities of stamps had not been made by him as he was required to do, and it was found that as a result of these omissions, he had stamps exceeding $5,000 in value. But it is clear, as we have indicated in the course of discussion this afternoon, that if he had not accounted for the stamps and this excess remained in his possession, then, of course, there was nothing to prevent him putting the proceeds of these stamps in his pocket. That is what the case for the State was.

He led his defence; the jury heard it; the judge, in our view, gave an admirable summing-up to the jury, and the jury found him guilty. We do not ourselves see any merit in the appeal, and we do not see anything in the evidence or in the summing-up from which he could hope to cull a ground of appeal.

We cannot allow this case to go without remarking upon what is so obvious from the evidence led in this matter. The evidence is that the supervisor or somebody attached to that particular department is required to check the issue of stamps as against the orders made by these postmasters from time to time. It is the evidence also that no signed orders were received from this appellant' in this department of the General Post Office. It is also clear that no one thought fit to communicate with this appellant making enquiries as to why these orders were not forthcoming. It is somewhat surprising to us that no check was made and that this state of affairs was allowed to continue for as long as it did.

We concede that it can be said that perhaps no system is fool-proof; but then a system is as good or as honest as the person who works it is good and honest, and we feel that perhaps if those officers responsible for checking the signed orders had alerted themselves or other persons about the absence of these two particular orders, then perhaps this state of affairs may not have arisen. We are satisfied that there was some degree of carelessness on the part of the persons concerned. It seems to us that this is a case which illustrates the need for a regular and periodic auditing of accounts both at the General Post Office (perhaps there is at the General Post Office) and particularly at the post offices in the outlying districts. It seems to us that unless there is a constant checking from time to time, incidents like this will always occur. As I said, systems are as good as the people who work them, and we would condemn the carelessness of any public officer who has failed to perform his duty which has the effect of leaving loopholes for people evilly disposed to commit crimes.

In this particular case, it would appear that the appellant saw the possibility of converting the stamps to his own use. That is a reasonable inference from the evidence when he failed to make the necessary entries in the book, and when one bears in mind that he himself can sell stamps from time to time. Every member of that office—if I recall the evidence correctly—has to sell stamps. The postmaster issues stamps and he himself can and does sell stamps to members of the public. One can only stop to reflect that if he is required to account for $10,000 worth of stamps and he could sell stamps, then it is obvious what could happen: he could sell the stamps, not account for them and put the money in his pocket. The case for the State is that this is what occurred in this case.

We feel that the summing-up was fair and the conviction inevitable. In these circumstances we do not feel that there is any merit in the application for an extension of time, and perhaps at that stage we could have disposed of the appeal immediately, but we were inclined to listen to learned counsel for the appellant because, as the president was gracious enough to point out this morning, we ought to hear him and to indicate to him in the course of the argument and discussion how we feel about this matter. We are satisfied that this appeal has absolutely no merit whatever. In these circumstances, the application for an extension of time is refused, the appeal dismissed, and the conviction and sentence affirmed.

CRANE, J.A.: I agree with the Order which has just been proposed by my brother Persaud.

I think I should say, however, that the system used by the superiors of the appellant at head office is very much responsible for what occurred. The system, as we have just heard, was that the appellant was in duty bound to sign an acknowledgement form for the particular denominations of stamps requisitioned, and to return that acknowledgement form to the head office. In several of the instances of the six sets of stamps requisitioned by and sent to him during the material time, that is, between January and September, 1968, acknowledgements by the appellant were not forwarded to head office, and it was in this slack state of affairs caused by lack of supervision that the appellant undoubtedly conceived the intent to defraud, of which the jury found he was guilty.

The appellant was clearly living in a fool’s paradise. He thought that it would have been virtually impossible to bring home to him guilt by evidence of the fact that he had received those requisitions, through his not giving the acknowledgements that were very necessary, and he kept those stamps. He was found, when his stock and cash account books, his cash, his stocks of stamps and postal orders were

all examined by the accounting officer, to have been short of $5,901.21. I must remark that it is an extremely large sum of money, and the jury quite rightly found him guilty of the offence for which he was charged.

Before leaving the case, I would comment on the number of frauds we, in the Court of Appeal, have had to cope with of late, some bordering along this nature, where accounting officers are remiss in their duty. And it has been our experience that that has really been the reason for all the cases that do come up to this court. Speaking for myself, an offence of this nature is not adequately punished by the sentence that has been given to the appellant. He was put in a position of trust, and for an officer who has had such a long period of service, he ought to have thought better of the situation.

I do not think I would like to say anything more but wonder whether justice was done in view of the Sentence inflicted.

Application refused.

RAMKALLIA

v.

PLANTATION VERSAILLES AND SCHOON ORD. LIMITED

[In the Full Court on appeal from the magistrate's court of the West Demerara Judicial District (Bollers C.J., and Gonsalves-Sabola J.) January 22, 1970; March 12, May 7, 1971].

Workmen's Compensation—Evidence—Medical Evidence—Conflict of medical testimony—Magistrate not adverting to question of temporary incapacity—Evidence showing temporary incapacity had not ceased—Workmen's Compensation Ordinance Cap. 111, ss. 8, 12.

The appellant, a weeder, claimed compensation from her employers (the respondents) on the ground that she had suffered an injury to her back on 30th July, 1968 when in the course of her employment a heavy box fell on her and squeezed her as she sharpened her cutlass under her house. On the medical evidence led the magistrate found against

her and dismissed her claim. He held that it was not possible that she could have been suffering from all the complaints testified to by Dr. Hugh 'as none of the doctors before Dr. Hugh found anything of the kind'. She appealed to the Full Court.

HELD: (i) the medical evidence was overwhelming that the appellant had not suffered any permanent partial incapacity which she had made the basis of her claim;

(ii) the reasoning of the magistrate was faulty. The language he used showed an unjudicial approach to conflicting expert testimony;

(iii) the magistrate had failed to advert to the question whether there was temporary incapacity proved, and on the evidence of the respondents' medical witness, Dr. George, the temporary incapacity had not ceased;

(iv) the appeal would be allowed and the respondents would be ordered to pay to the appellant periodic payments at the rate of $40.72 from the 30th July, 1968 until the expiration of a period of 5 years (less one month's payment already made) or until the incapacity ceased which ever was the shorter time.

Appeal allowed. Judgment entered for the appellant.

D. C. Jagan for the appellant.

G. M. Farnum, S.C., for the respondents.

JUDGMENT OF THE COURT: This is an appeal from the decision of the Magistrate of the West Demerara Judicial District who dismissed a claim for compensation brought by the appellant, a weeder, on a sugar estate under the Workmen's Compensation Ordinance, Cap. 111.

The appellant claimed compensation on the ground that she had suffered an injury to her back on the 30th July, 1968, in an accident arising out of and in the course of her employment when a heavy box fell on her and squeezed her as she sharpened her cutlass under her house.

The evidence of the appellant was that she was treated at the dispensary with tablets and electrical appliances and told to return on the following Friday. On this day she informed Dr. Abbensetts that she was feeling pain and he referred her to Lusignan Hospital. She remained in hospital for 15 days and then was discharged by Dr. Abbensetts who recommended her for light work. Because of the pain she was unable to do the light work. She returned to Dr. Abbensetts who examined her and referred her to Dr. George. Dr. George, after examination, told her to return to work, but she said she was unable to do so because

of pain. She was later informed by the Personnel Department that Dr. George had discharged her; she still felt pain and on the 10th September, 1968, she was examined by Dr. Hugh, a private doctor. On examination on 10th September, 1968, Dr. Hugh found pain on active and passive movement over the thoracic lumbar spine. In his opinion, the pain was due to a sprained back as a result of compression, on the box falling on her and he recommended six weeks temporary disability.

On 23rd October, 1968, Dr. Hugh again examined the appellant and found that her condition was not improved and recommended three weeks extension leave. He saw her again on 4th November, 1968, and on examination found no change in the clinical condition. Thus he considered her to be a chronic case and assessed her 40 per cent permanent partial disability. The doctor expressed the opinion that her condition was consistent with the accident described, but he found no evidence of tenderness.

Dr. Abbensetts stated that on the 31st July, 1968, the appellant complained to him of pain in the lumbar region i.e. across the lower part of her back and pain in her right hip; she did not complain of pain in the thoracic lumbar region. On examination he found no external marks of injury and treated her and referred her to Lusignan Hospital and treated her up to the 5th August, 1968. He again examined her on 23rd August, 1968, when she complained of pain and after examination in which he could find no physical cause he referred her to a specialist Dr. George. This doctor saw the patient again on the 26th August, 4th September and 8th September, 1969. Dr. Abbensetts stated that the appellant complained of pain in the small of the back which would include the lumbar sacral region but he found no muscle spasms. Dr. Brahman testified that he examined the appellant on the 4th August, 1968, and physical examination revealed no abnormality. He saw no external sign of injury whatever, all movements of her neck, back and spine were full, free and normal, her reflexes were normal and equal. The only thing seen on the X-ray was a sacralisation of lumbar 5 to the right and early osteoporosis. Sacralisation is a frequent ungenical abnormality and osteoporosis is the decalcification of the bone which is very common in elderly people and post menopausal women. She remained in hospital until the 19th August, 1968, when on examination he found that she was fully recovered. Finally, Dr. George, the specialist, examined the appellant on the 24th August, 1968, and found there was probably tenderness over the lumbar sacral region, the movements of the spine were normal and there were no muscle spasms. X-ray revealed no abnormality of the bone, he recommended one week's light work. On the 4th September, 1969, this doctor saw the patient for the last time and could find nothing wrong, not even tenderness. Under cross-examination Dr. George stated that the complaint was consistent with the type of injury the patient had suffered and that on the first occasion when he saw her he thought she was incapable of doing her normal duties. On the second occasion

when she complained of pain he diagnosed that she was suffering from low back ache and a person suffering from low back ache should not be given work which involved bending such as weeding.

On this evidence the learned Magistrate after a consideration of the evidence of Dr. Hugh stated in his Memorandum of Reasons—

> "It is not possible that she could be suffering from all these complaints. It is not possible that she could be suffering from these complaints from the accident as none of the doctors before Dr. Hugh found anything of the kind. I therefore could not accept the evidence of Dr. Hugh and according dismissed the applicant's claim for compensation".

The medical evidence was overwhelming that the appellant had not suffered any permanent partial incapacity which she had made the basis of her claim but we consider that the reasoning of the learned Magistrate here is faulty. Surely it was possible for the minority opinion of Dr. Hugh to be judicially acceptable in the face of all the other contrary medical evidence, especially having regard to Dr. George's diagnosis of low back ache and his evidence that a person suffering from low back ache should not be given work which involved bending such as weeding. It cannot be assumed that the learned Magistrate made the correct approach to the medical evidence but unfortunately expressed his finding in infelicitous language. The language he used unambiguously shows an unjudicial approach to conflicting expert testimony. But, assuming that the learned magistrate was right to find that on the evidence before him the appellant had not suffered any permanent partial incapacity which she made the basis of her claim, there remained, however, the question of periodic payments, and it was the submission of Counsel for the appellant that the periodic payments could not be brought to an end by the respondents until they had compiled with the provisions of s. 12 of the Ordinance. The relevant provisions of the section are to be found in sub-s. 3 of the section which reads as follows:—

> S. 12:
>
> "Any employer shall not be entitled otherwise than in pursuance of an agreement to end or diminish a periodic payment except in the following cases:
>
> (3) "Where the medical practitioner who examined the workman under S. 17 of this Ordinance, or in his absence any other medical practitioner has certified that the workman has wholly or partially recovered, or that incapacity is no longer due in whole or in part to the accident, and a copy of the certificate (which shall set out the grounds of the opinion of the medical practitioner) together with notice of the intention of the employer from the date of the service of the notice to end the periodic payment, or to diminish

it by such amount as is stated in the notice has been served by the employer upon the workman".

Provided that etc.

In answer to this submission Counsel for the respondents submitted that if there was evidence on which the Magistrate could have found that the appellant had recovered and was not suffering from any incapacity then failure to comply with s. 8 would be of no avail at this stage. He based his argument on a passage which appears in Willis's Workmen's Compensation 33rd edition at p. 390 under the head Effect of Notice S. 12(3) of the Workmen's Compensation Act 1925 (which is s. 8(3) of the local Ord.) and which reads as follows:—

> "Since there is no liability on an employer in any circumstances to continue the payment of compensation after a cessation of incapacity (*Ocean Coal v. Davies* 1926 19 B.W.C.C. 429), an objection that the employer has terminated payments without complying with the requirements of s. 12(3) is of no avail in a final application for arbitration".

This submission however overlooks the fact that the learned Magistrate dismissed the claim for compensation on the ground that it was not possible for the plaintiff to be suffering from the complaints as stated by Dr. Hugh; and Dr. Hugh had said that he was of the opinion that she had suffered a permanent partial incapacity. The dismissal was therefore virtually a finding that there was no permanent partial incapacity proved by the appellant. The learned Magistrate did not however advert his attention to the question whether there was a temporary incapacity proved, and as a result, the passage cited from Willis's could have no application to the facts of the present appeal as "a cessation of incapacity" had not been proved by the respondents on whom the onus lay. Furthermore we are in agreement with the submission made by Counsel for the appellant that on the evidence of the respondent's medical adviser Dr. George, the temporary incapacity had not ceased. Under cross-examination this doctor had admitted that when he first saw the appellant he considered that she was incapable of performing her normal duties and went on to say that when he saw her for the second time on the 4th September, 1968, he diagnosed she was suffering from a low back ache, and a person suffering from a low back ache should not be given work which involved bending such as weeding. Immediately prior to this opinion by the doctor, he had stated that her complaint was consistent with the type of injury that she had suffered. We thought that the Magistrate should have found that the low back ache came about as a result of the injury sustained by the appellant on the 30th July, 1968, in an accident which arose out of and in the course of her employment. In accordance with s. 8(1)d of the Ordinance, we are of the view that the periodic payments made to the appellants should continue until the

expiration of a period of 5 years or until the incapacity should have been proved to have ceased in time, whichever be the shorter.

In *Ocean Coal Co. v. Davies* 1926 19 B.W.C.C. 429 the workman admitted that at the date of the application he had recovered but his contention was that having regard to S. 14 of the Act the employers were bound to continue the payment of compensation until an award was actually made. The House of Lords rejected that contention. In the words of Lord ATKINSON at p. 442:

> "I can find nothing in either statute i.e. the 1923 or the 1925 Workmen's Compensation Act) authorising a distribution of doles among workmen after their incapacity has ceased, though these doles should be ticketed as weekly payments".

In that case cessation of incapacity was an established fact on the record. In the instant case that is not so, and the workman is thus entitled to the unfettered enforcement of S. 12(3) of the Ordinance.

For these reasons then, the appeal was allowed and the order of the Magistrate set aside. Judgment was entered in favour of the appellant and the respondents were ordered to pay to the appellant periodic payments at the rate of $40.72 from the 30th July, 1968, until the expiration of a period of five (5) years (less one month's payment already made) or until the incapacity has ceased whichever be the shorter time.

Costs to the appellant fixed at $70.00.

Appeal allowed.

Judgment entered for the appellant.

MAUD INEZ LAMBERT *v.* MARY CALDEIRA

[Court of Appeal (Luckhoo, C., Bollers, C.J., and Crane, J.A.)
October 13, 1970; May 11, 1971]

Immovable Property—Voluntary gift—Gift by deed—Deed notarially executed and registered—Legal and beneficial ownership—Donor divesting herself of beneficial ownership and covenanting to confer legal ownership—Gift incomplete—Legal ownership not passed—Whether there is a necessity to transport property to complete gift—

Whether donor holds legal estate as trustee for donee—Deeds Registry Ordinance, Cap. 32 [G], s. 32.

Equitable Estoppel—Deed of gift—Donee of gift of immovable property expending sums of money in maintenance of property and in the payment of rates and taxes—Whether donor estopped from retracting provisions of deed of gift.

During her lifetime, S executed a deed whereby in consideration of her natural love and affection for the appellant, she made a gift of certain immovable property to the latter, and bound herself "to hold the same unto and to the use of the Donee in fee simple and absolutely and beneficially free from any resulting Trust in favour of the Grantor". The deed was notarially executed, and registered in the Deeds Registry. S then put the appellant in possession of the property, herself removing therefrom, whereupon the latter redeemed the transport or document of title of the property upon the payment of a certain sum of money to a third person with whom it had been lodged as security. The appellant also paid the rates and taxes both during the lifetime of S and after her death; and expended sums of money on repairs. The evidence also established that S had removed from the premises, but because of unhappy differences, S refused to pass transport of the property to the appellant, and requested the latter to remove from the property. The appellant sued S for specific performance, but before the action could be heard, S died. That action was abandoned, but the present action, also for specific performance, was launched against the respondent in her capacity as executrix of the estate of S under whose will the same property was devised to her.

HELD: (i) that the necessary effect of the deed of gift together with the acts of S was that S became the trustee of the legal estate for the appellant, who would be entitled to the remedy of specific performance as against the respondent in her capacity as executrix of the estate of S.

(ii) that the doctrine of equitable estoppel would apply in the circumstances of this case to prevent the donor from retracting her agreement.

[*Per* BOLLERS, C.J.: The trust was completely constituted by the deceased declaring herself to be a trustee; and the property finally and completely vested in the deceased as trustee for the appellant as *cestui que trust*.]

[*Per* CRANE, J.A.: In view of the provisions of s. 3D of the Civil Law Ordinance, Cap. 2 [G], it appears that the general rule in the transfer of chattels is relevant to the situation; and if the deed is valid and enforceable, then [the property] will be in the nature of an *inter vivos* donation of movable property that has been duly executed, proved and filed as of record in the Deeds Registry in accordance with s. 18(1) of Cap. 32 [G.].]

Appeal allowed. Judgment of the court below set aside, and an order for specific performance made.

[**Editor's note**: This case is also reported in (1970) 18 W.I.R. 15]

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

R. P. Rawana for the respondent.

LUCKHOO, C.: Beatrice Albertha Shanks died on October 20, 1965. In her lifetime, *viz.*, on July 27, 1963, she had donated to the appellant, her cousin, by deed (which was registered in the Deeds Registry on that very day and year) the following immovable property:

> "Four undivided ninth (4/9) parts or shares of and in the southern front quarter of lot 29, situate in that part of the town of New Amsterdam called Smythtown, with the building and erection thereon."

She was the owner by transport (No. 435 of 1951) of this property, but had pledged the same to one James Henry for an indebtedness of $156. However, at her request the appellant paid off this amount and obtained and kept the said transport as from September 25, 1963.

In the following year, it appears that unhappy differences arose between them and as a result the deceased refused to pass transport to the appellant but asked her to remove from the house and to give her back her property, deed of gift, and transport. The appellant, it seems would in an amicable spirit have done so if she could have secured a refund of sums expended in relation to the property, but as this did not materialise she sought from the court by action filed in 1964 the remedy of specific performance against the deceased. While the action was pending the deceased died. The action was abandoned, and later the present action was brought against the respondent in her capacity as the executrix named under the last will and testament of the deceased, probate whereof was granted by the Supreme Court of Guyana on March 29, 1966.

It transpired, however, that the deceased by will dated October 13, 1965, divided to the respondent (another cousin) the same property and whatever else she might die possessed of, after the payment of her just debts. Hence the dispute and competing claims of the parties, each claiming to be entitled to the said immovable property, the appellant under deed of gift which was recorded, and the respondent as beneficiary under the last will and testament of the deceased.

The appellant's claim stood on this basis: the deed of gift which gave to her the property was unequivocal and unconditional. It recited that in consideration of the natural love and affection of the "Grantor" for the "donee", the grantor as beneficial owner (of the said property) "hereby grants and conveys unto the Donee" the said described property "to hold the same unto and to the use of the donee in fee simple and absolutely and beneficially free from any resulting trust in favour of the grantor". Both "set their hands" thereto in the presence of two subscribing witnesses and in the presence of one J. C. F. King, a "sworn clerk and notary public". This deed was recorded in the registry.

In consequence of what was so executed and recorded, the appellant moved into the said property, and remained in possession from then until now, and the deceased continued to live there until October 13, 1965, when she removed to the home of the respondent where she died on October 20,

1965. Further, the appellant, apart from securing and keeping the title deed upon paying the debt due for which it was held, assumed obligations incidental to the maintenance and upkeep of the said property and for the payment of insurance, rates and taxes.

She asked the court for: (a) an order for specific performance, that is to say, that the defendant in her aforesaid capacity should be compelled to transport the property to and in her favour, as property donated to her by the deed of the said Beatrice Albertha Shanks, deceased; (b) in the alternative, an order empowering the Registrar of the Supreme Court of Guyana to pass transport of the said property to and in her favour should the defendant fail to do so.

The respondent, on the other hand, contended that the deed of gift was of no effect and never had "any legal value in the eyes of the laws of Guyana", as what purported to be a gift was incomplete and ineffectual, as the property had not been transported, and, further, no trust could arise in favour of the appellant to supplement this incomplete gift. She therefore counterclaimed for a declaration that she is the owner and/or person entitled to possession of the said property, and for *mesne* profits.

The learned trial judge in an oral decision found that the deed of gift was unenforceable, dismissed the appellant's action, and gave judgment for the respondent on her counterclaim, declaring that she was the person entitled to possession of the said property. The appellant was therefore ordered to deliver up possession by a certain time and to pay *mesne* profits.

In his written judgment, the learned trial judge made reference, *inter alia*, to what DUKE, J., said in *Surejpaul v. Ramdeya & Sarju* ((1942), L.R.B.G., at p. 315), that is: "It is part of the law in this Colony that no transfer of immovable property can take effect unless perfected by transport", and said:

> "In the instant case the document (exhibit 'B') shows that the question of trust was entirely absent from the mind of the testatrix. Exhibit 'B' purported to effect a gift, and nothing else. There was no intention by the testatrix to be a trustee. Such a gift could only be effective by transport which was not done during the lifetime of the testatrix. The purported gift was therefore incomplete, imperfect, and ineffective. The fact that the document is a deed does not in my view alter the principles laid down in *Mangia v. Sagayan and Ors.* (2). In the former case at p. 60 the law is stated by SIR CHARLES MAJOR, C.J., thus: 'There is but one method of acquiring the ownership of real property in this colony, namely by conveyance or "transport" or the legal equivalent thereof.' Applying the above principles to the document exhibit 'B' and to the facts and circumstances of the instant case I am of the opinion that the deed of gift exhibit 'B' is unenforceable both at law and in equity."

This was tantamount to saying that no legal or equitable avenue was open for an award of the immovable property donated, although the donee

had entered into possession, and expended sums of money from time to time for nearly three years; but that the testamentary benefaction bestowed nearly three years after the gift, could oust and deprive the donee of what was given and enjoyed during that period. Is this the law?

The case for the appellant must largely depend upon and revolve around the legal consequences of: (a) the recorded deed of gift: (b) the *bona fide* assumption of possession of the said property; (c) the fact that she, to the knowledge of her deceased benefactor, spent money for nearly three years in maintaining and meeting necessary outgoings in the way of rates, insurance, etc; and (d) the fact that the pledged title deed at the request of the deceased, was at her expense redeemed, and kept in furtherance of the donation.

If the deceased were alive, could she in the circumstances have recovered possession of what was so alienated? And could she on equitable principles have successfully resisted the claim against her for specific performance to pass the legal title?

To be able to answer these questions, the character and contents of the instrument must be closely inspected to determine whether in the circumstances of the case, at law and/or equity, it was effective and, if so, to what extent. For convenience, I shall set out the relevant part of the deed and refer as from now to the appellant as the "donee" and the deceased as the "grantor":

> "THIS INDENTURE made this 27th day of July, in the year of Our Lord One Thousand Nine Hundred and Sixty-three at New Amsterdam, in the County of Berbice and Colony of British Guiana by and between BEATRICE ALBERTHA SHANKS, of Philadelphia Street, New Amsterdam, Berbice, hereinafter called the GRANTOR of the one part, and MAUD INEZ LAMBERT, of 40 Stanleytown, New Amsterdam, Berbice, hereinafter called the DONEE of the other part.
>
> WITNESSETH: That in consideration of the natural love and affection of the Grantor for the Donee, the Grantor as beneficial owner hereby grants and conveys unto the Donee the hereinafter described property, that is to say: "The Southern front portion of Lot 29 Smythtown with all the building and erection thereon as *per* Transport No. 435 of 1951' to hold the same unto and to the use of the Donee in fee simple and absolutely and beneficially free from any resulting Trust in favour of the Grantor.
>
> IN WITNESS WHEREOF the GRANTOR and the DONEE have hereunto set their hands at New Amsterdam, in the County of Berbice, and Colony of British Guiana, this 27th day of July, 1963, in the presence of the subscribing witnesses."

Both the grantor and donee signed in the presence of a sworn clerk and notary public and in the presence of two subscribing witnesses. There was no seal attached, but inasmuch as it was notarially executed, the necessity for a

seal does not arise as the following provisions is made by s. 15 of Cap. 2 of the Laws of Guyana.

> "15. Where by the English common law, or by any Ordinance or other statute now or hereafter applying to the Colony, any matter is required to be evidenced by deed, a document notarially executed shall be held to be as valid and effectual for all purposes as if sealed and delivered as a deed."

This deed was said, in the statement of defence, to be void *ab initio;* in the oral judgment of the learned trial judge it was declared to be "unenforceable" and in his written judgment the learned judge said:

> "The deed (exhibit 'B') specifically states that the gift was made for 'natural love and affection'. If there is any other consideration at all it is certainly past 'consideration'."

When duly signed, notarially executed, and delivered, the presence of consideration, that is to say, some benefit to the promissor or loss to the promisee granted or incurred by the latter in turn for the promise of the former, is not necessary. As is known, it is the solemnity and form of the deed which, in law, "import consideration" and impart contractual validity of what might otherwise be no more than *nudum pactum.* Therein promises made constitute covenants capable of giving rise to legal obligations, depending on how they are or may be construed and how affected by applicable rules of law.

My understanding of the cumulative effect of what was covenanted was to seek to secure and provide for the donee to have immediate enjoyment of the property, and afterwards full ownership. This was done in the rather curious way of utilising certain notions which originate from and prevail under the English law of real property.

Thus, when the grantor sought to "grant and "convey"—"as beneficial owner", I take it that the idea was to imply certain covenants, *viz.*, for right to convey, for quiet enjoyment, for freedom from incumbrance, and for further assurance (see Law of Property Act 1925 [U.K.], s. 76, replacing the Conveyancing and Law of Property Act 1881 [U.K.], S. 7). When it was said that the donee was to hold the same unto and to her use "in fee simple", I cannot conceive that more was intended than to indicate that she was to have full legal ownership. In reality, the exercise involves a transposition of ideas. The words "absolutely and beneficially", in conjunction with what went before, would serve to indicate that, apart from full "legal" ownership, there was also to be full "beneficial" ownership. The fulfilment of this grant as to "beneficial" ownership was implemented when the donee was put in possession of the property and proceeded to assume the benefit of its enjoyment. Finally, there was a declaration that what was conferred was to be "free from any resulting trust in favour of the grantor". This would no doubt intend to safeguard and protect the contemplated passing of "legal" ownership, which was to accrue eventually, to the extent of precluding the grantor

from ever asserting that this "legal" ownership in the donee was no more than a resulting trust in her favour.

To place the property in the hands of the donee for her immediate enjoyment was easy to accomplish. In actuality, immediately after the execution and recording of the deed (which was handed to her) she *bona fide* went into possession with the benefit of free occupation, whilst at the same time bearing such burdens as are incidental to ownership, *viz.*, the payment of rates, taxes, insurances, etc.

But it is palpably apparent that the deed itself was incapable of transferring any legal title in and to the property. The law of this country has time and again made it clear that there is but one method of acquiring the ownership of real property, namely, by conveyancing, or "transport", or the legal equivalent (see *Mangia v. Safayan & Others* (2)), and no transfer of immovable property can take effect unless perfected by transport (See *Mangru v. Kalla* (3); *Surejpaul v. Rameaya & Sarju* (1); *Brijlall & Anor. v. Jay Jay & Others* (4)). And s. 13(1) of the Deeds Registry Ord., Cap. 32 [G.] provides:

> "No person in whom the title to any immovable property situate in this Colony vests may transfer or mortgage that property except by passing and executing a transport or mortgage thereof before the Court."

The grantor herself would have known from previous experience that in order to acquire her own deed of transport of the said property (tendered in evidence), she had to swear to an affidavit, the required advertisements had to be published, and subsequently the previous owner had to appear before the Registrar of Deeds "to cede transport and in full and free property to make over and in favour" of her the said property. And so she could hardly be taken to have imagined or intended that a deed of gift by herself could successfully serve to transfer her legal title to the donee, an obligation to which she was solemnly committed.

Whilst it must be observed that at the relevant time her transport was held in pledge for debt, so also it must be noted that two months after she gave possession of the property to the donee, at her request the donee paid off the indebtedness, and kept the transport. Was this not a step in acknowledgement of her obligation under the deed to pass the legal title?

I have little doubt that if when the deed was made the grantor was asked whether she would pass transport in due course, she would have said words to indicate, "That is the purpose of my gift."

Let us now look at the authorities, starting with two cases which clearly influenced the decision of the learned trial judge, to see whether in law or equity the donee was entitled to any rights and, if so, what.

In *Milroy v. Lord* (5), Mr. Medley, the owner of certain shares in a certain bank executed a voluntary deed purporting to assign fifty of them to Mr. Lord to be held by him upon certain trusts for the benefit of the plain-

tiffs. But the shares were transferable only by entry in the books of the bank after compliance with certain formalities, and so no such transfer was ever made or effected. Mr. Lord held at the time a general power of attorney authorising him to transfer Mr. Medley's shares, and a further power of attorney to receive the dividends on the said shares in the bank, which he did, and remitted to the plaintiffs. It was held that as it was not the intention of the settlor to constitute himself a trustee of the shares, but to vest the trust in Mr. Lord, there was no valid trust of the shares created in the settlor; that no valid trust of the shares was created in Mr. Lord, for although he held a power of attorney under which he might have vested the shares in himself, he did not do so, and was not bound to do without directions from the settlor, since he held the power only as agent for the settlor; and that the disposition of the shares failed, as being an imperfect voluntary gift.

TURNER, L.J., made his classical statement so often referred to when he said ((1862), 4 de G.F. & J. at p. 274):

> "I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect to it by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

After this case came *Warriner v. Rogers* (6), in which BACON, V.C., said ((1873), L.R. 16 Eq. at p. 348):

> "The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with the interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest."

And then in *Richards v. Delbridge* (7), SIR GEORGE JESSEL, M.R., took the opportunity to reaffirm the law as was laid down in *Milroy v. Lord* (5) (*supra*) and put the matter this way ((1874), L.R. 18 Eq. at p. 14):

> "A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, T declare myself a trustee', but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning . . . for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise."

In this case if it was intended that the deed of gift should have been the effective means of passing the legal title, and no further step was contemplated, then, in my view this would not have met the requirements of the law, because (a) the means employed could never had led to the desired purpose; and (b) the circumstances would not have permitted of any implication that the grantor intended to hold the property in trust, after such an unsuccessful effort to pass "the legal title".

On the facts in *Milroy v. Lord* (5), it must not be forgotten that not only was the method adopted and intended to secure the transfer inappropriate and incapable of achieving the specific purpose, but that the owner had, in effect, clearly manifested an intention of placing in the hands of Mr. Lord the requisite authority to deal with the shares by executing powers of attorney for that purpose, which were wholly inconsistent with the implication of any trusteeship.

A vital question then in this case is: are the facts and circumstances consistent with the implication of trusteeship on the part of the grantor after divesting herself of the beneficial ownership in the property? A case which I have found very helpful on this aspect in *Re Rose* (*decd.*), *Rose v. Inland Revenue Commissioners* (8), which attracted full and careful judgments in the Court of Appeal. The facts were that the deceased by transfer dated March 30, 1943, in consideration of natural love and affection transferred in two lots a number of shares in an unlimited company. The transfers were in the form required by the company's Articles of Association. These authorised the

directors to decline to register any transfer "in their absolute and uncontrolled discretion". The deceased had, as governing director "full and uncontrolled authority to determine who shall be admitted from time to time to be shareholders of the company and for this purpose to determine the acceptance or rejection of all transfers of shares". At the date of their execution, the transfers were handed with the relative share certificates to the transferees or their agent. The transfers were duly stamped on April 22, 1943, and registered in the books of the company on June 30, 1943. The deceased died on February 16, 1947. The Crown claimed estate duty on the shares on the ground that the gift of the shares was not completed before April 10, 1943, the date which the parties agreed was the relevant date before which the gifts must have been completed to avoid duty under the combined effect of s. 38(2)(a) of the Customs and Inland Revenue Act 1881 [U.K.], s. 11(1) of the Customs and Inland Revenue Act 1889 [U.K.] and s. 2(1)(c) of the Finance Act 1894 [U.K.], together with subsequent legislation. ROXBURGH, J., held that duty was not payable.

The Court of Appeal, in affirming his decision, held that the deceased had done all in his power to divest himself of the shares and to vest them in the transferees, and the transfers were effective as between the deceased and the transferees to divest the deceased of beneficial ownership and to constitute the transferees the beneficial owners of the shares; the circumstance that the transferees much, to perfect their legal title, apply for and obtain registration, did not prevent the transfers from so operating, and pending registration the deceased was the trustee for the transferees of the legal estate in the shares which still remained in him; and, therefore, the gift of the beneficial interest in the shares had been made and completed prior to April 10, 1943, and no estate duty was exigible.

That case and the one now before us have certain common and similar facets. While both instruments were under seal, yet in each case the legal title could not pass because further events were necessary to bring about and perfect it. In *Rose's* case (8) this was the situation: it was necessary that certain provisions be observed before registration could be effected, and under art. 33 the directors could have declined to register the proposed transfer of shares "in their absolute and uncontrolled discretion"; in the meantime, the transferor under art. 28 was to be deemed to remain the holder of such shares until the name of the transferee was entered in the register in respect thereof; the company, under art. 9, was entitled to treat the registered holder of shares as the absolute owner, and could decline to recognise any trust or equity or equitable claim to or interest in such share, whether or not it had express or other notice thereof; the deceased as governing director of the company had full and uncontrolled authority to determine who should be admitted from time to time to be a shareholder of the company; and it was for the transferee to take the formal step of applying to be duly registered in the books of the company before registration could be effected.

Here (as mentioned already) there are equally compulsory requirements before a transfer of legal title of immovable property could take place. Affidavits must be sworn, and advertisements published to provide the opportunity for opposition to be entered by a creditor or anyone claiming to have a right, title or interest in or to the said immovable property. It is only when there is no such opposition that both parties may proceed to appear before the registrar "to cede" transport and transfer the legal title. The impediments which could have arisen to block the transfer of shares in *Rose's* case (8) due to the negative attitude of the company or perhaps a change of heart on the part of the transferor, in his capacity as governing director, are just as realistic as the entering of an opposition by a creditor or claimant to the land, or even the unwillingness of the grantor to honour her covenant to take steps to make over the legal title. The Court of Appeal in *Rose's* case (8) had to overcome the argument which arose through *Milroy v. Lord* (5) that the deed of transfer of shares *per se* was incapable of effecting the transfer of those shares in the company's register without the application for transfer, the necessary approval and due registration. Further, apart from the failure of the deed of transfer on its own to bring about the desired result, there was nothing to indicate that the transferor had expressly created a trust whereby he would hold the legal title in the interim for the transferee. Therefore, it became necessary for that court to survey the extent of the application of the principles emanating from *Milroy v. Lord* (5).

SIR RAYMOND EVERSHED, M.R., at the outset was critical of the general proposition that if a document is express, and on the face of it intended to operate as a transfer, it cannot in any respect take effect by way of trust, when he said that this "is too broad and involves too great a simplification of the problem, and . . . is not warranted by authority". His Lordship, after analysing the transfer, and concluding that the "interests" in the shares had passed to the transferee, went on to consider how the "gap" between transfer and registration should be construed. In the result (if I apprehend His Lordship's reasoning correctly), the combination of two fundamental factors were capable of providing the answer, *viz.*, the passing of the whole of the beneficial interest, and the existence of a covenanted obligation to part with the legal title too, from which trusteeship could be implied, so that in the circumstances it could truly be said that, pending registration of the shares, the transferor, whilst the legal estate remained in him, became a trustee of that legal estate "by the necessary effect of his own deed".

JENKINS, L.J., in his judgment recognised that while the transferor "had not transferred the full legal title", yet the registration of the transfers was an act the doing of which "he could not consistently with his own deeds oppose". His LORDSHIP had before his mind the vital question: "Was this an incomplete gift which was only complete by the registration?" when he went on to observe ([1952] 1 All E.R. at p. 1227);

> ". . . the effect of this transaction, having regard to the form and the operation of the transfers, the nature of the property transferred, and

> the necessity for registration in order to perfect the legal title, coupled with the discretionary power on the part of the directors to withhold registration, must be that, pending registration, the deceased was in the position of a trustee of the legal title in the shares for the transferees".

And concluded (*ibid*, at p. 1228):

> "It is, no doubt, true that the rights conferred by shares are all rights against the company, and it is, no doubt, true that, in the case of a company with ordinary regulations, no person can exercise his rights as a shareholder *vis-a-vis* the company, or be recognised by the company as a member, unless and until he is placed on the register of members. But, in my view, it is a fallacy from that to adduce the conclusion that there can be no complete gift of shares as between transferor and transferee unless and until the transferee is placed on the register. In my view, a transfer under seal in the form appropriate under the company's regulations, coupled with delivery of the transfer and certificate to the transferee, does suffice, as between transferor and transferee, to constitute the transferee the beneficial owner of the shares, and the circumstance that the transferee must do a further act in the form of applying for and obtaining registration in order to get in and perfect his legal title, having been equipped by the transferor with all that is necessary to enable him to do so, does not prevent the transfer from operating, in accordance with its terms as between the transferor and the transferee, and making the transferee the beneficial owner."

At this stage, it might be useful to look at s. 18 (1) of the Deeds Registry Ordinance, Cap. 32 [G]., which provides that:

> ". . . no donation *inter vivos*, act of division of an inheritance, or other instrument, whereby the interests of creditors or third parties may be affected, already or hereafter to be executed, shall be good, valid, and effectual in law or be in any way pleadable or allowed to be pleaded in any Court of justice in the Colony, unless the instrument is signed and executed in the presence of two witnesses, and until the instrument . . . is duly proved and filed as of record in the registry".

The deed in this case was so witnessed, presumably proved and actually filed as of record, and so qualified for cognisance. Does this provision not imply that there could be a gift *inter vivos* of immovable property, without the necessity for first passing transport, provided the instrument creating the gift be duly witnessed, proved and recorded? And was not one of its purposes to make the recorded information available for the guidance of would-be creditors or third parties who may be affected? Without deciding these questions, as they are not necessary for the purpose of the decision, I would be content to say that this provision, in my view, tends to confirm

that a gift of immovable property *could* take place in certain circumstances without the actual passing of transport.

In this case, I would find that especially because of the grantor's full transfer to the donee of the beneficial interest with the covenant to also confer legal ownership, and the intention manifested in furtherance thereof by securing and allowing the donee to have custody of the legal title, the grantor, by the necessary effect of this and all that was done, became the trustee of the legal estate for the donee. The donee, therefore, would, in her claim against the grantor's executrix, be entitled to succeed and be granted the remedy of specific performance, subject, of course, to any lawful or just claims made by any third party after due advertisement for the passing of transport. It must be observed that the donee's right to succeed could be justified on another basis. She had actually expended sums of money on the maintenance of the property, and paid for its rates and taxes and electricity charges after the deed was executed and beneficial ownership had been conferred. In such a situation, would equity not quicker protect a donee in possession under these circumstances, than aid a grantor to retract her beneficence after she had allowed occupation to occur, and acquiesced in consequential expenditure?

It is said in 18 HALSBURY'S Laws (3rd Ed.) 599 that:

> "The subsequent acts of the donor may give the intended donee a right to enforce an incomplete gift. Thus, if a donor puts the donee into possession of a piece of land and tells him that he has given it to him that he may build a house on it, and the donee accordingly, with the assent of the donor, expends money in building a house, the donee can call on the donor or his representatives to complete the gift".

The case of *Dillwyn v. Llewellyn* (9), is cited in support, and it was there held that although a voluntary agreement will not be completed or assisted by a court of equity in cases of mere gift if anything be wanting to complete the title of the donee in obtaining it, the subsequent acts of the donor may give that right; in the circumstances the subsequent expenditure by the plaintiff with the approbation of his father (the owner of the property) supplied a valuable consideration originally wanting; and the plaintiff was therefore entitled to the fee simple of the property.

Lord WESTBURY, L.C., in his judgment said ([1861-73] All E.R. Rep. at p. 387):

> "So if A puts B in possession of a piece of land, and tells him, T give it to you, that you may build a house on it'; and B, on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and to complete the imperfect donation which was made. The case is somewhat analogous to that of verbal agreement, not binding originally for want of the memoran-

dum in writing signed by the party to be charged, but which becomes binding by virtue of the subsequent part performance".

The equity which arises from the expenditure of money in furtherance of a promised expectation, therefore assumes importance when subsequently there is an attempt to retract from the promise made.

In *Plimer v. Wellington Corpn.* (10), the Privy Council expressly affirmed and approved the statement of the law made by LORD KINGSDOWN in *Ramsden v. Dyson* (11), where it was said ((1866) L.R. 1. H.L. at p. 170):

> "Their lordships consider that this case falls within the principle stated by LORD KINGSDOWN as to expectations created or encouraged by the landlord, with the addition that in this case the landlord did more than encourage the expenditure, for he took the initiative in requesting it."

LORD DENNING, M.R., in *Inwards v. Baker* (12), lent further support to the principle when he said ([1965] 1 All E.R. at p. 448):

> "So in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do. In this case, it is quite plain that the father allowed an expectation to be created in the defendant's mind that this bungalow was to be his home . . .
>
> So here, too, the plaintiffs, the successors in title of the father, are clearly themselves bound by this equity. It is an equity well recognised in law. It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as a result of that expenditure, he will be allowed to remain there."

And DANCKWERTS, L.J., in the same case said (*ibid,* at p. 449):

> "It seems to me that this is one of the cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injunction may not be perpetrated."

In the local case of *Re Evans* (13), reported in the Official Gazette of November 18, 1903, three judges of the Supreme Court in its General Jurisdiction were asked for certain directions by the executors of the will of the deceased under the Administration Ordinance. At p. 1322, it was said in the judgment:

> "The 2nd and sole remaining question on which directions are sought is whether the executors, who are authorised by the will to pass transports of the testator's immovable property should pass transport to Mrs. McLean of certain immovable property of the testator's situate at Bartica, on the Berbice River, which transport she has demanded. It is stated by the executors in their application, that the testator, before his death made a *bona fide* gift of this property to Mrs. McLean, who was one of his illegitimate children; that she accepted it and entered into possession, and has been in possession for more than a year, and has expended a considerable sum in improving the property; and that the testator duly advertised transport of the property, but owing to his last illness and subsequent death transport was never passed. The court relying on these statements, for the correctness of which the executors are responsible, and Mrs. McLean having been represented by counsel at the hearing, decides this question and answers it in the affirmative."

In whatever way the present matter is viewed, therefore, whether on the basis of an implied trusteeship or on the principle of equitable estoppel, there is little doubt in my mind that the appellant is entitled to succeed on the facts of this case.

In the result, therefore, I would set aside the judgment of the learned trial judge, allow the appeal, and order that the respondent in her aforesaid capacity be compelled to transport the property described to and in favour of the appellant, which said property was donated by deed by Beatrice Albertha Shanks, deceased, to her; and, in the alternative, that the Registrar of the Supreme Court of Guyana be empowered to pass transport of the said property to and in favour of the appellant, should the respondent fail to do so within 14 days of the entering of this order.

On the question of costs, I would only allow the appellant her costs in this court, as very little was done on her behalf in the court below, as appears from the record.

BOLLERS, C.J.: I agree with the judgment delivered by the learned Chancellor and the reasons for his conclusion, and would merely add that in my opinion the circumstances of this case fall within the third category of case or mode of transfer of property, as laid down by TURNER, L.J. in *Milroy v. Lord* (5), and set out in the Chancellor's decision. The strong inference to be drawn is that the deceased, by her conduct in the management of her affairs in relation to the property in dispute, manifested an intention to make a gift of the property to the appellant and, in effect, declared that she herself held the property in trust for the purpose of eventually conveying the legal estate in the said property to the appellant.

The deceased (grantor) executed a deed of gift in favour of the appellant as donee before a notary public and in the presence of two subscribing witnesses, in which she purported to convey the property to the donee and "to hold same unto the use of the donee in fee simple and absolutely and beneficially free from any resulting trust in favour of the grantor." The

deceased then put the donee in possession of the property, following which the appellant (donee) redeemed the transport or title deed of the deceased, which had been pledged to James Henry, on payment of the sum of $156 which was the extent of the indebtedness of the deceased to Henry. The appellant continued to pay the rates and taxes due on the property during the lifetime of the deceased and even after the death of the deceased, and expended sums of money on repairs. It is a fact that the deceased, who was also living on the property, removed from there, but during her lifetime made no effort to recover possession of the property from the appellant.

Those circumstances, in my view, clearly demonstrated that it was the intention of the deceased to transfer her interest in the property to the appellant and so render the gift binding upon her during her lifetime. There was then a clear intention of a declaration of trust by the deceased in favour of the appellant as beneficiary, and no question therefore arises in relation to the maxim that equity will not perfect an imperfectly constituted voluntary trust or gift. In my view the trust was completely constituted by the deceased declaring herself to be a trustee and the trust property finally and completely vested in the deceased as trustee for the appellant as *cestui que trust.*

My conclusion is, therefore, that the learned judge was incorrect when he took the view that to grant the appellant the remedy of specific performance sought by her in her writ would result in equity perfecting an imperfect voluntary trust. No such situation arose as the trust was already in existence arid perfected. The circumstances of this case do not support the contention that there has been any invasion or qualification of the statement of the law laid down by TURNER, L.J., in *Milroy v. Lord* (5). It is true that the celebrated authorities *of Mangia v. Safayan & Others* (2),*Mangru v. Kalla* (3), *Surejpaul v. Ramdeya & Sarju* (1), and *Brijlall & Anor. v. Jay Jay & Others* (4) have laid down the proposition which has been the law in this country for many years—that there is but one method of acquiring the ownership of real property in this country, namely, by conveyance or transport or the legal equivalent thereof. And s. 13(1) of the Deeds Registry Ordinance, Cap. 32 [G.], provides that:

> "No person in whom the title to any immovable property situate in this Colony vests may transfer or mortgage that property except by passing and executing a transport or mortgage thereof before the Court."

This principle, however, does not apply to the circumstances of the case as there is no question here of the appellant acquiring under the instrument the ownership or legal estate of the property. All that the appellant acquired was the equitable interest in the property under the declaration of trust. Had the deceased in her lifetime passed transport of the property to the appellant, there would have been no trust in existence as the appellant would then have acquired the ownership or legal estate thereof. The voluntary trust or gift, however, became binding on the deceased when by her conduct she clearly

demonstrated in her lifetime that it was her intention to transfer her beneficial interest in the property to the appellant.

In *Richards v. Delbridge* (7), SIR GEORGE JESSELL, M.R., laid down the law which I consider to be applicable to this case, when dealing with the ways in which a man might transfer his property effectively without valuable consideration, when he stated ((1874) L.R. 18 Eq. at p. 14):

> "The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other persons. It is true he need not use the words, T declare myself a trustee', but he must do something which is equivalent to it, and use expressions which have that meaning; for however anxious the court may be to carry out a man's intention it is not at liberty to construe words otherwise than according to their proper meaning.
>
> The cases in which the question has arisen are nearly all cases in which a man, by documents insufficient to pass a legal interest, has said, 'I give or grant certain property to AB'. Thus, in *Morgan v. Malleson* (14) the words were, T hereby give and make over to Dr. Morris an Indian bond'; and in *Richardson v. Richardson* (15) these words were, 'grant, convey, and assign'. In both cases the judge held that the words were effectual declarations of trust. In the former case, LORD ROMILLY considered that the words were the same as these: 'I undertake to hold the bond for you', which would undoubtedly have amounted to a declaration of trust.
>
> The true distinction appears to me to be plain, and beyond dispute: for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise."

When, therefore, the deceased executed the instrument of deed of gift in the manner prescribed by s. 18 of the Deeds Registry Ordinance, Cap. 32 [G.], it was valid and effectual in law and pleadable, and transferred the beneficial ownership in the property to the appellant. The deceased was therefore showing clearly an intention that she was depriving herself of her legal interest in the property in favour of the appellant, although she had not yet passed the legal title in the property to her. Earlier in his decision in

Richards v. Delbridge (7), SIR GEORGE JESSEL, M.R., had stated ((1874) L.R. 18 Eq. at p. 13, quoting BACON, V. C., in *Warriner v. Rogers* (6)):

> "The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with the interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest."

This is exactly what the deceased did when the deed was executed in accordance with the procedure prescribed under s. 18 of the Ordinance, and under s. 19 of the Ordinance the instrument or contract, whichever way one regards it, became *prima facie* valid and effectual as conveying to the transferee (appellant) all right, title and interest in the contract or instrument formerly possessed by the transferor (deceased) subject to the right of any interested person disputing the validity of the transfer.

There is the other aspect of the matter that if valuable consideration is given in exchange for the creation of the trust, it does not matter whether the trust is completely constituted or not, for equity regards as done that which ought to be done and will perfect the imperfect conveyance. See the *dictum* of LORD ELDON in *Ellison v. Ellison* (16), where the learned judge stated ((1802) 6 Ves. at p. 662):

> "I take the distinction to be, that if you want the assistance of the court to constitute a cestui *que trust*, and the instrument is voluntary, you shall not have that assistance, for the purpose constituting a *cestui que trust*, as upon a covenant to transfer stock, if it rests in covenant, but if the party has completely transferred stock, though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court."

The learned Chancellor has pointed out, and I agree with his reasoning, that the deed which was executed in this case took the form of a contract under seal, in which case, consideration is imported into the contract and the promise made by the deceased thereunder became binding on her even though it may have been merely a gift. Quite apart from this situation, I cannot agree with the learned trial judge that the consideration given by the appellant was past consideration. It was both present (executed) and future (executory) consideration, for after the execution of the deed, the appellant continued to pay rates and taxes due on the property and, by her consistency of conduct, showed that she would continue to do so in the future. So even if the transfer or conveyance in this case were imperfect (and I am not of that opinion), equity on the authorities, as I understand them, would perfect the imperfect conveyance. In my view, however, the voluntary trust created by the deceased was not imperfect but fully constituted and the appellant is free to enforce it.

The appellant is entitled to the remedy of an order for specific performance claimed by her in her statement of claim, and I would therefore allow the appeal, set aside the order of the trial judge, and make the order proposed by the learned Chancellor.

CRANE, J.A.: Four-ninths undivided parts or shares of and in the southern front quarter of lot 29, Smythtown, New Amsterdam, Berbice (hereafter called lot 29) is the subject-matter of this dispute. Lot 29 was owned by the late Mrs. Beatrice Albertha Shanks who, curiously, though it is supposed not without sufficient reason, made two different dispositions of it to two different relations during her lifetime. In 1963 she first executed an indenture of conveyance "in fee simple" of lot 29 to her cousin, the appellant. Later, in 1965, she devised it to another cousin, the respondent, whom she named executrix. The contest in this appeal is to determine which disposition prevails, the trial judge having decided in favour of the devisee.

The deed of conveyance duly signed, executed, proved and filed as of record in the Deeds Registry is in the nature of a donation *inter vivos* in accordance with s. 18(1) of the Deeds Registry Ord., Cap. 32 [G.]. It is important, and is in the following terms [HIS HONOUR set out the terms of the deed, and continued]:

It is the respondent's contention that the deed of conveyance is void *ab initio;* is an invalid and ineffective instrument as a means of effectuating the donor's intention of making the appellant a gift of immovable property "and never has had any legal value in the eyes of the laws of Guyana". This argument found favour with the learned trial judge who considered the deed "incomplete, imperfect, and ineffective"; he ruled that the deed was unenforceable and, consequently, quite capable of revocation by a subsequent testamentary disposition. So that when the testatrix, subsequent to her deed of gift, devised lot 29 to the respondent, the judge considered that was effective in law to constitute the latter the sole and undisputed owner of it; and it was in those circumstances that the respondent obtained a declaration to that effect on her counterclaim.

The learned trial judge, after reciting the facts of the case, which appeared to him to be largely undisputed, considered the question he had to decide purely one of law.

It is common ground that the appellant took possession of lot 29 immediately on the execution of the deed, that she went into possession and is still in possession, and that she has, since then, effected all repairs, paid rates, taxes, insurances and other outgoings, and has redeemed on behalf of the deceased the transport of lot 29 which the latter had at one time pledged with a moneylender to secure a loan. Although, I must say from that part of the record which the trial judge extracted in his judgment, it does appear from the very lips of the appellant that the deceased had later suffered a change of heart and had absolutely no intention of abiding by the deed of conveyance. The reason for this was that the appellant and the deceased

had a quarrel whereafter the deceased demanded the return of her transport and a cancellation of the deed, which the appellant was quite disposed to do, provided she was repaid all she had expended on the property.

In his judgment, the trial judge considered the law of Guyana as it was applied in *Surejpaul v. Ramdeya & Surju* (1), to the effect that there could be no transfer of immovable property in Guyana by way of gift unless perfected by transport, and even though he did not consider the principles of the law of trusts applicable in this case, he considered the law of completely and incompletely constituted trusts as elucidated in the well-known cases of *Milroy v. Lord* (5), *Jefferys v. Jefferys* (17), and *Richards v. Delbridge* (7), which were all fully argued before him, and in the operative part of his judgment spoke thus:

> "*In the instant case the document* (*exhibit* '*B*') *shows that the question of a trust was entirely absent from the mind of the testatrix,* exhibit 'B' purported to effect a gift, and nothing else. There was no intention by the testatrix to be a trustee. Such a gift could only be perfected by transport which was not done during the lifetime of the testatrix. The purported gift could only be perfected by transport which was not done during the lifetime of the testatrix. The purported gift was therefore incomplete, imperfect, and ineffective. *The fact that the document is a deed does not in my view alter the principles laid down in Mangi v. Sagayan and Ors.* (2), and *Gangadia v. Barracot* (18). In the former case at p. 60 the law is stated by SIR CHARLES MAJOR, C.J., thus: 'There is but one method of acquiring the ownership of real property in this colony, namely by conveyance or "Transport" or the legal equivalent thereof.' Applying the above principles to the document exhibit 'B' and to the facts and circumstances of the instant case I am of the opinion that the deed of gift exhibit 'B' is unenforceable both at law and in equity."

To me it was obligatory, in view of the respondent's plea challenging the validity of the deed of conveyance as ineffective, void *ab initio* and without "any legal value in the eyes of the laws of Guyana", that the focal points to which the learned trial judge ought to have directed his attention were: firstly, to the validity of the deed. This he should have determined by the true construction of those technical terms in the *habendum* of the deed, *viz.*, "to hold the same unto and to the use of the donee in fee simple and absolutely and beneficially free from any resulting trust in favour of the grantor"; secondly, to its registration as a donation *inter vivos* under s. 18(1) of Cap. 23 [G.], As I see it, those words of conveyance show how decided was the grantor's intention to pass to the donee the entirety of the interest she possessed in lot 29 and to retain nothing in it for herself. They show a clear attempt by both grantor and donee to effect an out-and-out conveyance of immovable property in Guyana by a conveyancing method and form which is inappropriate to local usage, being peculiar to the English common law of real property, *i.e.*, to the law governing freehold interests in land. But

whether they were conscious of it or not, the true effect of what was sought to be accomplished in their indenture may be granted from the following historical account which, I think, adequately explains the significance of, and construction that would normally be put upon those technical terms in the deed. In Cheshire's Modern Law of Real Property (6th ed., p. 107) the effect of a voluntary conveyance of land to uses is explained as follows:

> "If a feoffment was made before the Statute of Uses to a stranger in blood without the receipt of a money consideration (*ie.,* a voluntary conveyance), and without declaring a use in favour of the feoffee, the rule was that the land must be held by the feoffee to the use of the feoffor. The equitable interest that thus returned by implication to the feoffor was called a resulting use. The effect of the enactment by the Statute of Uses that a *cestui que* use should have the legal estate was, of course, that the legal estate resulted to the feoffor. In order to prevent this it became the practice in the case of such a conveyance to declare in the *habendum* of the deed that the land was granted 'unto and to the use of the grantee. The repeal of the Statute of Uses by the legislation of 1925 would, in the absence of a further enactment, have restored the original rule, and it might have led practitioners to believe that the expression 'to the use of was still necessary in order to render a voluntary conveyance effective."

A conveyance to uses, I will observe, appears to be in the teeth of s. 3(C) of the Civil Law of Guyana Ord., Cap. 2 [G.], which, by enacting that "the English common law of real property shall not apply to immovable property in Guyana", appears to impose an express prohibition against such a method of transferring title to immovable property. English conveyancing forms and precedents are, of course, part and parcel of the English common law of real property, and were it not for that which immediately follows in para. 3(D) (*ibid*), and its proviso (a), I would have been driven to the conclusion that the difficulty occasioned in this case by the use of English technical forms and expressions in conveying title to immovable property in Guyana is altogether insurmountable.

Section 3(D) of Cap. 2 and proviso (a) provide:

> "(D) There shall be as heretofore one common law for both immovable and movable property, and all questions relating to immovable property, within Guyana and to movable property subject to the law of Guyana shall be adjudged, determined, construed, and enforced, as far as possible, according to the principles of the common law of England applicable to personal property:
>
> Provided that—
>
> (a) immovable property may be held as heretofore in full ownership, which shall be the only ownership of immovable property recognised by the common law and shall not be subject to any rule of succession by primogeniture or preference of males to females, or to

> any other incidents attached to land tenure or to estates in land in England and not attached to personal property in England;. . .”

As I see it, in the light of the above, the employment of the English form of a conveyance to uses in transferring the grantor’s interest in lot 29 to the appellant, though prohibited by law, will not vitiate the gift of that property to her in view of the above provisions, because those technical expressions clearly give rise to a “question relating to immovable property”, i.e., a question of construction—whether, in view of the legal and equitable estates and incidents attached to land tenure raised therein by the use of technical expressions, the deed validly conveys to lot 29 to the donee. It appears to me that the deed does indeed give rise to such a question in the same way (as we have seen from the excerpt of Professor Cheshire’s work above) such a question would be raised when estates in land in England would be created in real property by a similar conveyance to uses. In such a state of affairs, s. 3(D) above directs that a question of such a nature must be adjudged, determined, construed, and enforced as far as possible, according to the principles of the common law of England applicable to personal property. In view of the traditional assimilation in Guyana of movable and immovable property into one common law, coupled with the fact that before 1917 under the Roman-Dutch system that prevailed, both forms of property was held in absolute or “full ownership”, i.*e.*, free from anything like the fee simple estate, entailed, life interest and future interest, or any incidents of land tenure, I consider that those technical words in the deed are to be read and construed solely as if the donor had intended to make a deed of gift of lot 29 as her personal or movable property.

Having provided in s. 3(B) of the Civil Law Ordinance, Cap. 2 [G.], that “the common law of Guyana shall be the common law of England” from and after January 1, 1917, it is evident that what the Legislature in 1916 essayed in the Civil Law Ordinance of that year, was the transfer “to the general conditions of the English common law the substantial identity of treatment of movables and immovables under the existing law”, and the means by which it sought to accomplish that task was by the common vehicle of the English law relating to personal property. So it appears that the general rule in the transfer of chattels is relevant to the situation now confronting us. This rule is to be found stated in 18 Halsbury’s Law (3rd ed.) 382, thus:

> “728. GIFTS UNLESS BY DEED INCOMPLETE WITHOUT DELIVERY. Gifts of chattels are more often made by delivery than by deed. It is well settled that, if there is no deed, a gift of chattels is not complete unless accompanied by delivery. A verbal gift of chattels without delivery passes no property to the donee, and is not a gift at all. Actual delivery is not mere evidence of the gift, but is part of the gift itself. In ordinary English language and in legal effect there cannot be a gift without a giving and taking.”

Therefore, if by s. 3(D) and proviso (a), the deceased is to be considered as having made a gift of lot 29 as her personal property, it is an im-

portant fact that she had put the donee in possession of it, and that the latter had since defrayed all expenses relative thereto because that would be the equivalent of delivery. But whether the donee was put in possession of lot 29 or not, that fact becomes of little moment where, as in this case, the donation is made by deed. See *Cochrane v. Moore* (19), where FRY and BOWEN, L.JJ., after having made an extensive review of the cases are reported to have said ([1890] All E.R. Rep. at p. 739):

> "This review of the authorities leads us to conclude that, according to the old law, no gift or grant of a chattel was effectual to pass it, whether by parol or by deed, and whether with or without consideration, unless accompanied by delivery; that on that law two exceptions have been grafted, *one in the case of deeds*, and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery; but that, as regards gifts by parol, the old law was in force when *Irons v. Smallpiece* (20) was decided; that that case, therefore, correctly declared the existing law; and that it has not been overruled by the decision of POLLOCK, B., in 1883 (*Danby v. Tucker* (21)) or the subsequent case before CAVE, J."

If I am right in construing the deed as a valid and enforceable document, then lot 29 will be in the nature of an *inter vivos* donation of movable property that has been duly executed, proved and filed as of record in the Deeds Registry in accordance with s. 18(1) of Cap. 32 [G.].

But I cannot refrain from saying how happy I am to give a construction to the deed which I consider meets the justice of a situation where the donee had been given the immediate possession of lot 29 on the signing of the deed and has been defraying all expenses relative to it from that time onwards. I believe, however, such a construction in no way conflicts with the principle applied by the trial judge and expounded in *Surejpaul's* case (1), *viz.*, that there could be no transfer of gift of immovable property in Guyana unless perfected by transport, although I consider the principle is restricted to gifts other than by deed, for in all the cases in which that principle has been applied, I have come across none like the present, where there has been a donation *inter vivos* which was registered, proved, and filed as a deed in accordance with law.

In *Surejpaul's* case (1), there are several features of similarity to the appeal we now consider. Like the present, it was an action by a donee against an executor for specific performance of a written undertaking to make a gift of immovable property that preceded a testamentary disposition of the same property, the only material difference being, that, unlike the present, it was a *parol* undertaking. Yet, I consider that if the undertaking had been given in a notarially executed deed, it would have made all the difference because the question of consideration which was found to be lacking could not have arisen.

I readily agree that once the intention to make a gift of immovable property is clearly shown in an appropriate instrument of transfer, which, though it is not operative to confer the full legal title, grants physical possession of the property, that will be operative to sever the beneficial from the legal ownership of the donor. In this state of affairs, equity will regard as done that which ought to have been done, and will look upon the donor as having effectually divested himself of his beneficial interest so that he becomes a trustee of the outstanding legal title for his donee who, in the event of death can invoke the court's assistance in compelling his benefactor's executor to transport the outstanding legal title to him. *See Re Rose* (*decd.*) (8), where a donor executed a transfer of shares in a private company and handed it with the share certificate to the donee but died before it had been registered.

In the case under review, the important point is that the donation *inter vivos* of lot 29 was perfected by a notarially executed document proved and filed as of record in the registry, and nothing remained under s. 18(1) for the grantor to do to perfect the gift. However, while it statutorily conveyed a *prima facie* title on the donee, there yet remains to be vested in her that "full and absolute title" retained by her grantor which only transport can give, but which now remains outstanding in the grantor's estate. It is here, I think, contrary to what the trial judge said above, that equity will lend its aid by compelling her executrix to transport the outstanding title to the donee.

As I have stated, the trial judge followed and applied, though without sufficient analysis, what he considered to be the *ratio decidendi* in *Surejpaul's* case (1), *viz.*, that *all* gifts of immovable property depended for their validity on the passing of transport. Indeed, so convinced was he of the firmness of this principle that it is to be observed in the extract from his judgment above, he did not seem to think it mattered that in the present case the gift was made by deed. He did not seem to attach any legal significance to the form in which the gift was made such as would serve to distinguish it from *Surejpaul's* case (1), for his attention was not adverted to the implications of a notarially executed donation *inter vivos.* I am, however, of the view that the existence of such a deed in this case makes a decisive difference and is really the feature which serves to distinguish the present from *Surejpaul's* case (1); and, if I may respectfully say so, I think this is where the judge went wrong, for whenever there is a deed properly executed and filed as of record, that is a factor which distinguishes all the authorities referred to in the judgment.

The deed makes all the difference, albeit it is couched in the technical language of an alien system of conveyancing. In this case it is the nature of a statutory conveyance because it confers on the donee a *prima facie* title to the gift, very much unlike the mere written undertaking in *Surejpaul's* case (1) which conferred no title whatever. In every instance where it has been held that in order to be valid the gift should be perfected by transport before the donor can be said to have completely divested himself of his property, I

have found there was in evidence only a mere parol undertaking as distant from a deed or other instrument notarially executed, signed by two witnesses and filed as of record in the registry. In insisting on the latter requirement, there is undoubted policy of the law in its endeavour to prevent the clandestine shifting of property from one person to another in fraud of creditors or other interested third parties, which is what it is sought to avoid by requiring execution in the presence of two witnesses before a sworn clerk and notary public and filing as of record. However, just as soon as that has been done, the deed so executed is regarded in law as

> "*prima facie* valid and effectual as *conveying* to the transferee or assignee all right, *title,* and interest in and to the . . . instrument. . . subject, nevertheless, to the right of any person interested disputing the validity of the transfer or assignment". (S. 19, Cap. 32).

As I have already indicated, the only doubt I originally had in this case concerned the legal validity of the indenture which conveyed lot 29 "unto the use" of the donee "in fee simple", in the face of what appears to an absolute prohibition on the application of real property law and its concomitant forms of conveyance to immovable property in Guyana. But I am convinced there is nothing absolute about that prohibition for, in the light of s. 3(D) and proviso (a) of the Civil Law Ordinance, Cap. 2 [G.], it seems fairly plain that once the grantor's intention to make a gift of lot 29 is clear, her use of alien technical expressions concerning incidents attached to land tenure and to estates in land in England will not vitiate her intention, for touching as they do on "a question relating to immovable property in Guyana", namely, the validity of the deed of gift, it appears to me that that question must be construed in accordance with English common law principles applicable to personal property, i.e., to what we, in Guyana, call movable property. In view of the fact that there has been both delivery by immediate possession to the donee, and a *fortiori,* or conveyance by deed, 1 consider that the question of the deed's validity is undoubted as it must be looked at and construed simply as if the grantor intended to give away lot 29 to the appellant as her movable property; so that the use of technical expressions can properly be ignored as superfluous so long as the intention to make the gift is manifest.

This being the law, I must conclude that the deed of gift is valid, irrevocable, and effectual in conveying to the appellant all the grantor's right, "title", and interest in that deed, and that the appellant is entitled to a declaration in respect thereof. In the result, the executrix must specifically perform the deed; and in view of the fact that the appellant is already *prima facie* statutorily entitled to lot 29, the executrix must within 14 days complete the donee's title by passing transport which will confer on her full and absolute title to lot 29; failing which, the registrar is empowered to do so.

I would allow the appeal and set aside the decision of the learned trial judge.

Appeal allowed.

Solicitors:

Miss H. D. Eleazer (for the appellant).

Sase Narine (for the respondent).

MCBOOL SHAH

v.

THE PUBLIC TRUSTEE OF GUYANA
as the administrator of the estate of
MICHAEL KENNETH KHAN

[Court of Appeal (Persaud and Crane, JJ.A., Khan, J.A. (ag.)
May 4, 5, 12, 1971]

Contract—Specific performance—Total failure of consideration—Whether undue influence proved—Rescission of contract of sale and purchase—Costs.

This was an appeal from a judgment of the High Court in which the judge had dismissed a claim for specific performance of a contract of sale and purchase on the ground that the purchase price was not paid, and had granted two reliefs prayed for in the counterclaim, viz., rescission of the contract on the ground of undue influence, and an order for injunction restraining the plaintiff from trespassing etc. The judge awarded costs to the respondent (defendant) both on the claim and counterclaim. The facts are fully set out in the judgments of the court. The appellant challenged the findings of the trial judge on the ground that he erred in concluding that the purchase price had not been paid, and also erred in holding that the respondent had adduced evidence in proof of the allegation of undue influence. The evidence on this latter aspect disclosed that the deceased Khan was ailing with high blood pressure. He was not bed-ridden, and went out almost every day for his morning walks and would return after an hour or two. There was no evidence that he suffered from any mental weakness or that he was feeble. The trial judge had found, however, that the purchase price of the property was grossly inadequate.

HELD: (i) the issue of payment of the purchase price was a question of fact for the trial judge and there was sufficient evidence on which he

could justifiably have come to the conclusion that the purchase price had never been paid;

(ii) the appeal against the order refusing specific performance of the contract would be dismissed; the contract would be rescinded on the ground of failure to pay the purchase price;

(iii) the evidence adduced did not support the finding of undue influence and that finding ought not to stand;

(iv) the judgment on the counterclaim would be varied by striking out the grant of the injunction;

(v) the appellant would have to pay the full costs of the appeal but only half taxed costs in the court below.

Appeal dismissed.

G. M. Farnum, S.C., and *Miss C. Fung-A-Fatt* for the appellant.

R. H. Luckhoo and *C. A. F. Hughes* for the respondent.

PERSAUD, J.A.: This is an appeal from a judgment of the High Court in a matter in which the plaintiff claimed specific performance of an alleged agreement of sale of certain property belonging to one Michael Kenneth Khan (now deceased) and comprising 20-odd acres, and an order that the defendant in his capacity as the administrator of the estate of the deceased person pass transport to him. The action was dismissed in the court below.

In his statement of claim, the plaintiff alleges an oral agreement between himself and the deceased on or about the 9th August, 1960, when alleges the plaintiff, he paid to the deceased the sum of $500 in pursuance of the said agreement. He further alleges that on the 15th of August of the same year the deceased gave him and he took possession of the property, and that on the 8th November he paid the deceased the sum of $4,700 to complete the full purchase price of the property. That very day affidavits of vendor and purchaser were prepared in the chambers of the late Mr. S. Misir, a barrister-at-law, who himself issued the necessary instructions to the Registrar to advertise the transport of the said piece of land. The plaintiff also alleges that since the 15th of August, 1960, he has been in possession of the land and in fact had taken possession proceedings against one Chaitan who occupied a house there.

The deceased died on the 13th December, 1960, before the transport could have been passed, and the defence is a denial that any money was paid by the plaintiff to the deceased in pursuance of the agreement. It is further pleaded and contended that if the alleged contract of sale had been entered into between the plaintiff and the deceased, the latter was induced into entering into same by the undue influence of the plaintiff by reason of his sickness and infirmity.

By way of counter-claim, the defendant pleaded that the plaintiff was never given possession of the property as was alleged, that he was a

trespasser, and claimed damages for trespass, an injunction restraining the plaintiff from going on to the land, and an order for the rescission of the contract. The learned trial judge found against the plaintiff both on the claim and counter-claim. He dismissed the claim for specific performance of the contract as the purchase price had not been paid, and granted two of the reliefs prayed for in the counter-claim, viz., rescission of the contract on the ground of undue influence, one of the circumstances being what he had described as the inordinately low purchase price, and an order for injunction. He awarded costs to the defendant, both on the claim and counter-claim.

It is agreed on all sides that the onus of proving payment was on the plaintiff; and for so doing he relief upon the evidence of one Salamat Ally, clerk to the late Mr. Misir at that time, and of one Amjad Alli, whose evidence was to the effect that he had loaned the plaintiff by way of cheque the sum of $600 in order to make up the purchase price. Salamat Ally swore that the full amount of $5,200 was paid by the plaintiff to the deceased on the date of the swearing of the affidavits, that is, on November 8, 1960, and that a receipt was issued by the deceased to the plaintiff for this amount. This evidence is contrary to the allegations contained in the statement of claim (which I have set out above). There was no application for an amendment nor was the plaintiff himself called to produce the receipt which Salamat Ally claims he saw, or the receipt for $500 which the plaintiff alleges in his statement of claim he received, or to explain their absence. In my view, the trial judge was entitled, indeed, he was justified in rejecting Salamat Ally's evidence.

When Amjad Alli's evidence comes to be examined, it is seen that at the outset he spoke of having been given a pronote by the plaintiff for $600 a few days before the 8th November, 1960, but when it is discovered that he had opposed a mortgage by the plaintiff in August 1963 in respect of a balance of $250 on a pro-note for $600 dated 20th June, 1961, this witness then said that what the plaintiff had given him in 1960 was really a 'good' and not a pronote, but that he regarded this 'good' as a valid pro-note until he had spoken to his solicitor, Mr. Sase Narain, who advised him on the necessity of securing a properly executed pro-note. Mr. Sase Narain was called but did not recall giving such advice. Again, I feel that, in the face of these various contradictions and inconsistencies, the learned trial judge was entitled to reject this witness's testimony also.

The testimony of these two witnesses having been rejected, the plaintiff himself not having given any evidence, I conceive that it would have been difficult in the absence of any documentary evidence for the plaintiff to have discharged the onus of proof cast upon him to prove payment. It is true that the deceased's affidavit of sale speaks of having sold, and the plaintiffs affidavit of purchase speaks of having bought; but it is difficult to accept this in the absence of any other documentary evidence, having regard to the practice which obtains in this country with regard to the passing of transports, and to the fact that the plaintiff himself is a businessman

of some experience, that the full purchase price would have been paid before transport was passed. As early as March 17, 1960, the plaintiff had applied to the Guyana Credit Corporation for a loan of $5,000 for purposes of purchasing this very plot of land; at least, so he himself stated in the application for the loan. That loan was approved, but had not been taken up at the time the affidavits were sworn to, so that it could hardly be said that the plaintiff paid with the loan received from the Corporation.

Another document which merits some consideration is Ex. "E" which, be it noted, is dated 15th August, 1960—before the full purchase price was paid according to the plaintiff's case—in which the deceased says that he had sold this property to the plaintiff and had handed over possession to him. The most that this could mean is that he had agreed to sell, for according to the plaintiffs case, whether by his pleadings or the evidence led on his behalf, the full purchase price had not, on the 15th August, 1960, been paid. I do not feel that this takes the matter any further. The learned trial judge expressed the opinion that this document—Ex. "E"—was merely given to the plaintiff for the purpose of enabling him to bring possession proceedings against one Chaitan; but when one bears in mind that the possession proceedings referred to were launched in March 1962—long after the death of the deceased—this conclusion appears untenable.

What seems more probable is that the deceased, having agreed to sell the land, and being a man of failing health, must have decided to authorise the plaintiff to overlook the land for the time being, and with this in mind, put him in possession. It is also quite probable that the plaintiff himself required some proof of the existence of an agreement of sale in support of his application to the Corporation for the loan; and this latter probability would go a long way to ground the conclusion that up to the 15th August, 1960, there was no receipt in the possession of the plaintiff for any part of the purchase price, as is alleged in the statement of claim. If, contrary to the pleadings, but consonant with the evidence of Salamat Ally, the entire amount was paid on November 8, 1960, then the conclusion will be the same, that is, there could not have been a receipt in existence on the 15th of August.

In my view, the plaintiff has failed to prove payment of the purchase price, and this leads me to the conclusion that there was really no enforceable contract in existence. As it has been put by SKYNNER, C.B., in *Rann v. Hughes,* (1778) 7 T.R. 350n:

> "It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such an agreement is '*vadum pactum ex quo non oritur actio*'."

Therefore, I am of the opinion that the judge was right in refusing an order for specific performance, but on the ground that there was a total failure of consideration.

Having come to this conclusion, it seems to me unnecessary to decide the other questions which were canvassed before us, that is to say, whether undue influence was used upon the deceased to cause him to enter into the contract of sale; or whether the evidence of the witness Rahiman Naj as to what the deceased told her is admissible; or whether the evidence of Mr. Misir in the Magistrate's Court in the possession case against Chaitan could be received in evidence. If it were necessary to decide this last point, I support the conclusion that that evidence is *res inter alios acta,* and therefore inadmissible. But I would say that the state of the evidence suggests that while, perhaps, a finding of undue influence was unjustified, the plaintiff, not having paid the purchase price, but having certain documents in his possession, took advantage of the vendor's death, who, apart from Mr. Misir (also now dead), Salamat Ally (whom the judge did not believe), and the plaintiff himself, was the only other person who could have deposed as to what actually occurred. As I have had occasion to remark, the plaintiff did not give any evidence in this matter. In these circumstances, a court in the exercise of its equitable jurisdiction, would have no hesitation but to rescind a contract, if this were at all necessary.

I would dismiss this appeal and affirm the judgment of the court below, but would vary the learned judge's order somewhat. The appeal against the order refusing specific performance of the contract would be dismissed, but I feel that in the main action, the defendant would be entitled to half his taxed costs only fit for counsel. He raised two main issues at the trial, viz., failure of consideration, and undue influence. I do not feel that he ought to have succeeded on the latter plea. On the counter-claim, I agree with the proposed order as regards the order for injunction, but would make no order for costs. In my judgment, if the contract is unenforceable by reason of lack of consideration, payment of consideration now would not render it so, and therefore I doubt whether it is necessary to make an order for its rescission. If it is, then I agree with the order proposed by my brother Crane for the reasons he has given. The defendant would also be entitled to his costs in this court.

CRANE, J. A.: Perhaps the most remarkable feature about this case is that neither party to the alleged oral agreement in the statement of claim has testified. It was no fault of the plaintiff that he did not, because he was ill and could not attend court; nor of the defendant, he having died before transport became ripe for passing. This must have put the trial judge in a rather unenviable position of having to decide this case without the advantage of having seen either contracting party; but merely with the aid of the documentary exhibits and supporting witnesses.

The issues which arose from the plaintiff's claim for specific performance and the defence and counterclaim were these:

ON THE CLAIM

(i) Did the plaintiff/appellant prove payment of the sum of $5,200, the purchase price of the property to the deceased, Michael

Kenneth Khan, the burden of which lay on him to do so by virtue of the denial in the defence?

(ii) Did the defence adduce a sufficient *prima facie* case of undue influence requiring the appellant to discharge the onus of proof by showing the contrary?

ON THE COUNTERCLAIM

(i) Who was in *de facto* possession of the property in dispute—the appellant or the defendant? A specific finding by the trial judge on this issue was essential in view of the defence to counterclaim which maintained that the appellant was put in possession of the property by the late Michael Kenneth Khan in pursuance of an agreement of sale.

(ii) Ought an injunction to be granted restraining the appellant, his servants and agents from entering upon, interfering with and otherwise disturbing the defendant in her occupation of the property and from acting to her prejudice in her possession of the same?

(iii) Ought damages to be granted for the alleged trespass and conversion of the property claimed? Or,

(iv) Should, alternatively, the agreement of sale and purchase be set aside?

On the claim, the trial judge had no difficulty in concluding that the purchase price for the property had never been paid, after having seen and heard the witnesses, Salamat Ally and Amjad Alli, whose testimony was discredited, that the sum of $5,200 was paid at one and the same time, and I see no reason to fault that finding. While both Salamat and Amjad were in agreement that the $5,200 was paid by the appellant in November 1960, at the chambers of Mr. S. Misir, Barrister-at-Law, with the aid of a cheque for $600 for which a pro-note was given by McBool Shah, the judge disbelieved Amjad Alli that he lent the appellant $600 in exchange for a pro-note in November 1960. The judge saw the witnesses; he heard Amjad Alli's explanation about having been first given a "good" in November 1960 for the $600; he heard how he was advised by his solicitor, Mr. Sase Narain, to obtain a pro-note instead of the "good" since it would enable him to sue on it; and also the lawyer's explanation. There was also the observation made by the judge that whereas the oral agreement in the statement of claim alleged payment of a deposit of $500 with the balance of $4,700 before passing of transport, and the obtaining of a receipt therefor, no receipt was, in fact, produced. The pleadings were, in fact, in conflict with the oral testimony, for if indeed Salamat Ally had seen the deceased sign a receipt for the full purchase price in Mr. Misir's chambers, this receipt ought to have been produced if it really existed. So that I can find no fault with the judge's conclusion that, ". . . it could not be successfully argued before me that the plaintiff had discharged the onus placed upon him on a

balance of probabilities that he had paid the purchase price for the said property".

On the second issue on the claim, I consider that the trial judge ought to have accepted the submission of counsel for the plaintiff that there had not been adduced by the defendant a sufficiency of facts in the nature of particulars of circumstances and conditions surrounding the transaction alleging undue influence on the plaintiff's part to put on him the onus of rebutting that defence. Admittedly, the deceased was 85 years old and in a poor state of health, and even if the fact was alleged that the appellant knew this, it was not affirmatively shown that his poor health affected his mind or that the plaintiff took advantage of such mental weakness as alleged. Again, though there is the evidence of Isaac Narine that the true value of the property in 1960 was $13,400, there is evidence that Khan's executrix swore to its value for estate duty purposes at $6,900 in June 1961. Certainly, she must have had a valuation before swearing, so how can inadequacy of price be now urged as a factor showing *prima facie* evidence of undue influence? And how can the finding of the trial judge be justified that from the physical and financial condition of the deceased and the inadequacy of the purchase price that the bargain was a hard and unconscionable one? I am, therefore, forced to the conclusion that the trial judge's finding of undue influence on the second issue of the claim must be set aside.

On the counterclaim, all that was said by the judge was:

> "There will also be judgment for the defendant on the counterclaim and the Agreement of Sale made on 9th August, 1960, must be rescinded in accordance with paragraph (c) of the counterclaim. It is further ordered that an injunction be granted in terms of paragraph (a) of the relief of the said counterclaim".

The learned judge, however, did not say which of the parties he found to be in possession of the property in dispute, although both were claiming to be in possession of it. This was why I said earlier that a specific finding on that issue was essential. However, I think it is right to conclude that he must have found that the defendant was the party in possession seeing that he granted her an injunction in terms of para. (a) of her counterclaim in which she reiterated her claim to be in possession and occupation of the property. It is my view, however, that the grant of the injunction cannot be sustained "because there was not a scintilla of evidence led in support of the grant of it. It is to be observed that not one of the allegations of the several acts of trespass and conversion made by the defendant and the unlawful and violent incursions into her property have been proved. Rather, the evidence pointed the other way: it is the plaintiff/appellant who has shown that he is entitled to possession by virtue of the document given him by the deceased and dated the 15th August, 1960 (Ex. "E"). This document has not been challenged. The injunction must, therefore, be set aside. likewise, it must follow, on the failure of the defendant to prove possession of the property, her claim to damages in her counterclaim must fail.

On the counterclaim, therefore, the only measure of relief to which the defendant is entitled is that which she made in the alternative, i.e., rescission of the agreement of purchase and sale. In my view, the defendant is entitled to this remedy, not on the ground of undue influence which was the ground on which the trial judge obviously granted it, but on the ground of the appellant's non-performance of a condition precedent which went to the root of the contract and brought about a total failure of consideration. I refer to the appellant's failure to pay the purchase price of the property. In my view, not only does the evidence show, in this respect, a failure to prove payment of the purchase price or part thereof, but it shows that payment has positively not been made. Accordingly, if a plaintiff sues for specific performance, he must, as was said by ARDEN, M.R., in *Milward v. Earl Thanet,* (1801) 5 Ves. 720n, prove himself "ready, desirous, prompt and eager" to perform all essential obligations under the contract. Payment of the purchase price is one of the conditions precedent to the right of a plaintiff to demand performance of the contract; so that for a plaintiff to allege payment of the purchase price when, in fact, he is found never to have paid it, that is a matter which goes to the root of the contract and entitles the defendant to say, "Since you have broken your part of the contract, I shall not perform mine, and I rescind the contract accordingly".

In *Australian Hardwoods v. Railway Commissioners,* (1961) 1 All E.R. 737 at p. 742, Lord RADCLIFFE in the Privy Council advised:

> "A plaintiff who asks the court to enforce by mandatory order in his favour some stipulation of an agreement which itself consists of interdependent undertakings between the plaintiff and defendant cannot succeed in obtaining such relief if he is at the time in breach of his own obligations".

I must, therefore, agree that the respondent is entitled to the following orders: that the appeal be dismissed and the contract of sale and purchase be rescinded; that judgment on the counterclaim be varied by striking out the grant of the injunction, and that the appellant do pay full costs in the Court of Appeal, but only half taxed costs in the trial court.

KHAN, J.A. (ag.): This appeal concerns the purchase and sale of a parcel of land described as lot 10, part of Plantation Richmond, on the Essequibo Coast. Lot 10 comprises about 20 acres of land and a building referred to as the "Manor House" in the pleadings.

The vendor, Michael Kenneth Khan, who lived at 18 North Street, Georgetown, obtained a judicial sale transport for the property in question in 1947 after he had caused same to be put up at parate execution for arrears of rates—a practice often used in this country by occupiers of land to obtain a clean title at a nominal fee in order to save the heavy fees entailed in the normal process of obtaining transport to land.

Khan was a civil servant who worked as a clerk at the Public Trustee and Crown Solicitor's office, Victoria Law Courts, Georgetown. He retired

in the forties with a pension, and thereafter did clerical work at the Police Canteen, Eve Leary.

There was no issue of his marriage. A step-son, Buller Carl Khan, lived with him at 18th North Street. The only other occupant of the house was his domestic help, Nora Wilson, who occupied a back room.

In 1959 his health began to fail. He was around 80 years old and was ailing with "blood pressure".

Sometime before the 17th March, 1960, Khan entered into negotiations with the appellant, McBool Shah, for the sale of the property, lot 10, Plantation Richmond. The purchase price was $5,200. The appellant, not having the cash to purchase the property, made application to the Credit Corporation on the 17th March, 1960, for a loan of $5,000 (five thousand dollars) to enable him to effect the purchase. The application disclosed that the appellant was then 50 years old, a butcher by occupation, and owner of a freehold property at Henrietta, Essequibo, valued at $8,000 (eight thousand dollars). He offered this freehold property and his life insurance policy with a surrender value of $2,000 (two thousand dollars), together with the property he was seeking to purchase from Khan, as security for the loan.

It is the case of the appellant that in pursuance of an oral agreement of purchase and sale between Khan and himself for the said property, he paid Khan on the 9th August, 1960, the sum of $500 (five hundred dollars) on account of the purchase price of $5,200 (five thousand two hundred dollars) and obtained a receipt therefor containing particulars of the said agreement. The balance of the purchase price was to be paid before the passing of the transport. Six days later, by a document dated 15th August, 1960, Khan gave possession of lot 10, Plantation Richmond, to the appellant, and on the 8th November, 1960, he completed the purchase by paying Khan the balance of the purchase money—$4,700. Consequently, both of them swore the necessary affidavits, and the property was duly advertised in the "Official Gazette" for the passing of transport on the 16th December, 1960. Unfortunately, Khan died on the 13th December, 1960, intestate. Khan's only surviving sister, Bibi Khodijutal Kubra, applied for Letters of Administration of Khan's estate and this was granted to her in November 1962. The property in question was valued for estate duty at $6,900.

In March 1962, before the grant of Letters of Administration, the appellant took out proceedings at the Anna Regina Magistrate's Court for possession of the 'Manor House' against the occupant, one Chaitan, called Seymore. At that hearing, the appellant gave evidence of his purchase of the property and called Mr. S. Misir, a barrister-at-law, who had prepared the conveyancing papers, as a witness. The defendant Chaitan raised the defence of being in undisturbed possession for over 30 years, *nec vi, nec clam, nec precario.* The magistrate declined jurisdiction.

Since the grant of Letters of Administration to Kubra, the appellant made repeated demands on her as administratrix to complete the sale by passing transport. This the administratrix refused to do, and, in consequence,

the appellant filed the present action in March 1963 in which he claims an order for specific performance of the agreement of sale.

In 1964 one Osman and his sister, Bibi Rahiman, nephew and niece of the deceased, applied to the court for the removal of the administratrix Kubra. This application was duly granted and the Public Trustee was substituted in place of Kubra as administrator of the estate of M. K. Khan, deceased.

In an amended statement of defence, the Public Trustee, as administrator, denied that there was ever any oral agreement of sale between the plaintiff and the deceased, and specifically denied that any monies were paid to the deceased as alleged. The defendant further alleged that if the alleged contract of sale was entered into between the plaintiff and the deceased, the latter was induced into entering the sale by the undue influence of the plaintiff and the contract ought to be set aside. The defendant also counter-claimed for damages for trespass, and, alternatively, rescission of the contract.

At the trial in the court below, it was agreed that the onus of proving a valid sale was upon the plaintiff and that the onus of proving that there was undue influence exercised over the deceased was upon the defendant.

On the first issue, the plaintiff did not give evidence, but relied on the vendor's and purchaser's affidavits, the notes of evidence of Mr. Misir, Barrister-at-Law—he having died before the action came on for hearing—and two witnesses, viz., Salamat Ally and Amjad Alli.

The purchase price was alleged to have been paid to the deceased in the presence of Salamat Ally and Mr. Misir at the latter's chambers in Croal Street. Amjad Alli was not present at the time of payment, but alleged that he had loaned the plaintiff $600 by way of a cheque to complete the purchase price, and that he subsequently saw the deceased with the cheque. The defence led evidence to show that the plaintiff's application to the Credit Corporation for a loan of $5,000 to purchase the property was granted in October 1960. The plaintiff accepted the loan on the 8th November, 1960—the same day the affidavits were sworn to at Mr. Misir's chambers—but he never uplifted the loan.

The learned trial judge, after considering the evidence (bearing in mind that it was a claim against the estate of a deceased person), rejected the evidence of Salamat Ally as to payment of the purchase price as untrue, and found that Amjad Alli's loan of $600 to the plaintiff was in respect of another transaction which took place in June 1961. The learned trial judge also rejected the admissibility of the notes of evidence of the late Mr. Misir in the possession proceedings in the Magistrate's Court as *res inter alios acta*, and found that the purchase price was never paid.

On the consideration of the second issue, the learned trial judge found that undue influence was exercised over the deceased by the plaintiff, and

dismissed the plaintiffs claim with costs, and gave judgment on the defendant's counterclaim and set aside the contract.

From the learned trial judge's decision the plaintiff (appellant) appeals to this court on the several grounds set out in his grounds of appeal.

With respect to the first issue, it is the submission of Mr. Farnum that the learned trial judge erred in law in rejecting the notes of evidence of the late Mr. S. Misir, Barrister-at-Law, in the possession proceedings before the magistrate between the appellant and the occupant of the 'Manor House'—one Chaitan called Seymore—as *res inter alios acta.* Mr. Farnum contended that the evidence of Mr. Misir in those proceedings was admissible, uncontradicted and cogent proof that the appellant had paid the purchase price. He relied on the rule of evidence, as stated in *Phipson on Evidence,* 10th Ed., at p. 541, para. 1423. The rule is stated thus:

> "At common law, testimony given by a witness in a civil or criminal proceeding is admissible in a subsequent (or in a later stage of the same) trial in proof of the facts stated, provided: (1) that the proceedings are between the same parties or their privies; (2) that the same issues are involved; (3) that the party against whom, or whose privy, the evidence is tendered had on the former occasion a full opportunity of cross-examination; and (4) that the witness is incapable of being called on the second trial."
>
> "Where any of the conditions above-mentioned is absent the evidence will be rejected either as *res inter alios acta,* or it is sometimes considered, as hearsay, since, even where the oath and right to cross-examine are present, yet the benefit of the demeanour of the witness is lost on the second trial".

Mr. Farnum contended that all the conditions were satisfied. The record of those proceedings was tendered and on careful examination shows that the parties to the possession proceedings were the appellant against one Chaitan, called Seymore, who appeared in his own right and not in any representative capacity. The defendant raised the defence that he was in undisturbed possession of the 'Manor House' for over 30 years *nec vi, nec clam, nec precario.* The contention of the defendant before the magistrate was that he was claiming the property as his own as against the claim by the appellant that the defendant was his tenant. It is to be observed too that at the time of those proceedings, Letters of Administration had not been granted to the estate. This was granted four months later to Bibi Kubra. The magistrate found that the claim, although *prima facie* one for possession, involved title to immovable property, and declined jurisdiction. The defendant in the present action was never a party to those proceedings and, indeed, could not have been because there was no personal representative of the deceased's estate at that time. It is therefore pellucidly clear, to my mind, that the proceedings were not between the same parties or their privies, and the very first condition was not satisfied. The evidence is, therefore,

res inter alios acta and is inadmissible. The learned trial judge so ruled and, in my view, rightly so.

Mr. Farnum further contended that the learned trial judge misdirected himself and drew wrong inferences in considering the evidence of the appellant's witness, Amjad Alli, and that there was also misconception of the evidence of Mr. Sase Narain, whose evidence the learned trial judge treated as a denial, whereas Mr. Narain stated, "I did not recall".

On consideration of Amjad Alli's evidence, the learned trial judge found that Amjad Alli did make a loan to the appellant, but the loan was in respect of another transaction which he sought to transpose in connection with the sale of the property in question. This finding was based on the date of the loan stated in the notice of opposition as June 1961 and not November 1960, stated earlier by Alli.

Faced with the later date on the notice of opposition, Amjad Alli then explained that he had forgotten the details of the transaction, but since he gave his evidence he went to his solicitor, Mr. Sase Narain, and it was Mr. Narain who refreshed his memory that the first document he (Alli) got from the appellant was a 'good' and not a pro-note, and it was he (Mr. Narain) who advised him to get a pro-note. He did so, and that accounted for the date on the note being over six months later than the date of the transaction. Amjad Alli's evidence, if believed, palpably indicates that Mr. Narain had recollected a matter nearly nine years after. Alli's explanation was based solely on what Mr. Narain told him about the 'good' and the pro-note after he (Alli) had given evidence on the 9th January, 1970. Mr. Narain was called immediately, and in the course of his evidence stated:

> "My recollection is that Mr. Alli did come to me some time in connection with a loan to Mr. McBool Shah. My recollection is hazy. I remember I filed Ex. "L". I cannot recall advising him to have a pro-note made. I do not recall any talk about a 'good' or 'pro-note'. I do not recall any talk of an unstamped document. Mr. Amjad Alli did see me on several occasions this year 1970. This morning I saw him concerning this matter".

In considering the evidence of Amjad Alli in the face of Mr. Narain's evidence, the learned trial judge stated: "In the face of this denial by Mr. Narain, Solicitor, I cannot possibly accept the evidence of Mr. Amjad Alli and Mr. Salamat Ally. . . ."

Mr. Farnum's contention that Mr. Narain never denied he had refreshed Amjad Alli's memory but said he did not recall, is a true statement on the record. I agree with Mr. Farnum that the words "I do not recall" do not amount to a denial simplicator! But when considered in juxtaposition with Mr. Amjad Alli's evidence, it can only mean that Amjad Alli was not speaking the truth when he said that Mr. Narain refreshed his memory about the 'good' and the pro-note, because if Mr. Narain was able to do so nine

years after the transaction, he was bound to recall what he is alleged to have said to Amjad Alli on the same subject-matter just four weeks after!

The learned trial judge, having accepted Mr. Narain's evidence, the logical inference to be drawn is that Amjad Alli fabricated the explanation, not believing that Mr. Narain would have been called by the court.

Salamat Ally's evidence was at variance with the appellant's statement of claim and the handing of the $600 cheque.

At the close of the plaintiffs case, the evidence adduced did not support the statement of claim which was never amended to accord with the evidence led. It appears to me that it was imperative, in the situation which presented itself, for the plaintiff to go into the witness-box and support the averments in his statement of claim. This he failed to do.

Mr. Farnum also contended that the evidence of Bibi Rahiman was inadmissible; further, she was a self-confessed liar, having sworn falsely in an affidavit in the course of her application for the removal of the executrix. She also gave evidence in the nature of a declaration of a deceased person against interest, and this was clearly a declaration not against interest, but in the interest of the deceased, and inadmissible. The learned trial judge stated in his judgment *inter alia:*

> "Quite apart from the evidence of Rahiman Naj it could not be successfully urged before me that the plaintiff had discharged the onus placed upon him on a balance of probability that he had paid the purchase price for the said property . . . plus the fact that the plaintiff had applied to the Guyana Credit Corporation for a loan of $5,000 on 17th March, 1960, which was approved in October 1960, and on the 8th November 1960 the plaintiff wrote accepting the loan but did not take it up, yet on that very date he alleges that he paid either $4,700 or $5,200 to the deceased indicates that no money was paid . . . . On the evidence I must therefore come to the conclusion that no money was ever paid to the deceased in respect of the purchase price of the property at Essequibo when it was sold to the plaintiff.

The learned trial judge, having excluded the evidence of Rahiman Naj from his consideration, it appears unnecessary to embark on an academic exercise to determine whether the alleged declaration of the deceased was admissible or not. The issue of payment was, in the final analysis, a question of fact for the learned trial judge, and there was sufficient evidence (apart from Rahiman's evidence), coupled with the surrounding and attendant circumstances, the cumulative effect of which pointed unequivocally to the inherent improbability that the purchase price was paid.

The second issue to be considered is the question of undue influence. It is the submission of Mr. Farnum that there is not a tittle of evidence to support the finding of the learned trial judge that the plaintiff had exercised undue influence over the deceased in procuring the contract of sale of the property in question.

In his judgment, the learned trial judge, after dealing with the principles to be borne in mind in considering the question of undue influence, made the following finding:

> "The evidence led by the defendant as to the illness and condition of the deceased during 1960 was unrebutted and it must be accepted that the deceased in that year was suffering from high blood pressure and from the state of his bank book required financial assistance. It is clear that the deceased, an old man of 84 had reached the stage when he could no longer manage the property in Essequibo, and was tired, sick and in need of financial assistance and as a result decided to sell the property for a purchase price which was grossly inadequate according to the evidence of Isaac Narine, which I have accepted. It is true that this gentleman did not inspect the property in 1960 and did so in 1969 in order to give the 1960 valuation but nevertheless he was a man who commanded some respect in the country; well acquainted with properties on the coast and often visited the property. There was no evidence to the contrary on this aspect of the matter and Narine's evidence must be accepted which would mean that the purchase price of $5,200 was a little more than one-third of the true value of the property. The purchase price was therefore inadequate and the bargain a hard and unconscionable one.
>
> "When all the circumstances as to the condition of the deceased, both financial and physical, and the inadequacy of price, the absence of independent advice, i.e., one solicitor acting for both parties are considered, I must hold that the defendant has shown affirmatively, circumstances from which undue influence was exercised over the deceased and the transaction having been impeached, the onus is then thrown on to the plaintiff to show that the purchase by him was fair, just and reasonable. This he failed to do and the transaction must be set aside".

It is common ground that the onus is on the defendant to prove affirmatively that there was undue influence exercised by the plaintiff over the deceased. The evidence on the record discloses that the deceased was ailing with high blood pressure. He was a widower and a pensioner. He was never bedridden. He went out almost every day for his usual walks in the mornings after breakfast and would return after an hour or two. According to the death certificate, he was 78 years old. He was ailing slightly during 1959. In April 1960 he bled from his nose. During 1960 he appeared to be the same way. Nora Wilson, who served him for half a century as a domestic help, stated that she did not notice anything peculiar about the deceased. She declared: "He used to still go out up to shortly before his death. He would go out walking. He would walk slowly. He went out by himself. There was no evidence that the deceased suffered from any mental weakness or that he was feeble. He was educated and not unschooled in matters of purchase and sale.

The deceased's bank account disclosed that at the end of 1958 he had a bank balance of twelve hundred dollars ($1,200) and in December 1960 a balance of $1,399. The learned trial judge found that the deceased was in financial need. The evidence does not support this finding. The deceased was the owner by transport of the property in which he lived and was receiving rents from another building on the said lot in North Street, apart from the Essequibo property. Both properties were free from mortgages and other debts. Indeed, the statement of Assets and liabilities—Ex. "H"—discloses that his indebtedness amounted to only $45. Added to this healthy financial position, he received a pension and had no financial obligations to meet apart from his personal domestic needs. There was evidence also that he owned jewellery to the value of over $600.

The learned trial judge also found that the purchase price of the property in question was grossly inadequate according to the evidence of Isaac Narine, which evidence he accepted and stated: "There was no evidence to the contrary on this aspect of the matter". On this aspect it appears that the learned trial judge inadvertently overlooked the affidavit of the Statement of Assets and Liabilities—Ex. "H"—sworn to by the then defendant/administratrix Bibi Khodijutal Kubra on the 27th day of June, 1961. The value of the property in question was then fixed at $6,900 (six thousand nine hundred dollars). That valuation was submitted by the defendant to the Commissioner of Inland Revenue as a true and fair value of the property in question at the time of the death of the deceased. This was accepted by the Commissioner as a true and fair value of the property in December 1960, which time coincides with the time of the sale. It is therefore untenable for the said defendant to now impeach the said affidavit. The maxim '*Omnia presaesumuntur rite et solemniter esse acta*' ought to be relied upon on this issue.

The purchase price of the property is $5,200. The valuation submitted to the Commissioner was $6,900, an amount of $1,700 less. On this issue, Lord ELDON stated *inter alia* in *Coles v. Trecothick,* (1804) 9 Ves. p. 234 at p. 246:

> "Unless the inadequacy of price is such as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance".

In *Callaghan v. Callaghan,* (1844) 8 Cl. & Fin. 374, it was held by the House of Lords that mere inadequacy of price is not an objection to granting specific performance, unless "it is so great as to prove either fraud, or that the parties could not have intended to execute the contract". In the light of the defendant's own affidavit—Ex. "H"—can it be truly said that the purchase price was grossly inadequate?

The evidence shows that the deceased was indeed a sick, old man, but not a poor and feeble man! He was certainly not mentally weak and not in need of any financial assistance. It appears, too, that he was active up to

shortly before his death. After swearing to the purchaser's affidavit on the 8th November, 1960, he was called upon to swear a further affidavit as vendor and he did so on the 16th of November. On the 28th November, 1960, he swore again a supplementary affidavit and on the 29th November—14 days before he died—another supplementary affidavit before Mr. V. C. Dias.

This is in accord with Nora Wilson's evidence that "the deceased used to still go out up to shortly before his death".

Finally, it is alleged in para. 10(f) of the statement of defence that "the deceased was given no opportunity by the plaintiff to obtain independent advice as the transaction was rushed through with indecent haste". The evidence shows clearly to the contrary. The negotiations for the sale commenced before the 17th March, 1960, when the plaintiff applied to the Credit Corporation for the loan of $5,000. That was more than eight months before the swearing of the vendor's affidavit.

The respondent's counsel, Mr. R. H. Luckhoo, who conducted his case with great ability and proper candour, was constrained to concede that there was no evidence of "indecent haste". I must, therefore agree with counsel for the appellant, Mr. Farnum, on this second issue that the evidence does not support the finding of undue influence by the learned trial judge and ought not to stand.

I have earlier indicated my concurrence with the finding of the learned trial judge on the first issue. In the final result, I would dismiss the appeal, and affirm the trial judge's order in dismissing the plaintiff's action. I would award the defendant only half of his taxed costs fit for counsel in the court below. I would also affirm the Order of the trial judge on the counter-claim save and except the relief for injunction asked for in para. 20(a), but would make no order as to costs on the counter-claim. The appellant must pay the respondent's costs of the appeal.

Appeal dismissed.

Solicitors:—
Cameron and Shepherd for appellant.
D. Dial for respondent.

SASE NARAYAN SHARMA *v.* PARBATIE

[High Court (Gonsalves-Sabola, J.).

April 22, 28, 29; May 15, 19, 1971]

Landlord and tenant—Agreement for a lease—Rent Control—Unfurnished business premises—Premises furnished as a boarding house—Change of user of premises—Standard rent—Increased rental—Whether the letting caught by the Rent Control Ordinance Cap. 186 [G] ss. 2, 3, 7 (*23*), *15.*

Statute—Construction—Construction of Statute in conformity with the common law—Rent Control Ordinance Cap. 186 [G].'

The plaintiff sued the defendant for $1,400: as two months' rent due under an agreement for a lease providing for the payment of $700: per month. The defendant defended the claim on the basis of an operative standard rent. It was urged on his behalf that the addition of furniture to unfurnished premises constituted an improvement within the contemplation of S. 15 of the Rent Control Ordinance and that it was that section which would empower the magistrate to add to the standard rent an amount in respect of the furniture added. The premises had originally been rented as unfurnished business premises by the Estate of Caetano to Phang in 1955 at a monthly rental of $157.39. In 1960 the premises were sold to Adjodha (now deceased) of whose estate the plaintiff was executor. After the original tenant's tenancy had come to an end Adjodha furnished the premises as a boarding house and it was in that character that the agreement for a lease was drawn up for rental to the defendant by the plaintiff (executor) in 1967. The 1967 agreement was superseded by another agreement in 1969 between the parties. The plaintiff contended that the standard rent of the premises should be determined by the first letting of those premises as furnished premises. It was also submitted that the provision of furniture by the landlord took the premises out of one statutory category, namely unfurnished premises, into another statutory category, namely furnished premises.

HELD: (i) on the premises being converted from unfurnished premises to furnished premises the standard rent would be the rent at which the premises were first let furnished;

(ii) the premises rented to Phang was an empty building, whereas the premises rented to the defendant was a going business concern, something qualitatively different from the premises in its former state;

(iii) the question was not whether the premises were within the Ordinance but whether the letting was, and in the case the letting was not caught by the Ordinance and the plaintiff's claim succeeded.

Judgment for the plaintiff.

E. A. Gunraj for the plaintiff.

M. Fitzpatrick for the defendant.

SASE NARAYAN SHARMA *v.* PARBATIE

GONSALVES-SABOLA, J.: The Plaintiff in his capacity as executor of the Estate of his father Ajodha has sued the defendant for $1,400: being rent due from the defendant for the months of January and February, 1971, under an agreement of lease executed on 1st October, 1969.

The defendant admits the tenancy and that the rent sued for was not in fact paid to the plaintiff but contends that there is no recoverable rent in arrears. The defendant says that the contractual rent was so grossly in excess of the standard rent of the demised premises that she has now over-paid, under the lease, an amount more than $6,000: in excess rent. The defendant claims entitlement to a set off.

It is as clear as daylight that the plaintiff's action must fail if there exists in respect of the letting of the demised premises in question an operative standard rent as claimed by the defendant. But first, let us place the premises in their historical perspective in the light of the facts as found by me.

In 1955 or 1956 the demised premises were let as unfurnished business premises by the Estate of J. G. Caetano to one Joseph Phang, known as Budsy Phang, at a monthly rental of $157.39. Up till the time his tenancy of the said premises ended in 1964 Phang carried on therein a betting business known as "Sports and Games". The Estate of J. G. Caetano sold the premises to Ajodha (deceased) in the year 1960. After Phang's tenancy came to an end, the user of the premises underwent a metamorphosis. Ajodha furnished the premises as a boarding house and employed the defendant as one of his servants therein. Ajodha died in 1967 and his executor, the plaintiff, entered into an agreement of lease with the defendant on 20th September, 1967, which was superseded by another agreement of lease executed on 1st October, 1969. The two documents were admitted in evidence as Exs. "B" and "A" respectively.

Except for one room measuring about 10′ x 6′ and known as the radio room, the premises rented to Phang were identical with those rented to the Defendant. The case was argued before me on the footing that the exception of that room from the demised premises was a matter of insignificance for all practical purposes and I accordingly ignore that room. The two leases Exs. "B" and "A", are identical in terms except that the rental under Ex. "B" is $800: per month, whereas that under Ex. "A" is $700: per month. The claim before me is one in contract and it is vital to appreciate precisely what are the terms of the agreement which bind the plaintiff and the defendant together in the relationship of landlord and tenant. In the view which I will ultimately take of this case those terms will play a decisive part. A high level of debate on several aspects of rent restriction law was achieved by Counsel during the course of the arguments, but having regard to the approach that I will take to the determination of the case it will not be necessary for me to allude to all of them.

Mr. Fitzpatrick, Counsel for the defendant, made a number of intelligent submissions which reflected a clear insight into the ramifications of the Rent Control Ordinance, and projected for my consideration and judgment some really vital issues in this case. I think it convenient that I should refer to some of his salient propositions. It was submitted:

(1) That on the authority of *Keane v. Clarke* (1951) 2 All E.R. 187 the standard rent of the demised premises was $157.39 which was the rent on the first known letting, and no rent in excess thereof was recoverable, unless the landlord established the destruction of the identity of the premises rented to Phang:

(2) That in Guyana a change of identity of premises could arise in only one of two ways—either by a structural alteration of the premises so substantial that it created a new entity, or by a change of user of the premises; such a change of user must be a change of user from one statutory class of premises to another statutory class—for example . . . a change from user as a dwelling house to user as a commercial building or vice versa. Any change of user that did not cross one of the statutory boundaries was not a sufficient change of user to destroy the standard rent. In particular it was submitted that where the premises were business premises a change merely in the type of business carried on therein was incapable by itself of amounting to a change of user.

I was referred to the case of *Ng Yow v. Wrong* (1950) L.R.B.G. 161 as authority for the proposition which I accept, that the contract of tenancy is decisive as to the user of premises.

(3) That the addition of furniture to unfurnished premises was not sufficient *per se* to change the identity of the premises so that the standard rent is destroyed.

In England prior to the Furnished Houses Rent Control Act (1946) the supply of furniture, substantial furniture, to unfurnished, and therefore protected tenancies had the effect of placing the premises outside of rent control and not of changing identity. Therefore, the next purportedly quite logical argument pressed upon me was that in Guyana where furnished premises are controlled, the addition of furniture to unfurnished premises does not change the identity of the premises and the landlord cannot therefore, *ex mero motu,* increase the standard rent on the ground of addition of furniture. What the landlord must do it was submitted, was to apply to the Magistrate to have the maximum rent assessed and fixed, in order to legitimise an increase in rent justified by the addition of furniture.

It was put forward that subsequent addition of furniture to unfurnished premises was an improvement under s. 15 of the Rent Control Ordinance and that it was that section that would empower the magistrate

to add to the standard rent an amount in respect of the furniture added. Mr. Fitzpatrick to be fair to him, was helpful enough at a later stage to concede that he was without authority for that proposition and I may add that this court would require authority for it.

Mr. Gunraj on this point fittingly replied that there would have been no need for apportionment under s. 7(23) of the Ordinance if furniture qualified as an improvement under s. 15.

Counsel for the plaintiff advanced the straight forward submission that the standard rent of the premises let to the defendant should be determined by the first letting of those premises as furnished premises. He referred to a passage of the text at p. 288 of the 8th Edition of the *Rent Acts by Megarry* in support of his contention that in ascertaining the relevant standard rent of premises one has to look for the first letting of the right kind—in this case a furnished letting, and that would be $800: on the strength of Ex. "B", the agreement of lease which originated the first letting of the premises in their present character. It was also submitted for the plaintiff that the provision of furniture by the plaintiff landlord took the premises out of one statutory category, namely unfurnished premises, into another statutory category, namely furnished premises.

It seems to me that the key to the solution of the problem lies in the construction of the term "standard rent". By s. 2 of the Rent Control Ordinance".

> "standard rent" means the rent at which a dwelling house, public or commercial building or building land was let on the 3rd September, 1939, or where such premises were not then let, the rent at which they were let before that date or in the case of their being first let after that date, subject to the provisions of sub-s. (2) of s. 7, the rent at which they were first let:
>
> Provided that in the case of a dwelling-house, public or commercial building or building land let at a progressive rent payable under a tenancy, agreement or lease, the maximum rent payable under that tenancy, agreement or lease, shall be the standard rent:"

S. 3 provides that the Ordinance, shall apply, *inter alia,* to all public or commercial buildings whether let furnished or unfurnished. Again, the term "Let furnished" means let at a rent which includes payment for the use of furniture. I agree with Mr. Fitzpatrick's submission that the standard rent of a furnished building to which the Rent Control Ordinance applies is the first contractual rent inclusive of payment for the furniture. But then I go on to uphold Mr. Gunraj's submission that the standard rent of premises which have been converted from unfurnished premises to furnished premises is the rent at which the premises were first let furnished—in the instant case $800: S. 7 (23) fortifies

me in my opinion that the standard rent of a furnished building can be different from the standard rent of the same premises unfurnished. I reason it this way—that subsection imposes a duty on the magistrate to "apportion and separately assess and fix the maximum rent (other than for the use of the furniture supplied by the landlord . . .")—I emphasise the words in parenthesis—"and a reasonable payment for the use of the furniture". "Maximum rent" means standard rent plus permitted increases under s. 15. Since sub-s. 23 deals with a rental that already includes payment for the use of furniture the words in parenthesis after the term "maximum rent" namely ("other than for the use of the furniture supplied by the landlord . . .") have the significance of excluding from the maximum rent the payment for furniture which would otherwise have been caught. That payment having been excepted from the maximum rent is at once tacked back on in the concluding words of the subsection—"and a reasonable payment for the use of the furniture as aforesaid". A payment for furniture is not a permitted increase under s. 15. Let us put it in the form of a quasi mathematical equation—if maximum rent is equal to standard rent plus permitted increases under s. 15, and maximum rent includes payment for furniture but permitted increases do not include payment for furniture, then necessarily standard rent includes payment for furniture; *quod erat demonstrandum.* The corollary of all this is that the standard rent of premises let furnished is virtually by definition not the standard rent of the same premises previously let unfurnished.

I, however, would like to put my judgment on another basis. The demised premises were formerly let empty to Phang. They were subsequently let to the defendant not merely furnished but as a going boarding house business concern. In other words whereas Phang got building alone, defendant got building plus furniture plus good-will of a business. Indeed the Rent Control Ordinance would be countenancing a strange equity and a strange justice if its provisions meant that the present landlord was not free to contract for an increased rental. This proposition so runs counter to the Common Law freedom to contract enjoyed by all persons who are *sui juris* that a court will scrutinise the Ordinance many times over for the clearest express provision to that effect. Statutes are not presumed to make any alteration in the common law, further or otherwise than they do expressly declare. As BYLES, J. said in *R. v. Morris* (1867) L.R. 1 C.C.R. 90 at 95: "It must be remembered that it is a sound rule to construe a statute in conformity with the common law rather than against it, except where, or insofar as the statute is plainly intended to alter the course of the common law." Mr. Fitzpatrick contended that the spirit of the Ordinance and the intention of the Legislature should prevail and that the court should see the Ordinance as an organic whole. All of this is impressive and in proper circumstances, applicable, perhaps even decisive, but if there is a *casus omissus* in the Ordinance the court must not be diligent to usurp law

making powers and supply what is omitted. The point that I am making is that although the Rent Control Ordinance applies to business premises let furnished or unfurnished, its provisions do not expressly encompass a letting of furnished business premises rented as a going concern with a goodwill attached. Perhaps it is consistent with the policy of the legislators of the Rent Control Ordinance that such a letting ought to be subject to the same restrictions enacted in respect of other types of letting, but I think an express provision is necessary. As WINN, L.J. said in the Court of Appeal in England in *Griffin v. Receiver for Metropolitan Police District,* reported at p. 11 of *The Times* of 14th June, 1967: "If Parliament had missed, it is not for us to remove the target into the path of the arrow". Be it remembered that there is no common law of rent restriction. Be it further remembered that the common law does not enquire into adequacy of consideration. I find that the subject matter of the contract between the plaintiff and the defendant was something qualitatively different from that of the contract between the Estate of Caetano and Phang. In the latter case the consideration moving from the landlord was an empty building. In the former case, the consideration moving from the landlord was a going business concern of which incidentally, the empty building housing it was just part, albeit a necessary, perhaps the most important part. Look at the lease Ex. "A", and see how prominently the boarding house business is spelt out as a substantial aspect of what the landlord was letting. The question is not whether the premises are within the Ordinance, but whether the letting is. In my opinion the particular letting in this case is not caught by the Ordinance.

I hold that the terms of the lease must be sustained and therefore there will be judgment for the plaintiff as claimed in the sum of $1,200; credit being given the defendant for the sum of $200: paid since the issue of the writ. Costs to the plaintiff are fixed in the sum of $300.00.

Judgment for the plaintiff.

FREDERICK MAHAICA *v.* DEREK PHANG AND JOSEPH PHANG

[High Court (Vieira, J.)—March 26, 27, 28, 31; May 8, 9; June 4, 21; November 22, 1969; January 22; March 6, 1970; May 22, 1971]

Contract—Forecast bets placed on results of horse race—Defendants licenced to run betting establishment—Gaming or wagering contracts—Legality of contract involving betting on horse race—Whether condition of limit to winning forecast brought to attention of person placing bet—Credibility of parties and balance of

probabilities on assessment and evaluation of evidence—Gambling Prevention Ordinance Cap. 21 [G] (now Cap. 9:02).

The plaintiff, the biggest customer of the defendants in placing bets, sued the defendants for the sum of $51,225.00 as balance for a payout due to him on a winning forecast in respect of the combination of two horses which ran first and second at a horse race meeting in Trinidad on 14th October 1967. The defence was that there was a limit of $10,000.00 as payout on a winning forecast regardless of the number of forecast bets placed by a person and that the plaintiff was well aware of that limit and was not entitled to be paid over and above that limit. Counsel for the plaintiff stated that he could not dispute that there was a rule at the material time about a limit of $10,000.00 in view of the rule books which were tendered in evidence, but said that the plaintiff was unaware at the material time that there was such a rule, was not told by the defendants of such a limit, and was therefore not bound by such a rule. The central issue was whether the defendants ever gave to the plaintiff, or brought to his knowledge or attention, notice concerning any rule or condition limiting the maximum payout on any single ticket to the sum of $10,000.00.

During the hearing the court, on its own motion, called for arguments, as a matter of law, whether the transaction could amount to a betting or wagering contract and if so whether betting on horse racing was a game of skill or chance. The defendants paid an annual licence fee of $2,500.00 (now increased to $25,000.00) to the Government of Guyana for the privilege of running a betting establishment.

HELD: (i) all games, whether involving skill or chance, or a combination of both, were lawful, and any gaming or wagering on any game was lawful unless (a) the object of the bet was contrary to public policy or scandalous or (b) the game amounted to a non-exempt lottery or to 'gambling' in a 'common gaming house' as defined contrary to the provisions of the Gambling Prevention Ordinance Cap. 21;

(ii) the plaintiff knew, as he was previously given a rule book by the defendants and was told at all material times, of the rule limiting the maximum pay out;

(iii) the plaintiff was specifically told on the 14th October 1967 by the defendant Derek Phang of the limit of $10,000.00 on the forecast bets regardless of the amount of bets placed.

(iv) on the balance of probabilities the evidence of the defence was more acceptable than that of the plaintiff and the action would, accordingly, be dismissed.

Judgment for the defendants.

*[**Editor's note**: An appeal to the Court of Appeal was dismissed].*

J.O. F. Haynes, S.C., and *C. A. F. Hughes* for the plaintiff.

C. L. Luckhoo, S.C., and *M. G. Fitzpatrick* for the defendants.

FREDERICK MAHAICA *v.* DEREK PHANG AND JOSEPH PHANG

VIEIRA, J.: This has been a very lengthy but most interesting matter in which the plaintiff, a rice miller, diamond magnate and race horse owner and who is an ardent and regular punter on horse racing in England and the Caribbean including Guyana, sues the defendants, a well-known and well-established firm of local bookmakers, for a large sum of $51,225.00 (fifty one thousand two hundred and twenty-five dollars) which he alleges is the balance of a payout due to him on the winning forecast of $407.00 in respect of the combination of two horses, Farrantes and Bridego, which came in first and second respectively in the 8th and final race at Union Park, Trinidad, West Indies, on Saturday 14th October, 1967.

At the close of the case for the plaintiff, Mr. Luckhoo gave an undertaking without admitting that the first-named defendant, Derek Phang (who alone of the two defendants gave evidence) was a partner or joint proprietor of the business known as Sports & Games, that the said Derek Phang was quite prepared, in the event of judgment being given in favour of the plaintiff, that it be made jointly and severally against himself and his elder brother Joseph Phang (the second-named defendant herein) who permanently resides in England.

At this stage also, the court, of its own motion, called upon Mr. Haynes to argue, as a matter of law, whether (1) the transaction in dispute could amount to a betting or wagering contract and (2) if so, whether betting on horse racing is a game of skill or chance.

Since decision was reserved in this matter I have had the opportunity to go fully into the history and the law relating to betting and wagering contracts and I adhere to the opinion I formed in the case *of Harry Persaud v. Cyril Chang* (Action 413 of 1968—Berbice) (unreported decision No. 29 of 1970) in which it was pointed out that there is no comparable legislation in this country similar to the English Gaming and Wagering Acts and that the only statutory provisions here is the Gambling Prevention Ordinance, Cap. 21. It was, and is, my considered opinion, that apart from Cap. 21, the law governing gaming and wagering in Guyana today is the common law of England (which, since 1st January, 1917, is the common law of Guyana) exclusive of statute. Reference was made to ss. 3B and 25 of the Civil Law Ordinance, Cap. 2, and I attempted to give a definition in relation to games, gaming and wagering generally in this country as follows:—

> "All games, whether involving skill or chance, or a combination of both, are lawful, and any gaming or wagering, on any game is lawful unless (1) the object of the bet is contrary to public policy or scandalous or (2) the game amounts to a non-exempt lottery or to "gambling" in a "common gaming house" as defined, contrary to the provisions of Cap. 21. All games of skill, however, are lawful even if played in a common gaming house".

It was further pointed out, that, as in this case, there was the added undisputed fact that the defendant paid an annual licence fee of $2,500.00 (now substantially increased to $25,000.00) to the Government of Guyana for the privilege of running a betting establishment.

In Harry Persaud's case (ubi supra) the Court of Appeal in dismissing the appeal merely adverted to the fact that the transaction could not be unlawful in view of the payment and acceptance of the licence fee by Government but, nevertheless, I considered it worthwhile to delve into the history of the subject in an attempt, however modest, to enrich our jurisprudence on a topic that has hardly been touched upon let alone investigated by our courts.

Having considered and overcome this apparent hurdle, so to speak, it is now necessary to go into the facts of this matter, the evidence in relation to which is extremely voluminous, running through as it does 4 Minute Books.

It is abundantly clear that there is really only one single narrow and vital issue of fact to be determined here and that is, whether the defendants, either by themselves or through their servants and/or agents, ever gave to the plaintiff or brought to his knowledge and/or attention any notice concerning any rule or condition limiting winnings on any particular ticket to the sum of $10,000.00 (ten thousand dollars) by means of any printed rules in book form or on any programme sheets or on any notice boards or at all in relation to the said 8th and final race run at Union Park Turf Club, Trinidad, on the said Saturday 14th October, 1967.

During the course of his address, Mr. Haynes stated that he could not deny that there was a rule at the material time about a limit of $10,000.00 in view of the rule books that were tendered. He concedes that if such a rule was in fact known by the plaintiff or brought to his knowledge and/or attention, then his client has not much of a leg to stand on.

The case for the plaintiff as I understand it, is as follows:—

(1) He has been betting on horse races since 1934 or 1935 when he was 15 or 16 years old. Betting is his hobby and he is one of the biggest, if not the biggest, punter in this country. He has betted in New York, Miami, Puerto Rico, Jamaica, Venezuela, Guyana and throughout the West Indies including Trinidad and Barbados. He has never betted in England but has frequently placed bets on English racing;

(2) Prior to 14th October, 1967, he was never aware that bookmakers world-wide had any limits to be paid out on any bets placed with them nor that they had rules in relation to betting. Prior to 14th October, 1967, he never saw any rule books here or elsewhere neither has he seen any written rules or conditions posted up in any bookmaker's office

nor has he ever been told about any such rules or conditions by any bookmaker here or elsewhere. Prior to 14th October, 1967, he never saw, looked at, read or was given any rule book by Derek Phang or any other member of his staff or by anybody else here or elsewhere containing any limitation of payment on any ticket neither was he told about any such limitation neither was any such limitation drawn to his attention, neither has he discussed any such limitation with any bookmaker or any fellow turfites. Prior to 14th October, 1967, he was never issued with any ticket by the defendants or anybody else here or elsewhere with any limit of $10,000.00 or any other sum stamped or printed or written thereon;

(3) it is only since 14th October, 1967, that he has been aware that there was a limit of $10,000.00 on the part of all local bookmakers in respect of every ticket sold and all tickets purchased by him since 14th October, 1967, has been stamped with such a limit of $10,000.00;

(4) at no time prior to 14th October, 1967, has there ever been any "Special arrangement" between himself and Derek Phang whereby he was ever given any special terms or conditions and, in particular, limiting the amount of the pay out to not more than $10,000.00 regardless of the amount of the forecast bets placed by him;

(5) he first visited Sports & Games in 1961 and started to bet with them from that time up to 1963 through his clerks but since 1963 he has betted himself with the defendants on both West Indian and English racing. Ninety-five per cent of his bets, whether on English or West Indian racing, were telephone bets and in only about 5 per cent of the time was he actually issued with tickets. There was a gentleman's agreement between Derek Phang and himself on this point. He bets on both a credit and cash basis and he had a special credit account with the defendants which was unlimited. Weekly statements of account are received by him to which would be sometimes attached original slips made out by the defendants on his telephone bets. No record was kept indicating whether a bet was a telephone bet or not except that the plaintiff would record this information on his programme sheets which, however, he would later destroy that very day. When bets are placed personally, tickets would be written out in duplicate, the original being white in colour which is given to the punter and the duplicate which is green in colour would be retained in the book;

(6) Clement Vasconcellos, a professional gambler, first worked with Sports & Games during 1957-1958 during which time he ran the "Fabulous Forecast Pool" which was a pool betting competition in which the nett pool was divided amongst those who won. The second-named defendant, Joseph Phang called Budsy Phang, ran the horse-racing side of the business himself and continued to do so until his departure for the United Kingdom on 15th January, 1963, since when he has been permanently resident there. In March 1958 Vasconcellos left for Trinidad

where he worked at the defendants' branch until 10th January, 1963, when he returned to Guyana and took over as Manager from Budsy Phang. He continued as Manager until May 1965, when Derek Phang replaced him. According to Vasconcellos, there were no booklets of rules as such in relation to races or betting whilst he was associated with Sports & Games; in fact, there were no printed rules at all in any form and the only rules he knew about were what were printed on the programme sheets, viz:–"$2.00 forecast—$1,000.00 limit; $1.00 forecast—$500.00 limit; quinella (i.e. a 50c. forecast)—$250.00 limit; $10,000.00 limit on doubles, trebles and accumulators". Vasconcellos and Derek Phang had a quarrel at the Georgetown Cricket Club during 1965 and since then the two men have not spoken to each other;

(7) on Saturday 14th October, 1967, about 1.30-2.00 p.m. the plaintiff went to the defendants' premises at 31, High Street, Georgetown, accompanied by the witness George Baird, a news reporter employed by the Guyana Graphic newspaper and close personal friend of his for a number of years and who had previously accompanied him there on several occasions since 1965 or 1966. The two friends went into the two storey building and entered Derek Phang's private office on the ground floor which is situate behind a large open enclosure used by members of the general public for betting. They went and sat on a suite which runs north to south, the back of which was against the western wall of the room which measures about 12′ x 14′. Along the eastern wall there was another suite which also ran north to south. They were both backing Derek Phang who sat alone at a desk running east to west and which was situate about 2′ away to the south-west of Baird. At a table about 15′ to the north-east of that desk and north of where the two men were sitting on the western suite sat one Dr. Manson-Hing and a young lady whom the plaintiff alleges was one Miss De Castro, Derek Phang's former Secretary, but whom Baird could not in fact say was Miss De Castro although he admits that he knows that particular young lady. According to the plaintiff, besides himself, Baird, Derek Phang, Dr. Manson-Hing, and Miss De Castro there were also present one Krakowsky, one Terry Vieira, one Carlos Fernandes and about eight others including Mr. C. Lloyd Luckhoo, S.C. In addition to all these persons, all of whom were betting that day, there were about seven tellers taking bets and writing out tickets. According to Baird, however, besides himself, the plaintiff, Derek Phang, Dr. Manson-Hing, Carlos Fernandes and a young lady, there were about 2 to 4 other persons present whom he did not know and also about 2 tellers accepting bets;

(8) there was a radio upstairs on the first floor as well as one by the telephone which was situate near the table at which Dr. Manson-Hing was sitting. Reports were being broadcast of the eight (8) races being run that day at Union Park Turf Club, Trinidad, West Indies, which were being relayed over several loudspeakers situate in the said office. The plaintiff betted very heavily as is his custom every day, the bets

being placed on his behalf by George Baird who is not himself a betting man. All bets placed that day were hold-over bets i.e., credit bets for settlement at the end of the day;

(9) on the first seven (7) races the plaintiff received eighteen (18) tickets, viz: Nos. 12949, 12952, 12955, 12958, 12961, 12964, 12967, 12970, 12973, 12976, 12979, 12982, 12985, 12988, 12991, 12994, 12997 and 13000 (Exs. "K7" to "K24" inclusive respectively) (all of which are duplicates except Ex. "K24" which is an original ticket), being a total credit investment of $12,056.00. Only one of these tickets actually won, viz: No. 12994 (Ex. "K22") which was a pari mutual bet at $300.00 each way = $600.00. On this ticket the plaintiff won the sum of $2,430.00, leaving a credit balance of $9,626.00 at the end of the 7th race.

(10) on the 8th and final race (which is the material one in this case) the plaintiff purchased six (6) tickets viz: Nos. 13003, 13006, 13009, 13012, 13015 and 13018 (originals tendered Exs. "A1" to "A6", duplicates tendered Exs. "K1" to "K6" inclusive respectively) being a total credit investment of $6,200.00. His total hold-over bets, therefore, for all the 8 races run that day amounted to the very large sum of $18,256.00, a figure that would undoubtedly stagger the imagination of the average Guyanese punter. On ticket No. 13009 (Ex. "A3") a pari-mutual bet of $200.00 each way = $400.00 he won the sum of $440.00. On ticket No. 13015 (Ex. A5) which was a pari-mutual bet of $600.00 each way = $1,200.00 on the favourite River Rhine, he won the sum of $1,320.00;

(11) tickets Nos. 13003 and 13006 (Exs. "A1" and "A2" respectively) also won and these are the two tickets that have caused all the trouble in this matter and which has led to a complete estrangement between the plaintiff and Derek Phang up to this day. Ex. "A1" involved two types of bets, firstly, a pari-mutual bet of $500.00 each way = $1,000.00 on Farrantes which was Horse No. 8 and which was either second or third favourite and, secondly, a forecast bet of $150.00 on each of the eight horses in the race = $1,200.00 with Farrantes as a banker to win. Ex. "A2" was a forecast bet of 6 combination of $200.00 each = $1,200.00 on horses Nos. 8, 5 & 12, the latter two being either River Rhine or Bridego, a rank outsider, or vice versa. The pari-mutual bet on Ex. "A1" paid the sum of $4,650.00, being $3,450.00 to win and $1,200.00 to place. The forecast of the winning combination of Farrantes and Bridego was later declared at the handsome sum of $407.00. On Ex. "A1" the plaintiff had this forecast 75 times and on Ex. "A2" he had it 100 times = 175 times which, if there was no limit as alleged by the plaintiff, would have won for him the large sum of $71,225.00. In all, therefore, the plaintiff should have won $71,225.00 + $4,650.00 + $440.00 + $1,320.00 + $2,430.00 = $80,065.00. The plaintiff was credited with the sum of $28,840.00, being the debit of $18,256.00 plus a cheque for $10,584.00 later received by him. So, therefore, if the plaintiffs story be accepted

and believed, he is entitled to the sum of $80,065.00—$28,840.00 = $51,225.00, which is the sum actually claimed by him;

(12) the plaintiff and Band were drinking scotch in the room. Before the 8th and final race was run, the plaintiff said to Phang—"Derek, I will like to have some forecasts on the 8th race and some pari also, win and place". Phang said nothing and, according to the plaintiff, Phang wrote out 4 or 5 tickets all of which he handed to Baird who then passed same to the plaintiff. According to Baird, however, he saw Phang write out 2 or 3 tickets which he handed to him, Baird, telling him at the same time "Give Fred the tickets" which he did. Baird then got up and went over to the window and when he returned shortly after he saw Phang handing about 2 or 3 more tickets to the plaintiff but he could not say whether Phang also wrote out those other tickets himself or not. About half an hour before leaving the premises the plaintiff realised that he had won but not how much as only the results and not the dividends had been declared. Phang then told him that he would let him know what was the amount to be paid out on the forecast;

(13) about 6.30 p.m. the plaintiff and Baird left the premises and went to the plaintiffs office at 176, Middle & Waterloo Streets, Georgetown, where, at about 7.15 p.m. the telephone rang. The plaintiff answered the telephone and he heard Phang say "Fred man you kill me. The forecast paid $407.00 but you must be aware that we have a rule where we can prevent paying out a larger amount than $10,000.00". The plaintiff then rather bluntly replied "This is gun play". He then told Phang that he knew nothing about any rule limiting pay outs to the sum of $10,000.00 and he remarked that it was only because of the large amount involved that Phang was now making mention of rules. He protested vehemently and demanded payment in full and angrily said "I don't mind spending some money on this and seeing the results" meaning either by court action or by force, if necessary. In a cajoling tone Phang then replied "Fred man come over and have a drink and let us talk it over; this is chicken feed". The plaintiff then said that he would only accept the invitation if they reached a settlement and he told Phang "If you decide to pay me what the Trinidad Turf Club paid then I will come across". Phang replied "Ow Fred man I am leaving for Trinidad in the morning. I am disturbed as this is a lot of money and when I get to Trinidad I will talk to you if you don't come over to Trinidad". Phang then intimated that he would be returning the following week and the plaintiff replied saying that Phang was not obliged to write a cheque then but could do so when he returned from Trinidad. The plaintiff was not really satisfied with the answers given by Phang which he considered evasive and the two men ended up by cursing each other;

(14) on Monday 16th October, 1967, the plaintiff telephoned Derek Phang who, at the time, was in the office of one James Chin, the

licensee of Turf Investments Ltd., (now Tote Investments Ltd.) at Duke Street, Port-of-Spain, Trinidad, and he told him that he must come to a settlement to which Phang replied that he would talk it over when he returned to Guyana on Wednesday 18th October, 1967. The plaintiff replied that he would be travelling to the Mazaruni where he would spend about 3 weeks and he would not be able to see Phang when he arrived but he could put the cheque on his account. Phang then said that he had already told him about a limit before he had left Guyana and he would not be able to talk anymore and that the plaintiff must wait until he came back;

(15) the plaintiff spoke to Phang on Wednesday 18th October, 1967, on the latter's return to Guyana but declined an invitation to see him at Sports & Games;

(16) about one week later before going to the Mazaruni, the plaintiff received a cheque for $10,584.00 accompanied by a letter signed by Derek Phang dated 23rd October, 1967, together with a statement of account (Exs. "C1" and "C2" respectively). He was rather surprised because that was the very first time that he had ever received a written statement of account from the defendants, all previous accounts being merely verbal or sometimes written out on scraps of paper and the amounts would be made out by adding machines. In his letter (Ex. "C1") Phang reminded the plaintiff that he had expressly confirmed their arrangement that he would not pay out more than $10,000.00 on any forecast bets placed by the plaintiff in the presence of several witnesses and pointed out that all bets were subject to that condition. Nevertheless, having regard to all the circumstances, he had decided to pay the sum of $10,000.00 on each of the two winning tickets and he ended up by reminding the plaintiff that he had always accepted bets from his subject to specified limits. The plaintiff took the cheque and Exs. "C1" and "C2" to his Solicitors, Messrs. Clarke & Martin, with whom he left the letter and statement of account. He retained the cheque which he subsequently deposited to his account;

(17) on 9th November, 1967, the plaintiffs Solicitors wrote a letter (Ex. "D") to Derek Phang informing him that their client had advised that the allegations contained in para. 2 of his letter of the 23rd October, 1967 (Ex. "C1") were false and that their client had no alternative but to dispute the correctness of the account submitted and to treat the cheque for $10,584.00 as a payment on account and they then demanded the immediate payment of the balance of $60,641.00;

(18) on 26th November, 1967, Phang wrote a letter (Ex. "E") to the plaintiff's Solicitors in which he expressed surprise at the plaintiff's denial of an arrangement that had been in operation between them for some time and which he had expressly confirmed before the race in question in the presence of several witnesses. He intimated that he had already made a generous concession in an effort to settle the matter but he regretted that he could not entertain the plaintiff's claim;

(19) on 20th December, 1967, the plaintiff filed this present action. The case for the defendants, as I see it, is simply this:—

(1) the second-named defendant, Joseph Phang Jnr., also known as and called Budsy Phang was and is the sole proprietor of Sports & Games which he started up at its present site during the year 1951. The building is a three-storey one which has been rented by the defendants in its entirety since the inception of the business. Punters use both ground and middle flats;

(2) during August, 1959, a most unusual event occurred at a race meeting in Barbados when a horse by the name of Bonaire won in a four horse field and an extraordinary dividend of $16.85 was paid out on a $1.00 ticket to win. There was great consternation amongst the bookies in Guyana and the eastern Caribbean and the defendants' branch in Trinidad was hit for the large sum of $125,000.00. As a result, there was a meeting of bookmakers and it was decided that rules would be made placing certain limits on the amounts to be won and one of those limits was that the pari-mutual dividend to be paid by bookmakers would not exceed the number of runners;

(3) the first-named defendant, Derek Phang, a lawn tennis player of some repute and a professional bookmaker, first joined his brother's business during 1961 where he worked for about 7 months between January 1961 and July 1961, during which latter month he left for Barbados where he opened up a branch called Ace Super Service (Barbados). He worked between Trinidad, Guyana and Barbados where he was based. During May, 1965, Derek Phang, at his brother's request, returned to Guyana and took over as Manager from Vasconcellos and during that very month there was an incident between the two of them at the Georgetown Cricket Club as a result of which they stopped speaking to each other. Vasconcellos left Sports & Games in the said month of May, 1965;

(4) one of the first changes introduced by Derek Phang occurred during 1965 when he caused to be printed several thousand green covered rule books similar to Ex. "F" and about 1,800 were distributed to all cash and credit customers free of charge. This was in line with the system employed by English book-makers with whom he had placed bets regularly over the years. These rules cancelled all previous rules and became effective from 15th November, 1965, and equally applied to both English and West Indian racing save and except that Rules 3, 5, 7 & 8 of the former did not apply to the latter. Rule 14, which is the important rule in this matter, provides as follows:—

"14. The maximum pay out on any single ticket is limited to $10,000.00".

Prior to this rule, the limit on doubles, trebles and accumulators was $20,000.00 which was changed unilaterally by Derek Phang himself around November, 1965, regardless of the bet placed. No announcement

was made over the public address system nor, apparently, was any notice posted on the notice boards in relation to this change. *Rule 6* of the rules for West Indian racing set out at the back of Ex. "F" provides as follows:—

> "6. All rules are subject to change but due notice will be given on our Notice Boards".

This rule was retained as well as *Rule 14* in a new set of white covered rule books similar to Ex. "B" which Derek Phang caused to be printed in Japan during 1968 and which were distributed to customers free of charge during the said 1968;

(5) prior to the introduction of rule books similar to Exs. "B" and "F" there were rules which included limits on maximum payouts on both English and West Indian racing which were printed on sheets of paper and posted up on the walls outside the building as well as on the walls inside both ground and middle flats. These rules, however, were not brought to the attention of punters—they were merely printed and posted up on the walls. Derek Phang would announce changes of rules over the public address system or put them up on the notice boards or both and, in relation to West Indian racing, when he would be invariably present on the premises, he would also notify punters personally of any change;

(6) Derek Phang first got to know the plaintiff during 1966 and one morning during that very year whilst the two of them were sitting at the same desk in the staff room he took a rule book similar to Ex. "F", several of which were in the drawer at the time, and personally put it in the plaintiff's left shirt pocket;

(7) on 1st April, 1967, Derek Phang issued ticket No. 1186 (duplicate tendered Ex. "G") to the plaintiff and he wrote on the face thereof the words "No limit for F/C" at the request of the plaintiff. This bet was in relation to West Indian racing and was a bet that permed the field (which was quite a usual type of bet for the plaintiff to place) and which cost $312.00;

(8) one Monday morning in June, 1967, Oscar Jones, messenger cum teller employed by the defendants since 1965, was given a long white envelope addressed to "Frederick Mahaica" by one Mr. Hazel who was then acting Manager during Derek Phang's absence abroad in England. In this envelope was a letter dated 24th June, 1967, signed by Derek Phang and addressed to the plaintiff (copy tendered for identification only as Ex. "J") in which it was intimated that Phang would be leaving the country and would be away from 25th June to 15th July, 1967. The plaintiff was asked to note the limits (as set out) on English and West Indian racing and he was reminded that the maximum payout on any one bet would be the usual limit of $10,000.00 whether singles, doubles, trebles or accumulators. In this envelope also was a rule book similar to

Ex. "F". Jones delivered this envelope personally to the plaintiff at his office at Middle and Waterloo Streets as was his usual custom;

(9) on 12th August, 1967, ticket No. 2019 (duplicate tendered Ex. "N2") was issued to the plaintiff in relation to a West Indian race meeting held in Barbados which involved two types of bets, viz: a $200.00 reverse forecast and a $300.00 each way pari-mutual = $1,000.00. The words "Maximum payout on above F/C bet is $10,000.00" appear on the face thereof;

(10) on 15th August, 1967, ticket No. 2040 (duplicate tendered Ex. "N1") was issued to the plaintiff in relation to an English race #267 in which he had 4 forecast bets at $200.00 each = $800.00. The 4 combinations were 1/4, 4/1, 2/4 and 4/2. Horse No. 4 was Vitruvious and Horse No. 2 was Hambleden. These two horses came in first and second respectively and the forecast of 4/1 paid $50.50 which included the stake. This, therefore, at $200.00 would amount to $1,100.00 which was $100.00 above the limit and Phang only paid the plaintiff the sum of $10,000.00 without any objection on the plaintiff's part. Phang then checked the balance owing to the plaintiff up to and including the said 15th August, 1967, which included the limit payout of $10,000.00 on Ex. "N1" and he issued a cheque of that same date (tendered Ex. "O") for the sum of $2,774.00 which he later discovered was an overpayment of $60.00;

(11) on 22nd August, 1967, tickets Nos. 980, 983 & 986 (duplicates tendered Exs. "Q3", "Q4" and "Q5" respectively) were issued to the plaintiff in relation to English racing and which represented an investment of $2,140.00. On all these 3 tickets the words "Maximum payout on each bet is $10,000.00" appear thereon;

(12) on 23rd August, 1967, tickets Nos. 974 & 977 (duplicates tendered Exs. "Q1" & "Q2" respectively) were issued to the plaintiff both in relation to English racing and which represented an investment of $840.00. On both these two tickets the words "Maximum payout on each bet is $10,000.00" appear thereon;

(13) sometime during September, 1967, the plaintiff was in Trinidad and he went to the office of Turf Investments Ltd. (now Tote Investments Ltd.) and there he placed a bet with the witness Perreira, a Guyanese resident in Trinidad since 1961. This bet was on an English race and involved an investment of $600.00 on two horses, Flourescence and Swinging Ministrel, each way, singles and doubles. The win double paid over $16,000.00 but when the plaintiff presented his ticket for payment he was only paid $10,000.00 in accordance with Rule 15 of the extant rules of that betting establishment as contained in the rule book similar to Ex. "L" and which states:—

> "15. There is a limit of $10,000.00 on any doubles, trebles or accumulator bets".

This particular bet was not kept by Perreira as such tickets are usually destroyed within weeks after the races are run and he could not know then that such a ticket might have been required subsequently for a case in court. A blank betting slip similar to the one issued to the plaintiff has been tendered as Ex. "M";

(14) on 29th September, 1967, ticket No. 2879 (duplicate tendered Ex. "H") was issued to the plaintiff in relation to 2 English races and across the face of it appear the words "Maximum payout on any bet $10,000.00". Although this bet involved 2 races for which Phang was prepared to pay out $10,000: on each race = $20,000: nevertheless, he only wrote out one ticket, which was not unusual for him to do whenever the plaintiff placed bets with him;

(15) the plaintiff mostly betted on West Indian races in person and by telephone on English racing and, in either case, the defendants would issue tickets in duplicate in the normal way. No note or record would be made whether any bet was made personally or by telephone.

(16) on Saturday 14th October, 1967, Derek Phang went to his office about 8.30 a.m. About 1.00 p.m. the plaintiff came to the premises accompanied by Baird whom Phang may have seen there before. The two men went into the staff room and not Phang's private office. The staff room is small, measuring about 10—12 feet square and has only one suite, 6 desks and chairs and a long couch. The plaintiff and Baird sat on the suite and the witness Joseph Victor Fernandes sat on the long couch about 2 away from Dr. Manson-Hing and opposite to where the two men were sitting on the suite. Neither Carlos Fernandes nor Miss De Castro nor Mr. C. Lloyd Luckhoo, S.C. were present at any stage that day. There was a lot of movement going on and people were coming in and going out of the Staff room. Phang himself was walking about and not sitting at his desk all the time. The plaintiff and Baird were drinking scotch whilst Phang was only drinking soft drinks as is his custom whenever he gambles. In this room, besides the plaintiff, Baird, Phang, Dr. Manson-Hing and Joseph Victor Fernandes, there were also present Monty Yhap, Daniel Sue Ping, one Williams and a few others. There was only one teller on duty;

(17) the plaintiff was making hold-over bets and on the first 7 races he purchased 18 tickets in all (Exs. "K7" to "K24" inclusive) at a cost of $12,056.00. Only one of these tickets, Ex. "K22", won, and the plaintiff was credited with the sum of $2,430.00, leaving a credit balance of $9,626.00 at the end of the 7th race;

(18) before the 8th and final race was run the plaintiff purchased 6 tickets (originals—Exs. "A1" to "A6", duplicates—Exs. "K1" to "K6" inclusive respectively). He called out the bets which were all written out by Dr. Manson-Hing, a personal friend of Derek Phang since boyhood days and a school mate of his elder brother Budsy Phang. Dr. Manson-Hing is invariably at the premises most Saturdays especially

when there is West Indian racing going on. Although he is a punter himself, he invariably assists in accepting bets and writing out tickets for which he is paid no remuneration whatsoever neither has he ever received any benefits for such services. Baird was not paying much attention to what was going on at the time and was in fact dozing most of the time;

(19) the first bet placed by the plaintiff on the 8th race was Ex. "A1". When he purchased the second ticket, i.e., Ex. "A2", Dr. Manson-Hing called Derek Phang over and showed him its duplicate, i.e. Ex. "K2" and spoke to him. Phang looked at the bet and then in his normal loud voice which could be heard throughout the staff room, said to the plaintiff "Fred, you can bet as much as you want but remember that you cannot win more than $10,000.00 on the forecast bets". He said this at least 4 or 5 times within a period of about 5 minutes and all before the 8th race was actually run. Joseph Victor Fernandes, a Guyanese and the resident Manager of the American Life Insurance Company, distinctly heard this conversation and its repetition at least 3 times by Phang in more or less the same words. At the first reminder given by Phang the plaintiff nodded his head in acknowledgement which, however, Fernandes did not see;

(20) these reminders were in relation to a previous conversation between the plaintiff and Derek Phang on that very day whereby the latter had made it quite clear that he was not prepared to pay out more than $10,000.00 to the former regardless of the amount of forecast bets placed by him;

(21) when Dr. Manson-Hing spoke to him Phang realised that what the plaintiff was trying to get at was to minimise his, Phang's, loss, in case the combination won;

(22) Farrantes was declared the winner of the 8th race but there was a photo-finish to decide 2nd and 3rd places. At the declaration, Bridego, an outsider, was declared second and River Rhine, the favourite, third. Phang then told the plaintiff that he had won a lot of money and that he would probably win the limit, i.e., $10,000.00 on all the forecast bets on Exs. "A1" and "A2". He then promised to let the plaintiff know the official results and payouts later on. The plaintiff said he was leaving for the Interior the next day and Phang then told him that he was also leaving for Trinidad the next day and he promised that he would let the plaintiff know the payouts later that same night. The plaintiff and Baird then left the premises about 6.30 p.m.;

(23) about 8.10 p.m. that very night Phang obtained the official payouts and he rang the plaintiff about 8.15 p.m. from his sister's house Anira Street, Queenstown. He told the plaintiff what the dividends on the pari-mutual were and then the forecast dividend of $407.00. He then told the plaintiff that he had won a lot of money and that his bet had reached or exceeded the limit of $10,000.00. The plaintiff then retorted

"No man, you can't do this to me because I bet and lose a lot of money with you and you will have to pay me the full amount," Phang replied that they could discuss the matter when he returned from Trinidad and the plaintiff from the Interior;

(24) the next day, Sunday 15th October, 1967, Phang flew to Trinidad and on Monday 16th October, 1967, whilst he was at Turf Investments Ltd. which was registered in the name of one James Chin, he received a telephone call from the plaintiff and the two of them arranged to meet at Sports & Games on Wednesday 18th October, 1967, at 11.00 a.m. Phang returned as scheduled but the plaintiff did not turn up and when he was contacted by telephone he declined to go and see Phang;

(25) on 23rd October, 1967, Phang wrote a letter (Ex. "C1") to the plaintiff which was accompanied by a statement of account (Ex. "C2") and also a cheque for $10,584.00. In this letter Phang reminded the plaintiff of their previous arrangement where he would not pay out more than $10,000.00 to the plaintiff regardless of the amount of forecast bets placed by him which had been expressly confirmed by him prior to the running of the last race on Saturday 14th October, 1967. He went on to say that although, according to their arrangement, he was entitled to limit the payout to the sum of $10,000.00 on tickets Nos. 13003 and 13006, nevertheless, in all the circumstances, he decided to pay the plaintiff the sum of $10,000.00 on each of those two tickets. Before writing this letter Phang had consulted his Solicitor, Mr. David De Caires, and it was only on his lawyer's advice that he had made a further gratuitous payment of $10,000.00 in the interest of good relations. Left to himself, he would not have paid more than $7,600.00 which was the limit of $10,000.00 less the sum of $2,400.00, being the amount of the forecast bets;

(26) (26) Derek Phang later received a letter (Ex. "D") dated 9th November, 1967, from the plaintiffs Solicitors, Messrs. Clarke and Martin, in which he was admonished for limiting payouts to the sum of $10,000.00 and he was informed that the plaintiff was disputing the correctness of his account and that the cheque for $10,584.00 would be treated as payment on account and demand was then made for the immediate payment of the balance of $60,641.00;

(27) on 26th November, 1967, Phang replied by letter (Ex. "E") in which he expressed surprise that the plaintiff had denied an arrangement that had been in operation between them for some time and which had been expressly confirmed by him before the race in question in the presence of several witnesses. He went on to say that he had already made a generous concession in an effort to settle the matter but he regretted that he could not entertain the plaintiff's claim;

(28) there was no further discussion with the plaintiff and on 20th December, 1967, he was served with a copy of the Writ in this action.

The addresses by both Senior Counsel in this matter were exhaustive and comprehensive and have been of great assistance to this court. One can only hope that young practitioners would seriously try to emulate the meticulous manner and the great industry and courtesy that have been displayed by all the lawyers in this matter.

Mr. Luckhoo asked the court to consider the following 5 important points—

(1) were there limits on bets on 14th October, 1967?

(2) did the plaintiff know of such limits?

(3) even if the plaintiff did not so know, would he be bound by the limits in view of the method of operation of the defendants?

(4) did the defendants take reasonable steps to notify their clients from time to time of their limits and of their changes of limits and, if they did so, would all punters be bound by such limits whether they knew of those limits or not?

(5) on the basis of the limits as pleaded and claimed by the defendants, has the plaintiff been paid the full amount or, indeed, more than the full amount, to which he was entitled?

POINT 1: The relevant exhibit is the green covered rule book printed in 1965 (Ex. "F") which was in full force and effect on Saturday 14th October, 1967. In this book, Rule 14 on English racing and Rule 1 on West Indian racing clearly show that there was a payout limit of $10,000.00 on each ticket.

POINT 2: The court has to consider the following significant and relevant factors—

(a) the plaintiff's many years of experience as a punter;

(b) the plaintiff's possession and knowledge of rule books such as Exs. "B", "F" and "L";

(c) both Vasconcellos and Perreira state that the programme sheets issued by bookmakers both here and in Trinidad and which were widely distributed did have limits printed thereon;

(d) limits were posted up on the notice boards on both ground and middle flats of the building;

(e) limits and changes of limits were regularly announced by Derek Phang over the public address system;

(f) on the very 14th October, 1967, the plaintiff was given several oral reminders by Derek Phang about a limit of $10,000: regardless of the amount of forecast bets placed by him;

(g) the plaintiff was well aware of the limits that appear on the face of Exs. "H", "N2", "Q1", "Q2", "Q3", "Q4" and "Q5";

(h) the transaction in Trinidad in September, 1967, just one month before, when the plaintiff was paid a limit of $10,000.00 on a win double bet of over $16,000.00.

POINTS 3 & 4: The defendants have taken all reasonable steps to notify their clients of the limits which they were imposing and, in such circumstances, all bettors would be bound by such rules as to limits;

POINT 5: the plaintiff has admitted having been credited with the sum of $20,000.00 on the 2 winning tickets, Exs. "A1" and "A2" and, if he had knowledge of the rules, which it is submitted he did have, then that was all he was entitled to and that is the end of the matter.

After the luncheon adjournment, Mr. Luckhoo put forward another and different proposition and that was, even if there was no adequate publication of its rules and/or conditions by a bookmaking establishment, if such an establishment does in fact operate under rules and conditions which stipulate limits, then any bettor would be bound by such terms and/or conditions whether he has actual knowledge or not, it being an implied term of the contract between himself and the bookmakers. Likewise, a bettor would be bound by any variations of limits with which he may not be personally acquainted if, in fact, the bookmaker has varied his limits.

Mr. Luckhoo then addressed me on the question of the credibility of the witness who gave evidence and pointed out the following factors for consideration—

(1) the plaintiff and his witness George Baird have put persons on the premises who were not actually there;

(2) in relation to the manner in which the bets were actually made, the plaintiff has stated that he personally dealt with Derek Phang in relation to the 8th and final race and that it was Phang himself who wrote out Exs. "A1" to "A6" inclusive. According to Baird he actually saw Phang write out 2 or 3 tickets and he also saw Phang hand 2 or 3 tickets to the plaintiff but he could not say whether Phang actually wrote out those tickets himself or not. Compare this to the evidence of Derek Phang who stated quite categorically that Dr. Manson-Hing wrote out Exs. "A1" to "A6" inclusive and that he had seen him write before and knew his handwriting well;

(3) George Baird did not really know what was happening at the material time as he was dozing. He does not know what a forecast really is as he does not know what is the determining factor. According to Baird the plaintiff only used two combinations, viz: 5/8 and 8/5, which is not so when one looks at the types of bets clearly set out in Exs. "A1" and "A2";

(4) the evidence of Derek Phang is corroborated in material particulars by a responsible witness, Joseph Victor Fernandes, and shows that the evidence of the plaintiff and Baird is untrue in several particulars,

viz: as to who was present, as to who took the bets and how those bets were made and in relation to what happened after the race concerning the photo-finish;

(5) Phang's letter of the 23rd October, 1967 (Ex. "C1") is conduct consistent with speaking to the plaintiff about limits on 14th October, 1967. This was denied by the plaintiff's Solicitors in their letter of 9th November, 1967 (Ex. "D") to which Phang replied by letter dated 26th November, 1967 (Ex. "E");

(6) all the betting books that have been tendered have not in any way been attacked as having been interfered with in any way. Further, the plaintiff has not been able to produce any of the original tickets to show that he was not concerned with such bets.

In reply, Mr. Haynes submits that the issue here is one of credibility and he opines that the demeanour of the witnesses is not enough. The court, he says, must consider motive, admissible documentary evidence and a consideration of the probabilities of the case.

Mr. Haynes asks the court to consider the following important and relevant factors—

(1) all duplicate tickets tendered are all inadmissible. Such documents cannot be considered by the court for any purpose whatsoever either to prove the contents thereof or the probability of the truth of the defendants' story or the consistency of Derek Phang's evidence or his credibility unless there is satisfactory proof that the originals were handed to or received by or seen by the plaintiff. On this aspect he asks the court to bear the following considerations in mind:—

(a) the plaintiff has denied ever receiving such tickets. How it may be asked can Derek Phang come after 2 years and say that he handed the originals of such duplicate tickets to the plaintiff without any aid to his memory and having regard to the fact that he accepts hundreds of bets every day;

(b) no written record was ever made at the time of any transaction as to whether such bets were made by telephone or whether the original ticket was sent with the account subsequently or was handed personally to the plaintiff;

(c) it is unreasonable to accept that Phang could remember with respect to any of the transactions in respect of which duplicates were tendered which of the 3 methods were utilised. Phang can only give general evidence. He cannot remember, after such a long time, each of these individual transactions;

(d) most of the bets on English racing were by telephone and most, if not all, of the duplicates tendered when he went back into the witness box and gave evidence on 4th June, 1969, were about transactions that took place two years previously in August, 1967;

(e) the evidence in relation to an English race #267 in which it is alleged that Phang issued ticket No. 2040 (duplicate tendered Ex. "N1") whereby the plaintiff won the sum of $10,100.00, $100.00 above the limit, has not been proved at all. The duplicate does not show that the plaintiff was paid $10,000.00 or any other sum. A cheque (Ex. "O") was produced for $2,774.00 and Phang said that was the result of what was owing to the plaintiff after it was concluded that he had won $10,000.00 but had lost on other races. Here again there is only the evidence of Phang.

Reference was made to the following cases—*Mustapha Ali v. Bookers Stores Ltd.* in the Court of Appeal (unreported decision No. 59 of 1966) and, in particular, the judgment of CRANE, J.A., at pp. 17—18; *Gillie v. Posho Ltd.* (1939) 2 All E.R. 196 (P.C.) at p. 201, letters E to G, per Lord PORTER; *James v. South Eastern and Chatham Railway Company Managing Committee* (1918) 87 L.J. K.B. 775 per SWINFEN-EADY, J., at pp. 777-778.

(2) as regards the letter dated 24th June, 1967, purporting to have been written by Phang to the plaintiff mentioning limits (Ex. "J" for identification only) this also is clearly inadmissible. The messenger, Oscar Jones, says that this letter was handed to him by Mr. Hazel (who has not been called as a witness) the day after Phang left for England whereas Phang himself has stated that he handed Jones the letter the day before he left for England. Are these two letters the same letter? Further, Jones himself has stated that he did not know what was in the envelope itself;

(3) as regards rule books, this is clearly a question entirely of fact. Phang has said that he handed one personally to the plaintiff and that he caused another one to be posted to him. This evidence must be considered in relation to all the other facts of the case;

(4) all the evidence as to what happened with other bookmakers and their customers or with the said bookmakers and the plaintiff, including the transaction which the witness Perreira alleged took place in Trinidad in September, 1967, or that the said bookmakers have rules imposing limits, is inadmissible either to prove the truth of the issue or on the issue of credibility—*res inter alios acta.*

Reference was made to the following cases—*Carter v. Pryke* (1791) English Reports 104; *Spenceley v. De Willot* (1810) 2 Camp. Cases (New Series) 391; *Hollingham v. Head* (1858) 6 Weekly Reporter 442; 7n *re Haggenmacher's Patents* (1898) 2 Ch. 280; 67 L.J. Ch. 675.

(5) all the probabilities are in favour of the plaintiff. The statements in the pleadings are different from the letters produced and from Phang's evidence concerning the position of the parties. Reference was made to the 3 letters, Exs. "C1", "D" and "E" and to paras. 4 of both Defences, and, in particular to the words "expressly confirmed" in para. 2 of Ex. "C1" and the words "expressly confirmed" in para. 2 of Ex. "E". The plead-

ings, letters and the oral evidence are conflicting and not consistent which all goes to the question of credibility. The plaintiff must surely have been more than stupid not to have asked for more tickets than he had if, in fact, he was aware of any limit;

(6) the court ought to consider the following improbabilities—

(a) surely Phang would have the greater motive for presenting an untruthful story! All the bets placed by the plaintiff were credit bets which did not involve the payment of one cent whereas, Phang, however, was being called upon to pay more than $60,000.00. Phang is obviously the man who would ultimately suffer;

(b) Phang did not intend to pay more than $10,000.00. He made a new rule on the spot that no matter how many winning forecast tickets the plaintiff had he would only pay out a total of $10,000.00. Has Phang got the power to make rules on the spot?

(c) the telephone conversation between the two men;

(d) is it likely that the plaintiff would still pursue a case for more money over and above the sum of $20,000.00 actually received by him if, in fact, he was fully aware of the limitation relied upon? Further, could this really be the position if, in fact, he had received a letter, a rule book and had actually accepted limited payouts without protest previously, in the presence of several witnesses as alleged?

(e) is it not significant that the plaintiff was only warned about limits in relation to the 8th and final race and. not in relation to bets placed by him on the first 7 races? Why was he in fact only warned in relation to tickets that won but not in relation to those that lost?

(f) why was not Dr. Manson-Hing called as a witness? Surely he would have been the person best able to tell this court why it was necessary or thought necessary to call Phang to go and speak to the plaintiff! Dr. Manson-Hing was present throughout and wrote out the tickets;

(g) how is it that the defence witness Fernandes only heard the vital part of the alleged conversation between the plaintiff and Derek Phang concerning limits and yet can give no particulars as to what happened previously?

(7) the burden of proving any condition is upon the defence and it is not for the plaintiff to prove that there was a contract subject to a condition;

(8) the parties trusted each other so much so that the plaintiff was given gigantic credit. He himself trusted the defendants to make out tickets accurately and to pay out if he won and they trusted him to make good his credit;

(9) in the final analysis, the whole case boils down to the personal credibility of the plaintiff and Derek Phang both of whom are men of substance and both of whom ought to speak the truth.

In winding up for the defence Mr. Fitzpatrick submits that—

(1)in so far as the admissibility of the documents stamped with the $10,000.00 limit is concerned, there is evidence from the plaintiff himself that he frequently bet through agents and, whether he received them or not, if his agent did in fact receive such documents, then their knowledge would be imputed to him and the plaintiff, accordingly, cannot wriggle out by saying afterwards that he did not receive the documents himself. If the tickets stamped with limits were given to his agents in the course of their duty to bet on his behalf then those agents had a duty to communicate those limits to the plaintiff and, if they failed to do so, he would, in law, still be bound by such limits.

Reference was made to *Gillie v. Posho* (ubi supra) which it is submitted is not applicable to the facts of this case; *A/S Rendal v. Arcos Ltd.* (1937) 3 All E.R. 577; Bowstead on Agency p. 359, Illustration 4, p. 360, Illustration 7 and p. 361, Illustration 16; Phipson on Evidence, 10th Edition, at p. 243;

(2) Perreira's evidence is admissible so far as the credibility of the plaintiff is concerned and in so far as it bears upon the central factor in this case, viz: the plaintiffs knowledge of the limitation of $10,000.00;

(3) all the cases quoted by Mr. Haynes were cases where evidence of similar acts were collateral to the main issue whereas in this case the question whether the plaintiff knew that book-makers had limits in the Caribbean was a central, if not the central, issue in this matter;

(4) there is evidence that it was the general practice of bookmakers in the region to have limits and such limits are admissible in support of this contention.

Reference was made to *Lewis v. Great Western Rly* (1877) 3 Q.B.D., p. 195 at p. 203; *Great Western Rly v. Sutton* (1869) L.R.H.L. 226; Phipson on Evidence, 10th Edition, paras. 1554—1557;

(5) as regards the question of motive it is submitted that the Plaintiff lost heavily prior to 14th October, 1967, and there is a probability that he wanted to recoup those losses. The reason why Phang imposed a special condition was because the plaintiff was down for the day and he did not want him to have a surplus for that day;

(6) in so far as Dr. Manson-Hing is concerned there was nothing to prevent the plaintiff from calling him as a witness. He is part of the system at Sports & Games whereas the witness Joseph Victor Fernandes is not. Manson-Hing's evidence would relate to the special condition imposed by Phang on the day in question but it is to be noted that the defendants have in fact paid the plaintiff on the basis of the general limit;

(7) this is the very first time that there is any evidence that the defendants were hit with the limit of $10,000.00 apart from the time

in August, 1967, when such a limit was paid to the plaintiff in respect of a win of $10,000.00 on ticket No. 2040 (Ex. "N1");

(8) the case for the defendants, on the final analysis, is much more reasonable than that for the plaintiff.

In assessing and evaluating evidence in relation to the question of credibility one of the most important, if not the most important, guide to a court of first instance has always been a consideration of the demeanour of the witnesses as they give their evidence in the witness box and the manner in which they answer questions in cross-examination.

The word "credit" means "belief in a person's trustworthiness" and the word "credibility" means "worthiness to be believed"—*Jowitt's Dictionary of English Law* (1959) Vol. 1 at p. 534. To my mind, for a court to accept and believe the evidence of a particular witness it must have confidence in the veracity of that witness.

Mr. Haynes has placed great reliance on the case of *Onassis and Calogeropoulos v. Vergottis* reported at (1968) 1 Lloyd's Rep. 294 in the Court of Appeal and at (1968) 2 Lloyd's Rep. 403 in the House of Lords. This decision is undoubtedly a remarkable one not only because of its complexity and of the wealth and repute of the three central figures involved but also because of the fact that the whole case ultimately depended upon an assessment of their credibility. As Lord DENNING, M.R., put it in the Court of Appeal at p. 298—

> "It was open to the judge and accepted by him that the case depended on the credibility of the witnesses, and his view of their credibility was the determining point in the case".

In the House of Lords, Lord MORRIS put it this way at p. 416—

> "As the case proceeded it became more and more manifest, and all the parties came to recognise and to accept that decision must ultimately rest where credence could be reposed. The case fell, as the learned judge appositely remarked, within "no recognised pattern". Its features were unique. Its setting was within its own special facts. On either side probabilities were in competition with improbabilities. The telling power of written words and of documents did not point irresistibly to any one conclusion. The case was one in which it became essential to decide where the truth lay. The judge had to decide whom he believed".

Now it is trite knowledge that it is no mean task to seek to disturb the decision of a trial Judge who has seen and heard the witnesses on a question of fact. In *Hontestroom* (*Owners*) *v. Sagaporack* (*Owners*) (1927) A.C. 37, Lord SUMNER, with whose opinion Viscount DUNEDIN and Lord CARSON agreed, said at p. 47—

> "What then is the real effect on the hearing in the Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction

> to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r. 1 (now Order 59). It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless, it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case . . . . If his estimate of the man forms any substantial part of his reasons for his judgment, the trial judge's conclusions of fact should, as I understand the decisions, be let alone. . . ."

In *Powell and Wife v. Streatham Manor Nursing Home* (1935) A.C. 243, Lord WRIGHT, after citing Lord SUMNER, said at p. 266—

> "I do not understand that Lord SUMNER is laying down any precise rules of universal application. I think it is difficult, if not impossible, to seek to lay down any precise rule to solve the problem which faces the Court of Appeal when it has to act as a judge of fact on the rehearing, but finds itself "in a permanent position of disadvantage as against the trial judge. In truth, it is not desirable, in my opinion, to do more than state, as I think Lord SUMNER was stating, principles that will guide the appellate court in the majority of such cases. The problem in truth only arises in cases where the judge has found crucial facts on the impression of the witnesses; many, perhaps most cases, turn on inferences from facts which are not in doubt, or on documents: in all such cases the appellate court is in as good a position to decide as the trial judge. But where the evidence is conflicting and the issue is one of fact depending on evidence, any judge who has had any experience of trying cases with witnesses cannot fail to realise the truth of what Lord SUMNER says: as the evidence proceeds through examination, cross-examination and re-examination the judge is gradually imbibing almost instinctively, but in fact as a result of close attention and of long experience an impression of the personality of the witness and of his trustworthiness and of the accuracy of his observation and memory or the reverse . . . ."

In *Watt or Thomas v. Thomas* (1947) A.C. 484, Lord THANKERTON made the following

made the following well-known statement regarding the position of an appellate court at p. 487—

"I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:

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

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

(III) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because the reasons given by the trial judge are not satisfactory, or because it unmistakably appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court . . . ."

Mr. Haynes made particular stress upon the following passages in the Onassis case—at p. 297 per Lord DENNING, M.R.—

"Now the judge, it is true, has a great advantage over this court. He sees and hears the witnesses, and we do not. But demeanour is not always a touchstone to truth. A man who appears to be convincing may yet be mistaken. He may, without being fraudulent, have reconstructed the facts in his mind so as to support his own case. Conversely, a man who appears shifty and spiteful may yet be truthful. The heat engendered by the case may have made him angry, but not a liar. It is for this reason that a judge of fact should always test the evidence by reference to the documents and the probabilities of the case".

Also at p. 298 by Lord DENNING—

"I think that in such a case as this it is important to see if there was any motive for the fraud. But the motive found by the judge did not exist. If there was no motive shown, one asks oneself: Why should Mr. Vergottis; himself a rich man, stoop to a deliberate fraud on friends whom he loved so well?

"Then another test which the judge took in favour of Mr. Onassis and Mme Callas was the "commercial probabilities" of the case. He pointed out that £60,000 was the appropriate payment for 25 shares: whereas it was very unlikely that Mme. Callas would lead it as an unsecured loan. The judge said that no businessman in his senses

could have recommended to Mme. Callas to put up this money unless it was coupled with a personal guarantee by Mr. Onassis and Mr. Vergottis.

"I must say that I do not regard the loan of £60,000 as a commercial improbability. Although it was unsecured, the personal relations of the parties were so close that Mr. Onassis and Mr. Vergottis would not let Mme Callas down. Here was an opportunity whereby she could get a good rate of interest on her money instead of keeping it in Switzerland at a much lower rate of interest. The suggestion of commercial improbability can be put the other way round. Why should Mr. Vergottis put up £120,000, an equal amount to Mr. Onassis, and only get 25 shares for it: whereas Mr. Onassis was getting 50 shares? The test of "commercial improbability" weighs equally one way or the other".

At p. 302, EDMUND DAVIES, L.J., (my note reads SALMON, L.J., this is obviously a mistake) said—

"How is a judge to decide which of the witnesses called before him should be believed? Not solely by demeanour, if there be other material available, for experience shows that the honest witness may fail to do himself justice and the dishonest may be an accomplished liar, and in both cases the truth may thereby be concealed even from the most vigilant and experienced judge. Demeanour needs to be balanced against the rest of the evidence, and if the trial judge is shown to have failed to do that, his conclusion as to credibility cannot, in justice, be regarded as unimpeachable. Furthermore, the graver the issues involved, and particularly if allegations of fraud, treachery, and even criminality are in the air, the greater the necessity for the appellate court to enquire whether the conclusion as to credibility is one which must under the law be regarded as, for all practical purposes, irrefragable.

"In arriving at a finding as to credibility, demeanour (albeit exceedingly important) is thus only one ingredient. But so also is motive. Again, there may be documentary evidence available which serves to indicate that, despite the impressive demeanour of a witness, his veracity is open to the gravest doubts. Accordingly, if it can be demonstrated that the trial judge fell into error in relation to such matters, it would not be just for this court to regard itself as compelled to regard as conclusive his finding on the issue of credibility".

The learned Lord Justice went on to say at p. 303—

"Just as demeanour is important, so also are the documents and these (as my Lords have already observed) strikingly support the defendant's case. So also is consideration of the probabilities. But while there are frequent references in the judgment as to the improbability of the plaintiffs acting as they did were the defendant's

version the true one, it nowhere reveals consideration of the improbability of the defendant's conduct were the plaintiffs' story true. This omission is particularly striking in relation to the defendant's vitally important letter of December 21, 1964, which (as the trial judge put it) (1967) 1 Lloyd's Rep. at p. 615—. . . 'taken at its face value, beyond all possibility of argument supports the defendant's case and goes to disprove the plaintiff's case'. . . ."

In the House of Lords, Viscount DILHORNE, L.C. said at p. 407—

"The evidence in this case covered a considerable period of time and on almost every point there was a serious conflict. Mr. Justice Roskill said at the commencement of his judgment that it was rare in the Commercial Court to encounter a case where there was 'so stark a conflict of evidence' and that the question he had to decide was who was telling the truth, Mr. Onassis and Mme. Callas or Mr. Vergottis: "Which do I believe?"

I think that in this he was right. The question in the case depended, and the decision, if there is a new trial, will depend, on the view taken by the judge of the credibility of the witnesses. In determining whose evidence to accept, a judge will have regard to the probabilities and to the documentary evidence".

The decision of the Court of Appeal was reversed by a majority of three to two. Viscount DILHORNE, L.C., Lord MORRIS of Borth-Y-Gest and Lord GUEST formed the majority whilst Lord PEARCE and Lord WILBERFORCE gave dissenting judgments. It was held by the majority that as the learned trial Judge made no finding on the question of motive it was not competent for the Court of Appeal to hold that he had misdirected himself as to motive. Further, if there were insufficient mention of points in the defendant, Vergottis' favour, it could not be assumed that the Judge ignored them and, further, that there was not a governing fact which in relation to others had created a "wrong impression" in the mind of the Judge and it could not be said that his judgment occasioned a "substantial wrong or miscarriage".

Lord MORRIS said at p. 424:—

"The more I have studied this case the more does it appear to me that its result depended upon coming to a decision as to which oral evidence to accept. If probabilities are considered there are many which point one way and many which point another. I see no purpose in recounting them. Complaint is made of the fact that the learned judge regarded it as commercially improbable that the only transaction should have been one under which Mme. Callas made an unsecured loan in connection with the purchase of the ship by two wealthy men who, according to the case for the plaintiffs, were buying it under a partnership arrangement of a kind which they had never previously contemplated. Whether or not this was commercially improbable must be a matter of individual opinion, but as I read the judgment the learned judge

considered that in the end his conclusion must depend rather upon an assessment of the witnesses than upon an assessment of the probabilities. When all the documents and all the probabilities and improbabilities and all questions of motive or lack of motive are considered the case remains one in which without seeing and hearing the witnesses it, is not possible to form a conclusion. Without having that experience I would not feel able to express a view as to whether the learned judge did or did not arrive at a correct conclusion".

Lord GUEST said at p. 427—

"I dismiss at once as a ground for misdirection the suggestion that the learned judge over-weighted considerations in favour of the plaintiffs and under-weighted considerations in favour of the defendant. I reject also suggestions that the plaintiffs' evidence was inconsistent with some of the pleadings and documents and that at times their evidence was inconsistent with each other's. This balancing of probabilities and weighing of the evidence is a matter for the judge and not an appellate Court. In my view, he approached the matter entirely correctly when he said at the outset of his judgment that a heavy onus was placed on the plaintiffs to establish their case upon a balance of probabilities, particularly in view of the gravity of the allegations made against the defendant. In these circumstances it was for the judge to evaluate the weight of the evidence on either side and having regard to these matters to decide where the truth lay. He has found that the plaintiffs were reliable and honest witnesses and he has regarded the defendant's evidence as unworthy of credit. It is not, in my view, for an appellate Court in these circumstances, to retry the case".

The Onassis case is undoubtedly not only a difficult and complex one, which all the judges in the Court of Appeal and the House of Lords themselves so considered, but also one that was remarkable for its own peculiar and unusual facts.

What then is the position in this matter concerning the credibility of the witnesses who have given evidence on oath?

Having regard to the legally admissible evidence as a whole, I accept and believe, on the balance of probabilities, the story as related by Derek Phang and his witnesses in preference to that given by the plaintiff and his witnesses.

I am not impressed with the demeanour of the plaintiff who strikes me as a rather abrupt, argumentative and hasty tempered sort of man and whose evidence I consider unworthy of credit. To my mind, George Baird is a rather quiet and serious minded type of individual who does not bet himself and who, clearly from his own evidence, has very little knowledge about the complexities of betting on horses. I do not consider that Baird was really paying any or much attention to what was going on at Sports & Games that Saturday and, in particular, to the events immediately preceding and following the running of that fateful 8th and final race.

Vasconcellos, who describes himself as a professional gambler, gave me the impression throughout his sojourn in the witness box that he detests the best bone in Derek Phang's body. He appeared to me to be an embittered man who would do his level best to get his own back on the defendants for whom he had given 7-8 years unbroken service both here and in Trinidad and with whom he might well have been still employed were it not for Derek Phang.

On the other hand, Derek Phang strikes me as an imperturbable, shrewd but honest businessman who takes a professional pride in the good name of his firm of which, I accept, he is merely the Supervisor or Manager. I am particularly impressed with the demeanour of the witness Joseph Victor Fernandes whom I consider an independent spectator not connected in any way with the system employed by Sports & Games and having no axe to grind for anybody. Oscar Jones, like Baird, is rather innocuous and his evidence, to my mind, does not really help the case further as I shall show later on. I have no reason to doubt the evidence of the witness Perreira in relation to what may be termed the "Trinidad transaction" which the plaintiff cannot himself recall but this evidence, I concede, can only be accepted and acted upon if it is, in fact, legally receivable.

Mr. Haynes has submitted that this case is essentially one of credibility. That credit is undoubtedly a most important factor there can be no real doubt but I entirely agree with Mr. Fitzpatrick that the main, if not the central, issue, here, is whether the plaintiff knew of the undisputed limit of $10,000.00 imposed by the defendants in accordance with Rule 14 of Ex. "F".

The plaintiff has stated most vehemently that prior to 14th October, 1967, not only was he unaware that bookmakers world-wide had any such limits but also that they had any rules at all in relation to betting. Let me say at once that I entirely reject this statement which I consider not only infamous but ridiculous and which would not fool a 10 year old child.

According to Phang, the plaintiff is not a sensible gambler in the sense that, unlike the wise punter, he does not bet on favourites but only on jockeys and on outsiders. Whether this is an accurate statement or not and I make no pronouncement on it, it seems clear to me, however, that the plaintiff is a most careless punter to say the least. Consider this statement of his in cross-examination that appears in para. 4 at p. 151 of Civil Minute Book No. 9 (Demerara)—

> "I know that bookmakers use sheet programmes on race days and I have in fact picked them up. I never paid any attention to such programmes to see whether they contained any rules or conditions".

If he had taken the trouble to read the sheet programmes issued by Sports & Games he would have seen clearly printed thereon the following express words as described by his own witness Vasconcellos who himself supervised the cyclostyling of such programmes containing information about limits—

"$10,000.00 limit on doubles, trebles and accumulators".

Now these are the exact words of Rule 3 on West Indian racing as set out at the back of Ex. "F". The plaintiff admits that he kept no proper records concerning his betting transactions except notes made by him on sheet programmes which, significantly, he destroys later the same day and in a scrap book which he does not produce. In para. 3 at p. 32 of Civil Minute Book #11 (Demerara) appears the following statement by the plaintiff in cross-examination—

> "Sometimes I have seen Mr. Phang write down in the book itself. I never paid any interest as to whether the book contained original and duplicate tickets".

So not only is he careless but he is also disinterested. What type of punter is the plaintiff? But, in addition, this statement is in direct conflict with the following passage of the plaintiff's evidence in cross-examination by Mr. Luckhoo appearing in the last paragraph at p. 156 which continues over to p. 157 of Civil Minute Book No. 9 (Demerara)—

> "Whatever bets are written in the Books are written in duplicate, the original is white and the duplicate is green. The punter is given the original and the duplicate is retained in the book".

How can one really accept the veracity of a witness who so blatantly contradicts himself?

"Res inter alios acta alteri nocere non debet" means that persons are not to be prejudiced by the acts or words of others, to which they were neither party or privy and which they consequently had no power to prevent or control. In other words, a person is not to be affected by what is done behind his back—*Jowitt's Dictionary of English Law* (1959) Vol. 2 at p. 1533. On this particular aspect, I am again in complete agreement with Mr. Fitzpatrick's submission that evidence of a general practice among bookmakers and, in particular, the evidence of the witness Perreira concerning the "Trinidad transaction" concerning a limit on payouts by Turf (now Tote) Investments Ltd., is admissible so far as the credibility of the plaintiff is concerned and so far as it bears upon the central issue in this case, viz: the plaintiff's knowledge of the limitation of $10,000.00.

I have read the 4 cases submitted by Mr. Haynes on this point and, to my mind, they are all decisions which relate to evidence of similar acts collateral to the main issue whereas, in this matter, as Mr. Fitzpatrick rightly points out, in my view, the central issue is whether the plaintiff knew that bookmakers generally had limits.

Thus, in *Spenceley v. De Willot* (1806) 7 K.B. 108, Lord ELLENBOROUGH, Chief Justice, refused to allow defence counsel to ask the Marquis De Chambonas, who had made a contract with the defendant wherein it was alleged that the defendant had committed usury, for the purpose of discrediting the said witness, what contract he had made with a Mr. Schullenburg and several other third persons from whom he had also

taken up money on the same and on other days on which the contract in question was made. His Lordship conceived that the question was entirely irrelevant to the issue in the cause and that it was not allowable for counsel in cross-examination to put to a witness any question concerning a distinct collateral fact not relevant to the issue for the purpose of disproving the truth of the expected answer by other witnesses. The Court of Ring's Bench upheld the ruling of the learned Chief Justice and held that whatever contracts the witness might have entered into with other persons for other loans could not be evidence of the contract made with the defendant unless the witness had first said that he made the same contract with the defendant as he had made with those persons which he had not said.

In *Carter v. Pryke* (1791) 170 English Reports p. 104, a landlord sought to adduce evidence, in a question between himself and his tenant whether rent was payable quarterly or half-yearly, that his other tenants of the same description as the defendant (who was in indigent circumstances) paid their rents quarterly. Lord KENYON refused to allow this evidence to be led holding, in the language of that era—

> ". . . the custom of one manor is no evidence of the custom of a manor adjoining".

In *Hollingham v. Head* (1858) 6 Weekly Reports 442, the plaintiff sold the defendant, a farmer, manure by the name of "rival guano" the price of which was £7 per ton and which the defendant alleged was sold upon the condition that, if not equal in quality to Peruvian guano, the price of which was £14 per ton, he should not pay for it. This was denied by the plaintiff. In cross-examination the plaintiff was asked "Did you not sell portions of the rival guano to other persons on the same terms?" (meaning the special agreement as to quality referred to above). Williams J. refused permission to ask such a question. On appeal, it was held by the Court of Common Pleas, that the learned judge was correct. Willes J. said at p. 442—

> "The fact of a person having entered into contracts of a particular kind on other occasions cannot be properly admitted, where no custom of trade to make such contracts is shown, and no connection between these and the one in question appears to exist. The only legitimate use of the question attempted to be put to the plaintiff, was to test his credit, and I doubt whether it is admissible even for that purpose—that, however, does not appear to have been its object".

In re Haggenmacher's Patents (1898) L.R. Ch. D. Vol. 2 p. 280, an action for infringement of the patent the subject of this petition, brought by the respondent to the present petition, having failed, the court being satisfied that the invention had been used prior to the date of the patent at one place out of several referred to, this petition was brought to have the patent declared void, the petitioner relying solely on the instance which had satisfied the court in the prior action. A witness for the petitioner stated that he had seen the invention used at the particular place relied on and in

cross-examination he stated that he had seen it used also at other places referred to prior to the date of the patent. The respondent asked to be allowed to adduce evidence as to the prior user at such other places. Romer J. said at pp. 283 and 284—

> "If I allow the respondent to give evidence to show that the story given by the witness about those other occasions was untrue, I ought to allow the petitioner to call evidence to support his story, and I should therefore be compelling the petitioner to go into those other cases, which the respondent seeks to go into, not for the purpose of establishing as a matter of fact that this invention had been used on those other occasions, because that is irrelevant, but solely for the purpose of discrediting the story told by the witness and of disproving the answers to some questions he was asked in cross-examination which are not matters relevant to the issue I have to try, but are collateral matters. That, it appears to me, would be allowing the respondent to go into evidence on matters not directly in issue and therefore I ought not to permit it".

These cases should be compared with the following two decisions. Firstly, in *the Directors etc. of the Great Western Railway Company v. William Richard Sutton* (1869) L.R.H.L. 226 Vol. IV, the plaintiff was a carrier in London and elsewhere carrying on business of collecting parcels from wholesale houses and from private individuals, packing them together in boxes or hampers, which he addressed to his country agents and sending them by the Great Western Railway to the different towns where he had agents who there received the boxes or hampers and distributed the parcels. His agents in like manner collected and forwarded to him similar boxes or hampers of parcels so collected, and on their arrival in London he received them from the defendants and distributed them to the ultimate consignees. The profits of the plaintiffs were derived from charging each parcel as if it had been separately carried by the defendants along their line and delivered by himself in town. The plaintiff complained that the defendants had charged him at a higher rate than was lawful for carrying those packed parcels, for that they were bound by s. 50 of 7 & 8 Vict. c. iii to charge all persons sending parcels of the "like description" and under the "like circumstances" at the same rate; but that the defendants carried packed parcels of the like description and under the like circumstances for various wholesale London houses, and charged them at a lower rate. At the trial the plaintiff called several witnesses to show what was the practice among mercantile houses when shipping similar packed parcels via the defendants' railway for which a lower charge was made than for those packed in the same manner by the plaintiff. The jury found for the plaintiff on the directions of Martin B which was affirmed to the Exchequer Chamber. Objection was taken at the trial by defence counsel to that part of Martin B's direction that the jury might find:—

"that parcels had been carried by the defendants for other persons containing goods of a like description and under like circumstances at a less rate than such goods were carried by them for the plaintiff."

The judgment of the Exchequer Chamber was affirmed in the House of Lords. BLACKBURN, J. said at p. 239—

"The mode of establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is reasonable, and therefore extortionate, the fact that another was charged less is only material as evidence for the jury tending to prove that the reasonable charge was the smaller one. When it is sought to shew that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not, it is enough to shew that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances. One single act of charging a person less on one particular occasion would not, I think, make the higher charge to all others extortionate during all that day, or week, or month, or whatever the period might be. I think it would be necessary to shew that there was a practice of carrying for some person or class of persons at the lower rate. But a single instance would be evidence to prove this practice; and if followed up by showing that the smaller charge was repeatedly made at intervals over a period of time, the jurors would, in the absence of explanation be justified in drawing, and would probably draw, the inference that the company during the period carried for others at that lower rate, and consequently that the higher charge was extortionate as being beyond the statutable limit of equality. It would be the very essence of the case to prove that the goods were "of the like description and carried under the like circumstances".

Lord CHELMSFORD said at pp. 261-262:—

"The only available evidence to prove the plaintiffs case was the general proof which he gave that the wholesale houses had for years been in the habit of sending packed parcels by the railway, and that the defendants had long known of this practice; and especially that with respect to one of the houses (Messrs. Morley) the defendants were perfectly aware of their habit of sending packed parcels. The plaintiff also proved knowledge brought home to the defendants through their Solicitors and traffic manager, by the evidence of witnesses given in their presence, of the practice of houses in London of packing parcels and sending them by the defendants' railways. This evidence was excepted to: but it appears to me that it was properly admitted for the purpose of proving the knowledge of the practice of the wholesale houses in London to pack parcels, which the de-

fendants learnt through the traffic manager, their agent in all matters relating to the traffic. The whole of the foregoing evidence constituted the proper mode of proving that the defendants knowingly and purposely charged the plaintiff at a higher rate than other persons upon packed parcels of goods".

Secondly, in *Lewis v. Great Western Railway* (1877) 3 Q.B.D. 195, the plaintiff, under a contract in writing signed by his agent, one Hutchinson, delivered to the defendants a quantity of Cheshire cheeses numbering 156 in all and having a total weight of 3 tons 18 cwt. to be carried from London to Shrewsbury at "owner's risk". As the plaintiff knew, the defendants had two (2) rates of carriage; a higher rate, when they took the ordinary liability of carriers and a lower one, when they were relieved of all liability, except that arising from the "wilful misconduct" of their servants. In using the words "owner's risk" the plaintiff intended that the cheeses should be carried at the lower rate and subject to the conditions restricting the defendants' liability. The defendants' servants packed the cheeses in such a manner that during their travel upon the defendants' railway they were extensively damaged but the defendants' servants did not know that such damage would result from the mode in which the cheeses were packed. The case was tried by LOPES, J., without a jury and that learned judge held that there was no evidence of "wilful misconduct" by the company's servants and he gave judgment for the defendants. The Court of Appeal affirmed the decision of LOPES, J., and held that, as the defendants carried at alternative rates, the condition excepting them from liability when carrying at the lower rate was just and reasonable and that the injury to the cheeses had not arisen from the "wilful misconduct" of their servants. BRAMWELL, L.J., said at pp. 202-203—

> "But I think it is a rule of evidence or law that where words are used which would comprehend some other than one necessarily exclusive meaning upon which the judges are to put an interpretation, then, as PARKE, B., said, all the surrounding circumstances, and the course of dealing between the parties, not only may, but must, be looked at to ascertain the meaning of those words when used in reference to those surrounding circumstances and that course of dealing; and therefore I cannot doubt that in this case there was a course of dealing between the consignor and the Great Western Railway Company, by which goods were sent and carried under two kinds of contract, and that, under the first kind, goods were carried at one rate by the company with an ordinary carrier's liability: the liability of insurers: and that under the second, goods were carried at another rate with what was compendiously termed "Owner's risk", which, when the course of business between the parties is regarded, means at the risk of the owner in consideration of the lower rate, plus the liability of the company for the "wilful misconduct" of their servants. Now I think that is the proper interpretation of the document signed by Hutchinson—an interpretation obtained, not by joining the con-

signment note to it but, by regarding the course of business between the consignor and the company".

BRETT, L.J., said at p. 208—

"Now I apprehend that, in order to construe a written document, the court is entitled to have all the facts relating to it and which were existing at the time the written contract was made, and which were known to both parties. Certain facts existing at a time when a written contract is made are sometimes customs of trade, or the ordinary usages of trade; sometimes the course of business between the parties; sometimes they consist of a knowledge of the matter about which the parties were negotiating; the court is entitled to ask for those facts, to enable it to construe the written document; not simply because they are customs of trade, or the course of business between the parties, but because they are facts which were existing at the time, and which have a relation to the written contract, and which are things which must be taken to have been known by both parties to the contract. Here there were certain facts given in evidence which, I think, we are entitled to look at to enable us to construe the phrase "owner's risk"."

COTTON, L.J., said at p. 212:—

"But in this, as in all other cases, we are entitled to look to the surrounding circumstances; we cannot look to the acts of the parties for the purpose of finding what their intention was, but we may look to the course of dealing of the parties to see whether they have given a conventional meaning to any terms used in the contract, and then the question becomes one simply of construction of the contract".

I shall now deal with the question of the admissibility of the duplicate tickets tendered and, in particular, Exs. "H", "N2", "Q1", "Q2", "Q3", and "Q4" and "Q5", on all of which are marked the words "Maximum payout on each bet is $10,000.00". This aspect of the case, to my mind, necessarily involves a question of credibility concerning the evidence of the two main protagonists in this matter with regard to the system of betting employed by them. Let me say at once that I do not accept and/or believe the plaintiff when he says that 95% of his bets were placed over the telephone in relation to both English and West Indian racing and that this was equally so even when he betted in person at Sports & Games and that, further, in only 5% of such cases was he ever actually issued with original tickets. I accept and believe the evidence of Derek Phang that in relation to English racing the plaintiff mostly betted by telephone and in relation to West Indian racing he would invariably bet in person and that, in relation to both English and West Indian racing, tickets would be issued by his firm in duplicate in the normal course of business. I cannot imagine that a well-known and well-established firm of bookmakers, as the defendants admittedly are, would ever employ such a slip-shod arrangement with any

of their customers as the plaintiff would have us believe and which he naively terms a "gentleman's agreement". Further, the plaintiff alleges that the statement of account (Ex. "C2") is the first and only statement of account that the defendants have ever submitted to him in writing, all previous accounts being merely oral. Again, I find this exceedingly difficult to believe. To my mind, it is most reasonable to assume, especially having regard to the undisputed fact that the plaintiff was their biggest customer, that the defendants would make absolutely sure that his account, above all, would be set out in detail, debit and credit, in plain black and white, so that a detailed check could easily be made in case of any dispute. So big a gambler in fact was the plaintiff that he was invariably issued with a whole book for his sole use, which I accept and believe was what was done whenever the plaintiff betted with the defendants, whether on English or West Indian racing. Further, this statement conflicts with the following passage of the plaintiffs evidence in cross-examination by Mr. Luckhoo appearing at para. 2 at p. 156 of Civil Minute Book No. 9 (Demerara):—

> "Sports and Games send me a weekly account. Sometimes they would attach the original slips of my telephone bets with the statement".
>
> How can this possibly mean "oral" statements?

Now it is undisputed that the plaintiff was given a whole book on Saturday 14th October, 1967, and that he placed 24 bets in all on the 8 races run that day for which 24 original tickets were made out and issued to him, of which he has only produced 7, viz: Exs. "A1", "A2", "A3", "A4", "A5", "A6" and "K24". I consider this a most significant fact which fortifies my opinion that this was nothing unusual but was, in fact, merely the normal course of dealing between the parties. To my mind, this demolishes the plaintiff's statement that he received tickets in only 5% of the cases even when he betted in person at the defendants' premises in High Street: Further, I have no reason to disbelieve Derek Phang when he said that it was only in very rare cases that the plaintiff would place telephone bets on West Indian racing and, in those rare cases, it was mostly in relation to the first race. To my mind, not only is the plaintiff a careless and disinterested punter and one who contradicts himself on several occasions, but one who has convenient lapses of memory whenever the occasion is to his advantage.

It is to be noted that 6 of the 7 tickets marked with a limit of $10,000.00 (Exs. "H", "Q1", "Q2", "Q3", "Q4" and "Q5") were all, according to Derek Phang, bets placed on English races and which, without any real dispute, were all telephone bets. The 7th ticket, Ex. "N2" was in relation to a race meeting in Barbados. It is clear from the record in this matter that there is no express evidence at all to show whether the originals of those duplicates were ever, in fact, submitted to or received by the plaintiff. It seems to me, however, that these duplicate tickets are all legally admissible by way of reasonable inference having regard to what I have accepted and believed as the normal course of dealing between the parties, viz: that the defendants issued tickets whenever the plaintiff placed bets

with them either in person or by telephone and in relation to both English and West Indian racing. This to my mind is equally applicable to Ex. "G" which was a bet on a West Indian race and which has the words "No limit for F/C" across the face, which is just the sort of thing the plaintiff may have asked for especially if he was down.

I accept and believe that written statements of accounts were submitted to the plaintiff and I consider it a most reasonable inference to draw having regard to the system employed by the defendants that, in the case of telephone bets, the original tickets would be submitted along with the written weekly statements.

In *Mustapha Ally v. Bookers Stores Ltd.,* (Civil Appeal No. 59 of 1966) (unreported decision No. 12 of 1969), the appellant, a businessman on the Corentyne, entered into two hire purchase agreements with the respondents, a Company carrying on business in this country, under which he undertook to hire a 30/60E Grantex Detached Rice Mill and a 08 Grantex Padi Dryer with the usual option to purchase both. After the mill and dryer were installed and the mill officially opened the appellant made numerous complaints about the incompetence of both mill and dryer. Several tests and inspections were made by the respondents' Manager, one Chung, who took exception to the manner in which the machinery was being handled by the appellant and the poor quality of the padi being used, but, nevertheless, he expressed satisfaction with the mill's performance. The appellant, however, was dissatisfied with the capacity of the mill and complained that he was getting far less bags of padi per hour as had been represented to him by Chung and also according to pamphlets handed to him by Chung. Despite this, the appellant paid off the outstanding balance of $70,000.00 due on both pieces of machinery thereby exercising the option under clause 9 of both hire purchase agreements. Correspondence passed between the parties after which the appellant brought proceedings in which he claimed damages for breach of warranty and for condition and/or fraud and/or misrepresentation on the sale of the two pieces of machinery. The trial judge (Khan, J.) dismissed the claim, accepting the evidence of the respondents' witnesses in preference to that of the appellant and his witnesses. The learned trial judge's finding of fact was reversed by the Court of Appeal and the respondents have since appealed to the Judicial Committee of the Privy Council before which Board the matter is still pending up to now.

There is only one point in that decision that is relevant to the facts of this case and, that is, whether the learned trial judge was correct when he admitted in evidence two documents, viz: Ex. "V1" which was a copy of the specifications relating to a No. 30/60 Grantex Detached Mill and Ex. "V2", which was the letter accompanying Ex. "V1". PERSAUD, J.A., said at p. 15—

> "The letter (Ex. "V2") clearly indicates that those persons to whom it was sent had inspected a similar mill at East Lothian (presumably Dr. Fraser's mill) which fact, in turn, would go to show that

Dr. Fraser's mill was being used by the respondent's agent as a show-piece to prospective buyers. But this in itself does not put at rest the question whether the letter and specifications were in fact sent or given to the appellant by Mr. Chung".

CRANE, J.A., said at pp. 17 & 18:—

"It is clear that if these exhibits (i.e., Exs. "V1" and "V2") are properly admissible, they would certainly affect the appellant with knowledge of both the type and capacity of the mill he had bargained for, render it improbable that he was given "Ex. "C", and support the case for the respondents. They were first put in evidence by Blair and marked "Tendered by consent—Ex. "V" (2 pages)", though I should have thought the appropriate marking at that stage ought to have been "Tendered for identification". This is obviously the case because the documents did not emanate from Blair, and when Chung came to testify, he identified Ex. "V1" as similar to the specification he gave to the appellant.

"Immediately after being introduced into evidence both documents were objected to and reasons given therefor. It was agreed that their admission be made "subject to cross-examination by the plaintiff". This I take to mean in the context, subject to cross-examination of the appellant upon his recall for that purpose, and that thereafter the court would rule on the question of the admissibility of those documents. In fact, the appellant was not recalled; he was therefore not cross-examined on the point. It must follow, therefore, that the exhibits are not properly admissible in evidence, the condition subject to which they were admitted not having been fulfilled. The judge, therefore could not properly regard them in the face of the appellant not having admitted receiving the originals, and the existing conflict of evidence between Blair and Chung on whether they were sent to him. There was no notice to produce served on the appellant, and he was obviously taken by surprise at the trial, but I consider it was a fatal omission for the judge not to have stated what consideration he gave to this vital and damning piece of evidence which must have affected his mind. All he found and accepted is, that the appellant spoke to Chung who supplied him with quotations after giving further information about rice-milling equipment. When, therefore, preference was given to Chung's evidence wherever there was conflict or variance with the appellant's, such findings as he made with respect to the type of mill (see finding number 3 above), and on its capacity (see finding number 4 above), must necessarily have been affected thereby, because both exhibits referred to those matters. Likewise, reference in Mr. Blair's letter (Ex. "K1") to the appellant's receipt of a quotation from Mr. Chung is no proof that Chung handed it to the appellant; but the judge has not spoken".

In *Gillie v. Posho Ltd.* (*In Liquidation*) (1939) 2 All E.R. P.C., 196, the appellant, who had arrived in Kenya in 1926, sought a farm suitable for wheat growing. He negotiated with a firm of land agents of whom one Wilfred C. Hunter was the senior partner and was recommended to purchase one of nine farms belonging to the respondent company, of whom Hunter was the liquidator, and eventually he acquired one of them. These farms were advertised for sale in the East African Standard of 29th January, 1927, as suitable for growing maize, wheat and coffee. The agreement of purchase was dated 3rd February, 1927. The appellant attempted to grow wheat on the farm until 1930, when it was established that the land was not suitable for that purpose. Meanwhile, the appellant had fallen into arrears with his payments, and the company instituted proceedings for the amount due, or, alternatively, to have the agreement rescinded, possession delivered to the company, and the moneys already paid by the appellant forfeited. In his defence, the appellant alleged that he was induced to enter into the agreement to purchase by Hunter who had fraudulently represented to him that the land was suitable for growing wheat, and that, in addition, the advertisement in the newspaper had stated that the land had been proved for wheat, and that such advertisement had finally caused him to purchase the farm. Hunter denied making the alleged representations, and stated in evidence that by December 23, 1926, long before the appearance of the advertisement, the appellant had already agreed to buy the land. In support of this contention, a letter from Hunter to the company's Solicitors, dated 23rd December, 1926, was produced, tendered, and accepted in evidence in the court below as showing that the negotiations were concluded prior to the appearance of the advertisement, and that the appellant could not have been influenced by its terms: Held, the letter in question was plainly inadmissible, either in examination-in-chief, or in cross-examination. It was no part of the *res gestae.* At most, it was a statement made by Hunter to a third party, of which statement the appellant had no knowledge, and the truth of which he never directly or indirectly admitted. In delivering the judgment of their Lordships' Board, Lord PORTER said at p. 201—

> "In *Jones v. South Eastern & Chatham Ry. Co's Managing Committee* (2), an attempt was made to enlarge the classes of case in which such evidence is admissible. In that case, the plaintiff, who had met with an accident, as she alleged, in the course of her employment, was cross-examined as to statements made to third parties as to the cause of her injury. When she in turn was called as a witness, evidence was sought to be given as to statements in her own favour made to her by third parties, but was rejected. On appeal to the Court of Appeal, SWINFEN-EADY, L.J., said at pp. 777 & 778:
>
> > ". . . it was argued that there is in certain cases a rule under which a witness may be asked to give particulars of what a person has said shortly after an occurrence, and the complaint that such a person may have made shortly after an occurrence, not as being evidence of

the facts complained of but as being evidence of the consistency of the story of the complainant from beginning to end, and it is said that such a question ought to have been admitted in the present case on that principle. The answer is two fold; first, that the principle has no application to a case of this kind. No doubt in cases especially of violence upon women and girls the rule is established under which a question of that kind is allowed to be put. . . . That is a special class of case. . . . Secondly, this statement was made two days after the alleged accident, and not shortly afterwards. If a statement of that kind were admitted, it would be easy to manufacture evidence by telling your various friends, and then calling them as witnesses to prove what you have told them".

"In the same case, NEVILLE, J., set out the general rule applicable to that case, and, as their Lordships think, to this case, at p. 779: . . . we have simply to apply here the general rule of evidence that statements may be used against a witness as admissions, but that you are not entitled to give evidence of statements on other occasions by the witness in confirmation of her testimony.

"In their Lordships' view, these observations correctly set out the rule of evidence applicable to this case, and the letter is inadmissible on both the grounds referred to above. No evidence has been given to show whether the statements in the letter were made with reference to some event which had only just happened, but, quite apart from the time that elapsed between the happening of the event and the recording of the statement, the letter is, in their Lordships' view, inadmissible upon the other ground given by SWINFEN-EADY, L.J., The letter was tendered and received by the court in order that its contents might be used in evidence to prove that the appellant had made up his mind to purchase the farm before he saw the advertisement, and the courts relied upon it as at least corroboration of that fact. For this purpose, it was wholly inadmissible and, in these circumstances, the case must go back to be tried by a court of first instance upon evidence which the court can properly receive, and upon such evidence only".

Assuming, but not admitting, that I am wrong in holding that the duplicate tickets with a limit of $10,000.00 marked thereon are legally admissible, then this whole case, to my mind, is clinched by the fact that I accept and believe that Derek Phang did in fact personally put a rule book similar to Ex. "F" in the plaintiffs left shirt pocket at Sports & Games during the year 1966. As regards this question of rule books, let me say at once that I entirely agree with Mr. Haynes' submission that the evidence of Derek Phang and Oscar Jones alleging that the envelope addressed to the plaintiff contained a rule book and the original of the letter tendered only for identification as Ex. "J", is clearly inadmissible, since there is no nexus to show that the letter handed to Jones by the acting Manager, Mr. Hazel, who it must be remembered did not give evidence, is one and the same

letter that Phang alleges he handed to Jones the day before he left for England in June, 1967. Further, Jones has himself stated that he did not know what was in the envelope but he assumed that it contained a rule book from what Hazel told him. This being so, I have no hesitation in disregarding this particular piece of evidence and erasing it altogether from my mind.

Having accepted, however, that the plaintiff was in fact personally given a rule book similar to Ex. "F" by Derek Phang, there is no real need for me to consider the other points raised because clearly, if this is so, the plaintiff cannot come afterwards and say that he was not aware of any rule similar to Rule 14 in Ex. "F" as he himself has indicated in the following passage of his cross-examination by Mr. Luckhoo at the second paragraph at p. 153 of Civil Minute Book No. 9 (Demerara):—

> "I agree that had I been aware of Rule 14 in Ex. "B" when I purchased Exs. "A1" and "A2" then I would only have been able to collect in all $20,000.00 and no more. I agree that this would be so regardless of the amount spent by me".

It seems to me that the reason why the plaintiff was personally given a rule book was simply because he was a punter that would have to be carefully watched if only because of the extraordinary and comprehensive nature of his betting. Here was a man who would be an ever present source of potential danger that might tax the defendants' financial resources to the limit if he ever won, which, in view of the way he betted, might be quite often indeed. What more reason, therefore, that he, above all others, should be positively notified or be made well aware of the defendants' express rule limiting payouts on any single ticket.

To my mind, this is a stronger case than the Onassis case in the sense that, ultimately, credibility is not the main consideration here as it was undoubtedly there. The question of motive or lack of motive, having regard to the central issue here of knowledge about limits on the part of the plaintiff, in my opinion, does not play much, if any, part, as it undoubtedly did in that case.

In deference, however, to the rather comprehensive arguments I shall deal, rather shortly, with those other points raised.

Firstly I have no doubt that Phang did impress upon the plaintiff on Saturday 14th October, 1967, in the presence of Joseph Victor Fernandes and others, that he was not paying out more than $10,000.00 regardless of the amount of forecast bets placed by the plaintiff, which he admits, in cross-examination, is not according to any rule in Ex. "F". He himself gives conflicting evidence about what he means by the expression "expressly confirmed" as it appears in the two letters written by him, viz: Exs. "C1" and "E". In the former, he says it means the "special arrangement" concerning his unilateral variation of 14th October, 1967, whereas, in the latter, he says it means the maximum payout of $10,000.00 in accordance with Rule 14 of Ex. "F". As I see it Phang had no legal or other right

to make that "special arrangement" since it was not done in accordance with Rule 6 on West Indian racing which provides as follows:—

> "6. All Rules are subject to change but due notice will be given on our Notice Board".

Phang himself admits that he did not comply with Rule 6 aforesaid but that he spoke to the plaintiff personally about it. If this had been a case where the plaintiff had sued for $20,000.00 and the defendant had only, paid $10,000.00 their defence being this "special arrangement", then I would have had no hesitation in giving the plaintiff judgment for the balance of $10,000.00. I would have done so, of course, not on the ground that the defendants cannot change their rules but because it was not done in the manner provided for by those rules. There is this further bit of evidence by Phang in cross-examination at para. 4 at p. 97 of Civil Minute Book No. 10 (Demerara):—

> "The plaintiff was not entitled to $10,000.00 on each of Exs. "A1" and "A2" because of a previous conversation I had with the plaintiff before the 8th race was known but after the bets were placed".

As I see it, "due" notice must mean "reasonable" notice which must be given at least before the punter places his bets on any particular race.

In para. 4 of his reply appears this significant passage:

> "4. Further and in the alternative the plaintiff says that if there were any conditions or limitations attaching to the acceptance of bets and/or to the maximum amount of payouts, such conditions and limitations did not apply to the plaintiff, by reason of a special arrangement which the plaintiff and defendants had entered into".

What "special arrangement" is the plaintiff talking about? Certainly not the one mentioned by Phang, since this has been vehemently denied by the plaintiff.

To my mind, the plaintiff well knew about the "special arrangement" made between himself and Phang and I have no doubt that it means what Phang says it means and which was repeated in the presence of Joseph Victor Fernandes.

Secondly, the question of agency, as raised by Mr. Fitzpatrick, to my mind, is not germaine to the main issues here since, according to the plaintiff, he stopped betting through his clerks since 1963 and Rule 14 in Ex. "F" did not come into operation until 15th November, 1965.

Thirdly, and lastly, the alternative submission raised by Mr. Luckhoo concerning an "implied" term raises rather difficult issues. As I understand the present position, the courts, in relation to excluding and limiting terms contained in written contracts, have always drawn a distinction between documents that are signed by the parties and those that are not signed such as railway tickets and commercial documents containing clauses for the sellers' protection. In the former class, it is difficult, if not impossible, in

the absence of fraud or misrepresentation, to deny the contractual character of the document and such persons are bound by their signatures whether they have read or chosen or neglected not to read the contents thereof. In the latter class, the question is, whether reasonable notice of the excluding or limiting term has been given by the defendant—See on this topic the valuable dissertation in *Cheshire & Fifoot on Contracts,* 6th Edition (1964) at pp. 108-114.

The distinction between the two classes is well illustrated by the case of *L'Estrange v. Graucob* (1934) 2 K.B. 394 (C.A.) where the plaintiff purchased an automatic machine from the defendants on terms contained in a document, described as a "Sales Agreement", and including a number of clauses in "legible, but regrettably small print", which she signed but did not read. The Court of Appeal held that she was bound by those terms and that no question of notice arose. SCRUTTON, L.J., said at p. 403:—

> "In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not".

With all due respect to Mr. Luckhoo, I do not think that any question of any "implied" terms arises here in relation to limits. Rule 14 of Ex. "F" is, clearly, an "express" term of limitation with regard to which notice is essential and it is so considered in Cheshire & Fifoot (ubi supra) in Cap. IV under the heading "The Contents of the Contract", sub-heading "Express Contracts".

There is one other document that I almost forgot to mention and that is Ex. "N1" in relation to English racing with regard to which Phang said the plaintiff won $10,100.00 which is $100.00 over the stipulated limit and that he paid the plaintiff the limit of $10,000.00 without any objection on the part of the plaintiff. No words of limitation appear on the face of this duplicate and Phang says that the cheque (Ex. "O") dated 15th August, 1967, for the sum of $2,774.00 was paid to the plaintiff representing the balance due to him as at that date and which sum included the credit limit of $10,000.00. I must confess that this document has given me some difficulty but, after careful reflection, I am inclined to agree with Mr. Haynes that this duplicate is not really legally admissible for the reasons put forward by him.

To my mind, therefore, there are only two documents that are not admissible in this matter and those are Exs. "J" and "N1". These apart, all the other duplicates are, in my opinion, clearly admissible since they form part of the surrounding circumstances and show the normal course of dealing between the parties which was not in any way unusual or unique

and which, in relation to a specific rule concerning payout limits was, in fact, the general practice among bookmakers not only in Guyana but throughout the Caribbean region, all factors, I think, that this court is entitled to look at in the absence of the originals which I accept and believe were received by the plaintiff and which I am more than convinced he has deliberately not produced to make the defendants' task much more difficult.

The plaintiff has given evidence that on that very Saturday 14th October, 1967, whilst at Sports and Games he placed telephone bets with Mr. Egbert Chin of Tote Investments Ltd. of Camp Street, Georgetown, and won over $30,000.00 on the said 8th race run at Union Turf Park Race Club and that no question of any limit ever arose. I have no reason to disbelieve this statement but it does not, in any way, affect my judgment in this matter since I am satisfied that not only the defendants but other bookmakers in the region had limits on payouts.

In the final analysis, therefore, I am satisfied, on the balance of probabilities, that not only did the plaintiff personally receive a rule book containing a specific rule limiting payouts on any single ticket to the sum of $10,000.00 but also, prior to 14th October, 1967, he actually placed bets on both English and West Indian races and was issued original tickets on the face of which were stamped or printed such a limitation and, in one particular instance, in September, 1968, at Turf Investments Ltd. in Port-of-Spain, Trinidad, he was actually paid a limit of $10,000.00 in relation to a win double bet of over $16,000.00 in accordance with Rule 15 of the extant rules of that betting establishment.

As I see it, the plaintiff clearly won $10,000.00 on each of two tickets, viz: Exs. "A1" and "A2" but in fact received $28,840.00, being a credit of $18,256.00 representing all the hold over bets placed by him, plus a cheque for $10,584.00. This means, in effect, that he has received $8,840.00 more than he should have actually received in accordance with Rule 14 of Ex. "F". So, therefore, the plaintiff has in fact been paid the general limit and not the special limit as pleaded by the defendants in para. 4 of their defence. Consequently, therefore, the plaintiff is not entitled to anything more at all.

To my mind, the plaintiff has not been honest with this court and he will not be permitted to gain an advantage and profit by his own fraud—"*Nullus commodum capere potest de injuria sua propria*".

For these reasons, therefore, this action is dismissed and I award costs to the defendants to be taxed certified fit for two Counsel.

Judgment for the defendants.

GANGA PERSAUD *v.* GORDON LIVERPOOL

[In the Full Court, on appeal from a magistrate's court for the Georgetown Judicial District (Bollers, C.J., and George, J.) March 6, 1971.]

Criminal Law—Forgery—Forgery of entry in birth register—Intent to defraud—Whether necessary to show intent to defraud a particular person—Whether charge laid under right section—Criminal Law (*Offences*) *Ordinance Cap. 10 ss. 252*(*b*), *279.*

The appellant was charged indictably with (but tried summarily), and convicted of, forgery with intent to defraud the public of an entry in a birth register by inserting the name "Paul" without a magistrate's court order authorising it, contrary to s. 279 of the Criminal Law (Offences) Ordinance, Cap. 10 (now s. 277 of Cap. 8:01). On appeal to the Full Court it was submitted that what the appellant had done in inserting the name "Paul" before the name Hisrie in the certified register of births and the annotation thereto did not amount to forgery, that the prosecution had failed to prove an intent to defraud the public, and that no one had in fact been defrauded. It was also

argued that the charge should have been laid under s. 252(b) of Cap. 10 and not under s. 279. The relevant provisions are set out in the judgment.

HELD: (i) what the appellant had done was a forgery as it amounted to a material alteration for which he had no authority as at the time the insertion was made no court order had been obtained authorising the alteration, and he had received no instructions from the Registrar General;

(ii) it was not necessary to show an intent to defraud a particular person;

(iii) the prosecution had proved an intent to defraud the public because any member of the public desirous of obtaining a birth certificate in respect of the offending entry would have been issued with a certified copy thereof which would show that "Paul" was one of the names properly registered of Hisrie Kowlessar, when in fact that was not so;

(iv) the charge was properly laid under s. 279 of Cap. 10, though it would have been more appropriate for it to have been laid under s. 252(b).

Appeal dismissed.

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

G. H. R. Jackman for the respondent.

JUDGMENT OF THE COURT: In the Magistrates' Court the appellant was charged indictably and convicted of the offence of Forgery of a Document with intent to defraud the public contrary to Section 279 of the Criminal Law (Offences) Ordinance. The particulars of the offence were as follows—

> Ganga Persaud on Wednesday 6th December, 1967 at Georgetown, in the Georgetown Judicial District, County of Demerara, in Guyana, with intent to defraud the public, forged a certain entry in Birth Register, to wit Birth Entry No. 100 of 1946 by inserting the name "Paul" without Magistrate's Order.

Before the trial commenced the prosecution made application for the summary trial on the grounds of adequacy of punishment, and the accused having being informed of his right to be tried by a jury, consented to be dealt with summarily under Sec. 60(1) of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15. And the Court thinking it expedient so to deal with the case and the appellant having pleaded not guilty the court proceeded to hear and determine the matter and found the appellant guilty. It is from this conviction that the appellant now appeals to the Full Court on the main ground that the evidence led failed to establish an act of forgery within the meaning of Section 279 of the Criminal Law Offences Ordinance, Cap. 10.

At the close of the case for the prosecution the counsel for the appellant closed his client's case and made certain submissions which now form the

basis of the main ground of appeal. These submissions were overruled by the Magistrate who proceeded to convict the appellant of the aforesaid offence.

The evidence led by the prosecution revealed that in the office of the Registrar General there are kept two certificate books in relation to the registration of births. One book contains the original copies of birth certificates and in the other is kept the certified copies of birth certificates.

When a person seeks a correction in his birth certificate to be made by the Registrar General he makes an application supported by an affidavit under Section 43 of the Registration of Births and Deaths Ordinance in respect of the correction before a Magistrate of the district who upon being satisfied that the error has been committed in the entry, makes an order in writing which is signed by him directing the Registrar to correct the entry. The Court Order is then taken to the Registrar General's Office and placed in a particular book where Court Orders are kept. The record clerk then makes an entry of the particular order in the Court Order Book.

The Court Order is then taken t*o* the Registrar General who then writes a note authorising a search clerk to make the necessary annotation in both registers, (i.e. the original register and the certified copy register).

On Wednesday 6th December, 1967 about 10.00 a.m. Paul Hisrie Kowlessar went to the Registrar General's Office taking with him his birth certificate and gave the particulars of the certificate to one Panday, a clerk employed in the department, but he did not authorise anyone to apply to the Magistrate's Court to have his name on his birth certificate changed nor did he attend the Magistrate's Court to receive a Court Order in order to have his birth certificate corrected.

On that same day Mrs. Ramdehall who was the transcribing clerk at the Registrar General's Office made out a birth certificate for one Paul Hisrie which she had transcribed from the Register of certified copies of births. She noticed that an amendment had been made to the 3rd column in the entry in the certified register and that there was also a note on the right hand margin of page 775 of the register. The note stated that a Court Order was granted authorising the amendment. Both the amendment and the note were in the hand-writing of the appellant.

Later that day Rudolph Skeete a vault attendant was checking the certificates written by the transcriber and while checking the original certificate with the certified copy he discovered a name had been written on the certified copy (i.e. the name "Paul" was inserted in column (3) above the name Hisrie). He also discovered the marginal note against the entry which had already been seen by the transcriber which was at page 775 at Entry No. 100. He stated that both the name and the note were in the marginal entry and the handwriting of the appellant whose handwriting was well known to him. He immediately asked the appellant for the Court Order. The appellant said that he had given it to the messenger. He then spoke to the messenger who gave him certain information.

The matter was then reported to the Deputy Registrar General, who asked the appellant if he had a Court Order authorising him to insert the name "Paul". The appellant replied "Yes", and when he was asked where it was he stated that he had given it to the messenger. The messenger immediately denied he had received any Court Order. The appellant and all concerned were next interviewed by the Registrar General who asked the appellant if he knew anything about the particular Entry No. 100. The appellant replied "Yes" and when asked if he had a Court Order he replied "No". Later at the Police Station the appellant was shown a folder in respect of an application of a birth certificate by one Paul Hisrie and a Court Order dated the 7th December, 1967 made by a Magistrate as a result of an application to the Magistrate's Court made on that same date, the appellant was duly cautioned, and in reply stated that he had nothing to say and he had no statement to give in writing.

It appears that the application on which the Court Order was made was received in the Magistrate's Court on the 7th December, 1967, but there was no date on the order and so the Magistrate inserted the correct date.

On this evidence the learned Magistrate arrived at the conclusion quite correctly in our view that there was no doubt that the appellant on the 6th December, 1967 had inserted the name "Paul" in the Register of Births in column (3) of Entry of Birth No. 100 and at the time when this insertion was made there was no Court Order authorising it, but subsequently on the 7th December, 1967 a Court Order was obtained from the Magistrate Court Georgetown, allowing this correction to the Entry No. 100 in the Registrar of Births. The learned Magistrate also found that the marginal note opposite to the entry made by the appellant stating that the necessary Court Order authorising the insertion had already been obtained was false.

It was submitted before us that what the appellant did in inserting the name "Paul" before the name Hisrie in the certified register of births in column (3) at Entry No. 100 and the annotation thereto did not amount to an act of forgery on his part.

In *R. v. Hopkins and Collins* (1957) 41 C.A.R. 231 at p. 235 (C.C.A.) Lord GODDARD, C.J. said—

> "What might have been the position at common law, is not necessary for us to discuss. Forgery no longer depends on the common law nor does it depend on . . . statutes which have been passed from time to time. It depends simply on the statute of 1913 . . ."

Our legislation in relation to the offence of forgery follows the English Act of 1913 and Sec. 240(1) enacts that—

> "For the purposes of this Ordinance forgery is the making of a false document in order that it may be used as genuine",

and Subsection (2) enacts that—

"a document is false within the meaning of this Ordinance if the whole or any material part thereof purports to be made by or on behalf of or on account of a person who did not make it nor authorise its making.

In our view the insertion in column (3) was a material part of the certificate of birth and it purported to be made on behalf of the Registrar General who did not authorise its making. The subsection goes on to provide that in particular a document is false—

(a) "if any material alteration whether by addition, insertion, obliteration etc., or otherwise has been made therein",

and it follows therefore that what the appellant did amounted to a material alteration from which he had no authority as no Court Order had been obtained and he had received no instructions from the Registrar General.

This was certainly true of the annotation which purported to represent that a Court Order had been received whereas in truth and in fact none was in existence. The document therefore not merely told a lie but told a lie about itself. In *R. v. Bateman* (1845) 1 Cox C.C. 186, it was held to be a forgery where the prisoner filled in a blank cheque for an amount greater than that for which he was authorised. Under the section under which the appellant was charged in this case it was irrelevant whether the document was a private or public one so long as it was proved that the insertion was made on a document. There is no definition of a document in the Forgery Act, but the distinguished editor of Kenny's Outlines of Criminal Law suggests that for the purposes of the Law of Forgery a document is writing in any form on any material which communicates to some person or persons a human statement whether of fact or fiction. This entry in the certified Register of Births must therefore fall within this definition.

Next it was submitted that the prosecution had failed to prove an intent to defraud as the appellant had done irregularly what is regularly done and no one had in fact been defrauded. The following statement of BUCKLEY, J. in *Re London and Globe Finance Corporation Ltd.*, (1903) 1 Ch. 728 is usually relied on in this connection to show the meaning of the words "intent to defraud". To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a person to act to his injury. More tersely it may be put that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action". As the greater includes the lesser an intent to deceive is included in an intent to defraud.

It is clear to us that there was an intention on the part of the appellant to deprive the person pertaining to the birth certificate of his correct name although under the Act it is not necessary to show an intent to defraud a particular person.

In *Welhan v. D.P.P.* 1960 1 All E.R. at p. 808 Lord RADCLIFFE pointed out that to defraud may mean to cheat someone or to practise a fraud on someone. It may mean to deprive someone by deceit of something which is regarded as belonging to him, or though not belonging to him is due to him or his right.

A further argument which was advanced before us, was that the charge as laid was improper and that the information against the appellant should have been laid either under ss. 245(a); 252(b) or 253(a) of the Criminal Law (Offences) Ordinance Cap. 10. S. 245(a) reads as follows—

Everyone who with intent to defraud—

(a) forges or alters any certificate, report, entry licence, permit, endorsement, direction, authority, instrument, or writing made or purporting or appearing to be made by the (President) or by any public officer, office, or department in (Guyana) .

(b) ……
……
shall be guilty of felony, and on conviction thereof shall be liable to (imprisonment) for fourteen years.

Under S. 252(b)—

Everyone who—

(a) ……

(b) forges or fraudulently alters, (in any register of births, baptisms, marriages, deaths or burials) any entry relating to any birth, baptism, marriage, death, or burial, or any part of the register or any certified copy of the register or any part thereof shall be guilty of felony and on conviction thereof shall be liable to penal servitude for life.

Under s. 253(a)—

Everyone who—

knowingly and wilfully inserts, or causes or permits to be inserted, in any copy of any register, directed or required by law to be transmitted to any Registrar or other officer any false entry of any matter relating to any birth, baptism, marriage, death or burial . . . shall be guilty of felony and on conviction thereof shall be liable to penal servitude for life.

There can be little doubt especially when regard is had to S. 65 of the Registration of Births and Deaths Ordinance, which specifically incorporate both ss. 252 and 253 of the Criminal Law (Offences) Ordinance into that Ordinance, that the most appropriate provision under which the charge against the appellant should have been laid, was s. 252(b). But in our opinion this by itself does not prohibit a charge being laid under s. 279. This section reads as follows—

> Everyone who forges or alters, or offers, utters, disposes of, or puts off, knowing it to be forged or altered, any document whatsoever, with intent to defraud the public or any person, or to prevent the course of justice, or to injure any person or the character of any person, or to deprive any person of, or prevent his obtaining, any office, employment, situation, trust legacy, devise, credit, money, valuable security, or other property, shall be guilty of felony, and on conviction thereof shall be liable to penal servitude for three years.

As we have already pointed out the appellant was charged with forgery with intent to defraud the public. As we see it, any member of the public desirous of obtaining a birth certificate in respect of the offending entry would have been issued with a certified copy thereof which would show that "Paul" was one of the names, properly registered, of Hisrie Kowlessar, when in fact this was not so. If this is too wide a view there can be little argument against the fact that there was an intention to defraud "any person or persons" desirous of obtaining a certified copy in respect of the entry and we would have been disposed to amend the conviction order accordingly.

For these reasons we considered that the Magistrate was right in overruling the submissions by counsel for the appellant at the trial and we would dismiss the appeal and affirm the conviction and sentence.

Appeal dismissed.

N. ELIAS AND SONS LTD. *v.* GEORGE ELIAS

[High Court—In Chambers (Gonsalves-Sabola, J.),
May 11, 17, 22, 29, 1971].

Order of court—Ex parte order—Distinction between ex parte interim order in nature of an injunction and an interlocutory injunction made on ex parte application—Construction of order—Whether ex parte order expired.

The plaintiffs issued a writ claiming certain relief against the defendant and on the following day obtained an order for an injunction, on an ex parte application, 'until after the hearing of a summons in this cause returnable on Tuesday the 11th day of May 1971'. It was further ordered 'that the plaintiffs be at liberty to issue and serve a summons returnable for that day to continue this injunction'. Conformably with the order of court the plaintiffs on the 30th April 1971 filed their summons to continue the injunction granted 'until the trial of this action or until further order'. On 5th May, 1971, the defendants filed a summons to discharge the injunction. Both summonses were called on 11th May and each side was granted leave to file an affidavit in respect of each of the summonses. On the matters being called on 17th May it was submitted in limine that there was nothing to continue because the ex parte order was limited to expire, and had expired on 11th May. Counsel for the applicants/plaintiffs drew the distinction between an ex parte interim order in the nature of an injunction and an interlocutory injunction on ex parte application which latter, he said, was the one granted in the instant case.

HELD: (i) the ex parte order was for an interim injunction which automatically continued on the plaintiffs issuing and serving on the defendant the summons returnable on 11th May;

(ii) the issue of the summons to continue the injunction was a condition precedent to the survival of the ex parte order beyond the 11th May.

(iii) the plaintiffs' compliance with the condition precedent kept alive the interim injunction granted ex parte.

Point taken in limine overruled.

C. A. F. Hughes for the plaintiffs/applicants.

F. Ramprashad, S.C., and Dr. F. W. H. Ramsahoye, S.C., for the defendant/respondent.

GONSALVES-SABOLA, J.: On the 29th day of April, 1971, the plaintiffs issued a writ claiming certain relief against the defendant. On the same day an ex parte application by way of affidavit was made for an injunction. The following day the 30th day of April, 1971, the

application was heard in Chambers by Fung-a-Fatt, J. who granted the injunction prayed "until after the hearing of a summons in this cause returnable on Tuesday the 11th day of May, 1971" and further ordered "that the plaintiffs be at liberty to issue and serve a summons returnable for that day to continue this injunction". Conformably with the Order of Court the plaintiffs on the 30th day of April, 1971, filed their summons to continue the injunction granted "until after the trial of this action or until further order".

On the 5th day of May, 1971, the defendants filed a summons to discharge the injunction, returnable for the 11th day of May, 1971.

On the return day of both Summonses, that is to say, the 11th day of May, 1971, both sides appeared in Chambers and leave was granted each side to file an affidavit in answer in respect of each of the summonses.

Hearing of both summonses was adjourned to the 17th day of May, 1971.

On that day Mr. Ramprashad for the defendant dealing with the summons to continue, took a point in limine, that in effect there was nothing to continue because the ex parte order of Fung-a-Fatt, J. was limited to expire on the 11th May, 1971, and there was no order made or leave given on 11th May for it to continue. It was submitted that although the ex parte order expressly granted the injunction "until after the hearing" of the summons to continue, the latter summons was expressly made returnable for 11th May, and if the injunction survived beyond that day, it would amount to a perpetual injunction. It was argued that the spirit of an injunction obtained ex parte was that it should last for just a few days until the matter became inter partes on the summons to continue. Further, the question was posed: Whence the necessity for the ex parte order specifically giving the plaintiffs liberty to issue a summons to continue the injunction, unless the intendment of the Order of Court was that the injunction should expire on the return day of the said summons? In other words why should there be any need to issue a summons to continue that which according to the plaintiffs, would survive anyway without a summons. I was asked to uphold the practice in these courts by holding that the injunction obtained *ex parte* lasted only up till 11th May and I was referred to Note 18 to the English R.S.C. O. 29 r. 1 as it appears in the Supreme Court Practice (1970) at p. 429: "Where an injunction is granted to extend over a certain day or until further order, it means that the injunction may be dissolved at an earlier date than the day limited, but cannot continue beyond such date without a fresh order". The authority for that passage is the case of *Bolton v. London School Board* (1878) 7 Ch.D. 766.

Mr. Hughes in reply distinguished between an ex parte interim order in the nature of an injunction and an interlocutory injunction on ex parte application which he submitted was the proper description of the one granted in the instant case.

Dr. Ramsahoye who replied for the defendant conceded the validity of Mr. Hughes' distinction between interim orders in the nature of an injunction and interim injunctions properly so called. Indeed the concession was unavoidable because in Halsbury's Laws of England 3rd Edition, Volume 21, p. 414 independent recognition is given of interim orders and the case of *Fuller v. Taylor* (1863) 32 L.J. Ch. 376 is therein cited as it was by Mr. Hughes, as authority for it. A passage in Kerr on the law and Practice of Injunctions, 3rd Edition at p. 625 states the position this way: "Instead of issuing an injunction in the first instance the court will often grant an interim order in the nature of an injunction by which the defendant is restrained until after a particular day named . . . In many respects there is a convenience in proceeding by interim order instead of granting an injunction. Among other conveniences the defendant is not put to the necessity of coming to the court to discharge the order". In *Fuller v. Taylor* (supra) at p. 377, WOOD, V.C., in speaking of interim orders said, "It is quite true that they are not exactly like *ex parte* injunctions, which put the other side to the necessity of coming here to dissolve them".

The emphasis by Mr. Hughes on the distinction between an interim order in the nature of an injunction and an interim injunction proper was by no means without purpose. CRANE, J. (as he then was) in the case of *Moonah v. Bahadur* (1964) L.R.B.G. 462 handed down a decision which, if followed by me on this issue will result in a ruling in favour of the defendant. In that case an *ex parte* injunction was on the 8th day of February, 1964 granted by a judge "until after the hearing and determination of a summons . . . returnable for 22nd day of February, 1964". On 4th March, the defendant cut and carried away padi contrary to the restraint imposed by the ex parte injunction. On a motion for committal for contempt, CRANE, J. said, "The only point in this matter is whether when the defendant did cut the padi . . . the Order of Court dated February 8, 1964 . . . operated to restrain what the defendant admitted he had done". The learned judge went on to hold that the interim order of injunction expired on the day appointed for the return of the summons for its continuance and expressed the opinion following. "It appears to me that the mere fact that the plaintiff has taken out a summons to continue the injunction is of no avail if he does not obtain the court's order to continue the interim injunction from the return date, or if the court does not do so of its own volition".

So here is a case whose ratio decides the point raised by counsel for the defendant in his favour.

It is however to be noted that the learned judge in that case based his decision exclusively on the following dictum of Malins V.C. in the case of *Bolton v. London School Board (1878)* 7 Ch. D. 766 at 771:

> ". . . Where an interim order is made to extend over a certain day or until further order, it does not mean that it is to go on after that

day until further order, but that it is to stop earlier if the court shall so order—'until that day or further order' meaning at an earlier date. Therefore the notice of motion to dissolve this order, which would dissolve itself if not continued, was wholly unnecessary, and that also must be dismissed with costs".

Mr. Hughes contended, apparently correctly, that Malins V.C. was there dealing with an interim order in the nature of an injunction, and not an interim injunction proper, so CRANE, J. was wrong to use that dictum as an authority where, what he had before him was an interim injunction. I was asked to express the opinion that CRANE, J. erred. I think that a careful reading of the language of the Vice Chancellor will elicit that his ratio decidendi was that the interim injunction under consideration was dissolved because the order decreeing it, expressly ordained its death on a named day. The text of the *ex parte* order is not set out in the report but the Vice Chancellor leaves no doubt about the phraseology of its operative part. He said (also at p. 771). . . "I having granted an order that they should not pull down until after Thursday, the order therefore coming to an end unless renewed this day, they think it necessary to give a notice of motion to dissolve this day that which the day itself would dissolve".

The thing to do is to look at the *ex parte* Order and see what it says. It is the terminology of the Order that determines the duration of the injunction. I recoil from employing notions of general practice as I have been urged to do, to interpret an order of court expressed in plain words and without ambiguity. In *Seton's Judgments and Orders*, Seventh Edition at p. 508 there is a note which is adaptable to my present purpose: "In granting an injunction the court should see that the language of the order is not ambiguous, but such as to make what it permits and what it prohibits quite plain". In the final analysis the question comes down to one of construction—it is a question of the meaning of the words in the *ex parte* Order.

It is with reluctance, diffidence and the greatest respect that I doubt that the case of *Moonah v. Bahadur* (supra) was correctly decided. I humbly think that the ratio of the *London School Board* case was not correctly perceived and therefore the case was misapplied; but in all fairness it has to be noted that the point raised by Mr. Hughes in the instant case passed sub silentio in *Moonah v. Bahadur*.

I hold that the *ex parte* order made by FUNG-A-FATT, J. on 30th April, 1971, is to be interpreted to mean:

(a) that the interim injunction came into being on 30th April, 1971.

(b) that the plaintiff who obtained it was under compulsion to issue and serve a summons to continue returnable on Tuesday 11th May.

(c) that if the plaintiff did issue and serve that summons so returnable, the interim injunction already granted would automatically continue until after that summons was heard inter partes; and

(d) that the issue of the summons to continue returnable on Tuesday 11th May was a condition precedent to the survival of the *ex parte* order beyond the 11th May.

I hold that since the summons to continue was punctually issued pursuant to the Order of Court the interim injunction granted *ex parte* is still current.

My ruling on this point is quite in consonance with the logic of the entire exercise of obtaining an injunction from the *ex parte* stage right through to the finality of a perpetual injunction. Taking a hypothetical case and assuming an *ex parte* order worded as the one in the instant case, a precis of the procedure would read as follows:

(a) Ex parte interim injunction is obtained expressed to last until after summons to continue is heard;

(b) The summons to continue is heard *inter partes* resulting in an order continuing the interlocutory injunction until after judgment in the action;

(c) Action determines in judgment for the plaintiff; interlocutory injunction is made perpetual.

It is to be noted that each stage in the procedure results in a new order taking the plaintiff one step closer each time to the perpetual injunction he is in pursuit of.

Dr. Ramsahoye submitted that the key to the case centred around the following words in the *ex parte* order, viz., "AND IT IS FURTHER ORDERED that the plaintiffs be at liberty to issue and serve a summons . . . to continue this injunction". But in my view that submission seeks to place undue weight on quaint drafting finesse. The terms of the Order are cumulative and must be read as a whole; the sequence in which the terms appear is not, in this case, an aid to their interpretation.

It is entirely within the jurisdiction of a judge to fix the length of time for which he grants an *ex parte* injunction. It is a matter of judicial discretion to be exercised of course, with proper regard for the exigencies of the situation and possible oppressiveness to the defendant.

The *ex parte* Order in the instant case is limited to after an event which has not yet occurred, namely the hearing of the summons to continue. The preposition "after" in the Order is the decisive word. The Judge in Chambers could have limited the duration of the Order to

11th May but instead the time he directed was "after the hearing of a summons in this cause etc".

I rule that the *ex parte* injunction ordered by FUNG-A-FATT, J. is still alive.

Point taken in limine overruled.

SOWATILALL *v.* KALIKA PERSAUD, et al

[In the Guyana Court of Appeal (Luckhoo, C., Cummings and Crane, JJ.A.) October 28, 1970; June 1, 1971].

Arbitration—Co-operative Society—Arbitrators—Jurisdiction to arbitrate.

Arbitration tribunals—Judicial review—Procedure laid down by statute.

The Plaintiff and first-named defendant (K.P.) were both members of a co-operative society registered under the provisions of the Cooperative Societies Ordinance, Cap. 326(G). Among the society's objects was the acquisition of land by purchase, grant or lease for its members. In pursuance of this object a plantation was purchased, and lot allocations of a provisional nature made to members. The plaintiff drew lots 12, 13 and 14 and K.P. lot 15. Both entered their respective lots and commenced cultivation thereof. As a result of a survey the plaintiff was required to vacate lot 14, and take up occupation of lot 11 instead, so that lot 14 could be occupied by K.P. who was required to give up lot 15 to the owner of lot 16. The plaintiff refused to comply notwithstanding an order to that effect by the Commissioner for Co-operative Development whom the Ordinance empowered to adjudicate in any dispute between a Society and its members.

The plaintiff having brought an action in the High Court challenging the Commissioner's Order and lost, K.P. took the matter to the Commissioner by way of reference, and claimed compensation from the plaintiff for wrongful occupation of lot 14. The Commissioner referred the matter to arbitrators who found against the plaintiff. The plaintiff then brought an action in the High Court attacking the order of reference, the arbitration proceedings, and the award.

HELD: that the Commissioner and arbitrators were possessed of the requisite jurisdiction to adjudicate in the matter, as neither the original, appellate nor supervisory jurisdiction of the High Court could properly be attracted to the case, having regard to the provisions of the

Ordinance; and that judicial review would lie only when the Commissioner had acted in excess of his jurisdiction, or had contravened the principles of natural justice.

Appeal dismissed. Judgment of court of first instance affirmed.

B. O. Adams, S.C., and *Miss S. Doobay* for the appellant.
M. C. Young for first-named respondent.
S. Rahaman for second and third-named respondents.

CUMMINGS, J.A.: I have had the advantage of reading the judgment of my brother Crane, in which he set out fully among other things, the nature and history of this litigation. I agree with the result at which he arrived. I shall, therefore, content myself with merely recording the main reasons for my conclusions.

The appellant appeals on numerous grounds but, in my view, the result of this appeal must turn upon whether or not (a) the Commissioner for Co-operatives had jurisdiction to appoint the arbitrators, and (b) the arbitrators had jurisdiction to consider the question of compensation and make the award they did. Both aspects invoke the interpretation of the relevant law.

I have no doubt whatever that the High Court of the Supreme Court of Judicature is in these circumstances the only legally competent authority to determine the question of jurisdiction (see the authorities cited by me in the case *of Rolf Brandt v. Attorney General of Guyana & Commissioner of Police* (Civil Appeal No. 3 of 1971) and to make, where circumstances warrant it, the declaration sought in this regard. And so I proceed to examine whether, in the circumstances of this case, the appellant is entitled to the declaration he seeks.

The Co-operative Societies Ordinance, Cap. 326, hereafter referred to as "The Ordinance" provides as follows:

'49.(1) If any dispute touching the business of a registered society arises—

(a) among members, past members and persons claiming through members, past members and deceased member, or

(b) between a member, past member, or person claiming through a member, past member or deceased member, and the society its committee, or any officer of the society, or

(c) between the society or its committee and any other officer of the society, or

(d) between the society and any other registered society,

such dispute shall be referred to the Commissioner for decision. A claim by the registered society for any debt or demand due to it from a member, past member of the nominee, heir or legal representative of a deceased member, shall be deemed to be a dispute touching the business of the society within the meaning of the sub-section.

"(2) The Commissioner may on receipt of a reference under sub-s. (1) of this section—

(a) decide the dispute himself, or

(b) refer it for disposal to an arbitrator or arbitrators.

"(3) Any party aggrieved by the award of the arbitrator or arbitrators may appeal therefrom to the Commissioner within such period and in such manner as may be prescribed.

"(4) A decision of the Commissioner under sub-s. (2), or in appeal under sub-s. (3) of this section shall be final and shall not be called in question in any civil court and shall be enforced in the same manner as if the decision had been a judgment of a civil court.

"(5) The award of the arbitrator or arbitrators under sub-s. (2) shall, if no appeal is preferred to the Commissioner under sub-s. (3), or if any such appeal is abandoned or withdrawn, be final and shall not be called in question in any civil court and shall be enforced in the same manner as if the award had been a judgment of a civil court.

My learned brother Crane has set out in detail the objects of this ordinance. The mischief it was intended to prevent is clear. The Government policy is one of self-help through co-operatives. A vibrant co-operative republic has no time for protracted and expensive litigation, but the tribunal to whom these matters are allocated must have jurisdiction.

It is common ground that the appellant and respondent were at all material times members of the society in good standing, and were, consequently, entitled to all the rights and privileges of the society, as prescribed in its rules. The dispute was between the respondent and the appellant over land allocated by the Society. The Commissioner to whom the matter was referred, decided in favour of the respondent. This decision vested in the respondent a right of possession of the disputed land. This is a right which fell to be protected by the Society in accordance with its rules. Where there has been a violation of such a right, compensation is a necessary concomitant. I find, therefore, upon an examination of the rules of the Society which is a contract between members *inter se* and also between the members of the Society and the provisions of the Ordinance, that the Commissioner had jurisdiction to refer the matter to the arbitrators and the arbitrators had jurisdiction to make the award that they did.

Consequently, I agree that the appeal should be dismissed with costs.

Appeal dismissed.

CRANE, J.A.: There is a long case history to this appeal, and for this reason it is considered necessary to say something concerning the background of facts precedent to the trial in the High Court.

The Devonshire Castle Co-operative Savings & Land Society Ltd. (hereafter called 'the Society') is an incorporated body registered under the provisions of the Co-operative Societies Ordinance, Cap. 326 (hereafter called 'the Ordinance'). From the objects clauses which are to be found in r. 3 of its rules as amended, it is evident the Society has for its predominant object the promotion of the economic interests of its members in accordance with co-operative principles and was registered with that end in view. These are as follows:

(i) "To encourage thrift, and to collect capital for use in some productive or co-operative venture.

(ii) To acquire land by purchase, grant or lease for the use of its members.

(iii) To undertake measures for the improvement of the living conditions and social welfare of the members.

(iv) To foster measures for co-operative credit, marketing and the supply of farming equipment for its members.

(v) To protect the rights and interest of its members.

(vi) To encourage the development of the Co-operative Movement in Guyana".

It was in pursuance of object (ii) above that Pln. Walton Hall on the Essequibo coast was acquired by purchase by the Society and lot allocations of a provisional nature made to members in accordance with its rules (Nos. 29-33). Sowatilall and the first-named respondent, Kalika Persaud, are two members to whom such allocations were made by the method of drawing for them. Sowatilall drew lots 12, 13 and 14, while Kalika Persaud drew lot 15. Both then entered into possession and prepared their respective lots for rice cultivation, and having so done must be held to have occupied in accordance with the terms and conditions prescribed in the Society's rules. By r. 32, allocations to each member are expressed to be "subject to survey by a sworn land surveyor", which suggests the provisional nature of the tenure and the fact that both their size and boundaries are liable to subsequent alteration whenever any survey should take place. In fact, that was what happened to the lots of both the appellant and the respondent because when a plan shifting and re-defining the boundaries of Walton Hall was prepared by surveyor Phang in 1957, the Society required the appellant to vacate lot 14 and to take up occupation of lot 11 instead so that lot 14 could be occupied by Kalika Persaud who, in turn, was required to give up lot 15 to the owner of lot 16.

Such was the result of the Phang survey with which the appellant was expected to comply. He however refused to vacate on or before

December 31, 1958, notwithstanding that was the order of the Commissioner for Co-operative Development whom the Ordinance empowers to adjudicate in any dispute between the Society and a member. Instead, the appellant launched forth action No. 2079/1958 in the High Court challenging the Commissioner's order. But, unfortunately for him, owing to many adjournments and an abortive hearing in that court, a re-trial was ordered, and the decision, which he lost, was not given until March 2, 1962. Even then, he was unwilling to give up possession of lot 14 to Kalika Persaud. In fact, he did not until October 31, 1964, when he was forced to do so by a writ of possession.

Next in the train of events was a reference by Kalika Persaud to the Commissioner. This took the form of a claim that a dispute had arisen between Persaud and the appellant whereby he, Persaud, became entitled to $7,574 as compensation for loss consequent on the appellant's wrongful occupation of lot 14 for a period of six years ending May 1964. Persaud based his claim on the appellant's refusal to comply with the Commissioner's order to vacate on or before December 31, 1958, which resulted in his being denied possession and gainful occupation of lot 14 during that period. The Commissioner accordingly referred the dispute to three arbitrators in accordance with s. 49(2)(b) of the Ordinance and Regulations. The terms of their order of reference are as follows:

> "Whether the said Sowattee Lall should pay the sum of $7,574.08 (seven thousand five hundred and seventy four .08 dollars) to the said Kalika Persaud, the said sum being compensation for the wrongful occupation for 6 years, of lot 14 Walton Hall, Essequibo, as shown on a plan by T. Phang, Sworn Land Surveyor. The said lot 14 being part of a larger portion of land occupied by the said Society and allocation to the said Kalika Persaud for his sole use and occupation, damages for trespass and costs should be paid".

The arbitrators sat on divers days between April 23, 1964, and July 11, 1964, on which day they found the appellant liable to pay Persaud compensation in the sum of $2,715.08 with $600 costs, and $800 as arbitration expenses. Dissatisfied with that finding, the appellant commenced action No. 1845/1966/Dem. in the High Court from the decision of which this appeal is brought praying the following declarations:

(a) that the order of reference and arbitration were null and void;
(b) that the arbitration proceedings were null and void, and
(c) the award was null and void.

An injunction restraining the enforcement of the award was also claimed, together with damages against Kalika Persaud.

Several grounds of appeal were argued before us foremost among which was, whether it was lawful for the Commissioner to refer the matter to arbitration there being no "dispute touching the business of the Society" between the appellant and Kalika Persaud since the

appellant has never been a trespasser on lot 14, but was in fact always in possession of it. It was also contended that there being no legal claim or cause of action vested in Sowatilall capable of forming the basis of a claim for compensation, costs and expenses in the sums awarded the proceedings before the arbitrators were null and void; and that it was an error for the trial judge to have held that such a claim attracted the jurisdiction of the Commissioner for Co-operative Development to adjudicate either in person or by arbitrators.

Without saying anything more on these grounds of appeal, I think the view taken by the trial judge that both the arbitrators and the Commissioner were possessed of the requisite jurisdiction to adjudicate in the matter was the correct one; although he himself did not seem to think he had any to decide the matter for the reason that the appellant ought to have appealed to the Commissioner rather than to the High Court. As a matter of fact, it was this view that was responsible for his refusal to make any of the declarations sought in the statement of claim, as can be seen from the concluding part of his judgment which runs as follows:

> "Thus, if Sowatilall thought he was aggrieved by the decision of the Arbitrators, having regard to all my previous findings and observations, he should have appealed to the Commissioner for Co-operative Development, even though it might have appeared that he was appealing from Caesar unto Caesar, and as that to my mind was the remedy which was provided by statute, a declaration should not be given in the circumstances of this case. *Barraclough v. Brown,* (1897) A.C. 615, *H. L. Flint v. A.G.,* (1918) 1 Ch. 216, *Musical Performers Protection Association Ltd. v. British International Pictures Ltd.,* (1930) 46 T.L.R. 485"

For my part, I believe this is really the decisive point in the appeal, for going as it does to the High Court's jurisdiction to entertain the action, it renders unnecessary any consideration of the other grounds and affords us an opportunity to settle once and for all a matter most vital to the administration of all co-operative enterprises registered under the Ordinance, particularly at this early stage in the development of our newly-born Co-operative Republic in which the spirit of co-operation is in evidence, and where co-operatives are fast becoming a way of life with us. I refer to the matter of the judicial review by the law courts of the determinations of those administrative tribunals instituted by the Ordinance and charged with the function of adjudicating in such domestic disputes as touch and concern the business of a registered society.

I commence with the observation that the object of the law in all registered co-operative enterprises is the avoidance of lengthy and often expensive law-suits by a special procedure being made available for the settlement of disputes. In our ordinance this is provided for in ss. 49 and 50 by a procedure that must be followed in much the same way as that

contained in the Indian Co-operative Societies Act, 1912, on which Cap. 326 is obviously modelled, and which extends throughout the whole of India where there has long existed co-operative ventures.

Ss. 49 and 50 of our Ordinance are in the following terms:

"49. (1) If any dispute touching the business of a registered society arises—

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between a member, past member, or person claiming through a member, past member or deceased member, and the society its committee, or any officer of the society; or

(c) between the society or its committee and any officer of the society; or

(d) between the society and any other registered society;

such dispute shall be referred to the Commissioner for decision. A claim by a registered society for any debt or demand due to it from a member, past member of the nominee, heir or legal representative of a deceased member, shall be deemed to be a dispute touching the business of the society within the meaning of this subsection.

"(2) The Commissioner may on receipt of a reference under sub-s. (1) of this section—

(a) decide the dispute himself; or

(b) refer it for disposal to an arbitrator or arbitrators.

"(3) Any party aggrieved by the award of the arbitrator or arbitrators may appeal therefrom to the Commissioner within such period and in such manner as may be prescribed.

"(4) A decision of the Commissioner under sub-s. (2), or in appeal under sub-s. (3) of this section shall be final and shall not be called in question in any civil court and shall be enforced in the same manner as if the decision had been a judgment of a civil court.

"(5) The award of the arbitrator or arbitrators under sub-s. (2) shall, if no appeal is preferred to the Commissioner under sub-s. (3), or if any such appeal is abandoned or withdrawn, be final and shall not be called in question in any civil court and shall be enforced in the same manner as if the award had been a judgment of a civil court.

"50. (1) Notwithstanding anything contained in the last foregoing section, the Commissioner at any time when proceeding to a decision under this Ordinance, or the Governor at any time when an appeal has been preferred to him against any decision of the

Commissioner under this Ordinance, may refer any question of law arising out of such decision for the opinion of the Supreme Court.

(2) Any judge, or judges, of the Supreme Court, as the Chief Justice may direct, may consider and determine any question of law so referred and the opinion given on such question shall be final and conclusive".

In India the approach to the problem of the settlement of disputes in co-operative societies is to be seen in the oft-cited excerpt from the case of *The Zemindar Bank, Sherpur Kalan v. Suba,* (1922) Civil Appellate side, Case No. 944/1922, dated 28th April, 1922, in which the High Court of Lahore observed:

"The principle of law as enunciated in various authorities is that statutes imposing restrictions upon the subject's right of suit should be strictly construed and such restrictions should not be extended beyond what the words used actually cover. In the present case, however, it appears to us that the words used do clearly contain a necessary implication depriving the subject of his common law right of action and provide a special and prompt procedure for cases in which, having regard to the class of people affected, a speedy decision as to their dispute is essential. It will be observed that the object of the Act is to encourage thrift, self-help and co-operation among agriculturals, artisans and persons of limited means, and it will, in our opinion, be impossible to attain these objects if these people for the settlement of their disputes have necessarily to undergo all the troubles and worries of an expensive and protracted litigation. It should further be noted that the English law on the subject is very much the same. . . . We think that it would be entirely repugnant to the scope and object of the Act if a suit like this were allowed to be decided in a civil court and we accordingly hold by substitutional remedy provided under the rules in the shape of a reference to the Registrar the common law remedy by an action in a civil' court has by necessary implication been taken away".

The English case of *Crisp v. Bunbury,* (1824-34) All E.R. Rep. 669, shows, in keeping with what has been said in the Indian case above, that the outlook in England on the subject is indeed to the same effect in the case of a society whose object is to encourage thrift for, as long ago as the year 1832, it was held by the judges of the Common Pleas that an action at law did not he against the trustees of a savings bank in the case of dispute since the only mode of proceeding was by arbitration. TINDAL, C.J., after construing s. 45 of the Savings Bank Act, 1828, which provided that disputes between "such institution or any persons acting under them, or any individual depositor therein . . . shall be referred to arbitration . . . and whatever award shall be made by the said arbitrators . . . shall be binding and conclusive on all parties, and shall be final to all intents and purposes without appeal", expressed the opinion that

the words and object of the above statute were so obligatory in nature' that they ousted the jurisdiction of the superior courts to deal with the matter, and ruled that the plaintiff was barred from pursuing his action in a court of law and must do so as provided under the statute. At p. 672 of the report, the Chief Justice gave reasons for saying why disputes of the nature comprehended by the Savings Bank Act, 1824, were relegated by the Legislature solely to the domain of arbitration, reasons which were considered as of general application by Lord BLACKBURN in that they are also applicable to a friendly society under 10 Geo. 4 c. 56 s. 27. [See *Municipal Building Society v. Kent*, (1884) 9 A.C. 260, 275]. TINDALL, C.J.'s, reasons are:

> "These institutions were intended to comprehend a very large number of depositors, chiefly from the lower walks of life; many of them contributing very small sums, and claiming very small profits by the addition of interest. On the other hand, the trustees and managers are uncertain in point of number. To allow, therefore, actions at law to be maintainable by each depositor against the trustees, upon the occasion of every dispute with the institution, either as to the amount of the balance due, or the interest claimed by him, would be, in effect, to cause the ruin both of the depositors and the institution, by casting the costs of an action in the superior courts at Westminster upon the losing party. No person would fill the gratuitous office of a trustee or a manager, if he was exposed to the hazard of suits at law at once so expensive and so numerous; no depositor would be able to enforce his just rights, if he must sue in the superior courts, at the hazard of being defeated with heavy costs if he sued more of the trustees than he might be able to prove liable; or subject to his suit abated if he sued too few. It is evident, therefore, that the legislature contemplated the cheap, simple, speedy, and equitable adjustment of all disputes by a referee in the mode pointed out in the Act, instead of a more expensive, dilatory, and uncertain remedy by action at law; and we think we should defeat that very serviceable object—serviceable alike to the depositors and to the institution—unless we construe the words used, as words which import an obligation to refer, and which take away the right to sue in the superior courts".

Reasoning by analogy from the foregoing premises, if it was obligatory on Kalika Persaud to have referred the dispute between him and the appellant to the Commissioner for Co-operative Development for decision either by that officer personally, or, at the latter's discretion, by arbitrators, it must follow it was equally obligatory on the appellant, being the party aggrieved by the arbitrators' award, to appeal against that decision to the Commissioner, because from the object and intendment of the Ordinance, the words "may appeal" in s. 49(3) above are to be construed as meaning "*must* appeal". Admittedly, there is no specified period or manner prescribed in either rules or regulations for appealing from the

arbitrators to the Commissioner, but that can be no impediment to such an appeal. In practice, all that is required to be done in such a case is the filing of a petition setting out the grounds of appeal against the arbitrators' decision which is considered a sufficient notice to the Commissioner who would be required to give reasons for his decision in writing. (See "*A Manual of Co-operative Law and Practice*", 3rd Ed., p. 256, by Surridge & Digby). But, as it is, this vital step in procedure was not taken by the appellant who, to all intents and purposes, it appears, considered the words "may appeal therefrom to the Commissioner" in s. 49(3) of the Ordinance merely of permissive import, whereas those words indicating as they do a specific tribunal, impose an obligation on him to appeal to that functionary. It was apparently this view which caused the appellant to by-pass the Commissioner whose function as an appellate tribunal is absolutely essential when judicial review of the award is contemplated by an aggrieved party. It is to him, and to him alone, that an aggrieved party must resort. For my part, I would approach the interpretation of the above words in the same way as did TINDAL, C.J., in *Crisp v. Bunbury* (above), when he said (ibid, at p. 672):

> "We are of opinion, both with reference to the words of the statute, and the object which it had in view, that the plaintiff is barred from maintaining the present action in a court of law and must pursue the remedy provided by the statute. It is undoubtedly true that the jurisdiction of the superior courts of Westminster is not to be ousted, except by express words, or by necessary implication: *Cates v. Knight,* (1789) 3 Term Rep. 442; yet, where the object and intent of the statute manifestly requires it, words that appear to be permissive only, shall be construed as obligatory, and shall have the effect of ousting the courts of their jurisdiction, . . ."
>
> My opinion, however, is that neither the original appellate nor the supervisory jurisdiction of the High Court can properly be attracted in this case, simply because both those jurisdictions are intended by the Ordinance to be exercised by a procedure that is strictly mandatory.

The powers of review by the High Court are thus circumscribed, and, as I see it, that court may properly exercise its supervisory jurisdiction only when the Commissioner has decided the dispute himself under s. 49(2)(a), or when there is an adjudication by him on an appeal from the arbitrators' award. In either event, such review lies only when he acts in excess of jurisdiction or contravenes the principles of natural justice. But it cannot be too strongly stressed that review by the High Court can only be in respect of the Commissioner's decision; not against the arbitrators' award, nor, it would seem, against the order of reference, nor against the arbitration proceedings. Such is the extent of the supervisory jurisdiction of the High Court in the light of the finality and primative provisions in s. 49(4). [See *Sowatilall v. Fraser et anor.*, (1960) 3 W.I.R. 70].

S. 49(5), however, is quite definite. It says that if there is no appeal to the Commissioner the arbitrators' award is final, and that it

shall not be questioned in any civil court. Here, I think the Legislature, by making use of such clear and unequivocal privative language, has put beyond peradventure its intention to oust the appellate jurisdiction of the High Court, having conferred that exclusively in the first instance on the Commissioner for Co-operative Development.

We have seen that the object and intention of s. 49(3) is to make it obligatory on an aggrieved party to appeal from the arbitrators' award directly to the Commissioner; also that s. 49(5) precludes questioning the award in any civil court if no appeal is preferred to him. But does the fact that, in this case, the appellant is also challenging two matters preliminary to the award, namely, the Commissioner's order of reference and the arbitration proceedings, give him the right to circumvent an appeal to the Commissioner by directly invoking the jurisdiction of the High Court in an action for a declaration and injunction? As I see it, the prohibition against the award being questioned in any civil court must, by necessary implication, also include questioning the Commissioner's order of reference to the arbitrators, for the reason that the award being the creature of that order, any attack on the order can only be an oblique attack on, and, in effect, an appeal against the award itself, a thing which is forbidden when there is no appeal to the Commissioner. Moreover, objection to both the Commissioner's terms of reference and the arbitration proceedings was taken and overruled in the arbitration proceedings that led to the award from which there has been no appeal to the Commissioner, the tribunal designated for that purpose. In such circumstances, it appears to me authority is not wanting for the view that when the legislature has supplied a code of procedure for obtaining judicial review, an award of arbitrators ought not to be impugned by action for a declaration when that code of procedure has not been followed.

In *Uttaxeter Urban District Council v. Clarke & Ors.* (1952) 1 All E.R. 1318, a local authority made a compulsory purchase order under the Housing Act, 1936, in relation to the Heath House estate. The order was confirmed by the Minister after a local inquiry. The estate comprised a large dwelling-house and out-buildings together with grounds. After acquiring possession, the local authority permitted the Staffordshire County Council the use of part of the house, while they themselves used the rest of the premises. The first defendant refused to quit the estate. Later he was evicted by warrant but re-entered and remained thereon until an injunction was granted against him. By the Acquisition of Land (Authorisation Procedure) Act, 1946, Schedule 1, para. 15, provision is made [somewhat like s. 49(3) of the Ordinance] for the steps to be taken by any person who regards himself aggrieved by the Minister's confirmation of a compulsory purchase order to question the validity of it by making an application to the High Court within six weeks from the date on which either the making of the order or the notice of confirmation is first published. The six-week period had long expired, and this being the case, the privative provision of para. 16

of the schedule hereunder applied so as to prohibit questioning the validity of the compulsory purchase order.

> "Subject to the provisions of the last foregoing paragraph, a compulsory purchase order . . . *shall not,* either before or after it has been confirmed, . . . *be questioned in any legal proceedings whatsoever,* and shall become operative on the date on which notice is first published as mentioned in the last foregoing paragraph".

The Commissioner is, however, not expected to adjudicate on intricate points of law. His limitations in this respect are fully appreciated and recognised in s. 50, where it is provided as a safeguard in the interests of justice that notwithstanding what has been said in s. 49, he may, when proceedings to his decision from the arbitrators' award, refer any question of law arising out of his decision for the opinion of the High Court. Had there been an appeal to him from the award, the Commissioner could have been asked to state a case for the opinion of the High Court on the matter of the invalidity of his order of reference and arbitration proceedings on which the arbitrators had ruled; but there was no appeal. Here again, the words "may refer" are interpreted to mean that it is imperative on the Commissioner to state a case on the point of law on the request of one or both of the parties in the appeal before him. I think it is obligatory on him to do so, he being a public officer, the depository of a power that is coupled with a duty which it is incumbent on him to exercise in the interests of persons having rights in the matter so as to prevent a failure of justice. That is why I conclude that "may refer" in s. 50 means "must refer". If he does not, the Commissioner may be compelled to state a case on an application to the High Court. The Ordinance having thus interposed the Commissioner as a middle tribunal between the arbitrators and the High Court, it must follow that the latter can exercise its supervisory jurisdiction in this case, neither over the arbitrators, nor over the Commissioner, simply because the latter has not yet adjudicated; and, not having thus spoken, there is nothing for the High Court to supervise. The situation, I consider, to be just the same as if, on appeal from the decision of a magistrate's court, an appellant were to by-pass the Full Court and come directly to us here. That would be utterly wrong in view of s. 33(1) of the Federal Supreme Court (Appeals) Ordinance, 1958, which provides for hearings of all magisterial appeals to be first heard by that court. We would, of course, be without jurisdiction to hear the appeal.

In such a situation, the general principle to be applied has been stated in several authorities like *Barraclough v. Brown,* (1887) A.C. 615, referred to by the trial judge. However, I think the judgment of ASQUITH, L.J., in *Wilkinson v. Barking Corporation,* (1948) 1 All E.R. 564, contains the best exposition on the subject in that it pointedly illustrates the problem confronting us. The learned Lord Justice said [(1948) 1 All E.R. at p. 567]:

> "It is undoubtedly, good law that, where a statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to this remedy or this tribunal and not to others. As the House of Lords ruled in *Pasmore v. Oswaldtwistle Urban Council* (1894) A.C. 394, per Lord HALSBURY): 'The principle that where a specific remedy is given by statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law'."

See also *Small v. Saul and Saul,* (1965) 8 W.I.R. 351.

In *Wilkinson's* case, the plaintiff took a preliminary point in an action for a declaration that he was entitled to receive an annual superannuation allowance under the Local Government Superannuation Act, 1937. The defendants, who were the Local Authority, did not, however, plead ouster of jurisdiction in the High Court to entertain the claim. Instead, they entered an unconditional appearance to the writ pleading that the plaintiff had no cause of action because, under s. 35 of the Act, his only remedy against a decision of the Local Authority was by way of appeal to the Minister of Health. It was held by MORRIS, J. at first instance that the fact that the local authority had entered an unconditional appearance to the writ did not preclude them from raising the point that the plaintiff had no cause of action because his proper and only remedy was the exercise of a statutory right of appeal to the Minister of Health. The decision was affirmed in the Court of Appeal where (at p. 567) ASQUITH, L.J., was in no doubt about the court's lack of jurisdiction to deal with the matter, notwithstanding the fact of the defendant corporation's submission thereto by its unconditional entry of appearance to the writ:

> "No act of parties", said he, "can create in the courts a jurisdiction which Parliament has said shall vest, not in the courts, but exclusively in some other body, and a party cannot submit to, so as to make effective, a jurisdiction which does not exist—which is, perhaps, another way of saying the same thing".

There is obviously a close parallel between *Wilkinson's* and the case which we now consider. Both were actions for a declaration in which High Courts of Justice were asked to arrogate to themselves a jurisdiction vested by statute in another tribunal. *Crisp's case* (above), as we have already seen, shows that the superior courts will not entertain jurisdiction where a plaintiff seeks to by-pass the appointed tribunal by suing for a declaration in a superior court instead of following the prescribed statutory procedure. Again, very important is the fact that in both statutes whereunder the actions were preferred, viz., the Local Government Superannuation Act, 1937, and the Co-operative Societies Ordinance, Cap. 326, there has been positioned after the tribunal having

original jurisdiction to entertain disputes (i.e., the Local Authority in the one case, and the Arbitrators in the other) another tribunal to whom a right of appeal is given. When such is the case, the authorities show it is to this tribunal to whom an aggrieved party must resort even if it appears by so doing he is appealing from "Caesar unto Caesar", to use the trial judge's observation; although that is a remark which I do not think appropriate here since the arbitrators, having been appointed by both parties and the Commissioner, were entirely independent of the Commissioner. In *Wilkinson's* case, ASQUITH, L.J., alluded to the increasing number of statutes which are nowadays drafted in such a way as to make it appear that an interested party is made judge in his own cause, but that observation clearly cannot properly apply in this case. I am of the view that the trial judge was right in declining to make the declarations sought, and for these reasons I would dismiss this appeal and confirm the order of the court below, with costs.

Appeal dismissed.

LUCKHOO, C.: I agree with the decision read by my learned brother Crane, and agree also with the order proposed by him.

ETWAROO *v.* JAGDEO PERSAUD JAGSARRAN

[In the Full Court, on appeal from a magistrate's court for the Georgetown Judicial District (Bollers), C.J., and Khan, J.)
June 4th, 1971.]

Criminal Law—Larceny—Asportation—Supermarket—Employee of supermarket concealing articles in packets and failing to pay for them at cash counter—Whether sufficient asportation to constitute larceny—Whether facts constitute an attempt to commit larceny—The Summary Jurisdiction (*Offences*) *Ordinance Cap. 14 [G] S. 89—The Summary Jurisdiction* (*Procedure*) *Ordinance Cap. 15 [G] S.38.*

The appellant was an employee of a supermarket where various items of food as well as articles such as Brylcreem and Vaseline hair dressing were sold. Employees were permitted by the management to make purchases in the same manner as members of the public, that is, to remove the articles from the shelves where they were displayed, and pay for them at the cashier's desk. The appellant took a parcel of sugar and one of flour to the cashier and offered to pay for those items only. Concealed at the bottom of the two parcels were four jars of Brylcreem

and two bottles of Vaseline. When challenged by the cashier, the appellant said that the parcels of sugar and flour with the cashier were not the ones he had placed there. He was charged with the larceny of the Brylcreem and Vaseline before a magistrate who convicted him of that offence. On appeal to the Full Court it was submitted that at the time the parcels were taken to the cashier the transaction of sale and purchase had not yet been completed and that the articles were still in the possession of the proprietor of the supermarket.

HELD: (i) the facts did not disclose the commission of the offence of larceny, but only of an attempt to commit the offence of larceny;

(ii) the articles had not at the material time been reduced into the exclusive possession of the appellant;

(iii) the evidence established an attempt to commit the offence of larceny for which the magistrate had power to convict by virtue of the Summary Jurisdiction (Procedure) Ordinance Cap. 15 S. 38, and the matter would be remitted to the magistrate with a direction to convict of an attempt to commit the offence of larceny.

Appeal allowed. Matter accordingly remitted to the magistrate.

[*Editor's Note:* An appeal to the Guyana Court of Appeal by the appellant was dismissed and the conviction and sentence of the magistrate was restored on the ground that the facts established the offence of larceny. See (1971) 18 W.I.R. 211].

Doodnauth Singh for the appellant.

G.H.R. Jackman for the respondent.

JUDGMENT OF THE COURT: In the Magistrate's Court the appellant was charged and convicted of the offence of larceny by a Clerk or Servant contrary to s. 89 of the Summary Jurisdiction (Offences) Ordinance, Cap. 14.

> The particulars of the offence read as follows:
>
> Etwaroo on Thursday 19th November, 1970 at Georgetown in the Georgetown Judicial District being employed as a clerk or servant with Messrs. Kwang Hing Supermarket, stole four jars Brylcreem value $7.00 and two bottles Hair Cream Vaseline value $4.00, total value $11.00 property of Kwang Hing Supermarket, his employer.

The evidence revealed that during the month of November, 1970 the appellant had been employed as a Clerk at Kwang Hing's Supermarket situate at 141 Camp Street, Georgetown. It appears that the appellant was a union official of the C.C.W.U. and had been active in the Trade Union Movement in making representations on behalf of the workers of the union and in an interview between the union and the proprietor/

manager of the Supermarket the latter had stated that he wanted to get rid of the appellant because he had been giving a lot of trouble in that when his fellow employees wanted to work he would tell them not to do so which caused dissension.

The employees in the supermarket were permitted to make purchases of goods in the same way as customers and members of the public, i.e. they were allowed to remove goods from the shelves on which they were displayed and take them to the cashier who would check the articles and strike the amount on the cash register, receive payment for the goods and hand a bill to the purchaser. In the case of an employee the goods were not always closely checked. On the day in question the appellant whose duties included taking up orders and getting together goods made a purchase of two items on his own behalf, i.e. four pounds of flour and four pounds of sugar in two separate parcels which he placed in a bag and took to the cashier. He informed the cashier that he had four pounds of flour and four pounds of sugar in the bag and he instructed the cashier to take out the money for the flour and the sugar. The cost of the flour was fifty-four cents and the sugar thirty-eight cents. As he was about to hand the money over to the cashier, the cashier enquired of him why he was buying on Thursday because he generally bought on Fridays. The appellant replied that he was buying the items for a lady. The cashier then opened the bag, removed the parcel of flour and felt it. Secreted in the flour he found four jars of Brylcreem and when he repeated the process in the case of the parcel of sugar he found concealed in the sugar two jars of hair cream vaseline. At no time did the appellant say that he was paying or offering to pay for these items which were the subject matter of the charge nor did he in fact pay or tender any money to the cashier at all. The proprietor/manager of the Supermarket was sent for and in the presence of the appellant a report was made by the cashier to the manager of what had taken place and the appellant stated that the two parcels were not those that he had put in the bag. Later the police were summoned and the cashier made a report to them in the presence of the appellant that the appellant had stolen some Brylcreem and vaseline and had put them with the contents of the two parcels. The exhibits were then shown to the police and as a result the appellant was arrested and cautioned. He made no reply. He was later taken to the station and charged. At the station the appellant made a statement in writing to the police in which he said that he had taken up a parcel of four pounds of sugar stamped thirty-eight cents and a parcel of flour stamped fifty-four cents and had left the parcels on the counter and gone to get up another order. About half an hour later he had returned and picked up the parcels and taken them to be cashed. He told the cashier that he was paying for four pounds of flour and four pounds of sugar and he took out ninety-four cents to pay for these items when the cashier searched the items and found the Brylcreem and vaseline and asked him how it was that he was only paying for the

flour and sugar. He was surprised to find these articles in the parcels but he knew they were similar articles kept in the back store of the supermarket. In his defence the appellant more or less repeated what he had said on his statement to the police and denied taking up the brylcreem and vaseline and placing them in a bag in the supermarket. He noticed that when the articles were removed from the parcels they were not stamped and he admitted that when the employees made purchases and took them to the cashier sometimes he would check them and sometimes he would not check them if the items were few.

The learned Magistrate accepted the evidence of the Prosecution disbelieved the defence and convicted the appellant.

In this court it was submitted by counsel for the appellant that on the facts the appellant could not be properly convicted of the offence of larceny because at the time the parcels containing the articles which were the subject of the charges were taken to the cashier the transaction of a sale and purchase had not yet been completed and all the articles were still in the possession of the proprietor of the supermarket. Counsel cited *Martin v. Puttick* (1969) 1 A.E.R., at p. 899 in support of his contention.

Counsel for the respondent on the other hand submitted that when the appellant concealed the articles in the flour and the sugar (which he honestly intended to pay for) that was clear evidence of an *animus furandi* and there was therefore a "taking" as required by the law of larceny when the appellant took the goods to the cashier with the clear intention of not paying for them. In our view the decision by the Divisional Court in *Martin v. Puttick* is of great assistance in determining this question. In that case—

> "The defendant, who was shopping in a supermarket, chose two chops, which were wrapped up and handed to her by an assistant. She put them into her shopping-bag instead of into one of the store's wire baskets, because they were damp. Then she went to the cash-desk where she paid for other articles in the basket but failed to produce the chops. The manager helped her to pack the other articles into her bag and noticed the chops; he did not mention them to her and allowed her to leave the shop before stopping her. She was charged with larceny of the chops; the justices found that she had purposely failed to produce the chops for payment, although she did not have that intent when the assistant handed them to her. They concluded that these facts did not amount to larceny and dismissed the charge.
>
> "Held, allowing the prosecutor's appeal, that no property in the goods picked up by a customer passed until they were paid for, and it made no difference that the goods were handed to the customer by an assistant. There had to be an asportation to constitute larceny, and the carrying away had to be against the owner's

will. If the manager allowed the defendant to carry the chops away no offence had been committed. *R. v. Turvey* (1946) 31 Cr. App. R. 154, in which the property was physically handed over by the owner's agent, was to be distinguished: in the present case the chops were never in the manager's control and he could not be taken to have handed them to the defendant or to have given her permission to take them away. Accordingly the offence was proved. (1969) 2 C.L.R."

WINN, L.J. who delivered the judgment made it clear that the basic understanding of persons who traded in a supermarket and invited purchases of their goods to be made was that in the interval between the moment of picking up any article and the point of time and place when the customer is at the cash-desk and is transacting with the cashier the completion of the purchases by obtaining from the cashier the total price and paying that price, the customer is holding the goods and carrying them by the permission of the proprietor for the purposes of the transaction.

The learned judge was there making the point that by implication the proprietor had given a limited permission to the customer to handle and carry goods which was still his property. He was of the view that the relationship that existed between the proprietor and the customer was that of a licence and possibly custody subject to an overriding course of control and continuing right of termination remaining in the proprietor. He then stated "At any rate no property has passed and no right has been conceded or granted by the proprietor to retain exclusive possession beyond the moment when the customer presents himself or herself to the cashier and it is subject to a condition subsequent that any such possession shall terminate unless the amount which is found to be due is paid by the customer to the cashier".

When therefore, the customer in a physical sense takes the article by removing it from the shelf and puts it in a basket provided by the proprietor there is not such a taking as is contemplated by or relevant to the purpose of the larceny Act 1916 in the definition of theft. It is clear therefore that when the appellant in the present appeal concealed vaseline and brylcreem in the flour and sugar while he may have had the *animus furandi*, i.e. the necessary *mens rea* existing in his mind it could not be said that there was an *actus reus* which is so necessary to constitute the offence of larceny. For the offence of larceny to be constituted both of these elements must exist for "*actus reus non facit nisi mens rea*" and the converse is equally true. As is well known larceny is an offence against the possession of an article whereby the thief obtains possession of the thing and not its property and larceny has been regarded as a dishonest change of possession of a chattel. It was the Earl of Jowitt who in *U.S.A. v. Dolfus Mieg* (1952) A.C. 582 at p. 605 said that in truth, the English law has never worked out a completely logical and exhaustive definition of possession and in the more recent decision of the House of Lords in a case involving the unauthorised

possession of drugs, i.e. *Warner v. Metropolitan Police Commissioner* (1968) 52 C.A.R. Lord REID pointed out that as a legal term "possession" is ambiguous at least to this extent: there is no clear rule as to the nature of the element required. All are agreed that there must be some mental element in possession, but there is no agreement as to what precisely it must be. Thus it will be seen that the judges of the past who were anxious to punish dishonesty treated the concept of possession in the case of the victim differently from the concept of possession in the case of the thief, with the result that in the case of master and servant or host when the goods of the master or host were entrusted with the servant or a guest possession was denied to the servant and guest and was said to be in the master or host and thereafter a servant or guest was liable to conviction for larceny if he infringed the continuing possession of his master or host by misappropriating his goods. A distinction was therefore taken at common law between "possession" and "custody". A servant or guest was said to have custody of the master's goods entrusted to him while possession remained in the master. If therefore, a custodian appropriated the thing in his charge he was deemed to take it when he did so. Obvious instances of custody would be where a master gives his silver to his servant for polishing, or where a shopkeeper hands goods across the counter for examination by a customer, or where an hotelier puts out cutlery for use by his guests. Dishonest appropriation by any of these custodians would be larceny notwithstanding that the owner has parted with immediate control, for the owner has not parted with possession. See *Smith & Hogan Criminal Law* p. 348. In the case of the supermarket type of case, however, as pointed out by WINN, L.J. what the customer obtains is a licence to remove the goods to the cashier's desk, i.e. a limited permission to do so and therefore it cannot be said that he has exclusive possession of any article which he might dishonestly seek to appropriate. It was also pointed out that even if possibly the dishonest customer had custody that custody was subject to an overriding course of control and continuing right of termination which remained in the proprietor, so unlike the servant or guest who appropriated his master's or host's goods it could not be said that the customer had obtained exclusive possession which a thief must have before it could properly be said the offence of larceny has been committed. So even if the concept of custody were introduced into this type of case that custody would be qualified by the limited permission of the proprietor to the customer to be in temporary physical possession of the goods albeit that in law possession of the articles remained in the proprietor. The other aspect of the matter is that when a customer removes goods from the shelves and takes them to the cashier's desk in order to pay for them, it cannot be said that he has done so *invito domino* for as already shown he has the limited permission of the proprietor to do so "and the property in the goods therefore only passes when the price is paid as this is clearly the intention of the parties. See *Martin v. Puttick* (1968) 2 Q.B. 82, D.C. *Lacis v. Cashmarts* (1969)

2 W.L.R., p. 329. We cannot therefore take the view that in the present appeal the appellant was properly convicted of the offence of larceny, as the articles had not been reduced into his exclusive possession. However, under s. 38 of the Summary Jurisdiction (Procedure) Ordinance cap. 15 where a full offence is charged but the evidence establishes an attempt to commit the offence, the defendant may be convicted of the attempt and be punished accordingly. An attempt has been described as a series of acts which if not interrupted would lead to the ultimate commission of the offence and it is clear to us that when the appellant concealed the articles the subject matter of the charge in the flour and sugar and took them to the cashier and only offered to pay for the flour and sugar those were acts on his part sufficiently proximate to the commission of the full offence of larceny to constitute an attempt and went beyond the mere preparation of acts antecedent to the offence. In other words the crime was inchoate and would not have been constituted until he had completed the transaction by paying the price of the goods, i.e. the flour and sugar. The fact that there was evidence of animosity existing between the proprietor and the appellant does nothing to deter us from reaching this conclusion as the proprietor did not give evidence to connect up the appellant with this aspect of the case.

For these reasons, then, the appeal must be allowed and the conviction and sentence of the magistrate set aside and the matter remitted to the magistrate with a direction to convict the appellant of an attempt to commit the offence of larceny contrary to s. 38 of cap. 15 and to impose sentence according to law.

Appeal allowed. Matter remitted to the magistrate.

CHARLES HUBERT DIAS *v.* EUGENE JOHNSON

[High Court (Vieira, J.) April 26, June 12, 1971.]

Practice and Procedure—Writ of summons—Not specifically indorsed with a statement of claim nor accompanied by a statement of claim—Writ filed for simple contract debt set out in 'indorsement of claim'—Whether 'indorsement of claim' is a 'statement of claim'—Whether plaintiff entitled to judgment in Bail Court—Writ irregular not void—Waiver of irregularity—Rules of the High Court O. 1, r. 4, O. 4, r. 6, O. 12, O. 26, r. 2, O. 54.

CHARLES HUBERT DIAS *v.* EUGENE JOHNSON

A claim for a simple contract debt was made in Bail Court in a writ which was not specially indorsed with a statement of claim or accompanied by a statement of claim. The writ was merely intituled "Indorsement of Claim". A preliminary objection was taken that there was, in effect, no statement of claim in the matter and that the cause of action set out in the general indorsement of claim did not conform with O. 4, R. 6. The defendant had filed affidavit of defence and amended affidavit of defence. A request for hearing was filed and ten months later the preliminary objection was taken. No application was made by defendant either by way of summons or by notice of motion to set aside the writ.

HELD: (i) the 'indorsement of claim' in the matter was not a 'statement of claim';

(ii) the writ was merely irregular and not void;

(iii) 'fresh steps' had been taken by the defendant since the filing of the writ and he must be taken to have waived the irregularity;

(iv) the plaintiff was granted leave to file an 'accompanying statement of claim' and the defendant was granted leave to file an amended affidavit of defence, if necessary.

Preliminary objection overruled.

B. De Santos for the plaintiff.

E. E. Adams for the defendants.

VIEIRA, J.: In this matter, the plaintiff claims the sum of $739.25 being the balance of an amount due, owing and payable by the defendant for work done and money advanced by the plaintiff to and for the use of the defendant at his request between 28th October, 1969 and 27th December, 1969. At Industry, East Coast, Demerara.

The Writ in this matter is not "specially indorsed with" a "Statement of Claim" neither is it "accompanied by" a "Statement of Claim" as the plaintiff may, at his option, do in those type of actions set out therein under O. 4, r. 6 of the Rules of the Supreme Court (1955) (Guyana) (hereinafter referred to as the Rules), but is merely intituled "Indorsement of Claim." It is to this nomenclature that Mr. Adams takes a preliminary objection. He submits there is, in effect, no Statement of Claim in this matter and, further, that the cause of action as set out in the general Indorsement of Claim does not confirm to O.4 r. 6. Mr. Dos Santos, in reply, submits that there is nothing magical about the term "Statement of Claim". This, he argues, is a claim for work done and services rendered and the 'Indorsement of Claim' is sufficiently indicative of the transaction in question which is a simple contract debt. He refers to O.4, r. 6 and to O. 54, r. 2 & 3 and opines that any objection is not to be made before the trial judge.

O. 4 of the Rules is intituled "Indorsement of Claim" and r. 6 thereof provides as follows—

"6. In actions—

(1) where the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant, with or without interest, or with or without a claim for a declaration that an opposition is just, legal and well-founded, and for an injunction restraining the passing of a transport, mortgage or lease or of a surrender, transfer or assignment of a lease arising.

   (a) upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note or cheque, or other simple contract debt; or

   (b) on a bond or contract under seal for payment or a liquidated amount of money; or

   (c) on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt other than a penalty; or

   (d) on a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand; or

   (e) on a trust; or

(2) Where a landlord seeks to recover possession of land or of a building, or part of a building, with or without a claim for rent or mesne profits, against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non payment of rent, or against persons claiming under such tenant; or

(3) where the plaintiff seeks to recover possession of a specific chattel or its value, with or without a claim for (a) the hire thereof or (b) for damages for its detention; or

(4) where the plaintiff claims possession of any property forming a security for the payment of money; or

(5) where the plaintiff seeks to recover any money due on a mortgage with or without a claim for the foreclosure of the mortgage in the terms thereof; or

(6) where the plaintiff seeks to enforce an opposition to the passing of a transport, mortgage or lease or of a surrender, transfer or assignment of a lease, with or without any other claim; or

(7) where the plaintiff seeks to recover possession of land or a building or any part thereof or damages for trespass to land or a building, with or without a claim for (a) a declaration (b) an injunction (c) mesne profits and (d) damages; or

(8) where the plaintiff seeks to enforce specifically a contract in writing or an oral contract which has been part performed for the sale or purchase of property;

the writ of summons may, at the option of the plaintiff, be specially indorsed with or accompanied by a statement of his claim or of the remedy, or relief to which he claims to be entitled. Such special

"Indorsement shall be to the effect of such of the Forms in Appendix C to these Rules as shall be applicable to the case, or in a similar form."

O. 4, r. 6 of the Rules is based upon and derived from O. 3, r. 6 of the English Rules of the Supreme Court, 1883, as amended (hereinafter referred to as the 1883 Rules), which itself originally derived from the Common Law Procedure Acts of 1852 and 1854 and the Chancery Procedure Acts of 1852. The 1883 Rules are merely a set of reforms and innovations grafted on to an existing system and were, and still are, not a complete code of civil procedure. One of the main aims of those Acts was to cut down the length and complexity of procedure and to reduce the more usual steps to standard form.

An excellent survey and analysis of the "Specially Indorsed" Writ is contained in the following passage appearing at pp. 4 & 5 of Basic Rules of the Supreme Court (1961) by Lewis F. Sturge, which to my mind, answers this whole problem—

> This celebrated Rule derives originally from the Common Law Procedure Act, 1852, but during the hundred years of its existence it has been so altered and adapted to new requirements that the resultant position is most complicated and can hardly be understood without some background knowledge.
>
> In the Act of 1852 the right was given to the plaintiff, at his option, to "specially indorse" his writ, that is to say, to put on the writ itself a concise statement of his claim. He could only do so in a limited class of cases being, broadly speaking, simple claims for money due. But where the Rule allowed him to do so a great simplification and speed-up of procedure was achieved in that he was relieved of the necessity of delivering any further statement of his claim and the defendant was put to the necessity of making his answer without further ado.
>
> Originally, "special indorsement" was primarily directed to obtaining judgment "in default of appearance". But in 1875 the position was radically altered. The procedure for obtaining summary judgment after appearance under O.14 was then brought into existence and "special indorsement" was given a new orientation by being dissociated from judgment in default of appearance and being linked instead of to the new 0. 14. The tie-up between O. 14 and O. 3, r. 6, still persists to-day and is absolute and obligatory, with rather unfortunate effects on the draftsmanship of the Rules, as will be seen.
>
> In 1933 it was decided to make a very wide extension in the scope of O. 14 which hitherto had been limited to actions for a debt or liquidated demand. Order 14 was thenceforth, and is to-day, available in all Q.B. and Chancery actions, except for about half-a-dozen excep-

tions expressly set out in sub-paragraph (1) of r. 6, supra, such as defamation, seduction, etc., or where fraud is alleged by the plaintiff. In view of the absolute tie-up between O. 14 and O. 3, r.6, it became necessary entirely to change the character of the latter Rule in order that, while retaining the link between this Rule and O. 14, the scope of the latter could be extended as was proposed. In making the alteration it was thought that it might be inconvenient to force the plaintiff to compress the whole of his claim in a case under the extended jurisdiction into a special indorsement and the amended rule therefore allowed him instead to "accompany" his writ with a statement of claim, instead of putting it on the writ itself. If he did so, he came with O. 3, r. 6, and consequently within O. 14. It must be confessed that the law stationers quickly provided a solution by printing larger writ forms!

The result of all this has been to make rather a nonsense of the text of the 1852 Act which notwithstanding the complete transformation of its purpose, has been retained as the framework of the rule. Order 3, Rule 6 no longer deals exclusively or even primarily with special indorsement. The distinction between "accompanying" the writ with a statement of claim under the so-called special indorsement procedure and "delivering" it with the writ as may be done under Order 20, Rule 1, is so fine as to be practically unimportant though theoretically vital. Though a special indorsement must be headed by the words "Statement of Claim", a general indorsement which did so instead of the more usual "The plaintiff's claim if for . . ." would not be bad as a general indorsement.

To summarize, the practical upshot of Order 3, Rule 6 to-day may be stated as follows:—

(1) its use is the gateway to and preliminary *sine qua non* for Order 14; (2) the limitations upon the availability of Order 14 procedure are contained in Order 3, Rule 6 rather than in Order 14 itself. (3) Order 3 Rule 6 does still retain its Common Law Procedure Act function in that it authorises a plaintiff to save time and money by putting his claim on the writ itself and to use for the purpose the excellent succinct forms in simple case which were provided by that Act, e.g., "goods sold and delivered" or "money had and received by the defendant to the use of the plaintiff. These forms are expressly preserved by the Rules".

A purpose of Order 14 of the 1883 Rules is to enable a plaintiff to obtain summary judgment without a trial, if he can prove his claim clearly, and if the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried—*Roberts v. Plant* (1895) 1 Q.B. 597, C.A. But it is a general principle that where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a *bona fide* defence, he ought to be given leave to defend—*Ward v. Plumbley* 6 T.L.R. 198. It is a preliminary

necessity to proceedings under Order 14 that a defendant personally appears to the writ. If he does not appear then the proper remedy is to apply for judgment by default under Order 13.

A summons under Order 14 cannot be issued except when a writ has been specially indorsed with or accompanied by a statement of claim. A special indorsement is "deemed to be" the statement of claim for the purposes of all actions except those specified in paras. (1)(a) and (b) of Order 3. Rule 6—The Annual Practice (1959) at p. 25 under heading "Effects of Special Indorsement."

In *Cassidy & Co. v. M' Aloon*, 32 L.R. Ir. 368, the Irish Court of Appeal held that the omission of the words "Statement of Claim" at the head, and the signature at the end, as shown in the skeleton form of specially indorsed writs (Appendix A Part I, No. 2, Part TV) and required to a pleading by Order 19, Rule 4, were fatal defects—see The Annual Practice (1959) at p. 25 under heading "Signature."

A special indorsement (but not an ordinary indorsement) can be amended under Order 28, Rule 2; and a writ containing a defective special indorsement can be amended by order so as to make it a specially indorsed writ for the purpose of Order 14, and, if appearance has been entered to such writ before amendment, such appearance stands to the writ as amended. If proceedings have been commenced under Order 14 before amendment they can be continued afterwards without a fresh summons, or a fresh affidavit, except so far as the latter may be rendered necessary by the amendment—*Roberts v. Plant* (1895) 1 Q.B. 597; *Paxton v. Baird* (1893) 1 Q.B. 139, distinguishing *Gurney v. Small* (1891) 2 Q.B. 584; and see *Stachwell v. Clarke*, 66 L.T. 641. See Order 14, Rule 1(b) and (nn). After an action has been sent to the short cause list the power of the Judge to amend the claim is unrestricted (*Thomas v. Alderton, Ltd.*, (1927) W.N. 305, C.A.)—The Annual Practice (1959) at pp. 24 and 25.

Proceedings in relation to specially indorsed writs in this country are governed by Order 12 of the Rules and amendments thereto by Order 26, Rule 2, both of which are similar in terms to Order 14 and 28, Rule 2 of the 1883 Rules, and, to my mind, the same considerations apply.

In this country we do not have Masters of the Supreme Court and the Judges have to do all those matters preliminary to the actual trial which are done by Masters in England. A Judge of the High Court in this country does all Chamber matters as well as all proceedings in "Bail Court" which is defined by Order 1, Rule 4 of the Rules as follows—

"4. In these Rules—

"Bail Court" means the Court before which—

(a) applications under O. 12;
(b) motions and other applications to be made in Court;
(c) proceedings under the Insolvency Ordinance;

(d) Judgment Summonses are heard."

As a Judge who has often done matters in Bail Court and Chambers, I am well aware that there is no standard practice among legal practitioners relating to specially indorsed writs although it is my experience that the great majority of them use the term "Statement of Claim" rather than the vague term "Indorsement of Claim" which, to my mind, is equally applicable to general writs of summons.

This point I must confess, has never been raised specifically before me up to now but, now that it has, it seems to me that there must be consistency and uniformity in the form to be used for specially indorsed writs.

This issue, to my mind, is completely set at rest when one considers Appendices B and C to the Rules. Form 1 of Appendix B relates to a general writ of summons of and after the words—"(Indorsements to be made on the writ before issue thereof)"—appear the following words—"The plaintiff's claim is for, etc." Compare this with Form 2 of the said Appendix which relates to a specially indorsed writ of summons where after the words—"(Indorsement to be made on writ before issue thereof)"—appear the following words—"Statement of Claim"—followed by the words—"The plaintiff's claim is for, *etc.*" Part 3 of Appendix C relates to forms of special indorsements under Order 4 Rule 6 and all are intituled "Statement of Claim."

In my considered opinion, therefore, the "Indorsement of Claim" in this matter is not a "Statement of Claim". As I see it, if a plaintiff wishes to obtain summary judgment in this country in the High Court under Order 12 of the Rules he must either (1) 'specially indorse" his writ, i.e., concisely set out on the writ itself his claim under the heading "Statement of Claim" or (2) attach to his "Indorsement of Claim" an "accompanying Statement of Claim." The former should always be used in all cases, if possible, except those that are complex or where there are several lengthy issues involved which would make it difficult to set out a concise and succinct precise.

The difficulty in this matter, as I see it, is to decide whether this Writ is void or merely irregular. If the "Indorsement of Claim" had also been unsigned then I would have had no hesitation in holding that the Writ was wholly void and of no effect whatsoever. But this is not so as it is signed by Solicitor for the Plaintiff.

In England to-day, the new Rules of the Supreme Court, 1965, has made a fundamental change in that every kind of non-compliance is now treated as a mere irregularity and not a nullity. This was as a direct result of the case of *Re Pritchard* (1963) Ch. 502, C.A., where it was held that an originating summons under the Inheritance (Family Provisions) Act, 1938, which had been issued in a district Registry and not out of the Central Office of the Chancery Division was "nullity." This new rule, Order 2, Rule 1, was, in a way, a tribute to the challenging dissenting judgment of Lord Denning, M.R. Unfortunately, this is not the case under the Rules and the Judges of this country still have the difficult task of distinguishing between a "nullity"

on the one hand and an "irregularity" on the other hand. Order 32 of the Rules relates to actions that are deemed deserted (Rule 8) and those that are deemed abandoned (Rule 9). There are no similar provisions under the 1883 Rules. One can only hope that this eminently sensible and equitable rule will be expressly adopted when our Rules are revised, whenever that may be. As I see it, the time has come when the Courts should or ought to decide matters, whether of a substantive or procedural nature, on the "justice" of the cause, and, surely, this judicial concept is becoming more and more apparent in the decisions being handed down by Commonwealth Courts to-day.

Non-compliance with the Rules is governed by Order 54 which is in identical terms with Order LXX of the 1883 Rules. No amendment has been sought by the plaintiff at any stage up to now. In general, a writ can only be amended after service by an order of the Court but a statement of claim on a specially indorsed writ may be amended once without leave under Order 26, Rule 2 which is in identical terms with Order 28, Rule 2 of the 1883 Rules. Similarly, a defendant may amend his counterclaim or set off once without leave under Order 26, Rule 3 which is also in identical terms with Order 28, Rule 3 of the 1883 Rules.

Order 54 of the Rules provides as follows—

"1. Non-compliance with any of these Rules or with any rule or 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 wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or a Judge shall think fit.

2. No application to set aside any proceedings for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after the knowledge of the irregularity.

3. Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion."

In *Anlaby v. Praetorius* (1888) 20 Q.B.D. 764, it was held that the proceedings were a nullity where judgment had been entered in default of defence before the time for defence had expired. An Instance where the proceedings were held to be merely irregular occurred in *Mason v. Grigg* (1909) 2 K.B. 341, where a defendant, who had appeared in person, had employed a Solicitor to conduct his defence without putting his name on the record. Another example of an irregularity is provided by *Reynolds v. Coleman* (1887) 37 Ch. D, 453. C.A., where, in an application for service of the writ or notice of the writ out of the jurisdiction, there had been a failure to state fully the facts on the *ex parte* application for such leave. In the last-mentioned case it was held to be too late, after one (1) year, to set aside service out of the jurisdiction.

It would seem that what is a sufficiently "fresh step" within the meaning of Order 54, Rule 2 (*ubi supra*) must depend on the nature of the irregularity and that the question is whether there is constituted a waiver of the objection—vide Annual Practice (1959) at p. 1988 under the heading "Taken any step after the knowledge of the irregularity." In *Rein v. Stein* (1892) 1 Q.B. 753. C.A., CAVE, J. said at p. 47—

> "In order to establish a waiver you must show that the party . . . has taken some step which is only necessary or only useful if the objection had been actually waived or has never been entertained."

In this matter the Writ was filed on 12th January, 1970 and service effected on the defendant on 16th January, 1970. On 24th January, 1970, an affidavit of defence was filed and on 2nd February, 1970, hearing fees were paid and leave was granted to the plaintiff to file further and better particulars within 7 days and the defendant was granted leave to file an affidavit of defence within 6 days thereafter. The particulars were filed on 11th February, 1970. On 16th February, 1970, leave was granted to the defendant to file an amended affidavit of defence within 14 days. On 8th March, 1970, the defendant, however, filed a statement of defence. On 9th March, 1970, the Court granted further leave to the defendant to file an amended affidavit of defence within 14 days but subject to the payment of $15.00 costs. This was done on 3rd April, 1970. On 6th April, 1970, MORRIS, J. granted leave to defend without further pleadings and the matter was directed to take its normal course. On 24th June, 1970, a request for hearing was filed.

This summary clearly shows that the preliminary objection in this matter was not taken until about 13½ months after the writ was filed and just about 10 months after the request for hearing was filed, and, during all this time no application was made on behalf of the defendant either by way of summons or notice of motion to set aside the said writ. It must be said, however, in fairness to both Counsel and Solicitor for the defendant, who are both experienced legal practitioners, that they did not come into the matter until the last moment.

In my considered opinion, this Writ is merely irregular and not void and it cannot be argued, as Mr. Adams does, that the form of action set out therein does not come within the ambit of Order 4, Rule 6 of the Rules. As I see it, this is a simple contract debt and is for a specific amount claimed.

To my mind, as the defendant has done nothing to set aside the Writ in this matter but has, in fact, filed an affidavit of defence and amended affidavit of defence, then he must be taken to have waived the irregularity in this matter.

As this "Indorsement of Claim" is not a "Statement of Claim" within the meaning of Order 4, Rule 6 of the Rules it is necessary, I feel, that leave be granted to the plaintiff, even though he has made no such request, to file an "accompanying Statement of Claim." No fresh appearance by the defendant is necessary but the defendant will also be granted leave to file an amended affidavit of defence, if this is considered necessary.

For these reasons, therefore, leave is hereby granted to the plaintiff to file an "accompanying Statement of Claim" within seven (7) days and leave is also granted to the defendant to file an amended affidavit of defence within seven (7) days thereafter, if necessary. This matter is now put down to Monday 28th June, 1971 at 9.00 a.m. for fixture for hearing.

I think it only just and fair that some costs be awarded against the plaintiff and I fix this in the sum of $35.00 which must be paid by him to the defendant before he files his "accompanying Statement of Claim."

Preliminary objection overruled.

NAZREEN RAHAMAN HANOMAN *v.* KATHLEEN HANOMAN

[Court of Appeal Persaud, Cummings and Crane, JJ.A.),
January 7, 8, 14; June 14, 1971]

Civil Procedure—Probate action—Service of writ out of court's jurisdiction—Particulars of solictor's affidavit in support of application for leave—Omissions and non-disclosures—Adequacy of affidavit—Court's inherent jurisdiction—Rules of the Supreme Court, 1955 [G], O. 9.r. 1—Rules of Court 1965 [U.K.], O. 11, rr. 3 (1) & (2); 4 (1) & (2); O. 76.

Probate action—Costs—Successful party—Costs out of the estate of the deceased person.

The respondent filed a writ in the Supreme Court of Guyana to have the will of a deceased person proven in solemn form, and named the appellant who resides in Trinidad and Tobago, as defendant. Upon an *ex parte* application being made on behalf of the respondent, the court made an order for the service of the writ outside of the jurisdiction of the court. The appellant then took out a summons to have the writ struck out on the ground that the court had no jurisdiction to determine the action.

HELD: (i) that the writ was properly issued, and that no order will be made for striking it out, but that the affidavit supporting the application for the order for service outside of the court's jurisdiction was totally inadequate, and in the exercise of its inherent jurisdiction, the court will strike out the order.

(ii) that consequent upon the order to strike out the order for service, the appellant is entitled to her costs out of the estate of the deceased person.

Appeal allowed.

[Editor's note: This case is also reported in (1971) 18 W.I.R. 34].

G. M. Farnum, S.C., for the appellant.

J. O. F. Haynes, S.C., for the respondent.

PERSAUD, J.A.: Cecil Ronald Hanoman (hereinafter referred to as "the deceased") was born in Guyana of Guyanese parents. Sometime prior to his demise, he took up residence in Trinidad where he carried on business, and he became a citizen of Trinidad and Tobago, an independent territory. He was married to the appellant, also born in Guyana, in Trinidad, and they lived there together until his death on November 6, 1965. The appellant is a medical practitioner who practises her profession in Trinidad, and who has continued to reside there after her husband's death. The respondent is the deceased's sister, and she resides in Guyana.

The fact so far as they are pertinent to this appeal are as follows: The respondent claimed that the deceased had left a will, whereas the appellant alleged that the deceased had died intestate, as any will that he might have made had been revoked by him. Accordingly, she caused her solicitors to enter a *caveat* in the Supreme Court Registry in Georgetown in March, 1966, which *caveat* was duly warned. In August, 1966, the respondent filed a writ in the Supreme Court of this country to have the will proved in solemn form, and named the appellant as the defendant 'as the widow of the deceased and one of the persons entitled to share in the estate of the said deceased in the event of an intestacy and because you have entered a *caveat* . . . . . .

In November, 1966, the respondent's solicitor filed an *ex parte* application for leave to serve the writ of summons on the appellant out of the jurisdiction of the court. The solicitor swore to an affidavit in which, apart from the fact that he stated he was the respondent's solicitor, and she had caused a writ of summons to be filed against the appellant, and asking for an order for personal service on the appellant in Trinidad, followed by the usual consequential orders, he deposed as follows:

"3. That I am informed and verily believe that the above-named defendant now resides in Trinidad, out of the jurisdiction of this Honourable Court, and it is not possible to effect personal service.

4. That I have been advised by counsel that it is necessary for the said defendant to be served with the said Writ of Summons to have a full and true determination of the issue herein.

5. I am advised by counsel and verily believe that the plaintiff has a good cause of action against the defendant herein."

The order was made, and the appellant was given 21 days after the receipt of summons within which to enter an appearance.

In January, 1967, the appellant took out a summons to have the writ struck out on the ground that the court had no jurisdiction to determine the action. Later the same month, there was an application by the appellant to amend the grounds for striking out the writ by adding that the issue or service of the writ was irregular and that the order giving leave to serve the writ out of the jurisdiction ought not to have been made. This amendment was refused, and the order of refusal was not appealed against. So that the only issue before the judge was whether the writ of summons should be struck out on the ground that the court had no jurisdiction to determine the action. Thereafter, the parties were permitted to file affidavits, preparatory to the determination of the summons. At the hearing, the trial judge allowed evidence to be led, after which he struck out the writ and ordered that the appellant's costs be paid out of the estate of the deceased, giving as his reasons for so doing the inherent jurisdiction of the court under O. 9, r. 1 and/or r. 2 of the Supreme Court Rules [G.], and the fact that he found that Trinidad was the *forum conveniens* where "the implementation of the will would and could be more conveniently affected . . ." Before the Full Court, to which the matter was then taken, counsel for the appellant conceded, as he has done before this court, that the issue of the writ was not irregular, but instead argued that the only point in the appeal was the regularity or otherwise of the service of the writ. The Full Court in allowing the appeal, and reversing the order that the writ be struck out, concluded its judgment in these words, after setting out the reasons why the appellant was contending there that the court ought to accede to her prayer in the exercise of its inherent jurisdiction:

". . . These are not sufficient reasons for invoking the inherent jurisdiction of the court. Besides, the respondent (appellant in the Court of Appeal) should have taken advantage of Ord. 10, r. 20 (2) and moved to have the writ, or more accurately, the service of the writ, set aside. What may be considered an attempt in this regard was made when it was sought to amend the summons, the subject matter of this appeal, to include the further grounds to which [we] have already adverted attention. This was denied her and she took no action to challenge the denial. [We] fail to see how she can now be allowed to succeed on an issue in respect of which she was refused leave to argue and which in any event was not fully ventilated."

In the judgment of the Full Court itself, there was no order as to costs, but when the order of court came to be drawn up, it was recorded that the order of the trial judge be set aside with costs to the appellant (respondent in this court) to be taxed.

The appellant now seeks a reversal of the Full Court's order, urging before this court that the original order for striking out the writ was properly made by the court in the exercise of the inherent jurisdiction, and that the order for costs whereby the appellant was made to meet the respondent's

costs personally ought not to have been made. It was also submitted on behalf of the appellant that in the application for leave to serve the writ outside of the jurisdiction, there was a non-disclosure of material facts, which amounted to an abuse of the process of the court, and that in striking out the writ, the court of first instance was acting in its inherent jurisdiction to protect itself from such abuse, and that the proper order to be made by the Full Court should have been one to stay the proceedings. Counsel for the respondent has conceded that he could not properly say that the affidavit accompanying the application was adequate and that perhaps in the court below, the appellant might have had an arguable case for setting aside the order for service; but not so when she moved to set aside the writ and when the inadequacy of the affidavit was not raised until now.

Much time was spent before the judge of first instance arguing that leave was sought under O. 9, r. 1 (d) of the Guyana Rules of Court which permits service outside the jurisdiction where the action is for the administration of the estate of any deceased person who, at the time of his death, was domiciled within the jurisdiction. Naturally, this led the judge to devote much thought to the question whether or not the deceased was domiciled in Guyana, which in turn caused the Full Court to consider the question whether this was an action for the administration of an estate. That court found that it was not, and proceeded to apply the English Probate Rules, holding that our rules were silent on the procedure to be adopted in probate actions.

There are no probate rules here, but O. 9, r. 1 (b) of our Rules of Court [G.] provides as follows:

"Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by order of the Court or a Judge whenever . . . any will . . . affecting immovable property situate within the jurisdiction is sought to be set aside or enforced in the action."

What seems clear is that O. 9, r. 1 (d) which refers to an action for the administration of the estate of a deceased person who at the time of his death was domiciled within the jurisdiction of the court, would not apply. It seems to me, therefore, that it was necessary to have investigated the question of the deceased's domicile. And if r. 1 (b) above is applicable, then r. 4 of the same order would also apply. That rule makes provision as follows:

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

It has also been submitted before us that the English Probate Rules would apply. Assuming they do, one finds that there is really no difference between the English Rules dealing with service out of the jurisdiction and our rules as they stand.

The English Probate Rules dealing with contentious business incorporate O. 76 of the English Rules of the Supreme Court 1965, r. 1 (2) of which provides that a "probate action" is an action for the grant of probate of the will—or letters of administration—of the estate of a deceased person, or for the revocation of such a grant or for a decree pronouncing for, or against, the validity of an alleged will. Rule 2 (1) provides that a probate action must be begun by writ, and the writ must be issued out of the probate registry. Rule 3 provides:

> "(1) Subject to paragraph (2) service out of the jurisdiction of a writ, or notice of a writ, by which a probate action is begun is permissible with the leave of the Court.
>
> (2) Order 11, rules 3 and 4 (1), (2) and (4) shall apply in relation to any application for the grant of leave under this rule as they apply in relation to an application for the grant of leave under r. 1 or 2 of that Order."

Rule 1 of the English Order 11 compares with some slight modification to our O. 9, r. 1, and r. 3 deals with service to be effected in Scotland, Northern Ireland, etc., while r. 4 (1) and (2) is the same as our O. 9, r. 4. Rule 4 (4) of the English Rules 1965 deals with the time which is irrelevant for the purposes of this discussion. So, the result is that we are thrown back to the consideration of an English rule which is not dissimilar to our rule, a distinction without any real difference. Perhaps it might be useful, therefore, to set down the English O. 11, r. 4 (1) and (2) to show the similarity to our rule:

> "(1) An application for the grant of leave under r. 1 or 2 must be supported by an affidavit stating the grounds on which the application is made and that, in the deponent's belief, the plaintiff has a good cause of action and showing in what place or country the defendant is, or probably may be found.
>
> (2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."

It seems clear, therefore, that whichever rules apply, in the determination of the question whether or not leave should be given to serve a writ out of the jurisdiction of the court, it is not necessary to determine the question of the deceased's domicile.

I believe that it is accepted that the court has a discretion whether or not it will authorise service out of its jurisdiction, for in *Johnson v. Taylor Bros. & Co., Ltd.* (1), Viscount Haldare said ([1920] A.C. at p. 153):

> "Order XI, r. 1 does not lay down in imperative terms a new principle of law as to be applicable in all cases. What it does is, while leaving intact the old principle that by the law of England, jurisdiction depends broadly speaking, on presence within the jurisdiction, to enable the court to give special leave for service out of the jurisdiction in certain circumstances. The court may do so, that is to say that the court has a new power which it is enabled to exercise in particular cases which seem to fall within the spirit as well as the letter of the various classes of cases provided for."

What is the standard which a plaintiff must achieve in order to invoke the court's inherent jurisdiction to make an order for service out of the jurisdiction? In *Vitkovice, Horni, etc. v. Korner* (2), Lord RADCLIFFE put the matter this way ([1951] 2 All E.R., at p. 340):

> ". . . the judge is expected to exercise some more critical function than that of merely accepting the statement on affidavit that the plaintiff is believed to have a good cause of action. Indeed, that belief would be quite consistent with the absence of any of the conditions necessary to justify service out of the jurisdiction . . . It must sufficiently appear to him that it is a proper case. The phrase is a composite one and it is not elucidated by taking it to pieces, but it seems to me that the use of the word 'sufficiently' in this context shows that it is not necessary that the judge should be satisfied beyond a reasonable doubt as to the existence of the qualifying conditions. Further, a case does not sufficiently appear to be a proper case for the purposes of this order unless, on consideration of all admissible material, there remains a strong argument for the opinion that the qualifying conditions are, indeed, satisfied."

I have taken the trouble to set out both the Rules of Court and the principles which are required to be observed where an application is made to the court for leave to serve a writ out of the jurisdiction, out of deference to the lengthy argument adduced in this court on that particular question, and also, I hope, for future guidance.

While conceding that perhaps the judge of first instance went too far in striking out the writ itself, counsel for the appellant referred to the affidavits in support of the original summons to strike out the writ, and submitted that the respondent has failed to disclose very material matters which must be taken into account when the court is determining whether or not to strike out the writ; that as a result of the suppression or concealment of most material facts, the court was beguiled into making an order for service which ought not to have been made, and would not have been made, had the true facts been known, and that such suppression or concealment, and the securing of the order of service by means thereof is an abuse of the process of the court. It is for these reasons, argued counsel before the Full Court, that the inherent jurisdiction of the court ought to have been invoked, and the order made by the judge of first instance affirmed. It is

obvious that by striking out the writ, the learned judge has, in effect, discharged the order for service.

Examining the record, and reading the affidavits in support of the motion I am forced to the conclusions that there was indeed a suppression or concealment of material facts, which would, in my judgment, result in the possibility of the court having been deceived. The order *nisi* should not have been made on the evidence then before the court, and an application for the discharge of the order ought to have succeeded, for all the authorities are agreed that upon an *ex parte* application under the order the utmost good faith must be observed by the applicant (see *Ellinger v. Guinness, Mahon & Co.* (*3*)).

Now, in view of all that has been recounted, can this court properly interfere by making the order which I feel the judge of first instance ought to have made, notwithstanding that the appellant preferred to attack the issue of the writ, and having regard to the fact that the point was argued before this court without objection?

That this court, as indeed all superior courts, has an inherent jurisdiction to so control its proceedings as to prevent an abuse of its process is unchallenged and unchallengeable, and such jurisdiction is exercisable as part of the administration of justice. Speaking in the Court of Appeal in *Avaigents Ltd. v. Balstravest Investments, Ltd*, (4), *and* of that court's jurisdiction to strike out an appeal, Wilmer, L.J., said ([1966] 1 All E.R. at p. 450):

> "It appears to me inconceivable that this court should not have inherent power to control its own proceedings by striking out a notice of appeal in a case where an appeal is plainly not a competent appeal."

The essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, and its immanent attribute. Without such power, the court would have form, but would lack substance. In dealing with the question in *Connelly v. D.P.P.* (*5*), Lord MORRIS said ([1964] A.C. at p. 1301):

> "There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process."

The inherent jurisdiction of the court has been defined as being the reserve fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.

In my judgment, this court in its inherent jurisdiction, can properly make the order which the judge of first instance ought, in the circumstances, to have made that is, that the writ should stand, but the order for service be discharged.

My attention has been drawn to O. 46, r. 17 of the Rules of the Supreme Court [G.] which reads thus:

> "No interlocutory order or rule from which there has been no appeal shall operate to bar or prejudice the Full Court from giving such decision upon the appeal as may be just."

This rule seems to have left the question of the order for service at large before the Full Court even though the amendment had been refused. If this is so, then it was fully within the competence of that court to have determined the question of the discharge of the order, in the exercise of its inherent jurisdiction.

I would, therefore, allow the appeal and vary the order of the Full Court by adding thereto an order discharging the order for service. The writ will stand as reinstated by the Full Court.

Now to the question of costs. If, as counsel for the respondent suggests, the original proceedings were totally unnecessary because the appellant had an address for service in Guyana, she having entered a warning to the *caveat*, then it seems to me that the respondent, who was the author of this "unnecessary" litigation, ought to be made to pay the costs. But I do not accept that as the correct position. I am of the opinion that it was right for her to have approached the court for leave in her attempt to establish the authenticity of the will of the deceased. Not much was said by way of argument on this question, save that counsel for the appellant would be content with an order for costs in the cause, while counsel for the respondent takes up the position that if the appeal is successful in whole or in part, then the appellant should get her costs out of the estate, but if the proceedings were unnecessary then she would not be entitled to her costs out of the estate.

I should observe once more that in the judgment itself of the Full Court, there is no mention of where the costs should lie; it is only in the Order of Court that it is said "the order of the trial judge is set aside with costs to the appellant to be taxed."

In the cases I have looked at concerning costs in probate actions, the question of costs arose at the end of the main action, and the following principles have been worked out, though they are not intended to be exhaustive. Firstly, where the testator or those interested in the residue of the estate have been the cause of the litigation, the cost of unsuccessfully opposing probate may be ordered to be paid out of the estate. Secondly, if the circumstances lead reasonably to an investigation in regard to a propounded document, the costs may be left to be borne by those who incurred them. (See *Mitchell v. Gard* (*6*), *Spiers v. English* (7), and *Re Cutliffe's Estate* (8) for the application of the principles). But these are all cases where

there has been a final determination of the question of the probate of the will; this is not so in the matter before us.

I feel that the appellant having succeeded here, she ought to be paid her costs of this appeal out of the estate. And as she ought to have succeeded in both the other courts to the extent that I have indicated, she is entitled to her costs there also, out of the estate.

CUMMINGS, J.A.: delivered an oral judgment in which he agreed with the order proposed.

CRANE, J.A.: Cecil Ronald Hanoman, a Guyanese by birth, died in Trinidad on the 6th November, 1965, having resided with his wife and carried on business there for many years.

The parties to this summons are his sister, Kathleen Hanoman, and his wife, Nazreen Hanoman, nee Rahaman. Litigation between them commenced when his sister whom he named executrix in his last will and testament executed in Trinidad, sought and obtained leave from VAN SERTIMA, J., to serve a summons out of jurisdiction. It was an *ex parte* application to serve the wife of the deceased in Trinidad with a writ commanding that appearance be entered on her behalf in an action to establish the will of her deceased brother in the High Court of Guyana. The judge made the order for service, although he ought not to have done so because the affidavit in support of the application for it was defective. Solicitor who swore to it did not depose to two matters of fact vitally necessary to support a valid and proper order for service of the writ out of jurisdiction. Before making an order service out of jurisdiction, O. 9 r. 4 of the Rules of the Supreme Court, 1955, which is a facsimile of the English O. 11 r. 4 of the English Probate Rules, requires a court or judge to be satisfied that four points have been clearly stated, viz.:

(i) that in the belief of the deponent, the plaintiff has a good cause of action;
(ii) the place where the intended defendant is residing;
(iii) that the defendant or respondent is a Guyanese citizen; and
(iv) the grounds upon which the application is made.

Solicitor's affidavit disclosed only points (i) and (ii), although (iii) and (iv) were equally and vitally necessary for the information of the judge. It was necessary to state point (iii), because in case a respondent happens to be an alien, leave to serve a writ on him when out of jurisdiction is not granted—only leave to serve notice of a writ is. Point (iv) was important because the rule of practice requires that every such affidavit should contain a full and frank statement of all necessary facts such as would justify the issue of the writ. The grounds upon which the application is made must at all times set out the nature of the proposed cause of action and the relief sought with sufficient facts to enable the court or judge to decide under which one or other of the sub-rules the particular case falls. For example,

if the action is for the administration of the estate of any deceased person under O. 9 r. 1(d), it must be stated that the deceased was domiciled within Guyana at the time of his death; and if, as in the instant case, the application is for leave to serve the writ in Trinidad, facts as to the comparative cost and convenience of proceeding there or in Guyana as required by r. 3 of O. 9 must be clearly set out. (See *The Annual Practice, 1961,* p. 152, on what matters the supporting affidavit should state).

It was failure to disclose points (iii) and (iv) above which led the wife to take out a summons in chambers for an order to strike out the writ of summons on the ground that there was "no jurisdiction to determine the action". Later, an application was made to amend that application. It sought two additional orders to strike out the writ; these were evidently in the alternative under O. 10 r. 2(ii) or (iii); although there was no such statement. They were: (i) that the issue of the writ was irregular, and (ii) the *ex parte* order for service out of jurisdiction on the wife ought not to have been made. MITCHELL, J., who heard the application to amend, dismissed it; there was no appeal from his decision; so all that remained was the application to strike out the writ for the reason that the judge had no jurisdiction to determine the action. That was later heard by VAN SERTIMA, J., the same judge who had originally made the order for service on the wife out of jurisdiction. He struck out the writ of summons, not however on the ground contained in the application, viz., that the court lacked jurisdiction to determine the action, but for the reason that he had a discretion to strike it out because, in his view, the High Court of Trinidad and Tobago was the *forum conveniens.* In so considering, the learned judge reasoned in this way:

> ". . . this is not an action that could be better and more truly determined and effect given to the terms of the will of the deceased, even if it were determined that he died domiciled in this country, by the court of this country. . . . I accordingly order in the exercise of my discretion and having regard to the *forum conveniens* that the application of the defendant that the writ of summons issued in the main action be struck out and that the costs of this application be paid out of the estate of the deceased to the defendant certified fit for one counsel".

On appeal, however, the Full Court reversed his decision and restored the writ of summons. In the appeal now before us, the wife seeks to have the order of VAN SERTIMA, J., reinstated on the ground that it was properly made in the exercise of the inherent jurisdiction of the court to strike out matters which are an abuse of its process. It is to be observed that before us it is not sought to support the decision of the judge for the reason he gave for striking out the writ, viz., that he exercised his discretion to do so on the ground that the court of Trinidad was the *forum conveniens,* but on another—that the judge had an inherent jurisdiction to strike out the writ because of wilful omissions and/or suppression of facts by the solicitor in his affidavit in the two respects abovementioned in points (iii) and (iv) which led to the

ex parte order for service on the wife in Trinidad. It is clear from this line of approach before us that what is really being sought on behalf of the wife is an attempt to have reviewed the order of MITCHELL, J., who, it will be recalled, refused to grant the amendments to the application to strike out the writ in the respects abovementioned. We shall see, presently, that counsel was also entitled to re-argue the matter before the Full Court that the *ex parte* order for service out of jurisdiction on the wife ought not to have been made, but neglected to do so.

The *ex parte* order for service out of jurisdiction was, as indicated, made on insufficient grounds, and for that reason VAN SERTIMA, J., would, as it seems to me, have had, in the first place, every justification for refusing service on the wife out of jurisdiction; but notwithstanding this course was not taken, can his decision to strike out the writ in the action be justified, particularly in the light of the evidence that he had, subsequent to the making of the order for service, all necessary grounds including points (iii) and (iv) before him? It is clear on the authorities that unless he came to the conclusion that those omissions and non-disclosures in the Solicitor's affidavit were *mala fide,* in that they amounted to an attempt to deceive him and so constituted an abuse of process, his decision to set aside his order for service out of jurisdiction could not be justified. He, however, made no finding of an attempt to deceive him thereby; so on the authority of *Ellinger v. Guinness, Mahon & Co.,* (1939) 4 All E.R. 16, 25, having subsequently all the relevant facts before him, including the facts that the wife was a Guyanese citizen and that the deceased had died domiciled in Guyana [i.e., particulars as to points (iii) and (iv) above], he could not with any authority have set aside service of the writ on the wife, at least, not on the ground of alleged omissions and non-disclosures. So that if, indeed, there could be no justification in the circumstances for setting aside service of the writ for omissions and non-disclosures in the affidavit, it is not easy to see with what authority he was impelled to the more serious course of striking out the writ in the action.

But, as has been shown, he claimed to have been justified in so doing by the exercise of his discretion in the choice of the *forum conveniens,* and, as a matter of fact, rested his decision on that basis following the case of *Rosler v. Hilbery,* (1925) Ch. 250. It appears, however, from this decision, that an application of the principle of the *forum conveniens* assumes there is a concurrent remedy available to the wife in the place where she is resident, i.e., in Trinidad, and that it will be more convenient to have the action tried in Trinidad. At any rate, before the principle of the *forum conveniens* can properly be applied, at least evidence ought to have been led, firstly, on the question whether the High Court of Trinidad had jurisdiction to entertain the matter, and, secondly, if so, evidence also of the comparative cost and convenience of proceeding in the Trinidad or in the Guyana High Court. But as it is, in the teeth of the requirements of ground (iv), disclosure had neither been made in Solicitor's affidavit nor in any evidence before the judge that there is a *lis alibi pendens* in Trinidad. It seems, therefore, clear

that the Full Court were right in holding that the judge was wrong in striking out the writ in the action on a point which was neither argued before him, nor supported by any evidence whatever. On the contrary, it appears to me that when it was found that the deceased died domiciled in Guyana possessed of movable and immovable property in both Guyana and Trinidad, that was sufficient to confer jurisdiction on the High Court of Guyana to make a grant of probate, because the domicile of the deceased in conferring jurisdiction to grant probate is a most important consideration and cannot be overlooked. This is made clear in *Tristram & Cootes Probate Practice,* 20th Ed., where it is stated at p. 76 as follows:

> "The determination of the domicile of a deceased person is most important before the application for a grant of representation, not only to ascertain what part of the estate is liable to Estate Duty, *but for the more important purpose of determining the validity of the will and the right to the grant*".
>
> "By the law of England, the will, if valid by the law of a deceased person's domicile, is provable in England; in most foreign countries the validity of the will is tested by the law of the country of which the deceased was a national".

I accordingly hold that the Full Court was right in restoring the writ of summons in the action when it ruled that it was wrong to have struck it out.

Now finally to the question whether we ought to vary the decision of the Full Court by setting aside service of the writ on the wife in Trinidad for the reason that service on her was superfluous and, as a matter of discretion, ought not to have been made because she, as caveator, had already entered appearance to the warning and given a local address for service.

While it must be conceded there was no appeal to the Full Court to have discharged the interlocutory order of MITCHELL, J., who, it will be recalled, refused to grant the amended application for the orders above-mentioned, it appears that the mere fact that there was no appeal from that judge's ruling was no barrier to the matter being considered afresh by the Full Court, for O.46 r. 17 of the Rules of the Supreme Court, 1955, provides that:

> "No interlocutory order or rule from which there has been no appeal shall operate to bar or prejudice the Full Court from giving such decision upon the appeal as may be just".

Being forced to concede that there was no proper ground on which the judge could have struck out the writ, counsel for the appellant has asked us to vary the Full Court's decision and to say that court ought to have reconsidered the judge's refusal, particularly in view of the submission made by counsel for the respondent—that by her entering a caveat to the will, the wife submitted to the jurisdiction of the court and so became a party on whom documents might be served. On reflection, it seems to me counsel

is right; his contention is certainly in keeping with O. 46 r. 17 above, and established principles of probate practice because after the wife's appearance to the warning had been filed by her solicitor on August 12, 1966, and her local address for service stated as—"Desiree Patricia Bernard, c/o Cameron & Shepherd, Solicitors, 2 High Street, Georgetown", that factor operated at one and the same time to bring to an end all non-contentious and to commence contentious business, a stage in the procedure which LOPES, L.J., made clear in *Salter v. Salter,* (1896) at p. 293:

> "A caveat is merely notice to the registrar to do nothing without notice to the solicitor who entered it. The effect of the warning is that the caveat becomes void unless the person who entered it appears within a certain time. If the person warned appears within the time limited the caveat proceedings are at an end. If after this a writ is issued the *lis pendens* commences, but not till then".

Service of a writ out of the jurisdiction is, of course, always a matter for the discretion of the court or judge, but on the commencement of the *lis,* I cannot think it was a proper exercise of the judge's discretion to grant leave to serve a writ on the wife who is out of jurisdiction when she already has an attorney within jurisdiction who has given in her appearance to the Registrar's warning an address for service of process. Observing that the very next step after such appearance in the contentious business that has been commenced is service of the writ, I cannot think that service should have been otherwise than as indicated in the appearance to the warning.

In my opinion, there was clearly no need for the sister (the applicant for the grant of probate) to apply *ex parte* on the 28th November, 1966, for leave to serve a writ of summons on the wife in Trinidad when the latter already had an attorney with an address for service within jurisdiction. Were it otherwise, I consider it would be contrary to O. 7 r. 4 of the Rules of the Supreme Court, 1955, which directs as to mode of service as follows:

> "If the defendant be within the jurisdiction of the court service may be effected by delivery of the copy of the writ to him or to any adult inmate or employee at his last known or usual place of abode or of business, *and if he be out of the jurisdiction of the court but represented by attorney, service may be similarly effected on the attorney or at his last known or usual place of abode or of business.*

Accordingly, while I would confirm the Order of the Full Court that the writ of summons be restored to the file for the above reasons, I agree with CUMMINGS, J.A., that it should be varied by adding that the order for service of the writ of summons on the wife in Trinidad should be discharged. Such is the order which the Full Court ought to have made when it became apprised of the fact that the wife had entered an appearance to the

warning, and given a local address for service, and which we, by virtue of s. 10(1)(a) of the Federal Supreme Court Ordinance, No. 19/1958, are empowered to make. I also agree with the Order as to costs as proposed by PERSAUD, J.A.

Appeal allowed.

Solicitors:—
Cameron and Shepherd for the appellant.
D. Dial for the respondent.

ROLF BRANDT

v.

ATTORNEY GENERAL OF GUYANA AND C. A. AUSTIN

[Guyana Court of Appeal (Luckhoo, C. Bollers, C.J., Persaud, Cummings and Crane, JJ.A.), January 25, 26, 27, 28, 29; February 3, 4, 5, 9, 10, 11; March 8, 1971.]

Constitutional Law—Fundamental rights and freedoms of expression and movement—Limitation of those rights and freedoms—Right of President to make expulsion order against alien—Constitution of Guyana, Cap. 1:01, arts. 12, 14, 18.

Natural Justice—Principles of—Whether alien has a right to be heard before President makes expulsion order—Whether alien has a right to be given reasons for the making of the expulsion order—Validity of expulsion order—The Expulsion of Undesirables Ordinance, Cap. 99 (now Cap. 14:05) [G], s. 4..

ROLF BRANDT
v.
ATTORNEY GENERAL OF GUYANA AND C. A. AUSTIN

Statute—The Expulsion of Undesirables Ordinance, Cap. 99[G.], s. 6—Construction of—Whether alien has a right to be heard after expulsion order is made but before it is executed—President to give opportunity to make representations and to inquire and decide thereon—Rules of natural justice—Whether breach thereof.

The appellant, an alien national of the Federal Republic of Germany, was lawfully resident in Guyana. On 3rd December, 1970, the President of Guyana, acting under s. 4 of the Expulsion of Undesirables Ordinance, Cap. 99, made an order of expulsion against him. No reasons were given for the making of the order. The appellant did not leave Guyana but through his lawyer made representations seeking a revocation or suspension of the order and permission on a *viva voce* hearing to know what conduct on his part impelled the making of the order and to be given an opportunity to make representations to meet allegations made against him. Communication by telephone and personally between the Minister of Home Affairs and the appellant's legal adviser revealed for the first time that the reason for making the order was based on the allegation that the appellant was a person "racially prejudiced against non-European people." Three incidents were related in which the appellant was alleged to have been involved. A letter from the Secretary to the Office of the President was sent to the appellant informing him that his representations were considered and that the expulsion order would stand. The appellant sought a declaration from the High Court that the expulsion order was illegal, unconstitutional, void and of no effect and an injunction restraining his deportation.

The trial judge dismissed the proceedings and on appeal to the Court of Appeal the appellant's main contentions were that he should have been given a hearing before the order of expulsion was made in keeping with the common law rule of *audi alteram partem* as an essential requirement of natural justice; that his right to a hearing was guaranteed by the Constitution of Guyana; and that he was denied a fair hearing and an inquiry within the meaning of the provisions of s. 6 of the Expulsion of Undesirables Ordinance. He also challenged the ground on which the order could have been made and urged that the reasons given were insufficient to justify the making of the order. The relevant provisions of the Ordinance are fully set out in the judgments of the court.

HELD: (i) the appellant was not entitled under the provisions of the Expulsion of Undesirables Ordinance to be heard before the making of the expulsion order;

(ii) the President's order of 3rd December, 1970, had been validly made;

(iii) there was no legal or unconstitutional impediment affecting the validity of the expulsion order;

(iv) the Ordinance did not give an arbitrary and unfettered discretion to the executive, and the powers were to be exercised in good faith and within the limits conferred by the statute;

(v) (Cummings and Crane, JJ.A, dissenting) the expulsion order was conditioned to take effect only after the appellant was afforded an opportunity for representations in writing to be submitted as to his excuse or reason why the order should not be complied with or enforced or why time should be extended; in which case the reasons for making the order must be communicated to him, and the matter to be thereafter inquired into and determined by the President in accordance with the principles of natural justice;

(vi) the President's order was unenforceable unless and until the President (a) supply the appellant with the reasons for his expulsion, (b) give him an adequate opportunity of making representations in writing under s. 6, Cap. 99, in respect thereof, and (c) thereafter inquire into and decide thereon according to the principles of natural justice.

Per Cummings, J.A.: In the instant case the appellant was heard and even supplied with the grounds upon which the order was made. The President considered his representations and informed him that he proposed nevertheless to make the order.

Appeal allowed.

[**Editorial Note**: This case is reported in (1971) 17 W.I.R. 448]

J. O. F. Haynes, S.C., *Dr. F. H. W. Ramsahoye,* S.C. and *Doodnauth Singh,* for the appellant.

Dr. M. Shahabuddeen, S.C. and *R. Biscessar,* for the respondents.

LUCKHOO, C.: Prior to the making of an Order of Expulsion by the President of Guyana on December 3, 1970, under the Expulsion of Undesirables Ord., Cap. 99 [G.], the appellant, Rolf Brandt, an alien national of the Federal Republic of Germany, was at all material times lawfully resident in Guyana. He was allowed to visit this country on divers occasions for some 17 months prior to January 16, 1970. It was on that date that the Permanent Secretary of the Ministry of Home Affairs informed him as follows:

> "I am to refer to your letter of December 1969 and to inform you that approval has been given for you to remain in Guyana as Manager of Messrs. Robert Alke & Company. Please call at the Immigration Department to have the necessary entry made in your passport."

In consequence of this, as from then he became employed with the said company, taking up residence with his wife and two children in the city of Georgetown, and his employment still subsists.

On October 15, 1970, assistant superintendent of police Sancho orally requested him to leave Guyana by the end of October 1970. This led him to consult his solicitors, Messrs. Clarke and Martin. Following upon representations made, the Permanent Secretary to the Ministry of Home Affairs, by letter dated November 14, 1970, informed his solicitors that the Minister was satisfied that his continued presence in Guyana was undesirable and that unless he left Guyana by November 30, 1970, a formal expulsion order would be made against him. No reasons were, however, given as to why it was

thought or considered that his continued presence in Guyana was undesirable. As he did not leave Guyana on that date, an Order of Expulsion was made on December 3, 1970, by the President of Guyana. That Order reads thus:

"ORDER
MADE UNDER
THE EXPULSION OF UNDESIRABLES ORDINANCE
(CHAPTER 99)

"WHEREAS I have deemed it conducive to the public good to make an expulsion order in respect of Rolf Brandt of 3 A Queen Street Georgetown.

"NOW THEREFORE under s. 4 of the Expulsion of Undesirables Ordinance, as amended by the Expulsion of Undesirables (Amendment) Act, 1967, and by virtue and in exercise of all powers enabling me in that behalf I do hereby direct that the said Rolf Brandt do leave Guyana by the 10th day of December, and thereafter remain out of Guyana.

Made this 3rd day of December, 1970.

(Sgd) A. CHUNG
President.

The appellant then consulted Dr. F. H. W. Ramsahoye, Barrister-at-Law, who made representations in writing for him on December 7, 1970, to the President, under s. 6 of the said Ordinance.

In view of the importance of that section and what revolves around it, I shall set it out at length. It reads thus:

(1) Any person against whom an expulsion order has been made may make representations in writing to the Governor setting forth reasons for non-compliance with such order or for non-enforcement thereof or for allowance of further time to comply, therewith, and on any such person signify his desire so to make representations the person in whose custody he shall be shall give him all reasonable assistance for their preparation and forward the writing to the Governor.

(2) On receipt of any such representations the Governor shall with all due despatch inquire into them and decide upon them."

In the representations made, the following reliefs were there prayed for in addition to any other which to the President "may appear just", *viz.*:

"(a) that the order of expulsion be revoked and/or suspended or be not enforced either generally or for such period or periods as may appear just;

(b) that the applicant be allowed to remain in Guyana and in any event to make such further oral or written representations as may be allowed either by himself or his legal representative until such representations and these representations are heard and determined;

(c) that the applicant be permitted upon *viva voce* hearing to know of any conduct on his part which led to the making of the expulsion order and to be further permitted to make representations in defence of an explanation of such conduct; and

(d) that the applicant and his legal representative be granted audience with the Honourable Minister of Home Affairs at such time as may be convenient to the Minister before the determination of these representations."

After this, the Minister spoke to Dr. Ramsahoye, on the telephone and personally (it is not known exactly when, but it would be between December 7 and 10, 1970). In the course of those conversations, the Minister for the first time explained the reason for making the order. This was based on the allegation that the appellant was a person who was "racially prejudiced against non-European people". Three incidents were related in which the appellant was alleged to have been involved. All of this appears in the affidavit of the appellant and is based on what Dr. Ramsahoye communicated to him. There was no answer to what so appears in the appellant's affidavit.

The reply to the written representations consisted of a latter dated December 10, 1970, from the Secretary to the Office of the President which is as follows:

"Dear Sir,

I am directed by His Excellency the President to refer to your communication dated 7th December, 1970, on the matter of your expulsion from Guyana and to inform you that after according the most careful consideration to your representations, it has been decided that the Order made on the 3rd December, 1970, under the Expulsion of Undesirables Ordinance (Cap. 99) should stand. You will, however, be allowed until 31st December, 1970, to comply with that Order.

Yours faithfully,
(Sgd.) C. R. Jarvis,
Secretary to the Office of the
President."

At no stage was the appellant heard or given an opportunity to be heard as was requested in para. (c) of the reliefs requested in his written representa-

tions. In those representations, made without the benefit of reasons for the expulsion Order, the following was brought to the notice of the President:

(a) On the 14th November, 1970, in reply to a letter written on behalf of the applicant by Messrs. Clarke & Martin, Solicitors, the Permanent Secretary to the Ministry of Home Affairs wrote that the Honourable Minister of Home Affairs was satisfied that the applicant's continued presence in Guyana was undesirable and that the Honourable Minister had instructed the immigration authorities to invite the applicant to leave Guyana voluntarily.

(b) The Honourable Minister's reasons for his decision were not then given either to Messrs. Clarke & Martin, Solicitors, or to the applicant.

(c) The applicant while resident in Guyana has limited his activities to his work with the firm of Robert Alke and Company and has not engaged in pursuits likely to influence the affairs or life in the country in a manner prejudicial to its well-being. In particular, the applicant has had no political or public activity and has lived in a manner usual for a private citizen.

(d) The applicant while being aware of his foreign nationality and of his position as a foreign national is sympathetic to the needs and aspirations of the people of Guyana and has at all material times conducted himself in a manner consistent with his recognition of his own position and with respect for the people of Guyana.

(e) The applicant believes in the equality of man and abhors discrimination on the ground of race, religion or creed. He believes in the rule of law and in the peaceful and orderly development of society in accordance with the rules made by those in authority and in accordance with fundamental notions of order, discipline and regularity.

(f) The applicant while living in Guyana has abided by the laws of the country and has not been in conflict therewith. In particular the applicant has committed no offence and has not been suspected of having committed any. The applicant has had an excellent record as a law abiding resident of Guyana.

(g) The order made against the applicant will, if enforced, cause grave hardship to the applicant and a dislocation of his family life. The termination of the applicant's appointment as manager of the business of Robert Alke and Company in Guyana will necessitate for him a search for another position elsewhere and will result in inconvenience and financial difficulties for himself and his family.

(h) The applicant has never intended to come into conflict with the authorities who determine whether he should be permitted to remain in Guyana and wishes to defend or explain any conduct on his part which might have led to the making of the said order.

On December 30, 1970, the appellant, by way of a writ of summons, sought a declaration from the court that the expulsion order made by the President on December 3, 1970, was illegal, unconstitutional, void and of no effect, and prayed for an injunction restraining the second-named respondent, in his capacity as Commissioner of Police and Chief Immigration Officer, from arresting or deporting him in pursuance of the said order. At the same time an *ex parte* application was filed asking for an interim injunction against the Commissioner of Police to prevent any arrest or deportation. When the *ex parte* application came up for hearing, it was ordered that the relevant papers be served on the Commissioner of Police. This was done and the hearing of the injunction proceedings started.

During the course of that hearing and with the consent of the parties, the affidavits filed were treated as pleadings; the arguments in the injunction hearing were treated as arguments in the case, and the hearing took the form of legal arguments on what was before the court.

The learned trial judge dismissed the appellant's claim with costs. Now he seeks a reversal of that order. His main contention in the court below was that, notwithstanding he was not a citizen of Guyana, he was entitled to protection under the laws of this country, and that although it was not expressly provided under the Expulsion of Undesirables Ord., Cap. 99 [G.], that he should be given a hearing before an Order of Expulsion was made, nevertheless such a provision must be read into the Ordinance to give effect to the common law rule of *audi alteram partem* as being an essential requirement of natural justice.

The grounds of appeal which were allowed to be amended (amended portions in italics), after hearing counsel, complained that:

(1) The decision was erroneous in point of law in that the appellant was entitled to be heard before an expulsion order was made by the President of Guyana against him on December 3, 1970.

(2) The decision was erroneous in that the President was a tribunal within the meaning of Art. 10(8) of the Constitution of Guyana and was not impartial in that the President decided upon matters determining the rights and obligations of the appellant without informing him of the matters alleged against him and without providing him with a fair hearing.

(3) The invalidity of the order made against the appellant could not in law be cured by subsequent representations which were made for and on behalf of the appellant pursuant to the provisions of s. 6 of the Expulsion of Undesirables Ordinance, Cap. 99 [G.].

(4) The appellant's right to a hearing was guaranteed by the Constitution of Guyana properly construed and by common law. Such right was not displaced by statute or otherwise, the appellant being a person who prior to the making of the order had a legitimate expectation to remain in Guyana.

(5) *The reasons given for the making of the order were not capable of supporting an opinion or conclusion that the appellant was an undesirable person within the meaning of the said Ordinance. Alternatively, there were no proper or valid grounds upon which the order against the appellant could have been made. In the further alternative, the order was invalid for the reason that the President could not have properly applied his mind to the relevant facts before the making of the order.*

(6) The decision to declare the appellant an undesirable person and the making of the order were contrary to the fundamental rights provisions of the Constitution and in particular arts. 5 and 14.

(7) *The appellant was denied a fair hearing and an inquiry within the meaning of the provisions of s. 6 of the Expulsion of Undesirables Ordinance, Cap. 99, and the order was in the circumstances unenforceable in law.*

I shall formulate three basic questions for consideration:

(1) Could the appellant claim a right at law to be heard before the making of the order of December 3, 1970?

(2) Was there any jurisdictional and/or constitutional impediment to affect the validity of the order when it was made? If not,

(3) Was there any breach of any statutory provision to affect its enforceability, and, if so, with what result?

Generally, it can be said that a State's right to expel aliens is a logical and necessary consequence of its sovereignty and independence, exercisable in conformity with its laws and/or such administrative concessions as it might wish to bestow in due recognition of "humanity" and "justice". Therefore, it would be the subject's right to seek redress for any effort to expel him, if there was not due conformity with the laws of the country. And the alien's right would be no less than that of the national at any such hearing. SCRUTTON, L.J., in his judgment in *R. v. Superintendent of Chiswick Police, Ex p. Sacksteder* (1), has forcefully endorsed this attitude in these words ([1918] 1 K.B. at p. 589);

> "I approach the consideration of this case with the anxious care which His Majesty's judges have always given, and I hope will always give, to questions where it is alleged that the liberty of the subject

> according to the law of England has been interfered with, and none the less when the person is not by birth or naturalisation a subject of the King but a foreigner temporarily living within the King's protection. This jurisdiction of His Majesty's judges was of old the only refuge of the subject against the unlawful acts of the Sovereign. It is now frequently the only refuge of the subject against the unlawful acts of the executive, the higher officials, or more frequently the subordinate officials. I hope it will always remain the duty of His Majesty's judges to protect those people."

Let me therefore examine the existing law under which the relevant expulsion Order was made, *viz.*, the Expulsion of Undesirables Ord., Cap. 99 [G.] (as amended).

The President has the power under s. 4 thereof at any time to make an order against an alien, that is, a person who is not a citizen of Guyana, requiring him to leave the country within a time fixed by the order and thereafter to remain out of the country, or direct that he be apprehended by any member of the police force and be deported from the country. This can only be done, however, if the alien is an "undesirable person", that is, a person against whom the President deems it "conducive to the public good to make an expulsion order". And s. 2 of the Ordinance says:

> " 'Undesirable person' means any person, other than a citizen of Guyana, in respect of whom the Governor-General deems it conducive to the public good to make an expulsion order."

If after this order is made the alien contravenes it by remaining in the country after the expiration of the time fixed by the order or any extension thereof, he renders himself "guilty" of an offence against the Ordinance (s. 7(1)), and may be apprehended "without warrant" by any member of the police force, and be deported from the country "forthwith" or after he shall have served any term of imprisonment imposed on him for his offence (s. 7(2)), which renders him liable to a penalty not exceeding two hundred and fifty dollars or to imprisonment with or without hard labour for any period not exceeding six months, or to both such penalty and imprisonment (s. 12(2)). When the time is ripe for his deportation, it is the President who directs in what manner he shall be deported (s. 10(1)). But the President may "at any time revoke an expulsion order absolutely or suspend its operation simply or subject to such conditions as he may think fit" (s. 13 (2)).

Nowhere under this Ordinance is anything to be found to indicate that it was ever intended that an alien should be heard or have the right to make representations *before* the making of an expulsion order. However, counsel argued that this should not inhibit the court from invoking the aid of its common law power in the circumstances of the case and ruling that the principles of natural justice demanded a hearing or right to make representations *before* the order was made, especially as the issue involved loss of liberty and employment, without observing the essentials of justice.

But, great as the anxiety of the common law might be in fit cases to come to the aid of one condemned without a hearing, its "justice" will not supply the omission of the Legislature in cases arising under statute if it be not in consonance with the end and purpose of the specific and relevant statutory provisions, or has the tendency of frustrating the Legislature's will, as expressed under those statutory provisions.

Let me therefore hasten to apply this test by considering the end and purpose of the Expulsion of Undesirables Ord. and the likelihood of any possible frustration thereof by a "pre-order hearing".

Would its purpose be served in eventualities of moment by restricting the power to make an order only after the indulgence of a hearing? Ought the determining authority to endure the handicap of consequential delays when the urgency of State security may be at stake? There may be many situations which demand prompt, expeditious and sudden action to render effective the contemplated riddance of an alien whose presence is deemed inimical to the national interest, either by securing his apprehension, or placing him immediately under an obligation to leave the country within a specified time, and for this purpose, executive discretion must not be unduly encumbered. In the first instance, the authority must be able to adjudge "unworthiness" summarily, lest through subterfuge of one kind or another a wanted person might seek to foil or thwart the making of the order and stultify its purpose, if it could not be made without hearing him.

This, in my view, was the underlying motive in *The King v. Inspector of Leman Street Police Station, Ex p. Venicoff* (2). There, the Secretary of State was empowered under Art. 12, para. 1 of the Aliens Order 1919 "if he deems it to be conducive to the public good" to make a deportation order against an alien. It was contended that on a true construction of this article, the Secretary of State had no power to make a deportation order without giving the person affected an opportunity of knowing the grounds on which the order was made, and/or the evidence or information relied on in support thereof, and/or giving him a fair opportunity of meeting the same. The EARL OF READING, C.J., said in his judgment [1920] 3 K.B. at p. 78):

> "I have no doubt that it is not for us to pronounce whether the making of the order is or is not conducive to the public good. Parliament has expressly empowered the Secretary of State as an executive officer to make these orders and to impose no conditions . . ." (And at p. 79 (*ibid*)*:* "the value of the order would be considerably impaired if it could be made only after holding an inquiry, because it might very well be that the person against whom it was intended to make a deportation order would, the moment he had notice of that intention, take care not to present himself and would take steps to evade apprehension. I therefore come to the conclusion that the Home Secretary is not a judicial officer for this purpose, but an executive officer bound to act

> for the public good, and it is left to his judgment whether upon the facts before him it is desirable that he should make a deportation order."

Then AVORY, J., said (*ibid*, at p. 80):

> "I am of the same opinion. The applicant can succeed only if he can show that the order for his deportation was made without jurisdiction . . indeed, the phrase itself 'if he (the Home Secretary) deems it to be conducive to the public good', is not consistent with the idea of an inquiry and a controversy between the parties."

This case has stood the test of time. It was approved (to mention but two instances) in *Reg. v. Governor of Brixton Prison, Ex. p. Soblen* (3), and again in *Schmidt and Anor. v. Secretary of State for Home Affairs* (4). In *Soblen's* case (3) Lord DENNING, M.R., said in support of the *Venicoff* case (2) ([1962] 3 W.L.R., at 1178):

> "That case has been questioned before us and it has been suggested that it was wrongly decided. All I need say about it is that in 1953 without any dissent in Parliament, an order was made in the very self-same words as the order considered in *Venicoff's* case (2). It is a reasonable assumption that Parliament proceeded on the assumption that *Venicoff's* case (2) was good law. And when I look to the objects of this legislation, it seems to me that much of the purpose of it would be defeated, if it were necessary for the Home Secretary always to give every alien the right of being heard before a deportation order is made. Reasons of security themselves might be such as to make it unwise and undesirable to give him advance notice of the intention to make a deportation order. He might well take advantage of it so as to absent himself and to avoid apprehension. I think, therefore, that there is no right to be heard before a deportation order is made."

DONOVAN, L.J., gave further support in these words (*ibid.*, at p. 1184):

> "While in most cases no doubt the grant to the alien of an opportunity to be heard before a deportation order were made would involve little administrative inconvenience, there would undoubtedly be cases where the intimation of proposed deportation would make the power to do so almost useless."

I would, therefore, adhere to the principle established by the *Venicoff* case (2) and overrule the submission that the appellant was entitled to be heard before the making of the order, as to do otherwise could, in certain cases, defeat the purpose of the Ordinance and frustrate the necessity for promptitude without previous warning.

The answer to the first question then is, that the appellant's contention that he was denied a right at common law to be heard before the making of the order of December 3, is misconceived, since the Ordinance, truly construed, did not intend that he should have that right.

Now to the second question: was there any legal and/or constitutional impediment which jurisdictionally inveighed against the validity of the order? This aspect was argued under the fifth ground of appeal which basically asserted that, (a) the reasons given for making the order were wholly incapable of supporting any reasonable opinion that the appellant was an undesirable person; (b) there was no proper or valid ground on which the order could have been made; and (c) the President could not properly have applied his mind to the relevant facts before the making of the order.

If there was no evidence on which the appellant could have been deemed "undesirable", then the exercise of the power of expulsion will have been made in excess of jurisdiction, and provide a legal reason for questioning the validity of the order. Similarly, if in making the order there was some violation of an applicable constitutional safeguard, then the order became questionable jurisdictionally. But in either case, the basis for the action taken must be known with some degree of certainty, and it must be capable of demonstrating the particular jurisdictional defect.

In the appellant's affidavit of December 31, 1970, he swore to this, namely, "I have not been told the reasons for my expulsion". In his statement of claim, no allegation appears, nor was any suggestion made that the order was made on grounds which would impair its validity. It was only after an affidavit for the respondents in reply (sworn to on January 4, 1971) had disclosed that the Minister had "explained the reasons for the making of the order" to Dr. Ramsahoye, that the appellant swore further on January 6, 1971, that he was informed by Dr. Ramsahoye of the "reason" and "incidents" which led to his expulsion. But despite this, there was still no allegation that the said "reason" and "incidents" were incapable of providing the basis for expulsion. If what appears in the appellant's affidavit of January 6, 1971, truly represents the full extent of the Minister's disclosure to Dr. Ramsahoye, it still fails to convey—(a) the context in which the utterances were made, and (b) the nature and particulars of the quarrel with Miss La Borde. On the other hand, if it does not contain the totality of what was said, then the court is equally handicapped in not being fully informed as to why the order was made.

However scant or inconclusive, trifling or indeterminate, be the "incidents" of alleged involvement, the background to and the circumstances of the reference to "black crosses", and this country being "the poorest in the world", *must* be known to comprehend its true import. So often words, in themselves apparently innocent, take on an entirely different meaning when related to the context and circumstances in which they were uttered. A full disclosure of the particulars of the quarrel with Miss La Borde and the surrounding circumstances would also have been helpful. For when executive discretion is not arbitrarily exercised, it is not within the province of the

courts to pry into the propriety of what exclusively concerns policy and administration or to sit on appeal within the domain of facts for the purpose of looking at the matter from another angle.

I would then rule, on the first aspect of the second question, that it has not been shown (and the burden lies on the appellant to do so) that there was no "power" to make the order, in the first instance, because there was no "evidence" (see *Leeson v. General Council of Medical Education and Registration* (5), *Allinson v. General Council of Medical Education and Registration* (6) and Lee *v. Showmen's Guild of Great Britain* (7).

Now to consider whether any constitutional impediment militated against the order made, bearing in mind that this was brought about because of what he was alleged to have spoken.

Succinctly, the question is: "Could an alien render himself legally liable to expulsion for indulging his constitutional right to freedom of expression?" Or, put another way: "Could he lawfully be deprived of his personal liberty because he said what the Constitution said he could say?"

Article 5 of the Constitution acknowledges the right to deprive him of his liberty by expulsion, but for his removal to be lawful, it must "be authorised by law", which, in this case would be Cap. 99, as amended. And the question as to whether it was authorised by law takes on a jurisdictional complexion if the reason for exercising the authority under the law conflicts with a right under the Constitution. The authority to deem a person "undesirable" under the Expulsion of Undesirables (Amendment) Act 1967 [G.] is wider in concept than it was under the 1930 Ordinance, for, while in the former instance the prerequisite is to be able to deem it "conducive to the public good", under the latter it was restricted to what was "detrimental to the preservation of peace and good order". That which was not "conducive to the public good" of a country might consist of not only opposition to its peace and good order, but also to its "social" and "material interests", thereby embracing a wider ambit than the limited category of "peace and good order" .

But it was the "definition" of the 1930 Ordinance which the Constitution, in effect, captured when it came into force on May 26, 1966, by providing under Art. 18 that—

> ". . . nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of articles 4 to 15 (inclusive) of this Constitution to the extent that the law in question—
>
> (a) is a law (in this article referred to as 'an existing law') that had effect as part of the law of the former Colony of British Guiana immediately before 26th May, 1966, and has continued to have effect as part of the law of Guyana at all times since that day;

(b) repeals and re-enacts an existing law without alteration; or

(c) alters an existing law and does not hereby render that law inconsistent with any provision of the said articles 4 to 15 in a manner in which, or to an extent to which, it was not previously so inconsistent."

As could be seen, this article not only saved Cap. 99, made up as it is of the Ordinance as amended by the Act of 1967, as an existing law capable of application, but stipulated that nothing therein was to be held "to be inconsistent with" or "in contravention of those articles dealing with the protection of fundamental rights and freedoms (arts. 4—15), provided that only what was "previously" inconsistent, that is, prior to May 26, 1966, would prevail, and any further inconsistency arising after May 26, 1966, would not.

How then would Cap. 99, as limited by Art. 18, affect the relevant protection of freedom of expression under Art. 12, which seeks to ensure that no person (except with his own consent) "shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to . . . communicate ideas and information without interference . . ."?

If what the alien said is reasonably capable of being construed as "detrimental to peace and good order", then he will have brought himself within the authority of the law under which he could be deprived of his personal liberty by being lawfully removed for the purpose of effecting his expulsion, subject, of course, to any further rights which he might have under the statutory provisions of the said Ordinance.

The jurisdiction then to bring about this outcome, although "inconsistent with" and "in contravention of" the protected freedom, came from the "saving" effect of a limitation expressly provided for.

This jurisdiction, then, must be exercised in the way prescribed by the law in the validity of the order is to be respected by the courts. In so doing, the executive must not travel "out of bounds" or wander "outside its designated area" or "digress away from its allotted task", neither must it "stray from the direct path which it was required to treat". Further, it must not do or fail to do that which is of such a nature that its decision becomes a nullity; it must not decide in bad faith; it must not make a decision which it had no power to make; it must not (even in good faith) misconstrue the provisions giving it power to act so that it failed to take into account what it was required to take into account, or base its decision on some matter which, under the particular law, it had no right to take into account (see *Anisminic v. Foreign Compensation Commission* (8)).

It could readily be appreciated then that the court's power is not excluded to investigate into compliance with procedural safeguards imposed by statute, or into the existence of prescribed conditions precedent to the exer-

cise of power, or into a plea that the order was made *male fide* or for a collateral purpose (*per* SHAH, J., in *Sadhu Singh v. Delhi Administration* (9)).

In much the same vein, Lord DENNING, M.R., in the *Soblen* case (3) said ([1962] 3 W.L.R., at p. 1181):

> "It is open to these courts to inquire whether the purpose of the Home Secretary was a lawful or an unlawful purpose. Was there a misuse of the power or not? The courts can always go behind the face of the deportation order to see whether the powers entrusted by Parliament have been exercised lawfully or not."

For the courts will not uphold an order which is "illegal" although "clothed with the garments of legality simply for the sake of appearances . . ." (*per* DONOVAN, L.J., in *Soblen's* case (3) at p. 1186).

And even where the statute seeks to bar recourse to courts by providing that there shall be "no appeal", or that the particular determination "shall not be called in question in any court of law", this would be unavailing if what was done did not measure up to some jurisdictional aspect of which the courts will take cognisance. Moreover, the strictest fulfilment of statutory prerequisites will be required before accepting the conclusiveness or finality of what was done, especially where a drastic power is bestowed in curtailment of the liberty of the subject (*see Musson v. Rodriguez* (10)).

And so in this case if the order was made purely on the basis of what the appellant said, and was in no way affected by considerations of the "peace and good order" of the country, but fell into some other category, which could not justify interference with his protected right of freedom of expression, then the jurisdiction to make the order would have been improperly exercised and contrary to constitutional safeguards.

To act, however, on the condensed version of what the Minister was supposed to have told Dr. Ramsahoye, having regard to the history of this disclosure and its obvious incompleteness, would be too conjectural, and points of jurisdiction should be decided on material which is not left so much, as in this case, in the air.

I am unable then to find that when the order was made in the first instance, there was any legal and/or constitutional impediment to affect its validity.

Now to embark on the last question. Up to this stage it has been seen that the law which enables the executive to expel an alien in this country is statutory; that under the Constitution, to justify this expulsion it must be effected under the authority of that law; that law does not bestow arbitrary and unfettered discretion, it must be exercised within the category of what is "conducive to the public good"; that there is no compulsion to allow the alien to be heard initially before the order is made; that if the alien, in the exercise of his constitutionally guaranteed right of free speech, attracts the wrath of "expulsion", his speech must be reasonably capable of being construed as "detrimental to the preservation of peace and good order"; that

the executive must act within the proper limits of its jurisdiction; and that if it does so, the courts, although of a different mind, will not interfere with what is essentially within its province. For to do so would be to dabble within the region of facts to assess how adequate the evidence is. Lord DENNING, M.R., in *Lee v. Showmen's Guild of Great Britain* (7), admirably crystallised the method of approach when he said ([1952] 1 All E.R. at p. 1182):

> "If, however, the facts were not reasonably capable of being held to be a breach and yet the committee held them to be a breach, then the only inference is that the committee have misconstrued the rules and exceeded their jurisdiction. *The proposition is sometimes stated in the form that the Court can interfere if there was the evidence to support the finding of the committee, but that only means that the facts were not reasonably capable of supporting the finding.*" [Italics mine.]

Does the alien then have no opportunity of a right to relief after the order is made? That would depend, of course, on the existence or not of any such statutory entitlement, otherwise it would fall merely to such concession as it may please the administration. Earlier, s. 6 of Cap. 99 was set out at length. The time has now come to give to this section the attention which will decide whether it provides no more than an administrative opportunity for the President's pleasure on compassionate grounds, or whether it aspires to achieve a higher purpose in assurance of fair play in hearing him whose liberty is about to be denied, and deciding accordingly.

Section 6 in its first part gives to the person against whom the expulsion order is made two sets of rights, and in the second part imposes two sets of duties on the determining authority. The deportee's rights are:

(1) To make the representations in writing, if he wishes, to the President and be afforded the opportunity of reasonable assistance in so doing and having the same conveyed, if he should be in custody. And

(2) To be at liberty to set forth reasons for non-compliance or non-enforcement thereof, or for allowance of further time to comply therewith.

The President's duties are:

(1) To inquire with all due despatch into the written representations made.

(2) To decide upon them.

What is the end and purpose of these rights and duties so simply and succinctly expressed? To merely provide an opportunity for the exercise of compassionate discretion, as counsel thought and argued in the court below,

or be the means of securing for the alien the justice which his cause might merit by including the President to revoke the order absolutely or suspend its operation simply or subject to such conditions as he may think fit, as s. 13(2) enables him to do?

The Solicitor-General argued that:

(a) The "hearing" under s. 6 is directed not to the question as to whether the order was valid or invalid, but is concerned solely with the question whether, although the order is valid, it should be executed or not.

(b) This was the limited object of the hearing made under s. 6 which did not intent to give the appellant a right to know the grounds for the making of the order. The section assures the validity of the order and the first step of the procedure which it prescribes is merely the making of representations for whatever reception may be accorded. If good enough reason is shown, the President may indeed revoke the order under s. 13(2). But this is an incidental result quite consistent with the interpretation that representations under s. 6 are directed not to the making of the order but only to its execution, and so no reasons for the making of the order are required to be given, and there is certainly no right to a subsequent hearing as to the making of the order.

(c) Where there is no primary right to a prior hearing, there is nothing to support an alternative right to a subsequent hearing, and correspondingly there would be no right to be supplied with either before or after the order was made.

Counsel for the appellant, on the other hand, maintained that the appellant had a right which arose by necessary implication from s. 6, to know why he was being expelled; and that he was never in any sense afforded a fair hearing and an "inquiry" within the meaning of that section.

Before proceeding to give my understanding of what this section stands for, perhaps it would be well to set down its reading (as s. 6) under Ordinance No. 1 of 1886, that is, before it was amended by Ordinance No. 30 of 1930 to assume its present form. Some enlightenment might accrue. It then said:

> "6. (1) Where any such alien (not having been convicted as aforesaid) alleges any excuse for not complying with such order or any reason why the same would not be enforced or why further time should not be allowed to him, he may submit the same to the Governor, and where such alien is in custody under any warrant of the Governor under this Ordinance, the person having the custody of such alien, on its being signified to him that any such excuse or reason is alleged by such alien, shall forthwith make known the same to the Governor.
>
> (2) Where the Governor is informed that any such excuse or reason is alleged by any such alien, the Governor shall suspend the exe-

cution of the warrant until the matter can be inquired into and determined by the Governor."

This language is as explicit as the scheme of the Ordinance (1886) is revealing. It hardly illustrates any concept of a casual or concessionary nature. Its imprint embraces what is more of a compulsory or obligatory nature.

To begin with, even after the Governor issues his warrant with a view to having an alien deported, his deportation was made "*subject to the other provisions of the Ordinance*", which included the opportunity for making representations in terms of s. 6. When the order was made then, it was never intended that its execution should follow as a matter of course, or that it should be final or irrevocable. On the contrary, its execution was to be "subject to" provisions for representations. In other words, it was an order conditioned to take effect only after the opportunity for representations was exercised at the option of the alien. The nature of what was represented would determine whether the order was a nullity, or should not be enforced, or called for an extension of time. Was this not a fair concept with an admirable intent?

Certainly, the way of its formulation illustrates its anxiety to gather from the alien why, if at all, he might wish to excuse himself for not obeying the order; for what reasons, if at all, he might wish to attack its enforceability, and why, if he wanted further time before deportation, it was necessary to ask for such extension. This is as comprehensive a basis for "contesting" the order or seeking compassionate considerations, as is reasonable to expect in the circumstances. The "contest" is raised when an "excuse" or "reason" is alleged and submitted, that is, an "excuse for not complying" or a "reason why the same should not be enforced". There is no "contest" when an extension of time is requested. This would be a simple matter for discretion on the actual grounds advanced, and would not therefore require an "inquiry" and "determination" or "suspension" of the order. That is why s. 6 (2) provided that where the Governor is informed that any such "excuse" or "reason" is alleged (referring to the first two categories in s. 6(1)), he shall "suspend" the execution of the warrant until the matter can be "inquired into" and "determined".

Further, it is highly significant that s. 6(1) does not make any provision for this form of representation in the case of an alien convicted under the Ordinance, that is, for knowingly and wilfully refusing or neglecting "to pay due obedience to the order" after a trial in the Supreme Court in its criminal jurisdiction. This is understandable since he will already have had the opportunity of putting his case, as fully as the circumstances would have permitted, before a court of law, which would have inquired into the whole matter and determined the issues.

For example, at such a trial it would have been competent to raise by way of excuse for not complying, some points of jurisdiction, as that in-

formation was not given "in writing" to the Governor prior to the making of the order, as is required by s. 2, or by way of reason for not paying "due obedience" to the order, that the information given was wholly false. Therefore, the necessity for "inquiry" and "determination" by the Governor on issues resolved at the trial would have been wholly superfluous. Hence the deliberate wording in s. 6(1). "Where any such alien (not having been convicted as aforesaid) . . .", which expressly denies to a convicted person a second opportunity to put forward what was already rejected. But if the alien did not have the benefit of such an investigation, the Governor was charged with the responsibility to inquire into what he had put forward and come to some fitting determination.

The present s. 6 (1) in its cryptic wording has similarly captured the same notion and spirit. Let me examine it.

It has been seen how under the 1886 Ordinance the execution of the Governor's warrant to deport was to be "subject to" the procedural provision for showing cause why there should not be compliance with the order, or why it should not be enforced, etc. This is exactly what the present section does, for to have the option of enjoying the statutory right to make representation "setting forth reasons for non-compliance or non-enforcement" is only another way of saying to the alien: "You may, if you wish, show cause (represent) why (setting forth reasons) the order should not be complied with or enforced (for non-compliance or non-enforcement)."

And as soon as this much becomes clear, the reasons for the making of the order (except in acceptable cases of emergency and national security, etc., none of which here applies) must be communicated if the statutory right conferred is to have any value. I would cite two authorities in support of this point of view. There is the case of *Ex. p. Walsh and Johnson; In re Yates* (11). Two judges in this case—ISAACS and RICH, JJ.—were of the view that in order that a person may lawfully be required to show cause why he should not be deported under s. 8AA of the Immigration Act (1901—25) [AUS.], it was a necessary condition that he should have been informed with reasonable definiteness of what particular acts the Minister was satisfied. There, the operation of the relevant enactment was made conditional on the Minister being satisfied that the person proposed to be dealt with was concerned in acts supposed to be detrimental to the welfare of the Commonwealth.

The centuries which have passed since the signing of that "Great Charter" have not one whit diminished the fervour of those who respect freedom under the law to see that, "No freeman shall be taken or imprisoned . . . or exiled . . . but . . . by the law of the land". And ISAACS, J., pointed out three basic principles which are recognised, namely (1925), 37 C.L.R., at p. 79):

(1) Primarily every free man has an inherent individual right to his life, liberty, property and citizenship.

(2) His individual rights must always yield to the necessities of the general welfare at the will of the State.

(3) The law of the land is the only mode by which the State can declare its will.

And

> "For their effective preservation and enforcement the Courts have evolved two great working corollaries in harmony with the main principles, and without which these would soon pass into merely pious aspirations. *The first corollary* that there is always an initial presumption in favour of liberty, so that whoever claims to imprison or deport another has cast upon him the obligation of justifying his claim by reference to the law. *The second corollary* is that the Courts themselves see that this obligation is *strictly and completely fulfilled before they hold that liberty is lawfully restrained.* The second is often in actual practice and concrete result the more important of the two to keep steadily in view. In the course of considering the questions here in conflict between the parties, it will be seen that the principles themselves and the corollaries are of far more than mere academic interest."

His Lordship rightly observed that deportation "as a political precaution" must be exercised "by the political department—the executive—and possibly on considerations not susceptible of definite proof but demanding prevention or otherwise, dependent on national policy, but in the event of challenge "the courts would decide the law". Then his Lordship went on to say (*ibid.,* at p. 101):

> "But if the Minister must first find 'acts', and must afterwards base his deportation order on those same 'acts' (plus the recommendation or the failure to attend), *how in the name of common justice* can it be denied that the accused is *entitled to know with sufficient precision what those alleged* '*acts*' *are,* and know that they are the '*acts*' *which the Minister himself has found*?"

And at p. 105 (*ibid*.)*:*

> "*There seems to me no just means of enabling the person to show cause except by furnishing him with a sufficiently clear indication of the 'acts' as being those in which the Minister finds he has been concerned. It is said in opposition to that, that the section does not say the Board must consider the* '*acts*' *as found by the Minister*. True, that precise form of language is not used. But what does '*show cause*' *involve?* Does it mean that, without any thing whatever alleged *or* charge notified, a man must affirmatively prove to an irresponsible tribunal he is not unfit to remain in Australia?"

And at p. 106 (*ibid*.)*:*

> "Nor is it, in my opinion, any answer to say that the party has not in fact been prejudiced. *If he might have been prejudiced by an insufficient intimation of the acts in question, the proceeding offends against what the law terms natural justice* (see *per* Lord ESHER in *Cotterill v. Lempriere* (12) (1890), 24 Q.B.D., at p. 639). This principle obtains not merely in indictments in criminal cases (see *R. v. Stocker* (13)), but wherever an accusation is made by which the accused may be made to suffer. It applies to a civil action to recover a penalty for a criminal act (*Davy v. Baker* (14)) and informations in the Exchequer for forfeiture (*R. v. Morley* (15)). It applies to the case of expulsion from a club. In *Cassell v. Inglis* (16) (1916), 2 Ch. at pp. 230 and 231, ASTBURY, J., says that, except in exceptional cases and where no otherwise provided, 'the accused shall be informed of the character of the charge to be investigated.' Parliament, judging *by the subject-matter and the whole frame of the section*, must presumably have intended *to make the protection real and not illusory*."

And at p. 108 (*ibid*.)*:*

> "On the true construction of the section it is a necessary condition, before any person affected can be lawfully required to show cause to a Board or suffer deportation, that he should be informed with reasonable definiteness of the particular acts of which the Minister is satisfied and for which the Minister, subject to failure to appear before a Board or to the Board's recommendation, proposes to deport him. No such information was, according to the evidence before us, ever given. By reason of the non-application of the statute to him—and, if necessary, by reason of the failure to notify the 'acts' as found by the Minister—Walsh is entitled to his liberty. By reason of the failure to notify the 'acts' as found by the Minister, Johnson is entitled to his liberty.
>
> I am therefore of opinion that the rules should be made absolute and the applicants discharged."

The other authority to which I would refer on this aspect is *de Verteuil v. Knaggs* (17). In this case, the Immigration Ord. No. 161, as amended by subsequent ordinances, contains the provisions applicable to the introduction and employment of immigrants in the Colony of Trinidad and Tobago. Section 203 provides:

> "If at any time it appears to the Governor, on sufficient ground shown to his satisfaction, that all or any of the immigrants indentured on any plantation should be removed therefrom, it shall be lawful for him to transfer the indentures of such immigrants for the remainder of their respective terms of service to any other employer who may be willing to accept their services and pay the remaining indenture fees: . . ."

It was under this section that the Governor made the order to which the appellant took objection, and provided he acted in good faith and within the limits of the authority conferred on him by the Ordinance, he was fully protected, and there would be no power in the court to interfere.

The case for the appellant, as stated in the endorsement of his writ of summons, was that "the order was not made under the proper and statutory exercise of the discretion vested in the acting Governor by s. 203 of the Ordinance, and was consequently null and of no effect. Lord PARMOOR in his judgment said ([1918] A.C. at p. 559):

> "It is clearly within the power and jurisdiction of the municipal Courts to entertain this question, and to determine whether the acting Governor, in making the order, which the appellant impugns, acted within the limits of the powers conferred on him by a municipal Ordinance."

It is true that the Ordinance did not prescribe any special form of procedure, but there was *an obvious implication* that some form of inquiry was required to enable the Governor "fairly to determine whether a sufficient ground had been shown to his satisfaction for the removal of the indentured immigrants". Lord PARMOOR, in a clear statement of the law, which is not without relevance in this particular case, said (*ibid.,* at p. 560):

> ". . . the acting Governor could not properly carry through the duty entrusted to him without making some inquiry whether sufficient grounds had been shown to his satisfaction that immigrants indentured on the La Gloria estate of the appellant should be removed. Their Lordships are of opinion that in making such an inquiry there is, apart from special circumstances, a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice. It must, however, be borne in mind that there may be special circumstances which would justify a Governor, acting in good faith, to take action even if he did not give an opportunity to the person affected to make any relevant statement, or to correct or controvert any relevant statement brought forward to his prejudice. For instance, a decision may have to be given on are *emergency, when promptitude is of great importance;* or there might be obstructive conduct on the part of the person affected."

I am unable to accept the Solicitor-General's restricted construction of s. 6, which limits permissible representations to those of a compassionate nature to be accorded response purely as an act of grace, at the pleasure of the executive, and precludes any challenge of the order either as to validity or righteous reasons for non-enforcement. To me, the simple language which

adorns the section is incapable of leading to the qualifications sought to be superimposed. From what words could any shade of meaning be evoked to oust representations submitted on the grounds of jurisdiction? Where is the language, or from what could it be inferred that "reasons for non-enforcement" were only intended to be reasons of a particular kind and not generally? Why should it be said that reasons for non-enforcement on grounds of hardship are legitimate, but not so if capable of destroying the very foundation upon which the order rests? This would indeed be a strange, if not strained, interpretation. Further, if a contest cannot be raised on grounds of jurisdiction or merit, then why were three distinct categories created when one would have sufficed? Each category, in my view, was intended to be disjunctive and to accommodate whatever could properly fall within its circumscribed area, and to contract the first two categories in order to shut out what is or could be germane and fundamental to validity and non-enforcement would ruin and frustrate the whole purpose of representation aimed at revocation, and restructure the section to serve a purpose never intended.

To put it simply, there are three inter-related stages, one leading to the other. *At the first,* the order is made *ex parte,* administratively and subjectively, without a right of hearing (for reasons already explained). *At the second stage,* it is open to representations when cause could be shown as to why it should not stand or why the time should be extended. Here the original administrative function is ousted and the authority assumes a quasi-judicial mantle, to "inquire into" and "decide" what might be issues of grave personal consequences. *At the third stage,* the result will determine its effect, whether it should be nullified, suspended or enforced.

Each stage calls for the exercise of a function, the type of which has to be clearly understood, in order to appreciate the scope of the "power" belonging to that function. What was purely ministerial and unquestionable in its inception when the order was made became quasi-judicial in the intermediate stage when representations were made under s. 6, and therefore necessitated due compliance with the rules of natural justice. Provided these rules were observed as the law required, there would be a reversion to the purely ministerial function in the final stage to exercise his discretion as to what should be the outcome of the order. An illustration of the exercise of these functions can be found in *R. Johnson & Co.* (*Builders*), *Ltd. v. Minister of Health* (18), where the function of the Minister at first was administrative, but when he had to consider objections it became quasi-judicial, and ended an administrative when he had to confirm or not the report of the local authority. It would therefore be incorrect to say that because a function is in its inception executive in character, it necessarily retain its executive character throughout (see *Lakhanpal v. The Union of India & Anor.* (19)).

I would have thought that the unmitigated purpose of s. 6 was to provide the executive with the opportunity which it did not have initially (and, as I have said before, for good reasons) to hear the alien, in his interests and in the interest of justice, on factual and legal issues when he will have known what he has to meet so that there could be a fair inquiry and a fair result. I

cannot appreciate the argument advanced that any question pertaining to the validity of the order is essentially one for the court and cannot be raised under s. 6. Suppose the order was a nullity because it was mistakenly made against one who was a citizen of Guyana, is it still to retain an assumed validity until the aid of the court is invoked when executive competence and action could set right what was wrong? Surely s. 6 was to be the instrument of securing liberation in fitting cases from the restraint of an order which was misconceived or made on false information, etc.! The opportunity to question, defend and explain through the channel of representations provides the clearest indication that the Legislature did not intend the executive to act arbitrarily but to take cognisance of what is right and just.

An argument was raised that s. 5 in the 1930 Ordinance, which was repealed by the 1967 Act, had provided that before an expulsion order was made against a British subject (who could then have been an "undesirable person" if not domiciled in the country or resident therein throughout the preceding two years), the grounds upon which it was proposed to make any such order would have had to be communicated to him in writing to allow him to answer within three days; and it was said that if this was specifically provided, why, if it was so intended, was express provision not so made in s. 6? The answer to this, in my view, is that when s. 6 first appeared in the 1886 Ordinance, there was no such provision in that Ordinance as the s. 5 of the 1930 Ordinance to provide the inference which it is sought to draw by comparison and contrast. The real question ought to be: what was the true import of s. 6 as it stood in its setting in the 1886 Ordinance with no contrasting section? On construction and the application of the common law principles laid down by Lord PARMOOR in *de Verteuil v. Knaggs* (17), I am in no doubt that a duty existed to let the alien have a fair opportunity to make any relevant statement which he may desire to bring forward, and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice.

When the Governor made an order under the 1886 Ordinance under s. 2, he did so because he had "reason to believe . . . it is expedient to remove" the alien, in much the same way as the Governor of Trinidad under the Immigration Ord. in *de Verteuil v. Knaggs* (17) had to be satisfied before making his order for the removal of immigrants. But although in the Trinidad case there was no specific provision for representation and inquiry before decision, yet the justice of the common law was invoked. How much more readily ought it not to be in this case where not only in 1886, but in the Ordinance as amended by the 1967 Act, s. 6 stands as a sheet-anchor?

Now I shall come to the duties incumbent on the President under s. 6 of Cap. 99. On receiving the alien's representations, the law says the President "shall . . . inquire into them"! What does this mean? Will he have met what is the law's demand merely by according them his "most careful consideration",

as indicated in the letter of December 10, 1970 (already cited)? Or was there more to be done?

It is perhaps unnecessary for me to remark that the words "shall inquire . . . . into" do not oblige the President to inquire himself into the matter; it will suffice if he causes to be done what is required or what the circumstances call for. But before proceeding further, let me recall the relevant circumstances.

When representations were made, the Minister's reasons for decision were not then given either to Messrs. Clarke and Martin, solicitors, or to the appellant. The appellant therefore set about to place his attitude and conduct in the issue by stating that he had not engaged in pursuits likely to influence the affairs or life in the country in a manner prejudicial to its well-being; that he had always conducted himself with respect for the people of Guyana; that he believed in the equality of man and abhorred discrimination on the ground of race, religion or creed; that he had an excellent record as a law-abiding resident of Guyana; and that he wished "to defend or explain any conduct on his part which might have led to the making of the said order".

In the number of reliefs for which he prayed, again he specifically requested "*a viva voce* hearing" to know of any conduct on his part which might have led to the making of the expulsion order and to be further permitted to make representations in defence, or an explanation of such conduct.

This was, indeed, the pivot around which his representations revolved. He wanted to come face to face with his alleged "misdeeds" and to be heard in answer. Was he entitled to this much?

In *Leeson v. General Council of Medical Education and Registration* (5), the said Council had the power of deciding whether a medical practitioner was guilty of infamous conduct in a professional respect after "due inquiry". BOWEN, L.J., said (1889), 43 Ch. D. at p. 383):

> "The statute says nothing more, but in saying so much it certainly imports that the substantial elements of natural justice must be found to have been present at the inquiry. There must be due inquiry. The accused person must have notice of what he is accused. He must have an opportunity of being heard, and the decision must be honestly arrived at after he has had a full opportunity of being heard."

And in *General Medical Council v. Spackman* (20), the House of Lords held that while the Council was entitled to regard the decree against a medical practitioner in a divorce suit as *prima facie* evidence of his adultery with his patient, when adjudging his conduct, it was bound to hear any evidence tendered by the practitioner, and that having refused to hear such evidence, it had not made "due enquiry" under s. 29 of the Medical Act 1858. Viscount SIMON, L.C., said [1943] A.C. at p. 635):

> ". . . while the council might well treat the conclusion reached in the courts at *prima facie* proof of the matter alleged, it must, when making 'due inquiry' permit the doctor to challenge the correctness of the con-

> clusion and to call evidence in support of his contention . . . The decree provides a strong *prima facie* case which throws a heavy burden on him who seeks to deny the charge, but the charge is not irrebuttable. So much follows from the structure of s. 29 and from the necessity, if there is to be 'due inquiry', of giving the accused party a fair opportunity of meeting the accusation. Unless Parliament otherwise enacts, the duty of considering the defence of a party accused, before pronouncing the accused to be rightly adjudged guilty, rests on any tribunal, whether strictly judicial or not, which is given the duty of investigating his behaviour and taking disciplinary action against him. The form in which this duty is discharged—e.g., whether by hearing evidence *viva voce* or otherwise—is for the rules of the tribunal to decide. What matters is that the accused should not be condemned without being first given a fair chance of exculpation. This does not mean that the council has to rehear the whole case by endeavouring to get the previous witnesses to appear before it, though in special circumstances the recalling of a particular witness, in the light of what the accused or his witnesses assert, may, if feasible, be desirable."

And Lord ATKIN (*ibid,* at p. 637) said:

> ". . . the very conception of *prima facie* evidence involves the opportunity of controverting it, and I entertain no doubt that the council are bound, if requested, to hear all the evidence that the practitioner charged brings before them to refute the *prima facie* case made from the previous trial. If this is inconvenient it cannot be helped. It is much more inconvenient that a medical practitioner should be judged guilty of an infamous offence by any other than the statutory body. Convenience and justice are often not on speaking terms."

The duty of "inquiry" which the Legislature has imposed through s. 6 is a procedural safeguard which the Legislature has deliberately laid down in protection of the cherished liberty of the party to be affected, and utmost care must be taken that it is duly observed to ensure that the material on which the order is based is true and dependable. Hence the opportunity to correct, contradict or explain.

I come now to the second duty imposed, viz., to "decide" on the representations. The duty of a body charged with the duty of deciding has been admirably stated by Lord LOREBURN, L.C., in *Board of Education v. Rice* (21), which has been approved countless times, not only from whence it came, but in the jurisprudence of a number of Commonwealth territories. He said [1911] A.C. at p. 182):

> "Comparatively recent statutes have extended, if they have not originated the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds . . .

> It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything."

Lord LOREBURN had just expressly observed that the Board "can obtain information in any way they think best, always giving a fair opportunity to those who are parties to the controversy for correcting or contradicting any relevant statement prejudicial to their view". The words "fair" and "relevant" are to be noted. They were used in relation to an administrative body charged with the duty of "deciding".

The general observations of the EARL OF SHELBORNE, L.C., in *Spackman v. Plumstead District Board of Works* (22), which was a case of administrative decision in a matter of local government, are also important. He said (1885) 10 A.C. at p. 240):

"No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice . . . This is a matter not of a kind requiring form, not of a kind requiring litigation at all, but requiring only that the parties should have an opportunity of submitting to the person by whose decision they are to be bound such considerations as in their judgment ought to be brought before him."

If the allotted task to "inquire into" and to "decide upon" is to be performed in conformity with the purpose of s. 6 which embodies the spirit Of "fair play in action", the request to be heard *viva voce* when there was ho opportunity to answer any grounds advanced (because they were not known) and having regard to the denial of any involvement, could hardly have been avoided or resisted.

But the Solicitor-General argued that Dr. Ramsahoye was told the reasons for the order of the Minister at some time between December 7 and 10 (on a balance of probability it must have been between December 8 and 10) and the indications are that there was no intention to make any further representations, although there was adequate time to do so between December 7 and 10.

It was also said that even if there was a failure to supply the reasons for expulsion before representations were made, this was cured by the subsequent oral communication to Dr. Ramsahoye.

The fact, nevertheless, remains that the appellant was not "heard"; his request for a *viva voce* hearing was left unheeded, despite his comprehensive general denials which certainly served to put whatever was communicated to Dr. Ramsahoye in issue.

In *Rex v. Housing Appeal Tribunal* (23), there was a rule which allowed the Appeal Tribunal to dispense with an oral hearing, but this did not mean that they might dispense with a hearing of any kind. They were bound to give the appellants a hearing in the sense of an opportunity of making out their case.

The reasons for appeal were put in, but the facts on which it was proposed to rely in support of those reasons were not set out. The reply controverted the reasons put forward by the appellants and stated a number of facts, as facts, in answer to the appeal. After 20 days had elapsed, the matter was considered on what was put forward by the appellants and what was said in reply.

SANKEY, J., said ([1920] 3 K.B. at p. 346):

> "Now a hearing in my view need not be an oral one, it may be on written representations. But the party against whom it is sought to make an order must have an opportunity at least of stating his case in writing and so making his defence . . . On those documents as they stood there were a number of disputed questions of fact, and there the matter ended. No opportunity was given to the appellants to say whether they admitted those facts or had any explanation to offer to them . . . It may well be that if the appellants had been given the opportunity they might have been able to disprove the statements of the local authority, and to show that their facts and inferences were wrong."

In *Reg. v. Archbishop of Canterbury* (24), a curate's licence had been revoked by the bishop and there was an appeal to the Archbishop. Lord CAMPBELL, C.J., in giving judgment said (120 E.R. at p. 1019):

> "The appellant here has not been heard. In his petition he denies almost everything charged against him, specifically, and asks the Archbishop to appoint a time and place at which he may be heard and adduce evidence in his behalf. Without any communication with him his judge decides against him. That was not a hearing."

And CROMPTON, J. said (*ibid.*, at p. 1020):

> "The appellant wishes to show that, on those original documents. his admissions have been misunderstood by the Bishop, and wrongly acted upon; and he has a clear right to be heard for that purpose."

When a right is conferred to make an objection, the opportunity for effective objection must be present. If the appellant had said, "What Dr. Ramsahoye was told is completely and absolutely false", how could a just conclusion be reached without hearing him and questioning him about the relevant circumstances? In *R. v. B.C. Pollution Control Board* (25), DAVEY, J. A., said ((1967) 61 D.L.R., at p. 224):

> "In my opinion the section confers a right to make an effective objection and that means surely the right to have the objection considered by the Board. That in turn implies a reasonable opportunity to support the objection by representations so that the Board may rule upon it intelligently. Anything less makes the statutory right to file an objection illusory and farcical."

Even if Dr. Ramsahoye had been fully informed of the allegations between December 6 and 10, I would hardly consider this to be an adequate opportunity to make answer. Indeed, it would appear that there was never any real intention of allowing him to do so.

The concept of natural justice is, after a waning period, on the march again with the vigorous stimulus imparted by the House of Lords in *Ridge v. Baldwin* (26), and more recently, by the encouraging endorsement in *Wiseman v. Borneman* (27). There, Lord MORRIS OF BORTH-Y-GEST has epitomised its value and virtue when he said ([1969] 3 All E.R. at p. 275):

> ". . . that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only 'fair play in action'. Nor do we wait for directions from Parliament. The common law has abundant riches; there may we find what BYLES, J., called 'the justice of the common law' (*Cooper v. Wandsworth Board of Works* (28))."

Before I come to the end of this third and last question, let me look at the case of *Stafford v. Minister of Health* (29). There, the Minister received

notice and grounds of objection from a landowner before confirming an order for compulsory purchase. The Minister sent the notice and grounds to the local authority, who sent to the Minister a detailed reply. The Minister, without informing the landowner of that detailed statement of the local authority's case, in the exercise of his discretion decided not to hold an inquiry and confirmed the compulsory purchase order. It was held that the confirmation order was invalid and must be quashed, since a mere notice and grounds of objection did not constitute a presentation of the landowner's case, and, as the local authority had had an opportunity of presenting their case in detail, the Minister had acted without hearing both sides.

On the one hand, the Minister had simply the appellant's naked grounds of objection, as the President had in this case, in a matter which was obviously controversial, and, equally, he did not have an opportunity of adequately presenting his case. If the local authority's view was to be taken, then it ought to have been certainly communicated to the landowner, who should then have had an opportunity of presenting in adequate form the case which he had done no more than adumbrate by the headings in his grounds of objection. A similar opportunity should have been given to the alien here.

I would have thought that if there was any intention of giving to the alien an opportunity of hearing him on what was communicated to Dr. Ramsahoye, assuming that the material aspects were, he would have been invited to answer specifically and to say whether he still wanted an interview after being made fully aware of the allegations. This was not accorded him.

Lastly, a return to the case of *Lakhanpal v. The Union of India* (19), as it has given to me a great deal of assurance that my view of s. 6 has not been rashly conceived.

Lakhanpal was arrested and detained under r. 30(1) (b) of the Defence of India Rules 1962, with a view to preventing him from acting in a manner prejudicial to the defence of India and civil defence. R. 30A (9) provided that:

> "Every detention order made by the Central Government or the State Government shall be reviewed at intervals of not more than six months by the Government who made the order and upon such review that Government shall decide whether the order should be continued or cancelled."

This provision bears some striking resemblance to the main features of s. 6. Under it, the determining authority which made the order could decide what is to be its fate, whether it should be continued or cancelled, as the President could revoke, suspend or enforce his order after representations. Then the "review" by the authority will correspond to the "inquiry" by the

President. In both instances the authority and the President must eventually "decide".

If the Solicitor-General's argument that the power to "decide" under s. 6 is wholly administrative and beyond the reach of the courts, since the principles of natural justice would have no place within the area there designated, then it would seem to follow on a parity of reasoning that the said r. 30A (9) should bear the same interpretation.

Lakhanpal had contended *inter alia* that:

"(i) the said order was treated as a mechanical and casual order passed without taking into consideration all the facts and circumstances relevant under r. 30(1)(b) and r. 30A (9); and that

(ii) it was passed in utter disregard of the duty of the Government to act judicially, implicit in the power conferred on it under r. 30A (9) to continue detention, as both the function to review and the decision thereon were judicial or quasi-judicial."

In reply, an affidavit filed by the Deputy Secretary of the Ministry of Home Affairs had stated ((1967) 3 S.C.R., at p. 117):

> ". . . that between the 10th December, 1965, and the 2nd of December, 1966, the petitioner had made representations either directly or through certain persons and had addressed letters explaining his position, that on the basis of those representations and letters and the report about his past activities called for from the police and after considering those materials the Central Government felt satisfied that if the petitioner were to be released, he was likely to resume his prejudicial activities and, therefore, his detention should be continued. The affidavit further alleged that at the time of the review of his case on December 2, 1966, 'the said letters, papers, representations and the report from the police were placed before the Minister who had considered the same and he was satisfied that it was necessary to continue the detention of the petitioner'. It also stated that it was not possible to disclose to the detinue the material on the basis of which the Central Government came to the said conclusion, that the order of detention was to prevent the petitioner from indulging in prejudicial activities mentioned in r. 30 (1) (b) and that the apprehension of his indulging in such activities would have to be judged and was judged from representations made by him."

On this the learned trial judge said (*ibid.*)*:*

> "It is thus clear from the counter-affidavit that the detaining authority considered (1) the representations and letters made and written by the petitioner, (2) the report of the police authorities in regard to the past activities of the petitioner (there being no question of any present activities as he was in jail since the 2nd of December 1965), and (3) the events which had since his detention taken place. According

to the Central Government, it came to the decision that continuation of his detention was necessary as it was satisfied that if he were to be released he would continue the same anti-national activities for which he was detained and that his professions that there was a change in his view was only a ruse to get himself released from detention."

Then His Honour went on to point out that the Government was the special forum on whose subjective satisfaction an order of detention for the considerations set out in r. 30 (1) (b) can be made and continued under r. 30A (9), and that there is a difference in the power to detain and the power to continue such detention beyond a period of six months.

"The decision to continue detention has to be arrived at *not subjectively but on an objective standard,* i.e., on a decision on materials relevant to the purposes under r. 30(1) (b) and r. 30A(9) gathered by or placed before the detaining authority, which, according to the authority, necessitates continuation."

If I may pause to draw this analogy in the present appeal, I would say; the power to make the order initially was subjective, but the power to decide on its enforcement must be based on *an objective standard* after weighing the reasons for making the order with the reasons set forth in the representations for non-compliance or non-enforcement.

His Honour concisely drew attention to stated aspects of jurisdiction which could serve to invalidate the order, in these words (*ibid,* at p. 119):

"Though it is the detaining authority which has to decide and its order is not subject to appeal or revision by a court of law such an order is liable to a challenge where either such facts and circumstances do not exist or where it is made on the basis of facts or circumstances not relevant or extraneous to the said purposes."

Then reference was made to the principles distinguishing a quasi-judicial function from one that is ministerial, and it was pointed out that even if there is no *lis inter partes* and the contest is between the party proposing to do the act and subject opposing it, yet the final determination of the authority will be a quasi-judicial act, provided the authority is required by the statute to act "judicially". (And a number of authorities were cited for this proposition about which there ought to be little doubt.) But how is it to be deduced whether a party is enjoined to act judicially where the statute is silent? The dictum of WANCHOO, J., who spoke for the court in *Board of High School and Intermediate Education, U.P. v. Ghanshyam* (30), is instructive on the point. He said ((1962) Supp. 3 S.C.R., at p. 43):

"Now it may be mentioned that the statute is not likely to provide in so many words that the authority passing the order is required to act judicially; that can only be inferred from the express provisions

of the statute in the first instance in each case and no one circumstance alone will be determinative of the question whether the authority set up by the statute has the duty to act judicially or not. The inference whether the authority acting under a statute where it is silent has the duty to act judicially will depend on the express provisions of the statute read along with the nature of the rights affected, the manner of the disposal provided, the objective criterion, if any, to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute."

Though in that case there was nothing expressed one way or another in the act on the regulation casting a duty on the committee to act judicially, the manner of the disposal and the serious effects of the decision of the committee (examinees could have been subject, in some cases, to criminal prosecution on charges of impersonation, fraud and perjury) would lead to the conclusion that a duty to act judicially was cast on it, and the principles of natural justice would apply to its proceedings.

To revert to *Lakhanpal's* case (19). The learned judge went on to say (1967), 3 S.C.R., at p. 121):

"Let us now proceed to consider the nature of the function of review and the decision thereon in the light of the principles laid down in these decisions. There can hardly be any doubt that in a case of the kind we have before us there must always occur a dilemma or a conflict between the claims on the one hand of personal liberty of an individual and those of national interests on the other. Nevertheless, it must be remembered that in such cases, the only remedy that a person detained has lies in the procedural safeguards that the Legislature deliberately lays down. Where such procedural safeguards have been fully and properly complied with, the court would have no power or would in any event be reluctant, even if it has, to interfere. That is because of the consideration that national interest and security should have . . . a prior claim than even the personal liberty of an individual who has acted or is likely to act in a manner prejudicial to them. In such cases, however, utmost care has to be taken to comply with such few safeguards which the law justifying the loss of liberty provides. That the impugned decision involves the right of personal liberty, a more cherished right than that one cannot conceive in our democratic State is obvious. It is equally obvious that the manner in which the question of continuation of detention enjoined upon Rule 30A(9) has to be determined is by applying the objective standard as against the subjective opinion or the belief of the detaining authority, i.e. by weighing evidence brought before or collected by such authority relevant to the purposes under Rule 30(1)(b) and Rule 30A(9) and then coming to a decision whether the order of detention needs continuation or not. How can such an authority come to its decision honestly and properly unless it is certain that the materials before it are true and dependable? How is that certainty to be derived unless the person concerned is

given an opportunity to correct or contradict such evidence either by explanation or through other materials which he can place before the authority? Keeping in mind the five factors laid down in the case of *The Board of High School and Intermediate Education* (30), the conclusion that we must come to is that the function entrusted to the authority under r. 30A (9) as distinguished from the power under Rule 30(1)(b) is quasi-judicial and the decision which it has to arrive at cannot be anything other than a quasi-judicial decision."

And, finally, concluded (*ibid.*, at p. 123):

"It is admitted that the petitioner was not given any opportunity of representing his case or to correct or contradict the evidence on which the Government was going to rely and which it admittedly relied on. But Mr. Dhebar's contention was that if the power of decision under Rule 30A (9) were held to be quasi-judicial in character a person detained would be entitled to disclosure of the materials in possession of the Government and on the basis of which the order would be made, that such a disclosure would not only be prejudicial to the very purposes of the Act and the Rules but also to national interest and, therefore, the Legislature could not have intended such disclosure. The answer to this contention is simple. In some cases, though such cases would be few, such disclosure would perhaps be embarrassing and, we will assume, detrimental to the larger interests of the country. But the proper remedy against such a consequence is not to deny the elemental right of representing his case to the person whose liberty is being deprived but by providing a rule whereunder the authority in suitable cases can claim privilege against such disclosure. Such a provision is in fact provided for under Art. 22 of the Constitution under the Prevention of Detention Act. There does not appear to be any reason why such a rule cannot be made under the Defence of India Act or the rules made thereunder.

It may be that in the present case the Government had materials before it which might justify the petitioner's detention. We do not know whether it had or not for the only thing that was said in the counter-affidavit was that there were materials on the consideration of which the Minister based his decision. If that be so, the proper thing to do was to give a chance to the petitioner to explain them. This not having been done the order of continuation of detention was illegal, it being a breach of the principles of natural justice and has, therefore, to be quashed."

In cases of deportation, it is to be expected that a dilemma may occur between the claims of the personal liberty of the individual and what is in the interests of the nation. But, as has been seen, the only remedy which the alien

to be affected has, lies in the procedural safeguards which the Legislature has deliberately laid down. Where such procedural safeguards have been fully and properly complied with, the court would have no power or would, in any event, be reluctant, even if it has, to interfere.

Having regard to what I have attempted to demonstrate, I am forced to the conclusion that the answer to the last question must be:

(a) That there was such a breach of the provision of s. 6 as must affect the enforceability of the order proper since the reasons for expulsion were not so communicated to the appellant as to enable him when making his representations to effectively state his case.

(b) That the failure to do so was not cured by the Minister's subsequent oral communication to Dr. Ramsahoye, inasmuch as no adequate opportunity was offered or allowed for him to be heard in person or in writing on what was alleged.

(c) That in law it could not be truly said that the duty to "inquire into" was discharged when the appellant was virtually denied his request to defend or explain *viva voce* what stood against him.

(d) That the decision, in the circumstances, was not in conformity with the principles of natural justice in that when he made his representations, (i) he did not know the nature of the accusation against him; (ii) he was not given an adequate opportunity to state his case.

This would, therefore, naturally affect the fairness of the decision against him, and, for the above reasons, nullify and render ineffective any enforcement or purported enforcement of the order.

I have deliberately omitted any reference to the argument that the President was a tribunal within the meaning of Art. 10(8) of the Constitution of Guyana, since Dr. Ramsahoye abandoned his argument after a short essay. Mr. Haynes' attempt to resurrect it in reply was fully demolished by the Solicitor-General. The short answer is, that the plain wording of Art. 10(8) makes it impossible to attach to it the meaning that the President could be placed in the category of a court of law or tribunal.

I would, therefore, allow the appeal and set aside the order of the learned trial judge.

In doing so, I would rule that the President's order of December 3, 1970, be declared to have been validly made and be unenforceable unless and until the President first (a) supply the appellant with the reasons for his expulsion; (b) give him an adequate opportunity of making representations in writing under s. 6 of Cap. 99 in respect thereof; and (c) thereafter inquire into and decide thereon according to the principles of natural justice.

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v.

ATTORNEY GENERAL OF GUYANA AND C. A. AUSTIN

The only issue on which the appellant was successful in this court was one which was never argued in the court below, and so give no opportunity to the learned trial judge to decide.

In consequence, each party should bear his own costs in that court.

However, the appellant would have two-thirds of his costs in this court.

BOLLERS, C.J.: Almost two and a half centuries ago, a distinguished judge, Fortescue J., made this dramatic statement in *R. v Chancellor of the University of Cambridge,* (1723) 1 Str. 557, at p. 567: "Even God himself did not pass sentence upon Adam, before he was called upon to make his defence." This was followed a little over a century later by Parke B. in *Bonaker v. Evans,* (1850) 16 Q.B. 162 (at p. 171) with the statement that—

> "No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the case against him, unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary."

This proposition was even more graphically and narrowly put a little earlier in the case of *Painter v. Liverpool Oil Gas Light Co.*, (1836) 3 A. & E. 433 (at pp. 448-449), wherein it is said that: "A party is not to suffer in person or in purse without an opportunity of being heard."

Later, in 1920, the highwater mark was reached in the decision in *R. v. Housing Appeal Tribunal*, (1920) 3 K.B. 334, where the governing statute stated that matters which came before the tribunal "may be determined without a hearing". Yet it was held that even this language did not enable the tribunal to proceed *ex parte*, but only to dispense with an oral hearing, and the right to be heard persisted even in the face of the privative clause.

The question now arises in this appeal whether an alien in this country, under expulsion from the country on a deportation order, can invoke this proposition to escape the consequences of such an order made by the President of the Republic of Guyana, acting on the advice of the appropriate Minister, i.e., the Minister of Home Affairs.

The facts in the case are fully set out in the judgment of the learned Chancellor and there is no need for repetition, so I will be content to address my mind to the three main questions in this appeal:

> 1. Whether the alien (appellant) was entitled to a hearing before the expulsion or deportation Order was made and, if so, whether there was a failure to observe the rules of natural justice in that there was a breach on the part of the authorities concerned of the *audi alteram partem* rule.

2. Whether if the alien (appellant) was not entitled to a pre-order hearing he was entitled to such a hearing after the Order was made under s. 6 of the Expulsion of Undesirables Ordinance, No. 30 of 1930, Cap. 99 (Kingdon Ed.), and, if so, whether there was a failure by the authorities to observe the *audi alteram partem* rule.

3. Whether the constitutional rights of the alien (appellant) have been violated.

The Expulsion Order was made by the President (and by constitutional super imposition) acting on the advice of the Minister under s. 4 of the Expulsion of Undesirables Ordinance, Cap. 99, as amended by the Expulsion of Undesirables (Amendment) Act, No. 10 of 1967, which reads as follows:

"4. The Governor may at any time make an order against an undesirable person requiring him to leave the colony within a time fixed by the order and thereafter to remain out of the colony, or directing that such person be apprehended by any member of the police force and be deported from the colony. The Governor may extend the time fixed by any such order."

S. 2 of the Ordinance, as a result of the amendment, defines an "undesirable person" to mean "any person, other than a citizen of Guyana, in respect of whom the President deems it conducive to the public good to make an expulsion order." And s. 6, as amended, enacts as follows:

"6. (1) Any person against whom an expulsion order has been made may make representations in writing to the Governor setting forth reasons for non-compliance with such order or for non-enforcement thereof or for allowance of further time to comply therewith, and on any such person signifying his desire so to make representations the person in whose custody he shall be shall give him all reasonable assistance for their preparation and forward the writing to the Governor.

(2) On receipt of any such representations the Governor shall with all due despatch inquire into them and decide upon them."

S. 5 was repealed by the Amendment Ordinance, No. 10 of 1967, but formerly enacted that:

"5. (1) If the undesirable person with whom it is proposed to deal under ss. 3 and 4 of this Ordinance is a British subject, an order prohibiting him from entering the colony or requiring him to leave the colony shall not be made until the grounds upon which it is proposed to make any such order are communicated in writing to the undesirable person, who may make such answer thereto as he may be advised.

(2) Such answer shall be made—

(i) in case of an undesirable person against whom it is proposed to make an order prohibiting him from entering the Colony, immediately;

(ii) in case of an undesirable person against whom it is proposed to make an order requiring him to leave the colony, within three days after the grounds upon which the order is to be made are served upon him, personally."

It will be seen, therefore, that up to the time the principal ordinance was amended, if it was proposed to make an expulsion order against a British subject as an undesirable person, that decision had to be communicated to him in writing and he was permitted to make such answer thereto as he might be advised. The answer under para. 2 of subsection (2) of s. 5 was to be made within three days after the grounds upon which the order was to be made were served upon him personally. Thus, the legislation was clear that in the case of British subjects, the grounds for his expulsion were to be supplied to him before an order was made, but in the case of aliens there was no such provision.

In regard to the first point to be considered, it is the submission of counsel for the appellant that on the authority of *Johnstone v Pedlar*, (1921) A.E.R. 176, the appellant, being an alien friend resident in this country and having been granted a permit on the 16th January, 1970, under s. 12 of the Immigration Ordinance, Cap. 98, to remain in this country for an indefinite period as manager of a business company, he owed local allegiance to the State, and as a result he had acquired the value and benefit of the fundamental rights enjoyed by a citizen provided for by Art. 5(1) of the Constitution of Guyana. He had not been declared a prohibited immigrant under s. 14 of the Immigration Ordinance, in which case he was entitled to remain here and enjoy the benefit of the fundamental rights under the Constitution as a citizen; and had he been declared a prohibited immigrant, there was procedure under s. 21 of the immigration Ordinance whereby he would be given notice of such decision and of the grounds thereof, and the right to appeal to a magistrate's court or to the Chief Immigration Officer under s. 22 of the Ordinance.

It is the contention of counsel, therefore, that when the appellant's rights under the Constitution and his rights under the Immigration Ordinance, Cap. 98, are put together, it would be correct to say that the permission given him to remain here carried certain valuable constitutional and statutory rights, and, as a result, the appellant was entitled to be served with the grounds for his expulsion and would be entitled to a pre-order hearing, for it is a rule of the common law that you must read into the provisions of the statute the precepts of natural justice unless there is nothing in the statute itself that says you cannot do that.

The Solicitor General, in reply, submitted that the appellant as an alien had acquired no right to remain in the country but was merely here on a licence or permission which could be revoked by the Governor (now President by constitutional super imposition) at any time without a hearing,

under s. 19(2)(b) of the Immigration Ordinance, Cap. 19, quite apart from Cap. 99 where, under s. 4 an order could be made by the President for his expulsion if he deemed it conducive to the public good. It was his further submission that it was the clear intendment of the Expulsion of Undesirables Ordinance, Cap. 99, that no pre-order hearing should be given to an alien.

An examination of the Expulsion of Undesirables Ordinance, Cap. 99, before it was amended by Act No. 10 of 1967, reveals to me that it was the clear intention of the Legislature that if the undesirable person was a British subject on whom it was proposed to serve an expulsion order, grounds had to be supplied to him to which an answer could be made. He was, therefore, entitled to a pre-order hearing. No such provision, however, existed in the case of aliens. The maxim "*expressio unius est exclusio alterius*," which has been described by Professor de Smith in Ms Judicial Review of Administrative Action as "a valuable servant but a dangerous master to follow," must, therefore, apply. If it were the intention of the Legislature that the alien should be served with grounds for his expulsion and be entitled to answer the allegations therein before an order was made, as in the case of the British subject, then such intention would have been clearly expressed, and the authorities show that the maxim has been applied to exclude a hearing where the statute in question expressly provided for hearing in certain circumstances only. See *Bird v Vestry of St. Mary's Abbots,* (1895) 1 Q.B. 912; *Hutton v Attorney General,* (1937) 1 Ch. 427, and *R. v. Brixton Prison* (*Governor*). *Ex parte Soblen,* (1962) 3 A.E.R. 641 (at p. 669), where Pearson, L.J., gave an interesting application of the maxim to a case of deportation when he Said:

> "Moreover, there is the rule of construction, *expressum facit cessare taciturn.* Here a condition precedent to the making of a deportation order is expressed, namely, 'If the Secretary of State deems it to be conducive to the public good' to make a deportation order against the alien. That express condition excludes the supposed implied condition that a hearing must be given."

The history of the section under which the expulsion order was made should be examined, and in Maxwell on Interpretation of Statutes (11th Ed., p. 19) it is emphasized how important such history may be because the interpreter should put himself in the position of those whose words he is interpreting so as to be able to see to what those words relate. Before the 1930 Ordinance was enacted, the position was governed by the Aliens Ordinance, No. 1 of 1886, which was limited to aliens and was eventually repealed by s. 14 of the 1930 Ordinance. S. 2 of the 1886 Ordinance provided that:

> "Where the Governor has reason to believe, from information given in writing by any person subscribing his name thereto, that, for the preservation of the peace and good order of the colony, it is expedient to remove therefrom any alien who is, or hereafter may be, within the colony, it shall be lawful for the Governor, by order under

> his hand to be published in the Official Gazette, to direct that such alien shall depart from this colony, within a time limited in such order,"

and I agree with the learned Solicitor General that the use of the word "expedient" in that context indicated that the making of an expulsion order was not intended to be subject to judicial review for failure to afford a hearing, as no case is known in which the use of that word was held to be consistent with a requirement for a hearing. See *Hutton v. Attorney General,* (1927) 1 Ch. 436 at page 439. In *Craig Village Council v. Local Government Board* (Civil Appeal No. 9 of 1968), this court rejected the view that the use of the word "expedient" gave rise to the principles of natural justice. What, therefore, the 1930 Ordinance did was to extend the expulsion power to British subjects on condition that they were first given a hearing at the pre-order stage, while in the case of "any other person," all that was done was to retain the right to be heard as to the execution of the order after it was made, which had been given to this category by s. 6 of the 1886 Ordinance. On the other hand, British subjects, having a right to a previous hearing under s. 5, were not given the right to a subsequent hearing which was given to aliens under s. 6. Now, by virtue of Act No. 10 of 1967, by the striking out of the word "other" in s. 6, British subjects were placed on the same footing as aliens, and as a result, it seems to me, by legislative intendment they have been deprived of their special right to a previous hearing.

In *Cooper v. Wandsworth Board of Works,* (1863) 14 C.B. (N.S.) 180 (at p. 194) which was the first in a long line of cases on demolition orders, the rule of natural justice was said to be of universal application and founded on the plainest principles of justice, and it was laid down that public authorities must either give the person concerned "notice that they intend to take this matter into consideration with a view to coming to their decision, or, if they have come to their decision, that they propose to act upon it, and give him an opportunity of showing cause why such steps should not be taken." (Per Sir Wilfred Greene, M.R., in *Urban Housing Co. v. Oxford City Council*). And Professor de Smith states in his Judicial Review of Administrative Action, 2nd Ed., at p. 107, that the general rule which was applied in a variety of legislative contexts, might be satisfied if an opportunity was available of lodging an appeal to higher administrative authority or of making informal representations before the order became finally operative, and it was displaced by express statutory provisions dispensing with the need to serve notice.

In *Cooper v Wandsworth,* Mr. Justice Byles had said:

> "A long course of decisions, beginning with Dr. Bentley's case, and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that the parties shall be

heard, yet the justice of the common law will supply the omission of the legislature."

Thus, in *Board of Education v. Rice*, (1911) A.C. 179 (at p. 182) Lord Loreburn, L.C., in the House of Lords formulated what has come to be recognised to be the best known statement of the *audi alteram partem* rule in English administrative law which is of general application, when in his speech he said:

> "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of state the duty of deciding or determining questions of various kinds . . . . In such cases . . . they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. . . . They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contracting any relevant statement prejudicial to their view."

In *de Verteuil v. Knaggs*, (1918) A.C. 559, the Privy Council decided that the power given by s. 203 of the Immigration Ordinance, Trinidad, to the Governor "on sufficient ground shown to his satisfaction" to transfer the indentures of immigrants from one employer to another, could not properly be exercised without inquiry; except in special circumstances such as an emergency, any person against whom a complaint is made must be given a fair opportunity to make any relevant statement, and to controvert any relevant statement made to his prejudice. In that case, Lord Parmoor, who delivered the judgment of the Board, after reciting s. 203 stated:

> "The ordinance does not prescribe any special form of procedure but there is an obvious implication that some form of enquiry must be made, such as will enable the Governor fairly to determine whether a sufficient ground has been shown to his satisfaction for the removal of indentured immigrants. The particular form of enquiry must depend on the conditions under which the discretion is exercised in any particular case, and no general rule applicable to all conditions can be formulated."

Later in his decision Lord Parmoor stated:

> "Their Lordships are of opinion that, in making such an enquiry there is, apart from special circumstances, a duty of giving to any person, against whom the complaint is made, a fair opportunity of making any relevant statement which he may desire to bring forward, and a fair opportunity of correcting or controverting any relevant statement brought forward to his prejudice."

In *The Queen v. Archbishop of Canterbury*, (1859)1 E. & E., at p. 545, where the Archbishop dismissed an appeal by a curate against the revocation

of his licence without having afforded him an adequate hearing, the court gave redress and issued a mandamus to him "to hear the said appeal and decide the merits thereof" because of a violation of the principles of natural justice. In that case, the relevant legislation enacted: "A curate whose licence shall have been revoked by the Bishop under the section may within one month after service upon him of such revocation, appeal to the Archbishop, who shall confirm or annul such a revocation as to him shall appear just and proper." And Lord Campbell, C J., said:

> "He was bound to hear the appellant, and he has not heard him. It is one of the first principles of justice, that no man should be condemned without being heard. We do not say whether the Archbishop's decision was right or wrong. We say only that he has not heard the petitioner. '*Qui statuit aliquid, parte inaudita altera, aequin licet statuerit, aequus haud fuit.*'"

In *Capel v. Child,* (1832) 2 Cr. & J. 588, where a Bishop was empowered by statute to order a vicar to appoint a curate (to be paid by the vicar) when satisfied either of his own knowledge or by affidavit that the vicar had neglected his duties, it was held that he was under an absolute duty to give the vicar notice and opportunity to be heard before making the order. In that case, Lord Lyndhurst, C.B., after reciting the governing enactment, stated: "Does this not import inquiry, and a judgment as a result of that inquiry? He is to form his judgment."

These three cases were based on the interpretation of the words "on sufficient grounds shown to his satisfaction," "as to him shall appear just and proper," "whenever it may appear either upon affidavit or upon his own knowledge," and were respectively held to import the rules of natural justice, and followed *Cooper v. Wandsworth* where the proposition was laid down that if the statute is silent, the justice of the common law will import the rules of natural justice unless excluded either expressly or by necessary implication by the statute itself. No such words appear in s. 4 of Cap. 99, but the word "deems" appears in the definition of "undesirable person" and, as will be seen later in this judgment, that word as used in this context does not import the principle of natural justice. As I have said, the history of the legislation and the application of the maxim "*expressio unius*" show that the clear intendment of the ordinance was to exclude the rule.

I now pass on to deal with what may be described as the security cases of *Ex parte Venicoff,* (1920) A.E.R. 157, *Ex parte Soblen,* (1962) 3 A.E.R. 641, and *Schmidt v. Secretary of State for Home Affairs,* (1969) 1 W.L.R. 337, which, in my view, firmly support the submission of the Solicitor General that the nature of the power of expulsion itself negatives a right by the alien to a pre-order hearing since the exercise of the power would be effectively frustrated by any requirement for such a hearing.

In Venicoff s case, it was held that the Home Secretary, in ordering the deportation of an alien under Art. 12(1) of the Aliens Order, 1919, now Aliens Order, 1953—Art. 22(b), made under the powers conferred by the Aliens Restriction Act, 1914, when he "deems it to be conducive to the public good," was acting in a purely executive capacity and the alien had no right to notice or hearing. Provided, therefore, the appropriate statutory formalities have been complied with, the functions of the Home Office in relation to the admission and deportation of an alien are almost entirely immune from judicial review. Lord Reading, C.J., in the Divisional Court stated that it was not for the court to pronounce whether a particular order is or is not conducive to the public good, for Parliament had expressly given the power to the Secretary of State as an executive officer, to make an order for the deportation of aliens and had not imposed any conditions. In the Venicoff case it was argued whether the Home Secretary must hold an inquiry before making the order, and counsel had contended that by reason of the use of the word "deems" in Art. 12, the Home Secretary must act as a judicial tribunal and therefore could not make an order without hearing the party against whom it was made. In answer to this contention, his Lordship then gave as his opinion that the Home Secretary was not a judicial tribunal for this purpose, but was an executive officer entrusted with a duty by Parliament. He then stated:

> "The legislature, in its wisdom, took from the courts during the war the power of inquiring into the particular facts of cases in respect of which orders might be made either under the Defence of the Realm Acts or the Aliens Restriction Acts and left it to the judgment of the Secretary of State."

In considering the word "deems" in Art. 12, his Lordship stated:

> "I cannot find anything which would lead to the conclusion that the word 'deems' in Art. 12 is to be construed as if it means that the Home Secretary can come to a conclusion only after he has held an inquiry. If that construction was adopted, the value of the order would be considerably impaired, for it might very well be that a person against whom it was proposed to make such an order would take care, if he had notice of such an inquiry, not to present himself, and, as soon as he knew that an inquiry would be held would take steps to prevent his apprehension. In any event, however, I have come to the conclusion that the Home Secretary is not a judicial tribunal for this purpose, but is an executive officer bound to act for the public good, and it is left to his judgment whether, on the facts before him, it is desirable to make such an order. He must come to a conclusion on the facts before him, and the responsibility is upon him."

And later in his judgment his Lordship said:

> "It is sufficient to say that this is emergency legislation, and that the power which has been given is for the purpose of enabling

the executive to act quickly and does not impose upon the executive the obligation of holding an inquiry."

In relation to the word "deems," Mr. Justice Avory thought that the very word itself was inconsistent with the idea of an inquiry or of a controversy between parties.

The definition of an "undesirable person" under the Expulsion of Undesirables Act, 1960, is in language similar to that of the Aliens Order, 1919, and includes security legislation, so that the case of *Ex parte Venicoff* can only lead to the result that the President when making the order is acting executively and is under no obligation to hold an inquiry.

The decision in Venicoff s case was approved of by the Court of Appeal in *Ex parte Soblen*, (1962) 3 A.E.R. 641, where *habeas corpus* proceedings challenged the validity of a deportation order, *inter alia*, on the ground that there had been a violation of natural justice, as the alien should have been given an opportunity to submit representations against the making of the order. Lord Denning, M.R., agreed that when a public officer is given the power to deprive a person of his liberty or property, the general principle of English law is that that is not to be done without his first being given an opportunity of being heard. This principle could not, however, be implied in regard to the legislation relating to the deportation of aliens. The learned judge then stated that a statute may expressly or by necessary implication provide that the person affected is not to be given a right to be heard. Such an exception has been held to exist in the case of deportation orders.

He then referred to Venicoff s case where it had been held that an alien had no right to be heard before a deportation order is made against him, and although that decision was not binding on the Court of Appeal, it ought to be assumed that it was good law because in 1953 an order in the same words as the order considered in Venicoff's case, was made without any dissent in Parliament. It was therefore reasonable to hold that Parliament was adopting the conclusion reached in the Venicoff case. His Lordship then pointed out that even if this were not an answer to the contention that had been set up, it would not be correct to imply that an alien had a right to be heard, because reasons of security might make such a right unwise as it would give him notice in advance of the intention to make a deportation order, and he might well take advantage of it so as to absent himself and avoid apprehension. Much of the purpose of the legislation would be defeated if it were necessary to give the alien the right to be heard before making a deportation order. Donovan, L.J. agreed that the absence of any express provision for some preliminary hearing was deliberate and was to be justified by the necessities of the case, and was of the view that the power vested in the Home Secretary to order deportation was a power to do an executive act and not a judicial act.

In the Schmidt case, the Court of Appeal considered the refusal by the Home Secretary of applications by certain alien students for an extension of time on their permits to remain in the country, and held that an alien had no right at common law to enter the United Kingdom except by leave of the Crown, which could be refused without giving any reason; and the Secretary of State had ample power under the Aliens Order, 1953, to refuse entry to an alien or to extend his stay if permission were given to enter for a limited purpose. The court said that as the alien students had no kind of right to an extension of their stay, the Secretary of State was under no duty to give them a hearing or to hear their representations, and had not infringed the precepts of natural justice.

In my view, this triumvirate of cases furnishes a complete answer to counsel's contention in this case that the appellant had acquired a right to remain and a right to enjoy the fundamental freedoms under the Constitution for, as pointed out by Lord Denning in the Soblen case, although every alien is free as he sets foot in the country, nevertheless, the Crown (in this country, the President) is entitled at any time to send him home to his own country if, in his opinion, his presence here is not conducive to the public good, and the alien for this purpose may be arrested and put on board a ship or aircraft bound for his own country. In England, this can be done either by way of the royal prerogative or under the Aliens Restriction (Consolidation) Order, 1916, and under the Aliens Order, 1953, made by virtue of the Aliens Restriction (Amendment) Act, 1919; and, as the Solicitor General has said, in Guyana this can be done by the President acting under s. 19(2)(b) of the Immigration Ordinance, Cap. 98 (without supplying grounds), and by s. 4 of the Expulsion of Undesirables Ordinance, Cap. 99, subject to s. 6 of the Ordinance, which has an overriding power over Cap. 98, wherein it is enacted in s. 38 that "nothing in this shall be deemed to affect the operation of the Expulsion of Undesirables Ordinance". This result is not surprising, for, as Lord Denning, M.R., pointed out in the Schmidt case, when it was being urged that the aliens were entitled to a hearing, they had no right to be in the country except by licence of the Crown and could be sent away at any time.

Widgery, L.J., in his judgment pointed out that the alien who had entered without a permit giving him a period of residence had no right kind of right to an extension of that period; and he compared the position of the alien with that of a man who takes the lease of a house for three months and wishes to renew it for a further period, in which case the landlord could reject his application out of hand. No question of natural justice arose because there was no right in the tenant which could be infringed. He concluded that an alien who seeks a variation of his landing permit is not asserting a right or interest capable of being interfered with and therefore entitling him to any consideration of natural justice.

Counsel for the appellant relied on the speech of Lord MacMillan in *Liversidge v. Anderson*, (1941) 3 A.E.R. 338 (at page 366), for his submission

that these three cases were special cases arising out of wartime legislation in times of emergency and these considerations were responsible for the judicial construction placed on the relevant legislation in each case. In *Liversidge v. Anderson,* Lord MacMillan did say:

> "However, in a time of emergency, when the life of the whole nation is at stake, it may well be that a regulation for the defence of the realm may quite properly have a meaning which, because of its drastic invasion of the liberty of the subject, the courts would be slow to attribute to a peacetime measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote, rather than to defeat, its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peacetime as well as in wartime."

The Solicitor General has, however, quite rightly in my view, shown that while it was true that Venicoff s case was based on Art. 12 of the Aliens Order, 1919, which was made by virtue of the Aliens Restriction (Amendment) Act, 1919, the wartime character of the 1914 Act was completely abstracted by the Aliens Restriction (Amendment) Act, 1919, which modified and then applied the 1914 Act on a peacetime basis, and the Earl of Reading, C.J., in Venicoff s case made it clear that under the Act of 1919 the limitation of period in the Act of 1914 had disappeared and there was power for one year from the passing of the Act of 1919 to make the regulations. And in Soblen's case, which was decided in 1962, under the 1919 Act Lord Denning expressly relied on this Act to overrule an objection to the validity of the Aliens Order, 1953, which was based on the fact that the order was not made in wartime, and he affirmed the principle as laid down in the Venicoff case.

There is also the other aspect of the matter that when English Legislation is adopted in other parts of the Commonwealth as here, there is a presumption that the resulting local legislation should be construed in accordance with any judicial construction given to the English parent legislation. [See Craies on Statute Law, 6th Ed., at p. 487, and *Trimble v. Hill,* (1879) 5 App. Cases 342, at p. 344-345].

In *Ridge v. Baldwin,* (1963) 2 A.E.R., (at p. 76), Lord Reid, speaking of wartime legislation, stated that it was an inevitable inference from the circumstances in which defence regulations were made, and from their subject-matter, that in many cases there was an intention to exclude the rules of natural justice. Wartime secrecy alone would require that. So he did not think that any decision that the rule was excluded from wartime legislation should be regarded with any great weight in dealing with cases of the older type. The case of the present appeal at the stage of the making of the Order, because of the possibility of frustration, is not a case of the older type.

I have come to the conclusion, therefore, that the appellant in this case was not entitled to a pre-order hearing, for the reasons that the *audi alteram partem* rule was deliberately excluded by the particular piece of legislation, and on the authority of the Venicoff, Soblen and Schmidt cases the appellant, being an alien, was clearly not entitled to a hearing which would have the effect of defeating the purpose of the legislation.

I turn now to consider the next point, and that is, whether the principles of natural justice arise under s. 6 of the Ordinance, Cap. 99, and, if so, whether there was a breach of the *audi alteram partem* rule in that the appellant was not supplied with the grounds for his expulsion at some time before making his representations in writing. The plain interpretation of the language used in s. 6 leads me to the conclusion that the alien (and British subject since the Amendment Act No. 10 of 1967 came into force) has the right to make representations in writing to the President in relation to the execution of the Order, setting forth reasons (a) for non-compliance or (b) non-enforcement of the Expulsion Order, or (c) for allowance of further time to comply therewith.

As to (a), non-compliance there must mean an excuse for not having complied with the Order, for instance, no available travelling facilities; as to (c), reasons for an extension of time to comply because of illness, or business reasons, or family arrangements; as to (b), reasons legal or factual for the non-enforcement of the Order. I apprehend the section, therefore, to enact that the alien can make representations in respect of those three matters, provided that the representations do not contest or bring into question the validity of the expulsion Order.

It is also clear to me that, as a result of the representations, the President may well act under s. 13(2) of the Ordinance and revoke the expulsion Order, or suspend its operations simply, or subject to such conditions as he may think fit. I can see no reason then why the alien cannot in his representations urge that while the Order is *prima facie* a valid Order, it ought not to be enforced because it was made on false premises, which may then lead to a revocation of the Order by the President under s. 13 of the Ordinance; or urge that it ought not to be enforced because, in fact, he is not an alien, or that the statutory procedure has not been complied with. [*Musson v. Rodriguez,* (1953) App. Cas. 532]. I concur in the view, then, that the provision as to non-enforcement in s. 6 provides an opportunity to nullify the practical effect of the order.

Subsection (2) of s. 6 in clear and precise language enacts that, on receipt of the representations the President shall with all due despatch inquire into the representations and decide upon them. I now approach the question whether, upon those words, the precepts of natural justice are super-imposed, bearing in mind the principle, as conceded by the Solicitor General, is that where the statute is silent on this matter, the justice of the common law will impose the *audi alteram partem* rule, provided that the statute itself does not, either expressly or by necessary implication, exclude the rule: *Cooper v. Wandsworth Board of Works,* (1863) 14 C.B. (N.S.) 180.

In *de Verteuil v. Knaggs*, (1918) A.C. 559, it is important to observe that the common law itself imposed an exception to the rule where prompt action might be required, as in the case of an emergency or obstructive conduct on the part of the person accused.

In *General Medical Council v. Spackman*, (1943) 2 A.E.R. 337, the House of Lords was called upon to consider s. 29 of the Medical Act, 1858, which ran as follows:

> "If any registered medical practitioner shall be convicted . . . of any felony. . . or shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the Registrar to erase the name of such medical practitioner from the register."

The House held that the words "after due inquiry" imported the precepts of natural justice. Viscount Simon, L.C., approved of the dictum of McKinnon, L.J., in the Court of Appeal, where that learned judge had stated: " 'Due inquiry,' however, does involve at least a full and fair consideration of any evidence that the accused desires to offer, and, if he tenders them, hearing his witnesses," and then went on to say later in his speech:

> "So much follows from the structure of s. 29 and from the necessity, if there is to be 'due inquiry,' of giving the accused party a fair opportunity of meeting the accusation . . . . Unless Parliament otherwise enacts, the duty of considering the defence of a party accused before pronouncing the accused to be rightly adjudged guilty, rests upon any tribunal, whether strictly judicial or not, which is given the duty of investigating his behaviour and taking disciplinary action against him. The form in which this duty is discharged—e.g. whether by hearing evidence *viva voce* or otherwise—is for the rules of the tribunal to decide. What matters is that the accused should not be condemned without being first given a fair chance of exculpation."

Lord Atkin then made his pronouncement which has been cited in several authorities:

> "Some analogy exists no doubt between the various procedures of this and other not strictly judicial bodies, but I cannot think that the procedure which may be very just in deciding whether to close a school or an insanitary house is necessarily right in deciding a charge of infamous conduct against a professional man."

There, I understand Lord Atkin to be saying that although the authority concerned may be master of its own procedure when acting judicially, the procedure may vary according to the circumstances of the case.

In *University of Ceylon v. Fernando*, (1960) 1 A.E.R. 631, the Privy Council was called upon to consider Clause 8, Part 1, Cap. 8, of the General

Act of the University of Ceylon which provided that where the Vice-Chancellor was satisfied that any candidate for examination had acquired knowledge of the nature or the substance of any question or the content of any paper, he might suspend the candidate from the examination, and approved of the action of the Vice-Chancellor in setting up a Tribunal of a Commission of Inquiry to inquire into the matter. They held that as no special form of procedure was prescribed, it was for the Vice-Chancellor to determine the procedure to be followed as he thought best, subject to the obvious implication that some form of inquiry must be made such as would enable him to fairly determine whether he should hold himself satisfied that the charge in question had been made out. Their Lordships observed that the question whether the requirements of natural justice had been met by procedure adopted in any case must depend to a great extent on the facts and circumstances of the case in point, and in support of that rule cited the dictum of Lord Atkin in *General Medical Council v. Spackman,* and the words of Tucker, L.J., in *Russell v. Duke of Norfolk,* (1949) 1 A.E.R. 109 at p. 118), where that learned judge said:

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

This brings me to a discussion of *Ridge v. Baldwin,* (1963) 2 A.E.R. 66, which has been described as the Magna Carta of natural justice. Here s. 191(4) of the Municipal Corporation Act, 1882, came under scrutiny by the House of Lords, and it was in the following terms:

> "The Watch Committee or any two justices having jurisdiction in the borough, may at any time dismiss any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the name."

The Watch Committee had met and dismissed the Chief Constable of Brighton because after he had been charged with others with the offence of conspiracy and acquitted, the judge had made certain disparaging remarks about him. At the meeting of the Committee which dismissed him, the Chief Constable was not present, nor was he charged or given notice of the proposal to dismiss him, or particulars of the grounds on which it was based, or an opportunity of putting his case. The House of Lords held that the Watch Committee were bound to observe the principles of natural justice, but the Committee had not done so, for the constable had not been charged nor informed of the grounds on which they proposed to proceed, and had not been given a proper opportunity to present his case. Lord Reid in his speech traced the history of the principles of natural justice and showed, as I understand it, how from the older authorities the courts always imported the principles of natural justice where the authority concerned was called upon to act judicially or in a quasi-judicial capacity, but as the years went on, the authorities became difficult to reconcile because insufficient attention

had been paid to the great difference between various kinds of cases in which it had been sought to apply the principle. He pointed out that what a minister ought to do in considering objections to a scheme may be very different from what a Watch Committee ought to do in dismissing a constable. In modern times, opinions had been sometimes expressed to the effect that natural justice was so vague as to be meaningless, but he felt that not because something could not be cut and dried or nicely weighed, it meant that it did not exist. Lord Reid then showed how the application of the principle had gone awry because, among other things, of a misunderstanding of the dictum of Atkin, L.J. (as he then was) in *R. v. Electricity Commissioners*, (1923) A.E.R. Rep. 150, where he said:

> "Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, acts in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

Lord Hewart, C.J., in *R. v. Legislative Committee of the Church Assembly*, (1927) A.E.R. Rep. 696, had sought to put a gloss on these words of Atkin, L.J., and thought in order that a body may satisfy the required test, it was not enough that it should have legal authority to determine questions affecting the rights of subjects: there must be super-added to that characteristic the further characteristic that the body had to act judicially. The duty to act judicially was an ingredient which, if the test is to be satisfied, must be present. Lord Reid then made it perfectly clear that if Lord Hewart meant it was never enough that a body simply has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially before it can be found to observe the principles of natural justice, then that appeared to him impossible to reconcile with the earlier authorities, and it was not what Lord Atkin meant, for, on the dictum expressed by Bankes, L.J., in the same case, when it was argued that the proceedings of the Commissioners were purely executive and controllable by Parliament alone, that learned judge had inferred the judicial element from the nature of the power. Atkin, L.J., had done the same thing and had cited cases where there was nothing superadded to the duty itself, and both Atkin, L.J., and Bankes, L.J., had inferred the judicial character of the duty from the nature of the duty itself. From a reading of Lord Reid's speech, it appears to me that what the learned law Lord was saying was that where the body or authority is called upon to act judicially or in a quasi-judicial capacity, then the principles of natural justice must be imposed, and there must be a return to *Cooper v. Wandsworth* for, he stated:

> "The question in the present case is not whether Parliament substituted a different safeguard for that afforded by natural justice, but

whether in the Municipal Corporation Act, 1882, it excluded the safeguard of natural justice and put nothing in its place."

In Re(H)K. (an infant), (1967) 1 A.E.R. 226, which concerned Commonwealth children who had a statutory right to join their parents in England if under 16 years, it was held that they had a right to be heard on the question as to whether they were over or under that age. S. 2(2) of the Commonwealth Immigrants Act, 1962, provided as follows:

> The power to refuse admission or admit subject to conditions under this section shall not be exercised in the case of any person who satisfies an immigration officer that he is the child under 16 years of age, of a Commonwealth citizen who is resident in the United Kingdom.

And Lord Parker, C.J., in the Divisional Court, although not quite making up his mind whether the immigration officer was required to act judicially or quasi-judicially, was of the view that the officer was not under any duty to hold a full-scale inquiry or to adopt judicial process and procedure, but he must at any rate act fairly and give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression was so that the immigrant could disabuse him.

Lord Parker then considered the decision of the Privy Council in *Nakkuda Ali v. M. F. de S. Jayaratne,* (1951) A.C. 66, which had been criticised by Lord Reid in *Ridge v. Baldwin,* and felt that the Privy Council did not intend to say anymore than that there is no duty to invoke judicial process unless there is a duty to act judicially. Salmon, L.J., thought that the immigration officer was acting in an administrative rather than in a judicial capacity, and a quasi-judicial capacity which had never been exhaustively defined seemed to cover a case where the circumstances in which a person who is called on to exercise a statutory power and make a decision affecting basic rights of others, are such that the law impliedly imposes on him a duty to act fairly.

In *Maradana Mosque* (*Board of Trustees*) *v. Badi-ud-Din Mahmud,* (1966) 2 W.L.R. 921; (1966) 1 All E.R. 545, P.C., it was laid down by the Privy Council that natural justice requires that a person against whom two charges have been made should be given an opportunity to answer both before a decision is reached.

The Minister of Education of Ceylon had power under s. 11 of the 1960 Act to order that the management of an unaided school be taken over by the Director of Education if satisfied that it "is being administered" in contravention of any of the provisions of the Act (as amended). Allegations of two such contraventions were made against the appellants, who were managers of an unaided school. They had been given an opportunity to answer one of these but not the other when the Minister made an order under s. 11. The Supreme Court of Ceylon refused to grant *certiorari.* On appeal to the Privy Council, it was held, that as regards the

second alleged contravention there had been an infringement of natural justice and that, as to the first, since the section required the contravention to be continuing at the date of the order, by which time the appellants had ceased to be in contravention, the Minister had no jurisdiction to make the order on the date when he did.

Lord Pearce, who delivered the judgment of the Privy Council, stated that it was not correct to regard the Minister's act as purely ministerial, and went on to say:

> "It was not contested below nor before their lordships that the Minister was acting in a judicial or quasi-judicial capacity in satisfying himself whether there had been a contravention. And until he was so satisfied he had no jurisdiction to make the Order. He must therefore in satisfying himself on that point observe the rules of natural justice. He must give the appellants notice of what was charged against them and allow them to make representations in answer."

Lord Denning in *Ex parte Benaim,* (1970) 2 W.L.R. 1009, takes it up from there and pronounces that the heresy that the principles only apply to judicial proceedings and not to administrative proceedings has been scotched by *Ridge v. Baldwin.*

An examination of these authorities leads me to the conclusion that where an administrative officer or body in the exercise of its administrative functions is called upon to decide some question affecting the rights of others, then he or they must act judicially or, as Lord Parker stated in the case of Re (H.) K. (an infant), they must act fairly and observe the rules of natural justice. That can only be said to be done if they have listened to both sides.

There cannot be a hearing in its true sense if the party accused is not aware of what is alleged against him whether or not there is a *lis inter partes.*

I do not intend to embark on an examination of the cases where a Minister was called upon to act under the Housing or Town Planning Acts, for they cannot be of any assistance in determining this question, for, as Lord Reid pointed out in *Ridge v. Baldwin,* in many cases it was sought to apply the principles of natural justice to the wider duties imposed on Ministers and other organs of government by modern legislation, but it had been held that those principles have a limited application in such cases, and those limitations have tended to be reflected in other decisions to which, in principle, they do not apply. Sometimes it may be said the functions of a minister or department may be of a judicial character and then the rules of natural justice can apply, but more often their functions are of a very different character and depend on questions of public interest and policy. And there is another important difference. The Minister cannot do everything himself,

as explained by Lord Shaw in *Local Government Board v. Arlidge,* (1914-15) A.E.R. Rep. 1. The Minister's officers will have to gather and sift all the facts including objections by individuals, and no individual could complain if the ordinary accepted methods of carrying on public business did not give him as good protection as would be given by the principles of natural justice in a different kind of case.

Lord Denning in his "Freedom under the Law," in the chapter dealing with public inquiries, has also pointed out that wherever a scheme of development is proposed which will interfere with private rights of property, Parliament insists before any order becomes effective that there should be a public inquiry into the matter and an inspector from the Ministry holds such inquiry and reports to the Minister. The officials in the department then consider the matter and then the order or scheme is made operative or disallowed. The inspector at a public inquiry is not, however, exercising a judicial function. He is not there to hear and decide as the President in this case. He is only there to hear and report to the Minister. The Minister must, no doubt, consider his report, but he is not bound by it nor is he confined to it. If he chooses to act on other information, he may do so. The Minister, therefore, acts in an administrative capacity and does not perform a judicial function. Lord Denning continues:

> "The safeguards against abuse of his powers are not to be found by requiring him to act judicially but by requiring him to follow the prescribed code of procedure, that is to say, a 'local inquiry' at which objectors can be heard, an inspector's report, and consideration by the Minister of the report. So long as the statutory procedure is complied with and the Minister genuinely considers the matter, the courts will not interfere."

In *Ridge v. Baldwin,* Lord Reid, in considering the application of the principles of natural justice to cases of dismissal, distinguished three classes of cases:

(i) dismissal of a servant by a master—[see *Vidyo-Daya University of Ceylon v. Silva,* (1963) 1 W.L.R. 77];

(ii) dismissal from office held at pleasure; and

(iii) dismissal from an office where there must be something against a man to warrant his dismissal;

and held that it was only in the third class of case that the principles of natural justice arose.

In *Durayappah v. Fernando,* (1967) 2 A.C. 337, we were told by the Privy Council that where the maxim audi *alteram partem* is in issue, a court should bear in mind the nature of the affected interests of the complainant, the circumstances in which intervention against them is justified, and the sanctions consequent upon such intervention. All of these principles, however, in my submission, are not applicable where the statute itself introduces the principles of natural justice, and this is what is done in s. 6 of

Cap. 99. So, too, the circumstance that the alien has no right to be here except by licence of the State, as pointed out in the Schmidt case, can have no effect on the operation of s. 6; so it therefore becomes unnecessary to consider whether the alien has a legitimate expectation of being allowed to stay; and it is interesting to note that even in England where there is no legislation comparable to s. 6, Lord Denning in the Soblen case reserved his opinion on the question whether after a deportation order is made and before it comes to be executed (by the alien being expelled from the realm), an alien may not in some circumstances have a right to be heard. It seems to me that under s. 6 the alien has that right, whereas in England it is a matter of concession before a Bow Street magistrate under the European Convention of 1955, which Lord Denning informs us in Schmidt's case may soon become law. It appears, therefore, that in this country, by virtue of s. 6 of Cap. 99, since the year 1886 we were ahead of England where representations were only permitted as a matter of grace.

It must follow from what I have said that the principles of natural justice must arise under subsection (2) of s. 6 of the Expulsion of Undesirables Ordinance, Cap. 99, as superimposed on the administrative functions of the President is the duty to act judicially, and the President in inquiring into the representations is acting in a quasi-judicial capacity and must act fairly before he decides upon them. For, as Lord Loreburn pointed out in *Board of Education v. Rice,* a case dealing with the obligations imposed by rules of natural justice rather than the question as to whether those rules applied at all, the rules applied to a body who had the duty of deciding or determining questions, and, indeed, to everyone who decides anything. It cannot be said that in this case the rules of natural justice were observed when the appellant was not supplied with the grounds for his expulsion before making his representations, as in that situation he would be in no position to answer allegations of which he was unaware, and the President would be unable to evaluate properly the representations if the appellant did not have the benefit of the grounds. The appellant's representations could amount to no more than a speculation of the grounds for his deportation, for he was denied the opportunity of disabusing the President. See *Stafford v. Minister of Health,* (1946) K.B. 621, where the words of Charles J. become apt in this case:

> "The appellant's objections are simply blank statements or contentions. If the Minister desired to hear both sides, as I am sure that on reflection he would, all that he had to do was to pass the Council's detailed answer to the appellant, who would then have set out his case *in extenso* and not merely, as he did, in headings of grounds of appeal."

Again, Lord Denning in *Kanda v. Government of Malaya,* (1962) 2 W.L.R. 1161, stressed that if the right to be heard is a real right which is

worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him, and then he must be given a fair opportunity to correct or contradict them. Similar language had been used by Harman J. (as he then was) in *Byrne v. Kinematograph Renters Society, Ltd.*, (1958) 1 W.L.R. 762, when he said:

> "What then are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, he should be given an opportunity to state his case; and, thirdly, of course, that the Tribunal should act in good faith. I do not myself think that there is really anything more."

It must be made clear that all I have said is subject to the exception of "special circumstances" which the common law imposes on the rule, such as in matters involving the security of the State or national emergency, in which case, no grounds for expulsion need be given—*de Verteuil v. Knaggs.* But this, apparently, is not such a case as the plea of national security has not emerged.

No words could be stronger than those of Brett, L.J., in *R. v. Local Government Board,* (1882) 10 Q.B.D. 309, 321, where he said:

> "Wherever the legislature entrusts to any body of persons other than to the superior courts the power of imposing an obligation upon individuals, the court should hold that the body is required to act judicially."

I am, therefore, of the view that the President, acting as a tribunal under the statute, did not do so in this case, and, remembering the words of Lord Lyndhurst in *Capel v. Child,* could not properly have formed his judgment.

The difference, then, between s. 6 and s. 5 (before its repeal) was that the alien had to displace a decision already adversely made against him, whereas the British subject did not have to do so and got his opportunity to displace a proposed decision before the order was made.

The submission that the appellant was entitled to an oral hearing as in his representations in writing he had asked for one, must be rejected in the circumstances of this case. A party is not entitled to an oral hearing so long as he has an adequate opportunity to present his case, *and a fortiori* he is not entitled to a hearing by the person who actually makes the decision. In my view, s. 6 of Cap. 99 lays down the procedure to be followed, and gives the alien an adequate opportunity of presenting his case where, of course, the grounds for his expulsion are supplied to him, and where the procedure is laid down by the statute, the authority is bound to follow that procedure. *Local Government Board v. Arlidge,* (1915) A.C. 120, *Ceylon University v. Fernando,* (1960) 1 W.L.R. 223. In those cases where the courts have held that an oral hearing was required, no procedure was laid down by the statute,

and in that situation if the authority is left without express guidance, it must still act honestly and by honest means. *Local Government Board v. Arlidge.* In my opinion, the procedure laid down under s. 6 of Cap. 99 is sufficient to achieve justice without supplementing the necessity for an oral hearing. See *Wiseman v. Borneman*, (1969) 3 A.E.R. 277, and the words of Lord Evershed in Re K. (Infants), (1963) 3 W.L.R. 408. The character of the proceeding and its purpose do not suggest or lend themselves to an oral hearing.

The act of the President then in making his inquiry into the representations without the appellant being seized of the grounds of his expulsion must, therefore, be held to be made without jurisdiction and voidable at the instance of the appellant. See the judgment of Lord Reid in *Anisminic v. Foreign Commission*, (1969) 1 W.L.R. 213, and the judgment of the Privy Council, in the Durayappah case, (1967) 2 A.C. 337, which disapproved of Lord Reid's view in *Ridge v. Baldwin* that where the rules of natural justice were not observed, the decision is null and void.

I am fortified in this conclusion by the decision of the High Court of Australia in Re Yates ex parte Walsh & Johnson, 37 C.L.R. 36, where the appellant was summoned by the Minister to appear before a Board under s. 8 AA of the Immigration Act, 1901-1925, to show cause why he should not be deported from the Commonwealth after a decision had been taken in respect of such deportation, and it was held that in order that a person may be lawfully required to show cause under the section, it was a necessary condition that he should be informed with reasonable definiteness of what particular acts the Minister was satisfied. I can find no distinction to be drawn between "showing cause " why a person should not be deported after a decision to deport has been taken, and making representations in writing why the expulsion order should not be enforced under s. 6 of Cap. 99, and Isaacs J., in *Ex parte Walsh*, stated:

> "There seems to me no just means of enabling the person to show cause except by furnishing him with a sufficiently clear indication of the 'acts' as being those in which the Minister finds he has been concerned. . . . But what does 'show cause' involve? Does it mean that, without anything whatever alleged or charge notified, a man must affirmatively prove to an irresponsible tribunal he is not unfit to remain in Australia?"

Earlier in his judgment that learned judge had said:

> "But if the Minister must first find 'acts' and must afterwards base his deportation order on those same 'acts' (plus the recommendation of the Board or the failure of the person to attend) how in the name of common justice can it be denied that the accused is entitled to know with sufficient precision what those alleged 'acts' are, and know that they are the acts which the Minister himself has found?"

I am further fortified by the dictum of Donovan, L.J., (p. 663) in *Ex parte Soblen*, which reads as follows:

> "I think the question should be approached from the standpoint that, ordinarily, a man shall be heard in his own defence before his liberty is interfered with in this drastic way, and that he should be denied that elementary requirement of natural justice only if the statute . . . when fairly construed, either expressly or by necessary implication exclude it."

I have endeavoured to show that far from excluding the principles of natural justice or being silent on it, the statute itself under s. 6 imposes the principles; and, according to Lord Reid in *Ridge v. Baldwin*, Parliament would know that the courts have an inveterate habit of imposing the rule on legislation in the language of s. 6 of Cap. 99.

I cannot accede to the contention of the Solicitor General that even if the appellant was not supplied with the grounds for his expulsion at the time the Order was served on him and before his representations were sent in, the grounds were eventually supplied to him by the Minister through his legal adviser and therefore there could be no failure to observe the rules of natural justice. The record shows that the Order was received by the appellant on the 3rd December, 1970, and the representations are dated 7th December, 1970. The legal adviser, in an interview with the Minister, obtained the reasons at some time between the 7th and 10th December, 1970, and it is not quite clear when he passed on those reasons to the appellant—it could be the 8th, the 9th or the 10th December, 1970. Meanwhile, the representations had already been sent in on the 7th, and under the Order the appellant was required to leave on the 10th. So if the grounds for his expulsion were conveyed to him at such a late stage, I do not think it could be properly urged that he had a reasonable time in which to make further representations in respect of the grounds which had been supplied to him. Nor was it drawn to his attention that he could make further representation.

I should think that the proper time for the giving of the grounds is when the Order is served on him. If the word "President" is substituted for the words "Deputy Commissioner," then the language of Lord Guest in *Shareef v. Commissioner for Registration of Indian and Pakistani Residents*, (1965) 3 W.L.R. 704, a decision of the Privy Council, becomes most apposite in this case, i.e.,

> "The Deputy Commissioner in fulfilling his duties under the Act occupies an anomalous position. In his position as a member of the executive he regulates the investigation into the matters into which he considers his duty to inquire and as an officer of state he must take such steps as he thinks necessary to ascertain the truth. When conducting an inquiry under section 10, 13 or 14 he is acting in a semi-judicial capacity. In this capacity he is bound to observe the principles

> of natural justice [section 15(4)]. In view of his dual position his responsibility is increased to avoid any conduct which is contrary to the rules of natural justice. These principles have often been defined and it is only necessary to state that they require that the party should be given fair notice of the case made against him and that he should be given adequate opportunity at the proper time to meet the case against him." (*Ridge v. Baldwin*).

The third point raised by Counsel for the appellant which, in my view, can be answered very shortly, was that under Art. 12(1) of the Constitution of Guyana, the appellant was free to hold opinions without interference and also free to communicate his ideas, and therefore if he was a man who was racially prejudiced and communicated those ideas, then he could not be hindered in the enjoyment of his freedom of expression. Art 12(2)(a) enacts:

> "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—
>
> (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;"

And the submission is that the Immigration Ordinance, Cap. 98, and the Expulsion of Undesirables Ordinance, Cap. 99, are not laws which make provisions specifically for public safety or public order. I reject this submission as being unsound as it appears to me that counsel is seeking to draw a distinction between what the French call *Le Loi* and *Le Droit* for which there is no justification. Both Ordinances, Cap. 98 and Cap. 99, included security legislation which is concerned with public order and public safety, and would be "any law which makes provision". *Olivier v. Buttigie* (1966) 3 W.L.R. 310, can have no application, as in that case there was no existing law which "made provision."

So the answer to the question which I posed at the commencement of my judgment must be in the affirmative, and the appellant can, from the legislation itself, i.e., s. 6 of Cap. 99, invoke the principles of natural justice from the riches of the common law, which is described by Lord Morris of Borth-y-Gest in *Wiseman v. Borneman* as only "fair play in action," for which these courts do not wait for directions from Parliament.

Even if I were wrong in the view that I have taken and the meaning of s. 6 of Cap. 99 is not what I consider it to be, I should take refuge in the juristic approach of the eminent French Jurist Francois Geny that where the law is not clear, the judge should tend to look to actual requirements of facts before him and give his decision with his eyes on the principles of justice and utility rather than seek for a decided case closely resembling the

one before him and obtain an answer to his difficulty only by reasoning by analogy from that case.

Finally, I concur with the observations of the learned Chancellor, whose judgment I have read in respect of the point as to whether this court can go behind the Order if it considers it to be a sham, or made with an ulterior motive, or made in good faith but in excess of the powers conferred on the President acting on the advice of the Minister, and have nothing to add.

I would allow the appeal and set aside the Order made by the trial judge, and grant a declaration that, in these circumstances, the expulsion order of the 3rd December, 1970, is valid but unenforceable, and the letter of the President dated 10th December, 1970, ineffective. I agree with the order proposed by the learned Chancellor.

PERSAUD, J. A.: That a sovereign State has the supreme power to refuse an alien entry or to annex conditions to permission to enter, and to expel or deport from the State at pleasure is accepted. This is how it has been put by Lord Atkinson sitting in the Privy Council in *A.G. for Canada v. Cain & Gilhula* [(1906) A.C. at 546]:

> "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order and good government, or to its social or material interests."

This view of the right of a sovereign State has never been dissented from, and is as sound today as it was in 1906, though it is also recognised that an alien who is resident within the realm is given the same rights for the protection of his person and property as a natural born or naturalised subject [Per Lord Phillimore in *Johnstone v. Pedlar* (1921) All E.R. Rep. at 192].

With these precepts in mind, I will examine the propositions advanced by the appellant in this case, observing at the same time, that the President purported to make the deportation order (in this judgment referred to as the Order) under the Expulsion of Undesirables Ordinance (Cap. 99). So far as is relevant for this case, s. 4 of Cap. 99 (hereinafter referred to as the ordinance, unless otherwise described) provides that the Governor (now the President) may at any time make an order against an undesirable person requiring him to leave the country within a time fixed by the order and thereafter to remain out of the country; and an undesirable person is defined as any person, other than a citizen of Guyana in respect of whom the Governor-General (President) deems it conducive to the public good to make an expulsion order. An expulsion order means, *inter alia*, an order made by the Governor (President) requiring an undesirable person to leave the country within the time fixed by the order and thereafter to remain out of the country.

ROLF BRANDT

v.

ATTORNEY GENERAL OF GUYANA AND C. A. AUSTIN

In Guyana after an order has been made, the person against whom such an order is made has a right to make certain representations under s. 6 of the Ordinance. That section, taking into account the consequential constitutional modifications, provides as follows:

> "(1) Any person against whom an expulsion order has been made may make representations in writing to the President setting forth reasons for non-compliance with such order or for non-enforcement thereof or for allowance of further time to comply therewith, and on any such person signifying his desire so to make representations the person in whose custody he shall be, shall give him all reasonable assistance for their preparation and forward the writing to the President.
>
> (2) On receipt of any such representations the President shall with all due despatch inquire into them and decide upon them."

In this matter much ground has been traversed, and much time spent in so doing; much erudite and penetrating argument has been advanced which bear testimony to the industry of counsel, but, in my opinion, the decision must ultimately turn on the interpretation of the section set out above.

Put succinctly, and as I apprehend them, the submissions adduced on behalf of the appellant are as follows:

(i) The appellant was entitled to be heard before the Order was made (the Order was made on December 10, 1970); in pursuance thereof that as his rights and obligations were affected by the Order, he ought to have been informed of the allegations made against him; that as this was not done, the Order was invalid, which invalidity could not have been cured by the subsequent' representations which were made for and on his behalf;

(ii) the appellant's right to a hearing was guaranteed by the Constitution of Guyana, and such right was not displaced by statute or otherwise, as the appellant was a person who prior to the making of the Order had a legitimate expectation to remain in Guyana;

(iii) the reasons given for making the Order were not capable of supporting the conclusion that the appellant was an undesirable person. I take this to mean that the reasons given were insufficient to justify the Order;

(iv) the Order was contrary to the fundamental rights of the appellant as provided in arts. 5 and 14 of the Constitution;

(v) the appellant was denied a fair hearing and an enquiry within the meaning of s. 6 of the Ordinance, as a result of which the Order was unenforceable.

I shall attempt to deal with grounds (i) and (iii) together, as they both seek to advance the right of the appellant to be heard prior to the Order being made.

S. 6 of the Ordinance leaves it to the President to decide whether it is conducive to the public good to deem any person, other than a citizen of Guyana (the appellant is not) an undesirable person. Such was the power vested in the Secretary of State in England by the Aliens Order, 1919 in R. *v. Leman St. Police Inspector Ex. p. Venicoff* [(1920) All E.R. Rep. 157], and such was the stand taken by the alien in that case. In delivering his judgment Viscount Reading, C.J., said (at p. 160):

> "What the court has to do is to consider the statute, and the article of the order made under it, so as to ascertain what are the powers of the Secretary of State. It is not for this court to pronounce whether a particular order is or is not conducive to the public good. Parliament has expressly given the power to the Secretary of State, as an executive officer, to make an order for the deportation of aliens, and has not imposed any conditions."

And referring to a suggested construction of the word "deems" to mean that the Secretary must hold an inquiry before the order is made, Lord Reading said (ibid):

> "If that construction was adopted, the value of the order would be considerably impaired, for it might very well be that a person against whom it was proposed to make such an order would take care, if he had notice of such an inquiry, not to present himself, and, as soon as he knew that an inquiry would be held, would take steps to prevent his apprehension. In any event, however, I have come to the conclusion that the Home Secretary is not a judicial tribunal for this purpose, but is an executive officer bound to act for the public good, and it is left to his judgment whether, on the facts before him, it is desirable to make such an order. He must come to a conclusion on the facts before him, and the responsibility is upon him."

It was held that there was no necessity for the Secretary of State to hold an inquiry before making the order, much being made of the point that the act of the Secretary of State under the provision was an executive act, and so not susceptible of judicial inquiry. I will readily grant that the provision concerned in that case was war time legislation, but subsequent decisions decided on peace time legislation have retained and justified this principle. I will deal briefly later on with the suggested different approach of the courts to the interpretation of the two types of legislation, but for the time being will content myself with examining other cases where it was held that the courts may not inquire into the validity of a deportation order as such.

In passing, I may mention that both *R. v. Home Secretary, Ex. p. Bressler* [(1924) All E.R. Rep. 668] and *R. v. Home Secretary, Ex. p. Thierry* [(1916—17) All E.R. Rep.] were determined under war time legislation, as

was *Liversidge v. Anderson* [(1941) 3 All E.R. 338]. However, it is worthy of note to observe that in the *Thierry* case both Swinfen Eady, C.J., and Pickford, L.J. expressed the view that if it were attempted to carry out by illegal means an order that was properly made, that may be a good ground for restraining the illegal act, even though the order would not be invalidated.

Liversidge v. Anderson [(1931) 3 All E.R. 338], which was described by Lord Reid in *Ridge v. Baldwin* [(1963) 2 All E.R. 66] as a very peculiar decision, itself turned on the interpretation of the words, "If the Secretary of State has any reasonable cause to believe any persons to be of hostile origin or associations, etc." as contained in reg. 18B of the Defence (General) Regulations 1939, legislation which the English Parliament introduced during World War II. In that case, Lord Atkin, in his dissenting judgment, expressed the view that statutes speak the same language in war as in peace, and that the functions of judges is to give words their natural meaning, following the dictum of Pollock, C.B., in *Bowditch v. Bowditch* [(1850) 5 Exch. 378] that "In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute." Lord Wright, one of the majority who dismissed the appeal, however, recognised the conflict raised between the liberty of the subject and the supremacy of Parliament, for he said (at p. 372 ibid):

> "All the courts today, and not the least this House, are as jealous as they have ever been in upholding the liberty of the subject. That liberty, however, is a liberty confined and controlled by law, whether common law or statute. It is, in Burke's words, a regulated freedom. It is not an abstract or absolute freedom. Parliament is supreme . . . . If extraordinary powers are here given, they are given because the emergency is extraordinary, and they are limited to the period of the emergency."

I wish to lay particular emphasis on the last words of the passage above, for no doubt, Lord Reid must have had them in mind when he said in *Ridge v. Baldwin* (ibid at p. 76): "It seems to me to be reasonable and almost an inevitable inference from the circumstances in which defence regulations were made and from their subject-matter that at least in many cases the intention must have been to exclude the principles of natural justice."

The same thought seemed to have been in the mind of Turner, J. in the New Zealand case of *Reade v. Smith* [(1959) N.Z.L.R.] when he said at p. 1000:

> "Cases dealing with war regulations promulgated in times of great national danger must, in my opinion, be carefully examined before being used too hastily as a touchstone for the validity of regulations made under more normal conditions. In the first place, the very wide scope of such statutes as the Defence of the Realm Act, 1914, the

> Emergency Powers (Defence) Act, 1940 or of the corresponding New Zealand statutes made it almost impossible to contend that any normal human activity was ineligible for regulation under one or other of the very general headings contained in the enabling sections. And, secondly, as is demonstrated by the speeches of the Lords in *Liversidge v. Anderson* (1942) A.C. 206; (1941) 3 All E.R. 338 (perhaps the high-water mark of these cases) the courts, in deciding such cases, have often quite understandably been influenced by the atmosphere of national emergency in which they were heard. In some of the cases a decisive factor has been the question of public safety involved in the disclosure of the source of ministerial information. No such feature, of course, is present in the case before me, which I can consider calmly in the more tranquil atmosphere in which litigation is conducted in times of peace."

But the "war time legislation" cases apart, the Courts in England have consistently held that the discretion to make an order for deportation which is vested in the Secretary of State may not be questioned in a court of law.

By the time the case of *Reg. v. Governor of Brixton Prison, Ex. p. Soblen* [(1962) 3 W.L.R. 1154] came to be decided, the Aliens Restriction Act, 1914 had been amended by the Aliens Restriction (Amd.) Act, 1919 by the deletion of the reference to the existence of a state of war between His Majesty and any foreign power, and making the power exercisable by the Secretary of State to impose restrictions on aliens at large, such restrictions to be imposed by an Order. The various powers were spelt out in the Aliens Order, 1953 including the making of an order of deportation if the Secretary of State "deems it conducive to the public good." It was under this power that the Secretary of State acted in the Soblen case. On the question whether or not the alien had a right to submit representations before the Order was made, it was held that deportation was an act of an executive, not of a judicial or quasi-judicial character, and, accordingly, an alien was not entitled to an opportunity of submitting representations against the making of the order. At p. 1178 (ibid) Lord Denning, M.R., after approving of the decision in the Venicoff case appeared to have been echoing the sentiments expressed by the Earl of Reading when he said:

> "And when I look to the objects of this legislation, it seems to me that much of the purpose of it would be defeated, if it were necessary for the Home Secretary always to give every alien the right of being heard before a deportation order is made. Reasons of security themselves might be such as to make it unwise and undesirable to give him advance notice of the intention to make a deportation order. He might well take advantage of it so as to absent himself and to avoid apprehension. I think, therefore, that there is no right to be heard before a deportation order is made."

Lord Denning went on, be it noted, to reserve his opinion whether an alien may not in some circumstances have a right to be heard after the deportation

order is made but before it is executed. In the same case, Donovan, L.J., expressed the view (at p. 1184) that there would undoubtedly be cases where the intimation of proposed deportation would make the power to do so almost useless, and continued: "I, accordingly, concur with the view that such a condition" (to hear the alien before the order is made) "is not to be implied, but rather that the absence of any express provision for some preliminary hearing was deliberate and is to be justified by the necessities of the case." Pearson, L.J., said (at p. 1193) that the expression "if the Secretary of State deems it expedient to be conducive to the public good" refers "unmistakably to an executive policy decision to be taken by a Minister of the Crown as to what is expedient to be done, and not to an issue to be determined judicially or semi-judicially between parties. The maxim *audi alteram partem* is no doubt a sound and valuable maxim of administration as well as of adjudication, but it may not be suitable for insertion as an implied condition in the terms of a particular statutory instrument."

In *Schmidt v. S. of S. for Home Affairs* [(1969) 1 All E.R. 904], which was concerned with the Hubbard College of Scientology, the Minister had refused to extend the stay of certain aliens in the U.K., and Lord Denning, M.R., said (at p. 908): "I think the Minister can exercise his power for any purpose which he considers to be for the public good or to be in the interests of the people of this country". Widgery, L.J., expressed himself thus (at p. 911):

> "I can see no reason whatever in the Aliens Order, 1953 to suggest that an alien possessing a permit for a limited period of residence has any kind of a right to a renewal; and accordingly when he asks for renewal, there is no obligation on the Home Secretary to give reasons which are consistent with the legislation or to act fairly or to do any of the other things for which counsel has contended in this case. Of course, very different considerations may arise on the making of a deportation order. An alien in this country is entitled to the protection of the law as is a native, and a deportation order which involves an interference with his person or property may raise quite different considerations . . ."

Thus, it will be observed so far that though all the judges are agreed that upon the interpretation of the relevant legislation, an alien is not entitled to be heard before a deportation order is made, both Lord Denning—in the Soblen case—and now Widgery, L J.,—in the Schmidt case—have expressed reservations as to whether an alien has a right to be heard before the order is executed.

In *R. v. Brixton Prison Governor. Ex. p. Havlide* [(1969) 1 All E.R. 109] Lord Parker, C J., expressed the opinion that whatever the courts may do as regards granting a conditional discharge or making a probation order

under art. 26 of the Aliens Order, 1953, it cannot exclude the absolute discretion of the Secretary of State to make a deportation order.

Similarly, in the instant case, it is my view that once the President deems it conducive to the public good to make an expulsion order, the courts may not inquire into his reasons for so doing, nor, I venture to think, into the sufficiency of those reasons, for such a decision, apart from being an executive one, may be based on policy, or on other matters, the examination of which the courts are not competent to undertake, for to do so would be to cloak the courts with executive powers under the guise of holding a judicial inquiry. This must be studiously avoided, as it is no business of the courts to pass judgment on the decisions of the executive which are based on policy considerations. In this regard, I would like to quote *in extenso* from Lord Greene's judgment in *Carltona, Ltd. v. Commissioners of Works* [(1943) 2 All E.R. at 564] where the matter is put very clearly in the following language:

> "It has been decided as clearly as anything can be decided that, where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith. If it were not so it would mean that the courts would be made responsible for carrying on the executive government of this country on these important matters. Parliament, which authorises this regulation, commits to the executive the discretion to decide and with that discretion if *bona fide* exercised no court can interfere. All that the court can do is to see that the power which it is claimed 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."

But there is a caveat, and an important one, that I would enter on the absolutism of such a proposition, and it is this: One of the most important tasks of the courts is to see that the powers of the executive are properly used, that is, honestly and reasonably for the purposes authorised by Parliament and not for any ulterior motive, for it is said, "All power corrupts. Total power corrupts absolutely."

This concept is adequately and conveniently covered by Coke in his "Institutes" when he wrote:

> "This court hath not only jurisdiction to correct errors in judicial proceedings, but other errors and misdemeanours extra-judicial tending to the breach of the peace or oppression of the subjects, or raising of faction, controversy, debate, or any other manner of misgovernment; so that no wrong or injury, either public or private, can be done,

> but that this shall be reformed or punished in one court or the other by due course of law."

And, of course, lest we forget, there was the now famous dictum in 1924 of Lord Hewart which has retained in its simplicity the true meaning of the function of the courts to the effect that: "(It) . . . is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" *R. v. Sussex, Justices, Ex. p. Mc Carthy*, (1924) 1 K.B. 259].

So that notwithstanding that a deportation order may appear valid on its face, the authorities seem to indicate that in certain very limited instances, viz., sham, or ulterior motive, the courts may go behind the order. In *R. v. Supt. of Chiswick Police, Ex. p. Sacksteder* [(1918) 1 K.B. 578], where the Home Secretary made a deportation order under the Aliens Restriction Act, 1914 and the Aliens Restriction (Consolidation) Order, 1916 as a result of which an order for the alien's arrest was also issued, it was held that the order for arrest was valid. Pickford, L.J., in the course of his observations, said (ibid at 586):

> "I am not prepared to say that in every case where there is an order for detention or imprisonment the court is entitled to go behind that and see what the motives for making that order were. But I certainly am not inclined to say that in no case can the court go behind an order which on the face of it is valid ordering detention or custody. If that order is, if I may say so, practically a sham, if the purpose behind it is such as to show that the order is not a genuine or *bona fide* order, it seems to me the court can go behind it. Therefore I wish to guard myself against being supposed to say there are no circumstances in which the court can go behind an order for detention valid on the face of it."

And in the same case, Warrington, L.J., said (at p. 589):

> "Then can the court in this case go behind the order, which is a legal order, for arrest? I am far from saying that there may not be cases in which that can be done. If, for example, the order, though on the face of it a valid order, was a mere sham to cover up something which would be illegal or to enable some subsequent act to be done which would itself be illegal. In the first case I am far from saying that the court could not go behind the apparently valid order and say that it was no order at all. In the second case I am far from saying that the court might not find means of preventing the subsequent illegal act from being done."

It is conceded that in that case both judges were speaking of the order of arrest, but it seems to me that their observations can with equal force be applied to a deportation order. And this view is fortified by the dicta, both

of Lord Denning and Donovan, L.J., in the Soblen case. In comparing the principles arising out of the law of extradition and those dealing with deportation, Lord Denning said (at p. 1181 ibid):

> "How are we to decide between these two principles? It seems to me that it depends on the purpose with which the act is done. If it was done for an authorised purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it was unlawful."

And Donovan, L.J. dealt with the question whether the court could hold that the order was invalid because it was a sham, and said (at p. 1186):

> "The task of the subject who seeks to establish such an allegation as this is indeed heavy. On the face of it the order which he wishes the court to quash will look perfectly valid, and to get behind it and to demonstrate its alleged true character he will need to have revealed to him the communications, oral and written, which have passed between the home and the foreign authorities. But if the appropriate Minister here certifies, as he has done in this case, that such disclosure will be contrary to the public interest, then as a general rule the subject will not obtain it. He will be left to do his best without such assistance; and in the nature of things, therefore, he will seldom be able to do more than raise a prima facie case, or alternatively to sow such substantial and disquieting doubts in the mind of the court about the *bona fides* of the order he is challenging that the court will consider that some answer is called for. If that answer is withheld, or, being furnished is found unsatisfactory, then, in my view, the order challenged ought not to be upheld, for otherwise there would be virtually no protection for the subject against some illegal order which had been clothed with the garments of legality simply for the sake of appearances and where discovery was resisted on the ground of privilege."

It will be observed that Donovan, L.J. has directed attention to the fact that the order itself could be attacked in the circumstances he has set out, no doubt on the ground of lack of jurisdiction. An integral part of sham and ulterior motive is *mala fides.* If a *prima facie* case of *mala fides* is established (even though the burden to do so may be truly onerous and well nigh impossible), the courts will intervene on behalf of the subject. This question was examined in *Union of India v. Goel* [(1964) 4 S.C.R., at pp. 729-30] (a case dealing with disciplinary proceedings against a civil servant whom art. 311 of the Constitution of India guaranteed a due inquiry before he was dismissed, or removed or reduced in rank) where Gajendragadkar, J., speaking for the entire court compared the no-evidence situation with the sufficiency of evidence. He accepted that sufficiency or adequacy of evidence was not a matter for the courts, but held that the court "can and must enquire whether there is any evidence at all in support of the impugned conclusion." Dealing with the question of *mala fides,*

he said (at p. 729): "But we are not prepared to hold that if *mala fides* are not alleged and *bona fides* are assumed in favour of the appellant, its conclusion on a question of fact cannot be successfully challenged even if it is manifest that there is no evidence to support it."

In the case now before us, there is no allegation of *mala fides,* and I have already expressed the view that adequacy of the evidence on which the order was made, is not a matter upon which this court can properly pronounce. I have referred to the Indian case to show that an order such as this can be attacked, it seems, if *mala fides* based on lack of evidence can be proved. But I must be careful to attract attention to the fact that in that case the civil servant's rights to be informed of the charges to be heard and to make representations are explicitly spelt out in the Constitution.

My conclusion on this submission, therefore, is that except in the case of sham, ulterior motive, and *mala fides,* (the onus of proving which rests on the alien) the making of a deportation order may not be attacked, and in this case, the appellant would have had no right to be heard before the order was made; and if this is so, then it must follow that he was not entitled to be informed of the evidence against him before the order was made. And I repeat, sufficiency of evidence, once there is evidence, is a matter for the executive, not the courts.

Grounds (ii) and (iv) may now be dealt with together:

It is argued that the appellant had, if not a right or interest, at least a legitimate expectation to remain in Guyana, approval having been given to him to remain here as manager of Messrs. Robert Alke & Co., commercial agents and importers, in pursuance of the provisions of the Immigration Ordinance, Cap. 98. Therefore, argues counsel, the appellant had a legitimate expectation to remain in Guyana until the permit is lawfully terminated under that ordinance. As I understand it, this is separate and apart from the argument that by virtue of arts. 5, 12 and 14, he had certain guaranteed constitutional rights.

The legitimate expectation, says counsel, springs from the permit granted to his client under the provisions of Cap. 98. The Deputy Senior Immigration Officer has sworn in an affidavit—which forms part of these proceedings—that the permit was given under s. 12 of the Ordinance, and reg. 4 of the Regulations (Cap. 98, sub. leg.). In my judgment, the submission bears examination if only by reason of the reference to s. 12 by the Immigration Officer.

The categories of persons whom Cap. 98 designates as prohibited immigrants for the purposes of that ordinance are set out in s. 3. S. 12 enables an immigration officer to grant a permit to an immigrant to remain in the country for the purpose of making further inquiry as to whether or not he should deem the immigrant a prohibited immigrant for such time

as may be necessary for carrying out the inquiries. The proviso to the section is interesting, and is reproduced hereunder:

> "Provided that—
>
> (a) the grant of such a permit shall not prejudice in any way the making of the decision as to whether the immigrant is or is not a prohibited immigrant, or the taking of any action under this ordinance as a consequence of such decision; and
>
> (b) no such action shall be taken while such permit is still in force."

I understand the proviso to mean that the grant of time under the section shall not, during that time, preclude an immigration officer from deeming the immigrant prohibited, and taking such action as a result thereof, as he may be authorised to take by the ordinance, provided no such action is taken within the time granted. This prohibition does not, however, affect the right of the President, or an immigration officer acting on the direction of the President, to revoke the permit under s. 19(4)(b). But it seems to me that until s. 19(4)(b) is invoked, a permit granted under s. 12 remains alive. However, can it be said that s. 12 was the appropriate section in this case?

The letter of January 16, 1970 signed by the Permanent Secretary, Ministry of Home Affairs says the approval was given for the appellant 'to remain in Guyana as Manager of Messrs. Robert and Alke and Company.' Without a doubt, this must bear reference either to "purposes of employment" or "purposes of trade or business" for both of which an immigrant officer may, under s. 10 grant a temporary permit for three months to start with, which permit can be extended from time to time by the Chief Immigration Officer up to a maximum period of three years, and which may be further extended, provided certain formalities are complied with. I would have thought myself that it was under s. 10 that the permit was granted, and the reference to reg. 4 by the respondents themselves seems to substantiate this. And I say this, notwithstanding that in the letter already referred to, no time limit was fixed. In my judgment, whichever section was involved, it can, with truth be said, that the appellant had a legitimate expectation to be allowed to remain in Guyana once he continued to be employed as manager of Robert Alke & Company, and provided he did not lapse into one of the categories prescribed in s. 3 of Cap. 98, which would have the effect of making him a prohibited immigrant for the purposes of that ordinance. But it must be stressed that whatever the value of the expectation, it does not transcend the power of the President to deem the appellant an undesirable person under Cap. 99, and making a deportation order thereunder, as is seen from s. 14 which provides as follows: "The provisions of this ordinance shall have effect notwithstanding anything provided by the Immigration Ordinance." However, it seems that if the appellant was lawfully in this country by virtue of Cap. 98, and no steps were taken to revoke his permit under that ordinance, but it is revoked under another ordinance, while the act of revocation—whatever the procedure is—may be unchallengeable, this would amount to a revocation

before the time limit expires, in which case he ought to be given the opportunity of making representations [See *Schmidt v. S. of S.* (1969) 1 A11 E.R. p. 909] which is precisely what s. 6 of the Expulsion of Undesirables ordinance, Cap. 99 seeks to do. The respondents contend that the permit was granted pursuant to s. 12 of Cap. 98, but this is quite untenable in my opinion. Reading sections 10 and 12, and reg. 4 and the letter—already referred to—it is impossible to accept that in these circumstances, action was taken under s. 12. The more appropriate section is 10, and apart from the express allegation that action had been taken under s. 12, the respondents would appear from their pleadings to have accepted the former position, for they admitted that the permission of January 16, 1970 had been granted after the appellant had "resided in Guyana with limited permissions granted from time to time for seventeen months previously." To say that this statement supports the contention that the immigration officer was pursuing inquiries to decide whether or not the alien was a prohibited immigrant under s. 12 would be to put an undue strain on one's credulity.

Now to the question of fundamental rights: A fundamental right has been defined as "a legally enforceable right governing the relations between the State and the individual. It has both a negative and a positive aspect. It must, as the words indicate be fundamental. It does not mean merely a right of liberty permissible under the law; it also means a right of liberty in a positive sense which enables the individual to develop his personality and his faculties and to live his life in his own interest and in the interest of the community as a whole." [The Constitution of India, by P.J. Gajendragadkar]. It is the case that most—if not all—written constitutions carry provisions which seek to protect the fundamental rights of citizens and non-citizens of the country concerned. Such is the case with the Guyana Constitution. In some jurisdictions, what are described as the fundamental rights are enshrined in a Bill of Rights, but by whatever name they are called, the observations of Mr. Justice Jackson in the American case of *Board of Education v. Barnette* [(1943) 319 U.S. 624] seem apposite enough:

> ". . .the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to the vote; they depend on the outcome of no elections."

Put briefly, the argument advanced by the appellant under ground (iv) is that his personal liberty, freedom of expression, and freedom of movement are guaranteed by arts. 5, 12 and 14 respectively, of the Constitution, and any law which has the effect of providing incursions against such rights, must firstly be read and "construed with such modifications, adaptations,

qualifications and exceptions" as may be necessary to bring them in conformity with the Guyana Independence Act, 1966 and the Guyana Independence Order, 1966, and Cap. 99 must be construed accordingly. Secondly, says counsel, the rights guaranteed under the Constitution—if they are to be restricted—must be restricted by a specific law dealing with that particular subject-matter; one cannot interpret the provisions of Cap. 99 to detract from the Constitution. Special attention was asked to arts. 12 and 14.

The effect of s. 5 of the Independence Order of 1966 is to save the laws which were in force on May 26, 1966; Cap. 99 was such a law. Art. 5 of the Constitution, in so far as is relevant to this case, provides that no person shall be deprived of his personal liberty, save as may be authorised by law for the purpose of effecting the expulsion or other removal of a person from Guyana. I shall set out the relevant parts of Arts. 12 and 14. Art. 12 provides:

> "(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference and freedom from interference with his correspondence.
>
> (2) 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—
>
> (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health."

And Art. 14 provides—

> "(1) 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) …….
>
> (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—
>
> (a) for the imposition of restrictions on the movement or residence within Guyana of any person or on any person's right to leave Guyana that are reasonably required in the interests of defence, public safety or public order or for the purpose of preventing the subversion of democratic institutions in Guyana."

The short answer to this submission is that provisions such as those contained in Cap. 99 can be said to be reasonably required in the interests of

defence, public safety, public order, etc., and in any event, are saved by art. 18 which provides as follows:

> ". . . nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of articles 4 to 15 (inclusive) of this Constitution to the extent that the law in question—
>
> (a) is a law (in this article referred to as 'an existing law) that had effect as part of the law of the former Colony of British Guiana immediately before 26th May, 1966 and has continued to have effect as part of the law of Guyana at all times since that day;"

Counsel has referred us to *Olivier v. Buttigieg* [(1966) 2 All E.R. 459] a case from Malta, where it was held that an order issued by a Minister of the Government prohibiting the circulation and reading of a particular newspaper by government employees in certain government offices, contravened the constitutional rights of the editor of the newspaper concerned as provided by s. 14(2) of the Constitution of Malta. S. 14 of the Malta Constitution is similar to our s. 12. If, contends counsel as would appear to be the case, the appellant is being expelled from Guyana because of what he is reported to have said to other persons in Guyana, then there is a clear violation of his right of the freedom of expression guaranteed by art. 12, particularly when one bears in mind the dicta expressed in the Indian case of Re *Romesh Thapper v. State of Madras* [(1950) 37 A.I.R. (S.C.R.) 127] that "There can be no doubt that freedom of speech and expression includes freedom of propagation of ideas. . ." and in the United States case of *Martin v. City of Struthers* [(1942) 319 U.S. p. 146] by Black, J., that "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be carefully preserved."

While the force of the above dicta may not be questioned, and the courts must be constantly and anxiously vigilant towards the preservation of the Constitution, both in form and spirit, the answer to counsel's submission lies, in my opinion, in the argument of the learned Solicitor General to the effect that the State can say to an alien: "We have no desire to bridle your expressions of opinion, but if your expressions of opinion are such, as, in our opinion, not in the interests of defence, public safety, public order, etc., we reserve the right under the existing law to deem you undesirable, and take steps to expel you." I therefore find no merit in this submission. Equally unmeritorious is the submission that when the President acts under s. 6(2) of Cap. 99, he is acting as a tribunal so as to attract art. 10(8) of the Constitution.

Now to the last point, that is to say, whether the appellant was entitled to invoke the principles of natural justice, having regard to s. 6 of Cap. 99, and if so, whether there has been a breach of those principles. That aspect of natural justice with which we are concerned in the instant case is that no man may be condemned unheard, the corollary of which is that he must be given reasonable notice of the nature of the case against him. As it was put by Tucker, L.J. in *Russell v. Duke of Norfolk* [(1949) 1 A11 E.R. at 118]:

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth . . . one essential is that the person concerned should have a reasonable opportunity of presenting his case."

And this is how the matter was treated by Ramaswami, J. in *Union of India v. Roy* [(1968) 2 S.C.R., at 202]:

> ". . . the extent and application of the doctrine of natural justice cannot be imprisoned with the strait-jacket of a rigid formula. The a application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the person affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case."

Before proceeding any further, I wish to observe that the rule affecting the application of the principles of natural justice as originally propounded had been restricted to judicial and quasi-judicial tribunals, both in earlier cases, and by text writers [See Basu's Comparative Administrative Law (1969), and Yardley's Source of English Administrative Law (1963)]; but more recent judicial decisions have sought so to narrow the line of demarcation as to make it more apparent than real. This is indicated by cases such as *Ridge v. Baldwin* [(1963) 2 All E.R. 66]; Re K. (H) (an infant) [(1967) 1 All E.R. 226]; and *Schmidt v. S. of S.* [(1969) 1 All E.R. 909], in which the view was expressed that it matters little what is the character of the tribunal; the important thing is that it is required to act fairly.

I have already expressed the opinion that the President was not performing a judicial or, for that matter, a quasi-judicial function, when he purported to act under s. 6(2) of Cap. 99, but as I hope to show, this does not necessarily shut out the principles of natural justice unless the statute expressly or by implication so provides. He was obliged by statute to hold an inquiry, however, and in my opinion is that all inquiries held under in a statutory power, whether obligatory or optional should be the subject of fair procedures.

So I should now proceed to examine the relevant statutes, commencing with the Aliens Ordinance, 1886 (No. 1) which was "An ordinance to authorize the Removal from (the Colony of British Guiana) of Aliens

considered dangerous to the Peace and Good Order of the (Colony)" with particular attention to s. 6 of that Ordinance, which is the forerunner of s 6 of Cap. 99 and whose marginal note reads: "Procedure where excuse or reason alleged for delay in complying with order." That section enabled an alien against whom an expulsion order had been made to allege "any excuse for not complying with such order, or any reason why the same should not be enforced or why further time should be allowed to him," in which case, the Governor was required to suspend the execution of the warrant until he had inquired into, and determined the matter. Even though the marginal note spoke of delay, it is clear that under the 1886 Ordinance, the alien was entitled to advance any excuse why the order should not be enforced against him. In my opinion, the language of that ordinance is no different in meaning from the language used in the Expulsion of Undesirables Ordinance, 1929 (No. 30) and which has been retained in Cap. 99 (set out above). The 1930 Ordinance, while defining an "undesirable person" to mean, *inter alia*, a person other than a British subject domiciled in the colony or resident therein throughout the preceding two years, "whose presence in the colony is considered by the Governor-in-Council to be detrimental to the preservation of peace and good order," provided for a British subject in respect of whom it was proposed to make an expulsion order, to be supplied with the grounds upon which it was proposed to make the order, and he was given an opportunity to make an answer thereto (s. 5). S. 6 has already been set out.

Then in 1967 s. 5 was repealed, and s. 6 amended so that all aliens were placed in the same position of making representations after the order was made. In my judgment, there is no justification for saying that the rights which were enjoyed by a British subject under s. 5 were, upon its repeal, transposed to s. 6. Equally, there is no reason for holding that any rights hitherto enjoyed by non-British subjects under s. 6 have been lost to them, or in any way curtailed by virtue of the amendment. If such a person had a right before to make representations setting forth reasons for non-enforcement of the order, that right remains intact. The simple situation as a result of the amendment is that a British subject, who is deemed an undesirable person, is in no better position than any other alien, but the other alien is in no worse position than he was in before.

S. 13(2) of the Ordinance enables the President to revoke an order absolutely or to suspend its operation either simply or subject to conditions. It is difficult for me to accept that the Legislature intended that the President, having made an order after having given the matter his close attention, would revoke that order out of mere whim or caprice. It is to be expected that he will do so after due consideration, which includes, to my mind, inquiring into the representations made under s. (1). This assists me towards the conclusion that "reasons for non-compliance" contained in s. 6(1) are not to receive an unduly restricted meaning, but may include

reasons against the making of the order. This is a far cry from saying that the alien, in advancing reasons after the order has been made as to why it ought not to be enforced, can question the authority of the President to make the order. Far be it from that. What he will be doing is to advance reasons in competition with, or in explanation of, the reasons which prompted the making of the order. And, the reasons which he advances must be inquired into and a decision arrived at; this is what the statute enacts. In effect, the ordinance introduced the principles of natural justice which the expulsion laws of the United Kingdom lacked, but which the English courts have come to accept, ought to be applied. If, as I believe, this is the case, then the appellant can pray in aid of his cause, the principles of natural justice, that is, that he should be given a fair hearing in the form and manner prescribed by the statute, that is to say, he must be allowed to make written representations setting out reasons why the deportation order should not be enforced, and the test whether he had been fully and adequately heard is an objective one, even though whether or not his presence in Guyana is conducive to the public good is tested subjectively.

S. 6 does not prescribe the procedure to be followed by the President when he inquires into the representations, but inquire he must, and decide, he must. Surely this means, as was said by Byles, J. in *Cooper v. Wandsworth Board of Works* [(1863) 14 C.B. (N.S.) 180] that although there are no positive words in a statute requiring that a party shall be heard, yet the justice of the common law will supply the omission of the legislation, and that the *audi alteram partem* rule is of "universal application and founded on the plainest principle, of justice." In *Board of Education v. Rice* [(1911) A.C. 182] Lord Loreburn set down the rule as follows in referring to the duty of departments of offices of State whose duty it is to decide or determine various questions:

> ". . . they must act in good faith and fairly listen to both sides, for that is the duty of everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

But it must be borne in mind that the rules of natural justice are not rigid norms of unchanging content, and their ambit may vary according to the context, for example, subject to what any particular statute under which action is being taken may provide, a national emergency may occur which requires prompt action in which case rules of natural justice must yield to the statute and to the special circumstances. As it was put by Shelat, J. in dealing with a state of emergency in *Lakhanpal v. Union of India* [(1967) 1 S.C.R., at 439]:

> "Presumably an emergency having been declared by the President the legislature granted such a drastic and unique power enabling the Government to act quickly to prevent the person concerned from doing anything detrimental to the said matters. In such a case it must be

> presumed by the legislature that a judicial process under normal laws may be either inept or inappropriate."

But apart from any such situation, a person against whom an allegation is made is entitled to a fair and reasonable opportunity to be heard.

I am of the opinion that the instant case is even stronger for a hearing than was the case in *De Verteuil v. Knaggs* [(1918) A.C. 667] where the statute concerned empowered the Governor of Trinidad to transfer the indentures of immigrants from one employer to another "on sufficient ground shown to his satisfaction." In delivering the judgment of the Privy Council, Lord Parmoor said (at p. 560 ibid):

> "The Ordinance does not prescribe any special form of procedure, but there is an obvious implication that some form of inquiry must be made, such as will enable the Governor fairly to determine whether a sufficient ground has been shown to his satisfaction for the removal of indentured immigrants. The particular form of inquiry must depend on the conditions under which the discretion is exercised in any particular case, and no general rule applicable to all conditions can be formulated."

The case now before us, as I have been at pains to point out, is not one where it is necessary to read an implication from the words of the ordinance that an inquiry should be held by the President; there is express statutory provision to this effect. He is required to take a decision, which must mean a real decision, not a purported decision. [*Anisminic v. Foreign Compensation Commission*, per Lord Pearce (1969) 1 All E.R. 237]. "The word 'decision' in common parlance is more or less a neutral expression and it can be used with reference to purely executive acts as well as judicial orders. The mere fact that an executive authority has to decide something does not make the decision judicial. It is the manner in which the decision has to be arrived at which makes the difference and the real test is: Is there any duty to decide judicially?" [Per Fazl Ali, J. in *Province of Bombay v. Adrani* (1950) S.C.R., at 642].

The cases are legion where the adherence to natural justice has been insisted upon, where the rights and property of persons have been affected. Two cases that seem to have gone the other way are: *Nakkuda Ali v. Javaratne* [(1951) A.C. 66] and *R. v. Metropolitan Police Commr. Ex. p. Parker* [(1953) 2 All E.R. 717] in both of which it was held that the acts complained of were mere administrative acts, and so not subject to the writ of certiorari. The Parker case concerned the revocation of a cab-driver's licence, which was revocable by the Commissioner of Police "if he is satisfied, by reason of any circumstances arising or coming to his knowledge . . . that the licensee is not a fit person to hold such a licence." Lord Goddard, C.J. expressed the view that the licence was nothing but a per-

mission, and (at p. 720) "if a man is given permission to do something, it is natural that the person who gives permission will be able to withdraw the permission. As a rule, where a licence is granted, the licensor does not have to state why he withdraws his permission." There the court held that the wording of the regulation seemed to make it clear that it was not intended that there should be held anything in the nature of an inquiry. In the earlier case of *R. v. Manchester Legal Aid Committee* [(1952) 1 All E.R. 480] in which Lord Goddard was one of the judges, it was held that a local committee under the legal Aid (General) Regulations, 1950 being a body of persons having legal authority to determine questions affecting the rights of subjects, had a duty to act judicially, and therefore certiorari will lie. It is clear that the decision in that case turned on the interpretation of the relevant regulations. And this, no doubt, is what Lord Haldane meant when he said in *Local Govt. Board v. Alridge* [(1915) A.C. at 120] in relation to conflicting views as to the true character of a tribunal:

> "Which of these opinions was right can only be determined by referring to the language of the Legislature. Here, as in other cases, we have simply to construe that language and to abstain from guessing at what Parliament had in its mind, excepting so far as the language enables us to do. There is no doubt that the question is one affecting property and the liberty of a man to do what he chooses with what is his own."

See also the dictum of Finlay, J. in *New Zealand Dairy Board v. Okitu Co-operative Dairy Co. Ltd.* [(1953) N.Z.L.R. at 403].

The learned Solicitor General, with his usual assiduity, has submitted a number of cases emanating from South America in which the unquestioned right of the State to expel undesirable foreigners has been reiterated over and over again. As I have already said, no one questions this right. Indeed, it might be useful to quote from the Venezuelan case In re Krupnova (Venezuela Fed. Court of Cassation, 1941):

> "The right of expulsion of undesirable foreigners as well as of exclusion or expulsion of ineligible aliens, being based on the free exercise by the State of its sovereignty, it is natural that there should be no right of appeal on any ground against it . . . . But by a Venezuelan provision, as a safeguard against possible error committed in a decree of expulsion with regard to the nationality of the person to be expelled, the law permits the allegation that he is a Venezuelan. It is easy to see that such allegation does not affect in any way the actual right of expulsion, which is a categorical manifestation of national sovereignty. It is, indeed, an implicit confirmation of the essential unimpeachability of the decree for the expulsion of pernicious foreigners. . . ."

But we are not in a position to know what were the provisions of the various legislation in those cases. And so we are driven irrevocably back to our statute, bearing in mind that whether or not the principles of natural justice are to be applied depends on an implication to be drawn from the statute itself, as was decided by this court in *Craig Village Council v. Local Govt.*

Board (Civil Appeal No. 9 of 1968) where it was held that the application of *audi alteram partem* rule was precluded by s. 19 of the Local Government Ordinance.

I will, myself, refrain from referring in detail to what has come to be regarded as the *locus classicus* of the application of the rules of natural justice [*Ridge v. Baldwin* (1963) 2 All E.R. 66] except to advert attention to the fact that the Nakkuda Ali case did not receive universal approval of their Lordships.

Bearing in mind all that has been said hitherto. I am of the opinion that there has been a failure to observe the *audi alteram partem* rule, in that the appellant should have been told of the allegations that were made against him so as to enable him to make representations as to why the order should not be enforced. The order was made on the 3rd of December, 1970 the written representations were made between the 7th and 10th, for on the latter day, the appellant was informed that his representations had been considered, but that the order should stand; he was, however, given up to the 31st to leave the country. His counsel was granted an interview by the Minister of Home Affairs between the 7th and 10th, and it was then that the allegations were conveyed to counsel who, no doubt, must have passed them on to his client soon after, but who, clearly could not have answered them before the Minister, if only because he could not have received prior instructions on them. In my opinion, the appellant ought to have been given a further opportunity—if he wished—to make representations in reply to those allegations, in an attempt to show why the order should not be enforced. Of course, the President, having considered the representations may decide that the order must nevertheless stand, and be enforced, but in my judgment, the clear implication of s. 6 is that the alien must be heard, and to enable him to present his case properly, he must be supplied with the allegations themselves, though not necessarily the evidence supporting the allegations. I certainly would circumscribe my judgment to relate to allegations only, as the President may have good reason for not disclosing his source of information, and there is nothing in law to compel him to do so.

I appreciate the force of the Learned Solicitor General's argument to the effect that the onus was on the appellant, if he wished to make further representations after he was made aware of the allegations, to do so, as the order was extended to the 31st of December; but I cannot accede to it in these circumstances. The appellant could hardly have been expected to make further representations when in answer to his earlier representations to be allowed to do precisely this, he is told in effect, that the matter has been finally determined. His position was somewhat similar to that of the plaintiff in *Annamanthado v. Oilfields Workers' Trade Union* [(1961) 4 W.I.R. 117] where it was held that the plaintiff was not debarred from avail-

ing himself of a particular rule merely because he had failed to present himself at a meeting at which disciplinary proceedings were taken against him.

This brings me to a point raised during the argument and to which I wish to advert attention before I depart from this judgment. I refer to the question whether, when a deportation order is served upon an alien, he should be told of his rights under s. 6. The learned Solicitor General quite rightly—if somewhat shortly—answered by saying that there is no provision in the ordinance which calls for this. I agree. But it may well be argued that—and this is particularly so where the alien is unrepresented—failure to inform him of his rights can result in his being put in a false position, with the consequence that he could not properly make representations. For myself, I can hardly conceive of a more serious breach of natural justice. Fortunately, this does not arise in this case, and so nothing more need be said about it.

In the result, I agree that the appeal be allowed. In my judgment, the order is good, but unenforceable by reason of failure to comply with the provisions of s. 6 of the Ordinance. I agree with the order proposed by the learned Chancellor.

CUMMINGS, J.A.: By virtue of Order in Council 575 of 1966 made by Her Majesty in Council on 16th May, 1966, pursuant to the Guyana Independence Act 1966, Her Majesty's Government in the United Kingdom ceased to have any responsibility for the government of the colony of British Guiana and as from 26th May, 1966, the territory attained the fully responsible status of a Sovereign democratic state to be known as Guyana.

The Constitution of Guyana hereinafter in this judgment referred to as "The Constitution" is embodied in the schedule to said order in council.

It was thereafter amended—

(i) by the Representation of the People (Adaptation and Modification of Laws) Act, 1968;

(ii) by the Constitution of Guyana (Amendment) Act, 1969; and

(iii) with effect from 23rd February, 1970, by the provisions set out in the Second schedule thereto.

Consequent upon a resolution of the National Assembly of Guyana, pursuant to the provisions of article 73(5) of the Constitution, Guyana's constitutional status on and after 23rd February, 1970, is that of a Republic.

It is therefore of the utmost importance that this court, while endeavouring to avoid where possible a construction of constitutional and statutory enactments which will derogate from the sovereignty of the young Republic, should nevertheless be abidingly conscious that it is the watchdog of the rights of all persons within its allegiance. Accordingly, as I approach

this judgment I call to mind the ancient precedent recorded in Deuteronomy 1, 16-17:

> "And I charged your judges at that time, saying Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him.
>
> "Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's; and the cause that is too hard for you, bring it unto me, and I will hear it."

and I shall endeavour to examine:

> "With the anxious care which His Majesty's Judges have always given and I hope will always give to questions where it is alleged that the liberty of the subject according to the law of England has been interferred with and nonetheless when the person is not by birth or naturalisation a subject of the King but a foreigner temporarily living within the King's protection. This jurisdiction of His Majesty's Judges was of old the only refuge of the subject against the unlawful acts of the sovereign. It is now frequently the only refuge of the subject against the unlawful acts of the Executive, the higher officials, or, more frequently, the subordinate officials. I hope it will always remain the duty of his Majesty's Judges to protect the liberty of the subject."

per Scrutton, L.J. in *R. v. Superintendent Chiswick Police Station ex parte Sacksteder*, 1918 118 Law Times.

The appellant, a national of the Federal Republic of Germany, came to Guyana and was allowed, in accordance with the provisions of s. 12 of the Immigration Ordinance, Cap. 98, and the Regulations made thereunder to enter Guyana. On 16th January, 1970, he was permitted by the Government of Guyana to remain in Guyana and to work as Manager of a business concern trading in Guyana under the name and style of Robert Alke and Company Limited.

On 15th October, 1970, he was requested by Assistant Superintendent Sancho, a member of the Guyana Police Force attached to the Immigration Section thereof, to leave Guyana at the end of October, 1970. He did not comply with this request but through his lawyers, Messrs. Clarke and Martin, made certain representations by letter dated 4th November, 1970, to the Permanent Secretary to the Ministry of Home Affairs who informed them that the Hon. Minister of Home Affairs was satisfied that the appellant's continued presence in Guyana was undesirable and that if he did not leave Guyana by 30th November, 1970, a formal Expulsion Order would be made against him. The plaintiff did not comply.

On 3rd December, 1970, the President of Guyana purporting to act in accordance with the provisions of s. 4 of the Expulsion of Undesirables

Ordinance, Cap. 99, as amended by the Expulsion of Undesirables Act 1967 issued and served on him a deportation order which read as follows:—

"GUYANA No. III of 1970

ORDER

MADE UNDER

THE EXPULSION OF UNDESIRABLES ORDINANCE

(CHAPTER 99)

WHEREAS I have deemed it conducive to the public good to make an expulsion order in respect of Rolf Brandt of 3A Queen Street, Georgetown.

NOW THEREFORE under section 4 of the Expulsion of Undesirables Ordinance, as amended by the Expulsion of Undesirables (Amendment) Act, 1967, and by virtue and in exercise of all powers enabling me in that behalf I do hereby direct that the said Rolf Brandt do leave Guyana by the 10th day of December, 1970, and thereafter remain out of Guyana.

Made this 3rd day of December, 1970

(SGD.) A. CHUNG,
PRESIDENT"

It will be observed that in this Order the time for leaving Guyana had been extended to 10th December, 1970.

On 7th December, 1970, Dr. Fenton Ramsahoye, Barrister-at-Law, acting upon the instructions of the appellant made representations in writing to the President in which he sought information as to the grounds for the making of the Order so that he could answer. The Hon. Minister of Home Affairs told Dr. Ramsahoye that the plaintiff was racially prejudiced against non-European people and mentioned three incidents in which the appellant was alleged to have been involved viz:

1. That the appellant had told a Guyanese girl selling poppies that she should be selling black crosses instead;
2. that the appellant had told a senior official of the Ministry of Home Affairs that Guyana was the poorest country in the world and that he was prepared to advertise that fact in Germany;
3. that the appellant had made a quarrel with a Miss La Borde, a servant of one of the public corporations of Guyana whilst she was in the course of her duties.

The appellant denied these allegations.

ROLF BRANDT
v.
ATTORNEY GENERAL OF GUYANA AND C. A. AUSTIN

The President's Secretary replied to the representations in the following letter:—

"OP: C. 9/4/2

OFFICE OF THE PRESIDENT.
GEORGETOWN.
GUYANA.

10th December, 1970.

Dear sir,

I am directed by His Excellency the President to refer to your communication dated 7th December, 1970, on the matter of your expulsion from Guyana and to inform you that after according the most careful consideration to your representations, it has been decided that the Order made on the 3rd December, 1970, under the Expulsion of Undesirables Ordinance (Cap. 99) should stand. You will, however, be allowed until 31st December, 1970, to comply with that Order.

Yours faithfully,
SGD. C.R. JARVIS
(C. R. JARVIS)
Secretary to the Office of the President.

Mr. Rolf Brandt,
3A Queen Street,
GEORGETOWN."

On 29th December, 1970, the plaintiff filed a writ in the High Court against the Attorney-General of Guyana and Mr. Carl Austin, the Commissioner of Police claiming:

(a) a declaration that the expulsion order made against him by the President of Guyana on the 3rd day of December, 1970 was illegal, unconstitutional, void and of no effect;

(b) an injunction restraining the second-named defendant acting or purporting to act in his capacity as Commissioner of Police and Chief Immigration Officer from arresting or deporting or from causing or permitting his arrest or deportation by any member of the Police Force under his command pursuant to the said Order;

(c) further or other relief;

(d) costs.

Simultaneously with the writ he filed an ex parte application for an interim injunction directed against the Commissioner of Police. This was served on the Commissioner of Police; and the matter came on for hearing before Jhappan, J. in Chambers. By consent, the parties filed affidavits which were treated as pleadings. No further evidence was led; and the arguments on the hearing of the injunction proceedings were treated as arguments in the action.

Appellant's contention was that no reason was given as to his undesirability, and no hearing had in relation to the cause for the President's deportation Order of 3rd December, 1970, giving him an opportunity to be heard.

The learned trial judge considering as he did that the cases of *R. v. Leman Street Police Station Inspector and Secretary of State for Home Affairs ex parte Venicoff* (1920), *Nakuda Ali v. Javaratne* (1950) 66 T.L.R., p. 214 A.E.R. Rep. 157, *R. v. Brixton Prison* (*Governor*) *ex parte Soblen* (1962) 3 A.E.R. Rep. 641, *Schmidt v. Secretary of State, Home Affairs* (1969) 2 W.L.R. 149, were based upon statutes in *pari materia* with the relevant local legislation, took the view that the words "conducive to the public good" were not justiciable and consequently neither by statute nor common law was the appellant entitled to the reasons for the making of the Order or to a hearing and dismissed the action with costs against the appellant.

From this judgment the appellant appealed to this court on several grounds which are set out hereunder for convenience:

1. The decision was erroneous in point of law in that the appellant was entitled to be heard before an Expulsion Order was made by the President of Guyana against him on 3rd December, 1970;
2. The decision was erroneous in that the President was a Tribunal within the meaning of article 10(8) of the Constitution of Guyana and was not impartial in that the President decided upon matters determining the rights and obligations of the appellant without informing him of the matters alleged against him and without providing him with a fair hearing;
3. The invalidity of the Order made against the appellant could not in law be cured by subsequent representations which were made for and on behalf of the appellant pursuant to the provisions of s. 6 of the Expulsion of Undesirables Ordinance, Cap. 99;
4. The appellant's right to a hearing was guaranteed by the Constitution of Guyana properly construed and by common law; such right was not displaced by statute or otherwise the appellant being a person who prior to the making of the Order had a legitimate expectation to remain in Guyana;
5. The reasons given for the making of the Order were not capable of supporting an opinion or conclusion that the appellant was an

undesirable person within the meaning of the said ordinance. Alternatively there are no proper or valid grounds upon which the Order against the appellant could have been made for the reasons that:

(a) it was not permissible for the President to found an Order in part or whole on any expression of opinion protected by the fundamental right enveloped in article 12 of the Constitution;

(b) what remains was not capable of nor provided any grounds for the making of the said Order.

In further alternative the Order was invalid for the reasons that the President could not have properly applied his mind to the relevant facts before the making of the Order;

6. The decision to declare the appellant an undesirable person and the making of the Order were contrary to the fundamental rights provisions of the Constitution and in particular articles 5 and 14;

7. The appellant was denied a fair hearing and an enquiry within the meaning of the provisions of s. 6 of the Expulsion of Undesirables Ordinance, Cap. 99, and the order was in the circumstances unenforceable in law;

but in effect the questions for determination by this court are simply these:—

(a) was the making of the deportation Order against the appellant without a hearing a violation of his fundamental rights guaranteed to all persons by the provisions of the constitution?

(b) Quite apart from this, was he entitled to a hearing under the *audi alteram partem* rule at some time prior to the enforcement of the Order?

The gravamen of appellant's contention in this Court was:—

1. That the effect of the Order deprived him of his constitutional rights and was in violation of the constitution;

2. The permit to remain in Guyana for an unlimited time issued to him on 16th January, 1970, in accordance with provisions of s. 10 of the Immigration Ordinance Cap. 98 together with his constitutional rights was not a bare licence but a licence coupled with rights; this permit not having been revoked, the appellant was in accordance with the *audi alteram partem* rule entitled to a hearing before being deprived of his rights:

(a) either before the President decided that his presence here was not conducive to the public good; or

(b) after he so decided but before he made the order; or

(c) after the order was made but before it was put into effect.

On the other hand the Solicitor General, for the respondents submitted that:

(a) The provisions of the Constitution in no way affected the exercise of the President's power to make a deportation order in accordance with the provisions of the Undesirable Persons Expulsion Ordinance Cap. 99, as amended by Ordinance 11 of 1967;

(b) Although conceding that the "abundant riches" of the common law would supplement statutory provisions with the principles of natural justice where they were not expressly or by necessary implication excluded by the statute, construction of the relevant legislation in this case excluded by necessary implication the application of the *audi alteram partem* rule;

(c) if there was a right to a previous hearing the failure to grant such a hearing was cured by the circumstances that the appellant was in fact given a full hearing after the order was made and before it was executed, with the result that the order was in fact reconsidered by the President who then ordered that it should stand subject to an extension of time for compliance;

(d) the right to a hearing after the order was made as provided in s. 6 was confined to representations with respect to non-compliance, non-enforcement and/or further time to comply and did not extend to the merits which are not justiciable.

I propose to deal first of all with the appellant's constitutional position.

The relevant provisions of the Constitution to which counsel has referred are as follows:

A. The Guyana Independence Order 1966 made by Her Majesty-in-Council para:—

> "5.(1) Subject to the provisions of this Order, all laws (including laws made or having effect as if made under the existing Orders) in force in, or otherwise having effect as part of the law of, British Guiana immediately before the appointed day (in this section referred to as 'existing laws') shall continue to have effect as part of the law of Guyana on and after that day but all such laws shall, as from that day, be construed with such modifications, adaptations, qualifications

and exceptions as may be necessary to bring them into conformity with the Guyana Independence Act 1966 and this Order.

(4) The Governor-General may by order made at any time before 26th May, 1967 make such amendments to any existing law as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of the Guyana Independence Act 1966 and this Order or otherwise for giving effect or enabling effect to be given to those provisions.

(8) In this section 'amendment' includes modification and adaptation."

B. The Constitution of Guyana article:

"5. (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say

(i) for the purpose of preventing the unlawful entry of that person into Guyana, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Guyana or for the purpose of restricting that person while he is being conveyed through Guyana in the course of his extradition or removal as a convicted prisoner from one country to another;"

"10. (8) Any court or other tribunal prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other tribunal, the case shall be given a fair hearing within a reasonable time."

"12. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference and freedom from interference with his correspondence.

(2) 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—

(a) that is reasonably required in the interest of defence, public safety, public order, public morality or public health or . . ."

"18. (1) Except in proceedings commenced before 26th November, 1966 with respect to a law made under the British Guiana (Constitution) Orders 1961 to 1965, nothing contained in or done

under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of articles 4 to 15 (inclusive) of this Constitution to the extent that the law in question—

(a) is a law (in this article referred to as 'an existing law') that had effect as part of the law of the former Colony of British Guiana immediately before 26th May, 1966, and has continued to have effect as part of the law of Guyana at all times since that day;

(b) repeals and re-enacts an existing law without alteration; or

(c) alters an existing law and does not thereby render that law inconsistent with any provision of the said articles 4 to 15 in a manner in which, or to an extent to which, it was not previously so inconsistent.

(2) In sub-paragraph (c) of the preceding paragraph the reference to altering an existing law includes references to repealing it and re-enacting it with modifications or making different provisions in lieu thereof, and to modifying it; and in the preceding paragraph 'written law' includes any instrument having the force of law and in this and the preceding paragraph references to the repeal and re-enactment of an existing law shall be construed accordingly."

In my view, article 10(8) does not apply to the President acting under the Expulsion of Undesirables Ordinance Cap. 99 as He is not "a tribunal prescribed by law" for the specific purpose of "the determination of the existence or extent of any civil right or obligation." His findings in this connection are merely collateral for the purpose of performing his function under the ordinance which is to decide whether in the interest of the public good he should make an order for the deportation of an alien. All he has to determine is whether the person against whom a deportation order is proposed is an alien and if so, whether it is conducive to the public good to make the Order; the making of which would terminate rather than determine any right which may have existed. Consequently, this ground of appeal must fail.

Article 18 which must be read along with s. 5 of the Guyana Independence Order of 1966 saves existing laws; the rights protected by article 12(1) are subject to anything done under the authority of any law which makes provision: "That is reasonably required in the interest of defence, public safety, public order, public morality;" and there is specific provision subjecting the fundamental right to personal liberty adumbrated in article 5(1) to the authority of any law made for the purpose of "effecting the expulsion, extradition or other lawful removal of any person from Guyana."

It is clear that Cap. 99 then falls within the ambit of both these express limitations; therefore the Constitution of Guyana does not in any way affect the operation of its provisions. Consequently, the grounds of appeal upon which this submission is founded also fail.

It is therefore to the Common Law and the relevant statutory enactments—The Immigration Ordinance, Cap. 98 and The Expulsion of Undesirable Persons Ordinance, Cap. 99 that one must continue to look in relation to this topic. First the Common Law.

> Section 3 of the Civil Law Ordinance of British Guiana Cap. 2 provides "That the common law of the colony shall be the common law of England as at the date aforesaid."

i.e. 1st January, 1917.

In *Robins v. National Trust Company Limited* 1927 A.E.R. Rep. at p. 73, the Privy Council speaking through Viscount Dunedin had this to say at p. 76:

> "When an appellate court in a colony which is regulated by English law differs from an appellate court in England, it is not right to assume that the colonial court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled the colonial court which is bound by English law is bound to follow it. Equally, of course, the point of difference may be settled so far as the colonial court is concerned by a judgment of this Board."

The position of an alien at English Common Law emerges clearly from the following authoritative pronouncements:—

In A.G. for *Canada v. Cain* 1904 to 1907 A.E.R. Rep. p. 58, the Privy Council, speaking through Lord Atkinson said at p. 584:

> "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from that State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interest: Vattel Law of Nations bk. 1, s. 125. The imperial government might delegate those powers to the governor or the government of one of the colonies, either by royal proclamation which has the force of a statute, or by a statute of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has assented.
>
> "If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them."

In *Johnstone v. Pedlar* (1921) A.E.R. Rep., p. 176, Viscount Finlay in the course of his speech in the House of Lords said at p. 180 et seq.

"The plaintiffs have been foreigners, and no question arose as to their being in any sense subjects of the British crown as it might have arisen if the wrongs complained of had been done in British territory. An alien in British territory is normally regarded as a British subject for the time being in virtue of local allegiance and it is for this reason that in dealing with the defence of 'act of state' it is often said that the act must have been abroad as well as against a foreigner in order that the defence should succeed. The plaintiff is not a subject of the British Crown, but he was, at the time of his arrest, within British territory. It was contended for him that he must be treated for the purposes of the present case as a British subject, inasmuch as he was at the time resident in Ireland. Lord Hale, in Pleas of the Crown (Vol. 1, p. 541), after discussing a statute of Henry 8 (21 Hen. 8 c. 11) giving to any of the King's subjects whose goods have been taken away the right to a writ of restitution on conviction of the thief says:

> 'Though the statute speaks of the King's subjects it extends to aliens robbed, for though they are not the King's natural subjects they are the King's subjects when in England by local allegiance.'"

Viscount Cave at p. 182 and Viscount Phillimore at p. 192 made similar pronouncements. And now to the relevant legislation:

1. The Immigration Ordinance Cap. 98 which provides as follows:

"10 (1) An immigration officer, without deciding whether or not an immigrant is a prohibited immigrant, may, at the request of the immigrant, grant him a permit to enter and remain in the colony for such period not exceeding three months as may be specified in the permit—

(a) as a passenger in transit; or

(b) for medical treatment; or

(c) as a visitor; or

(d) for purposes of employment; or

(e) for purposes of trade or business; or

(f) for any other purpose of a temporary nature—where the immigration officer is satisfied that the immigrant's request for such permit is made in good faith.

(3) Where a permit under this section has been granted by an immigration officer, the Chief Immigration Officer may from time to time extend the period specified in the permit up to a maximum of three years from the date of entry into the Colony of the Immigration to whom the permit relates.

"19 (1) Every permit granted under this ordinance shall be in the form from time to time approved by the Chief Immigration Officer,

modified if necessary in accordance with the facts of any particular case.

(2) The Chief Immigration Officer may direct that any permit, or any permit of a particular class, granted under this ordinance may be endorsed on the passport or other document establishing the identity and national status of the immigrant or in such other manner as the Chief Immigration Officer may think fit."

II. The Expulsion of Undesirables Ordinance, Cap. 99 which was enacted in 1930—No. 30 provides as follows:—

"An ordinance to make provision for preventing the entry of undesirable persons into the colony and for the expulsion of undesirable persons from the colony.

"2. 'Undesirable Person' means any person, other than a British subject domiciled in the colony or resident therein throughout the preceding two years (exclusive of any time spent in prison) and other than a consul or vice-consul of a foreign power duly accredited to the colony, who, not having received a free pardon, has been convicted in the colony or elsewhere of murder or of an offence for which the court convicting him could have sentenced him to imprisonment for at least six months without the option of a fine or whose presence in the colony is considered by the Governor in Council to be detrimental to the preservation of peace and good order;

"'expulsion order' means an order made by the Governor—

(a) prohibiting an undesirable person from entering the colony; or

(b) requiring an undesirable person to leave the colony within the time fixed by the order and thereafter to remain out of the colony; or

(c) directing that an undesirable person be apprehended and deported from the colony.

"5 (1) If the undesirable person with whom it is proposed to deal under ss. 3 and 4 of this Ordinance is a British subject, an order prohibiting him from entering the colony or requiring him to leave the colony shall not be made until the grounds upon which it is proposed to make any such order are communicated in writing to the undesirable person, who may make such answer thereto as he may be advised.

"6(1) Any other person against whom an expulsion order has been made may make representations in writing to the Governor setting forth reasons for non-compliance with such order or for non-enforcement thereof or for allowance of further time to comply therewith, and on any such person signifying his desire so to make representations, the person in whose custody he shall be shall give him

all reasonable assistance for their preparation and forward the writing to the Governor.

(2) On receipt of any such representations the Governor shall with all due despatch inquire into them and decide upon them."

"13 (2) The Governor may at any time revoke an expulsion order absolutely or suspend its operation simply or subject to such conditions as he may think fit."

This was amended by Act No. 10 of 1967 which provides as follows:—

"1. This Act may be cited as the Expulsion of Undesirables (Amendment) Act, 1967, and shall be construed and read as one with the Expulsion of Undesirables Ordinance, hereinafter referred to as the Principal Ordinance and any amendments thereto.

Short Title.

Cap. 99

2. S. 2 of the Principal Ordinance is hereby amended by the substitution for the definition of 'undesirable person' of the following—

'"Undesirable person" means any person, other than a citizen of Guyana, in respect of whom the Governor-General deems it conducive to the public good to make an expulsion order;'

Amendment of section 2 of the Principal Ordinance

3. S. 5 of the Principal Ordinance is hereby repealed.

Repeal of section 5 of the Principal Ordinance

4. Sub-section (1) of s. 6 of the Principal Ordinance Amendment is hereby mended by the deletion of the word 'other'

Amendment of s. 6 of the Principal Ordinance

5. The Principal Ordinance is hereby amended by the addition of the following section—

"This ordinance to prevail over Immigration Ordinance Cap. 98

14. The provisions of this ordinance shall have effect notwithstanding anything provided by the immigration Ordinance."

Under the analogous English legislation—The Aliens Order 1953 and the earlier orders in which the same condition existed in the same words, made in pursuance of the Aliens Restriction Act 1914 and 1919 the Home Secretary is empowered to make an order for the deportation of an alien if "he deems it conducive to the public good to do so"—the identical words used for the exercise of the President's power with regard to the deportation of 'undesirable persons' in the Amendment Ordinance; and as no order can now be made against Guyanese nationals, the undesirable person therefore corresponds with the alien in the English legislation and at Common Law.

Accordingly, in Guyana the Alien's common law rights—to which are added the fundamental rights in the Constitution—are restricted by legislation in *pari materia* with the English legislation.

In *Trimble v. Hill* (1879-80) 5 A.C., the Privy Council, speaking through Sir Montague Smith, said at p. 344:

> "Their Lordships think the Court in the colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the courts in England are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in colonies where a like enactment has been passed by the legislature, the colonial courts should also govern themselves by it."

The pronouncements of the English Courts upon this topic are therefore apposite.

In *R. v. Leman, Street Police Inspector and Secretary of State for Home Affairs ex parte Venicoff,* ((1920) A.E.R. Rep. p. 157) the Earle of Reading, C J., with whose judgment in the Divisional Court Avory & Roche, J J. concurred, said at p. 160:—

> "But this court has really nothing to do with the facts of the case, and I am making these observations merely because there has been considerable discussion about the matter, and it must not be assumed that we have come to any conclusion upon the facts. What the court has to do is to consider the statute and the article of the order made under it, so as to ascertain what are the powers of the Secretary of State. It is not for this court to pronounce whether a particular order is or is not conducive to the public good. Parliament has expressly given the power to the Secretary of State, as an executive officer, to make an order for the deportation of aliens, and has not imposed any conditions. By the Alien Restriction Act, 1914, power was given to the King in Council to make these regulations when a state of war existed between the King and any foreign Power, or when there was imminent danger or great emergency."

Lord Denning, an eminent judicial protagonist for the application of the principles of natural justice, said in the Court of Appeal in *R. v. Brixton Prison* (*Governor*) *ex parte Soblen* 1962 3 A.E.R. 641 at p. 658 G:

> "I quite agree that, when a public officer is given the power to deprive a person of his liberty or his property, the general principle of our law is that that is not to be done without his first being given an opportunity of being heard and of making representations on his own behalf. That has been the tenor of the decisions of these courts for nearly a hundred years; but there are exceptions. A statute may expressly or by necessary implication provide that the person affected is not to be given a right to be heard. Such an exception has been held to exist in the case of deportation orders. In 1920 it was held by a Divisional Court in *R. v. Leman Street Police Station Inspector and Secretary of State for Home Affairs ex parte Venicoff,* that an alien has no right to be heard before a deportation order is made against him. That case has been questioned before us and it has been suggested that it was wrongly decided. All I need say about it is that in 1953, without any dissent in Parliament, an order was made in the very selfsame words as the order considered in Venicoff s case. It is a reasonable assumption that Parliament proceeded on the assumption that Venicoff s case was good law. And when I look to the objects of this legislation, it seems to me that much of the purpose of it would be defeated if it were necessary for the Home Secretary always to give every alien the right of being heard before a deportation order is made. Reasons of security themselves might be such as to make it unwise and undesirable to give him advance notice of the intention to make a deportation order. He might well take advantage of it so as to absent himself and to avoid apprehension. I think, therefore, that there is no right to be heard before a deportation order is made."

and Lord Donovan at p. 663 said:

> ". . . a Divisional Court in 1920 held, in effect, that a denial of a prior right to be heard was implicit in the Act and in the regulations then current, which differ in no material respect for this purpose from the regulations in the Order of 1953; see R. *v. Leman Street Police Station Inspector ex parte Venicoff,* already cited. Since that time Parliament has on numerous occasions made fresh orders concerning aliens and their possible deportation without attempting to alter the law laid down in Venicoff s case and this is a weighty reason why we should not overrule the case now unless we were quite clear that it had been wrongly decided. For myself, I do not think that it was. The power vested in the Home Secretary to order deportation is a power to do an executive or administrative and not a judicial act. While in most cases, no doubt, the grant to an alien of an opportunity to be heard before a deportation order were made would involve little administrative inconvenience, there would undoubtedly be cases where the intimation

of proposed deportation would make the power to do so almost useless."

In *Schmidt & Anor. v. Secretary of State for Home Affairs* (1969) 2 W.L.R, p. 337, Lord Denning at p. 350 adhered to his views expressed in the Soblen case and again followed Venicoff s case.

In *Wiseman v. Borneman* 1969 (3) A.E.R., p. 275—not a deportation case—Lord Guest, dealing generally with the application of the principles of natural justice, said:

> "It is reasonably clear on the authorities that where a Statutory tribunal has been set up to decide final questions affecting parties' rights and duties, if the statute is silent on the question the courts will imply into the Statutory Provision a rule that the principles of natural justice should be applied. This implication will be made on the basis that Parliament is not to be presumed to take away parties' rights without giving them an opportunity of being heard in their interest. In other words, Parliament is not to be presumed to act unfairly. A dictum of Byles, J. in *Cooper v. Wandsworth Board of Works,* it is clear to this effect and has been followed in many subsequent cases. . .
>
> "The true view in my opinion is that expressed by Lord Justice Tucker in *Russel v. the Duke of Norfolk* There are in my view no words which are of universal application to every kind of enquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rights in which the tribunal is acting, the subject matter that is being dealt with and so forth."

and Lord Wilberforce said at p. 285:

> "But as Lord Evershed said, it was not enough to say that the proceeding was a judicial proceeding. It was necessary to define or to have in mind what was the true character of the judicial proceeding and what was its purpose."

In my view, in the instant case the President in the exercise of his power to deport an alien is not "a Statutory Tribunal set up to decide 'final questions affecting parties' rights and duties'," such exercise is a positive and definite executive act terminating rights and duties if two conditions exist, viz:

(a) the person is not a Guyanese national, i.e. he is an alien;
(b) it is in the President's opinion conducive to the public good to deport him.

Although this is not a judicial proceeding the President, is, nevertheless, under a duty to act fairly. What is fair in the circumstances must depend on these criteria and above all the intention of the legislature, having regard

to the purpose and scope of the Act—an intention to be ascertained in accordance with well established rules of construction—see Heydon's case (1584) 3 Rep. 7b.

A useful aid in ascertaining the purpose of legislation is an examination of its history.

The earliest legislation in Guyana on the topic is the Alien's Ordinance of 1886 No. 1 which for the sake of convenience is included as an appendix to this judgment. Its purpose is clearly stated in the preamble thereto which by virtue of s. 17(1) of the Interpretation Ordinance, Cap. 5 may be referred to in explaining its "scope and pith." It is "for the due security of the peace and good order of the colony." It is a security measure. In so legislating, the legislature must be presumed to have known the law with respect to the Sovereign's power to expel an alien.

It is not surprising therefore, having regard to the purpose of the ordinance that no provision is made for any service upon the alien of the reasons for the making of the Order or for hearing him before the Order was made. Such a provision could very well have defeated the purpose of the ordinance as the alien knowing before hand what was proposed against him could have gone into hiding or absconded. Here then the necessary implication is that no hearing was intended at the pre-order stage and consequently the exercise of the Governor's power was not justiciable providing that the conditions precedent to its exercise existed. The only provision for a hearing is related to the representations concerning non-compliance with the order or reasons why it should not be enforced or requesting that further time should be allowed him to comply. It is true that when representations are made the Governor must enquire into them but such enquiry was limited to that specific field; and the examination of the merits for the making of the Order did not fall within the ambit of this enquiry. It seems to me illogical to suggest that what was not justiciable before the making of the order becomes so after the order shall have been made.

This ordinance was repealed and re-enacted by Ordinance 30 of 1930, the relevant provisions of which have already been cited above. Although there is no preamble to that, it was obviously intended to be a substitution of another security measure for the repealed one. It extended the Governor's power to make deportation orders not only against the alien but also against British subjects who were not domiciled or resident in Guyana for a period of two years prior to the occurrence which attracted the ordinance. Such a significant inroad on the constitutional concepts then governing the British Empire in general and the status of British subjects in particular, necessitated the inclusion of the provisions of the right to be heard adumbrated in s. 5 of that Ordinance.

S. 6 of Cap. 99 corresponded roughly to s. 6 of the 1886 Ordinance but the latter provisions was, of course, restricted to aliens, since the 1886 Ordinance itself did not apply to any other person. In the extension of the power to British subjects which was effected in 1930 there followed logically

the consequential changes substituting "any other person" in that ordinance for "any person" in s. 6 of the 1886 Ordinance.

In other words, what the 1930 Ordinance did was to extend the expulsion power to British subjects on condition that they were first given a hearing, while in the case of "any other person" all that was done was to retain the right to be heard as to the execution of the order after it was made, which had been given to this category by s. 6 of the 1886 Ordinance. On the other hand, British subjects, having a right to a previous hearing under s. 5, were not given the right to a subsequent hearing given to aliens under s. 6. Since by virtue of Act II, of 1967, British subjects caught by the provisions of Ordinance 30 of 1967 were treated as aliens and deprived of their special right to a previous hearing under the repealed s. 5, the word "other" was appropriately deleted to give effect to the intention that they also should have the benefit of the post-order hearing which aliens have always had.

By Clause XIII (8) of the 1928 Royal Instructions "any Bill of an extraordinary nature and importance, whereby . . . the rights and property of (British) subjects not residing in the colony . . . may be prejudiced" to be reserved for the assent of the King himself, and accordingly it is to be observed that the Bill, though enacted in December, 1929, was in fact reserved for the King's assent which was signified in October, 1930, and promulgated by proclamation—vide Rules and Regulations, 1930 at p. 103. Obviously, in considering the Bill the King and his advisers would have been concerned to ensure that no unnecessary in-road was being made on the previous right of British subjects not to be expelled. This confirms the view that in conferring a right to a hearing the ordinance was concerned solely with the position of British subjects.

Having expressly provided for a hearing in certain circumstances it follows by necessary implication that it intended that there should be no hearing in others—the maxim is *expressio unius est exclusio alterius*—see *Bird v. Vestry of St. Mary Abbotts*, and *Hutton v. Attorney General*, in both of which the statute expressly provided for a hearing in certain circumstances only. In *ex parte Soblen*, Pearson, L.J., gave an interesting application of the maxim to a case of deportation when he said:

> "Moreover, there is the rule of construction, *expressum facit cessare taciturn.* Here a condition precedent to the making of a deportation order is expressed, namely, 'If the Secretary of State deems it to be conducive to the public good to make a deportation order against the alien.' That express condition excludes the supposed implied condition that a hearing must be given."

I adopt as a correct statement of the settled law as to the effect of partial repeals the following passage from Craies statute law sixth edition at p. 413:

> "It may no doubt be said that if a clause is repealed, this clause is to be taken as if it never existed' but it cannot be said that 'where a particular clause in an act is repealed the whole act must be read as if that clause has never been enacted'."

See also A.G. *v. Lamplough* (1878) 3 Exch. D. p. 214.

In any event even apart from s. 5 the intent to exclude a prior hearing would continue to be demonstrated and supported by s. 6; the provision for a post-order hearing in s. 6 coupled with the omission of a pre-order hearing is a deliberate legislative intent that in accordance with established case law there should be no hearing before an expulsion order was made against an alien.

It was urged upon this court by counsel for the appellant that the rationes decidendi of the Venicoff case being:

1. the war time history of the legislation; and
2. the then existing notion that there was no need for a hearing when the act was an executive act as distinct from a judicial or quasi-judicial act—a notion which was scotched by the decision of the House of Lords in *Reid v. Baldwin,* this court since it is not bound by the decisions of the English Court of Appeal should treat the matter as *res Integra* and not follow the Venicoff case and the decisions in that court which followed; it but rather should follow the vast number of English and Commonwealth cases he cited in which the courts resorted to the Common Law and applied the *audi alteram partem* rule when the decision could have resulted in the termination of parties' rights where the statute did not provide for a hearing but did not expressly exclude one.

These cases depended on the particular facts of each case; the nature of the tribunal; the rights involved; the possible result, etc.

The important fact to bear in mind, however, is that the law relating to the deportation of aliens constitutes, as Lord Denning puts it in the Soblen case (cited earlier in this judgment) an exception to the general rule. The power to be exercised in that kind of case is internationally recognised as a fundamental "judge-proof" Sovereign power.

When this is remembered, those cases though very attractive to those of us who have been reared in the atmosphere of the Common Law are clearly distinguishable.

Walsh v. Johnson (1925-1926) 37 C.L.R., p. 36 is the only deportation cited in which the court (The High Court of Australia) decided that there was a duty to serve upon the alien the grounds for the making of the order. But this is easily distinguishable when it is observed that the Statute provided that *inter alia* the person to be deported was to be heard to "show cause why" the Minister should not make the order against him. Isaacs, J. said with reference to the relevant statute:

> "But if the Minister must first find 'acts' and must afterwards base his deportation order on those same 'acts'. . . how in the name of common justice can it be denied that the accused is entitled to know with sufficient precision what those alleged 'acts' are and know that they are the 'acts' which the Minister himself has found?"

This, with respect, is understandable but it is a long way from saying that without the specific statutory requirements the necessity for service of grounds would be implied.

In the interpretation of the words "conducive to the public good" it is helpful to consider the Privy Council's interpretation of similar though not identical words in The British North American Act, 34 and 35 Vic 28, which authorised the Parliament of Canada to provide for "the administration, peace, order and good government of any territory not for the time being included in any province." Speaking through Lord Halsbury in *Riel v. R.* (1884) 10 A.C. 675 at p. 678 the Board said:

> "The first point is that the Act itself under which the petitioner was tried was ultra vires the Dominion Parliament to enact. That Parliament derived its authority for the passing of that statute from the imperial statute, 34 & 35 Vict., c. 28, which enacted that the Parliament of Canada may from time to time make provision for the administration, peace, order and good government of any territory not for the time being included in any province. It is not denied that the place in question was one in respect of which the parliament of Canada was authorised to make such provision, but it appears to be suggested that any provision differing from the provisions which in this country have been made for administration, peace, order and good government in the territories to which the statute relates, and further that, if a court of law should come to the conclusion that a particular enactment was not calculated as matter of fact and policy to secure peace, order and good government, that they would be entitled to regard any statute directed to those objects, but which a court should think likely to fail of that effect, as ultra vires and beyond the competency of the Dominion Parliament to enact.
>
> "Their Lordships are of opinion that there is not the least colour for such a contention. The words of the statute are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departure from criminal procedure as it is known and practised in this country have been authorised in Her Majesty's Indian Empire. Forms of procedure unknown to the English common law have there been established and acted upon, and to throw the least doubt upon the validity of powers conveyed by those words would be of widely mischievous consequences."

Lord Donovan (an extract from whose judgment in the Soblen case is cited earlier in this judgment) said that he agreed with the decision in the Venicoff case.

Professor Allen in "Law and Orders" Third edition at p. 254 et seq., after reviewing a number of cases said:

> "It would seem that no question of natural justice can arise when all that the statute requires is that a Minister shall be 'satisfied with certain actions as necessary or desirable, or uses the enabling form' 'if it appears to the Minister (or competent authority) to be necessary and/or expedient.' These have become frequent forms of delegation and their effect seems to be virtually to exclude 'judicial review' on the ground that Ministerial action taken under their authority 'is purely administrative'. .

He concludes:

> "The same is to be said of the suggestion that there may be a limit of unreasonableness in the exercise of powers in these carte blanche forms of delegation. This is often stated; in the passage which I have quoted from freedom under the law Denning, L.J. places great reliance on it. The form in which the principle is usually expressed is that manifest unreasonableness may be evidence of mala fides or of failure to apply the mind to the true matter in hand. All one can say is that this contention has, so far as I know, never yet prevailed against the 'Judge-proof formula, and on the existing decisions it does not seem too wide a generalisation to say that in the forms of delegation which we have been considering no question of executive reasonableness is examinable by the courts."

Guyana is, however, now no longer a colony and this court may find it rewarding to consider and when desirable adopt the interpretation not only of English and Commonwealth but also those of foreign courts whose legislation is in *pari materia.* Accordingly, I have examined and attached as an appendix to this judgment extracts from the decisions on the topic of the High Court of Australia, the Supreme Courts of Brazil, Venezuela, Mexico, Ceylon and Burmah. They indicate in no uncertain terms that these courts have similarly interpreted the similar deportation legislation of their systems. (Vide pp. 32-41).

The judgment of the Supreme Court of Brazil in *Feldman v. Justica Publico is* succinct, forceful and convincing. That court held by a majority of eight to one that:

> "It is an established principle of international law that a nation after admitting a foreigner to its soil, promises to recognise those rights which belong to him as a human being, and to lend him the protection of its laws and authority. Brazil has always observed this standard, as may be seen in its Constitution and in its laws, which reflect the liberal and Christian sentiments of its people. The State, however, preserved, as corollary of its sovereignty, the right to expel the alien for sufficient

cause. The country of origin of the person expelled is not entitled, according to these same principles, to prevent the exercise of that incontrovertible right. Expulsion is a question of a police measure, expressing a political necessity of administrative convenience. It is within the exclusive competence of the executive power. The judicial power intervenes, within very restricted limits, with respect to individual liberty, according to our traditions and our laws, without entering into a consideration of the motives of convenience, of political interest, or of public utility which may determine the executive act. It is not necessary that the causes of expulsion should be stated, since they are for the exclusive determination of the executive power.

The nature of and necessity for the existence and effective exercise of the power of expulsion is also illuminatingly revealed in the following pronouncement of Isaacs, J. in the Walsh case (supra):

> "(5) Deportation—I agree with the Solicitor-General—and indeed, Dr. Evatt did not contest this—that deportation as a means of self-protection in relation to the constitutional functions is within the competency of the legislative organ of the Australian people. This nation cannot have less power than an ordinary body of persons, whether a State, a church, a club, or a political party who associate themselves voluntarily for mutual benefit to eliminate from their communal society any element considered inimical to its existence or welfare. We have only to imagine, as I suggested during the argument, some individual found plotting with foreign powers against the safety of the country, or even suspected of being a spy or a traitor. It matters not, as I conceive, whether he is an alien or a fellow-subject, whether he is born in Kamtschatka or in London or in Australia, the national danger is the same. No one stays to ask where a bomb which is on one's premises was manufactured. The urgent question is how to get rid of it. Needless to say, I speak only of national power, that is, the right of the community as a whole to preserve its own existence. Power may be abused. That does not affect its presence or even its utility. A surgeon's knife may be put to base uses; but it is a necessary means in extreme or dangerous cases to save life. Whether a power is abused or not depends entirely on the wisdom and the sense of justice of those entrusted with it. The central fact to bear in mind in applying this truth to the present case is that in every department of public action it is the Commonwealth itself that functions. The Commonwealth, as a whole, functions—and can function—only by its designated organs. Obstruction to or interference with the judicial organ is obstruction to or interference with the Commonwealth itself. So of obstruction to or interference with the Parliament and the Executive. In some instances the particular organ has implied executive power to remove obstruction as is shown in *Barton v. Taylor.* But

where that does not exist a law is necessary, and that it is the function of the legislative organ to supply. The law, however, in authorising the removal of the obstruction, authorises the removal from the path of the Commonwealth itself of an obstacle which is contrary to its peace, order and good government. Obstruction and interference are not confined to physical hindrance of active exercise of powers. Parliament, in its survey of national affairs, may be content with the normal condition of trade and commerce, and of opinion that it should thus continue. If it affirmatively so declared, the matter would be transparently clear. It may equally declare that if anyone endeavours to prevent that normal course of trade and commerce from continuing, he may be either punished for his past acts or prevented from repeating them. Prevention by discarding him as a member of the community, that is, by banishing him, is no doubt an extreme step to be judged of by the legislative and executive departments, but I cannot doubt that a court must hold it to be a competent step—see the opinion of Sir J. Campbell and Sir R. Rolfe in Forsyth's Cases and Opinions on Constitutional Law, pp. 465-466. If, for instance, one man were thought by the whole of the rest of Australia, to be so great a danger in relation to defence that nothing short of expulsion—consistently with community, it would be absurd to say his single will to remain could prevail over that of six millions of people to the contrary. He could admittedly at will sever his political connection with Australia. Is Australia powerless to sever that connection at its united will? I cannot doubt it. Further, in that case, deportation of that man could be properly directed as being a hindrance or obstruction to peace, order and good government of the Commonwealth, in relation to a matter in respect of which the Parliament has power to make laws, namely, national defence. There is nothing in the written constitution to require the power of deportation always to be exercised through the medium of the Judiciary. If it is enacted as a punishment for crime, it necessarily falls to the judicial department. The court then determines the matter, as it does every other, upon the proved circumstances of the case.

"If it is enacted not as a punishment for crime, but as a political precaution, it must be exercised by the political department—the Executive—and possibly on considerations not susceptible of definite proof but demanding prevention or otherwise dependent on national policy. These principles, which are self-evident, have been abundantly recognised in American in cases of which *Mahler v. Eby* is the latest.

When therefore regard is had to the plain meaning of the words of the ordinance, the history of the legislation, the interpretation of English and Foreign legislation in *pari materia* which the legislature must be presumed to have known; the intention of the legislature clearly emerges. Consequently, I am unable to accept the submission and am of the view

that the learned trial judge was right in his conclusion that the President's order was valid.

I pass now to the final submission. Did s. 6 entitle the appellant to service of the grounds upon which the order was made and to a hearing. Again this question of intention, so once more to history. When the legislature intended that grounds should be supplied in the case of the British subject under the repealed s. 5, it expressly stated this and provided time limits. In s: 21 of the Immigration Ordinance where the Alien is given a right to appeal provision is again made for the service of the grounds on which the order was made and the time within which it should be served. This is the legislative practice attracted by the topic having regard to its purpose. When therefore it provides for a hearing without stipulating the service of grounds, then no service was intended. In *Croft v. Dunphy,* (1933) A.C. 156, Lord McMillan at p. 165 observed:

> "When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the state which has conferred the power."

And in Re the Central Provinces and Berai Act. No. XIV of 1938, 1939 F.C.R. 18, Sir Maurice Gwyer C.J. observed at p. 53:

> "Lastly, I am entitled to look at the manner in which Indian legislation preceding the Constitution Act had been accustomed to provide for the collection of excise duties; for Parliament must surely be presumed to have had Indian legislative practice in mind and, unless the context otherwise clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply."

Moreover, service of the grounds is also contra-indicated by the very nature of the power.

The enquiry predicates a hearing but the nature of the hearing depends on the nature of the tribunal, the subject matter and the purpose of the statute and the rights to be affected.

In the instant case the appellant was heard and even supplied with the grounds upon which the Order Was made. The President considered his representations and informed him that he proposed nevertheless to make the Order.

There was therefore, in my opinion, full compliance with the statutory requirements.

It is also necessary to consider s. 13(2) of the Ordinance.

Surely the reason for the inclusion of this provision was to give the person against whom the order was made a chance to have it revoked.

Then how would the section operate? The President may *sua sponte,* because he was subsequently convinced that the information upon which he acted was wrong; or for any reason be considered justifiable, conditionally or unconditionally suspend or absolutely revoke the order. This is a wide power of review. The absence of rules of procedure for its exercise cannot negate its existence. It is here that the justice of the Common Law would be invoked and rules of procedure adopted to ensure that the person has a fair chance to present his case.

It seems to me that it is open to the appellant, even now, to invoke the President's exercise of this power. The presence of this provision, in my view, indicates the clear intention of the legislature to confine the power of expulsion to the absolute discretion of the President. It is true that its effect is an appeal from Caesar to Caesar and those of us who have been reared in the atmosphere of the common law are hesitant to adopt a construction which has the appearance of arbitrariness. We must never forget, however, that as Judges our duty is to ascertain and apply the intention of the legislature in accordance with the well established and hallowed cannons of construction.

With great respect to those who think otherwise, to hold that the President's power to expel an alien, when exercised within the jurisdiction conferred upon him by duly enacted legislation, is open to judicial review would tend to frustrate the expressed will of the legislature and to derogate from the fundamental power of the Sovereign State of Guyana to do what is well recognised internationally and promulgated in the legal systems of all Sovereign States.

Harsh though the result might be—that this power has in this case been validly exercised and that the order is consequently enforceable, I so declare.

Accordingly, I would dismiss this appeal and affirm the judgment and order of the learned trial judge with costs here and below.

APPENDIX I

AN ORDINANCE TO authorise the Removal from this Colony of Aliens considered dangerous to the Peace and Good Order of the colony.

(12th May, 1886)

Whereas it is expedient for the due security of the peace and good order of the colony that provision should be made respecting aliens arriving or resident in the colony:

Be it therefore enacted by the Governor of British Guiana, with the advice and consent of the Court of Policy thereof, as follows:—

Short Title

1. This ordinance may be cited as the Aliens Ordinance, 1886;

Power to the Governor in certain cases to order an alien to depart from the colony

2. Where the Governor has reason to believe, from information given in writing by any person subscribing his name thereto, that, for the preservation of the peace and good order of the colony, it is expedient to remove therefrom any alien who is, or hereafter may be, within the colony, it shall be lawful for the Governor, by order under his hand to be published in The Official Gazette, to direct that such alien shall depart from this colony, within a time limited in such order.

Arrest of alien not complying with order.

3. (1) If any such alien knowingly and wilfully refuses or neglects to comply with such order, or is found within the colony after such publication and after the expiration of the time limited in such order, it shall be lawful for the Inspector General of Police to cause such alien to be arrested and committed to prison until he is taken in charge for the purpose of being sent out of the colony under the authority given by this ordinance.

(2) The Chief Justice or a judge of the Supreme Court may, if he sees sufficient cause, admit any such alien to bail, or sufficient security being given for his appearance to answer the matters alleged against him.

Penalty on alien for not complying with order.

4. Every alien who knowingly and wilfully refuses or neglects to pay due obedience to any such order of the Governor shall be guilty of a misdemeanour, and, being convicted thereof before the Supreme Court of British Guiana in its criminal jurisdiction, shall be liable to imprisonment for any term not exceeding one month for the first offence and not exceeding twelve months for the second or any subsequent offence.

Power to deport alien not complying with order.

5. Where an alien who has been directed to depart this colony by any order of the Governor under this ordinance is found within the colony after the expiration of the time limited in such order, it shall be lawful for the Governor with order and whether or not such alien has been arrested or committed for refusal or neglect to obey such order or convicted of such refusal or neglect, and either before or after such alien has suffered the punishment inflicted for the same, by warrant

under the hand and seal of the Governor, to give such alien in charge to any person to whom the Governor may think proper to direct the warrant, in order to such alien being conveyed out of the colony; and such alien, subject to the other provisions of this ordinance, shall be so conveyed accordingly.

6.(1) Where any such alien (not having been convicted as aforesaid) alleges any excuse for not complying with such order or any reason why the same should not be enforced or why further time should be allowed to him, he may submit the same to the Governor, and where such alien is in custody under any warrant of the Governor under this ordinance, the person having the custody of such alien, on its being signified to him that any such excuse or reason is alleged by such alien, shall forthwith make known the same to the Governor.

(2) Where the Governor is informed that any such excuse or reason is alleged by any such alien, the Governor shall suspend the execution of the warrant until the matter can be enquired into and determined by the Governor.

(3) Such alien, if in custody under any such warrant, shall remain in such custody, and, if not in custody, may be given in charge by any such warrant, and shall remain in custody until the matter is determined.

Power to judge to continue in or discharge from custody alien not deported within one month after commitment.

7. Where an alien who is committed to prison until he is taken in charge for the purpose of being sent out of the colony is not sent out of the colony within one month after such commitment, it shall be lawful, on application by or on behalf of the person so committed, and on proof that notice of the intention to make such application has been given to the Attorney-General, for the Chief Justice or any judge of the Supreme Court, according to his discretion, to order the person so committed to be continued in or discharged out of commitment

Saving as to Consul Officer

8. Nothing in this ordinance shall effect any Foreign Consul or Vice-Consul.

APPENDIX II

CEYLON

In *Sudali Andy Asary v. Vanden Dreesen* 54 N.L.R. 66 (1952) in The Supreme Court of Ceylon Choksy, A.J. dealing with a deportation case where the Immigrants and Emigrants Act No. 20 of 1948 empowered the

Minister of Defence and External Affairs to make a deportation order against an alien if he deems it to be conducive to the public interest, said:

> "In entrusting such a power to the Minister and to the Minister alone, the legislature appears to have assumed, as anyone would be entitled to assume in the first instance, that such a high executive officer of the Dominion would act with a sense of responsibility before exercising such a power in the course of his executive functions. For it is purely as the executive that he acts when discharging his functions under this section and in no sense as a Court of Law. Any danger to the subject from any arbitrary or capricious exercise of such power is conserved by the right which the subject has of questioning or challenging the action of the Minister by habeas corpus proceedings. If the subject can place before this court facts which prima facie show that the Minister acted in bad faith (with all that that expression connotes in the context of habeas corpus proceedings) then the court is entitled to go behind the writ or warrant of commitment, and examine all the facts which led up to it. In the absence of such a prima facie case, one cannot assume that the Minister has acted irresponsibly but would rather be entitled to go on the presumption of the regularity of all official acts."

APPENDIX III

BRAZIL

1.

In re Manoel Osoria decided by the Brazilian Supreme Court on June 27, 1936, 126 Revista de Direito, 72; (1935-1937), Annual Digest and Reports of Public International Law Cases, p. 346. This was a case of an alien whose children were born in Brazil, and who had acquired real property in Brazil. He was ordered to be expelled on the grounds of being "an element dangerous to the public order." On his application for *habeas corpus*, it was held that the application must be denied. The court said: "According to the settled and undisturbed course of decisions, express statutory provisions and the views of writers, the court has no jurisdiction to pass on the opportuness, suitability, or justice of the expulsion."

2.

FELDMAN v. JUSTICA PUBLICA

Brazil, Supreme Court, September 27, 1939, 82 Revista Forense 733; (1938-1940) Annual Digest and Reports of Public International Law Cases, pp. 393—4.

THE FACTS—The petitioner, a Roumanian national had, been in detention for expulsion since January 1, 1936. The Roumanian Legation, acting on the instructions of the Roumanian Government, refused to issue him a passport. He was confined in the Sao Paulo house of detention. He obtained a writ of *Habeas Corpus.*

Held (eight judges to one): that the writ must be dismissed. The court said: "It is an established principle of international law that a nation after admitting a foreigner to its soil, promises to recognise those rights which belong to him as a human being, and to lend him the protection of its laws and authority. Brazil has always observed this standard, as may be seen in its Constitution and in its laws, which reflect the liberal and Christian sentiments of its people. The State, however, preserved, as a corollary of its sovereignty, the right to expel the alien for sufficient cause. The country of origin of the person expelled is not entitled, according to these same principles, to prevent the exercise of that incontrovertible right. Expulsion is a question of a police measure, expressing a political necessity of administrative convenience. It is within the exclusive competence of the executive power. The judicial power intervenes, within very restricted limits, with respect to individual liberty, according to our traditions and our Laws, without entering into a consideration of the motives of convenience, of political interest, or of public utility which may determine the executive act. It is not necessary that the causes of expulsion should be stated, since they are for the exclusive determination of the executive power. There must be considered, however, from the humane, legal, and Christian point of view, the situation in fact created for the petitioner by the refusal of a passport by his country of origin. He is not a common criminal and he cannot remain forever in the prison in which he has spent nearly four years, without a fixed term. Decree-Law 1532 of August 23, 1938, in article 4 offers an adequate solution for cases such as this. It provides that 'When it is not possible to effect expulsion, the foreigner shall be detained at the disposal of the Minister of Justice and Internal Affairs, and shall be confined in a penal farm colony or employed on public works'."

APPENDIX IV
VENEZUELA
In Re KRUPNOVA

Venezuela, Federal Court of Cassation. June 27, 1941. Semanario Judicial, 5a Epoca, 3827; (1943-1945) Annual Digest and Reports of Public International Law Cases, p. 236.

THE FACTS—The petitioner, a foreigner, was a night club entertainer. She entered Venezuela on May 8, 1940, with permission to remain for four months. The permission was later extended. When the extension was about to expire she went through a form of marriage with a Venezuelan with whom

she was living, before a person purporting to act as head of the parish. On May 31, 1941, she was ordered to be expelled from Venezuela for having overstayed her permitted time. She filed an objection on the ground that she was a Venezuelan citizen by reason of her marriage with a Venezuelan citizen, and sought annulment of the decree of expulsion.

Held:—that as the Marriage had been solemnized by an unauthorised person she was not a Venezuelan citizen. There could be no appeal against the decree of expulsion. "The right of expulsion of undesirable foreigners as well as of exclusion or expulsion of ineligible aliens, being based on the free exercise by the State of its sovereignty, it is natural that there should be no right of appeal on any ground against it. . . . But by a Venezuelan provision, as a safeguard against possible error committed in a decree of expulsion with regard to the nationality of the person to be expelled, the law permits the allegation that he is a Venezuelan. It is easy to see that such allegation does not affect in any way the actual right of expulsion, which is a categorical manifestation of national sovereignty. It is, indeed, an implicit confirmation of the essential unimpeachability of the decree for the expulsion of pernicious foreigners . . . ."

APPENDIX V

MEXICO

In re Galico, decided by the Supreme Court of Mexico on May 9, 1942, *Memoria de la Corte Federal y de Casacion*, 1942, I, 220; (1941-1942) Annual Digest and Reports of Public International Cases, p. 309. In this case the petitioner was held by the police in Mexico city under order of the Secretary of Government for deportation to the Marias Islands. The lower court ordered the suspension of the deportation order and the petitioner's release on bail. The government appealed. It was held that the order must be reversed. The court said: "The President has exclusive power to order expulsion from the country, immediately and without judicial intervention, of any foreigner whose presence he deems undesirable. No suspension of such resolution can be ordered by any court. There is no proof that the Secretary was going to deport the prisoner to the Marias Islands. The prisoner should be delivered to the authorities for removal to the frontier or a port."

APPENDIX VI

BURMA

SITARAM v. SUPERINTENDENT, RANGOON, CENTRAL JAIL Burma High Court, February 15, 1957, 1957 Burma Law Reports, 190, High Court.

(San Maung and Ba Thaung JJ.)

THE FACTS:—The appellant, a citizen of India, was arrested and proceedings opened against him under the Extradition Act. While in custody, he applied successfully for a writ of habeas corpus to the High Court under Section 491 of the Code of Criminal Procedure, proceedings against him under the Burma Extradition Act being held to be defective since, in the purview to the Act, India was not a "foreign State." A deportation order was then served on the applicant under the Foreigners Act, and he challenged it, contending that the Foreigners Act was illegal and ultra vires the Constitution, that he had been a law-abiding and not an undesirable alien and therefore could not attract the deportation power of the Act.

Held:—that the application for habeas corpus must be dismissed. The fact that the unsuccessful action had been taken against the applicant under the Extradition Act did not preclude an order being made against him under the Foreigners Act. It was not for the courts to question the desirability or otherwise of a deportation order under that Act, and the Executive need give no reasons for such an order.

The court stated the facts and the arguments, and continued: ". . . the fact that action against the applicant Sitaram had been taken unsuccessfully under the Burma Extradition Act on the ground that he was a fugitive criminal from India cannot, in our opinion, preclude an order being passed against him under Section 3(b) of the Foreigners Act. This section reads:

> 'The President of the Union of Burma may by writing order that any foreigner be deported forthwith from the Union of Burma.'

(The court then dealt with the question of the interpretation of this provision, holding that the language of the section was clear and that therefore it was not permissible to look at the preamble of the Act. The court then continued):

"In our opinion, so long as the person concerned is a foreigner it is not for the courts of law to question the desirability or otherwise of his deportation under Section 3(b) of the Foreigners Act. This matter is entirely within the province of the executive authorities. We are fortified in the view which we take in this matter by the observation of the Supreme Court in *Kyi Chung York v. The Controller of Immigration* (1951) B.L.R. (S.C.) 197. There it was held that every country which extends its hospitality to an alien can withdraw it and send him back to his own country, that every power has the right to refuse to permit an alien to enter the State and if it permits an alien to enter, to annex what conditions it pleases to such permission and expel or deport him from the State at pleasure, and that this principle is to be found embodied in Section 3 of the Foreigners Act whereby the President may order any foreigner to remove himself from the Union of Burma. In *The King v. Secretary of State for Home Affairs, ex parte Duke of Chateau Thierry* (1917) 1 K.B. 922, Swinfen Eady L.J. observed at p. 930:

> 'A Secretary of State is not required to justify in a court of law his reasons for making a deportation order in the case of an alien.'

This observation applies with full force to the President of the Union of Burma acting under the powers conferred upon him by Section 3 of the Foreigners Act.

"In *Hans Muller of Nurnberg v. Superintendent*, Presidency Jail, Calcutta, and Others, A.I.R. (1953) S.C. 367, it was pointed out by the Supreme Court of India that the Foreigners Act was not governed by the provisions of the Extradition Act, and the fact that a request had been made to the government under the Extradition Act did not fetter the discretion of the government to choose the less cumbrous procedure of the Foreigners Act when a foreigner was concerned, provided always that in that event the person concerned leaves the country a free man."

CRANE, J.A.: One of the most outstanding features of our Constitution is considered to be that contained in Art. 3. It is that the guarantee of protection of fundamental rights and freedoms of the individual, unlike in some other countries, extends not only to citizens, but also to "every person in Guyana," and in this sense it may well be considered a human right. Aliens are, therefore, included, irrespective of race, place of origin, political opinions, colour, creed, or sex. Fundamental rights are not, however, absolute or unqualified; they are subject to such limitations as are contained in the entrenched provisions themselves; limitations which operate in defeasance of those rights, so as to make their guarantee to the individual enure only so long as he does not prejudice those rights and freedoms of others or the public interest. If he does so, the individual cannot lay claim to fundamental rights for every person must so restrain himself in their enjoyment as not to infringe upon the enjoyment of those rights and freedoms of others.

Articles 5 and 14 are two entrenched provisions germane to this appeal in that the rights to personal liberty and freedom of movement which they guarantee are said to have been denied the appellant. While Art. 5(1)(i) guarantees the individual non-deprivation of the fundamental right to personal liberty, he can lay no claim to it where the law authorises a restraint on his liberty with a view to preventing either his unlawful entry into, or the effecting of his expulsion from Guyana. Art. 14(1)(3)(e) protects the right to freedom of movement save where, not being a citizen of Guyana, any law imposes restrictions on his freedom of movement. These paragraphs undoubtedly embrace such persons as are not citizens of Guyana, i.e., aliens whose status at common law, when in residence, is in many respects not unlike natural born citizens.

An alien at common law is a subject of a foreign state not born within the state's allegiance; yet he is possessed of certain rights of citizenship and

of almost full proprietary capacity; he has access to the courts and, as a matter of law, being in "local allegiance " to the State when in residence, is entitled to whatever protection the State accords to its citizens. [See *Johnstone v. Pedlar,* (1921) All E.R. Rep. 176]. There is, however, a conflict of eminent textwriters' opinion on the right of the executive to expel him in peace-time without parliamentary approval (amongst which, see Dicey's Law of the Constitution, 8th Edn., p. 407, infra); though this view is doubted by Lord Denning in *R. v. Brixton Prison* (Governor). Ex parte Soblen, (1962) 3 All E.R. 641, 660. But, as we shall see, an alien lawfully within this country normally enjoys no security as to the duration of his stay.

It is chiefly for these reasons that I consider the point which arises in this appeal to be of great constitutional importance and one we must settle without delay. It may be formulated in this manner: What are the limits to judicial review of a denial by the executive (if indeed there be such denial) of a resident alien's claim to be entitled to a hearing either before or after an expulsion order is made against him by the President of Guyana? This question will give rise to several subsidiary ones which will necessarily have to be answered in this appeal, viz.: In what circumstances should executive authority be subjected to an implied obligation to give reasons for its decisions, and what effect should be attributed to a failure to give any reasons or adequate reasons? When should the grant of a statutory power be construed as imposing an implied duty to give persons who will be affected by its exercise prior notice and opportunity to be heard? What are the minimum requirements of a fair hearing? and so forth.

Before embarking on a consideration of this appeal, I think it is right to say that however much the appellant may be inclined to suggest he has not been accorded a fair hearing in keeping with the principles of natural justice at the statutory inquiry after the making of the order to expel him from Guyana, I think it can confidently be asserted that he cannot truthfully make that complaint with regard to this court. Here, his appeal was deservedly given priority of hearing to all matters as we have been told in "Freedom under the Law," p. 1, he has a right to expect in a matter involving his liberty, and I think it is right to say too, that he was accorded every possible facility in the presentation of it; so much so, that he was even permitted in the face of strenuous objection from the Solicitor General to recast his original grounds of appeal by amending one ground and introducing another, whereby he was allowed to set up an entirely new case on a point which he deliberately refrained from pursuing before the trial judge.

I will observe, this course was permitted only because we are engaged on an exercise involving the liberty of the individual—a necessary exercise, however, in which the material cited from innumerable volumes of case law was like—to borrow the simile from Sir John Salmond's Jurisprudence, 12th Edn., p. 129,—"gold in the mine, a few grains of precious metal to a ton of useless matter."

ROLF BRANDT

v.

ATTORNEY GENERAL OF GUYANA AND C. A. AUSTIN

On the 3rd December, 1970, the President of Guyana made the following Order:

"GUYANA No. 111 of 1970.

ORDER

MADE UNDER

THE EXPULSION OF UNDESIRABLES ORDINANCE

(CHAPTER 99)

WHEREAS I have deemed it conducive to the public good to make an expulsion order in respect of Rolf Brandt of 3A Queen Street, Georgetown.

NOW THEREFORE under section 4 of the Expulsion of Undesirables Ordinance, as amended by the Expulsion of Undesirables (Amendment) Act, 1967, and by virtue and in exercise of all powers enabling me in that behalf I do hereby direct that the said Rolf Brandt do leave Guyana by the 10th day of December, 1970, and thereafter remain out of Guyana.

Made this 3rd day of December, 1970.

(Sgd.) A. CHUNG,
President."

Thus the President purported to act under s. 4 of the Expulsion of Undesirables Ordinance, Cap. 99, as amended by No. 30/1967 (also called the 1930 Ordinance) which reads as follows:

> "4. The President may at any time make an order against an undesirable person requiring him to leave the State within a time fixed by the order and thereafter to remain out of the State, or directing that such person be apprehended by any member of the police force and be deported from the State. The President may extend the time fixed by any such order."

In s. 2 of the 1930 Ordinance, an undesirable person is defined as "any person other than a citizen of Guyana in respect of whom the President deems it conducive to the public good to make an expulsion order;" and the relevant expulsion order in s. 2(b) ibid, is defined as one "requiring an undesirable person to leave the State within the time fixed by the order and thereafter to remain out of the State."

Following on the expulsion Order, the appellant Rolf Brandt, a national of the Federal Republic of Germany, instructed his legal adviser to make representations on his behalf pursuant to s. 6 of the Ordinance which is in the following terms:

> "6.(1) Any person against whom an expulsion order has been made may make representations in writing to the President setting forth reasons for non-compliance with such order or for non-enforcement thereof or for allowance of further time to comply therewith, and on any such person signifying his desire so to make representations the person in whose custody he shall be shall give him all reasonable assistance for their preparation and forward the writing to the President.
>
> (2) On receipt of any such representations the President shall with all due despatch inquire into them and decide upon them."

Representations were accordingly made and bore date the 7th December, 1970, i.e., three days before the expiration of the President's Order, so that any representations, it seems to me, could not reasonably affect non-compliance, but only non-enforcement and the allowance of further time, because time for compliance had not yet expired. They were signed by the applicant's legal representative, Dr. Ramsahoye, with the knowledge and authority of the applicant, and prayed for one or other of the reliefs set out in them, and, it is important to note in view of the appellant's claim that he has been denied a fair hearing, "either alternatively or cumulatively as may appear just," viz.:

(a) "That the order of expulsion be revoked and/or suspended or be not enforced either generally or for such period or periods as may appear just.

(b) "That the applicant be allowed to remain in Guyana and in any event to make such further oral or written representations as may be allowed either by himself or by his legal representative until such representations and these representations are heard and determined.

(c) "That the applicant be permitted upon a viva voce hearing to know of any conduct on his part which led to the making of the expulsion order and to be further permitted to make representations in defence or an explanation of such conduct.

(d) "That the applicant and his legal representative be granted audience with the Honourable Minister of Home Affairs at such time as may be convenient to the Minister before the determination of these representations."

In substance, the representations allege, *inter alia*, that it is with the permission of the Guyana Government that the applicant, his wife and two children are in Guyana where they have been in residence for a period of

some 17 months and where the applicant is allowed to carry on business as Manager in Messrs. Robert Alke & Co., a firm of commission agents and importers; that on the 15th October, 1970, the applicant was served a written notice by the police authorities requiring him to leave Guyana by the end of that month. On enquiry from the Ministry of Home Affairs for the reason for terminating his stay, his solicitors learnt that his presence in Guyana is not desirable and that the immigration authorities were instructed to invite him to leave Guyana voluntarily. No reasons for decision were given either to him or to his solicitors for this course of action by the Ministry. The representations further allege that while in residence in Guyana his activities have been at all times limited to his work in his firm; that he does not engage in any public or political activity whatever, being constantly aware of his foreign nationality, and, as a matter of fact, he is in sympathy with the needs and aspirations of Guyanese people. Avowing his belief in the equality of man and his abhorrence of discrimination on the grounds of race, religion or creed, the applicant insists that he has committed no offence nor has he been suspected of committing any, and urges in his favour an excellent record as a law-abiding citizen. Assigning as reasons why the President ought not to enforce the Order, he states that such enforcement will cause him grave hardship and result in dislocation of family life, and that the termination of his appointment as manager in Guyana will necessitate searching for another position elsewhere, resulting in inconvenience and financial difficulties for himself and family.

We shall see presently that two of the appellant's main pillars of contention are based on both aspects of the *audi alteram partem* rule—(a) that he was denied the right of knowing what case he had to meet because he was handicapped in effectively formulating his representations by being deprived of a copy of the President's grounds for the making of his Order; and (b) that he was deprived of the opportunity of stating his case by way of a *viva voce* hearing, notwithstanding the fact that he had specifically requested one, and when the circumstances of the case demanded one. The President, however, did not think so, for on the 10th December, three days after the making of the representations, His Excellency directed his secretary to inform the applicant that "after according the most careful consideration" given to his representations, it had been "decided" that his Order of the 3rd December, 1970, would stand, but that he would be allowed an extension of time to the 31st December, 1970, to comply with its requirements. This would seem to indicate that the President was indeed aware of the fact that, in keeping with s. 6(2) of the 1930 Ordinance, it was necessary for him to "inquire into them (the representations) and decide upon them."

The next event of importance was on the 29th December, 1970, i.e., two days before the expiration of the grant of further time. On this day, the appellant moved the High Court for an *ex parte* grant of an interim order of injunction, accompanied by a writ and statement of claim seeking, (a) a

declaration that the expulsion Order of the 3rd December, 1970, was illegal, unconstitutional and void and of no effect; (b) an injunction restraining the second respondent, the Commissioner of Police and Chief Immigration Officer, from arresting or deporting him pursuant to the Order of expulsion. In his affidavit, he repeated and relied, somewhat untruthfully it would appear, on the assertion in his representations, namely, that he was neither informed of the reasons why his presence in Guyana was considered undesirable, nor was he allowed to say anything about such reasons as there were, if indeed, any existed, for the view taken by the Ministry of Home Affairs. He denied he was given a fair hearing either before or after the making of the President's Order, and insisted that failure to grant him a hearing before the Order, was an invalid exercise of presidential power which was illegal, unconstitutional, null and void and of no effect, being in breach of both Art. 10(8) of the Constitution of Guyana and s. 6 of the Ordinance.

In a joint affidavit in reply sworn on behalf of both respondents, it was revealed (in a paragraph which has not been controverted), that permission had been given the appellant to stay in Guyana under s. 12 of the Immigration Ordinance, Cap. 98, and Reg. 4 of the Immigration Regulations, from which a clear deduction can be drawn that the immigration authorities were indeed satisfied that *bona fide* employment was available to him and that he was not likely to become a charge on public funds if he were allowed to enter the State. The respondents, however, denied the applicant's claim to have lived the life of an ordinary citizen and not to have contravened the law or engaged in public or political activity. The informant, who deposed on their behalf, said that in an interview with the Minister of Home Affairs, he was told by him that shortly after his receipt of a copy of the representations from the appellant, the appellant's lawyer was in communication with him both on the telephone and in person, on which occasions the subject of the representations was fully discussed. The Minister said he explained the reasons for the making of the expulsion Order and rejected another explanation suggested by his counsel. However, after the most careful consideration given to Dr. Ramsahoye's "other representations," the Minister obtained from the President an extension of time to the 31st December, 1970, for the appellant to comply with his Order.

The respondents are, however, insistent that the appellant had been given reasonable time to arrange his affairs so as to enable him to leave Guyana with very little hardship to himself and family, and they contend that if indeed he has encountered such hardship as he alleges, it has been due to his own fault, i.e., his own delay in making his application for the injunction on the eve of the expiration of the expulsion Order. While admitting there was no hearing before the Order was made, the respondents maintain that he is not entitled to be so heard. They concede his right to make representations after the Order and the fact that he did make such representations both in writing and orally by his counsel, as he requested in relief (b) above, but they deny they have acted or will act in any way illegal

or unconstitutional by any action they have already taken or such they propose to take, and they state categorically that the appellant has been afforded such a hearing under s. 6 of the Ordinance as he was entitled to. In opposing his application for the interlocutory injunction, they assert that if he is allowed to continue to remain in Guyana, his continued presence here will seriously prejudice the public good.

In his affidavit of January 6, 1971, in reply to that sworn on the respondents' behalf is contained the first inkling of the reasons which led to the making of the President's Order, although it was impossible to glean these from paragraph 8 of his representations. In that affidavit the applicant admitted having been told by his lawyer the details of what transpired at the interview with the Minister of Home Affairs; yet, this is the very first time he considered it appropriate to swear that he was indeed possessed of knowledge of those reasons which motivated the expulsion Order, although he positively said in his previous affidavit in support of the summons that he was unaware of any reasons. These reasons of which he said his lawyer informed him when in conversation with the Minister, concern allegations of racial prejudice against non-European people, and three incidents in which he is alleged to have been involved, viz., (1) when he told a Guyanese girl selling poppies that she should be selling "black crosses" instead; (2) when he had told a senior official of the Ministry of Home Affairs that Guyana was "the poorest country in the world" and that he was prepared to advertise that fact in Germany; and (3) when he provoked a quarrel with a Miss La Borde, a servant of one of the Corporations, while she was acting in the course of her duties.

At the conclusion of the hearing of the *ex parte* motion for the interim injunction which took place before Jhappan J., it was agreed between the parties, with the judge's approval, that the affidavits in the matter be treated as pleadings, that the arguments advanced on the summons for the interim injunction be treated as arguments in the case, and that oral evidence be dispensed with. Thenceforth, the learned judge treated the proceedings as in open court wherein, after an adjournment for consideration, he delivered an oral decision dismissing with costs the appellant's action for a declaration and injunction.

In his reasons for decision, the trial judge gave consideration to the appellant's claim that his fundamental rights to personal liberty, to deprivation of property, to security of the protection of the law, and to freedom of movement were infringed by construing Articles 5, 8, 10, 14 and 18 of the Constitution which respectively involve those rights, as against what he considered to be the true construction of the Expulsion of Undesirables Ordinance, Cap. 99, and concluded there was no inconsistency between the latter ordinance and those Articles of the Constitution. It is now urged before us that the judge was in error in concluding as he did; that we should

hold that both his decision declaring the appellant an undesirable person was wrong and the President's Order of expulsion was contrary to the appellant's fundamental rights, particularly to Articles 5 and 14 of the Constitution.

I have already expressed the opinion above—that both paragraphs of Articles 5(1)(i) and 14(1)(3)(e) refer to aliens, i.e., such persons who are not citizens of Guyana and who must now by virtue of Guyana's position as an independent sovereign State be so classified if not registered as citizens of Guyana. Though the 1930 Ordinance does not specifically, but only inferentially, refer to aliens, if indeed that law can properly be construed as a law dealing with them (and that was how indeed the learned judge, quite rightly in my view, construed it), then, clearly, a restraint by the President on the liberty of the appellant, an alien, when he deemed it conducive to the public good to expel him from Guyana, appears to me to fall within the savings clause of Art. 5(1)(i) and within the limitation "the public interest" in Art. 3. Such restraint cannot therefore be said to be inconsistent with or in contravention with his fundamental rights. While I think the wording of Art. 14(1)(3)(e) is so plain as to leave no doubt about the matter, I consider the same conclusion to be inescapable with respect to Art. 5(1)(i) in view of the definition of "undesirable person " in s. 2 of the 1930 Ordinance which makes it impossible to expel a citizen of Guyana. In any event, the 1930 Ordinance, being an "existing law," in that it formed part of the law of British Guiana immediately before the 26th May, 1966, cannot be held to be inconsistent with or in contravention with Articles 4—15 in view of the saving of such laws by Art. 18 of the Constitution.

In examining the question of what right has an alien to be in Guyana, and the circumstances in which he can lay claim to that right, if indeed such right exists, it will be necessary to refer to the Aliens Ordinance, 1886, the precursor of the 1930 Ordinance, and then, at a later stage to consider the right, if any, conferred on him by his permit under s. 12. The 1886 Ordinance, as its long title indicates, was one—"To authorise the removal from this colony of aliens considered dangerous to the peace and good order of the colony," and, in the light of the preamble thereto, whenever it was expedient for the due security of the peace and good order of the colony that provision should be made to remove aliens who were either about to arrive in or were in residence in the colony, the Governor was empowered to act in that direction.

According to the old procedure in s. 2 ibid, whenever the Governor had reason to believe from signed written information from anyone that it was expedient for the preservation of the peace and good order of the colony to remove an alien who was either resident in or likely to come into the colony of British Guiana, he signed an order directing the alien to depart therefrom within a limited time, and caused it to be published in the Gazette. If the alien did not depart as ordered, he was liable to arrest, trial and conviction for failure to do so and, above all, to deportation under warrant. Provision was in this manner made for the exclusion and expulsion of aliens

from this country. There was, however, no provision for a right for the alien to be heard in person by the Governor before he made his order, nor can one be implied on an application of the three tests laid down by Lord Upjohn in *Durayappah v. Fernando,* (1967) 2 All E.R. 152, 156, for there was no judicial element to be observed in the Governor's powers to warrant the application of the doctrine of *audi alteram partem.* This is so because the circumstances in which the Governor was entitled to intervene were in the expediency of the due security of the peace and order of the colony, and the sanction of the expulsion was not to be applied unless the alien did not see fit to make submissions to the Governor containing allegations of excuses or reasons for non-compliance or non-enforcement of the order. This was what made the Governor's power, just as is our President's today, a purely executive one.

There was, however, a procedure in s. 6 ibid, which obliged the Governor (except in the case where an alien was convicted of having knowingly and wilfully neglected 'to pay due obedience' to his order), to inquire into and determine three matters after making his order—(1) any alleged excuse by the alien for non-compliance therewith; (2) any reason which the alien had for saying why the order should not be enforced; and (3) whether the alien should be allowed further time within which to comply. We can see that this old procedure very closely resembles that now extant in s. 6 of the 1930 Ordinance, and I believe I am right in saying, although not a facsimile, there is really no substantial difference, if any, between it and its re-enactment in substance in s. 6 of the 1930 Ordinance, save as to wording, which seems only designed to improve the graces and style of the draftsman.

I will, however, attempt to show later that the alien must have based any such excuse or reason chiefly on compassionate grounds. If I am right in this, then it will not be at all difficult to see why the Legislature excluded from such consideration any alien who was convicted for deliberately disobeying or neglecting to obey the Governor's order to depart. I construe the absence of the words in the old s. 6 in parenthesis from s. 6 of the 1930 Ordinance to mean no more than that an alien (unlike before 1930) was thenceforth to be allowed the benefit of making representations whether he was convicted or not.

But the Aliens Ordinance, 1886, was repealed in 1930 by the Expulsion of Undesirables Ordinance of that year (No. 30/1930—s. 14), the latter being wider in scope since, in addition to including certain convicted British subjects within the definition of "undesirable persons," it also embraced persons whose presence in the then colony of British Guiana was considered by the Governor-in-Council "detrimental to the preservation of peace and good order." With the reflection that domiciled British subjects and those in residence for the previous two years (with the exception of any time

spent in prison), were exempt from the definition, it is clear that the 1930 Ordinance was intended to include both aliens and a restricted class of British subjects.

The definition of an undesirable person, however, underwent a change when the Expulsion of Undesirables (Amendment) Ordinance, No. 10/1967, repealed it and substituted another in its stead, namely—"any person other than a citizen of Guyana in respect of whom the President deems it conducive to the public good to make an expulsion order." This substituted definition, along with the repeal of s. 5 of the 1930 Ordinance, which dealt with the right of a British subject to be served with the grounds on which it was proposed to make an expulsion order against him, was rendered necessary with the advent of Independence when Guyana became a sovereign member of the Commonwealth. The result was that with the repeal of s. 5, all reference to British subjects vanished, and the 1930 Ordinance became in the true sense an aliens ordinance, just as was its forerunner, the Aliens Ordinance, 1886.

S. 5 (now repealed) provided that:

> "5 (1). If the undesirable person with whom it is proposed to deal under sections 3 and 4 of this Ordinance is a British subject, an order prohibiting him from entering the colony or requiring him to leave the colony shall not be made until the grounds upon which it is proposed to make any such order are communicated in writing to the undesirable person, who may make such answer thereto as he may be advised.
>
> (2) Such answer shall be made—
>
> (i) in case of an undesirable person against whom it is proposed to make an order prohibiting him from entering the colony, immediately;
>
> (ii) in case of an undesirable person against whom it is proposed to make an order requiring him to leave the colony, within three days after the grounds upon which the order is to be made are served upon him, personally."

S. 4 of the 1930 Ordinance, being silent on the question whether an alien should be permitted the right to be heard before the President makes his order of expulsion, it is quite permissible, since the statutes are *in pari materia*, to look at its counterpart, namely, s. 2 of the Aliens Ordinance, 1886, which gave the Governor in certain circumstances the power to order aliens to depart from the colony, for, as Lord Blackburn said in *Mayor of Portsmouth v. Smith*, (1885) 10 App. Cas. 364, 371:

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

> section not incorporated, which came by way of a proviso or exception on that which was incorporated, that should be referred to; but all others, including the interpretation clause, if there be one, may be referred to."

I believe I have sufficiently detailed above the contents of s. 2 of the Aliens Ordinance, 1882, and have expressed the view after construing it, that no such right to be heard was given by the Legislature. On the contrary, I consider that an extremely wide executive policy discretion was conferred on the Governor so as to enable him to determine from the signed writing received from an informer, and no doubt information from any other reliable source, whether he should make the order expelling the alien. The Governor exercised a purely executive discretion on a matter of opinion and policy whenever he had reason to believe it was expedient so to act in the interests of the due security of the peace and good order of the colony. No objective test was possible. His was entirely an executive policy decision; it was in his absolute and unqualified discretion as to what was expedient in the circumstances and not a matter for him to decide on after giving the alien an oral hearing. So that if there was no right to be heard in 1886 at the pre-order stage, I am afraid it cannot be said that any such right is now vested in the alien by the wording of s. 4 of the 1930 Ordinance.

In fact, s. 4 of the 1930 Ordinance gives the President power to make an expulsion order "at any time" he pleases subject, of course, to his acting in good faith and without any ulterior motive (of which there is no allegation here) when he deems it conducive to the public good to make it. He is not required to justify in a court of law his reasons for making a deportation order in the case of an alien. But what is more striking is the fact that this power to make the order is exercisable at his pleasure, i.e. "at any time," and as there need be nothing in a derogatory sense on record against the alien's character or reputation to warrant his expulsion, [see Ex parte Duke of Chateau-Thierry, (1917) 1 K.B. 922], the President is decidedly under no obligation either to hear him before expelling him or to supply a copy of the reasons which moved him to make his order. In fact, it may be highly detrimental, in some instances, to the interests of State security that the President should disclose his reasons. This right to expel or deport an alien at pleasure was expounded in the case of *A.G. for Canada v. Cain*, (1904-7) All E.R. 582 at page 584 infra, when Lord Atkinson, in delivering the opinion of their lordships' Board, advised His Majesty in a matter involving the expulsion of an alien from the Dominion of Canada thus:

> "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from that State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and

> good government, or to its social or material interests: Vattel Law of Nations, bk. 1, s. 231; bk. 2, s. 125. The Imperial government might delegate those powers to the governor or the government of one of the colonies, either by royal proclamation which has the force of a statute (*Campbell v. Hall*), or by a statute of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has assented. If this delegation has taken place, the depository can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them. . . . The power of expulsion is, in truth, but the complement of the power of exclusion. If entry be prohibited, it would seem to follow that the government which has the power to exclude should have the power to expel the alien who enters in opposition to its laws."

And I would respectfully add, as a general proposition it seems to follow that if an alien has no right to enter any State, he can have no right not to be expelled therefrom. The important distinction between Cain's case and the present of course is, that he entered Canada "in opposition to its laws," while the appellant, being the possessor of a valid permit to stay for what appears to be an unlimited time, was not in breach of Guyana's immigration regulations. However, I think Cain's case is quite relevant here, in that it clearly demonstrates the right of the State to expel an alien at its pleasure, a power which undoubtedly originated in the prerogative.

In arriving at his conclusion that the appellant had no right to be heard before the making of the Order, the learned judge followed and applied the case of *R. v. Leman Street Police Station Inspector, and Secretary of State for Home Affairs. Ex parte Venicoff,* (1920) All E.R. Rep. 157, which he found to be on "all fours" with the present case. In Venicoff's case, it was held that the Home Secretary was acting in an executive, and not in a judicial capacity, and it was therefore not necessary for him, before making his expulsion order, to hold any inquiry or to give the person against whom he proposed to make the order, an opportunity to be heard, and that, so interpreted, Art. 12(1) of the Aliens Order, 1919, whereby the Home Secretary is empowered to make a deportation order against an alien if he (in identical manner as our President) "deems it to be conducive to the public good to do so," was not *ultra vires* as being against the principles of natural justice. Therefore, with the ground for expulsion in the definition of "undesirable person" in s. 2 of the 1930 Ordinance being synonymous with Art. 12 of the Aliens Order, 1919, viz., in respect of its conduciveness to public good, it is not difficult to see why the trial judge had no hesitation in accepting Venicoff's case as good authority, particularly as it seemed to him a legitimate deduction that our Legislature must have had Venicoff's case in mind in 1930, and in view of its affirmation in the recently decided case of A. *v. Brixton Prison* (*Governor*). *Ex parte Soblen,* (1962) 3 All E.R. 641 at page 659 where Lord Denning, M.R., definitely considered there is no right to be heard before a deportation order is made against an alien,

although he reserved decision on the point whether "after a deportation order is made and before it comes to be executed (by his being expelled from the realm), an alien may not in some circumstances have a right to be heard." It is evident that the Court of Appeal could not decide this point in Soblen's case because Soblen, not having any right whatever to enter England in the first place, could not properly claim any right to be heard after the order was made for his deportation.

The point, however, now arises in neat form for decision in this appeal, in view of the fact that the appellant, much unlike Soblen, was actually at the time of the signing of the expulsion Order, in possession of a valid permit under s. 12 of the Immigration Ordinance, Cap. 98, and Reg. 4 of the Immigration Regulations, for a stay in Guyana of indefinite duration. It was for this reason, coupled with the fact that it is said to have been revoked before its time, that it was contended in support of ground 4 of the amended grounds of appeal that prior to the making of the Order of expulsion, the appellant had a legitimate expectation that his permit would enure for a reasonable period and had ordered his business and domestic affairs with that expectation, and why we gave the appellant leave to amend his grounds of appeal by introducing an entirely new case which he had specifically declined to argue in the court below for the reason that he did not think it an appropriate contention in his case, viz., that the President's Order is unenforceable because he was denied the opportunity of hearing what case he had to meet as well as fairly stating his own case at the inquiry under s. 6 of the 1930 Ordinance. That a legitimate expectation may entitle a man to a right to be heard after the making of an order but before the time for its execution was, in fact, the view of no less a judge than Lord Denning, M.R., which he again expressed, though somewhat obliquely in *Schmidt v. Secretary of State*, (1969) 1 All E.R. 904 (at page 909):

> "He (the alien) has no right to enter this country except by leave; and, if he is given leave to come for a limited period, he has no right—and, I would add, no legitimate expectation—of being allowed to stay."

We shall presently be concerned with the true construction of s. 6 of the 1930 Ordinance with a view to determining whether the appellant's allegation of the denial of the principle of *audi alteram partem* can be sustained, bearing in mind that the right of exclusion and expulsion of undesirable aliens from any country is a categorical manifestation of national sovereignty, that is to say, it is an exercise, as Lord Atkinson said in Cain's case above, of prerogative power which the depository can exercise to the extent to which it has been delegated to him from the sovereign. This was also the opinion of Denning, M.R., in Ex parte Soblen, (1962) 3 All E.R. (at p. 660) when he said:

> "I always understood that the Crown had a royal prerogative to expel an alien and send him home, whenever it considered that his presence here was not conducive to the public good. Sir William Blackstone certainly said in his Commentaries on the Laws of England (4th Edn.), Vol. 1, pp. 259, 260; '...strangers who come spontaneously . . .' are '. . . liable to be sent home whenever the King sees occasion'. And this view is in accord with international law as stated by the law officers of the Crown (Sir Richard Webster, A.G., and Sir Robert Findlay, S.G.) in 1896 in Thomas Mann's case. It seems clear from that case that by international law any country is entitled to expel an alien if his presence is for any reason obnoxious to it; . . ."

Today, however, executive authority in Guyana is no longer delegated by nor vested in her Majesty. It is vested solely in the President of Guyana, and is exercisable by him subject to the provisions of the Constitution (Art. 33). When, therefore, he made his expulsion Order, there was an act of prerogative power which, as it seems to me, was not curtailed nor abridged in any way by any express or implied obligation to afford the appellant a hearing under s. 4 of the 1930 Ordinance, and when I come to analyse s. 6 ibid, after having done so in relation to the repealed s. 5, I will also be concerned to show that the provision whereby the alien is permitted to make representations in writing is strictly limited thereunder, and likewise entails no abridgment of the prerogative of expulsion.

I am, therefore, constrained on both principle and authority to uphold the conclusion to which the learned judge came—that there was no right to a hearing before the President made his Order, and that there is no merit in the first ground of appeal.

In support of the complaint in ground 6 that there has been a denial of a fair hearing in accordance with the principles of natural justice, counsel for the appellant cited the case of *Cooper v. Wandsworth Board of Works*, (1863) 14 C.B. (N.S.) 180, in which a principle "of universal application and founded on the plainest principles of justice " was stated to be that, where a statute authorising interference with property or civil rights is silent on the matter of a hearing, the courts, drawing upon the authority of the older cases, invoked "the justice of the common law" to "supply the omissions of the legislature." This principle of the common law embodying prior "notice and opportunity to be heard" was expressed by Mr. Justice Byles in Cooper's case (at p. 188) thus:

> "There are two kinds of notices, either of which might have been given by the defendants—namely, notice of their intention to hear the complaint, in order that the party might come and shew cause why an order should not be made; and notice that they had made an order, so that the party might come and give his reasons why the order should not be carried into execution."

Can it be that there has been an endeavour by the Legislature, in so far as the interests of security in dealing with aliens permitted, to build

in both the above kinds of notices into ss. 5 and 6 of the 1930 Ordinance within the spirit of *Cooper v. Wandsworth*? I have endeavoured to answer the question in the succeeding pages by showing this is not so.

Before 1967, an undesirable British subject had a right to a pre-order "hearing" so as to enable him to contest the making of it. Under the repealed s. 5, it was obligatory to serve him a priori with notice of the grounds on which it was proposed to make the order and to give him a corresponding right to answer them—immediately, if just arriving in the country, or within three days if he were resident here. In his case, there could never have been a valid post-order hearing because that section provided for service of grounds before the order was made, so that while s. 5 gave the right to a pre-order hearing, it excluded a post-order hearing, unlike what was said in Cooper's case. That was all the "hearing" to which he was entitled on such written submissions. The next step was for the Governor-in-Council to make a decision. It is clear that no oral hearing was required nor could one be implied from the section, for it was impossible to say that the statutory procedure was so defective as to need supplementing by the interpolation of the requirement of an oral hearing at which the undesirable British subject would be in a position to challenge in person and/or by witnesses those who informed against him when speed was of the essence of the matter. I am clearly of the view that no such hearing was intended by that section. To my mind, s. 5 was a recognition by the Legislature of the universally accepted fact that the power to deport being of so drastic a nature, there was need to ensure it was not used indiscriminately against British subjects as well. It is suggested, it is both for this reason that the undesirable British subject was favoured with, along with a pre-order hearing, the communication in writing containing the grounds on which it was proposed to make the order as a condition precedent to its making, whereas his counterpart, the alien, was not; and also for the reason that by s. 2(3) of the Immigration Ordinance, Cap. 98, he was deemed to belong to the Colony of British Guiana.

It therefore appears that the right formerly accorded the British subject to make his answer in the repealed s. 5 before the order, was an entirely precautionary measure in the nature of a safeguard against error in the making of a deportation order against a person whom the law deemed to belong to the country. I think this view of mine finds persuasive support in a Venezuelan case which the Solicitor General has been kind enough to submit to us after we had adjourned for decision. It is the case of In re Krupnova, June 27, 1941, in the Venezuela Federal Court of Cassation, and reported in *Memoria de la Corte Federal y de Casacion*, (1942) I 220; (1941-1942) Annual Digest and Reports of Public International Law Cases, p. 309, Law 20326 of July 31, 1937, Article 45. The short facts were that the petitioner, a foreigner, was a night club entertainer. She entered Venezuela on May 8, 1940, with permission to remain for four months. The permission was later extended. When the extension was about to expire,

she went through a form of marriage with a Venezuelan with whom she was living, before a person purporting to act as head of the parish. On May 31, 1941, she was ordered to be expelled from Venezuela for having overstayed her permitted time. She filed an objection on the ground that she was a Venezuelan citizen by reason of her marriage to a Venezuelan citizen, and sought annulment of the decree of expulsion.

It was held that as the marriage had been solemnized by an unauthorised person she was not a Venezuelan citizen. There could be no appeal against the decree of expulsion. "The right of expulsion of undesirable foreigners as well as of exclusion or expulsion of ineligible aliens, being based on the free exercise by the State of its sovereignty, it is natural that there should be no right of appeal on any ground against it. . . . But by a Venezuelan provision, as a safeguard against possible error committed in a decree of expulsion with regard to the nationality of the person to be expelled, the law permits the allegation that he is a Venezuelan. It is easy to see that such allegation does not affect in any way the actual right of expulsion, which is a categorical manifestation of national sovereignty. It is, indeed, an implicit confirmation of the essential unimpeachability of the decree for the expulsion of pernicious foreigners . . ."

Under s. 6 there is likewise no right to an oral hearing. If the representations, that section says the President shall "inquire into them," not "hear" and decide on them. The alien has only the right to make written representations on three specific matters which I consider to be subjective since they are known only to him. There can therefore really be no injustice in first making the order, provided he is permitted to make those representations specifically along the lines indicated in the section showing reasons why that which has already been validly and unconditionally made by the President, and which he had no *a priori* right to dispute, ought not to be enforced, i.e., executed. I can see no logic in his requiring grounds or reasons on which the Order was made in order for him to set forth representations on those three matters that are peculiarly within his own knowledge because in each case, no one can be expected to know better than the alien, (a) why he has not complied with the Order; (b) why he claims the President ought not to enforce it; or (c) why further time should be granted him to comply. Certainly, the President's grounds cannot assist him in this respect.

When we look at the position of the undesirable British subject under s. 5, as indeed we are entitled to do, even though it has been repealed, it will be clearly seen that he was given a right to contest the making of the Order, because there was an absolute prohibition against the President's making it until he was given the grounds on which it was proposed to do so. It will, therefore, follow as a reasonable deduction, I think, that those grounds must have been concerned with the making of the Order seeing they enabled him to prepare an answer to what was proposed.

S. 6, on the contrary, does not expressly give an alien the right to grounds or reasons on which the order was made, and the question is,

whether there is an implied obligation to give them to him so that he might make representations. I approach the solution of the matter in this way: I feel it is only if the representations can be said to be concerned with impugning the making of the order or can reasonably be so construed, that the alien will be entitled to the grounds he desires; but can they be so said? For my part, I do not think so, for unless I can be convinced there is some connection between those three matters on which the representations are to be made and the making of the Order, I cannot see how any claim to be supplied with grounds or reasons can validly arise. I think the correct interpretation of s. 6 is that it is a section to which resort is to be made (save for one case), on essentially compassionate grounds. Quite positively, I cannot concede the argument that the grounds on which the Order was made should be supplied so that representations can be made, for that would equate the purpose of the representations of the alien under s. 6 with that of the answer of the British subject under the repealed s. 5, namely, to dispute the making of the order, something which the alien had no prior right to do. This cannot be so, for while both answer and representations before 1967 concerned both types of "undesirable persons," they were intended to deal with entirely different situations—the answer as the means of contesting the order, while the use of representations was meant to be for a limited and subjective purpose that could not properly impugn the making and so the validity of the Order. It is my view that the three respects on which representations are to relate were never intended to attack the validity of the Order in any way, save in one universally recognised instance, viz., the President's jurisdiction to make it on the ground that the person affected is not an alien but a citizen. If the alien can prove his citizenship, he is entitled to have the order revoked. See Swinfen Eady, L.J., in Ex parte Theirry, (1917) All E.R. Rep. 523 (below), and In Re Krupnova (above). It seems very clear to me that s. 6 is not intended to be used as the alternative mode of procedure stated by Byles J. in *Cooper v. Wandsworth*, whereby it is obligatory to give, apart from service of the order, a hearing in the nature of showing cause against its enforcement after it has been made, simply because there was no right given the alien to a pre-order hearing at which he could have argued against the making of it; it is only if he were so primarily entitled could he, subsequently and alternatively, contest its making and so be entitled to those grounds. This is why I think that the grounds on which the Order was made were relevant only to the making of it under the repealed s. 5, not to the making of representations under s. 6, and ought not to be supplied.

But in support of the contention that there was an implied obligation to furnish such grounds before representations, we were referred to the Australian case of Ex parte Walsh & Johnson; In re Yates, (1925) 37 C.L.R. 36. That was a case under s. 8AA of the Immigration Acts, 1901-1925, a section which deals with disturbances which threaten the peace, order and good government of the Commonwealth of Australia, and with cases in

which the maintenance of the Constitution is in danger, and the circumstances in which the Minister of Home Affairs may make an order for deportation. The procedure is that the Governor-General first makes a proclamation to the effect that there exists a serious industrial disturbance prejudicing or threatening the peace, order or good government of the Commonwealth, which remains in force until revoked. On the Minister then satisfying himself that "any person not born in Australia has been concerned in Australia in acts directed towards hindering or obstructing, to the prejudice of the public, the transport of goods or the conveyance of passengers in relation to trade or commerce with other countries or among the States, or the provision of services by any department or public authority of the Commonwealth, and that the presence of that person in Australia will be injurious to the peace, order or good government of the Commonwealth in relation to matters with respect to which the Parliament has power to make laws, may, by notice in writing, summon the person to appear before a Board, at the time specified in the summons and in the manner prescribed, to show cause why he should not be deported from the Commonwealth. . . . If the person fails to appear at the time specified in the summons to show cause why he should not be deported from the Commonwealth, the Minister may make an order for his deportation."

On the recommendation of the three-man Board, the Minister made a deportation order against Walsh and Johnson, both settlers in Australia, the one since 1893 and the other since 1910. It turned out, however, that the summons calling upon them to show cause before the Board against deportation did not specify which of the particular "acts" were done by them such as formed the basis for the making of the order. The question for consideration before the High Court of Australia, therefore, was, whether a person subject to deportation is entitled to know from the Minister what "acts" the Minister considered him guilty of, so that he may at the proper time judge for himself whether to abstain from appearing before the Board or to contest before the Board the Minister's findings. All five judges of the High Court of Australia, while differing as to the application of the Act to Walsh and Johnson, were of unanimous opinion, which is reflected in the following summary of the conclusions of Mr. Justice Isaacs (at page 108):

> "On the true construction of the section it is a necessary condition, before any person affected can be lawfully required to show cause to a Board or suffer deportation, that he should be informed with reasonable definiteness of the particular acts of which the Minister is satisfied and for which the Minister, subject to failure to appear before a Board or to the Board's recommendation, proposes to deport him."

In view of the fact that s. 8AA contains several acts any one of which the Minister may satisfy himself that the subject has been concerned in, as stated therein, one cannot dispute the soundness of the above construction since it was absolutely necessary to furnish particulars specifying which one or other of the particular "acts" was committed in order to enable the men

effectively to contest the making of the deportation order by showing cause why they should not be deported from the Commonwealth. It seems to me Ex parte Walsh & Johnson bears relevance to the situation under the repealed s. 5, rather than to s. 6 of the 1930 Ordinance, i.e., to that of the former convicted British subject, since it related to the pre-order stage of the matter where grounds were imperatively necessary to show why the order which it was proposed to make ought not to be made in the first place. Ex parte Walsh & Johnson was a clear instance of an abridgment of the prerogative of expulsion at pleasure, by provision being made in s. 8AA of the Immigration Acts, 1901—25, for the right to an oral hearing before deportation in much the same way as the repealed s. 5 of our 1930 Ordinance abridged it, by providing that the Governor's order should not be made until an undesirable British subject was served a communication in writing containing the grounds on which it was proposed to make the order so as to enable him to furnish an answer thereto; and I have already ventured an opinion why this was the case.

Under s. 6, however, particulars of grounds can serve no purpose in showing why an order which has been already validly made ought not to be executed on any of the three grounds in that section, for if an alien has no right to a pre-order hearing, that is to say, the right to contest the making of the Order, then it must be assumed that a valid order came into existence when the President signed it. The alien can have no right to impugn the Order thereafter, unless the law confers on him the right to do so. But can it be said that the law does so by conferring on him the right to make representations in writing in the three respects mentioned in s. 6? In other words, can s. 6 be properly construed as conferring on him the right of contesting the making of the Order when he did not have that right before? In considering this question, it is pertinent to inquire what connection there is between those respects in which his representations are to be made and the making of the Order such as would necessitate particulars of the grounds on which it was made being given the alien.

In my analysis of this section, I consider that it is only when the right to a pre-order hearing exists such as in Ex parte Walsh & Johnson, or in *de Verteuil v. Knaggs*, (1918) A.C., and in the many other cases cited, can particulars be demanded as of right in respect of a post-order hearing or inquiry. This must be so, I think, because there would have been the entitlement to the right to have those particulars at the pre-order hearing; so that if the alternative course of making the order before the hearing is preferred, the right to particulars of the grounds ought not to be denied because the right to have them would have existed at the pre-order stage. However, in the case under review, there was never the right to a pre-order hearing; nor can it be said, in view of this fact, as I have pointed out, that an inquiry under s. 6 is intended to be the alternative form of hearing within the spirit of *Cooper v. Wandsworth* (above), simply because there must be a prior

before there can exist an alternative form of anything. Cooper's case, therefore, has no application to the circumstances of this case.

It was argued there was no prior notice to the appellant of any ground why the President made his Order, but surely the reason expressed therein that His Excellency considered it "conducive to the public good" was such a notice! [See Ex parte Bressler, (1924) All E.R. Rep. at p. 670].

The other point for consideration is whether the opportunity that has been allowed the appellant to make representations has measured up to the demands of a fair hearing at the inquiry, which is undoubtedly implied in s. 6 of the 1930 Ordinance, i.e., whether the President can be said to have acted fairly and in accordance with natural justice, or with what the Americans call "due process of law," an elementary principle of which is that no party ought to have his case decided without being afforded an opportunity of hearing the case which he has to meet as well as stating his own case. In other words, did the President, having already come to a decision to expel, fairly communicate the fact to the appellant that it was his intention to act upon his Order and give him an opportunity of effectively presenting his representations before the inquiry?

It was suggested by counsel for the appellant that the minimum consideration which ought to have been shown him was that after the Order was made, the appellant should have been informed immediately of the reasons for which it was made so as to enable him to make his representations in writing and told that he was free to make any statement he wished to make by way of denial or explanation. Here, counsel's contention is, as we recorded it, that although s. 6 provides for an inquiry, it does not fully set out the procedure to be followed, and this being the case, this court is free to strike out on a line of its own by laying down supplementary procedure in two areas, viz., (i) directing that when he is served with an expulsion order an alien must also be served with a copy of the President's reasons with full particulars for making that order, so that he could make up his mind whether to make representations; and if he so decides, whether he would ask for an oral hearing, or an opportunity to put questions to the persons on whose statements the President acted, or whether he would merely seek further time within which to comply with the order, or make representations against its non-enforcement; (ii) directing how the inquiry is to be conducted, so that it would lead to a decision which complies with natural justice. An inquiry, says counsel, connotes something more than the President's just reading the representations. It is incumbent on him to weigh what was said in those representations against the reasons and particulars on which he made his order, i.e., he must evaluate evidence so that if in the course of investigation it is seen that any statement is made to the prejudice of the alien, the latter should be given the opportunity to contradict and explain it. At least, when the alien requests an oral hearing, one ought to be granted him; although what form an inquiry should take depends on the particular circumstances of each case.

For my part, I believe both of counsel's suggestions are founded on a misconception, viz., the need for the President to disclose to aliens the sources of the information on which he acted. In a security case, such as this, it is not a question of disabusing the President's mind of anything said by any one to the prejudice of the alien, for no one is entitled to know the reasons which made it conducive to the public good that he should make his expulsion order, unless the law either expressly or by necessary implication so decrees. He acts on information received from any reliable source which he need not disclose, as counsel suggests, in order that there can be confrontation between alien and informers, as in a court of law where the grounds on which an order is made can be attacked as being inadequate or ill-founded in fact. In coming to his decision, it is not true to say that the President merely reads the representations, as is suggested. Rather, it is expected that, with a view to informing his mind, he, with a spirit of fairness, pursues inquiries from and obtains information from all available sources of a formal and informal nature. Nowhere does the section suggest, nor, in my view, can there be any implied obligation, in the absence of any question of reputation, property or professional standing arising, that the alien should face his accusers, as is required by procedure applicable in the ordinary courts of justice, or before a statutory Board of Inquiry at which he is to be accorded a *viva voce* hearing by virtue of the fact that he is to appear personally and to answer particulars or acts on which it is proposed to make a deportation order. See Ex parte Walsh & Johnson: In re Yates, (1925) 37 C.L.R. 36; and this is where I think counsel has misconceived the situation. All that is required by s. 6 is that the President acts fairly and in good faith (which has not been denied) when he inquiries into the written representations of the alien before coming to his decision after using his discretion. I think the principles stated by Lord Loreburn, L.C., in the case of *Board of Education v. Rice*, (1911—13) All E.R. Rep. at p. 38, are of particular relevance to the President's purely executive functions:

> "Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon Departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many other, what comes up for determination is a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and listen fairly to both sides, for that is a duty lying upon everyone who decides anything. But I do not think that they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information

> in any way that they think best, always giving a fair opportunity to those who are parties to the controversy of correcting or contradicting any relevant statement prejudicial to their view."

In the case under review, however, there is no controversy between parties. The President is never concerned with a *lis* when considering the making of an expulsion order, where the necessity for giving the other party the opportunity for contradicting any prejudicial statement arises. Though the President may indeed act on his information, the informer is not a party so as to sustain a *lis inter partes.* See per Greene, M.R., in *Johnson & Co. v. Minister of Health.* (1947) 2 All E.R. at p. 399, and *Local Government Board v. Arlidge,* (1914-15) All E.R. Rep. 1, at pp. 6, 8.

I would wish to approach this question of a fair hearing by first making the observation that the scheme of procedure in s. 6 of the 1930 Ordinance does not contain any direction that it is the President's duty to do as is suggested, and with the caution in mind that is counselled by Lord Reid in *Wiseman v. Borneman,* (1969) All E.R. 275, where he said (at p. 277):

> "For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation."

and the timely warning by Lord Denning in the Court of Appeal, (1967) 3 A.E.R. 1045 at page 1047:

> "When Parliament thus expressly states the matters which are to be taken into consideration, it is difficult to say that there is an implied obligation to take other matters into consideration."

In Wiseman's case it was argued, just as in this case, that there was an implied obligation in the interests of natural justice to take into consideration other matters not stated in a procedural section. For myself, I find it rather difficult to lend an ear to the complaint that natural justice demands that a copy of the President's reasons for decision, with particulars, ought to have been supplied the appellant after the Order was made and before he made his representations in writing, because that course would seem to suggest that the representations were in some way dependent on and could not have been effectively made without those reasons and/or particulars. In my view, s. 6 does not lay down any procedure for appeal like that from a judicial decision whereby an appellant is obliged, (a) to be given the court's reasons for judgment before formulating his grounds of appeal; and (b) to be granted a *viva voce* hearing to enable him to argue the matter. Distinguish, *The Queen v. The Archbishop of Canterbury,* (1859) 120 E.R. 1014, at p. 1019, where Lord Campbell, C.J., said that when the Legislature gives the right of appeal, ". . . that implies that the appellant is entitled to an opportunity of being heard. . . . The appellant should have had an opportunity of arguing. . . ."

But I am afraid the situation here cannot bear that connotation because all that s. 6 requires of the alien is for him to set out, (i) reasons, i.e., excuses in his representations for his tardiness in complying with the Order which, I will observe, was the way "non-compliance" was construed in s. 6(1) of the Aliens Ordinance, 1886 (see the word "delay" in the marginal note which, though it may not be used as an aid to construction, was not inconsistent with the basic idea of non-compliance being founded on blame worthiness for which an "excuse," to use the very word in the section, was necessary); (ii) reasons showing why the President should not enforce the Order against him; and (iii) reasons for requesting further time within which to comply. On all three matters, however, it is evident that the validity of the Order must be assumed; but in this case the appellant, not being in default of compliance, could not properly show cause for non-compliance. There was as yet no delay nor failure to comply before December 10, 1970, and during the time when the President was considering his representations. No doubt, this is why such representations as he made were confined to non-enforcement and urged such matters with respect thereto in the form of dislocation of family life, inconvenience and financial hardship, as to which, it is contended, all matters of "non-enforcement" are restricted.

For my part, I would hesitate to say that the latitude given the appellant in s. 6 is thus restricted, for in addition to such compassionate grounds as have been disclosed, I am rather inclined to believe, contrary to the view of the learned Solicitor General, that the amplitude of the term "non-enforcement" is enough to enable him (in one case only), to challenge the making of the Order itself, i.e., to impugn the validity of it by saying there was a want of jurisdiction in the President to make it on the ground that he is not an alien but a citizen of Guyana, and for that reason it is non-enforceable. If this is established, the President must revoke his Order. See In re Krupnova (above). I am unable to agree with counsel for the appellant that reasons for non-enforcement may also allege inadequacy of grounds for the making of the order, or that the President was misled by the person on whose information he acted. This was certainly not the opinion of Swinfen Eady, L.J., in *Ex parte Duc de Chateau-Theirry,* (1917) All E.R. Rep. 523 (at page 525) when he said:

> "A Secretary of State is not required to justify in a court of law his reasons for making a deportation order in the case of an alien. In the *event* of it being disputed that the subject of a deportation order is an alien, the matter must be determined by the court, and unless it be proved that the person is an alien, the order must be quashed as made without jurisdiction, but I am not aware of any other ground upon which such an order can be quashed. Under these circumstances, the respondent being an alien, I am of opinion that the order of the King's Bench Division for the quashing of the deportation order was erroneous."

But when the State makes an allegation that a person is an alien, the burden is on the individual to prove his citizenship, not on the State to prove his lack of it, and the State should not place the individual in a position which makes his discharge of the burden of proof unreasonable.

S. 6 does not direct, as the procedure in an appeal section would, that an alien is entitled to know the reasons for the exercise of the President's discretion to expel him any further than the ground disclosed in the Order that the latter has deemed it conducive to the public good to do so for running down the spine of both the 1886 and the 1930 Ordinances is the matter of public security. Therefore the President is not obliged to furnish any reasons for his decision which is purely executive. It seems to me that neither policy nor good sense would permit an alien to make out a case for non-enforcement of the Order by committing the President to giving reasons, and/or particulars, along with his Order, of any act or offence the alien is alleged to have committed, when the President acts at his pleasure, and particularly, at that stage, when it is unknown whether the alien may wish to elect to obey the Order by leaving the country or to make representations. Where, however, the authority in which is vested the power to decide is entrusted with a wide discretion to be exercised in the interests of security, as in the present case, it will readily be conceded that it may be detrimental in some instances to peace and good order, i.e., to public security that the authority should give particulars and/or reasons for making the order. As a matter of fact, even the administrative concession whereby an alien in England makes his representations before a Bow Street magistrate does not apply where the order was made on grounds of public security. See 557 H.C. Deb. Written Answers, 174-175; 595 H.C. Deb., col. 1349.

While counsel for the appellant is prepared to admit this, nevertheless, he contends this is not one of those cases involving security and that, in fairness, the doctrine of *audi alteram partem* ought to apply. But who can say counsel is right? Where is the line to be drawn between those matters which strictly do not involve State security and those which do? Who is to determine in such matters whether a case falls on one side of the line or the other? What did Parliament intend when it entrusted the deeming of what is conducive to public good to the eminent domain of the President? Did Parliament intend the courts to examine executive reasons in every case where there is an allegation that public security is not involved to see whether or not it is?

I am afraid the answer must clearly be that it is no business of the courts or any one else to call for and examine reasons pertaining to executive action in security cases in order to determine their reasonableness, adequacy, validity or otherwise. It would be otherwise if an authority were to disclose its reasons voluntarily, for it will then be quite competent for the courts to examine them to see whether any course of action falls within the four corners of the power conferred; and if it does not, to pronounce against the validity or otherwise of the action taken; but providing all statutory

formalities have been complied with, the functions of the executive in deportation cases are almost entirely immune from judicial review.

I must agree that if the President were compelled to give his reasons, it would be opening the back door to judicial review of the adequacy of the evidence on which he acted in the particular security case, something on which the courts are unquestionably incompetent to pass judgment. As was said by Lord Greene, M.R., in *Carltona Ltd. v. Commissioners of Works,* 2 All E.R. 560 (at page 563):

> "The last point that was taken 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 have come to the conclusion to which they did come. That argument is one which, in the absence of an allegation of bad faith—and I may say that there is no such allegation here—is not open 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 in these important matters. Parliament, which authorises this regulation, commits to the executive the discretion to decide and with that discretion if *bona fide* exercised no court can interfere. All that the court can do is to see that the power which it is claimed 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."

But, quite apart from any implied obligation which, it is urged, arises under s. 6 and which, from the particular circumstances of the case ought to give the right to an oral hearing to the appellant, I have earlier pointed out that the appellant prayed in his reliefs to be allowed to make "further oral or written representations as may be allowed either by himself or by his legal representative," and that he sought these reliefs either alternatively or cumulatively. Since this is so, how then can the appellant now complain when the President chooses the alternative course of hearing counsel instead of the appellant? The President was given an alternative choice of hearing counsel. The President made his choice. The appellant must abide by it. In my view, there has been no denial of the right of a fair hearing either in the respect that he had sought and was denied a *viva voce* hearing, or that he was denied the opportunity of knowing what case he had to meet by having

a copy with particulars of the President's reasons for making the Order withheld from him, for in neither case was he so entitled, because the doctrine of *audi alteram partem* did not apply.

It did not apply because, quite apart from the fact that the appellant's alien status which, as we have seen, gives the executive the prerogative power of expelling him at pleasure, his permit under s. 12 of the Immigration Ordinance, Cap. 98, only sanctioned his stay until the immigration officer had determined whether or not he was a prohibited immigrant. From the very nature of his permit (which is not disputed), there was conferred on him no right, interest or legitimate expectation of which it would be unfair to deprive him without hearing what he had to say. See *Schmidt v. Secretary of State* (above) at p. 908—909. Quite positively, no question of restraint on his liberty or deprivation of his property arises, and, as a matter of law, the nature of the permit being what it is, no question of its having been revoked before its time can properly arise in view of s. 14 of the Expulsion of Undesirables (Amendment) Ordinance, 1967, which says that the provisions of the 1930 Ordinance are to prevail over the Immigration Ordinance, Cap. 98. It was for this reason that I observed at the commencement of this judgment that an alien who is lawfully within this country normally enjoys no security as to the duration of his stay.

Nor is there substance in the contention that the head of the executive acted as a tribunal under Art. 10(8), which would imply that he acted judicially and so would have to obey the rules of natural justice by guaranteeing the appellant a fair hearing. The short answer is that the President can in no sense be regarded as a "court or other tribunal prescribed by law," for the President is not a "court of law" nor any functionary or the analogy of such a court. See Art. 125(1) of the Constitution of Guyana. In *Eshugbayi Eleko v. Government of Nigeria*, (1931) A.C. 662, it was said: "The Governor, acting under the Deportation Ordinance, acts solely under executive powers, and in no sense as a court." So when pursuing an inquiry with a view to making a decision under s. 6, the President certainly does not pretend to determine the existence or extent of any civil right which is a purely judicial function relegated strictly to a court of law.

Before concluding, there remains for consideration another constitutional point. It is based on the conjoint effect of the alternative contention in ground 5 of the amended grounds of appeal, namely, that "there were no proper or valid grounds upon which the Order against the appellant could have been made," and on Art. 12 of the Constitution which, in so far as is relevant, reads:

> "12.(1) Except with his own consent no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference, and freedom from interference with his correspondence.

(2) 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—

(a) that is reasonably required in the interest of defence, public safety, public order, public morality or public health; or

It will be recalled that the appellant is alleged to have told a senior official of the Ministry of Home Affairs that Guyana was "the poorest country in the world" and that it was his intention to advertise that fact in Germany. Here, it is contended that is merely an expression of opinion to the freedom of which the appellant is entitled, and, being protected by Art. 12(1) above, that cannot have afforded any proper or valid ground for the making of the expulsion Order. By way of illustrating his proposition, counsel argued that were the appellant to express such an opinion in a newspaper, it would have been his constitutional right to say so, and he urged there is nothing inherently restrictive of speech on a true construction of the Expulsion of Undesirables Ordinance, Cap. 99, that can reasonably lead the President to conclude that the appellant's presence was not conducive to the public good. Further, he contends, at the time when Art. 12 came into force, i.e., on the 26th May, 1966, there was no law dealing specifically with freedom of expression such as could fall within the limitation "any law" in Art. 12(2)(a) or (b) of the Constitution; so that the President's Order, purporting as it does to have been made under s. 4 of the 1930 Ordinance, when, according to counsel, none of the freedoms alleged in Art. 12(1) concerns that ordinance, there was no valid ground for the making of the Order. Before any law can be considered as having taken away the right of freedom of speech from the individual, says counsel, it must relate to a specific and defined subject; but Cap. 99 does not so relate.

In support of his contention, counsel cited the case of *Olivier v. Buttigieg*, (1966) 2 All E.R. 459. This is a case involving a breach of fundamental democratic freedoms under ss. 13 and 14 of the Malta (Constitution) Order-in-Council, 1961. Without going too deeply into the facts of that case, certain ecclesiastical authorities in Malta condemned certain newspapers, including a labour party newspaper called "Voice of Malta," of which the respondent was editor. The respondent was president of the opposition Malta Labour Party. The appellants, who were the Minister of Health and Chief Government Medical Officer in Malta, issued a circular which, in reference to political discussions by government employees during working hours, prohibited in regard to employees "the entry in the various hospitals and branches of the department of newspapers which are condemned by "the ecclesiastical authorities. The respondent claimed that this circular, in so far as it affected the "Voice of Malta," was a breach of his constitutional rights as stated above.

It was first held under s. 14(2) of the Constitution of Malta, which is a provision very similar to our Art. 12, that the prohibition went beyond what was reasonable to regulate the conduct of employees during working hours and constituted a hindrance to the respondent in the enjoyment of his freedom of expression, viz., to import information and ideas without interference, thereby contravening the respondents' constitutional rights. Secondly, that there was no protection afforded the appellants under s. 14(2) since publication did not contravene any law providing for public safety, public order or public morality.

As I see it, there can be no doubt about the soundness of the decision in Olivier's case, for, as Lord Morris observed, while the appellants were entitled to issue reasonable orders to regulate the conduct of government employees during working hours, the regulation went too far in that it was discriminatory in imposing a partial ban on certain newspapers for departmental premises could not be regarded as private premises of some private employer.

The distinction between Olivier's case and the appellant Rolf Brandt's is, it seems to me, that while publication of the "Voice of Malta" in various hospitals and departments could not possibly be regarded as contravening "any law" providing for public safety, public order, and public morality, the appellant's threat to publicise Guyana's poverty abroad could, on the contrary, readily lend itself to the interpretation that there was a contravention of the 1930 Ordinance in that the appellant was considered an undesirable person by the very fact that the President considered his presence in Guyana not conducive to the public good and hence to the maintenance of public order. Counsel for the appellant, drawing on the observation of Lord Morris in Olivier's case (at p. 468 of the report), suggested that the Minister of Home Affairs had not acted as he ought to have done, for he, being in a public position of responsibility, did not honour the spirit of the Constitution on something which the appellant said within the spirit of the Constitution. For myself, I have no doubt what the appellant said can reasonably be construed as falling within the limitation contained in Art. 12(2)(a) of the guaranteed right to free speech, if, in truth, he did utter his threat to publicise Guyana's poverty abroad. Speaking for myself, I have no doubt that would be against the spirit of the Constitution and the public interest, as I have tried to explain above when considering Art. 3. It appears to me that the public interest, the public good, public order, public defence and public safety are all concepts of cognate nature, for what is conducive to the public good must be considered to be in the public interest in order that public order, public defence and public safety may be maintained and assured. So that if, indeed, the President did not consider it as conducive to the public good that Guyana's poverty should be published abroad, certainly he must be considered to have been acting in the public interest when he expelled the appellant. Whilst it may be no sin to be poor, there can be no virtue in having it bruited about the world. Assuredly, that can have none other

than a detrimental effect on the public interest and damage the image of Guyana and Guyana's economic interests abroad at this crucial time when everyone knows everything possible is being done to build them up. If, indeed, the President felt this way, and one can never tell, no one will deny it was reasonable for him to hold that such publication would be in contravention of public order and so not conducive to the public good, as I have tried to explain, and a valid ground on which to exercise his discretion to make the Order he did.

The appellant, it is clear, has laboured under the misconception that the expulsion Order was in breach of his constitutional rights. In view, however, of my finding that the Order is, *intra vires*, constitutional, valid and enforceable, the President is protected by the savings in Arts. 5, 12, 14 and 18(1)(a) to which those fundamental rights therein stated are subject.

In my judgment, there is no substance in any of the grounds of this appeal. They are misconceived, and I would dismiss the appeal with costs.

Appeal allowed.

Solicitors:
M. A. A. Mc Doom for the appellant.
State Solicitor for the respondents.

MAISIE HARRIS AND OTHERS

v.

GUYANA AND TRINIDAD MUTUAL LIFE INSURANCE COMPANY LIMITED

[High Court (Khan, J.) May 13; June 19; July 10, 19, 23; October 22, 23; November 11, 13, 1968; September 27, 1969; March 21, 25, 1970; June 26, 1971]

Insurance—Motor Vehicle—Registered owner out of country—Application by agent for policy of insurance in respect of vehicle—False answer as to ownership and registration of vehicle—Misrepresentation on material facts—Liability of insurers on policy in case of an accident involving vehicle—Motor Vehicles Insurance (*Third Party Risks*) *Ordinance Cap. 281, s. 8.*

S. was the registered owner of a motor car which he hired to M. at a daily rental. S. left the country, putting C. in charge of the vehicle with instructions to M. to pay the rental to C. Upon the expiration of the existing policy of insurance, C. applied to the defendants for insurance coverage, and secured a policy. In completing the proposal form, in answer to the question, "Is the proposer the owner of the vehicle, and is it registered in his name?" C. said, "Yes". S. returned to the country, whereupon C. handed over all the relevant papers to S. On the next day, while the car was being driven by M., it was involved in an accident. The passengers in the car, died as a result of the accident. The plaintiffs (representing the deceased persons' estates) sued the driver M. in two separate actions and secured judgment against him. The defendants took no part in that litigation, even though the process was served on them. The plaintiffs requested payment from the defendants of the amounts

obtained as judgment in the aforementioned actions, but to no avail. The plaintiffs then brought an action against the defendants claiming the amounts by virtue of s. 8 of the Motor Vehicles Insurance (Third Party Risks) Ordinance Cap. 281.

HELD: (i) the policy of insurance issued to C. was in force though voidable;

(ii) the defendants not having avoided the policy on the ground of misrepresentation when they had the opportunity to do so, were precluded from raising the issue as against a third party;

(iii) the driver M. was not at the time covered by the policy of insurance which had been issued to C, but was driving under permission of S., the registered owner in respect of whom there was no valid policy of insurance.

Action dismissed.

[**Editorial's note**: This case is also reported in (1971) 17 W.I.R. 250. Reversed on appeal. See 19 W.I.R. 203.]

M. G. Fitzpatrick for the plaintiffs.

C. A. F. Hughes for the defendants.

KHAN, J.: This action raises questions of general interest and considerable importance in the Law of Motor Car Insurance. It appears that some of the issues raised have to be determined for the first time.

On the 6th January, 1967, at about 6 p.m. the three plaintiffs and Jean Harris were travelling as passengers in motor car HR 713 driven by Michael Murray along the East Bank Public Road. The car struck a bridge and ran into a trench. The three plaintiffs suffered injuries which were not serious, but Jean Harris suffered severe injuries from which she died. At the time of the accident there was a policy of Insurance with the Defendants in respect of car HR 713 in accordance with the provisions of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap. 281 of the Laws of Guyana.

The No. 1 plaintiff, Maisie Harris obtained Letters of Administration of the estate of the deceased Jean Harris—and subsequently instituted *Action No. 1137 of 1967* in the High Court against the driver, Michael Murray for damages for loss of expectation of life on behalf of the said deceased estate. On the 3rd of November, 1967, the action was heard by Fung-A-Fatt, J.: and judgment entered for the plaintiff against the

said driver Michael Murray for $1,710.00 with taxed costs in the sum of $830.50.

Nos. 1, 2 and 3 plaintiffs also instituted action No. 1140 of 1967 in the High Court against the said driver Michael Murray for damages for injuries sustained by them. This action was also heard by Fung-A-Fatt, J.: on the 3rd November, 1967, and judgment was entered for the three plaintiffs for $442.00 as damages with costs fixed at $275.00.

The above actions were filed on the 15th May, 1967, and were served on the defendants on the 16th May, 1967. The defendants took no part in the aforesaid actions. The plaintiffs requested payment of the judgments obtained in the two actions referred to above from the defendants but to no avail.

The Plaintiffs now claim the amount owing under the aforementioned judgments from the defendants by virtue of and under s. 8 of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap. 281, of the Laws of Guyana.

S. 8(1) of Cap. 281 provides as follows:

> "If after a certificate of Insurance has been issued under sub-s. (4) of s. 4 of this Ordinance, to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under para. (b) of sub-s. (1) of s. 4 of this Ordinance, (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the authorised insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the authorised insurer shall, subject to the provisions of this section, and subject to any limitations on the total amount payable under the policy in pursuance of the fourth, fifth and sixth provisos to para. (b) of sub-s. (1) of s. 4 of this Ordinance pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs any sum payable in respect on that sum by virtue of any enactment relating to interest on judgments".

The Defendants in their affidavit of defence do not admit that the car HR 713 was at all material times insured with them. By para. 4 of their affidavit of defence, the defendants state that the actions in question were brought against Frederick Smartt as the registered owner of motor car HR 713 and Michael Murray as driver of the said car and servant or agent of Frederick Smartt at the time of the accident and that the judgments in the said actions were obtained against Michael Murray only. The defendants say that there was no valid policy of Insurance in force in relation to the user of the motor car by either Frederick Smartt or Michael Murray at the time of the accident, and further, no certificate of Insurance in the prescribed form or at all was

ever issued by the defendants to the said Frederick Smartt, the registered owner of the said motor car.

The defendants further contend that the statement of Claim discloses no cause of action against them. Defendants deny that the amounts owing by Michael Murray under the judgment obtained by the plaintiffs against him are due by them to the plaintiffs under s. 8 of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap. 281, or at all.

The circumstances leading up to the present dispute with respect to the existence of a valid policy of Insurance are as follows:—

Sometime before November, 1966, Frederick Smartt, the registered owner of Motor Car HR 713 hired same to Michael Murray at a daily rental of $8.00 per day. Murray operated the car as a hire-car, paid the rental of $8.00 per day daily to Smartt. During November, 1966, Smartt left Guyana for overseas, leaving David Caesar—a physiotherapist as his agent to collect the rental from Murray. Before Smartt left he handed over to Caesar the licence, certificate of fitness, and Insurance renewal receipt of the car. He also took the driver, Michael Murray to Caesar and instructed Murray to pay the hire of $8.00 per day to Caesar on his (Smartt's) behalf. Murray had exclusive possession of the car and Caesar had the right of re-possessing the car in the event of non-payment of the daily hire. The car was insured with the Guyana National Insurance Company to expire in December, 1966. By that time the Guyana National Insurance Company ceased operating motor insurance. Caesar went to the defendant's company and applied for insurance coverage on the 17th December, 1966, and eventually obtained a policy of Insurance (Full Third Party Comprehensive).

In answer to question 6 of the Proposal Form Viz: "is the proposer the owner of the vehicle, and is it registered in his name", it is recorded "Yes" when in fact the registered owner was Frederick Smartt. Michael Murray continued to drive and operate the car HR 713 on the terms agreed on with Smartt and paid Caesar the $8.00 per day.

In his evidence before me, Caesar described the arrangement thus "After Smartt left Michael Murray drove the car with my permission. I collected from Murray $8.00 per day for hire of the said car HR 713. Murray had sole possession of the car. I was responsible for it and could have taken it away if I wished to. This was all word of mouth".

The arrangement continued well up to the 5th of January, 1967, when the registered owner Frederick Smartt returned to Guyana. On the said afternoon of the 5th January, 1967, Caesar handed back all the relevant papers of the car HR 713 to Smartt. In his own words

he stated inter alia:—"Mr. Smartt the owner of the car came back to the country. I saw him on the 5th January, 1967, and I handed over control of the car on the 5th January, 1967, to Smartt".

Under cross-examination: Caesar reiterated his position in these words: —"My connection with Murray ceased on the 5th January, 1967, after I handed over my responsibility to Smartt. I collected no money after the 5th January, 1967. I now say I had nothing to do with Murray on the 6th January, 1967. He was not under my control on the 6th January, 1967, I had not to give him permission on the 6th January, 1967 . . . ."

On that day, 6th January, 1967, at about 6.00 p.m. Michael Murray was still the driver of the car HR 713 and was involved in an accident in which the plaintiffs suffered injuries and Jean Harris died, as stated earlier in the first paragraph of this judgment.

On the 9th January, 1967, both Smartt and Caesar went to the Defendant's Office to effect a transfer of the Insurance from Caesar to Smartt. They filled up the necessary application form for transfer of the policy (Vide Ex. "C"), and waited for approval. The transfer was never approved but by a letter dated 11th March, 1967, the defendants wrote Caesar as follows:—

11th March, 1967.

David Caesar,
40, D'Urban Street,
Werk-en-Rust.

Dear Sir,

Policy No. M 29723—Car No. HR 713

Take notice that as provided for under Condition 4 of the General Condition of the abovenumbered Policy covering the vehicle No. HR 713, I have been instructed to cancel the Policy, and, consequently, this cancellation is to take immediate effect.

Under the terms of the Motor Vehicles Insurance (Third Party Risks) Ordinance, 1937, you are required to surrender the current certificate of Insurance now in your possession within seven days from the date hereof, namely, 18th March, 1967, failing which you will be committing an offence.

If, therefore, the Certificate of Insurance referred to above and at the same time, the policy of Insurance are surrendered to me the unexpired portion of the premium, namely, $35.85 will be refunded to you.

Yours faithfully,
Assistant Secretary.

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LIFE INSURANCE COMPANY LIMITED

On the 6th June, 1967, Mr. Lampkin (Solicitor) on behalf of the registered owner Frederick Smartt wrote the Defendants as follows:—

VIBERT LAMPKIN (LLB. LOND.)
SOLICITOR
DIAL 4665

"CHAMBERS"
10 Croal Street,
Georgetown, Demerara
GUYANA.

6th June, 1967.

The Secretary,
Guyana & Trinidad Mutual Fire Ins. Co. Ltd.,
Robb Street,
Georgetown.

Dear Sir,

Re: *Maisie Harris v. Frederick Smartt & Michael Murray 1137/1967.*

Maisie Harris et al v. Frederick Smartt & Michael Murray 1140/1967.

I have been consulted by Mr. Frederick Smartt with reference to the above actions.

My client instructs me that he was the registered owner of motor car No. HR 713 which was involved in an accident on 6th January, 1967, with one Jean Harris who received injuries from which she died.

On or about 16th December, 1967, my client's agent David Caesar of 40, D'Urban Street, Werk-en-Rust, Georgetown came to your office to take out Insurance on the said car. My client was out of the country at the time and though his agent produced the Certificate of Registration to show that the car was registered in my client's name, the policy was issued in the name of David Caesar and an undertaking given by your Office that the policy would be transferred to my client on his return. My client returned on 5th January, 1967, and the accident occurred on the following day; my client notified your Company of the accident on 9th January, 1967, when he attended at your office with Caesar to effect the transfer. He was told to leave .25c. for stamps for the transfer, which had to await a Meeting of your Directors but Caesar was subsequently notified that your Company had refused to effect the transfer, and that the Policy has been cancelled and he was repaid part of the premium.

In the circumstances your Company still has to indemnify my client for any damages and costs awarded against him in the present actions. I am enclosing the Writs of Summons which were served on him on 25th May, 1967. Kindly let me know when he must call on your Solicitors to sign an Authority.

Yours faithfully,
Sgd. Vibert Lampkin.

c.c. Dias & Gomes,
Solicitors.

By a letter dated 13th June, 1967, the defendants replied to Mr. Lampkin's letter as follows:—

2, Croal Street,
Georgetown,
Guyana,

13th June, 1967.

DIAS & GOMES,
SOLICITORS,
CARLOS GOMES, C.B.E.
FRANCIS I. DIAS.
ANDREW J. GOMES,

Dear Sir,

Our clients the Guyana & Trinidad Mutual Fire Insurance Company, Limited, have instructed us to reply to your letter to them of the 6th June, 1967, written on behalf of your client Mr. Frederick Smartt, a copy of which you sent to us.

Our clients deny the allegations contained in the third paragraph of your letter.

Our clients stated that Mr. David Caesar came to their offices on the 17th December, 1966, and stated that he wished to insure motor car HR 713. The proposal for the motor Insurance was filled in by one of our client's employees at the dictation of Mr. Caesar, Mr. Caesar then read the proposal for the Insurance and signed his name at the bottom. In the proposal, in reply to question "6". "Is the proposer the owner of the vehicle and is it registered in his name? (if not, state the name and address of the owner and of the person in whose name the vehicle is registered",) the answer given is "Yes", On the 17th December, 1966, a policy of insurance was issued in favour of Frederick Smartt and Mr. David Caesar came to our clients' office and filled up an

application to transfer the said insurance from Mr. Caesar to Mr. Smartt, but this application was refused by our clients.

Your client had not motor insurance with our clients in respect of motor car HR 713 and our clients are not liable to indemnify your client.

The certified copies of the Writs of Summons sent with your letter are returned herewith.

Yours faithfully,

Sgd. Dias & Gomes.

D. & G./ns
Enc. 2.

The facts as stated above are not in dispute save and except the circumstances as stated by Caesar as to how he happened to take out the policy in his own name instead of the name of Smartt. Caesar's version on this aspect was denied by the defendant's witness, Dennis Parmanand. Caesar admits being knowledgeable in such matters and that he knew what was required in answer to question 6 of the proposal form. Yet according to him he allowed the answer "Yes" to remain in the column because of what he alleged Parmanand told him. On consideration of this aspect, I accept the evidence of Parmanand as more probable and reject the version of Caesar and find as a fact that Caesar made a false statement in respect to his answer to question 6 of the proposal form. What is the effect of this false statement in the proposal form? On this aspect, Counsel for the defendants submitted that no liability in the Company could arise under the policy because it was obtained therein by misrepresentation of material facts, and that such a policy insured no one. Caesar had warranted in the proposal form that the statement contained therein were true and correct. That formed the basis of the contract between Caesar and the defendants. Where any material statement is untrue, the policy is rendered invalid and no liability could arise. Counsel further contend that a third party right to recover from an insurance company a judgment obtained against the driver of a motor vehicle is based on the assumption that at the time of the accident, there was a valid policy of insurance in existence. If the policy is invalid then the Insurance Company is under no liability to pay any judgment obtained by a third party. Moreover, Counsel stressed, the insurance company can challenge the validity of the policy of insurance in such 3rd party proceedings to recover a judgment obtained

against the driver. It is not incumbent on the Company to institute proceedings for a declaration that the policy was invalid. The defendants rely on *Guardian Assurance Coy. v. Southerland* (*1939*) *(2) A.E.R.* at p. 249, where a policy of insurance and a cover note against 3rd party risks in respect of a motor-car were obtained by misrepresentation and non disclosure of material facts. It was held (1) that the Insurance Company was entitled to a declaration under s. 10(3) of the Road Traffic Act that they were entitled to avoid the policy and the cover note. (II) that a policy of Insurance or cover note so obtained insures no one and therefore cannot be held to be a "policy of Insurance" within s. 36(4) of the Road Traffic Act, 1930, so as to make the insurance company liable under that section to indemnify the persons or classes of persons specified in the policy.

S. 10(3) of the Road Traffic Act 1930, is similar to s. 8 of Cap. 281—our Ordinance. Counsel for the plaintiff challenges the interpretation put on the Guardian case by defendants and submits that it must be interpreted in the context in which it was made. That case was brought under s. 10(3) of the Road Traffic Act 1930—(s. 8(3) of our Ordinance). The Company there did the right thing under the section which provides as follows:—

> "No sum shall be payable by an authorised insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground that he was entitled to do apart from any provision contained in it.
>
> Provided that an authorised insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment of that action, unless before or within seven days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the nondisclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled, if he thinks fit, to be made a party thereto".

In the Guardian case (*supra*) BRANSON, J.: stated *inter alia*—at p. 249:

> "This contention rests upon the Road Traffic Act 1930, s. 36(4). This subsection, it is argued confers upon any person or class of person specified in a policy of insurance issued under that section, a statutory right to indemnity in respect of any liability which

the policy purports to cover. A policy it is said, is none the less a "policy issued under the section" because it has been obtained by misrepresentations or fraud, and the statutory right to indemnity arising by force of the statute, on the issue of the policy, and not of the contract contained in the policy remains in force, though the contract may be voidable—or, indeed avoided or rescinded—by mutual consent of the parties".

The learned judge continued:—

> "Apart from authority, I cannot so construe the subsections. It applies to "a person issuing a policy of insurance under this section", that is to say, by virtue of sub-s. (l)b, one which "insures such person . . . or persons . . . as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person by or arising out of the use of the vehicle on a road . . . ."

The learned judge then expressed the view that "a policy obtained by misrepresentation of material facts insures no one, and so cannot be held to be such a policy, and therefore sub-s. 4 does not apply to a policy so obtained. To accede to the argument would be to hold that the legislature had deprived an insurance company which issues policy under s. 36 of its common-law right to repudiate liability arising out of a policy, the granting of which has been induced by material misrepresentations".

In answer to BRANSON, J's: opinion, Counsel for the plaintiff contend that the right to repudiate liability arising out of a policy induced by material misrepresentation is preserved by s. 8(3) of Cap. 281 (s. 10(3) of the English Act) which the learned judge seems to have over-looked when expressing his opinion. Moreover, the Guardian case brought in conformity with that section, vide: *Croxford v. Universal Insurance Company*, 1936 (1) A.E.R., p. 151; and p. 157 re: s. 38 of 1930—Act and pp. 159-162 and 164-165 and 166 re: s. 10 of 1934—Act.

Authority for plaintiffs argument is found in a much later case:—*Durant v. McClaren* 1956 (2) Lloyds list Law Reports p. 70:—

In his judgment, Goddard, Chief Justice stated as follows:—

> "This is a case stated by Justices for the County of Survey, who, obviously, very reluctantly dismissed an information against the respondent, Brian Douglas Friend Maclaren, alleging that he drove a car without a policy of insurance being in force; and on the facts found, Maclaren is obviously a very, very dishonest person, and if he could be disqualified from driving it would

be a very good thing, because the Justices find that to enable him to get cover from driving he told two deliberate lies.

The facts show that on November 4, 1955, an insurance company had refused to insure him, so he would not be able to drive his car, and he went to Godfrey Davis, Limited, who are well known as a firm who hire out cars for people to drive themselves. Of course they have to see that there is proper insurance in force, so that made the customer who comes, answer certain questions to enable him to be insured, and among other questions they asked (*inter alia*).

Has any insurer in respect of any motor vehicle owned or controlled by you:—

(a) Declined your proposal?

(b) Cancelled or refused to renew?

And this man answered "No". He knew that the week before that his insurance company had refused to insure him. Then he was asked:

15. Have any accidents and/or losses occurred during the THREE YEARS immediately previous to today's date in connection with any vehicle owned hired or driven by you?

And the answer is:

"Nil. No payment has been made by any insurance company to me ever"'.

Never mind whether any payment had been made, he had four accidents, so he is obviously a man of whom insurance companies fight shy, and therefore when he goes on the road he is a public danger, and *it is great misfortune that he was not prosecuted under s. 112(2) of the Road Traffic Act 1930.* If he had been he would have been liable to a fine not exceeding £50 or to imprisonment for a term of not exceeding six months or to both such imprisonment and fine. For such a scandalous case as this, if he had been prosecuted under that section, I hope the justices would have sent him to prison. If he does again, I should think he ought to get the full six months and the fine as well; it is scandalous conduct. But he was prosecuted for driving an uninsured motor car, and Mr. Du Cann has argued that this cover that was granted was void. The difficulty has arisen is caused by s. 10 of the Road Traffic Act, 1934, which was passed for the protection of people who may be injured in an accident, not really to protect these drivers whether fraudulent or not, but to protect the people who may be injured.

Therefore, if a person is injured the effect of this section is that an insurer who has delivered a certificate of insurance, although

he may have, the right to avoid the policy and for this purpose I do not see that makes any difference whether the policy is void or voidable—if he can avoid the policy he is none the less liable to pay the injured person damages although he will have a remedy over against his assured.

This point arose in the case of *Goodbarne v. Buck* (1940) 1 K.B. 107 (1939) 65 LI.L. Rep. 27 which was tried before Mr. Justice Hilbery. Mr. Justice Hilbery there held that until the insurers had taken steps to avoid the policy they would remain liable.

At the time this man was prosecuted, no steps had been taken to avoid the policy; therefore, it seems to me that under s. 10 the insurers remained under a liability to indemnify third parties, and that is what the statute is concerned with; it is the obligation of the insurance company to indemnify third parties. They remained under that obligation to indemnify until they had taken proceedings. Therefore, I think the Justices were right in saying that they could not distinguish this case from *Goodbarne v. Buck, sup.;* and, as I said in the earlier part of my judgment, this man ought to have been prosecuted, and it is a great pity he has not been, under the other section for the fraudulent statements he made for obtaining the policy.

For these reasons, I think the Justices were perfectly right in coming to the decision they did.

And Mr. Justice Ormerod: "I agree, although with some reluctance. Clearly this is a bad case, and Mr. Du Cann in his argument laid emphasis on the words of s. 35(1) of the Road Traffic Act, 1930, which says: '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', etc. His argument is that if by any means an insurance policy may be avoided or may be void *ab initio,* then it cannot be a policy in force. Quite clearly when s. 35 was passed that might have been the position, but s. 10 of the act of 1934 does provide that the policy is in force and remains in force once a certificate of insurance has been given, and the insurance company must pay if judgment is obtained in respect of an accident unless proceedings are taken under s. 10(2). No proceedings of that kind have been taken in this case, and therefore until such proceedings are taken the insurance company remain liable to pay any damages incurred, providing, a judgment is obtained, in spite of the fact that the proposed insured has made clearly false statements in his proposal. In these circumstances,

it seems to me that this insurance was in force, at the time when the respondent was driving this car, and I agree that this appeal must be dismissed".

Mr. Justice Donovan: "I also agree, I think that in spite of the lies told by the respondent in the proposal form, it is not possible to say that there was not a policy in force at the time of the accident within the meaning of s. 35 of the Road Traffic Act, 1930. It was in force then though it might lose its force if the insurer adopted the procedure under s. 10 of the 1934 Act".

In Hardy Ivamy's "Law of Fire and Motor Insurance" at pp. 297 and onwards the learned author discusses the application of s. 8 now s. 207 of the 1960 Act in U.K. The view expressed accords with Durrant's case (supra).

I, therefore, find that the policy issued to Caesar was in force though voidable. The defendants did not seek to avoid it on the ground of misrepresentation of material facts as provided under s. 8(3) of Cap. 281. They had notice as early as 10th January, 1967, of the facts when Caesar sought to transfer the policy to Smartt.

It is too late at this stage for the defendants to raise the issue of misrepresentation of material facts *as against a 3rd party* when they had every opportunity of adopting the procedure within the provisions of s. 8(3) of Cap. 281. They ought to be precluded from doing so now.

The question as to whether the policy of insurance continued to be in force after the 5th January, 1967, when Caesar handed back to Smartt—the registered owner of the car—all the papers relevant to the car's operation, must be considered in the light of the authorities and the particular circumstances obtaining at the time of the accident.

It is agreed on all sides that the real issues are:—

(1) was there a policy of insurance in existence at the time of the accident (i.e.) on the 6th January, 1967—the day after Caesar handed back control of the car to Smartt) *sufficient* for the purpose of s. 8 of the Ordinance, cap. 281? and

(2) was the driver *Murray*—the person against whom the judgments were obtained, "a person insured by the policy".

Having found that the policy was only voidable and was in force on the 5th January, 1967—the time when Caesar handed back "control" to Smartt—the question arises; Did the handing back to Smartt without notice to Murray affect 3rd parties in respect of the death of or bodily injury?

It is the contention of the plaintiffs that 3rd parties are not affected because of the provisions of s. 4(3) and s. 4, of the Ordinance.

It is admitted that a certificate of insurance had been issued under s. 4(4) of the Ordinance; and that judgment had been obtained by a third

party in respect of a liability as is required to be covered by s. 4(1)(b) namely—death or bodily injury. By s. 4(3) it is provided "Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons" *vide—Tattersall v. Drysdale* 1935 L.J.R. vol. 104—P. 511. And by s. 4(1)(b) "In order to comply with the requirement of this Ordinance a policy of insurance must be a policy which—(a) is issued by a person who is an authorised insurer, and

(b) insures, such person, persons, or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the Motor Vehicle on a public road: . . ."

It is contended by counsel for the plaintiff that despite the handing back of the car by Caesar to Smartt, Caesar had an insurable interest. On the other hand, counsel for the defendant argues that Caesar never had an insurable *interest*—or alternatively that if he had both the interest and the policy terminated when he handed back control to Smartt the day before the accident.

It is stated in Shamcross on Motor Insurance—2nd Ed. at p. 20 "an insurable interest exists where the assured stands in some legal relation to the subject matter of the insurance whereby he stands to incur some legal loss if the event insured against occurs".

In *Boss v. Kingston*—1963 (1) All E.R. p. 179 Lord PARKER, C.J., stated *inter alia* at p. 179—

> "The conclusion of the justices was based on the fact that, once the Triumph motor cycle was sold, the appellant Boss had no insurable interest in it. That being so, they were of the opinion, following the reasoning in *Rogerson v. Scottish Automobile and General Insurance Co. Ltd.,* (1) and *Tattersall v. Drysdale* (2) that the whole policy lapsed, including the further cover provided in respect of other cycles not owned by or under hire to the insured. It is to be observed, however, that, in the present case, unlike the cases referred to, the policy is in respect of third party risks only, and accordingly, that there is no necessity for the assured to have any insurable interest in the vehicle. He could in law at any rate, and possibly in practice, be able to get cover against damage caused by his driving of any vehicles whether or not he had any insurable interest in them. Accordingly,

as it seems to me, these cases are not, at any rate directly, relevant and the justices' reasoning was wrong".

This aspect is also dealt with in Crane's "Law of Compulsory Motor Vehicle Insurance" at p. 79 as follows:—

> "As regards the interest of the proposer in the subject matter of the insurance, namely, the motor vehicle it becomes important to the insurers to ascertain whether the assured is the sole beneficial owner of the vehicle, or is a hirer of the vehicle under a hire purchase agreement. Under the statutory third-party insurance, however, so long as the assured himself uses, or causes or permits another person to use, the vehicle on a public road, his liability to third parties to the extent set out in para. (b) of sub-s. (1) of s. 4 of the Ordinance must be covered by insurance, and it is submitted that the exact nature and extent of his interest in the vehicle are immaterial. But the information as to the assured's interest in the vehicle may still be necessary to enable the insurers to consider the personal element connected with the proposed contract, and to prevent "collusive insurances". Persons who might be considered unfit to become parties to the insurance contract by reason of their previous record may procure other persons who possess no interest in the vehicle to enter into the insurance contract on their behalf.

And vide pp. 8 and 161-162. It appears no insurable interest is necessary in this country. In any event, if Murray's driving was caused or permitted by Caesar then it would appear that Caesar had an insurable interest according to Shamcross (supra) at p. 83:

> "He has an insurable interest in the liability of or accidents to persons driving the car with his consent".

Finally: it appears that the crucial question to be decided is whether the driver *Murray* was a "person insured by the Policy—that is, was he a person who at the time of the accident was driving the car with the permission of the assured Caesar? It is useful to reiterate the facts here".

Before the 6th January, 1967 Caesar had ultimate control of the car, Murray had possession with Caesar's knowledge and consent. When Smartt returned on the day before, 5th January, 1967—Caesar handed back all relevant paper and accounted to Smartt.

Murray was informed of this *after* the accident on the 6th January, 1967. On these facts counsel for the plaintiff submitted that at the time of the accident, Murray was a person covered by the policy as he was at that time still *driving* with and by Virtue of Caesar's permission.

He sought support from the following cases which attempt to define "permission" within the meaning of the Motor Vehicle Insurance Cap. 281.

> *Goedsmith v. Dealvin 1933, W.M. 255 Clydebank Co-op v. Bennie (1937) S.C.J. 17 Churchill v. Morris (1938) 158 L.T. 255 Peters v.*

MAISIE HARRIS AND OTHERS

v.

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LIFE INSURANCE COMPANY LIMITED

General Accident etc. 1938, 2 All E.R. p. 267 *Goodbarne v. Buck 1940 (1) All E.R. 613 Smith v. Ralph 1936 (2) Lloyds Rep. 439,* and *Kelly v. Cornhill Ins. Co. 1964 (1) All E.R. 321. In Peters v. General Accident (supra).*

"The vendor of a motor van insured by the defendants handed over the insurance policy with the van 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 the Road Traffic Act, 1934, section (s. 8 of Ord.). The Motor van was sold for £10: of which £5: was paid when the van was handed over and the remaining £5: after the occurrence of the accident—*Held.* 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 purchasers' own property. (II) 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".

In the above case it was also urged that the handing over of the policy on the sale of a car was in law an assignment of the policy. This argument was rejected upon the ground that the insurers relied upon the history of the driver.

On this important issue the defendants contend that the judgment which the plaintiffs obtained were against Murray, the driver, in his capacity as a servant and/or agent of Smartt. The evidence discloses that there was never any policy of insurance in existence between Smartt and the defendants insuring Smartt or any of his servants or agents. The policy in dispute is between the defendants and David Caesar; It purports to cover Caesar and persons driving on the order of or with the permission of Caesar: There is no judgment against either Caesar or any one who was driving on Caesar's order or with his permission at the time of the accident. Consequently the defendants are not liable under the policy between Caesar and the defendants.

It is further contended by the defendants that an insurance policy is a contract of personal indemnity. The insurance company cannot be compelled to accept responsibility in respect to a third party who may be quite unknown to them. The categories of risks covered by the policy are:

(i) The assured in respect of the user of the insured car.

(ii) The assured in respect of his temporary user of another motor vehicle provided he retains ownership of the insured car.

(iii) Any person driving the insured car with the order or permission of the insured.

Where the assured never had ownership of the insured car, then the policy is invalid and neither the assured or any one else is covered by the policy.

Moreover, it is contended Caesar's authority ceased on the handing back on the 5th January, 1967, his evidence *inter alia:*—

> "My connection with Murray ceased on the 5th January, 1967, after I handed over my responsibility to Smartt. I collected no money after the 5th January, 1967. I had nothing to do with Murray on the 6th January, 1967. He was not under my control on the 6th January, 1967, I had not to give him permission on the 6th January, 1967".

Smartt it is contended had the power to repossess the car and whether Murray knew or not is irrelevant. In *Goodbarne v. Buck* 1940. I.A.E.R, McKINNON, L.J. dealt with the question of permission at p. 616, thus:

> "In order to make a person liable for permitting another person to use a motor vehicle it is obvious that he must be in a position to forbid the other person to use the motor vehicle. As at present advised, I can see no ground on which anybody can be in a position to forbid another person to use a motor vehicle except in a case where the person charged is the owner of the car. If one is the owner of a car or a van, one can forbid or one permit another to use it. It was no doubt for that reason that considerable effort was made to establish that in case H. A. Buck was really the owner of the car".

On the other hand it is the contention of the Counsel for the plaintiffs that *knowledge in the driver* was not irrelevant. Despite the hand-over of the relevant papers by Caesar to Smartt in respect of the car HR 713, Caesar's permission to Murray continued to be effective at least until Murray had notice of the hand-over. It is contended that the need for notice in the present circumstances is supported by the leading case of *Kelly v. Cornhill Ins. Coy.* 1964 (1) All E.R. p. 321. In that case:

> "A father, the owner of a motor car, had insured it with the respondents under a policy current for the period April 26th, 1959, to April 26th, 1960. In the proposal form the father stated that the car would be driven by his son, and that the father did not intend to drive it. The Policy insured any person driving the car "with the permission of the insured". The father gave the son permission to drive the car, no limitation of the permission was expressed and the permission had not been terminated by the father. The father died on June 2nd, 1959. On February 4th, 1960, when the son was driving

the car in England and while it remained part of the father's estate, there was an accident in which the car, and property belonging to third parties was damaged. The father's executrix had not terminated the son's permission to drive. The policy contained no provision dealing with the extent to which it was to continue after the father's death. On appeal by the son from a decision sustaining the respondents' plea that he had no title to use them as the permission did not continue after the father's death.

HELD (Lord HODSON and Lord GUEST dissenting): the permission to the son continued until shown to have been terminated, and the term "permission" was not so rigid that it could not refer in the context of the policy to a period after the death of the person giving the permission; in the present case, where the car remained part of the father's estate, the respondents had failed to establish that the permission" was not so rigid that it could not refer in the context of the policy to a period after the death of the person giving the permission; in the present case, where the car remained part of the father's estate, the respondents had failed to establish that the permission, being of unlimited duration had been revoked, and accordingly the plea that the son had no title to sue had been wrongly sustained (see p. 323, letter I, p. 325, letter G, p. 326, letter D, p. 328, letter C, and P. 332 letters A and E, post. Appeal allowed".

Counsel for the plaintiff has adverted my attention to certain passages in the five very learned judgments of their Lordships in the above case.

I have given careful and weighty consideration to the whole of the judgments, and must confess with humility that I am more in agreement with the reasoning of the dissenting judgments of Lord HODSON and Lord GUEST.

Both appear to support the views expressed by Mr. KINNON, L.J. in *Goodbarne v. Buck* (*supra*).

I am inclined to the view that permission implies the power to revoke the permission at any time. Permission as the Lord president (in Kelly's case) pointed out presupposes a power to withhold or extend the permission.

In the instant case Caesar had no power to revoke or withhold permission from Murray, the driver, after the 5th January, for the sole reason that the owner Smartt who had originally contracted with Murray, and who was still the registered owner of the car had returned, Caesar was merely filling the gap so-to-speak during Smartt's absence. Caesar's evidence cannot be ignored. The present policy requires the permission of Caesar, the insured, and he has stated categorically that he had no connection with the car after

the 5th January, 1967. His evidence may very well be self-serving, but it is not rebutted.

In Kelly's case the executrix had lent her support to the driver. The case thus turns on the narrow question whether the permission of the insured within the terms of the policy continued after Caesar handed back control to Smartt. I think not! Murray was clearly driving under the permission of Smartt on the 6th January, 1967—the time of the accident.

I have reached this conclusion not without some reluctance.

(i) because the driver bona fidely believed that he was covered; and

(ii) the whole scheme of Third Party insurance was intended to make provision for the protection of third parties against risks arising out of the use of motor vehicles i.e. that every driver of a motor vehicle should be covered against such risks by a policy of insurance.

This is indeed a hard case—which would have been met by the Motor Insurers Bureau in England. No such body exists in this country. In the circumstances, I suggest that this judgment be tested.

I would like to express my appreciation to Counsel for their cooperation in the course of the hearing and particularly to Mr. Fitzpatrick, Counsel for the plaintiffs whose assiduous preparation and very able arguments considerably lightened my task.

In the result the action is dismissed. Each party to bear their own costs.

Action dismissed.

Solicitors:

David De Caires for plaintiff.

Dias and Gomes for defendants.

WINIFRED HOOKUMCHAND ET ANOR *v.* OLGA APPIAH ET AL

[High Court (Bollers, C.J.) March 10, 11; June 5, 17, 28, 1971]

Probate action—Lost will—Degree of proof of execution of will—Whether proof beyond reasonable doubt or on a balance of probabilities—Due executive and contents of lost will to be clearly proved—Wills Ordinance Cap. 47 (*now Cap. 12:02*).

The plaintiffs alleged that they were the beneficiaries of the estate of Hector Hookumchand and executors under the last will and testament of the deceased. They sought an order for a declaration that probate in solemn form be granted of the contents of the lost will bearing date 20th October 1969 as set out in Appendix "A" of the amended statement of claim. The main issues at the trial were whether the plaintiffs had discharged the burden of proof placed upon them in showing that the said will was duly executed in accordance with the Wills Ordinance, Cap. 47 and that the terms of the destroyed, lost or misplaced will had been clearly established.

HELD: (i) on the evidence adduced in the case, whether the standard of proof beyond reasonable doubt or proof on a balance of probabilities was adopted, it was clearly proved that the will of the 20th October, 1969 was executed by the testator in the presence of the two attesting witnesses who each signed the will in the presence of the testator and of each other;

(ii) the contents as appeared in Appendix "A" annexed to the statement of claim was clearly established;

(iii) the burden placed on the plaintiffs (propounders) of proving that the will was not destroyed by the testator animo revocandi was clearly discharged;

(iv) the fourth-named defendant would be ordered to pay the costs of the plaintiffs, and in the event of the failure of the plaintiffs to recover the said costs, the plaintiffs costs would be paid out of the estate of the deceased testator; the defendants save and except the fourth-named defendant would be entitled to their costs out of the estate.

Judgment for the plaintiffs accordingly.

[**Editor's Note**: An appeal to the Court of Appeal was dismissed. See [1972] 18 W.I.R. 244].

R. H. Luckhoo and K. Prashad for the plaintiffs.

G. M. Farnum, S.C., and P. De Freitas for the defendants.

BOLLERS, C. J.: In this action the plaintiffs as the beneficiaries of the estate of Hector Hookumchand also known as Ramdhani deceased of No. 41 Village, West Coast Berbice, Guyana claim a declaration that probate be granted in their favour of the last will and testament of the deceased dated 20th October, 1969 which they allege was destroyed by the defendants or lost or misplaced.

In the amended statement of claim for which leave to file and serve was sought and granted before the commencement of the trial, the plaintiffs who are the daughter and grandson respectively of the deceased allege that they were named as executors under the said last will and testament of the deceased and that the said will was never revoked and was in existence both during and after the death of the deceased and was actually in possession of the 1st named plaintiff. The further allegation is that on the 23rd January, 1970 the 1st named plaintiff discovered that the cannister in which the key for the iron safe wherein the will was kept was wrenched open and the contents of the iron safe ransacked and the aforesaid will missing.

The terms of the said will are set out in a document marked "A" and annexed to the amended statement of claim. The plaintiffs therefore claim the declaration as already stated.

The 1st, 2nd, 3rd and 4th defendants who are the remaining children of the deceased and the 5th named and 6th named defendants who are the grandchildren of the deceased and who were named as beneficiaries under the alleged missing will, but who would be entitled to a greater share of the estate on an intestacy allege that the aforesaid will dated the 20th October, 1969 was not duly executed by the deceased in accordance with the Wills Ordinance Chapter 47 and accordingly they put the plaintiffs to the proof that the said will was duly executed and that the deceased knew and approved of the contents of the said will.

The main issues at the trial which arise for determination are whether the plaintiffs have had discharged the burden of proof placed upon them in showing that the said will alleged to be made by the deceased on the 20th October, 1969 for which probate was sought was duly executed in accordance with the Wills Ordinance Chapter 47, and that the testator at the time of due execution was possessed of the necessary testamentary capacity and whether the terms of the destroyed, lost or misplaced will have been clearly established, and whether the will had been destroyed by the testator animo revocandi.

The evidence which I accept reveals that during the month of October, 1969 the deceased was suffering from cancer of the pyloric end of the stomach with secondaries in the liver and mesentary. He was treated with injections by his medical adviser Dr. Sagar. The doctor found that the illness of the deceased did not affect his mind and he spoke coherently and sensibly. Unfortunately the deceased an old man of between 60 and 70 years old expired on the 12th of December, 1969. Meanwhile on the 20th October, 1969 the testator sent the 4th named defendant Reginald Hookumchand and Eustace Tucker on a mission to call the Village Overseer Mr. Barrington Moore and a Mr. Gilbert Ross to his home at No. 41 Village, West Coast Berbice. The 4th named defendant announced to Gilbert Ross that his old man was ill and was going to make a will and wanted him to sign as a witness. When the three men reached the bedroom of the deceased they found the testator ill in bed and his daughter the 1st named plaintiff present. Tucker remained on the front step and did not enter the bedroom.

The testator then declared that he wanted Mr. Moore to make his will and he then informed Ross that he wanted him to sign as a witness. The testator then called his daughter Winifred the 1st named plaintiff to bring a round table and chair into the bedroom which she did. Mr. Moore sat on the chair, Gilbert Ross sat on the iron safe and the 4th named defendant sat at the foot of the bed. The 1st named plaintiff sat at the side of the bed and braced up the old man. The testator then proceeded to dictate the terms of the will to Mr. Moore who took them down in an exercise book.

Mr. Moore then transcribed what he had written down in the exercise book on to a will form. Mr. Moore then read out the terms and contents of the will to the testator and at the end of it asked the testator if that was alright. The testator signified his assent. Mr. Moore then passed the will to the testator who signed the will in the presence of Mr. Moore and Gilbert Ross and then Mr. Moore passed the will to Gilbert Ross who read the will and signed it as an attesting witness, and then Mr. Moore signed the said will.

Each of the attesting witnesses therefore signed in the presence of each other and the testator. At the time that the attesting witnesses appended their signatures to the document both the 1st named plaintiff and the 4th named defendant were present.

About five days later the 2nd named plaintiff returned to his home from Abary and paid a visit to his grandfather the testator. His grandfather then showed him the will and this plaintiff noted that he and Winifred Hookumchand had been appointed executors to the will and that the two witnesses to the will were Gilbert Ross and Barrington Moore. After he read the will the testator handed the will to the 1st named plaintiff who put it in the iron safe and then locked the safe. She then put the key of the safe in the cannister. On the 20th November, 1969 exactly one month after the will was executed the District Commissioner. Mr. Ramgobin was taken to the home of the testator by the 2nd named plaintiff in order to effect a transfer of 168 acres Crown Land on the left bank of the Abary which the testator owned, to the 2nd named plaintiff. The District Commissioner made sure that the deceased agreed to the transfer whereupon the deceased instructed his daughter the 1st named plaintiff to show the District Commissioner his will. The 1st named plaintiff went into the next room and returned with a brown envelope which he handed to the District Commissioner. When Mr. Ramgobin Persaud opened the envelope he found it contained the last will and testament of the deceased. The will contained a number of bequests and he checked to see whether there was a bequest of the 168 acres of Crown Land in the Abary to the 2nd named plaintiff Jerry Rachpaul and found the bequest therein. He noticed that the will was signed by the testator Hector Hookumchand in a slanting manner and it had been witnessed by Barrington Moore with whose hand-writing he was familiar and Gilbert Ross. The plaintiffs have verified that this was the will of the 20th October, 1969.

He then advised that the will should be registered at the Registry. After completing the business of the transfer of the land the District Commissioner left the home of the deceased. At the time of the visit of the District Commissioner to the home of the deceased. At the time of the visit of the District Commissioner to the home of the deceased the 1st and 2nd named plaintiffs and the 3rd and 4th named defendants were present when the transfer of land was effected. Two days later the 2nd named plaintiff Jerry Rachpaul was given the will by the deceased to take to Georgetown in order to have it registered. The 2nd named plaintiff travelled to Georgetown with Eustace Tucker and the 4th named defendant. On the way the 4th named defendant asked the 2nd named plaintiff how much money the deceased had given him to carry home. The 2nd named plaintiff explained that it was not money the deceased had given him but the will. The 4th named defendant accused him of telling ties whereupon the 2nd named plaintiff showed him the will and he then handed it to Tucker who was in the back seat of the car. Tucker read the will and gave it back to the 4th named defendant who put it back on the seat. These three men then took the will to the Registry in Georgetown but the 2nd named plaintiff was not allowed to deposit the will in the Registry as he had no authorisation from the deceased. The 2nd named plaintiff then returned with the will to his grandfather's home where it was locked up in the safe and the key replaced in the cannister.

On the death of the deceased on the 9th January, 1970 the will was removed from the safe and taken by the 1st and 2nd named plaintiffs and the 4th named defendant to the office of Mr. K. Prasad, Barrister-at-Law in New Amsterdam, but Mr. Prasad was not in office and the will was subsequently deposited in the safe at No. 41 Village. On the 22nd day of January, 1970 these three persons returned to Mr. Prasad's office without the will and were told to come back the next day. On the 23rd January, 1970, the 1st named plaintiff removed the key from the cannister, opened the safe and found the contents of the safe ransacked and the will missing. On subsequent examination she discovered that the hinges of the cannister were wrenched and broken. The 4th named defendant was in the bedroom and the 1st named plaintiff announced to him that the will was missing. The 4th named defendant then assisted in the search but could not find the will. The same day the 1st and 2nd named plaintiffs and the 4th named defendant went to Mr. K. Prasad's office where they met Mr. Prasad and the 4th named defendant on the instructions of Mr. Prasad dictated the terms of the will to Mr. Prasad's clerk. The terms dictated were identical with those given in the evidence by Gilbert Ross and the 2nd named plaintiff who was careful enough to make a note in writing of the terms dictated by the 4th named defendant. On the following day the 1st and 2nd named plaintiffs and the 4th named defendant went to the Criminal Investigation Department, New Amsterdam, Berbice where the 4th named defendant reported to Assistant Superintendent Duff that the will made by his father Hector Hookumchand deceased was stolen from an iron safe at no. 41 Village, West Coast Berbice. The 4th named defendant reported that the will had been made in favour of his sister Winifred

Hookumchand and give the police the name of two suspects. He also reported that an agreement made between the deceased and one Hamilton was stolen. He then made the definite statement that the key for the safe was kept in a cannister and the 3rd named defendant Frank Hookumchand knew where the key was, and the witnesses to the will were Gilbert Ross and Barrington Moore.

Subsequently in June, 1971, the Superintendent met the 4th named defendant at a funeral at Pln. Washington where the Superintendent told him that he had heard from Mr. Krishna Prasad that the matter had reached court and that he would be summoned to give evidence, whereupon the 4th named defendant told him he must not attend court and he would fix him up.

In the meantime Gilbert Ross had spoken to Mr. Barrington Moore and asked him to go to Mr. K. Prasad and give a statement and Mr. Moore had replied that the boys had been to him the night before and that they had given him $2,000.00 not to go to Mr. Prasad but if Doreen wanted him to go she would have to give him $2,500.00. Mr. Moore had also informed the District Commissioner Mr. Ramgobin Persaud that he had prepared the will and Gilbert Ross had signed as a witness.

It would be seen from my findings that I have accepted more or less all the evidence given by the plaintiffs and their witnesses save and except that I have arrived at the conclusion that the 2nd named plaintiff was mistaken as to the precise dates on which the parties visited Mr. K. Prasad's office in New Amsterdam, and was convinced after a careful examination of all the evidence that Gilbert Ross, the 2nd named plaintiff and the 4th named defendant because of the fact that they were familiar with the lands and property of the deceased testator and their respective opportunities for reading and hearing the contents of the will read, actually remembered the contents of the will which were in the terms of the document marked "A" and the 4th named defendant had actually dictated the said contents to Mr. Prasad's clerk. I am also completely satisfied that the plaintiffs have discharged the burden of proof placed upon them in showing that the will of date 20th October, 1969 was made in accordance with the Wills Ordinance Chapter 47 and at the time of the making of the will both the medical evidence and the other evidence in the case have shown that the deceased testator had possessed the necessary testamentary capacity and was of sound mind and memory at the time when he had dictated the terms of his will and executed it in the presence of the attesting witnesses.

On the other side of the coin I cannot and do not accept the evidence of the 4th named defendant and the witness Barrington Moore. Their version of what had taken place in the house of the deceased on the 20th October, 1969 when the testator dictated the terms of his will to Mr. Moore seem to me to be absurd. It is incredible that Mr. Moore who had prepared two

previous wills for the deceased which had not been signed by one attesting witness though executed by the testator in the presence of one attesting witness would again enter into the useless exercise of preparing yet another will which would obviously be invalid. It seems to me preposterous that a man of Mr. Moore's intelligence would permit the testator to sign the will in his presence and then allow him to leave the premises to send for him at a subsequent time for another witness to sign which would clearly infringe the provisions of the Wills Ordinance, and when he stated that he signed the will because he considered that the witness would soon come, he was clearly betraying the trust reposed in him by the testator as a responsible person to prepare a will to be executed in accordance with the law. It also seems more than passing strange that he should have been paid and have received a fee for making what must have been obvious to everyone concerned an invalid will. Mr. Moore's manner and demeanour in the witness box left much to be desired and although at one period of his examination in chief he was subtly led by counsel he failed to measure up to the necessary standard of a truthful witness. It is also a strange circumstance that though it was put to the 1st named plaintiff that Gilbert Ross had signed the will in the absence of Mr. Moore no cross examination was directed to Ross on this point.

The 4th named defendant Reginald Hookumchand was an object of misery in the witness box and I have no difficulty in branding his evidence on the main points as a tissue of lies. He seemed to have got confused with the Ross' and sought to introduce on to the scene a Mr. Abraham Ross whose name was never mentioned by Mr. Moore. He also imposed on Mr. Moore the act of calling for three previous wills alleged to have been made by the deceased and tearing them up at the request of the deceased and then handing them over to the 1st named plaintiff to be burnt in the fire. Mr. Moore however never deposed to this act. The 4th named defendant also maliciously and without support from his pleadings introduced the element of fraud into the case and imputed to the 2nd named plaintiff and to the legal adviser the fraudulent act of the former in inserting a bequest of a portion of land in favour of Frank Hookumchand, and the latter advising in favour of this exercise. He seemed to have completely overlooked the fact that in his report to the police he had failed to mention this circumstance. This defendant gave evidence of a visit to Mr. Moore's house accompanied by the 1st and 2nd named plaintiffs where Mr. Moore was alleged to have told them that the will was not properly signed. Strangely enough not one word of this important event was put to the 1st and 2nd named plaintiffs in cross-examination. His evidence assumed even more fantastic proportions when he gave a story that after the will was found to be missing he went with the 1st and 2nd named plaintiffs and his own son to a man at Port Mourant in order to look into a ring to see whether they could discover where the missing will was.

In the final analysis the evidence of the 4th named defendant appears to me to be worthless and is rejected.

In *Sugden and others v. Lord St. Leonards and others* (1876) 1 PD. 154, 252 it was clearly established that the contents of a lost will may be proved

by the evidence of a single witness though interested and that secondary evidence can be given in proof of the contents of such a will but such evidence must be of extreme cogency. In *Woodward v. Goulstone* (1886) 11 App. Cases 469 Lord Herschell L.C. said "Now I cannot but be alive to the extreme danger of establishing a will merely by parol evidence of its contents. I think therefore, that in order to support a will propounded, when it is proved by parol evidence only, that evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intentions of the testator".

In Sugden's case Sir George Jessel M.R. when dealing with the evidence of a testator's declaration of intention pointed out that as a matter of course, the courts must be cautious in admitting such evidence for, from its very nature it is not open to the test of cross-examination and is very often second or third hand. It is also frequently fabricated so that the court must be especially put on its guard. In the more recent case of *Wipperman Wissler v. Wipperman and others* (1953) 1 A.E.R. 764 Pearce J. considered the dicta of these two learned judges in these two old cases and pointed out that the dicta was only meant to apply to the particular facts of the case in the former case and in the latter it was dealing with the evidence of a testator's declaration. He then stated categorically that in his view that the required standard of proof was the ordinary standard of proof in civil cases.

On the evidence in this case whether the standard of proof beyond reasonable doubt or proof on a balance of probabilities is adopted, I hold that it has been clearly proved that the will of the 20th October, 1969 was executed by the testator in the presence of the two attesting witnesses who each signed the will in the presence of the testator and each other, and the contents as appears in the document marked "A" annexed to the amended statement of claim have been clearly established. There was strong evidence suggesting that the 4th named defendant was concerned in the disappearance of this will but I do not consider that I can make any firm finding in this regard. The burden placed on the plaintiffs (who were propounding the contents of the will) of proving that the will was not destroyed by the testator animo revocandi is clearly discharged and the presumption of revocation repelled by the convincing evidence that after the testator's death the will was taken to the office of the legal adviser and actually reported stolen from its usual repository by the 4th named defendant Reginald Hookumchand. (See *Patten v. Poulten* (1858) 1 S & T 55 and *Welch v. Phillips* (1836) 1 Moo PC 302.

I agree with the view taken by both counsel for the plaintiffs and for the defendants that in view of the circumstances of this case and more particularly the disappearance of the will an investigation or an enquiry was necessary and as a result the defendants' costs should be paid out of the estate of the deceased.

The sole exception however is in the case of the 4th named defendant Reginald Hookumchand who I think should be made to bear the plaintiffs costs for he was fully aware of the contents of the will, being present at the time the will was executed and knew that it was the testator himself who had dictated the contents of the will and he therefore had no justification in persisting in the defence of "want of approval" or "invalidity of the will".

There was also the allegation by him of fraud made against the 2nd named plaintiff and his legal adviser and his attempt to bribe the police not to come to court. I therefore make the following order:—

> "The Plaintiffs will have a declaration in p. 12(a) in the amended statement of claim and it is further ordered that probate in solemn form be granted of the contents of the lost will bearing date 20th October, 1969 as set out in Appendix "A" of the amended statement of claim.
>
> It is further ordered that the 4th named defendant do pay the costs of the plaintiffs to be taxed certified fit for the counsel, and in the event of the failure of the plaintiffs to recover the said costs from the 4th named defendant, the plaintiffs costs be paid out of the estate of Hector Hookumchand also called Ramdhani (deceased). It is further ordered that Nos. 1, 2, 3, 5 and 6 defendants have their costs to be taxed certified fit for counsel to be paid out of the estate. Stay of execution for six (6) weeks".

Judgment for the plaintiffs.

Solicitors:—

Mr. Dabi Dial for the plaintiffs.

Mr. S. M. A. Nasir for the defendants.

RONALD GIBSON *v.* LUCIANNE GIBSON

[In the Full Court on Appeal from a Magistrate's Court
(Bollers, C J., Vieira, J.), April 30, June 29, 1971].

Husband and wife—Action by wife against husband—Action in convention—Proper forum—Married Persons (*Property*) *Ordinance Cap. 169 S. 12.*

The respondent, the wife of the appellant, sued her husband in the magistrate's court for the conversion of a bed which she claimed as her property, she have been made a gift of it by a relative. The appellant claimed the

bed as his property, he having sold it to a relative who was also a defendant in the magistrate's court. The magistrate found against the appellant and the other defendant and awarded the wife damages. Only the appellant appealed, and it was submitted on his behalf that the magistrate had no jurisdiction to inquire into the matter and that the proper forum was the High Court.

HELD: this was an action to secure the wife's separate property, and as the damages claimed fell below $250: [the amount being within the limitation of $250: provided for by S. 3(1) of the Summary Jurisdiction (Petty Debt) Ordinance Cap. 16] the proper forum was the magistrate's court.

Appeal dismissed.

[**Editor's note**: An appeal to the Court of Appeal was dismissed. See [1972] 18 W.I.R. 228].

B.E. Gibson for the appellant.

S.E. Brotherson for the respondent.

JUDGMENT of the Court: The parties to this Appeal are husband and wife who used to live and cohabit together at 103, Canterbury Walk, Beterverwagting, E.C. Demerara. Among the furniture in the matrimonial home was one (1) Vono double bed which each party has claimed as his/her property and in respect of which the respondent brought a claim in the Magistrate's Court for conversion, alternatively, the return of the said bed, valued $75.00.

One Norma Mentore, the appellant's cousin, was the first-named defendant in the lower Court whilst the appellant was the second-named defendant. Mentore did not give evidence, nor has she appealed. In their written Defences both the appellant and his cousin alleged that the said bed was sold by him to her.

In her evidence, the respondent stated that she had left the matrimonial home as the result of a quarrel with her husband and that when she later returned she did not see the bed which, she claimed, was given to her by her sister, Pansy King, about 3 years prior to July, 1970, which is the material date in this matter. Later, as the result of certain information, she contacted Mentore who told her that she would loose down the bed and she asked the respondent to let her know when she could come for it. The respondent went back a second time and Mentore told her that she had brought the bed from the appellant and that she had a receipt therefor.

The appellant gave conflicting evidence about this bed. At first he said that he had given it to his cousin and made out a receipt for same but had never actually received any money from her. Later on, however, he said he had sold the bed to his cousin for $15.00—$20.00 but had issued a receipt therefor for only $10.00. He alleged that he had bought the bed a number of years ago but he could not remember when this was or how much it cost. He denied ever selling any bed belonging to his wife.

The learned Magistrate accepted and believed the evidence of the respondent in preference to that of the appellant and gave judgment in her favour for the sum of $75.00, costs $4.88 and fee to Counsel of $10.00

Before the learned Magistrate, Mr. Gibson submitted, *inter alia*, that in view of the provisions of section 12(1) of the Married Persons (Property) Ordinance, Chapter 169 (hereinafter referred to as the Ordinance), the Magistrate had no jurisdiction to enquire into the matter and that the proper forum was the High Court. This submission was rejected by the learned Magistrate who stated in his Memorandum of Reasons that the authorities cited by Mr. Gibson had absolutely no relevance to the point taken and, indeed, it confirmed that a wife can bring and maintain an action against her husband in respect of her own property.

S. 12 of the Ordinance provides as follows—

> "12(1). Every woman married after the commencement of this Ordinance shall have, in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject as regards her husband to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings for the protection and security of her own property, in the same manner as if she was unmarried, but except as aforesaid, no husband or wife shall be entitled to sue the other for tort.
>
> (2)……...
>
> Provided that no criminal proceedings……...
>
> ……
>
> (3)……."

S. 12 of the Ordinance is based upon and derived from s. 12 of the Married Women's Property Act, 1882 which came into force with effect from 1st January, 1883. The common law did not allow a married woman to possess any property independently of her husband since they were regarded as one person. Where property was settled on her, however, Equity treated her,, in respect to that property as a femme sole. The Act of 1882 almost abolished the common law distinction between married and unmarried women in respect of property and, for the first time, permitted a married woman to acquire, hold and dispose by will or otherwise of any real or personal property as her separate property as if she was a femme sole. The statutory concept of separate property has not been superseded, by virtue of the Law Reform (Married Women and Tortfeasors) Act, 1935, by placing a married woman in the same position as regards the acquisition, holding and disposition of property as a femme sole.

In *Bramwell v. Bramwell* (1942) 1 All E.R. 137, C.A. Goddard, L.J. (as he then was) said obiter at pp. 138 & 139.

> "It is not necessary to decide it in this case, but I have the greatest doubt as to whether a husband can bring an action for the recovery of land against his wife in these circumstances, alleging that she is wrongly

in occupation of the land, because, if she is wrongly in occupation of the land and he has a right to eject her, then it seems to me she is a trespasser, and the Married Women's Act, 1882, s. 12 expressly says that a husband cannot bring an action of tort against his wife. There are provisions under which this position can be dealt with. The C.C.R., Ord. 6, r. 4, makes provision for making application to the Court by originating application. R. 4 provides as follows:

(1) Any proceedings authorised to be commenced in a county court and not required by any Act or rule to be commenced otherwise, may be commenced by originating application. And then there are certain provisions in the order with regard to originating applications. One object, no doubt, that the legislature had in providing for these matters to be dealt with by originating application was that it is not always desirable, in the case of disputes between husbands and wives, that they should be dealt with in public when they can be dealt with in chambers, as they are in the High Court or by the county court judge."

In *Gottliffe v. Edelston* (1930) 2 K.B. 378, an unmarried woman sustained injuries through a man's negligent driving of a motor car and issued a writ against him claiming damages in respect thereof. Before the trial of the action she married him. Held, that her right of action was not such a thing in action as would become her separate property within the Act of 1882, but was barred by the general disability of husband and wife to sue each other for a tort. In a masterly historical survey and analysis *McCardie J.* referred to the position at common law and the substantive change made by the Act of 1882 and the learned Judge then went on to say at p. 389—

"It is well settled that a wife has the widest powers of action for the protection and security of her separate property. See Lush on Husband and Wife, 3rd ed., pp. 513, 515, and so on. For this purpose she may sue either in contract or in tort. Thus she may sue in tort for conversion of her goods by her husband; *Larner v. Larner* (4). The cases go to the utmost extent in favour of the wife, and she may bring every class of action against him, whether for damages or breach of contract or debt, and she may also claim an injunction against under the most striking circumstances: see *Shipman v. Shipman* (5) in the Court of Appeal. But, strangely enough, as Lush J. points out, the Act has nowhere enabled a husband to sue his wife for a tort under any circumstances whatsoever: see Lush on Husband and Wife, 3rd ed., p. 515. It may be said today with even more force than it was said by Blackstone 165 years ago: "So great a favourite is the female sex of the laws of England": see Blackstone, Bk. 1., cap., 15, p. 445."

McCardie J. went on to say at pp. 391 & 392—

"The word "property" in the Act of 1882 and the phrase "thing in action" in s. 24 of that Act must, I think, be read in the light of the general policy of the Act, so far as any policy at all can be inferred

> from it. The Act conferred no privileges on the husband. It conferred many privileges on the wife. But it is plain, I think, that the framers of the Act did not wish to encourage litigation between spouses. Such litigation is admittedly unseemly, distressing and embittering. Hence the working of s. 12 of the Act, as follows (…… These words "except as aforesaid, no husband or wife shall be entitled to sue the other for a tort," are broad and emphatic. The wife is given full power to guard her separate property. But, apart from that separate property, she cannot, I think, sue her husband for any tort whether before or during marriage."

In *Ralston v. Ralston* (1930) 2 K.B. 238, the parties were married in 1893 but separated in 1899 under a deed of separation and thenceforth lived separate and apart. After the separation the plaintiff set up in business as a garage proprietor, and she subsequently converted this business into a private limited company in which she held the majority of the shares and was also the chairman and managing director. In 1929 she saw in a churchyard near her husband's residence a tombstone on which was the following inscription: "In loving memory of Jennie the dearly beloved wife of W.R. Crawshay Ralston of the Bungalow, Valley. Died 20th May, 1916." The defendant was the W.R. Crawshay Ralston mentioned in the inscription and he had caused the inscription to be made. The plaintiff brought an action against her husband for libel and also for a declaration that she was the lawful wife of the defendant. Held, that, though the inscription was capable of a defamatory meaning, the plaintiff, by reason of s. 12 of the Married Women's Property Act, 1882, could not sue her husband on it, the action being for a tort and not for the protection and security of her separate property. MacNaghten J. said at pp. 243—245—

> "It was argued on behalf of the plaintiff that it was an action for the protection or security of her "property" within the meaning of the statute, because the alleged libel affected her credit and character as a trader, and reliance was placed upon an interlocutory observation of Brett J. in *Summers v. City Ban* (2). That was an action in which a married woman, who carried on the business of a restaurant keeper in the City of London separately from her husband, claimed damages against the City Bank, of which she was a customer, for breach of their duty, in that the bank had failed to present a bill of exchange for payment, had failed to notify her of its dishonour on presentation, and had dishonoured cheques which she had drawn upon her account.
>
> In the course of the argument in that case Brett J. is reported to have said (2): "Is not the married woman suing for the protection of her trade or business, when the married woman sues for a libel which affects her credit and character as a trader?" Since in that case the action was an action for damages for breach of the duty arising from the relationship of banker and customer it is clear that the observation was obiter, and no decision was given by the Court with regard to that matter.

> The next case brought to my attention was that of *Reg. v. Lord Mayor of London* (3). In that case Mr. Vance, a comedian, had published in a newspaper a paragraph asserting that Mrs. Vance was not his wife, and she thereupon applied for a summons against him for criminal libel. The Lord Mayor refused to grant a summons upon the ground that Mrs. Vance, being the wife of Mr. Vance, could not in the circumstances prosecute, or give evidence against, her husband, and the Divisional Court, consisting of Matthews J. and A.L. Smith J., discharged a rule calling upon the Lord Mayor to issue a summons. But in the course of his judgment A. L. Smith J. said that while it was impossible for them to hold that criminal proceedings instituted by the wife for such a libel were proceedings for the protection and security of her own separate estate, they expressly gave no opinion on the question whether an action for libel in a case like that, could be maintained by a wife against her husband, and so far as that case is concerned the question before me remains open. Assuming however, that the ownership of the majority of the shares in the "Temeside Garage Ltd.," is in the plaintiff and the fact that she is chairman and managing director of that company constitutes her a trader within the dictum of Brett J., a question upon which I have considerable doubt, can it be said that the imputation made upon her by the inscription on the tombstone is an imputation which affects her credit or character in her trade? In my opinion it does not, and in coming to that conclusion I am fortified by the decision of the Court of Appeal in *Tinkley v. Tinkley* (1). In that case the plaintiff Mrs. Tinkley was living apart from her husband, and had instituted divorce proceedings against him. In order to maintain herself she had entered domestic service, and whilst she was in domestic service her husband gave her into custody upon a charge of theft. She was brought before one of the Metropolitan police magistrates who dismissed the charge. Mrs. Tinkley thereupon commenced an action against her husband, not indeed for libel, but for malicious prosecution. The action came on for trial before Sutton J. who held that it was not maintainable because it could not be regarded in any sense as an action for the protection and security of her separate property. Mrs. Tinkley appealed and the Court of Appeal, consisting of Lord Alverstone, C.J., Cozens-Hardy M.R., and Budkley L.J., unanimously affirmed the decision of the learned Judge."

It seems to us, having regard to the authorities and on a proper construction of s. 12(1) of the Ordinance that there is a clear distinction between the case where a wife attempts to sue her husband in relation to a tort of a purely personal nature such as libel and the case, as here, where she sues her husband in relation to her own property. As we see it, the learned Magistrate was perfectly justified to decide as a matter of fact whose property the bed was and, having done that in favour of the wife had jurisdiction to entertain the respondent's claim because, although it involved the tort of

conversion, nevertheless, the res, being part of her own separate property, was capable of being the subject-matter of a claim by virtue of the clear and unambiguous language of s. 12 (1) of the Ordinance and, since the amount was within the limitation of $250.00 provided for in s. 3 (1) of the Summary Jurisdiction (Petty Debt) Ordinance, Chapter 16, then the Magistrate's Court was indeed the proper forum.

For these reasons the Appeal was dismissed and costs were awarded to the respondent fixed in the sum of $15.00.

Appeal dismissed.

PETER STANISLAUS D'AGUIAR ET AL.

v.

P. C. MAURICE COX

[Full Court of the High Court of Guyana (Bollers, C.J., George and Massiah JJ.), March 26; May 28; June 29, 1971].

Criminal law—Procedure—Plea taken by one magistrate—Not taken by another magistrate who conducts trial—Whether trial is vitiated—Summary Jurisdiction (*Procedure*) *Ordinance, Cap. 15 [G.], s. 27*(*1*).

Summary Jurisdiction—Appeals—Written decision delivered by magistrate—Whether magistrate is required to prepare fresh reasons for decision—Summary Jurisdiction (*Appeals*) *Ordinance, Cap. 17 [G.], s.8.*

Interpretation of Statute—Proof of exemption, etc.—Amerindian Ordinance, Cap. 58 [G.], s. 5—Summary Jurisdiction (*Procedure*) *Ordinance, Cap. 15 [G.], ss. 7*(*4*), (*8*).

Constitutional law—Freedom of movement—Statute in force before coming into force of the Constitution—Whether ultra vires the Constitution—Constitution of Guyana, arts. 14, 18—Amerindian Ordinance, Cap. 58 [G.], ss. 5 and 6.

The appellants were charged in the magistrate's court with entering an Amerindian district otherwise than in accordance with the permission in writing of the Chief Interior Development Officer, and without lawful excuse. The appellants pleaded not guilty before a magistrate of the Georgetown Judicial District, whereupon the case was transferred to the Essequibo Judicial District to be heard by a magistrate there. The

latter proceeded to hear evidence without taking the pleas of the appellants, and convicted them,

On appeal.

HELD: (i) that the plea of not guilty continue to apply when the magistrate of the Essequibo District took evidence and finally adjudicated in the matter;

(ii) that the magistrate, having given his decision in writing, there was no necessity for him to give a fresh set of reasons for decision in order to comply with s. 8 of Cap. 17;

(iii) that there was no need for the prosecution to specify in the complaint that the appellants were not Amerindians, nor was there any necessity for the prosecution to prove that they were not Amerindians, or that they entered the district without lawful authority, etc. Rather it was for the appellants to prove that they fell within the exemption;

(iv) that the Amerindian Ordinance is not *ultra vires* the Constitution of Guyana.

Appeal dismissed. Convictions affirmed, but penalties varied.

Mr. C. L. Luckhoo, Senior Counsel, for the 1st, 9th, 10th and 11th appellants.

Mr. P. DeFreitas for the 7th appellant.

Mr. O. M. Valz for the other appellants.

Mr. G. Jackman for the respondent.

BOLLERS, C.J., delivered the judgment of the court: On March 27, 1970, at about 12.30 p.m. an aircraft owned by the Guyana Airways Corporation landed at Paruima Airstrip. The appellants together with three children disembarked from the aircraft with baggage and cartons. They then proceeded to the Kamarang River where some of them boarded a boat which took them down the river. The boat returned on two occasions and took the others in the same direction. On the following day at about 4.30 p.m. a party of policemen headed by an Assistant Superintendent of Police went to a church mission at Paruima village, which is situate about one mile from the airstrip where the appellants had disembarked. There they saw the appellants and the children in a house. In the presence and hearing of the other appellants the Assistant Superintendent told the first appellant that it was an offence for anyone to enter Paruima, which is an Amerindian District. He then asked them if they were in possession of a written permission from the Chief Interior Development Officer to be at Paruima. The first appellant replied in the negative and the others laughed. The Superintendent detained them and the following day escorted them to Georgetown with their baggage and the cartons, where they were later charged. There appears to have been two cartons, one containing rum and the other beer.

The appellants were charged jointly for entering an Amerindian District without permission, contrary to s. 6 of the Amerindian Ord., Cap. 58 [G.]. The particulars of offence read as follows:

> "The defendants on the 29th March, 1970, at Paruima, Mazaruni, in the Essequibo Judicial District entered the Upper Mazaruni Amerindian District otherwise than in accordance with the permission in writing of the Chief Interior Development Officer and without lawful excuse".

On March 31, 1970, the charge came up before a magistrate of the Georgetown Judicial District and all the appellants pleaded not guilty. Eventually on May 6, 1970, the trial commenced in a magistrate's court in the Essequibo Judicial District, and on June 2, 1970, the magistrate in a written judgment found all the appellants guilty and fined each of them $50., and ordered that they each pay the sum of $21.14 by way of costs. It is against their convictions and sentences that the appellants now appeal to this court.

The first ground of appeal argued was that there was a non-compliance with s. 27(1) of the Summary Jurisdiction (Procedure) Ord., Cap. 15 [G.], in that the learned magistrate did not, when the charge was read in the Essequibo Judicial District, ask the appellants whether they were guilty or not guilty. The record disclosed the following note on the case jacket: "All defendants not guilty". Mr. Luckhoo sought and was granted leave to file an affidavit setting out what he alleged had transpired. In this affidavit he deposed to the fact that the note of the appellants' pleas was made by the magistrate of the Georgetown Judicial District before whom the appellants had appeared. When they appeared before the magistrate of the Essequibo Judicial District, however, he merely read the charge to the appellants but did not invite them to plead. He stated that he was positive about this as he was of the view that the plea taken by the magistrate of the Georgetown Judicial District was a nullity and as a result his mind was alerted to the necessity for a new plea when the matter came up in the Essequibo Judicial District and he is positive that no plea was taken. He also drew attention to the fact that at the conclusion of the case among the submissions he had made to the magistrate was one relating to this very point. The magistrate in his reply to a letter written by Mr. Luckhoo to him stated that although he remembers reading the complaint to the appellants, he cannot "vividly recall the pleas being taken". In the circumstances, we would consider this aspect of the matter on the assumption that no plea was taken when the matter came up before him. Although we can find no authority directly bearing on this point, we feel that the case of *Budhu v. Allen* (1) could be of some assistance. In that case the appellant was charged with the offence of sending an obscene writing to another person, to which she pleaded not guilty. A charge for the offence of delivering an obscene letter was substituted but she was not called upon to plead to this charge, and no objection was made to the trial which accordingly proceeded on the

assumption that her plea of not guilty applied to the new complaint. The failure of the magistrate to take a new plea to the new complaint was one of her grounds of appeal. LEWIS, J.A., had this to say about it (1962), L.R.B.G., at p. 163):

> "First, it is said that the conviction was bad because the defendant appellant was not called upon to plead after the complaint was amended. The answer to that is that the defendant agreed to go on and to answer the new complaint and the case proceeded on the basis that her plea of not guilty applied to the new complaint. The merits of the case were gone into and she cannot now complain of the irregularity in procedure. See *Turner v. Postmaster-General* (*2*)".

S. 31(1) of Cap. 15 [G.] deals with the transfer of a cause where the ground of the complaint arises out of the jurisdiction of the court. It reads as follows:

> "If, on the hearing of any complaint it appears that the ground of the complaint arose beyond the limits of the jurisdiction of the court before which the complaint was made the court may, on being satisfied that it has no jurisdiction direct that the matter be transferred to the court having jurisdiction where the ground of complaint arose".

This was no doubt the section which the magistrate for the Georgetown Judicial District used as his authority for transferring the case to the Essequibo Judicial District. Before this transfer was ordered the appellants' pleas which in our view formed part of the hearing of a complaint were taken. In this plea they indicated that they were not guilty. They and their legal advisers acquiesced in the hearing of the case without the magistrate's omission to again take their pleas being pointed out to him although their legal advisers were cognisant of it. We do not feel that in the circumstances there is any real difference in principle between this case and that of *Budhu v. Allen* (1), and accordingly do not agree with counsel's submission.

The next point taken was that the magistrate failed to comply with s. 8 of the Summary Jurisdiction (Appeals) Ord., Cap. 17 [G.], in that he did not draw up a statement of his reasons for the decision appealed against. In this regard we were referred to the unreported case of *Ressouvenir Estates Ltd. v. Dhanraj* (3). In that case the magistrate had delivered his decision in writing. It was a very short decision and absolutely failed to analyse the evidence led at the trial. As we understand it the Court of Appeal held that such a brief memorandum could not be considered a statement of the magistrate's reasons for his decision and accordingly there was a non-compliance with s. 8. In the present case the magistrate delivered a written decision in which he considered and examined at length all the points and submissions made by counsel and solicitor who appeared. It is in our view a very comprehensive statement of his reasons for his decision. The only complaint therefore which can be made is that

he did not prepare a fresh one after the appellants had appealed and lodged their respective securities. In this case we presume he reproduced his written judgment as his memorandum of reasons. We cannot take so narrow a view of s. 8 and therefore are of the opinion that having regard to the nature and content of his written judgment it was unnecessary for him to in effect rewrite it in order strictly to comply with the sequence of events provided in Cap. 17 [G.]:

The next ground argued was that the particulars contained no allegation that the appellants were not Amerindians. Ss. 5 and 6 of the Amerindian Ord., Cap. 58 [G.], read as follows:

> "5(1) No person other than an Amerindian shall enter or remain within any District, Area or Village or an Amerindian settlement or encampment without lawful excuse or without the permission of the Commissioner.
>
> (2) Any person aggrieved by the refusal of the Commissioner to grant such permission may appeal to the Governor in Council whose decision shall be final.
>
> (6) Any person who enters any District, Area, Village settlement or encampment as aforesaid otherwise than in accordance with the permission in writing of the Commissioner and without lawful excuse shall be liable on summary conviction to a penalty of fifty dollars".

"Amerindian" is defined to mean:

> "(a) an Indian of a tribe indigenous to Guyana or neighbouring countries;
>
> "(b) any descendant of any Amerindian within the meaning of para. (a) of this definition to whom, in the opinion of the Commissioner, the provisions of the Ordinance should apply".

The effect of ss. 5 and 6 must be that no barriers are placed on Amerindians entering any of the areas designated by virtue of the ordinance.

On the issue of what is required to be stated in the particular of a complaint s. 7(4) of the Summary Jurisdiction (Procedure) Ord., Cap. 15 [G.], provides as follows:

> "The description of any offence in the words of the statute creating the offence or in similar words, with a specification so far as practicable of the time and place when and where the offence was committed, shall be sufficient in law".

S. 8 of that Ordinance provides that:

> "Any exception, exemption, proviso condition excuse or qualification, whether it does or does not accompany the same section the description of the offence in the statute creating the offence, may be proved by the defendants, but need not be specified or

> negatived in the complaint, and if so specified or negatived no proof in relation to the matter so specified or negatived shall be required on the part of the complainant".

In support of his argument that the omission to state in the particulars of the offence that the appellants were not Amerindians, counsel for the appellants drew attention to the case of *Harper v. Prescod* (4). In that case the appellant was charged under s. 7 of the Vagrancy Act of Barbados. This section reads as follows:

> "Every person who in any street, highway, or public place shall without lawful authority or excuse (proof whereof shall be on the party accused) accosts a person,"

shall be deemed an idle and disorderly person and liable on conviction to a penalty or imprisonment. The information brought by the appellant charged the respondent that he accosted the appellant on a certain road. The information omitted to state that the road was a street, highway, or public place. The court held that this was an omission of an essential ingredient of the statutory offence, without which no offence was disclosed on the face of the information. The Barbados Court of Appeal dismissed the appeal and upheld the magistrate's refusal to allow the amendment when the information as laid disclosed no offence. This case is clearly distinguishable from the present one which does disclose an offence under s. 6 of the Ordinance, and by virtue of s. 8 of the Summary Offences (Procedure) there was no need to specify in the complaint that the appellants were not Amerindians.

But a more serious objection was raised: viz. that

> "(a) there was no proof by the prosecution that the appellants were not Amerindians.
>
> "(b) there was no proof that they did not enter the Paruima Amerindian District with lawful authority or with the consent of the Chief Interior Development Officer".

The validity of both these submissions would depend on whether the combined effect of ss. 6 and 7 of the Amerindian Ordinance can be said to impose an absolute prohibition on persons entering any Amerindian District subject to certain exceptions qualifications or excuses which are peculiarly within the knowledge of the appellants. The determination of this issue depends in all cases on the proper construction of the language which creates the offence (see *R. v. Ewens* (5)). This was one of the primary issues in the case of *D'Aguiar v. Barrow* (6). There the appellant had been charged with speaking at a public meeting without the required notification of an intention to hold that meeting being given contrary to s. 13(1) of the Public Order Ordinance, 1955 [G.]. S. 3(1) of that ordinance requires every person desirous of holding a meeting in any public place to give no less than 48 hours prior notice or such shorter notice as the approval officer of police of the district

may think fit, to that officer. After an exhaustive consideration of several authorities including *R. v. Oliver* (7), and an examination of the relevant provisions of the ordinance the Full Court came to the conclusion that the section creating the offence did not create an absolute prohibition against speaking at a meeting in a public place. Hence no evidential burden was placed on the appellant and therefore it was obligatory on the respondent to prove every ingredient of the particulars of offence.

In *R. v. Ewens* (5) *supra* the appellant was convicted with having in his possession a substance specified in the schedule to the Drugs (Prevention of Misuse) Act 1964 [U.K.] without being duly authorised to do so. The section under which he was charged read as follows:

> "Subject to any exemptions for which provision may tee made by regulations made by the Secretary of State and to the following provisions of this section, 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:
>
> (a) it is in his possession by virtue of the issue of a prescription by a duly qualified medical practitioner or a registered dental practitioner for its administration by way of treatment to him or to a person under his care".

It was argued that among the things which the prosecution had to prove was that the appellant was in possession without being authorised to do so. MELFORD STEVENSON, J., who delivered the judgment of the Court of Criminal Appeal, came to the conclusion that the words "it shall not be lawful for a person to have in his possession a substance for the time being specified in the schedule unless" were words of prohibition. And with regard to the exceptions he had this to say ([1967] 1 Q.B. at p.330):

> "It is tolerably plain that there must be many statutory prohibitions which would become incapable of enforcement if the prosecution had to embark upon inquiries necessary to exclude the possibility of a defendant falling within a class of persons excepted by the section when the defendant himself knows perfectly well whether he falls within the class and has or should have readily available to him the means by which he could establish whether or not he is within the excepted class".

In our opinion the words contained in s. 5(1) of the Amerindian Ordinance are words of prohibition. Further, whether the appellants are Amerindians or have a lawful excuse or enter or remain in the district with the permission in writing of the Chief Interior Development Officer are facts peculiarly within their knowledge. Accordingly the evidential burden of leading or eliciting some facts which would bring them within any one of the exceptions must be on them. It would not therefore be

for the prosecution to lead evidence to negative their coming within any one of the exceptions provided by the legislation. This they have failed to do, and according to s. 6 they would be liable to a penalty on summary conviction. It is therefore unnecessary for us to consider the arguments advanced, viz., that the prosecution had not shown that the appellants were not lawfully or excusably in the district and therefore had not discharged the burden of proof.

Finally it was argued that the provisions of ss. 5 and 6 of the Amerindian Ordinance are *ultra vires* the Constitution. In this regard our attention was adverted to art. 14 of the Constitution of Guyana. This article makes provision for the protection of freedom of movement in Guyana and the relevant portions read as follows:

> "(1) 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:
>
> (a) for the imposition of restrictions on the movement or residence within Guyana of any person or any person's right to leave Guyana that are reasonably required in the interests of defence public safety or public order or for the purpose of preventing the subversion of democratic institutions in Guyana;
>
> (b) for the imposition of restrictions on the movement or residence within Guyana or on the right to leave Guyana of persons generally or any class of persons that are reasonably required in the interests of defence, public safety or public order or for the purpose of preventing the subversion of democratic institutions in Guyana.
>
> (c) (c) for the imposition of restrictions on the acquisition or use of land or other property in Guyana".

However, we do not think it necessary to embark upon any consideration or analysis of the effect this article may have on ss. 5 and 6 of the Amerindian Ordinance. We have come to this view because of the provisions of art. 18(1)(a) of the Constitution. The relevant portions of this provision read as follows:

> "nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention

of any of the provisions of arts. 4 to 15 (inclusive) of the Constitution to the extent that the law in question:

(a) is a law that had effect as part of the law of the former colony of British Guiana immediately before May 26, 1966, and has continued to have effect as part of the law of Guyana at all times since that day".

The Amerindian Ordinance was enacted in the year 1953 and formed part of the laws of Guyana immediately before May 26, 1966. The clear implication of art. 18(1), therefore, in so far as ss. 5 and 6 of the ordinance are concerned, must be that even if the provisions of the latter are in conflict with those provisions for the freedom of movement of persons as set out in the Constitution, they would still have full force and effect after May 26, 1966.

Counsel for the appellants referred us to the case of the *Chief of Police v. Powell* (8), in which the High Court of Saint Christopher, Nevis and Anguilla held that s. 3A of the Public Meetings and Processions Ordinance which forbids the speaking at public meetings without the permission of the Chief of Police had been impliedly repealed by s. 10 of the Constitution. That Constitution came into force subsequent to the enactment of that ordinance and guarantees the enjoyment of freedom of expression which includes the freedom to communicate ideas and information without interference.

However, an examination of the Constitution of Saint Christopher, Nevis and Anguilla and of the West Indies Act [U.K.], under which the Constitution was enacted, reveals that it contains no provision corresponding to art. 18 of the Constitution of Guyana. That article expressly saves legislation in force before May 26, 1966, which may be in conflict with the fundamental rights and freedoms provisions of the Constitution. It is, therefore, easy to understand why the High Court of Saint Christopher, Nevis and Anguilla held as it did in the *Powell* case (8).

It was, however, further submitted that, even assuming that art. 18 precludes any consideration of the *vires* of the Amerindian Ordinance, the magistrate ought to have referred the issue of its possible contravention of art. 14 to the High Court. In this regard our attention was directed to the fact that the constitutionality of ss. 5 and 6 of the Amerindian Ordinance had been argued before the magistrate; and our attention was drawn to art. 19(3) of the Constitution. This provision reads thus:

"If in any proceedings in a Court subordinate to the High Court any question arises as to the contravention of any of the provisions of arts. 4 to 17 (inclusive) of the Constitution, the persons presiding in the Court shall refer the question to the High Court unless in his opinion the raising of the question is merely frivolous or vexatious".

In arriving at his decision as to the constitutional validity of ss. 5 and 6 the magistrate confined his efforts to an examination of art. 14, and in particular to paras 1, 2 and 3(a) to (c). He did not advert attention to art. 18. Indeed it appears that he had not been aware of the existence of this article.

If, in fact, the constitutional validity of ss. 5 and 6 could only have been tested by an examination and determination of the effect which art. 14 would have had on them, then we would have been forced to the conclusion that the learned magistrate had committed a specific illegality when he proceeded to arrive at a conclusion on this aspect of the case and not refer the question to the High Court. We say this because such an examination could involve issues of considerable constitutional importance and in such a case it would have been mandatory that the issue be referred to the High Court. But we are of the opinion that if the magistrate had been aware of arts. 18 and 19 he would have had no difficulty in coming to the conclusion that the former precluded any consideration of the *vires* of the Amerindian Ordinance and so come to the conclusion that its suggested repugnancy to art. 14 was frivolous. In such a circumstance the need to refer the matter to the High Court would not arise.

[His Honour also examined the question of penalty, and continued]: For the reasons given above we would dismiss this appeal and affirm the conviction of the magistrate, but we reduce the penalty imposed on each of the appellants.

Appeal dismissed.

N. ELIAS AND SONS LIMITED AND GEORGE KHAN

v.

PARSRAM AND SONS LTD.

[In the Full Court on appeal from a magistrate's court for the Georgetown Judicial District (Bollers, C.J., and Gonsalves-Sabola, J.) July 3, 1971.]

Landlord and tenant—Order for possession of demised premises—Application for warrant of ejectment—Applications for rehearing and revision on ground of altered circumstances—Appeal on grounds that magistrate wrongly rejected evidence and wrongly admitted evidence—Managing Director of respondents called as witness for the appellants—Cross-examination by counsel for

respondents of own client—Whether unfair advantage obtained by cross-examination.

Having obtained orders, by consent, for possession of their premises the respondents (landlords) applied for warrants of ejectment while the appellants (tenants) applied for rehearing and revision of the decision of the magistrate, ordering possession, on the ground of altered circumstances. At the hearing of the applications the appellants called as a witness the managing director of the respondents with the object of eliciting from that witness that altered circumstances did exist and of probing whether the respondents had held a directors' meeting to authorise the bringing of ejectment proceedings. The magistrate disallowed questions put by the appellants' counsel as to when was the last directors' meeting of the respondents and as to whether a resolution was passed authorising the application for ejectment. Counsel for the respondents elicited in cross-examination of the same witness that the demised premises were still required for the respondents' use as the respondents were without premises to carry on their business. On appeal from the decision of the magistrate dismissing the applications for revision and ordering ejectment to issue counsel for the appellants argued that the magistrate wrongly rejected evidence which was legally admissible, and wrongly admitted evidence (evidence obtained under cross-examination) which was inadmissible.

HELD: (i) the magistrate was in the circumstances right when he disallowed the questions put to the managing director of the respondents in order to find out whether or not the proceedings for ejectment were properly authorised;

(ii) the magistrate had properly exercised his discretion in allowing the cross-examination of the respondents' managing director in order to elicit that circumstances had not altered and that the premises were still required for the respondents' use, after he had considered whether or not an unfair advantage would be obtained by counsel for the respondents cross-examining his own client

(iii) even if the cross-examination of the managing director was wholly disregarded the appellants' applications would still have failed as there was sufficient evidence to sustain the decision.

Appeal dismissed.

R. H. McKay for the appellants.

E. A. Gunraj for the respondents.

JUDGMENT OF THE COURT: The appellants were tenants of the respondent. By consent, orders for possession were made in respect of their tenements by the Magistrate of the Georgetown Judicial District on 16th January, 1969 and on 28th February, 1969 respectively.

In due course the respondent-landlord applied for warrants of ejectment while the appellant-tenants each applied for rehearing and

revision of the decision of the Magistrate ordering possession, on the ground of altered circumstances. By consent the four applications were consolidated and heard together.

Counsel for the tenants called as his first witness Alim Parsram Narwani, the Managing Director of the Landlord company. The objective of that exercise was firstly to elicit from the witness that altered circumstances did exist and secondly to probe whether the landlord-company had held a directors' meeting to authorise the ejectment proceedings.

The learned Magistrate disallowed questions by Counsel for the tenants-appellants as to the following matters, "When was there the last directors' meeting of Parsram and Sons Ltd?" and whether a resolution was passed authorising the application for ejectment.

Counsel for the landlord-company, the respondents herein, cross-examined Alim Parsram Narwani and elicited from him that the demised premises were still required for the Company's own use because since a fire in February, 1962 destroyed premises in which the Company carried on its business, the Company was without premises to carry on its business.

One George Khan was also called as a witness by the tenants-appellants but he really took the matter no further.

At the close of the case for the tenants the landlord company also closed its case and the Magistrate after hearing Counsel on both sides, dismissed the applications for revision but ordered ejectment to issue.

From that decision of the Magistrate these two appeals were brought on a number of grounds. During the argument before us Counsel for the appellants conceded that there was no evidence of altered circumstances on the record and the grounds of appeal seriously urged were as follows:

(1) The learned Magistrate wrongly admitted inadmissible evidence, namely, certain aspects of the cross-examination of the witness Alim Parsram Narwani.

(2) The learned Magistrate wrongly rejected evidence which was legally admissible, namely, the question relating to the Company's resolution authorising the present proceedings.

The grounds were argued in reverse order and they will now be dealt with in that very order.

It was submitted that the learned Magistrate was wrong to disallow examination of the Managing Director on whether the Company passed a resolution authorising proceedings because if the Managing Director brought proceedings without authority the Company would not be bound by the result of such proceedings.

It was further submitted that it was permissible to go over the head of Solicitor who signed the applications for warrants of ejectment and enquire into the domestic affairs of the Company to ascertain how the Solicitor came to be authorised. A number of cases which were cited as supporting those submissions will now be considered.

In *John Shaw and Sons* (*Salford*) *Ltd. v. Peter Shaw and John Shaw* (1935) 2 K.B. 113, the plaintiff company brought actions against two of its directors for the recovery of debts owing by them. The action was authorised by resolution of the permanent directors at a meeting to which none of the ordinary directors was summoned, and notwithstanding that a resolution passed subsequently by the shareholders at an extraordinary meeting of the company directed the Chairman to discontinue proceedings, a writ was issued against each defendant. Judgment was given for the plaintiff company but was reversed on appeal on the ground that there was no cause of action established, but the Lords Justices of Appeal did not agree among themselves on the question of whether the bringing of the proceedings were duly authorised. GREER, L.J. held that under the Company's articles of association the power to give instructions was vested in the permanent directors and therefore, the actions were authorised.

SLESSER, L.J. construed the Company's articles to arrive at an opposite conclusion.

ROCHE, L.J. for different reasons reached the same conclusion as GREER, L.J. viz. that the actions were authorised.

Despite their variant rationes decidendi there emerged from their Lordships' judgments one point about whose validity this Court has no doubt, that is, that in deciding whether legal proceedings by a company are properly authorised one has to refer to the Company's articles for guidance.

It is to be noted that no stage of the proceedings before the Magistrate in the instant case did Counsel for the tenants seek to put in evidence the articles of association of the respondent Company nor in any way did he intimate an intention to do so.

The case of *Bolton Engineering Co. Ltd. v. Graham & Sons Ltd.* (1957) 1 Q.B. 159 was cited to us as a case where the English Court of Appeal through DENNING, L.J. took the view that a Company's intention could properly be inferred from the intention of its officers and agents having regard to the nature of the matter under consideration, the relative position of the directors and the relevant facts and circumstances of the case. In that case the question for the court's decision was whether a landlord Company could successfully under S. 30(1)(g) of the Landlord and Tenant Act 1954, oppose the grant of a new tenancy on the ground that the landlords intended to occupy the holding for their own purposes. Prior to the commencement of court proceedings there had been no board meeting or other collective decision evincing the

intention of the landlord-company to occupy the demised premises, but the business of the landlords was customarily managed by their directors who in their managerial capacity affirmed such an intention and had taken practical steps to that end. At p. 172 of the report DENNING, L.J. says:

> "So the judge has found that this company, through its managers, intend to occupy the premises for their own purposes. Mr. Albery contests this finding, and he has referred us to cases decided in the last century; but I must say that the law on this matter and the approach to it have developed very considerably since then. A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.
>
> Again at p. 173 the learned Lord Justice drives home his point. He says:
>
> "So here, the intention of the company can be derived from the intention of its officers and agents. Whether their intention is the company's intention depends on the nature of the matter under consideration, the relative position of the officer or agent and the other relevant facts and circumstances of the case. Approaching the matter in that way, I think that, although there was no board meeting, nevertheless, having regard to the standing of these directors in control of the business of the company, having regard to the other facts and circumstances which we know, whereby plans had been prepared and much work done, the judge was entitled to infer that the intention of the company was to occupy the holding for their own purposes".

In no sense does this case of Bolton Engineering Co. Ltd. advance the cause of the tenants-appellants. On the contrary it puts the respondents in the position where they can say with authority that since on the record there is evidence of the Managing-Director of the Landlord-company called incidentally by the appellants, that the respondents still required the demised premises and required them urgently for their own use for business and since it was the case that the Company's applications for ejectment were in the presence of the Managing Director being prosecuted by Counsel instructed by Solicitor, it does seem idle to raise such an issue as whether there was a resolution authorising the applications for ejectment.

Counsel for the appellants said that he relied most strongly on the case of *Daimler Co. Ltd. v. Continental Tyre Rubber Co.* (*Great Britain*) *Ltd.* (1916) A.C. 307. In that case there was a successful challenge by the appellant-company on the right of the respondent Company or any of its officers acting on its behalf to institute an action for payment of a trade debt. So the appellants herein sought to extract from the judgments there delivered by the Law Lords, a principle that it is a proper matter of defence for a defendant in any case to query whether the institution of proceedings was properly authorised by or on behalf of the plaintiff.

The facts of the Daimler case show that it is authority for no such principle. The respondent-company though incorporated in England, was German in everything else. The holders of all its shares save one and all its directors were Germans resident in Germany. The one non-German share was registered in the name of the Secretary who was German born but was naturalised a subject of the English Crown. The action was brought by that Company after the outbreak of the First World War and the issue given paramountcy in the appeal in the House of Lords was that of Trading with the enemy in the absence of a licence from the Crown. It was in that light that the challenge of the authority to bring the action must be viewed.

The appellants distinctly in the pleadings challenged the right of the respondent company to institute the action on the express grounds that the parent company of the respondent company was an alien enemy and the officers of the latter were all alien enemies and as such were incapable of suing and giving valid discharges. The secretary of the respondent company filed an affidavit in reply but was curiously silent on the subject of his authority to start legal proceedings. Later, in giving evidence that Secretary identified a minute of the Company as giving him the necessary authority. The minute in fact did not.

Lord ATKINSON treated this aspect of the case at p. 333 in these words:

> "It is no doubt true when a secretary of a company is found doing certain things in the name of and on behalf of his company which could legally be authorised, and no resolution or minute is proved authorising him to do those things, the maxim "*omnia praesumuntur rite esse acta*" will be applied, and the necessary authority will be presumed to have been lawfully given to him. This maxim cannot, I think, be legitimately applied where the agent vouches a particular document as the source of the authority he claims to exercise, and it is found that the document when produced gives him no such authority. It cannot be presumed he got the authority by means he has on oath repudiated. His oath rebuts the presumption".

The Daimler case does not aid the appellants. That case is generally understood as being authority for the proposition that if in the course

of an action the court becomes aware that the plaintiff is incapable of giving any retainer at all, it will not allow the action to proceed: See The Annual Practice 1965. Vol. 2 p. 3077.

This is something very different from allowing Counsel to fish in cross-examination or in examination-in-chief where he calls the opposite party as his own witness. It is in our view contrary to the proper administration of the law to allow this line of enquiry which could only lead to an intolerable result in the trial of cases.

In any event this court would require authority for the alleged right of a defendant to probe into the domestic affairs of a company to ascertain whether certain internal procedures have been compiled with before an action is brought. The policy of the law in this regard is expressed in the well-known rule in *Royal British Bank v. Turquand* (1856) 6E. &B. 327.

That rule is that persons dealing with a company are not concerned to enquire whether all matters of internal management have been compiled with if everything is apparently regular. Outsiders to a company are not concerned with indoor management. Once it was *intra vires* Parsrams and Sons Ltd. to bring the applications they brought, and their right to do so was not called in question, enquiry by strangers is amiss as to whether internal resolutions had been passed authorising the applications.

That very learned judge, ATKIN, L.J., put the whole question of challenging the authority to sue in proper perspective in *Russian Commercial and Industrial Bank v. Compton D'Escompte De Mulhouse and others* (1923) 2 K.B. 630 at 671:

> "I desire to add that even if there were a question of defective authority to sue, in my judgment it was not open to the defendants to raise the point as a matter of defence. The judgment of WARRINGTON, J. in the case of *Richmond v. Branson* (1914) 1 Ch. 968, 974 appears to me to state the law in a matter of this kind, where the question is Whether the action has been brought with the authority of an existing principal, himself capable of suing. In that case the learned judge says: 'But the real question is the authority of the solicitor. Is that a question which can be raised as a relevant issue in the action and at the trial? No authority has been cited in support of the affirmative of such a proposition, and, in my opinion, it is impossible, according to the ordinary practice and procedure of the court to justify that proposition. The business of this court could not be carried on if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shewn not to exist in the proper form of proceeding, namely, a substantive application on the part of the parties concerned to

stay the proceedings on the ground of want of authority'. The Daimler Case (1) does not appear to be inconsistent with this view. That was a case where no retainer could be given at all, and in such a case the court may very well refuse to hear the action on being informed of the facts. This appears to be the ground of the decision in the joint opinion of Lord PARKER and Lord SUMNER. They say (2): When the court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed. It clearly would not do so in the case of and in the case of an infant plaintiff, and I can see no difference in principle between the case of an infant and the case of a company which has no directors or other officers capable of giving instructions for the institution of legal proceedings. There the only persons controlling the company were personally incapacitated from giving instructions to sue because they were alien enemies. Here the position is entirely different, the administration is ex-hypothesi in the hands of a friendly government, who could undoubtedly directly an action to be commenced in the name of the existing Bank. They are in the position of ordinary principles, and I have never heard of any plea having been formulated which would entitle the defendant to raise at the hearing of a defence that, though the plaintiff had the right to sue, he had not in fact authorised the particular action. If it were a valid plea, one would expect to find some trace of it in the books during the last 500 years.

The appellants' submissions are incompatible with the authorities which are conclusive against their ground of appeal.

The first ground of appeal was that the Magistrate wrongly admitted inadmissible evidence, namely certain aspects of the cross-examination of the witness Narwani. Counsel's complaint was that although he had called Narwani, that witness retained his character as being the opposite party and his own counsel should not have been allowed to cross-examine him on details which the witness would normally give in support of his own case. This point was taken although the four applications were being heard together and notwithstanding that tenants' counsel had deliberately undertaken the risk of calling the enemy as it were, to testify on their behalf.

What common justice required was that leading questions should not, if objected to, be asked. But the objection taken before the Magistrate was not on that ground at all. Before us Mr. McKay for the appellants argued that Narwani's cross-examination should have been restricted to matters led in chief only, then Narwani should have made a second trip to the witness box to give evidence in chief after the tenants had closed their case. Reliance was placed on a ruling given in the case of *Tedezchi v. Singh* (1948) 1 Ch. 319 by ROXBURGH, J. In that case the plaintiff sued the first defendant for specific performance of an agreement alleged

to have been contained in letters which had passed between his Solicitors and the second defendants, a firm of Solicitors. The plaintiff called the senior partner of the second defendant firm to prove his authority to have acted for the first defendant and the learned judge denied counsel for the second defendant the right to cross-examine his own client. The judge thought the case unusual and pronounced the situation as being without precedent. In his judgment the matter rested within his direction which had to be judicially exercised but was not controlled by any rule of practice.

In the instant case the Magistrate exercised his discretion in allowing the cross-examination. Even assuming though we do not decide that there was a specific illegality thereby committed in what way are the merits substantially or at all effected?

The four applications were consolidated by consent of the parties. At some stage Mr. Gunraj must have had the right to elicit from Narwani all the matters actually elicited from him in cross-examination. Certainly in a summary hearing of the consolidated applications it was convenient for Narwani to have given all the evidence he could give at one and the same time. The learned Magistrate specifically considered whether Mr. Gunraj would be gaining an unfair advantage by cross-examining his own client and thought not. This court *ex post facto* does not think otherwise.

Finally, it must be observed that the ground of appeal under consideration merely asserted that the Magistrate wrongly admitted inadmissible evidence. It did not go on to allege as is required by s. 9 of the Summary Jurisdiction (Appeals) Ordinance Cap. 17, that there was not sufficient evidence to sustain the decision. Of course, if the cross-examination of Narwani by Mr. Gunraj is wholly disregarded the tenants must still have failed in their application for rehearing and revision on the ground of altered circumstances.

It follows that since both grounds of appeal have been decided against the appellants, each appeal is dismissed and the order of the Magistrate in each case is affirmed.

Against each appellant ejectment will issue on 31st October, 1971. Costs against each appellant are fixed in the sum of $16.10. Leave to appeal to Court of Appeal granted.

Appeal dismissed.

NOOR ABJAL *v.* JOHN NAGREADIE

[In the Full Court on appeal from the Magistrate's Court of the Essequibo Judicial District. (Bollers, C.J., Khan and Vieira, JJ.) June 18, September 30, 1971]

Rice Lands—Trespass—Claim by plaintiff in magistrate's court for damages for trespass—Denial by defendant of tenancy—Jurisdiction of assessment committee to determine issue of tenancy—No jurisdiction in magistrate to entertain claim where factum of tenancy in dispute—Rice Farmers (*Security of Tenure*) *Ordinance 1956 ss. 11, 51*(*1*), (*4*).

The respondent claimed to be a tenant of ten acres of rice land rented from the appellant. He alleged acts of trespass against the appellant in preventing him from reaping the rice crop and said he was entitled to the protection of the Rice Farmers (Security of Tenure) Ordinance. The appellant denied the relationship of landlord and tenant and averred that the magistrate had no jurisdiction to entertain the claim, as that was a question which fell within the exclusive jurisdiction of the Assessment Committee. On appeal against decision of the magistrate awarding the respondent damages for trespass the same submissions were made on behalf of the appellant.

HELD: (i) it was for the Assessment Committee to decide the question of tenancy of rice lands;

(ii) the magistrate had no jurisdiction to proceed to hear and determine the matter;

(iii) the magistrate should have put the matter down *sine die* pending an investigation by the Assessment Committee into the question whether there was a valid tenancy existing between the parties.

Appeal allowed.

J. O. F. Haynes, S.C., and *Doodnauth Singh* for the appellant.

F. L. Brotherson for the respondent.

JUDGMENT OF THE COURT: On 9th January, 1970, the respondent filed a plaint in the Magistrate's Court of the Essequibo Judicial District in which he alleged that he was a tenant of the appellant in respect often (10) acres of rice lands situate at Fredericksburg, Wakenaam, Rio Essequibo and thus entitled to the protection of the Rice Farmers (Security of Tenure) Ordinance, No. 31 of 1956 (hereinafter referred to as the Ordinance) He averred that since 14th November, 1969, the appellant, without any lawful authority, committed several acts of trespass by barring and barricading his rice lands thus effectively preventing him from reaping the 1970 Spring crop which was estimated to yield 150 bags of padi at $6.50 per bag = $975.00. In addition, he claimed the sum of $10,000.00 (ten thousand dollars) as prospective general damages.

In his defence, dated 27th January, 1970, the appellant expressly denied that he was at any time the landlord of the respondent and he averred that the Magistrate had no jurisdiction to entertain the claim.

Before the learned Magistrate, Counsel for the appellant submitted *in limine* (1) that the plaint was bad in law and could not be entertained because this would mean that the Court would be exercising a jurisdiction under section 51(1) of the Ordinance which, under section 11 thereof was within the exclusive jurisdiction of the Assessment Committee set up under the said Ordinance and (2) the Court had no jurisdiction to hear and determine the matter. Counsel cited *Small v. Saul and Saul* (1965) 8 W.I.R. 351 in support of his arguments. The learned Magistrate overruled these submissions and proceeded to take evidence from the parties and their respective witnesses.

At the close of the case for the appellant, his Counsel reiterated that there was no proof, in the absence of documentary evidence such as a receipt, that any relationship of landlord and tenant existed between the parties and he requested the Court to decline jurisdiction in view of the unsatisfactory evidence of the respondent. In reply, Counsel for the respondent submitted that all tenancies in relation to rice lands are re-statutory tenancies and that trespass had been established by the appellant and his witness. Reference was made to *Ramnarine v. Darsoo* (1959) L.R.B.G. 286; *Khan v. Rahaman* (1961) (Civil Appeal No. 41 of 1961) (unreported); *Sankar v. Orie* (1968) Civil Appeal No. 5 of 1968 (unreported) and *Mangra* known *as Bagh Khan v. Rayman* (1970) (unreported High Court decision No. 5 of 1970).

On 10th July, 1970, the learned Magistrate gave decision in favour of the respondent and awarded him damages, costs and counsel's fee in the total sum of $1,218.50.

In the appeal before us, Mr. Doodnauth Singh submitted that the respondent's claim was based chiefly upon trespass and upon that basis the learned Magistrate's had no jurisdiction since it was necessary, *a priori*, for the respondent to establish satisfactorily the factum of tenancy which, under the Ordinance, can only be done by an Assessment Committee and this, clearly, has not been done in this matter. Mr. Brotherson, in reply, submitted that the lands were undisputably rice lands and when the evidence is considered then the only possible inference that the learned Magistrate could have come to was that a yearly tenancy had been created in respect thereto. He referred us to section 5 of the Ordinance and he cited *Bovell v. Kalamadeen* (1955) L.R.B.G. 58 in support thereof.

In *Rahamotoola Khan v. Hamid Rahaman* (Civil Appeal No. 14 of 1961 (unreported), SIR STANLEY GOMES, Chief Justice of the Federal Supreme Court, succinctly stated the whole purpose and intent of the Ordinance in these words—

> "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 im-

posing restrictions on the common law right of landlords and tenants of rice lands and by the constitution of assessment committees in whom it vests power and authority to adjudicate upon matters arising out of the relationship of landlord and tenant and to make orders and give directions in relation thereto."

Section 3 of the Ordinance is absolute in its terms and provides as follows—

> "3. 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 a landlord or by a tenant, except as in this Ordinance provided."

In *Misree Persaud v. Gangasarran and Dinnanauth Poonai* (1967) (unreported High Court decision No. 29 of 1967) and *Mangra* known as *Bagh Khan v. Fazeel Rayman* (1970) (unreported High Court decision No. 5 of 1970), it was held that all tenancies in relation to the letting of rice lands under the Ordinance are statutory tenancies by virtue of section 3 thereof. It was pointed out in both those cases that, under the Ordinance, there is no provision whereby a landlord can give a tenant a valid notice to quit the holding since, under Section 5(1)(d) thereof, there is an implied condition that the landlord shall not evict a tenant or give him notice to quit and the only remedy left to the landlord desiring possession is to apply to the Assessment Committee under section 29(1) but only upon the grounds specified in section 29(2) thereof.

It is well settled that, even if a landlord satisfactorily proves one of the specified grounds for possession, the Committee, just like the Rent Assessor under the Rent Restriction Ordinance, Chapter 186, cannot make an order or judgment for possession of the holding unless—

> "in any such case as aforesaid the committee considers it reasonable to make the order or give the judgment."

In *Hicken Ltd. v. Ohab* (1958) L.R.B.G. 98, the statement of LUCKHOO, J. (as he then was) that—

> "the principles to be applied in respect of an application under the Ordinance were very much the same as those applied under the Rent Restriction Ordinance, Chapter 186."

was approved by the Federal Supreme Court in *Khan v. Rahaman* (*supra*). Section 11 of the Ordinance sets out the powers and duties of the Committee and section 51 (1) provides as follows—

> "51.(1). Subject to the provisions of subsection (3) of section 3 of the Summary Jurisdiction (Petty Debt) Ordinance, any claim or other proceedings (not being proceedings before the Assessment Com-

> mittee as such) arising out of this Ordinance shall be made or instituted in the Magistrate's Court."

It was pointed out by BOLLERS, C.J. in *Misree Persaud v. Gangasarran and Dinnanauth Poonai* (*ubi supra*) that—

> "section 51 (1) of the Ordinance is exactly similar in working to Section 26(1) of the Rent Restriction Ordinance, Chapter 186, both sections being, in fact, the basis upon which the question of jurisdiction rests."

It is abundantly clear from the decisions of *Evelyn v. Latchmansingh* (1961) 3 W.I.R. 107, and *Small v. Saul and Saul* (1966) 8 W.I.R. 351, that an action for damages in respect of premises protected by the Rent Restriction Ordinance, Chapter 186, must be brought in the Magistrate's Court. In the former case LUCKHOO, C.J., said at p. 110—

> "In the present action the plaintiff's claim is wholly dependent upon the question whether or not she was protected by the Rent Restriction Ordinance and that being so the claim should have been instituted in the Magistrate's Court and cannot be validly brought in the Supreme Court, the jurisdiction of the Supreme Court having been ousted by the provisions of s. 26(1) of the Rent Restriction Ordinance, Cap. 186 (B.G.)."

In the latter case ARCHER, P. said at p. 355—

> "The jurisdiction granted by s. 26(1) of the Ordinance is exclusive. The language is imperative, subject to the provisions of s. 3(3) of the Summary Jurisdiction (Petty Debt) Ordinance Chapter 16 (B.G.). There it is provided that an action (which is a proceeding for the recovery of a debt or demand, or of damages or of a chattel or thing) within the jurisdiction of a magistrate's court as to amount or value may be commenced in the magistrate's court."

In *Bovell v. A. K. Kalamadeen*, Executor of the Estate of Kalamadeen deceased (1955) L.R.B.G. 58, the applicant was in occupation of the premises at the time an application was made to the Rent Assessor to have the said premises assessed. Whilst the assessment proceedings were pending the applicant was ejected from the premises as the landlord regarded her as a mere trespasser. At the time of the hearing of the application the applicant was still out of possession and the application was struck out by the Rent Assessor. In dismissing the appeal BOLAND, J., in an oft-quoted judgment, said at p. 58—

> "I agree with the Assessor that no assessment could be made on the assumption that the applicant is a tenant, until that issue between the parties is determined by a competent Court. It was open to the applicant to take proceedings against the respondent for violating her rights as tenant by his act of ejecting her. That was the necessary preliminary to seeking to get the Assessor to make an assessment of the premises.

> The application in my opinion was correctly struck out. That would not prejudice the right of the applicant to apply again for assessment, if she is successful against the respondent in her claim that she was a tenant wrongly ejected. The issue as to tenancy in this case the Assessor should have declined to determine."

Having regard to the provisions of the Ordinance and the relevant authorities quoted above, it is clear, we feel, that a Magistrate does have jurisdiction and is, in fact, the proper forum to award damages for trespass in relation to rice lands even though the amount claimed is in excess of the statutory limit of $250.00 (*vide* section 51(4) on this aspect). But it is equally clear that he can only do so where the factum of tenancy has first been satisfactorily established before the competent forum, viz: the Assessment Committee for the area in which the rice lands are situate. Clearly this has not been done in this matter. Mr. Brotherson's submission that, having regard to the undisputed fact that the lands are rice lands and that from the evidence itself the learned Magistrate was entitled to draw the inference that a yearly tenancy had been created in respect thereto, is surely, an untenable proposition.

As we see it, it is for the Assessment Committee to decide the question of tenancy of rice lands and, accordingly, in this matter, the learned Magistrate was clearly acting outside the scope of his authority when he found as stated by him in his Memorandum of Reasons for decision—

> "I found as a fact from the evidence that the defendant who denied being the plaintiffs landlord at the trial, was in fact his landlord and did have a transaction with the plaintiff as alleged by the letter which pointed to and were related to his tenancy of the rice lands in question."

What has really happened here is that the respondent has based his claim on an action for damages for trespass based upon a contract of tenancy and the learned Magistrate, in such circumstances, had no jurisdiction to proceed to hear and determine the matter. What he should have done was to have put the matter down *sine die* pending an investigation by the Assessment Committee into the question whether there was a valid tenancy existing between the parties.

From these reasons this appeal was allowed and the order of the learned Magistrate was set aside and the judgment was amended to read—"Jurisdiction declined; fee to Counsel for defendant $75.00." We awarded costs to the appellant fixed in the sum of $34.80 and refused leave to appeal to the Court of Appeal.

Appeal allowed.

ABDOOL LATIFF *v.* TANI PERSAUD

[Privy Council (Lord Guest, Lord Wilberforce, and Lord Cross of Chelsea), October 6, 1971]

Procedure—Dismissal of action on preliminary submissions—Order of dismissal not entered—Recall of order—Notice of appeal against order of dismissal—Matter called but no appearance of plaintiff—Action dismissed for want of prosecution—Notice of appeal against second order of dismissal—Whether matter should have been dismissed for want of prosecution.

The appellant filed an action in the High Court against the respondent, claiming a sum of money. In his defence the respondent pleaded that the statement of claim disclosed no cause of action. The point was argued when leave was sought on behalf of the appellant to make two amendments. This was refused and the action dismissed, but before the order of dismissal was entered, the judge recalled the matter and gave the appellant leave to make one of the amendments, whereupon he fixed a new date for further hearing. Before that day arrived, the appellant had given notice of appeal against the order of dismissal; and when the matter was called on the fixed date, there being no appearance on behalf of the appellant, the action was dismissed for want of prosecution. Upon appeal against the first order of dismissal, the Court of Appeal held that the judge was entitled to have recalled his order, and held accordingly the first notice of appeal was bad, but extended the time within which the appellant could appeal against the second order of dismissal. The appellant availed himself of this opportunity and appealed against the second order. The Court of Appeal held that the matter had been concluded by the second order of dismissal, and dismissed the appellant's appeal. The appellant then challenged that order in the Privy Council.

HELD: that the order of the Court of Appeal be discharged, that the order of dismissal made by the judge of first instance be discharged, and the matter be remitted to the High Court for hearing.

Appeal allowed.

LORD CROSS OF CHELSEA delivered the judgment of the Board: This is an appeal by Abdool Latiff the plaintiff in the action against an order of the Court of Appeal of the Supreme Court of Guyana dated April 14, 1969, affirming the judgment of VIEIRA, J., dated June 28, 1968, dismissing the action for want of prosecution. The action was started by specially endorsed writ dated September 14, 1967, whereby the plaintiff claimed against one Tani Persaud the sum of $1,789.94 on various grounds there set out. A defence was put in January, 1968, which alleged (*inter alia*) that the statement of claim disclosed no cause of action. On May 15 and June 1, 1968, VIEIRA, J., heard submissions by counsel on the question whether the statement of claim as drawn disclosed a cause of action and an application on the part of the plaintiff

for leave to make two amendments to it. On June 8 the judge gave judgment holding that the submissions of the defendant were well founded, refusing to allow the amendments and dismissing the action with costs. On June 17, before his order of June 8 had been drawn up the judge saw counsel for the plaintiff (Mr. Stafford) and counsel for the defendant (Mr. Rai) in his chambers and told them that on reflection he considered that he had been wrong to dismiss the action and that he was recalling his order. He gave leave to the plaintiff to make one of the two amendments for which he sought leave and varied the order for costs by directing that the plaintiff should pay to the defendant one half of his costs incurred up to that day. He adjourned the further hearing of the action until June 28. Mr. Stafford told the judge that he doubted whether he had any power to recall the order of June 8 even though it had not been drawn up and said that his client was lodging an appeal against that order. Notice of appeal was in fact filed later on June 17 and served on the defendant. When the matter came before the judge again on June 28 the plaintiff was not represented. Mr. Stafford had told the judge earlier that day that an appeal against the order of June 8 was pending and that he had no instructions to appear on the further hearing of the action. Mr. Rai submitted that a judge had a right to recall his order at any time before it was drawn up and that the notice of appeal was irregular. The judge had the name of the plaintiff called three times outside the court and as neither he nor anyone on his behalf appeared he made an order dismissing the action for want of prosecution and directed the plaintiff to pay the defendant's costs. On October 28, 1968, the Court of Appeal gave judgment on the plaintiff's appeal against the order of June 8. The court held that the judge had power to recall his order of June 8, that accordingly the notice of appeal of June 17 was invalid, and that any appeal which the plaintiff might wish to bring must be against the order of June 28. The court extended his time for bringing such an appeal and directed that the costs of the appeal should be costs in the cause. On November 7, 1968 the plaintiff served notice of appeal against the order of June 28—the grounds of appeal being in substance first that the judge ought not to have proceeded with the trial of the action pending the hearing of the appeal and secondly that the plaintiff was not given proper notice of hearing on June 28. On November 29, VIEIRA, J., gave written reasons for his decision for the benefit of the Court of Appeal. After setting out the history of the matter he said, "As far as I can see the only point in this appeal is whether the appellant was given proper notice concerning the fixture of June 28". Then after saying that as Mr. Stafford was present in his Chambers on June 17 it was not really possible to argue that the plaintiff was not notified of the date fixed for the hearing, he continued

> "It seems to me, on the final analysis, neither here nor there whether this Appeal is dismissed or allowed since, in my humble opinion, the really important factor in this whole matter is

> that now we have a very clear and authoritative decision of the Court of Appeal, the judgment of which was delivered by CRANE, J.A., (Ag.), with whom the Acting Chancellor and PERSAUD, J.A., concurred, concerning the limits, if any, to the jurisdiction of a judge of the High Court in Guyana in relation to recalling and varying his own judgment or order after pronouncing same".

The appeal against the order dismissing the action for want of prosecution was heard on April 14, 1969. The members of the court thought, as VIEIRA, J., thought, that the matter was concluded by the decision of the Court of Appeal of October 28, 1968; but their Lordships cannot agree. Although the judge was entitled to recall his order of June 8 and the plaintiff was very ill-advised to contend that the order made on June 17 was a nullity the action should not have been heard while the appeal was pending. If the plaintiff had attended the hearing on June 28 and asked for an adjournment the judge could not properly have refused to grant one, and in view of what Mr. Stafford had told him he might well have stood the case over on his own motion instead of dismissing it. After the first appeal was dismissed on October 28 the plaintiff instead of applying to the judge to discharge the order of June 28 brought an appeal against it. On that appeal the Court of Appeal should, their Lordships think, have discharged the order on proper terms as to costs. Unfortunately counsel (not Mr. Stafford) who then represented the plaintiff appears not to have appreciated or at all events to have been quite unable to get across to the members of the Court of Appeal the point that whether the order dismissing the action for want of prosecution should stand did not depend on whether the judge had power to recall his order. According to the reasons for the judgment which were signed by the Chancellor on May 8, 1970, counsel actually consented to the appeal being dismissed. But the order of the court though it records the consent of the plaintiff to the part dealing with costs does not indicate that he consented to the dismissal of the appeal and their Lordships have before them an affidavit by counsel in which he denies that he did consent to its being dismissed. There is no doubt that the plaintiff or his advisers are themselves largely to blame for the confusion which has arisen in this case. Nevertheless their Lordships think that subject to the defendant being properly protected in the matter of costs the order dismissing the action for want of prosecution should be discharged. The order which their Lordships will humbly advise Her Majesty should be made in this case is that that part of the order of the Court of Appeal dated April 14, 1969, which affirms the judgment of VIDIRA, J., dated June 28, 1968, be discharged; that the order of VIEIRA, J., dated June 28, 1968, be discharged; and that the action be remitted to the High Court for hearing. The costs of the hearing on June 17 will be dealt with as costs in the cause. The plaintiff must pay to the defendant his costs of the hearing on June 28, 1968. The order of the Court of Appeal dated

April 14, 1969, as to the costs of the two appeals will stand and the appellant must bear his own costs of the appeal to the Board.

Appeal allowed. Matter remitted for hearing.

ISAHACK *v.* THE COMMISSIONER OF INLAND REVENUE

[High Court—In Chambers (George, J.) on appeal from a decision of the Board of Review—November 21, December 19, 1970; October 7, 1971.]

Income Tax—Appeal—Notice of Appeal to Board of Review signed by barrister-at-law—Validity of notice of appeal—Income Tax Ordinance Cap. 299 s. *56(D)—Legal Practitioners Ordinance, Cap. 30.*

This was an appeal from a decision of the Board of Review which had dismissed an appeal to it by the appellant because the notice of appeal was signed by a barrister-at-law and not by a solicitor. It was argued on behalf of the appellant that the barrister-at-law who had signed had done so acting in his capacity as a solicitor. The learned judge in his judgment examined the relevant provisions of the Income Tax Ordinance Cap. 299 and of the Legal Practitioners' Ordinance (which provisions are set out in the judgment) and

HELD: (i) when the barrister-at-law signed the appellant's notice of appeal he was not in breach of subsection 2 of s. 56(D) of the Income Tax Ordinance when read in conjunction with s. 44 of the Legal Practitioners Ordinance;

(ii) the appeal would be allowed, the Board's order of dismissal be set aside and the matter be remitted to the Board of Review with directions that the appeal be heard on its merits.

Appeal allowed.

L. T. Persaud for the appellant.

S. Rahaman for the respondent.

GEORGE, J.: The short point in this matter, which is an appeal from the decision of the Board of Review, is whether a Barrister-at-Law is empowered to sign the notice of appeal required by Section 56(D)(1) of the Income Tax Ordinance, Cap. 299. Subsection 2 of this section reads as follows:—

> "Every such notice shall be signed by the appellant personally or by a Solicitor on his behalf, and such notice shall contain the appellant's address and, if the notice is signed by a solicitor the business address of the solicitor."

It is the submission of solicitor for the appellant that the barrister who signed the notice of appeal was acting in his capacity as a solicitor as provided for under Secs. 42 and 44 of the Legal Practitioners' Ordinance, Sub-section 1 of section 42 provides *inter alia:—*

> "Notwithstanding anything to the contrary in any Ordinance or rule, a barrister or a solicitor shall be entitled to act alone and have audiences:—
>
> A. In any cause or matter in a magistrate's court or other inferior Court or tribunal."
>
> Sec. 44 reads as follows:—
>
> "Notwithstanding anything to the contrary in any Ordinance or rule, a barrister shall be entitled to practice as a solicitor in respect of all proceedings including the issue of writs of summons or other processes, in any of the matter specified in Section 42 hereof. . ."

It is common ground that the Board is an inferior tribunal within the contemplation of these provisions. The parties are also agreed that the word "proceedings" in Sec. 44 would include the notice of appeal required by Sec. 56D. If therefore, these sections are applicable then the barrister was entitled to sign the notice of appeal. Sections 42 and 44 were enacted in the year 1931 and came into operation on the 20th July, 1931, while Sec. 56D first appeared in the Income Tax Ordinance in the year 1956. The issue to be resolved, therefore, is whether the words "any Ordinance or rule" in sections 42 and 44 should be construed to mean any Ordinance or rule whether passed before or after the year 1931.

In an attempt to resolve this issue I thought it would be useful to examine the provisions of the Interpretation Ordinance Cap. 5. Except for Sections 9, 9A, 12, 14, 17, 23, 24, 36, 39 and 40 of this Ordinance all its provisions specifically indicate the extent of their applicability to Ordinances, whether enacted before or after the commencement of that Ordinance. The sections which do not contain such provisions deal with the following matters:

Secs. 9—The meaning of service by post.

9A—The time for performance of an act in relation to Sunday or public holiday.

12—The effect of each section contained in any Ordinance.

14—The amendment or repeal of an Ordinance in the same session of Parliament.

17—The effect of the preamble and schedule to an ordinance.

23—The saving the rights of the State in any enactment.

24—The Form a suspending clause in an Ordinance should take.
36—Evidence of the fiat of the Director of Public Prosecutions.
39—Delegation of powers.
&
40—

But, as far as I am aware, from the time these sections have come into operation, they have been construed as applying not only to Ordinance then in existence, but also those which have come into operation since. It follows that no clear guide to a solution of the present issue can be had from an examination of the Interpretation Ordinance.

Indeed, I know of no rule of construction which would limit the application of an Ordinance or section only to things or objects in being at the time the legislation became effective. Accordingly, the words "Ordinance" and "rule" in secs. 42 and 44 of the Legal Practitioners Ordinance must be construed to include Ordinance and rules which have come into being after the 19th day of July, 1931. This would therefore include section 56D of the Income Tax Ordinance.

It is, however, argued that Section 56D sets out a special code to be followed in the event of an appeal. Counsel for the Commissioner contrasted the provisions of subsection 2 of Sec. 56(D) with the proviso to sub-section 8 of that section. He argues that when, as in the proviso, the Legislature intended that a barrister-at-law, should act, it was specifically so stated. The net result of this argument must, however, be that the very forthright and positive words of Secs. 42 and 44 viz. "notwithstanding anything to the contrary in any Ordinance" have been impliedly modified. As is well known courts lean against implying a repeal or modification of one statute by another, "unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied" (see *Kutner v. Phillips* (1891) 2 Q.B.D. 267 at p. 272. Indeed, before coming to the conclusion that there is a repeal by implication a court must be satisfied that the two enactments are so inconsistent and repugnant that they cannot stand together before it can from the language of the latter imply the repeal of an express enactment. In my opinion despite the proviso to sub.-sec. 8 which specifically provides for the admission by the Board of an appeal to be made by a barrister, this is not a sufficient basis for me to come to the conclusion that section 44 has *pro tanto* been modified by Sub.-Sec. 2 of Sec. 56(D).

In my opinion, therefore, when the barrister signed the appellant's notice of appeal he was not in breach of subjection 2 of Sec. 56(D) when read in conjunction with Sec. 44 of the Legal Practitioners Ordinance.

I would therefore allow the appeal, set aside the Board's order of dismissal and remit the matter with directions that the appeal be heard on its merits. I award costs to the appellant paid at $20.00 (twenty dollars).

Leave to appeal is granted if necessary.

Appeal allowed. Matter remitted.

IN THE MATTER OF THE TRADE MARKS ORDINANCE CAP. 340
and
IN THE MATTER OF THE APPEAL FROM A DECISION OF THE REGISTRAR OF TRADE MARKS BY MOORE DRY KILN COMPANY OF OREGAN

[High Court—In Chambers (George, J.) on appeal from the decision of the Registrar of Trade Marks—October 15, 1971]

Trade Mark—Application to register—Distinctiveness—Surname—Trade Marks Ordinance Cap. 340 (*now Cap. 90:01*) *SS. 2, 11.*

The appellants applied under the Trade Marks Ordinance Cap. 340 to the Registrar of Trade Marks to register in Part A of the Trade Marks Register the surname "Moore" in large block letters together with a small replica of a global device below and to the left of the surname. The Registrar after hearing arguments on behalf of the appellants held that the mark was unacceptable for registration on the ground that it was not distinctive and refused the application. On appeal to a judge in chambers from the refusal the appellants argued that the mark was registrable under paras, (a) and/or (e) of S. 11 of the Ordinance in that it was a surname represented in a special or peculiar manner and was distinctive. The provisions of S. 11 are set out in the judgment.

HELD: (i) the word "Moore" was an ordinary surname and was not represented in any special or peculiar manner;

(ii) the global device was insignificant alongside it, and they could not together, and looked at as a whole, be said to be distinctive;

(iii) the Registrar was right in refusing to register the mark in Part A of the register.

Appeal dismissed.

J. A. King for the appellants.

E. Beharry for Registrar of Trade Marks.

GEORGE, J.: On the 6th March, 1969, the appellant applied to register in Part A of the Trade Marks Register the word "MOORE" together with a global device in Classes 7, 9, and 11. On the 20th the Registrar of Trade Marks wrote to the appellants' agents informing them that the mark was unacceptable for registration on the ground that it was not distinctive. After hearing oral arguments by Solicitor on behalf of the appellants, the Registrar maintained his refusal to register the mark. It is from this refusal that the appellants now appealed to this court. S. 11 of the Trade Marks Ordinance, Cap. 340, which sets out the requirements for registration of a trade mark in Part A of the Trade Marks Register, as indeed are all the other provisions of the Ordinance, is taken from the Trade Marks Act 1938 of the United Kingdom sub-s. (1) of that section reads as follows:—

> In order for a trade mark (other than a certification trade mark) to be registrable in Part A of the Register, it must contain one of the following essential particulars:—
>
> (a) the name of a Company, individual, or firm represented in a special or particular manner.
>
> (b) the signature of the applicant for registration or some predecessor in his business;
>
> (c) an invented word or words;
>
> (d) a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification geographical name or a surname;
>
> (e) any other distinctive marks; but a name signature or word or words other than such as fall within the description in the foregoing paras. (a), (b), (c) and (d) shall not be registrable under the provisions of this paragraph except upon evidence of its distinctiveness".

Sub-s. 2 of this section defines "distinctive" to mean adapted to distinguish the goods with which the proprietor of the trade mark is or may be connected in the course of his trade from goods in the case of which no such connection subsists. And, in determining whether a trade mark is adapted to distinguish, sub-s. (3) enjoins the Registrar to have regard to the extent to which:

> (a) the mark is inherently adapted to distinguish and
>
> (b) by reason of the use of the mark or any other circumstances it is in fact adapted to distinguish.

Although it is conceded by the counsel for the appellants that the mark is not registrable under paras. b, c and d of s. 11(1), he contends that it confirms to the requirements of paras. (a) and/or (e) in that it is a surname

represented in a special or peculiar manner and is distinctive. The mark sought to be registered consists of the surname MOORE in large block letters together with a small replica of a global device below and to the left of the surname.

There can be little doubt that although it is extremely difficult for a surname by itself to confirm to the requirements for registration set out in s. 11, this is not impossible. For example, in *Teofani and Co. Ltd. v. A. Teofani* (1913) 2 Ch. 545, (which was approved in *Burford Cos Appln* (919) 36 R.P.C. 139 at p. 147) it was held that a surname may be registrable where it is an uncommon name and its user has been so extensive that it has in fact become distinctive.

In support of his contention that the mark sought to be registered is distinctive, counsel for the appellant drew attention to the case of *Diamond T. Motor Car Co. Appln.* (1921) R.P.C. 373. In that case the trade mark sought to be registered consisted of the word "Diamond" with a T within a diamond shaped border. The court, although requiring, as a condition precedent to its registration, that the applicant disclaim the right to the exclusive use of the word "diamond" the diamond shaped border as well as the letter T, allowed the registration of the mark on the ground that it was distinctive. The view was there emphasised that, what must be looked at in determining the distinctiveness of the mark was the whole of it and not its component parts. Using this same yardstick the court confirmed the Registrar's disallowance of the registration of the surname "Benz", written in fanciful lettering surrounded by a wreath within concentric circles, on the ground that it was not distinctive. (See *Benz and Cie's Appln* (1913) 29 T.L.R. 295). In coming to his conclusion FARWELL, L.J. said:—

> "Benz" was the essential part of the mark. The use of it consisted of a common place embellishment. The whole object of the application was to get the name of Benz registered with the qualification of an unmeaning wreath.

Further he expressed the opinion that the learned judge, before whom the appeal against the registration of the trade mark was heard, was quite right in holding that it was not enough to add a wreath to a name, which could not be regarded as distinctive, in the absence of actual evidence of its distinctiveness being advanced to the Board of Trade or the court as required by the Trade Marks Act 1905.

In *Tarzan Trade Mark* (1970) R.P.C. 450, one of the points considered by the Court of Appeal was the meaning of the words "adapted to distinguish". EDMUND DAVIES, L.J., at p. 459 adopted the interpretation

of HARMON, L.J., in *Weldmesh Trade Mark* (1966) R.P.C. 200 at p. 228. There the learned Lord Justice of Appeal had this to say:

> "By 'inherently adapted' I take the Act to mean adapted by itself, standing on its own feet".

In the present case the word "MOORE" is an ordinary surname, and is not, represented in any special or peculiar manner. The global device is insignificant alongside it. In my opinion, even if the appellant were to be required to disclaim the exclusive use of the surname and the device, these cannot together and looked at as a whole be said to be distinctive. To adopt the words of FARWELL, L.J. in the Benz case in the whole object of the application is to get the name Moore registered with the qualification of an unmeaning global device". Accordingly I come to the conclusion that the Registrar was right in refusing to register the mark in Part A of the register. No arguments were advanced before me to support the registration of the mark in Part B of the register, as provided for in s. 12 of the Ordinance. Indeed for the reasons already given together with the fact that no evidence has been led as to the user of the trade mark, it is also not inherently capable of distinguishing the appellant's goods from those of others.

I accordingly dismiss this appeal. Each party will bear his own costs.

Appeal dismissed.

CHATTERPAUL RAMDEEN *v.* RAMDEEN

[High Court—In Chambers (Vieira, J.) on appeal from the decision of a rice assessment committee—
October 17, 31; November 28, 1970; October 16, 1971]

Rice lands—Application by landlord to assessment committee for possession on ground of non-payment of rent—Order for ejectment issued—Arrears paid after the time given by committee but before order for ejectment made—Evidence showing persistent failure on part of appellant to pay rent as it became due—Order of ejectment not unreasonable in circumstances of case—Rice Farmers (*Security of Tenure*) *Ordinance 1956 SS. 26*(*5*)(*a*), *29*(*2*).

The appellant, a son of the respondent, was a tenant of his in respect of rice lands at No. 54 Village, Corentyne. On 17th January, 1969, the father made application to the Assessment Committee for possession of eleven acres of rice land on the ground of non-payment of rent for

the years 1963-1967 and on 30th May 1969 the Committee made an order for possession effective 30th November 1969 unless the sum of $373.12 representing the balance of rent due for period 1963—1967 be sooner paid. On 1st December 1969 the respondent applied for ejectment. On 19th January 1970 he received a cheque for $373.12 from the appellant for the said arrears of rent. On 26th January 1970 the Committee made an order for ejectment, from which the appeal was brought by the appellant. It was contended that as the appellant had paid off the arrears before the order of ejectment was made it was unreasonable for the Committee to have granted the order of ejectment. The judge on appeal heard evidence on certain aspects of the case in accordance with the provisions of S. 26(5)(a) of the Rice Farmers (Security of Tenure) Ordinance and arguments were heard on the aspect of the son's persistent failure to pay his rent.

HELD: (i) the sum of $373.12 was the rent in respect of 11 acres for the year 1967. That amount was paid and therefore there were no arrears accruing up to 31st December 1967;

(ii) rent was not paid for the years 1968 and 1969, but ejectment could not issue for those years as application for possession for nonpayment for rent for those years was not made to the Committee;

(iii) the evidence showed persistent failure on the part of the appellant to pay his rent as it became due, and, accordingly, the order of ejectment made by the Committee was not an unreasonable one despite the fact that the appellant had paid off the arrears before the said order was made.

Appeal dismissed.

M. Poonai for the appellant.

O. M. Valz for the respondent.

VIEIRA, J.: The appellant is the respondent's son and his tenant in respect of rice lands situate at No. 54 Village, Corentyne, Berbice. Before the Assessment Committee the appellant alleged that he was tenant in respect of 16 acres of rice lands but his father made application for possession in respect of only 11 acres thereof. There was another Appeal (No. 2222 of 1969) brought by the father in respect of these very 5 acres in dispute which was heard and determined by me on 6th October, 1970. In that appeal it was argued that the son was not a tenant of those 5 acres at the material date, viz: the date of the application for possession in 1967. The Committee accepted the evidence of the father and found as a fact that there was a surrender of the tenancy by the son but, nevertheless, they were of the opinion that such a surrender was invalid since it was not in writing and, accordingly, they found for the son. I considered this not only an erroneous supposition but also an inconsistent finding and I allowed the Appeal and set aside the order of the Committee with costs.

The history of this instant appeal is as follows—

1. On 17th January, 1969, the father made an application to the Assessment Committee for possession of the 11 acres on the ground of non-payment of rent for the years 1963-1967 inclusive and on 30th May, 1969 the Committee made an order for possession effective 30th November, 1969, unless the sum of $373.12, representing the balance of rent due for the years 1963—1967 inclusive, be sooner paid.

2. Op 1st December, 1969, the father applied for ejectment in relation to the said 11 acres.

3. On 19th January, 1970, the father received a cheque for $373.12 from his son representing the said arrears.

4. On 26th January, 1970, the Committee made an order for ejectment, from which order this appeal has been brought by the son.

Before me, Mr. Poonai argued that, although it is conceded that the son paid the arrears after the time given by the Committee, nevertheless, it was unreasonable for the Committee to have granted the order of ejectment as the arrears were paid off before the actual order for ejectment was made. The record, he urges, shows that only one year's rent was owing and it is unreasonable, he contends, to make an order for ejectment in relation to only one year's rent and he referred me to s. 29(2) of the Rice Farmers (Security of Tenure) Ordinance, No. 31 of 1956 (hereinafter referred to as the Ordinance).

Mr. Valz, in reply, referred me to *Dellenty v. Pellow* (1951) 2 K.B. 858, C.A., and pointed out that at p. 4 of the Record the son himself admits in cross-examination that he has not paid rent for the years 1968 & 1969. He submitted that, on the evidence, the son owed a balance from previous years and also for two subsequent years, viz: 1968 & 1969. He was prepared to concede that the sum of $373.12 upon which the order was made was indeed for the year 1967 and that there was no balance from previous years but this concession, he argues, does not affect the position since the Committee has accepted that the son was always in arrears. Thus they clearly believed the father on this aspect and this court, he urges, ought not to disturb such a finding.

Not being satisfied as to whether the sum of $373.12 represented arrears or not and whether in respect of 16 acres or 11 acres I directed that evidence be adduced in accordance with the provisions of s. 26(5)(a) of the Ordinance which has recently been amended by s. 8(1)(a) of the Rice Farmers (Security of Tenure) (Amendment) Act, No. 6 of 1971 (whereby Rice Assessment Appeals will now be heard by the Full Court of the High Court instead of by a single Judge in Chambers). In addition, I directed both parties to produce certified copies of all documents pertaining to the rental per annum including all assessment certificates, if any.

Only the son gave evidence before me, the father closing his case at the end thereof.

Mr. Valz referred me to *Smith v. Perry* (1946) 2 All E.R. 672 and submitted that no attempt has been made by the son to show that the Committee's findings of fact were not supplied by the evidence or were improperly made. Mr. Poonai, in reply, referred me to p. 4 of Ex. "D" which was an application by the son in respect of the 5 acres in dispute where the father stated in examination-in-chief—

> "The applicant did pay the rent in December, 1966. This was rent up to 1965".

Mr. Poonai also referred me to Ex. "E", which was an application by the father in respect of 16 acres for the period 1963—1965 being the sum of $1,084.80 and in respect of 11 acres for the period 1966—1968 being the sum of $754.38, a total of $1,839.18, where at p. 2 of the Record the father admitted that he was paid a cheque for $395.00 by his son on 12th December, 1966 but stated that this was not rent for any one year but was paid on account of arrears.

From the oral and documentary evidence led before me I accept and believe, on the balance of probabilities, that the sum of $373.12 was the rent in respect of 11 acres for the year 1967 and that this was paid and that there were no arrears accruing up to 31st December, 1967. It is clear that the son has not paid rent for the years 1968 & 1969 but this, to my mind cannot operate to his detriment and cannot be used by the Committee against him in relation to the question whether it was reasonable to let ejectment issue or not, since no application for possession for non-payment for rent for those years was ever made to the Committee.

The vital question to be determined here, as I see it, is whether there was any evidence or sufficient evidence upon which it can be concluded that it was reasonable for the Committee to make the order of ejectment that they did especially having regard to the fact that the arrears were in fact paid after the date for possession had expired but before the order for ejectment was made. The answer, to my mind is given by the decision of the English Court of Appeal in *Dellenty v. Pellow* (1951) 2 K.B. 858, C.A., where the County Court Judge made an order for possession of premises within the Rent Restriction Acts on the ground of non-payment of rent, which was one (1) year in arrear. The arrears were paid into court before judgment, but the tenant had a bad record for non-payment of rent, having had to be summoned repeatedly. Held, that although in the ordinary case payment of arrears into court would make it unreasonable to make an order for possession, in the present case, having regard to the tenant's record there was evidence upon which the learned County Court Judge could conclude that it was reasonable to make the order for possession. JENKINS, L.J., said at pp. 859 & 860:

> ". . . Where possession is sought on the ground of non-payment of rent, and the tenant pays the rent into court, or tenders it before judgment, it would not be reasonable to make an order for possession. But in this case the evidence showed that there had been a long history of default on the part of the tenant, and that time after time it had been necessary to issue summons against him before the rent could be extracted. This time again he had allowed his rent to fall into arrear for more than a year, and did not pay until the summons was issued and the case was about to be heard. Accordingly, in my view, in the particular circumstances of this case there was evidence on which the judge could come to the conclusion that, although the rent was actually paid into court before his judgment nevertheless, it was a case in which it would be reasonable to make an order.

Both EVERSHED, M.R. and BIRKETT, L.J. expressed their agreement with this statement.

It is now well settled that the principles to be applied in respect of an application under the Ordinance are very much the same as those applied under the Rent Restriction Ordinance, Cap. 184—see the valuable judgment of LUCKHOO, J. (as he then was) in *Gladys Hicken Ltd. v. Ohab* (1958) L.R.B.G. 98; and *Khan v. Rahaman* (1961) a decision of the Federal Supreme Court (Civil Appeal No. 41 of 1961) (unreported).

From both the oral and documentary evidence in this matter it is clear that there is a long history of strained relations between father and son, the latter being regularly in arrears of rent and against whom several actions, both for possession before the Committee and for rent before the Magistrate, were brought by the father. The Committee, to my mind, were perfectly justified in finding on the evidence before them as they did that the son persistently failed to pay his rent and the order of ejectment made by them was not an unreasonable one having regard to all the circumstances despite the fact that he paid off the arrears before the said order was made. I can see no valid reason for disturbing the finding of the Committee that the son was an undesirable tenant and one who should be ejected from his holding.

For these reasons this Appeal is dismissed and the order of the Assessment Committee is hereby confirmed. There will be costs to the respondent fixed in the sum of $25.00.

Appeal dismissed.

RAMLOCHAN *v.* JAIRAM

[High Court Mitchell, J.)
January 13, 14, September 6, 7, October 30, 1971].

Trespass—House and house lot in occupation of defendant as licensee—Plaintiff claiming house under will of deceased father and house lot by transfer of tenancy executed between himself and father—Defendant claiming to be in occupation as of right and relying on provisions of Title to Land (*Prescription and Limitation*) *Ordinance Cap. 184—Claim for possession, damages and injunction.*

The plaintiff sued his brother for possession of a house and house lot situate at Better Hope, East Coast, Demerara, and for damages for trespass to the house and land and an injunction to restrain any further trespass. He claimed the house as his under the terms of the will of his late father Ramnarain who died in August 1967, and the tenancy of the house lot by virtue of a transfer executed by the father to him with the approval of the La Bonne Intention Sugar Estate (the proprietors). The defendant denied receiving from the plaintiff any notice to quit. He claimed that the house was built by his father with monies provided by him (defendant), that he lived in the house for 'upwards of 15 years prior to the death of his father Ramnarain' and that he occupied the house and the land on which it was erected in his own right as owner and was never at any time a tenant at will of the plaintiff or of anyone else. He relied on the provisions of the Title to Land (Prescription and Limitation) Ordinance Cap. 184.

HELD: (i) the house was owned by the father Ramnarain who had bequeathed it to the plaintiff;

(ii) the tenancy of the house lot was transferred by the father to the plaintiff;

(iii) the defendant was not in occupation of the house and land in his own right, but was a licensee whose licence was terminated by a reasonable notice to quit;

(iv) the plaintiff was entitled to possession and to damages for trespass, and to an injunction restraining the defendant, his servants and agents from trespassing on the house lot and building.

Judgment for the plaintiff.

F. Ramprashad, S.C., for the plaintiff.

Dr. F. W. Ramsahoye, S.C., for the defendant.

MITCHELL, J.: This is essentially a family dispute in which brother is arrayed against brother with sisters taking their alignment on either side.

Ramlochan, crippled son of a deceased father Ramnarain, claimed that his deceased father Ramnarine left him a house at lot 6, Better Hope, East Coast Demerara, Guyana, as a legacy in his last will and testament dated 14th December, 1966. Ramnarain died on 3rd August, 1967.

Ramlochan also claimed that prior to his death his father Ramnarine on 1st August, 1967, just two days before his death, while in full command of his faculties, had executed a document at the office of the La Bonne Intention Estate, whereby he relinquished all his rights and interests in Lot 6, Better Hope South to his son Ramlochan, the plaintiff, and agreed that the said lot 6 and the house which was situated on it should be transferred to his son Ramlochan. The document which the father Ramnarain executed was made in the presence of one David Jackson, who at the relevant time in 1967 was an officer in the personnel department of the La Bonne Intention Sugar Estate, and it was his duty at the time to look after the transfer and allocation of leases. It will arise for consideration in this case whether Ramnarain was a lessee at all of the estate or a mere tenant in respect of the house lot for which he paid a monthly rent and this like all other facts will have to be determined on the evidence. David Jackson, also, signed as a witness to that document, tendered in this matter as Ex. "B". In addition to the house being a legacy from his father as in a will for which probate was granted, and its being transferred to him as required by the estate authorities, Ramlochan asserted that in 1959 he had loaned his father $700.00 to rebuild the said house, and that the house was rebuilt by a carpenter named Paul Narine, and to his knowledge his brother Jairam, the defendant, had made no contribution to the rebuilding of that house and throughout the years since the house was rebuilt, his brother Jairam, during his father's life-time had made no claim whatsoever to the house.

Ramlochan further said that after the house was rebuilt in 1969 he and his brother Jairam lived in the house. There is no evidence that either of them paid any rent to the father, or, to each other and the conclusion emerging from the evidence is that they both lived in the house at lot 6 free of rent, gratuitously as far as the father was concerned. Ramlochan said that he lived in the house for only two weeks. As he was a bachelor then, and as the customers who went to him in the course of his trade as a tailor sometimes used bad words, and as Jairam said that he should leave the house he "blocked off a portion of the bottom part of the house, and there he carried on his trade as a tailor. He said that his father never repaid him the amount of $700.00 which he said he had loaned him but he had a receipt tendered as Ex. "C" for the sum of $160.00 which he had personally paid to Paul Narine.

This receipt Ex. "C" was never put to Paul Narine for verification when he gave evidence on behalf of the plaintiff but Narine said that Ramlochan had paid him for his labour in rebuilding the house.

Accordingly, Ramlochan asks the court for a declaration that the building situate on lot 6, Better Hope, East Coast Demerara, on land purporting to be leased from the La Bonne Intention estate is the property of Ramnarain deceased.

Ramlochan, also, said that the following on the grant of probate of the will of the deceased Ramnarain on 5th March, 1968, in a letter dated 22nd October, 1968 tendered as Ex. "F", through his lawyers, he requested the defendant to give up possession and occupation of the house at lot 6, Better Hope, and took abortive steps in the Sparendaam Magistrate's Court to obtain such possession. He, again, sent his brother Jairam another notice dated 4th February, 1969, Ex. "D" demanding the possession of the building. Jairam failed to give up possession and Ramlochan has, thus, asked this court for an order giving him possession of the said building on lot 6, Better Hope, and, also, possession of the land on which the building stands. He has, also, asked the court to grant him an injunction restraining the defendant Jairam his servants and/or agents from trespassing on the land and building situated at lot 6, Better Hope and damages in excess of $500.00 for trespass to the said house and land.

In support of his claims Ramlochan called the witness David Jackson who spoke of the visit of Ramnarine, the deceased, and of Ramlochan and a sister Ratnie to his office at the personnel department, La Bonne intention estate, and of how Ramnarine requested a transfer of his rights and interest in Lot 6, Better Hope to his son Ramlochan, the plaintiff. David Jackson said that he questioned Ramnarine as to whether he was serious about what he had requested and Ramnarine affirmed his request. The document Ex. "A" transferring the rights and interest of Ramnarine was duly executed by Ramnarine and when the document was read and explained to Ramnarine he said that he was satisfied. David Jackson went on to say that that was not the first occasion on which he had approached him (Jackson) about a transfer to his son Ramlochan. Jackson, also, said that as far as the estate was concerned Ramnarine had done all that he should do to effect the transfer of the house and the lot to his son Ramlochan and that up to the time of the hearing of this matter as far as he was aware, Jairam had done nothing to indicate that he claimed ownership of the house or to oppose the transfer which his father purported to have effected by the document Ex. "A". He said, also, that it is necessary to submit an application to the estate when an owner wished to rebuild and so the estate is in a position to know the owner. He also, stated that on the day that the document of transfer was executed by Ramnarine he seemed a normal healthy man and was not assisted into the office by his daughter Ratnie.

Paul Narine, the carpenter, gave evidence, also, on behalf of the plaintiff and spoke of having rebuilt a house for Ramnarine called Rattan and that Ramlochan, the plaintiff, had paid him for his services. The document Ex. "C" signed by Paul Narine acknowledging the receipt of the sum of one hundred and sixty dollars ($160.00) from Ramlochan tends to support this proposition. He testified that Ramnarine was the "moving spirit" in the rebuilding of the house.

Rookmin, the sister of both the plaintiff and the defendant gave evidence on behalf of the plaintiff. She gave evidence to corroborate Ramlochan the plaintiff, that their deceased father had borrowed money from Ramlochan by which to rebuild the house in question. She said that her father had told her so. She asserted that she was not present at the transfer of the house by her father to Ramlochan but her father had told her before he died that he had transferred the house to Ramlochan. As far as she was aware no one spent money on the house after it was rebuilt. The back steps of the house in question had fallen off even though Jairam was living there and he had not effected repairs. Jairam, however, she said had built a house for his daughter in the "squatting area".

Ratnie, another sister of the plaintiff and defendant, gave evidence on behalf of the plaintiff and spoke of having gone with her father and Ramlochan, the plaintiff, to the office of the La Bonne Intention sugar estate where a transfer of the purported "lease" of the land on which the house in question was effected in favour of Ramlochan. Mr. Jackson was present when a document was made which gave effect to the transfer. She said that her father spoke and gave the instructions to Mr. Jackson.

The defendant Jairam in his defence to this action denied having received any notice to quit from the plaintiff. He claimed that he lived in the house in question for upwards of fifteen (15) years prior to the death of his father Ramnarine in 1967, and that he occupied the house in question and the land on which it was erected in his own right as owner, and was never at anytime a tenant at will of the plaintiff or of anyone else. He asserted that the house was first built by Ramnarine from monies which he (Jairam) had provided. He asserted, also, that the house was painted by him. He said in his statement of defence but not in evidence on oath that it was he who had repaired and reconstructed the house at much expense to himself. He claimed that the plaintiff acquiesced in his ownership of the house. Accordingly, he claimed that he is entitled to occupy the house in his own right as owner. He claimed that his possession of the property is protected by the Title to Land Prescription and Limitation Ordinance, Cap. 184 in respect of both the house and the "lease" granted by the La Bonne Intention estate and he relied on Ss. 3, 5, 6, 7, 9, 10, 11, 12, 13 of the said Title to Land (Prescription and Limitation Ordinance Cap. 184).

The defendant gave evidence on his own behalf. He told of having worked with his father at picking coconuts and on a "pin seine". He used to receive from his father half of the amount which was received from his workings of the "seine" and from the sale of fish. As a result, he was able to effect savings and was able to give his father the sum of $500.00 (five hundred dollars) to pay for a house near to lot 6, Better Hope which was being sold. The transaction of the purchase of that house was discontinued and the money advanced for the purchase of that house returned. His father Ramnarine retained that sum of $500.00. The seine was, subsequently, sold for the sum of $1,000.00 and that

sum was, also, retained by his father. Later his father bought a property near to the railway line and his father went and lived there, but before doing so, about 1955 he told him (Jairam) that the place at lot 6, Better Hope belonged to him. In 1958, whilst he was living in the house repairs were effected to the house by Paul Narine, the carpenter who gave evidence on behalf of the plaintiff. Jairam said that he had accompanied his father to buy materials. The materials for the house which was later broken down and reconstructed in 1959, if one accepts the receipt of Paul Narine, the carpenter in conjunction with his evidence were bought four years afterwards. According to Jairam his father had already told him that the house was his own and he had lived in it, but materials were bought in the name of his father Ramnarine and another man named Jonas, and one might think, significantly, not in his name. His father, also, advanced the sum of fifty dollars ($50.00) towards the cost of glass windows for the said house and according to Jairam he worked and later paid for them. Jairam said that he paid for the painting of the house and he produced two receipts for $50.00 (Ex. "G") and $30.00 (Ex. "H") respectively in support of his assertion of fact. Jairam said, also, that he paid for the installation of electricity in the building and paid the rent for the land on which the house was situated to Pln. La Bonne Intention in the name of his father Rattan (Ramnarine) from 1955 to 1967 as in Ex. "J1" to Ex. "J10". It is significant to note that though he alleged that his father told him that the "place" belonged to him since about 1955 Jairam himself took no effective steps to have the purported "lease" of the land on which the house stands transferred to him and continued paying rent, according to him, over the years in the name of his father, nor did he take any steps to obtain evidence as to his purported ownership of the house. He said that he did not know that his father had applied for a transfer of the purported lease to Ramlochan. In 1969 Ramlochan sent him a notice to quit the premises Ex. "K" (dated 4th February, 1969) through his then lawyer Mr. Ripudaman Persaud. Prior to that he had received a notice Ex. "F" (dated 22nd October, 1968) requiring him to deliver up possession of the said house at Lot 6, Better Hope Housing Scheme, East Coast Demerara. The letter Ex. "F" also informed him that Ramlochan was the executor of the estate of Ramnarine deceased and sole beneficiary under the will of the said Ramnarine and that probate of that will was granted to Ramlochan. There is no evidence that the defendant did anything to vindicate his right (if any) to remain in that house. It appears that he did nothing whatsoever and if he had any right at all to remain there he slept on it after he was informed that that right seemed to have been taken away. Subsequently, the plaintiff brought a claim against the defendant in the Magistrate's Court. Then this action was brought in 1969 in the High Court. Jairam claimed that the property was his.

Jairam agreed that it was his father who employed Paul Narine the carpenter to effect the reconstruction and repairs. He agreed that his father caused Paul Narine to submit a plan of the reconstruction and

repairs in his (the father's) name. He agreed, also, that his father went himself and took out money and paid for the materials and supervised the building of the house. The contract for the supply of electricity to the house (which he occupied) was also in his father's name and was so up to the time of the hearing of this matter. He said, also, that at the time of the hearing of this matter the front step of the house was in a state of disrepair and the back step had already fallen off the house and he agreed that the house was in substantially the same condition as when built in 1959.

The total effect of what Jairam admitted was that he himself had done nothing to the house since his father built it even though according to him his father had told him since about 1955 (before it was rebuilt) that it was his own and he was living in the house since. However, he had borrowed $600.00 on his insurance policy and lent that amount to his daughter to build a house elsewhere. But he had no money to spend on a house where he lived, and which he claimed was his own. One must inevitably ask whether in the exercise of the jury mind on the facts Jairam's conduct in these circumstances is reasonably consistent with his ownership of the house or not.

Dularie, a sister of both Ramlochan and Jairam, gave evidence on behalf of the defendant and said that her father had told her that it was her brother Jairam's money by which the new house was built and her father had, also, told her that Jairam had given him $500.00 and he had kept that money with another $1,000.00 which he got from the sale of the seine and that the house was Jairam's house.

Her evidence was forthcoming substantially in an attempt to corroborate Jairam's evidence as to what the dead man Ramnarine had said and done.

I appreciate that both in relation to the case for the plaintiff and to the case for the defendant the court should look for corroboration of evidence involving the deceased person Ramnarine or Rattan, who is not in position to deny or rebut any allegation made of him, or, against his interest. Accordingly, I looked for corroboration of the evidence involving the deceased Ramnarine in both the case for the plaintiff and the case for the defendant. I was fortified in my conclusions in this regard by having the benefit of seeing and of hearing the various witnesses observing their demeanour and determining their respective credibility or lack of credibility.

I came to all my conclusions of fact on the balance of probabilities and I would like to think that like any other court in the performance of Judicial functions I am entitled to come to conclusions.

I find as a fact that the house in question at lot 6, Better Hope, East Coast Demerara was initially, wholly owned by the deceased, Ramnarine and wholly possessed by him and that he paid "rent" to the La Bonne Intention estate for the land on which the house stands.

I find as a fact that throughout the period of his life as revealed in the evidence in this case up to the time of his death he exercised control over this house whether it was in relation to repairing it or saying who should occupy it as was consistent with the ownership of the property.

I find as a fact that up to the time of his death and afterwards there was no act or otherwise by anyone, including the defendant, to indicate an ownership or possession inconsistent with that of Ramnarine, or the probability of such ownership or possession on the part of anyone else. It was then apparently accepted by all concerned in this case that he was owner.

I find as a fact that the defendant and the plaintiff occupied their respective areas of the house and premises at Lot 6, Better Hope, East Coast Demerara with the consent and permission of the said Ramnarine, and at no time did either, or, both indicate by word or deed to him or anyone else that either was occupying in his own right, or, by dint of an interest which was adverse to Ramnarine's interest. Rather, I find that they both and particularly the defendant acted in recognition of the proprietary rights of Ramnarine to the extent of even paying as he did the rent due to the La Bonne Intention estate by Ramnarine called Rattan, in the name of the said Rattan himself. Jairam has sought to explain that he has done so while acting under the belief that his father had told him that the property had belonged to him, Jairam, but having regard to the acts of ownership as revealed in the repairs and the rebuilding done by the father in 1958, even while he (Jairam) was living in the house and three (3) years after he was (according to him) told that that house was his I find Jairam's explanation in conjunction with his conduct unequivocally inconsistent with the purported ownership which he claimed but never asserted by word or deed.

Having regard to the conduct of the deceased Ramnarine on the one hand as revealed in the evidence of all the witnesses and of Jairam on the other as similarly revealed, I have no hesitation in coming to the clear conclusion that the house in question at all material times belonged to the deceased, Ramnarine, and that Jairam had no interest whatever in it or part of it. His assertion that he has an interest in the house and lease to my mind having regard to all the circumstances of this case including the credibility of the witnesses whom I have seen and heard is, I conclude, an after-thought, after the executor of the estate of Ramnarine deceased in the person of the plaintiff Ramlochan had taken definite steps to assert his right to possession of the house in which he lived.

I do not believe the defendant when he said that he had lent his father money to purchase a house, and that his father retained that money and used it in the rebuilding of the house in question. I reject that evidence as untrue. I do not believe the evidence of the defendant

when he, also, said that his father had sold the fishing seine which they worked and appropriated the proceeds of that sale towards the rebuilding of the house. That evidence, to my mind, is untrue. I do not believe the evidence of his sister Dularie when she gave evidence in support of the plaintiffs assertion in that regard and I was satisfied that I should not accept her evidence in corroboration of the defendant's evidence because having regard to her testimony and what I had seen and heard of her, she did not impress me as a witness of truth.

Accordingly, I came to the clear conclusion that the defendant Jairam had no propriety interest actual, or held in trust for him by his father or any right to possession in the house in question or the land on which the house stood. I came to the conclusion also, that he lived in the occupation of the house as an act of grace and favour with the bald permission or bare licence of his father, who permitted him to live there out of benevolent regard, in my opinion, for the difficulty of an invalid child which he had, the invalid child also, being the grandchild of Ramnarine. I, also, concluded that it was a similar feeling of fatherly kindness and benevolence that prompted Ramnarine to allow Ramlochan, who was, also, invalid to live on the said premises.

So Jairam's occupation of the premises was without any right in law grounded in him and was not manifested in any title, or contract of tenancy for there was none, and he had no interest in equity for I find that he neither contributed in any way to the building or rebuilding of the house in question nor did his father tell him that the house and land on which the house was belonged to him so as to have held them both and their relative interests in trust for him. It is very easy for anyone, especially relatives, to make assertions and allegations against a dead person who is not alive to deny and disprove them, and it is even easier when the assertion is based primarily on what appears to be the generosity of the dead person. The court, to my mind, must guard against such a faculty and must require what it conceives as satisfactory proof before accepting assertions and allegations (as distinct from seemingly valid documentary proof) against the interests of deceased persons. I find that in his occupation of the premises in question Jairam was a mere licensee of his father and as such his license to remain there could have been revoked at any moment by notice to him provided he was given a reasonable time within which to remove himself and his belongings placed on the land and in the house as a result of the license which his father had previously given him.

On the facts alone in this case as I find them the defendant's resistance to the plaintiff's claim must fail. However, apart from and in addition to my findings of fact and the conclusions and consequences which flow from such findings, I shall consider other aspects of the case and such other consideration as I shall give does not derogate or detract from the conclusions of fact to which I have arrived.

In the particular circumstances of this case the apparent possession of the lease and house spot which Jairam enjoyed was not conclusive of any right to possession or any tenancy, his apparent possession was a mere permission given by Ramnarine to legitimise his presence and the acts flowing from his presence. The permission was personal to Jairam and in the circumstances of this case was, obviously, not something which he could assign or sublet. Ramnarine, the father, had no ability or power in the circumstances of this case to create a valid tenancy between Jairam and himself or grant Jairam a lease in respect of the land. He did not have a lease of the premises himself or a sufficient "estate" in the house lot. Only the La Bonne Intention estate had sufficient estate to grant a lease. Again, the circumstances and the conduct of Ramnarine (father) and Jairam (son) show clearly (as I find) that all that was intended was that Jairam should have the personal privilege of occupying the house and house spot with no interest in either. Jairam was a licensee. "There is one golden rule which is of very general application, namely that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind" per Lord GREENE M.R. in *Booker v. Palmer* (1942) 2 A.E.R. 674 C.A. at p. 677 quoted by Lord DENNING in *Isaac v. Hotel de Paris Ltd.* (1960) 1 W.L.R. 239 P.C.

In the circumstances of this case I find that Jairam did not do anything which did not fall within the scope and purview of his license to remain on the land and in the house. His license, too, in the circumstances of this case was not coupled with an interest. To my mind, it seems probable that the arrangement between himself and his father was that he would use the premises while the father retained effective legal possession of them. The use of the premises by Jairam as revealed in the circumstances of this case and having regard to my findings of fact and the payment of the rent due to the estate in the name of the father Rattan (Ramnarine) do not import a grant of the house and rented land on which the house stood to Jairam and to my mind Jairam's conduct supports that also.

Again, if Jairam was to have had his license effectively coupled with an interest, it would seem that it was necessary first for him Ramnarine to have a valid "lease" from the estate which he did not, and for Ramnarine to be able to assign that lease of land to Jairam. This could not have been as Jairam merely "rented" the house spot from the estate. Jairam failed to have the tenancy of the land transferred to him over the years that he lived on the land with the consent of his father.

The estate had to effect his transfer. This was the normal way of affecting a transfer of the tenancy and he in this regard slept on any rights, if he had any (and I find that he did not) and did nothing. Equity, 'if it is invoked, aids the vigilant not the dormant.'

In so far as the payment of the amount due to the estate for the rent is concerned he said that he paid. I held the view in the circumstances

of this case, having regard to his occupation and use of the premises that he was doing no more than could or should have been done towards the estate in these circumstances and the payment to the estate was not value given to his father for his (Jairam's) occupation. The estate received the benefit for what was rented and it could be reasonably inferred, also, that Jairam the defendant was permitted to live in that house and remain on the land provided that he paid the rent to the estate. Assuming, but not admitting, that this inference is considered equivocal with the proposition that the defendant paid because his father told him that the place was his own, then the defendant would have failed, on the balance of probability, to disprove what is revealed and manifestly clear on the face of the receipts i.e. that Rattan was the owner. He was not giving his father any value or any benefit for his being on the premises. As between his father and himself Jairam's occupation was gratuitous and even Equity would not enforce a gratuitous agreement even though it was under seal and there is even no seal in this case. I appreciate that natural love and affection has been held to be a sufficient consideration (*Sharingtgon v. Strotton* (1565) Plowd. 298) but it is sufficient only in the case of a deed (*Callord v. Callord* (1957) 2 And 64. As a corollary if the father personally had paid the estate the rent due rather than merely appearing to do so on the face of the receipts as Jairam has claimed in the circumstances of this case he would not have affected the gratuitous arrangement between Jairam and himself but only increased the generosity of the father. The father would have been paying something more which, as between them, he, the father, was not required to pay to allow Jairam to remain in his, the father's house.

I appreciate that there is no positive evidence that Jairam did in fact pay the amounts mentioned in the receipts (Ex. "Ji" to Ex. "J1C") but I, also, appreciate that the evidence of David Jackson is to the effect that a rent collector went from the estate went to the house mentioned in some of the receipts as lot No. 6, Better Hope Housing Scheme, and collected rent. He would then, according to Jackson, give a provisional receipt and then return later with a receipt signed by the cashier, and in so far as Jairam produced Ex. "J1" to Ex. "J10", and there is no evidence that he obtained them from Rattan it is probable that he paid the rent himself for and on behalf of Rattan whose name appears on those receipts and obtained the receipts and produced them. I was, however, quite* satisfied that the production of the receipts in the name of Ramnarine (Rattan) was equivocal and was not an indication that he (Jairam) owned the place and possessed the premises to the exclusion of Ramnarine (Rattan) or anyone else. Ramnarine (Rattan) remained at all times personally liable to the estate for rent.

Jairam said that he paid for the making of windows of the house. He produced no receipt of other evidence in support. Having regard to the evidence of Paul Narine, the carpenter, and the defendant particularly, I do not believe that the defendant paid for windows for

the house. He admitted that the house was substantially the same as when Paul Narine built it in 1959, and that the windows were now rotten and the front steps were in a state of decay, and that the kitchen had fallen down, yet he was in a position to borrow money from his insurance to assist his daughter to build a house but had no money to spend on the house which was supposed to have been given to him since 1959 and in which he lived. My mind absorbs this kind of evidence as indicating a contradiction of his ownership of the house (bearing in mind that there is no unequivocal evidence that the house had ever ceased to be that of Ramnarine). The contract for the supply of electricity to the house in question was in the name of his father and still is in his father's name, even though he actually lives in the house and consumes the electricity supplied. This, to my mind, is another instance of a contradiction of his ownership, which he accepted and acted upon over the years. To all intents and purposes his father was the consumer and remained liable to the suppliers of electricity.

The two receipts Ex. "G" and "X", "H" indicate that money was received from Jairam for painting a house at Dwarka Street. It may be that the house at Dwarka Street to which the receipts relate is the same as lot 6, Better Hope Housing Scheme, but I cannot definitely conclude this on the evidence as there is no evidence connecting the two but it is probably so. However, accepting that he paid for the painting of the house in question, the painting of the house, having regard to all the other circumstances of this case as I have found them, is not indicative of a property interest, or, any interest at all sufficient or strong enough to disturb or, resist the interest of Ramnarine (Rattan) himself or someone who stood in his shoes. I find in the circumstances of this case that the painting of the building was merely to decorate and preserve the existing structure as it was, and was not an unequivocal act of ownership, or, undisputed possession. I find, also, in the circumstances of this case that it is a reasonable inference that whatever was done to the house whilst it was occupied by the defendant Jairam was probably done with the permission and consent of Ramnarine (Rattan), who at all material times remained the owner of the said house and the one who rented the house lot from the La Bonne Intention estate.

Having regard to the evidence of the plaintiff, Paul Narine and the receipt Ex. "C" given by Paul Narine to Ramlochan the plaintiff, I must conclude that Ramlochan, the plaintiff paid Paul Narine for his labour to the amount of $160.00 and the receipt Ex. "C" was given for that. But having regard, also, to the evidence of the said Paul Narine to the effect that Ramnarine made arrangements with him for the building of the house, that he made the plan for the rebuilding of the house for him (Ramnarine) and Ramnarine gave money to one Jonas and he paid for the materials, I have unequivocally concluded that even though the receipt Ex. "C" was in the name of the plaintiff, Ramlochan, and Paul Narine said that he (Ramlochan) had paid him, in all the circumstances of

this case the money he paid Paul Narine most probably came from the old man Ramnarine himself, and that even though Ramlochan paid Paul Narine, he really to all intents and purposes paid for and on behalf of his father, in a transaction that was wholly undertaken by his father and only by his father and that he only received a receipt in his name.

Having regard to all the circumstances of this case I do not believe that the plaintiff had any interest in the house in question in his own right and I do not believe that he made any independent contribution to the property in question.

I reject the evidence of contribution to the property on the part of the plaintiff and on the part of the defendant.

The father Ramnarine made and executed his will on 14th December, 1966, and he died on 3rd August, 1967. There is no evidence in this case to suggest that when he made and executed his will he was unduly influenced. When Ramnarine made his will he appointed Ramlochan the plaintiff, as his executor and trustee of his will and he clearly left "all of his property, real and personal, movable and immovable, whatsoever and where to his son Ramlochan the plaintiff.

I am of the opinion that the father Ramnarine must have had all of his property and all his interests in active contemplation and consideration when he made the will, and it was most probable that he considered the house at lot 6, Better Hope Housing Scheme and the lot on which that house stands when he made that will. The will which was duly probated gives full and undiluted effect to his intention to give the house to his son Ramlochan in so far as that was his own to be given. There is no evidence of opposition by anyone to the grant of probate.

The land on which the house stands is rented from the La Bonne Intention estate and from the receipts for payment of rent produced both by Ramlochan and Jairam, it emerges that the rent for the house lot is payable monthly. This evidence is not a lease for years. It follows, therefore, that the tenancy of the lot could not have been transferred to Ramlochan by the will itself, but the concurrence of the estate was necessary and in the manner prescribed by the estate. This transfer of the tenancy of the said lot 6, Better Hope Housing Scheme, from the father Ramnarine to Ramlochan was effectively done with the consent of the estate when Ramnarine went with Ramlochan to the office of the estate, and in the presence of David Jackson executed the document of transfer Ex. "A". David Jackson whom I saw and heard and whom I believe said that that occasion of the executing of Ex. "A" was not the first time that Ramnarine had approached him about a transfer to his son Ramlochan. This indicates the clear intention of Ramnarine to transfer something which he knew and believed was and which up to that time no one else had ever claimed or disputed.

I was satisfied that Ramnarine had lawfully bequeathed his ownership of the house to Ramlochan and had lawfully appointed Ramlochan as

executor and that the will so appointing him was probated and that Ramlochan as executor had authority to carry out the terms of his father's will and as sole beneficiary under the terms of that will was solely entitled to the ownership and possession of the house to the exclusion of anyone else. I was, also, satisfied that the tenancy of the house-lot was transferred to the said Ramlochan from his father Ramnarine by the La Bonne Intention estate after Ramnarine had relinquished his interests in the house lot and by consent of the estate had voluntarily ended his tenancy of the said house lot.

Accordingly, Ramlochan was entitled to the possession of the house and the possession of the house lot by virtue of the tenancy relationship which he had established with the La Bonne Intention estate, apart from and in addition to what his father had done, and as evidenced by the estate's acceptance of payment from him for land rent of lot 6 Better Hope in the receipts Exs. "E1", "E2", "E3" for the years 1969, 1970 and 1971. The defendant, whatever he may say, had established no such tenancy relationship with the estate and thus was not entitled to remain on the estate land in his own right.

The relationship between the La Bonne Intention estate and Ramnarine was not, on the evidence, that of lessor and lessee. There is no evidence apart from the receipts themselves which merely speak of "rent" that the estate had "leased" the house spot to Ramnarine so as to give him a legal estate in that area of land. It is appreciated that a leasehold is a legal estate if it is created in the manner required by law, or, if it is for a term of years, that is if it is to last for a period which is certain and fixed. I cannot conclude and I do not think that any court would conclude otherwise, merely on the basis of the receipts tendered that the period of occupancy by Ramnarine was related to each month, and continued month by month as the receipts indicate, or, it was for the longer period of a year and continued year after year. A lease it is well known cannot be for a period in perpetuity. The effect of an arrangement purporting to create a perpetual relationship at a rent may create a yearly tenancy, and in so far as there is stated no definite period of occupancy stated between the estate and Ramnarine in this case, that, to my mind, is the true legal position. The estate did not confer on Ramnarine the right of exclusive possession of the house lot for a period that is definite or capable of definition, in that it had a certain beginning and a certain ending. That being so, Ramnarine the father was not in a position to assign, give, or, pass on any real interest in the land on which the house stood. It would seem that this case proceeded on the assumption that Ramnarine occupied the house spot by virtue of what I would describe as a "legal lease" when there is no evidence in this case that there was such a lease. Accordingly, the defendant Jairam could not have acquired such a lease. I am of the view that the court has to decide a matter on the evidence submitted for its consideration, and it does not have to invite the parties, *ex post facto,* to clarify or explain their

omissions or deficiencies. This could work an injustice as either or both parties set about to "bolster" their respective positions. I decided this matter on the evidence submitted for my consideration without indulging in speculation.

It may not be inappropriate to refer to the Civil Law Ordinance, Cap. 2, and particularly s. 3(D)(d) which states:

> "no action shall be brought whereby to charge anyone upon
>
> any lease of immovable property for a period exceeding one year, or
>
> any contract or agreement for the sale, mortgage, or lease of immovable property or any interest in or concerning immovable property, or
>
> any declaration, creation of any trust relating to immovable property, 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 corollary to that subsection is applicable to the defendant Jairam in this case in that he cannot claim as a defence in this case that he had an interest in the house spot when he had nothing to show that he has against Ramnarine and Ramlochan who both show that they have.

Again there is a non-compliance with s. 14 of the Deeds Registry, Ordinance, cap. 32. I have given consideration to the effect of s. 3(1) and (2) of the Housing of Labour Workers on the Sugar Estates Ordinance, cap. 183 which states,

> "3(1) Any lease of immovable property to which this section applies for a term of twenty-one years or more, or for term renewable at the will of the lessee indefinitely, or for periods which, together with the first term thereof, amount in all to twenty-one years or more, and any surrender, assignment or transport thereof, shall have effect as if such lease, surrender, assignment or transfer had been passed and executed before the Supreme Court in the manner specified in s. 14 of the Deeds Registry Ordinance.
>
> (2) This section shall apply to any lease granted by any company engaged in the manufacture of sugar or in the cultivation of sugar cane to any labour worker in respect of any immovable property owned by the company, and to any surrender, transfer or assignment of such lease."

I appreciate that a non-compliance with the requirements of s. 14 of the Deeds Registry Ordinance, cap. 32 would not invalidate any lease entered into between any sugar labour worker and a sugar cane company in respect of any immovable property owned by the company, but, to my mind, it must be a lease, which could normally have been registered to have legal effect but is excused from being so. A lease in its real sense presupposes a consensus between the parties as to the possession and as to the duration of the lease. If these requirements are lacking,

or, one of them it could not be described as a lease. There is no evidence in this case that there was a consensus as to duration of the occupancy as between Ramnarine and the La Bonne Intention estate in respect of the house spot, even if one accepts the fact of possession. In addition there should, also, be a compliance with s. 3D(d) of the Civil Law of Guyana, cap. 2, before s. 3(1) of the Housing of Labour Workers on Sugar Estates Ordinance, cap. 183, can be invoked in aid.

The means by which the La Bonne Intention sugar estate transferred the obligations which rested on Ramnarine to Ramlochan were indicative of an act of novation on the part of a landlord in relation to a tenant and clearly show that no lease in the legal sense was given to Ramnarine in the first place and no new lease was given to or entered into by Ramlochan as Ramnarine's successor to the very house spot even though has right of occupation as between himself and the estate was established.

So Ramnarine could not be holding in trust for Jairam something which he did not have for himself. That is why it was necessary for him to transfer the tenancy of the house lot as he did apart from and in addition to any will he had made giving Ramlochan his real and personal property, because his merely bequeathing the house could not effectively ensure Ramlochan's possession and occupation of that house spot unless it fell within the scope of the Rent Restriction Ordinance, cap. 186.

In giving consideration to s. 3 of the Title to Land (Prescription and Limitation) Ordinance, cap. 184, to which the statement of Defence referred, it is appropriate to consider what "land" means as stated in the Interpretation Section, s. 2 of the said cap. 184. In that section "land" includes any leasement, profits prendreservitude or other right over immovable property or connected therewith. The claim made by the defendant does not fall within the description given, as I find that Ramnarine was a mere tenant for a house spot of the estate and the receipts produced by the defendant himself do not indicate that he was any more than what Ramnarine was, a mere tenant, and could be no more as far as the house spot of the estate was concerned. He paid rent for a house lot. There was no lease for a term of years between the estate and Ramnarine.

Jairam himself was not in sole and undisturbed possession of the land on which the house stood. At most he was merely paying the land rent which his father paid and would have paid as a tenant of the estate but that did not give him an interest, or, right in himself as distinct from anyone else on the land on which the house stood. It merely entitled him to possession during the currency of a contract of tenancy of the house spot but there was no contract of tenancy between Jairam and the estate by implication acceptance or otherwise. The contract of tenancy existed between Ramnarine (Rattan) and the estate. Jairam had no interest at all in the land itself and his use of the house which

in the circumstances of this case was movable property on the house spot was with the permission of Ramnarine. To my mind thus, without going into any further details as to the application of ss. 5, 6, 7, 9, 11, 12, 13, Jairam was not in possession of land so as to be a person in whose favour the period of limitation might run so as to give rise to his being in possession adverse to the owner. The provisions of the Title to Land (Prescription and Limitation) Ordinance cap. 184 cannot be conjured up or invoked to aid him. They do not apply to his occupation of the house or, land as there is no conclusive evidence that Ramnarine was lessee of the estate as distinct from a mere tenant.

I find that there is no intention on the part of Ramnarine at any time to transfer his right of tenancy to Jairam and that his intention to transfer to someone manifested itself only in the transfer to Ramlochan and to no one else.

A finding of "tenant at will" is a matter of law and whether the parties admit or deny that I am of the view that the court itself is not precluded from making a finding which may not necessarily record with what the parties say or with their pleadings.

Jairam had no interest in the house and no interest in the land on which the house stood.

In so far as I find that Jairam was in the house and on the house spot with the permission of Ramnarine and on Ramnarine's death, Ramlochan the plaintiff became entitled to the ownership of the house and possession of both the house and the house spot, I find that Ramlochan was entitled to terminate the permission granted to Jairam if he wished. Jairam was no tenant of Ramnarine. He further did not become a tenant of Ramlochan.

I find in the circumstances of this case that Jairam, the defendant, obtained from his father only the personal privilege in the form of a licence of occupying the house and the land on which the house stood with no definite interest in the land on which the house stood or the house itself.

DENNING, L.J. said in *Facchini v. Bryson* (1952) 1 T.L.R. 1386 at p. 1390.

> "In all cases where an occupier has been held to be a licensee there has been something in the circumstances such as a family arrangement, an act of friendship or generosity or such like to negative any intention to create a tenancy"

I agree with that proposition.

In *Errington v. Errington and Woods* (1952) 1 K.B. 290, where a father wishing to provide a home for his son and daughter-in-law allowed them to occupy a house that he had bought in return for their promise to pay the instalments still due to a building society it was

held that a licence rather than lease was created. The case of *Cobb v. Lane* (1952) 1 A.E.R. 1199 also illustrates this thinking and supports it.

I find that Ramlochan in a written notice, dated 4th February, 1969 Ex. "D" requested the possession of the premises occupied by the defendant. In my opinion, even though the notice described Jairam the defendant as a tenant at will, which I find he was not, that did not affect or destroy the efficacy of the notice which in effect, terminated the defendant's permission to occupy the premises. By merely saying that he was a tenant at will does not make him so. Assuming for the purposes of the defendant's case that that was so the notice nevertheless brought his "tenancy" to an end.

I find that in another written notice dated 22nd October, 1968 Ex. "F" Ramlochan had requested the defendant to leave the house at lot 6, Better Hope Housing Scheme, and that letter had also terminated whatever permission the defendant had to remain on the premises.

I find that the defendant after reasonable notice to quit continued to remain in the house and on the house spot without right, and by doing so has unjustifiably interfered with the plaintiffs possession, enjoyment and control of the house and house spot to which he is entitled.

I find that a reasonable time has elapsed since those notices were given to the defendant and he has made no attempt to leave, but rather had resisted the plaintiffs attempt to obtain possession of the premises.

Accordingly, I find that the defendant has trespassed in the house at lot 6, Better Hope Housing Scheme, and on the land which forms the house spot.

As a corollary to all that I have said and assuming (even though I have found to the contrary) that the defendant had some right to the house, he has slept on his rights through the years like Rip Van Winkle and has been awakened too late and the courts, and the Courts of Equity do not aid those who sleep on their rights.

I will, therefore, grant the plaintiff the declaration that the building in question situate at lot 6, Better Hope, East Coast Demerara on land rented (not leased) from the La Bonne Intention Estates Ltd. was the property of Ramnarine deceased, and following on his death, of his estate, probate whereof was granted on 5th March, 1968 and numbered No. 88 of 1968.

I will, also, grant possession of the said building to the said estate which by the said probate devolved and vested in the personal representative of the said Ramnarine deceased in the person of the plaintiff, Ramlochan, who is, also, the sole beneficiary under the said will of Ramnarine deceased, on or before 1st January, 1972.

An injunction is, also, hereby granted to the said Ramlochan, plaintiff, restraining the defendant, his servants and, or, agents from trespassing

on the said house lot and building situated at lot 6, Better Hope, East Coast Demerara.

In so far as damages for trespass claimed by the plaintiff are concerned, it would seem that having regard to the defendant's being given reasonable time to leave the premises after the notice Ex. "F" dated 22nd October, 1968, the defendant should have reasonably left the premises about January, 1969 and has thus, remained in the premises for approximately three (3) years (for there is no reason to think that he has removed) after that first notice, and still continues to do so. He has robbed the plaintiff of the enjoyment of the premises over those years. Even though the plaintiff has given no evidence of special damage which he has incurred as a result, trespass is actionable per se and compensated without proof of special damage. In the circumstances of this case I would award the amount of $750.00 (seven hundred and fifty dollars) to the plaintiff as a reasonable compensation for the trespass by the defendant over the years.

There will be costs to the plaintiff fixed by consent of the parties in the sum of $750.00.

Judgment for the plaintiff.

HUBERT DASH ET AL *v.* BHAGWAN JAIRAM PERSAUD, representing the estate of SHRIKISHUN.

[Court of Appeal (Bollers, C.J., Persaud and Crane, JJ.A.)
October 28, 29; November 25, 1971.]

Immovable property—Prescriptive title—Whether petitioners a fluctuating body of persons or a clearly defined group of individuals—Whether petitioners or opposers in occupation of disputed land for the statutory period—Title to land (*Prescription and Limitation*) *Ordinance Cap. 184 s. 3* (*now Cap. 60:02*).

On the evidence before the Commissioner of Title the petitioners claimed that the disputed area of land fell within the transport of Pln. Good Hope, which transport was held by their ancestors and predecessors in title and that they had always occupied the area, by farming, rearing cattle, cutting timber, picking fruits, etc., under the belief that the area formed part of Pln. Good Hope, but quite apart from that, they had been in possession

nec vi, nec clam, nec precario since the year 1901. The opposer also laid claim to the land as his own as falling within the transport of Pln. Spring Garden, and that he had also been in possession for the statutory period *nec vi, nec clam, nec precario.* The Commissioner of Title considered that it was not the duty of the court to determine whether or not the land claimed was Spring Garden or Good Hope. He refrained from making a finding as to occupation because he felt that the land had not been properly identified and because he also felt that the petitioners were a fluctuating and undefined body who were not capable of taking title. He accordingly dismissed the petition.

HELD: (i) the Commissioner was in error in declining to determine whether or not the land was Spring Garden or Good Hope;

(ii) the disputed are formed the southern portion of Pln. Spring Garden;

(iii) the petitioners were not a fluctuating body of persons, but were a clearly defined group of individuals;

(iv) the matter would be referred to the Commissioner of Title with a direction that he should proceed to make a finding as to whether the petitioners or the opposer had been in occupation of the disputed area *nec vi, nec clam, nec precario* for the statutory period.

Appeal allowed. Order of the Commissioner of title set aside.

C. A. F. Hughes for the appellants.

F. H. W. Ramsahoye and *W. M. Zephyr* for the respondent.

JUDGMENT OF THE COURT: In 1962 in the Supreme Court of British Guiana (now the High Court of the Supreme Court of Judicature), the appellants (the petitioners in the Court below) filed a joint petition for a declaration of title in respect of a portion of land described as "a piece or parcel of land west of the Public Road, being part of the southern portion of Plantation Spring Garden, in the County of Essequibo and Colony of British Guiana containing 199.605 acres mentioned and referred to as Section A, and shown bordered pink on a plan by J. A. Kranenburg, Sworn Land Surveyor, dated 12th July, 1961, and recorded in the Department of Lands and Mines as Plan. No. 9918 on the 18th day of July, 1861."

There were thirty-nine petitioners, and an affidavit in support of the petition was filed by two of the petitioners—Hubert dash and Samuel Horn—on behalf of themselves and the other petitioners, in which they alleged that they and/or their predecessors in title occupied the said land for a long period prior to the year 1926, and that they had at all material times worked upon the said land and enjoyed, used and occupied the same for their sole use and benefit, without interference from anyone. They then set out in their affidavit the dates upon which each petitioner enjoyed the sole use and undisturbed possession of the land.

It was their further allegation that the petitioners in their own right had used and enjoyed the land for more than a period of 33 years by farming, rearing cattle, burning coal, cutting the growing timber thereon, picking and carrying away coconuts and other fruits, and have used and enjoyed the dams and drainage trenches thereon for the purpose of ingress and egress to and from the various parts of the said land and the trenches thereto *nec vi, nec clam, nec precario* solely for themselves and without disturbance from anyone over the said period of time.

Finally, it is alleged that the right of every other person to recover the said land has expired or been barred and the title of every such person thereto has been extinguished.

There were other affidavits in support of the petition filed by the District Commissioner for the county of Essequibo and one Sue-En-Sue, who claimed to be the owner of the northern plantation of Spring Garden, both of whom said respectively that from their own knowledge and information received the petitioners and their ancestors had been in continuous possession of the disputed area of land since the year 1910, and in Sue's affidavit he swore that the petitioners up to the present time had been burning coals, cutting wood, grazing cattle and picking fruits from the fruit trees thereon without let or hindrance from anyone. In the affidavit of the District Commissioner, he said that in the year 1953 he visited the land and found the petitioners on the land and noted evidence of extensive clearing and cultivation which appeared to have been done over a long period.

The petition was opposed by the respondent, one Bhagwan Jairam Persaud, representing the Estate of Srikishun (deceased) and affidavits in support of the opposition were filed by farmers and labourers who alleged that Ranjcoomar and his brother Srikishun and another brother, Ramsundar, had been in the sole, undisturbed and continuous possession of the disputed area of land which was shown on a plan by J. A. Kranenburg, Sworn Land Surveyor, and marked 'A'. The gist of the affidavits in support of the opposition was that the opposer and his relatives had dug black-sage, reared cattle, cut bushes, cleaned trenches, repaired wire fences on the disputed area since the year 1916.

On the evidence before the Commissioner of Title, the petitioners claimed that the disputed area of land fell within the transport of Plantation Good Hope, which transport was held by their ancestors and predecessors in title for the year 1916, and they had always occupied the area under the genuine belief that the disputed area formed part of Plantation Good Hope, but, quite apart from the question of ownership under a transport, they themselves had been in possession of the disputed area *nec vi, nec clam, nec precario* since the year 1901.

In the evidence of Samuel Horne, he asserted that a company dam and two trenches separated Plantation Spring Garden, held under transport by Sue-En-Sue, from the land south of it, and that land was Plantation Good Hope, and the area in dispute was immediately south of the company dam

separating Spring Garden from Good Hope. He went on to say that all the petitioners worked the land together, carrying on provision farming, cutting wood and burning coals, and picking fruits from the land. They also planted coconut and mango trees, and as a child he had seen his grandparents working the land, and as he got older he worked the land himself along with the other petitioners. They did so openly without interference from others. He stated that his belief was that the area that he was claiming was part of Good Hope and not Spring Garden and if it was Spring Garden neither he nor his ancestors would have wanted to claim it. And on behalf of the other petitioners, he stated that they were claiming the disputed area because they were satisfied in their minds too that this land was part of Good Hope. His evidence was that all the petitioners were related to each other, and they worked all over the disputed area from time to time and everybody worked different pieces from time to time. They would cultivate any spot on the land chosen by them and sell the produce for their own profit. Both he and Hubert Diash admitted that Ranjcoomar, who was the brother of the opposer Srikishun, had been on a portion of the disputed area which was a pasture, which was subsequently fenced, but the remainder of the disputed area had never been cultivated by Ranjcoomar, Ramsundar or the opposer Srikishun. In their belief, Ranjcoomar had been given permission by their ancestors to be there.

In other words, the sum-total of the petitioners' evidence was that Srikishun and his predecessors in title had been confined to a particular portion of the land which was used by them as a pasture and which had subsequently been fenced, and never encroached on the remaining portion of the disputed area until the year 1955 when Srikishun commenced to grow rice in the disputed area. Eventually Srikishun commenced to cultivate the area with rice and at the time of the hearing of the petition he had the whole of the disputed area under rice cultivation.

The evidence led by the opposer revealed that in the year 1913 one Ranjcoomar was on the disputed area of the land and had in that year obtained Letters of Decree for the southern portion of Plantation Spring Garden, and he admitted that Ranjcoomar had had a pasture there and had been in occupation of the pasture in the said disputed area. The further evidence led by the opposer was that subsequently Ranjcoomar had, by will, devised the land known as the southern portion of Plantation Spring Garden, to Ramsundar and Srikishun, and subsequently Ramsundar had transported his share in the said land to Srikishun. From the year 1913 Ranjcoomar had been in possession of the land and not the petitioners who were working the land aback of the disputed area. It was claimed that some of the petitioners had agisted their cattle on the disputed area for which they had paid fees to Srikishun and counterfoils of receipts were produced.

The totality of the evidence, therefore, reveals that both the petitioners and the opposers were claiming ownership of the land by transport and also by possession *longi temporis.* In other words, they were both claiming to have

been in possession of the disputed area for the statutory period *nec vi, nec clam, nec precario.*

The Commissioner of Title in his judgment, and quite rightly in our view, considered that there were two issues to be resolved in this matter *i.e.* (a) whether or not the portion of land claimed formed part of Plantation Spring Garden or Plantation Good Hope; and (b) whether or not the petitioners or the opposer was and still is in occupation for the statutory period of time. Unfortunately, the Commissioner of Title resolved neither of these two issues and stated that he considered it was not the duty of the Court to determine whether or not the land claimed was Spring Garden or Good Hope. He felt it was the duty of the persons claiming the land to have the land identified and then seek title for such identified land.

In relation to the plans that had been put in evidence by both sides, he found that there was conflict and therefore he was unable to find with certainty whether or not the land claimed was Spring Garden or Good Hope. He therefore refrained from making a finding as to occupation, because the land had not been properly identified and because he felt that the petitioners were a fluctuating body of persons who were not capable of taking title and who would only hold the land in trust for the fluctuating and undefined body. Because of these two reasons, he made no finding in respect of the issue of occupation and proceeded to dismiss the petition.

We are of the view that the learned Commissioner was in error when he felt that it was not the duty of the Court to determine whether or not the land claimed was Spring Garden or Good Hope. On the evidence it was his clear duty to have made up his mind which evidence he accepted as being true and which evidence he discarded as being untrue, and then to have made a specific finding as to whether the disputed area fell within the petitioners' transport, as alleged by them, or the transport of the opposer. And then it was his further duty to have proceeded to have made a finding on occupation.

We conceive that on the evidence before us we are in as good a position as the Commissioner was to determine the first issue, that is, whether the disputed area was covered by the transport in relation to Good Hope or whether it was covered by the opposer's transport in relation to the southern portion of Plantation Spring Garden, and we are firmly of the view, after an examination of the plans submitted by both sides and the documentary evidence of the transports etc. in relation to the devolution of the title, that the disputed area fell within the transport of the opposer in relation to the southern portion of Plantation Spring Garden.

The first transport which provides a starting point is Exhibit 'G', dated 11th December, 1847, and it is by Charles Benjamin to Alexander Duff, his heirs and assigns of "Plantation Spring Garden situate on the left bank of the River Essequebo, bound on the north by Plantation Good Intent, on the south by the abandoned Plantation Good Hope, being 398½ roods cacade together with all its buildings etc., save and except two acres of land

on the north-east corner of the plantation and defined on a diagram thereof by the Sworn Land Surveyor John Mc Neil". We have it, therefore, that as early as 1847 the whole of Plantation Spring Garden, save and except two acres, was transported to Alexander Duff.

In 1881 that same area which had been conveyed in 1847, save and except the two acres being excluded, was then conveyed by Allan Trotter to William Craigen and this evidenced by the transport Exhibit 'KK'.

In 1887 that same area of land known as Plantation Spring Garden, save and except the two acres, was transported by Dugale Ritchie to and in favour of the Aurora Plantation Company limited—Exhibit 'LL'.

In 1904 the same area of land, with the exception of the two acres known as Plantation Spring Garden, was conveyed by the Aurora Plantation Company Limited to Sewbury Silas Heard of Aurora, Essequebo, his heirs and assigns.

On the 9th January, 1911, Phulgaria Ellen Heard, widow, of Plantation Aurora, Essequibo, in her capacity as one of the joint and several executors under the will of Sewburn Silas Heard, then passed a portion of land forming part of Plantation Spring Garden, to Evan Wong, the said portion of land having a facade of 207 roods, commencing from the northern boundary of the said plantation and extending in a southerly direction by the whole depth of the said estate, save and except the two acres of land on the northeast corner of the plantation which had been excepted by the precious transports. So, for the first time, there was a fragmentation of the area of Plantation Spring Garden which left 191 roods in facade not conveyed to the transportee.

In the year 1912 Evan Wong passed transport of what he had obtained to Thomas Sue-En-Sue, which is evidenced by the transport Exhibit T. It should be noted at this point that Sue-En-Sue in his evidence had claimed the entire Plantation Spring Garden, but it is clear from the transport that he had only obtained that portion of Spring Garden which contained a facade of 207 roods.

On the 28th May, 1913, Ranjcoomar, the brother of Srikishun, who was born in 1876, became the purchaser at execution sale of Plantation Spring Garden with all the cultivation and appurtenances thereon, etc., save and except the two acres of land on the north-eastern corner of the plantation which had been previously excepted, and also save and except such portion of the said plantation as was transported on the 9th January, 1911, to Evan Wong, and Letters of Decree were issued to him in respect of that purchase. It follows, therefore, that Ranjcoomar must have obtained the remaining 191 roods in facade of Plantation Spring Garden.

In 1934 Ramsundar, in his capacity as the executor under the will of Ranjcoomar (deceased), conveyed the title of the land purchased by Ranjcoomar at execution sale both to himself and to Srikishun as residuary legatees under the will of Ranjcoomar (deceased), and later, in the same year

1934, Ramsundar and Srikishun transported the same portion of land to Srikishun. Thus it is clear that in 1934 the portion of land held by Ranjcoomar under Letters of Decree in 1913 was passed to Srikishun, the opposer, and he became the sole owner of the said portion of land, which must have been, by inescapable inference, the remaining 191 roods in facade of Plantation Spring Garden.

This conclusion is supported by the various plans produced in evidence, and the firs plan of Plantation Good Hope of 1774, Exhibit "TT, by Vander Burght, shows an area of 250 acres demarcated and cut off from the south-eastern portion of Plantation Good Hope, and it is interesting to note that the area appears to have been marked "Spring Garden" by the Lands and Mines Department with a question mark over it. When Vander Burght's plan is placed alongside the plan of 1846 by Hadfield, Exhibit 'YY', it becomes clearer that this demarcated acres by Vander Burght forms the southern portion of Plantation Spring Garden, and Hadfield has stated on his plan that it consists of 250 acres. When the plan of Good Hope by Kranenburg, dated 1961, is examined alongside these two other plans, it will be seen that he makes the area 199.605 acres, which is a figure close to the 191 roods in facade of Spring Garden not accounted for by the documentary titles. And, indeed, he has it demarcated as Plantation Spring Garden, and admitted in evidence that the disputed area of land from the document was Plantation Spring Garden. Yet, strangely enough, without giving reasons, he arrived at the conclusion that it was part of Plantation Good Hope.

Phang's plan, Exhibit 'D', makes the area 267.40 acres, and places the disputed area squarely as the S½ of Plantation Spring Garden. And in his evidence Phang pointed out that this plan followed and was in conformity with the plan by Chalmers of July 1866 and also Dewar's plan of June 1956, Exhibit 'UU'.

On Seymour's diagram dated 30th November, 1910, it is stated that he had surveyed a portion of Plantation Spring Garden at the request of the proprietor, Sewburn Silas Heard, and he shows on this diagram the northern portion of Spring Garden. From his plan the words "Plantation Spring Garden" are inserted to the south, all of which indicates that there was a southern portion of Spring Garden with which the proprietor Heard was not then concerned as he was then about to convey the northern portion of Plantation Spring Garden to Evan Wong.

We are firmly of the view, therefore, that the disputed area in this petition formed the southern portion of Plantation Spring Garden and fell within the transport of the opposer Srikishun. It may be that sometime before the plan by Vander Burght in 1774, this portion of land formed part of Good Hope, but Vander Burght's plan suggests that this portion of Good Hope adjacent to Plantation Spring Garden was carved out to form the southern portion of Spring Garden, which was later described in the more recent plans as south half of Spring Garden. We are not of the view that these petitioners were a fluctuating body of persons, as laid down in the case

of *Mc Garrell & Others v. Demerara Company Limited*, (1962) 4 W.I.R. 426, and it is clear, under the authority of that case, that ownership of land cannot reside in a fluctuating body such as the villagers or land-owners of any particular village. These petitioners were a clearly defined group of individuals who were claiming to be in possession, not only through their ancestors and predecessors in title, but claiming to be in possession as individuals on their own behalf for the statutory period of 30 years and upward under s. 3 of Title of Land (Prescription and Limitation) Ordinance, Cap. 184, and capable of accepting title in their own names. It was the duty of the Commissioner then to determine whether the petitioners were in adverse possession of the disputed area of land *nec vi, nec clam, nec precario*, for the statutory period, or whether the opposer, whose predecessor in title having obtained title to the land in 1913, was in possession of the said land bearing in mind the relevant principles of law to be applied in these cases.

The point was raised by counsel for the respondent that a declaration of title for the disputed area could not be made in a joint petition by the several petitioners who each claimed to be in possession of the disputed area separately, as there was no evidence of a joint undertaking to occupy the whole of the area.

This submission does not find favour with us, as it is easily answered by O. 14, rr. 1 & 8, the effect of which is that all persons may be joined in an action (and an action includes any proceedings) as plaintiffs, in whom the right to relief in respect of or arising out of the same transaction is alleged to exist whether jointly or severally, where such persons are interested in a common question of law or fact, or where they have a common interest in the cause or matter.

This appeal must therefore be allowed, and the Order of the Commissioner set aside. The matter is remitted to the Commissioner with an intimation that this Court finds that the evidence discloses that the disputed area of land is, in fact, the southern portion of Plantation Spring Garden held under transport by the opposer Srikishun, and with a direction that the Commissioner do proceed to make a finding as to whether the petitioners were in occupation of the disputed area *nec vi, nec clam, nec precario* for the statutory period or whether the opposer was in possession of the said land and to take evidence and hear further argument if necessary.

Each party must bear his own costs of appeal.

Appeal allowed.

ABDULLA AND OTHERS *v.* THE STATE

[Court of Appeal (Luckhoo, C., Persaud and Crane, JJA.), October 22, 27; November 30, 1971].

Evidence—Conflicting testimony of witness—Necessity for trial judge to give full directions on effect of contradictions—Contradictions arising from the testimony of two witnesses—Defence of mistaken identity and alibi—Duty of trial judge to leave to the jury to find which witness was speaking the truth.

The only eye-witness to an offence of alleged robbery was the virtual complainant. At one stage of her testimony she said she had not shouted out the names of her assailants, and later she said she did. There was a material conflict between her evidence and that of a police constable to whom she had given a statement of events as to whether she was asleep when her assailants entered her house.

HELD: (Persaud, J.A., dissenting) there arose a necessity for the judge to have directed the jury that the evidence of the shouts was hearsay, not admissible, and could not be treated as evidence identifying the appellants; and that, in view of the discrepancies between the evidence of the virtual complainant and the policeman to whom she had given a statement of events, the judge ought to have left it to the jury to decide who was speaking the truth.

Appeals allowed. Convictions and sentences set aside.

C. Lloyd Luckhoo, S. C., and Bhairo Prasad, S.C., for the appellants.

W. G. Persaud for the State.

CRANE, J. A. (Luckhoo C. concurring): On the presentment of the Director of Public Prosecutions, these three appellants were arraigned on a two-count indictment respectively charging them with breaking, entering and stealing merchandise from the ship of Jagdeo Budhram, and robbing his wife, Rajdai, under arms, of a radio, money and a quantity of jewelry, contrary to ss. 229(a) and 222(c) of the Criminal Law (Offences) Ordinance, Cap. 10, in the following circumstances:

Jagdeo Budhram, a businessman of No. 64 Village, Corentyne, resides with his wife and children in two-flat premises, the upper consisting of living quarters situate above a parlour and motor spare parts sections below. On Xmas night 1969, at about 7-7.15 p.m., having secured the doors and windows of the lower flat, he took the day's sales, some $240, to the upper flat access to which is gained by an inter-connecting stairway. There are two bedrooms there. In the smaller, there was an iron safe already containing about $2,000. Budhram deposited the day's sales there, locked the safe and gave the key, which was included in a bunch, to his wife. She then put them in a drawer of a writing-desk in the same room as the safe and then Budhram

left for Skeldon at about 8 p.m. to attend a cinema show with his three children, leaving Rajdai alone in the upper flat. There was, however, one other person about the premises—the night watchman; but he was useless as such, since he lay in drunken slumber outside the building.

What happened next was told to the jury by Rajdai, she being the only eye-witness to it. Her experience was indeed a harrowing one. She said after her husband left with the children she began to sew at her machine. At 10.15 p.m. she went to the toilet, and on coming out saw the three accused "rushing upstairs" along the inter-connecting stairway. She became afraid and shouted out. The first accused had a small black and red gun, the second had what appeared to be a knife, and the third a cutlass. As she shouted, the third put one hand over her mouth and with the other held the cutlass against her head, while the second accused pressed his knife against her throat. At this time, the first held the gun to her chest. Rajdai went on to relate how the three intimated that their quest was money which they knew to be in the bedroom, and how when she denied there was any upstairs, they insisted that she kept it there, demanding from her the key to her chest in the bigger bedroom where, in order to deceive them, she told them the money was when they continued to press their weapons on her. To distract their attention further, possibly with a view to gaining time, Rajdai told her assailants the key was underneath the pillow of her bed. They became enraged, however, when they did not find it there, and offered her personal violence. They slapped her on the face and threatened to chop her up if she did not give them the key. It was then that she broke down and told them where it was. The safe was opened by the first accused and the contents, which consisted of about $2,240, a gold tillary, a pair of gold bangles, and 15 gold brooches, removed. All the while the safe was being rifled, the third accused was doing violence to her: he pushed her outside of the smaller bedroom holding her by the throat and stuffed a shirt into her mouth as a gag. Meanwhile, the first and second accused, who were in the smaller bedroom for about half an hour, left with bulky pockets, the second taking with him her transistor radio. Both ran downstairs where they were joined by the third accused who at that time released her, thus enabling her to run to the window and to shout out for the watchman, but only to be answered by her daughter who had just returned from the cinema.

On being informed what had transpired during his absence, Jagdeo Budhram immediately went to the police station returning shortly afterwards with the police constable Dorsett, who carried out investigations into the matter leading to the arrest of the three accused and their subsequent arraignment and conviction in the High Court of Berbice where they all pleaded they were mistakenly identified by Rajdai and raised defences of alibi.

There were several grounds of appeal. In the first place, complaint is made that the learned trial judge ought not to have admitted as evidence the answer given by Rajdai to the question put to her by the jury which she had already answered in the negative, namely, whether she shouted out the names of the accused to anyone as they were running away from the premises.

Rajdai answered the jury by saying she did so to the night watchman, whereas she had earlier said she had never "at any time" done so that night. It is contended that Rajdai's shouts were not contemporaneous with the departure of the men and could not therefore be considered part of the *res gestae.* Assuming the evidence was admissible in the circumstances of the cross-examination, nevertheless, it seems to us the necessity arose for the judge to direct the jury that it was hearsay in the circumstances; that it was not admissible and so could not be treated as evidence identifying the accused as Rajdai's robbers, there being on the evidence no circumstances of spontaneity in Rajdai's shouts of the names to the watchman; and, further, that the particular contradictory and irreconcilable answers could only tend to derogate from her credit and not enhance it. This omission will have to be borne in mind and taken into account when dealing with another and more substantial omission affecting this witness's credibility which will be specifically dealt with later. The complaint made that the judge did not bring to the jury's attention five matters of discrepancy between the depositions and the evidence in Court, nor guide them on the effect thereof, does not appear to be a matter of great moment in view of the nature of the discrepancies, and the fact that no special assistance in respect thereof was called for.

It will be recalled that when Jagdeo Budhram returned home from the cinema he went at once to the police station and made a report there of what had occurred during his absence, and that he returned home soon afterwards with P.C. Dorsett. The latter, who testified in court, told the jury, under cross-examination, that he made a record of what Rajdai Budhram told him on the morning of the 26th December, 1969, in which she said that it was whilst she was asleep on a bed in the hall that the accused entered the house and demanded money from her. This record was, in fact, in complete opposition to that which Rajdai gave in her testimony under cross-examination, when she denied telling Dorsett any such thing. As a matter of fact, Rajdai was forced to concede that were she indeed asleep in bed, she could not at the same time have seen the men coming upstairs. Under re-examination, however, Dorsett attempted to clear up the situation. He did so by explaining he had made an incorrect record of what Rajdai told him, that his record was out of sequence, and that he had made a mistake when he said she told him she was asleep in the hall when the men rushed upstairs. What happened was, he said, Rajdai had in fact told him she was sewing, then went to lie on a bed, and then afterwards went to the toilet. He, however, had failed to record the fact that it was when she was returning from the toilet that the men rushed up the stairs to her.

It seems to us, in the light of such an important conflict of evidence and what appears to be a glaring attempt by one prosecution witness to "square" his evidence with another's on what was undoubtedly the most vital issue in the case, one would have expected the jury to have received the fullest possible assistance from the trial judge as to how they were to consider and attempt to resolve a conflict of this nature. All that was done, however, by the learned trial judge was to remind them of what Rajdai

said in cross-examination and of what Dorsett said Rajdai had told him on the point, and to give them the charge that it was a matter for them to decide whether or not they were going to accept what Dorsett said, and in considering it they were at liberty to think that at least on that particular aspect he was an unreliable witness. The learned trial judge said:

> "During cross-examination, she said that she did not tell Police Constable Dorsett that she was sleeping on a bed in the hall when the three accused came into her house. You will remember, however, that during cross-examination, Police Constable Dorsett said that Mrs. Budhram told him so and he recorded it, but, later on, he said he did not make a true record of what she told him because she did not really say she was lying on a bed in the hall when the accused came upstairs to her. He said he gave a different version of what she had told him.
>
> "You will have to decide whether or not you can accept this evidence from Police Constable Dorsett. You may well think that at least on that particular aspect he is an unreliable witness."

We are of the view, however, that in the light of the defences of alibi and mistaken identity, the situation called for a more thorough direction in view of Rajdai's insistence that she was not asleep in bed, and Dorsett's *volte face* under re-examination. In our view, the jury ought to have been told that if they believed Dorsett was speaking the truth under cross-examination when his own recollection and his written record made at the time were in accord, then they could not at the same time believe Rajdai that she was not asleep in bed, in which case her credibility would be thereby seriously shaken and the circumstances of her identification altered. If, on the other hand, for some unknown reason, they were to disbelieve what Dorsett said in reexamination, which was against his statement on oath under cross-examination, and his own record, then his evidence could not aid in any way in the advancement of the credit-worthiness of Rajdai's testimony. In these circumstances, it seemed obligatory for the judge to have reminded the jury of what he had said before as to where the onus of proof rested; that since Rajdai's was the only evidence on the crucial point of identification, they ought not to convict the accused in view of the uncertainties already alluded to in her evidence unless they felt sure of their guilt, and that if they had any reasonable doubt about that matter the accused were entitled to the benefit of it.

We are decidedly of the opinion that was the kind of direction to which the accused were entitled in view of the contradictory state of the evidence of prosecution witnesses Rajdai Budhram and P.C. Dorsett. The principle involved is greater than the case, for we cannot feel certain that the accused, by reason of the non-direction, did not lose the chance of an acquittal. For the trial judge to have left it to the jury to say whether P.C. Dorsett was an unreliable witness in the particular respect of which he spoke, without saying more than he did, was, in our opinion, a non-direction amounting to a misdirection which vitiated the convictions and sentences.

For the above reasons, we will allow the appeal and set aside the convictions and sentences.

PERSAUD, J.A.: I will be content not to repeat the facts of this case in detail, but rather to deal with the various points as they were raised before us, and in so doing refer only to those portions of the evidence that are relevant to the points under discussion.

In her examination-in-chief, the witness Rajdai Budhram, after describing what had occurred in the house, said:

> "I saw when the three accused ran down the stairs. I then got up, removed the shirt from my mouth, ran to a western window and shouted for the watchman."

Later in cross-examination, she said:

> "When I first saw the accused they were running up the stairs. I then shouted loudly 'Ah'. I did not shout the names of the accused at any time that night. I did not call their names because my brother-in-law would not have heard."

And in answer to the jury she said:

> "I shouted the names of the accused persons when they left the premises. I shouted their names to the watchman."

Exception has been taken to the reception of the answer to the jury as not being part of the *res gestae,* and further, assuming it was admissible, it was submitted that the prejudicial effect far outweighted the evidential value, and the judge should have directed the jury on the purposes for which such evidence could be used.

Assuming that what the witness intended to convey was that she shouted the names while the appellants were still in her home, then the evidence would be admissible as part of the *res gestae* being substantially contemporaneous with the incident being described by the witness, or so proximate thereto as to make it admissible.

In the instant case the judge gave the jury these directions:

> "You must bear in mind that in considering the evidence, you can only act on evidence which you find to be true, and in considering the evidence of a particular witness, you are not bound to accept all that that witness has told you nor are you bound to discard all that a particular witness has said. It is perfectly open to you to accept a portion—even a small portion—of the evidence which you find to be true and to disregard the remaining portion of his evidence which you find to be untrue."

Nowhere did he contrast the first answer of the witness Rajdai Budhram with her second answer, and it has been submitted that this was an omission fatal to the conviction. The authorities to which I will refer later in

this judgement all relate to discrepancies between a previous statement of a witness (previous in the sense that the statement had been given on a previous occasion), and that witness's testimony at the trial. Here the situation is somewhat different in that the inconsistency (if it was an inconsistency) occurred in the evidence at the trial, and the judge ought to have drawn the jury's attention to this fact, and left it to them to form their own conclusion. But having regard to the passage in the summing-up to which I have already alluded, and to the fact that throughout the judge kept reminding the jury that identification was the important issue, and to determine that issue they must rely exclusively on the evidence of Rajdai Budhram, I am of the opinion that the defect has been cured, and no injustice has been done.

But it seems to me that at the trial, the later statement of the witness was understood to mean that she called the names of the appellants soon after they had left the premises, and I will now approach the matter on that basis. My understanding is supported by the judge's statement to the jury that: "She said that after the accused left her home, she shouted to the watchman . . ." If this is so, the evidence was inadmissible on the ground, not that it was hearsay, but it is not part of the *res gestae.*

The rule is that acts, declarations, and incidents which constitute, or accompany and explain, the fact and transaction in issue, are admissible for or against either party, as forming parts of the *res gestae.* The declaration must be substantially contemporaneous with the fact, that is, made either during, or immediately after its occurrence, but not made at such an interval from it as to allow of fabrication, or to reduce them to the mere narrative of a past event. As it has been put in *Teper v. Reg.,* [(1952) 2 All E.R. at p. 450]:

> ". . . for identification purposes in a criminal trial the event with which the words sought to be proved must be so connected as to form part of the *res gestae* is the commission of the crime itself. . ."

This dictum was stated in relation to the admission of evidence as part of the *res gestae.* But it must not be forgotten that the evidence in *Teper's* case was challenged on the ground that it was hearsay, and it is on that and that alone that that decision turned. But as Lord Normand has put it (ibid at p. 449) while the rule against hearsay evidence is fundamental, it admits of certain carefully safeguarded and limited exceptions, one of which is that words may be proved when they formed part of the *res gestae.* I have already dealt with the position if the evidence can be regarded as part of the *res gestae.*

Now to revert to the position where it is not part of the res *gestae.* In *R. v. Bendingfield* 14 Cox C.C. 341, it was held that a statement made by the deceased immediately after she emerged with her throat cut from a room in which the accused was, was inadmissible as part of the *res gestae,* 'for it was not part of anything done, or something said while something was being done, but something after something done.' This ruling has been consistently followed in subsequent cases.

The headnote in the case of *Reg. v. Gibson* [(1887) 18 Q.R.D. 537] would seem to suggest that in every case where inadmissible evidence is admitted the conviction is bad. The note reads thus:

> "In a criminal trial, if any evidence not legally admissible against the prisoner is left to the jury, and they find him guilty, the conviction is bad; and this notwithstanding that there was other evidence before them properly admitted and sufficient to warrant a conviction."

But when the facts of that case and the judgments are examined, two circumstances emerge. Apart from the fact that the objectionable evidence was hearsay, there was no other evidence to connect the appellant with the offence, and the judge asked the attention of the jury to the objectionable evidence. I have examined the various judgments delivered in that matter, and I can find no dictum falling from the lips of the judges which would justify the last sentence in the headnote referred to above. Indeed Baron Pollock (at p. 542) used language which suggested the contrary, for he said, '. . . in every case where inadmissible evidence is received it would become the office of the Court to decide in what way the jury ought to have acted upon the evidence before them which was legally admissible.'

The question received some treatment from the Privy Council in the *Teper* case, where it was held that before assessing the evidence caused by the wrongful admission and deciding whether it affected the substantial justice of the trial, the nature and effect of the other evidence must be looked at. Referring to an earlier decision of the Privy Council, Lord Normand said (ibid at p. 451):

> "In *Dyal Singh v. King-Emperor,* (1917) L.R. 44 Ind. App. 137 it was observed, in a case where this board had no ground for doubting that the appellant had been properly convicted, that the mere admission of incompetent evidence, not essential to the result, is not a ground for allowing the appeal against conviction. In the same case it was stated that: 'The dominant question is the broad one whether substantial justice has been done' and that in the particular case the question was whether looking at the proceedings as a whole, and taking into account what has properly been proved, the conclusion come to has been a just one.'"

And referring to the *Teper* case when dealing with this same question in *Hamilton v. R.,* (1961) L.R.B.G., Gomes, C.J., said:

> "In the case of *Teper* Lord Normand laid down the rule which he considered should be applied in cases where improper evidence has been put before the jury. He stated that the test is whether on a fair consideration of the whole proceedings the tribunal or the board must hold there was a probability that the improper admission of the evidence turned the scale against the accused."

The views then expressed are not novel, and have found expression in several other cases. In *Renouf v. A.G. for Jersey*, (1936) A.C. 445, Lord Maugham reviewed the facts of the case and said (ibid at p. 477) ". . . their Lordships are unable to come to the conclusion that there has been here a violation of legal principles resulting in grave and substantial injustice . . ." In *Stirland v. D.P.P.* (1944) A.C. 315, Viscount Simon said (at p. 320 ibid):

> "Apart altogether from the impeached questions . . . there was an overwhelming case proved against the appellant. When the transcript is examined it is evident that no reasonable jury, after a proper summing-up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was therefore no miscarriage of justice . . ."

Let me now turn to the directions given in the instant case. The judge, in referring to Rajdai Budhram's evidence, said:

> "She said that at no time that night, did she call out the names of the accused persons—another aspect on which counsel for the defence laid stress. When he questioned her on it, he said that if she knew these men by name, as she tried to make out, why did she not shout out their names? These are matters which you must bear in mind when considering your verdict."

My impression of the language used by the judge is that the defence were ignoring the answer given to the jury, and that it suited them better to urge that as the witness had not called the appellants' names that night, she could not have recognised her assailants. It is on this basis that the defence seemed to have been put to the jury, and in my opinion, if this is so, it does not now lie in the mouth of the defence to take a different approach on appeal and urge that the admission of the evidence must have had an adverse effect on the minds of the jury.

In regard to this ground of appeal, and in view of what I have said, I am of the opinion that this is a fit case in which the proviso to s. 16 of the Federal Supreme Court Ordinance, 1958, should be applied, for I feel that the evidence against these appellants was overwhelming, and they could hardly complain of a miscarriage of justice.

It was also submitted that in directing the jury on discrepancies, particularly in relation to the evidence of Rajdai Budhram, the judge ought to have stated the discrepancies, should have told them that the effect of a contradictory statement was to negative or neutralise the witness's testimony and that it was insufficient to put evidence which was given at the trial on a higher plane than that given in the lower court. Counsel relied upon the case of *Leonard Harris* (20 Crim. App. R. 144) in support of his submission. In that case where a witness was cross-examined on her previous statement which contradicted her evidence in court, the stamp of approval was given by the Court of Appeal to the trial judge having treated her as a hostile witness, telling the jury that the effect of her previous statement was to cancel out her sworn testimony. The Court of Appeal went on to observe that the

cross-examination upon the assertions previously made was allowed 'not for the purpose of substituting those unsworn assertions for her sworn testimony, but for the purpose of showing that her sworn testimony in the light of those unsworn assertions, could not be regarded as being of importance'. [Ibid at p. 147].

The law on the matter has been recently re-stated by Lord Parker, C.J., in *R. v. Golder, R. v. Jones, R. v. Porritt*, (1960) 3 All E.R. 457, and repeated in *R. v. Olivia*, (1965) 3 All E.R. 116. In *R. v. Golder,* Lord Parker said (ibid at p. 459):

> "In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence on which they can act."

It is to be observed that Lord Parker does not use language similar to that approved of by Lord Hewart in *Harris*' case, and which counsel presses upon this court, that is, that the previous statement would serve to cancel out the witness's testimony. Surely the degree of cancellation must depend on the quality of the contradictions. In certain cases, a witness's testimony may be so contradictory to his previous statement as to be enough to destroy his credit so as to render his evidence valueless, and if he were the only witness called to testify as to the acts of an accused person, an acquittal should be inevitable. But there may be cases where the contradictions are so insubstantial that the marrow of the witness's testimony remains unaffected. In *Cross on Evidence* (3rd Ed. at p. 209) it is written:

> "Language is sometimes used which suggests that the jury is bound to disregard the entirety of the testimony of a witness who has previously made a contradictory statement, unless he can give a satisfactory explanation of his conduct, but it is doubtful whether this can be treated as a rule of law because everything depends upon the circumstances of the case . . ."

And the case referred to is the Canadian case of *Deacon v. R.*, (1947) 3 D.L.R. 772, which reiterated the principle that a witness's previous inconsistent statements can only be used to test credibility and cannot in themselves be used as proof of the facts asserted therein, but in which it was held that the testimony might be considered notwithstanding the contradictions, that is, previous contradictory statements do not necessarily attach a nil value to subsequent testimony.

In his directions to the jury in this matter, the judge said:

> "Members of the jury, during the course of the trial, you may have heard the witnesses being asked if they had not said this thing or that thing in the Magistrate's Court during the preliminary inquiry into this matter. It is my duty to tell you that what they said in the Magis-

trate's Court could only be introduced in this court in order to discredit their testimony in this court and in order to make you feel that they are not witnesses of truth because they said something different on a previous occasion.

"What was said in the Magistrate's Court cannot be substituted for the testimony in this court and should only be looked at to determine whether or not their contradictions would lead you to regard their testimony in this court as being unreliable. You must bear this in mind when you come to address your minds to the deposition of the witness Rajdai Budhram, which has been tendered in this case . . ."

In my judgment, the directions given were adequate in the circumstances, but an examination of the extent of the discrepancies might be useful to see what weight they would have had with the jury in view of the other evidence. In the High Court, the witness Rajdai Budhram said she could not remember telling the magistrate that the accused came up the stairs walking one behind the other; she could not remember if she had told the magistrate that she got confused on seeing the accused; she could not remember if she had told the magistrate that when she first saw the accused, 'the one in front, i.e., No. 3 accused was about four feet in front of me'; she could not remember if she had told the magistrate that it was No. 3 accused who took up the pair of scissors and threatened to dig out her eyes. The depositions, which were tendered, disclose that the witness gave the following answers at various stages in her evidence before the magistrate: "Nos. 1, 2 and 3 came up the stairs walking one behind the other; I got confused on seeing them. When I first saw them the one in front—No. 3—was about four feet from me. No. 3 pushed my head upwards by holding under my chin, picked up a scissors from the safe and threatened to dig out my eyes." A comparison of the answers does not disclose such divergent answers as to render her evidence at the trial so valueless as to call for a direction from the judge as that set down in the *Leonard Harris* case, if that were at all the legal position. I would reject this submission also.

Rajdai Budhram denied telling P.C. Dorsett that she had been sleeping on a bed in the hall of the house when the three men went into the house. She conceded that had she been sleeping on the bed in the hall, she could not have at the same time seen the men coming upstairs. P.C. Dorsett gave evidence in which he said that Rajdai Budhram had told him that she had been sleeping on a bed in the hall when the three accused entered the house and demanded money from her. Apart from the fact that if they demanded money from her, she would presumably have had to be awake at that point of time. Dorsett contended that that was not all Rajdai Budhram had told him, and that his record was incorrect; that what she told him was that she had been sewing, that she went to lie on the bed; she got up, went to the toilet and on her return the three accused rushed upstairs to her.

After giving the jury general directions as follows:

> ". . . two witnesses may give you two different versions of the same incident and those versions may be so widely different substantially, that you may well think that you cannot believe either of those witnesses and the safest thing to do in such circumstances, you may think, would be to discard the evidence of both, not knowing which one to believe,"

he later on pointed out the discrepancies in the answers of the two witnesses, and invited them to find that Dorsett might have been an unreliable witness on that particular aspect. Counsel complains that he might have invited them to find Dorsett reliable in which case the veracity of Rajdai Budhram would have been in peril.

The judge could very well have done so, but I fail to see the justification for so doing when Dorsett himself said that his record was at fault. In any event, the judge was at pains to let the jury know that the question of identification was a fundamental one, and that that question turned solely on the evidence of Rajdai Budhram. I would reject this submission too.

Exception has been taken also to the judge asking the jury whether they thought that the witness Rajdai Budhram could have been mistaken when she said she identified the accused as the persons who invaded her home on the night in question. It was urged that the defence was not that she had made a mistake, but that she was not telling the truth. In my judgment, this submission is lacking in merit. A perusal of the record discloses that each accused person, when leading his defence, said that the witness had made a mistake. They also said that they never went to Budhram's house, and did not rob Rajdai Budhram. I suppose it can be said that implicit in the latter statements is the suggestion that the witness was not speaking the truth. But as it was put by the judge, the jury did not have to go as far as to find her an untruthful witness so far as the question of identification was concerned; all that was required was that if they found that she was mistaken, then the identification would not have been proved, and the accused persons would haw been entitled to be acquitted.

In my opinion, and for the reasons given, these appeals ought to be dismissed, and the convictions and sentences affirmed.

The majority of this Court holds a contrary view. I can only say I maintain my view with great respect to my learned brothers.

Appeal allowed.

DORIS SOOKWAH
v.
STEPHEN BOYCE AND GUYANA ELECTRICITY CORPORATION

[High Court (Mitchell, J.) February 10, 11, March 11, 23, December 6, 1971].

Negligence—Contributory negligence—Apportionment of liability—Deceased cycling out from minor road on to a main road.

Damages—Personal injury—Award under the Accidental Deaths and Workmen's Injuries (*Compensation*) *Ordinance Cap. 112—Award under Law Reform* (*Miscellaneous Provisions*) *Ordinance Cap. 4—Value of dependency—Calculation of—Multiplier.*

The plaintiff, mother of the deceased, claimed damages under the Accidental Deaths and Workmen's Injuries (Compensation) Ordinance and under the Law Reform (Miscellaneous Provisions) Ordinance for loss suffered as a result of the negligence of the defendants when the deceased was fatally injured in a collision with a vehicle driven by Boyce (the admitted servant of the second-named defendants at the material time) on 29th March 1967 on the Chelsea Park public road, Mahaica. The plaintiff was forty (40) years old and the deceased nineteen (19), and the trial judge found that his probable annual earnings was $390.00. The defendants alleged that the deceased was cycling with his head down from a dam towards the public road at a fast rate of speed and that as he approached the main road he came into contact with the left front fender of the jeep. The plaintiff claimed to be a dependant of the deceased, her eldest child, living with her at the time of his death. She also claimed to have paid $150: as funeral expenses. Her evidence was to the effect that the deceased worked as a labourer, picking coconuts, cutting rice etc., for $20: per week from which he gave to her $ 15: each week.

HELD: (i) the negligence of the deceased was the primary and substantial cause of the collision but that some negligence oh the part of Boyce had contributed to the cause of the death of the deceased;

(ii) having regard to all the circumstances of the case including the fact that the deceased emerged from a minor road on to a main road the degree of negligence on the part of Boyce would be put at no more than 20 per cent;

(iii) on the issue of damages, the plaintiff was a dependent under the Act;

(iv) a multiplier of ten (10) would be the appropriate multiplier in the circumstances of the case;

(v) total liability would be assessed at $3,900.00 under the Accidental Deaths etc. Act, plus $150: as funeral expenses, plus $2,000.00 as damages for loss of expectation of life, making a total of $6,050.00 of which the plaintiff would be entitled to judgment in the sum of twenty per cent (the defendants' liability) of that amount, that is to say, the sum of $ 1,210.00 with twenty per cent of the costs to be taxed.

Judgment for the plaintiff accordingly.

Dr. F. W. H. Ramsahoye, S.C., for the plaintiff.

B. Commissiong for the defendants.

MITCHELL, J.: Doris Sookwah, a mother of deceased Aryan Persaud, was granted letters of Administration of the estate of the deceased on 1st October, 1968, and as Administratrix of the estate of Anjan Persaud who died as a result of being involved in a collision with a motor vehicle driven by Stephen Boyce, she claimed from the said Stephen Boyce and from the Guyana Electricity Corporation, with whom he was employed, and who admitted in the course of the hearing of this matter through Counsel for the defendants that at the material time Stephen Boyce was their servant and agent, damages in excess of $500.00 (five hundred dollars) under the Accidental Deaths and Workmen's Injuries (Compensation) Ordinance, Chapter 112, for loss suffered by the defendants of the said deceased who was fatally injured in the collision with the vehicle driven by Stephen Boyce on 29th March, 1967.

Doris Sookwah also claimed damages in excess of five hundred dollars ($500.00) under the Law Reform (Miscellaneous Provisions) Ordinance, Chapter 4 for the benefit of the estate of the said deceased for the loss of expectation of life suffered by the deceased.

Doris Sookwah asserted that the collision which resulted in fatal injury to Anjan Persaud was due to the negligent driving of Stephen Boyce, and that the Guyana Electricity Corporation, his employers are vicariously liable for the negligence of their servant.

Veronica Barker, who gave evidence on behalf of the plaintiff, spoke of her standing by the roadside at Chelsea Park, Mahaica, about 5.00 p.m. on 29th March, 1967, and of her speaking to a Roman Catholic priest in connection with arrangements for her daughter's wedding. According to her she was facing east and saw a boy coming on a cycle from east to west on the southern side of the road. She saw the jeep PT 803 coming in the same direction behind the said cyclist, whom she subsequently discovered to be Anjan Persaud whom she had known. She said that Anjan Persaud was riding about two (2) to two and a half (2½) feet from the southern parapet of the road, and the jeep came behind the cyclist and struck him down. The cyclist was then thrown about eight (8) feet in the air and fell on the southern side of the road just inches away from the southern parapet. The jeep then dragged the bicycle, "flung" it against a paling about five (5) rods away and drove for a distance of about one hundred (100) yards from the point of impact before it came to a halt in front of her entrance. She could not say much of the speed of the jeep but in her opinion it was travelling at a fast rate of speed. When she first saw the jeep, it was about sixty (60) to seventy (70) yards from the cyclist Persaud. There is a curve or bend in the road, and that curve or bend in the road was east of a dam which was on the southern side of the road running from north to south. She was standing at a distance of about 200 (two hundred) rods west of that dam and where she was, she could not have seen anyone coming from that dam. However, according to her the deceased, Anjan Persaud was about forty (40) yards west of that dam when she first saw him and the accident occurred about eighty (80) to ninety (90) yards east of where she was standing. So if one accepts the evidence of

Veronica Baker, Aryan Persaud would have travelled for some distance on the road before the jeep collided with him. This will be a fundamental issue of fact which I shall have to resolve as the defendants are asserting that Anjan Persaud was cycling with his head down from a dam towards the road at a fast rate of speed and as he approached the main road he came into contact with the left front fender of the jeep.

Mowlah Bacchus with whom the father of the deceased worked as a coconut picker testified that on 29th March, 1967 Anjan Persaud was helping his father at picking coconuts at his (Bacchus's) place. He received certain information, and as a result he ran along a dam unto the public road and saw the body of Anjan Persaud on the public road at a distance of about four (4) to five (5) rods (which he demonstrated by pointing out a distance of thirty (30) feet) from the dam. He said that Anjan Persaud was not employed by him.

If one accepts the evidence of Mowlah Bacchus as to where the body of Anjan Persaud was seen by him it will be appreciated that it was nearer to the dam than as described in the evidence of Veronica Baker.

Sergeant 5174 Mahadeo who was stationed at the Mahaica Police Station on 29th March, 1967 spoke of having visited the scene of the accident in question with Veronica Baker on the day after the accident. He also visited the scene on the day of the accident with Stephen Boyce who pointed out the point of impact and in the presence of Stephen Boyce he took measurements. He said that the width of the road at the point of impact as pointed out by Stephen Boyce was 24 feet 6 inches, and that from his point of impact to the southern edge of the road was 12 feet 9 inches. From Boyce's point of impact to the western edge of the dam 31 feet. Boyce indicated to Sergeant Mahadeo that he first saw the deceased riding at a point 3 feet 9 inches from the southern edge of the dam and from that point to where the deceased was found lying was 17 feet 9 inches. Sergeant Mahadeo saw two (2) spots of what appeared to be blood east of the body. Veronica Baker in the presence of Stephen Boyce pointed out a point of impact which did not coincide with Boyce's and which was 5 feet 3 inches from the southern edge of the road as against 12 feet 9 inches pointed out by Boyce. However, her point of impact as pointed out to Sergeant Mahadeo was only 18 feet west from the centre of the southern dam leading to the public road. This evidence must be related to the evidence which she gave as to what she had actually seen of the accident and it is recalled that she had said that Anjan Persaud was about forty (40) yards west of the dam when she first saw him and the accident occurred about eighty (80) to ninety (90) yards east of where she was standing at a distance of 200 rods west of the dam. It is difficult to reconcile her evidence of the spot where Anjan Persaud was struck down with her evidence as to the point of impact as revealed through Sargeant Mahadeo. Veronica Baker also, pointed out to Sergeant Mahadeo that

she was standing at a distance of 264 feet from the point of impact and this is reasonably approximate with her estimate that the accident occurred about eighty (80) (90) yards east of where she was standing. The cycle involved in the accident was damaged. Sergeant Mahadeo said that the front wheel of the cycle was bent and twisted and that the back wheel of the cycle was bent in an "S" shape. Sergeant Mahadeo said that he made no record of the distance from the dam to where the body was. The body was in the same position when he returned to the scene at night with Stephen Boyce, as it was at 5.30 p.m. in the afternoon when he first went there.

Thomas Bayne the police photographer took photographs at the scene and having regard to the propositions of the plaintiff and of the defendants the photographs Exhibit B1 is perhaps, the most significant. The photograph B1 shows a view of the Chelsea public road looking approximately east along the public road. It shows a view of the body of Aryan Persaud, the pedal cycle and a dam leading on to the public road, which in all probability is the dam from which Anjan Persaud had come.

The total effects of the evidence led on behalf of the plaintiff and on behalf of the defendant leads me unequivocally to the conclusion that some time shortly before the collision the deceased had come out from the dam east of where he was struck down and on the southern side of the road. The questions arise for consideration as to what distance from the dam the collision between the jeep or landrover PT 803 and Anjan Persaud actually took place and whether he was struck from behind.

Veronica Baker in her evidence said that the jeep struck Anjan Persaud from behind, threw him about eight (8) feet in the air and he fell on the southern side of the road just inches away from the southern parapet.

Sergeant Mahadeo said, however, when he went with her on the day following the accident to the scene she had pointed out a point of impact and from that point of impact which she had indicated to where the body of Anjan Persaud was found was a distance of seventy-seven (77) feet. Sergeant Mahadeo had also said that from the centre of the southern dam leading to the public road (which I can reasonably conclude is the same dam seen in the photograph Exhibit B1) to the point of impact as shown by Veronica Baker west of the dam was eighteen (18) feet. Sergeant Mahadeo stated that the width of the dam was twenty-seven (27) feet at the point where it joins the public road and he had taken that measurement when he visited the scene with Stephen Boyce. If the width of the dam where it joins the public road is twenty-seven (27) feet then the middle point of that dam on the public road would be 13 feet 6 inches from either the eastern or western side of that dam where it joins the public road, and if according to Veronica Baker from the "centre" of the southern dam to her point of impact is eighteen (18) feet then Anjan Persaud had travelled only 4 feet 6 inches from the western point where the dam reaches the public road when he was struck down. The evidence is not in accord with Veronica Baker's previous testimony which was to the effect that when she saw Anjan Persaud for the first time he was about

40 to 50 yards west of the dam. The measurement taken by Sergeant Mahadeo in relation to the point of impact shown by Veronica Baker and the dam on the southern side of the road seem to support the defence, which is to the effect that Anjan Persaud rode quickly onto the public road from the southern dam and came in contact with the front fender of the land-rover near to the dam and that he had not turned and ridden any distance from the dam before he was struck down.

According to Sergeant Mahadeo from the point of impact as shown by Stephen Boyce to the western edge of the dam (the said dam on the southern side of the road) was thirty-one (31) feet, and the point of impact was fifteen feet three inches (15′ 3″) from the first bloodspot which he had seen west of Boyce's point of impact. Veronica Baker's point of impact was thirty-five (35) feet from the first bloodspot. From Boyce's point of impact to the middle of the eastern dam was 32 feet. Having regard to Baker's point of impact which was 18 feet from the middle of the southern dam (which I construe to be the same as the eastern dam) it would seem that Boyce's point of impact was fourteen (14) feet further west of the dam than Baker's point of impact. But that is not what the defence is really asserting.

Vernon Garraway gave evidence on behalf of the defendants and spoke of travelling in a car behind the jeep PT 803 when he saw a pedal cyclist of East Indian descent cycling with his head down from a mud-dam towards the Chelsea main road at a fairly fast rate. As the cyclist approached the main road he came in contact with the left front fender of the jeep. According to Vernon Garraway the cyclist was coming towards the main road and he attempted to swerve back south. After the impact the cyclist was thrown in the air and fell on his back on the left side of the road. Vernon Garraway further said that apart from himself, Felix Perry, Daphne Mitchell and Stephen Boyce, no one else was on the scene for about ten (10) minutes after the impact. Then a man arrived and then after him, a woman. Vernon Garraway indicated that the body of Anjan Persaud, as seen in the photograph Exhibit B1 taken by Thomas Bayne, was in approximately the same position on the road as when it had fallen on the road after the impact. Vernon Garraway also, said that he had seen the pedal cyclist, who in the circumstances must have been Anjan Persaud when he was about eighty (80) yards away from him. Garraway denied that the cyclist had come out of the minor (dam) road and had straightened up when the accident occurred. He said that the cyclist approached the main road, swerved slightly to the west and came in contact with the left fender of the jeep at the junction.

Stephen Boyce who was the driver of the Electricity Corporation land-rover PT 803 at the material time said that as he was driving along, the cyclist suddenly appeared from out of a dam. He said that he was about three (3) feet from the cyclist when he first saw him and at that time the cyclist was facing north across the road, "right up to the left front fender" to use his

own words. He said that he took evasive action by pulling his vehicle hard to the right and by applying the brakes of his vehicle but he heard an impact on the left front fender. He said that at the time of impact he was north of the centre line of the road and the vehicle was facing a north-westerly direction. His point of impact as pointed out to Sargeant Mahadeo was 12 feet 9 inches from the southern edge of the road which has a width of 24 feet 6 inches at the point of impact which he showed.

It emerged that at an inquest held into the death of Anjan Persaud at which Stephen Boyce testified, he had said that if he did not pull off to his right, the "centre" of the vehicle would have hit him (Anjan Persaud). He had, also, said that the cyclist came out at a speed from the dam and that from the time he had seen him up to the time the impact occurred he did not apply his brakes, that he was trying to pull his vehicle away to save him. I will have to decide whether I shall accept his evidence as given in this matter before me having regard to what he has said previously and if I do what weight, if any, I attach to his evidence.

Felix Perry, an electrical maintenance superintendent of the Guyana Electricity Corporation, spoke of travelling behind Stephen Boyce at the time of the accident. He spoke, too, of having seen someone cycling very fast with head down up a slope. He said that he was about seventy-five (75) feet east of the dam when he first saw the cyclist and Boyce was then about seventy-five (75) feet west of him, which would place Boyce at the dam. At that time, according to Felix Perry, the cyclist was about eight (8) feet on the dam, inside. Boyce then changed his direction in relation to the curve of the road and at the point of impact Boyce swerved to the right and the cyclist was going north. According to Felix Perry the accident happened on the public road opposite the middle of the dam.

I find as a fact that the deceased Anjan Persaud had ridden on a pedal cycle unto the Chelsea public road, East Coast Demerara, immediately before he came into collision with the land rover PT 803 which at that time was owned by the Guyana Electricity Corporation the second-named defendants, and was travelling on the road. There seemed to have been no other traffic on the road at that spot, at that time.

I find as a fact that at the material time when the land rover PT 803, collided with the deceased Anjan Persaud on the Chelsea public road it was driven by Stephen Boyce, first-named defendant, whom Counsel for both defendants admitted before the Court was the servant or agent of the second-named defendants, the Guyana Electricity Corporation.

If, as has been asserted by the plaintiff, the pedal cyclist was struck from behind when he was on the cycle, apart from what the witnesses have said it is reasonable to expect and to find damage to the rear of the cycle, indicative of impact in the rear. Sergeant Mahadeo has not recorded any damage to the cycle apart from stating that the bell of the cycle was in work-

ing order and that the brakes could not be tested owing to the accident. Apart from that record which he used to refresh his memory and not in that record itself Sergeant Mahadeo said from recollection that the front wheel of the cycle was bent and twisted, but he could not remember anything about the front fork, that the handle was twisted, the back wheel bent in the shape of an "S" but he could not remember anything about the back fork, that the fender of the cycle was twisted.

The photographs Exhibits B1 and B2 threw some light on these facts. In Exhibit B1 the body of Anjan Persaud is seen on the road surface itself, even though one foot is touching the grass parapet, and the cycle, most probably the cycle he was riding is seen near to a fence or paling. I am of the view that the propulsion or force from the impact most probably pushed or directed the cycle, which most likely was what really came in contact with the land rover, towards the fence and the body of Anjan Persaud which was on the cycle was thrown in the air and fell where it lay. The position of the cycle, in my jury mind opinion, near to the fence is not consistent with its being dragged along the road and it is the view of my jury mind that the cycle was pushed, thrown or propelled in the direction and to the place where it was found rather than it was dragged for any distance. The damage to the land rover, too—dents to the left front fender and the rear view mirror glass on the left front fender being broken—and the photographs of the land rover as Exhibit B4 and Exhibit B5 are, also in my jury mind opinion not consistent with the cycle being dragged as Veronica Baker would have me believe.

In so far as my jury mind finds that the cycle was most probably pushed, thrown or propelled towards the fence, that would tend to indicate and bear some relationship with the direction in which the cycle was travelling at the time when the force of the land rover was applied to it and directed it towards the fence. From this and having regard to what all the various witnesses have said my jury mind would conclude that it was more probable that the cycle was not moving straight west at the time of impact.

Again, this is borne out, in my opinion, by a close look at the photograph of the cycle itself in Exhibit B2. The cycle is not lying flat in that photograph but it is obvious that the back wheel of the cycle is not twisted in an "S" as Sergeant Mahadeo recalled, and the spokes in that back wheel seem to be intact, and the fender is only slightly out of alignment with the wheel itself. I am of the view that if the cycle was struck from behind it would be reasonable to expect and to find more damage to the back wheel than it is revealed in Exhibit B2. The photograph seems to negative that proposition and that probability.

Accordingly, I am of the view that the cyclist Anjan Persaud was not struck from behind and was not struck when he was travelling in a westerly direction on the Chelsea public road. My jury mind having regard to all the

evidence submitted for my consideration finds that it is probable or more probable that Anjan Persaud was cycling north or north-west when the land rover came from a slightly north-easterly direction having regard to the curve of the road in that vicinity, and there was the collision. Also, the points of impact as pointed out by Stephen Boyce thirty-one (31) feet from the western edge of the dam, and by Veronica Baker eighteen (18) feet from the centre of the southern dam, even though they differ indicate that the impact occurred comparatively near to the southern dam leading to the public road from which Anjan Persaud had ridden.

The evidence of Mowlah Bacchus also tends to support that view when he said that he saw the body of Anjan Persaud about four (4) to five (5) rods from the dam and demonstrated that distance in court before me by pointing out a distance of about thirty (30) feet or a little more.

I find, also, in the circumstances of this case, having regard particularly to the evidence of Veronica Baker, Mowlah Bacchus, Sergeant Mahadeo, Vernon Garraway, Stephen Boyce, Felix Perry and to my previous conclusions that it is more probable that the cyclist Anjan Persaud rode from the southern dam unto the Chelsea public road into the path of the oncoming land rover driven by Stephen Boyce than that he did not in the vicinity of or near to the southern dam itself.

In riding from the southern dam, which is the circumstances of this case is a minor road, unto the main and major public road as he probably did, Anjan Persaud owed a legal duty of care to himself, and to other users of the road, to see that the cycle which he rode and which was under his sole immediate control did not come in contact with other users of the road, or cause crises, dangers or difficulties for them. Having regard to the points of impact as shown by Veronica Baker and Stephen Boyce and to that probable area of the collision and to the probable direction in which the cycle and the land rover were travelling at the material time of impact, and to the damage to the cycle and to the land rover, I am of the view that Anjan Persaud committed a breach of that legal duty of care which was cast on him when riding out from the dam unto the Chelsea public road into the main stream of traffic on that road and in that manner he caused his bicycle to come onto that road at a moment of time when the land rover was approaching and created the circumstances which were responsible for the land rover colliding with his cycle with consequential injury and death to himself. I find that Anjan Persaud is liable in negligence for the collision between the land rover and his cycle and for his own death.

Having regard to the evidence of Sergeant Mahadeo that from the dam one could see eastwards for about twenty-five (25) rods if one is near to the public road and that one gets a clear view of the public road at a distance of about (12) feet inside the dam, to the evidence of Vernon Garraway who said that he had seen the cyclist riding on the dam when he was about eighty (80) yards east of the cyclist and at that time the cyclist was about six (6) to eight (8) yards from the public road, to the evidence of Stephen Boyce as to when

he first saw the cyclist, to the evidence of Felix Perry that he first saw the cyclist when seventy-five (75) feet away from the dam and at that time Boyce was then seventy-five (75) feet west of him (thus at the head of the dam) and the cyclist was then eight (8) feet on the dam, I conclude with due consideration of the photographs that it was possible for someone driving a motor vehicle west of the Chelsea public road to see someone emerging from the southern dam whether that person emerged quickly or not and that it was possible to see that person when that person was at a distance of between eight (8) feet and eight (8) yards from the public road. In so far as Stephen Boyce has said that he did not see Anjan Persaud until he was about three (3) feet from him, and as the dam has a width of approximately fourteen (14) feet, it is probable that Stephen Boyce could and should have seen Anjan Persaud before he emerged, or, when he was in the process of emerging from the dam if he was keeping a proper look-out. I appreciate that Boyce said both in his written statement to the police and in his evidence on oath that the cyclist suddenly appeared, but from the evidence of all the witnesses it should not have been all that sudden having regard to the area of vision of the dam. In my opinion, Boyce was negligent to some extent in not having seen Anjan Persaud before he was about three (3) feet to three feet 9 inches from him so as to be in a better position to appreciate and to react and deal with the difficulty, crisis or danger which Persaud's emergence onto the road presented. Boyce said that he saw the dam immediately before the accident, just about a foot of it adjoining the public road and when he saw the foot of the dam the cyclist was already on the public road. But Vernon Garraway was able to see the cyclist about eighty (80) yards east of the dam and at that time the cyclist was six (6) to eight (8) yards from the public road, and Felix Perry saw him when he (Perry) was about seventy-five (75) feet from the dam and the cyclist was then eight (8) feet on the dam.

Boyce said in evidence on oath that he had applied his brakes but at the inquest into the death of Anjan Persaud he had said that he did not apply his brakes as he was pulling his vehicle away to save him. I do believe that he did not apply his brakes and I, also, believe that he swerved or pulled away to avoid hitting Anjan Persaud but, nevertheless, did so. The fact that he did not apply his brakes in those circumstances is not by itself unequivocally indicative of negligence, and may indicate that in the agony of the moment confronted with this situation he took the course of swerving rather than braking or doing both.

The area of Boyce's negligence, to my mind, is limited to the time within which he could have reasonably seen Anjan Persaud emerging from the dam into his path as Persaud did, and thereby to take appropriate action whether effective or not to avoid coming in contact with him. In the circumstances of this case he did not give himself all the time he could even though he had little to do what he could have done, and he would have had that

little more time if he was keeping a proper look out as he reasonably should in relation to minor approaches to the main road. I find that the negligence of Anjan Persaud, was, however, the primary and substantial cause of the collision and of his own death but that some negligence on the part of Stephen Boyce contributed to the cause of Anjan Persaud's death.

It is difficult in cases of this sort to delineate and delimit the degree of negligence, but having regard to all the circumstances of this case including the fact that Anjan Persaud emerged from a minor road unto a main road, I would assess the degree of negligence on the part of Stephen Boyce at no more than twenty per cent (20%), and in so far as at the material time Stephen Boyce was the servant or agent of the second-named defendants, The Guyana Electricity Corporation, they would be vicariously liable to the plaintiff for Boyce's negligence to the extent of twenty (20) per cent of the total negligence responsible for the death of Anjan Persaud.

On the question of damages it may not be inappropriate to refer to the much quoted passage of Lord Wright in *Davis v. Powell Duffryn Associated Collieries* (No. 2) (1942) 1 All E.R. 657; (1942) A.C. 601; 111 L.J.K.B. 418; 167 L.T. 74; 58 T.L.R. 240; 86 Sol. Jo. 294 H.L.: I quote,

> "There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years purchase. That sum, however, has to be taxed down having due regard to uncertainties for instance, that the widow might have again married and thus ceased to be dependent and other like matters of speculation and doubt."

It is, therefore, necessary that I find the amount of wages which the deceased was probably earning having regard to the regularity of his employment.

On the day when Anjan Persaud was killed the evidence revealed that he was assisting his father who was a coconut picker employed by Mowlah Bacchus. Mowlah Bacchus had not employed Anjan Persaud. Anjan Persaud was the eldest child of Doris Sookwah and was nineteen (19) years at the time of his death and living at home with her. Doris Sookwah said that he used to pick coconuts, cut rice, "lap" bushes and clean trenches. She said that he worked for $20.00 (twenty dollars) per week and used to gave her $15.00 (fifteen dollars) each week from that amount. No other evidence as to his working or earning is forthcoming.

DORIS SOOKWAH
v.
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It is very easy for any person to come to the Court and give evidence in support or, against the interest of a deceased person. In those circumstances while corroboration is not required as a matter of law, the Court must, nevertheless, and necessarily proceed with caution before deciding to accept evidence in relation to a deceased person's interest. In this case, the interest of the deceased as to damages coincides with that of Doris Sookwah as she is the person who stands to benefit from anything which she said that the deceased told her and from any award which the Court may make. The Court must, thus, be careful about accepting her evidence as to the earnings of the deceased.

It is clear that Anjan Persaud assisted his father at Mowlah Bacchus, and it is probable, too, that he assisted his mother and father at other jobs. In her evidence in cross-examination Doris Sookwah said that he did not have a steady job. This would suggest that there was not regularity in his employment. The evidence as to the earnings of Anjan Persaud is uncertain and unreliable. Be that as it may it is probable that he made some contribution to the household of which he was a part and which may be assessed in terms of money. I am prepared having regard to all the circumstances of this case and the inference to be drawn from those circumstances to assess that at what I consider an average reasonable amount in the sum of seven dollars and fifty cents ($7.50) per week. This I will hold to be the "datum or basic figure" within the meaning of the extract above-mentioned from Lord Wright. In considering the amount of $7.50 I have taken into account other factors which might have reasonably affected that basic figure, for example that the deceased might have increased his earnings, that he might have also had reduced earnings also with its effect on his contribution, that he might have had increased expenditure having regard to his normal personal demands and living expense as he grew older, that he might have been married early with consequent reduction in the amount which his mother might have shared that being unskilled he might not have been employed at all. It is established that the basic figure should be increased or decreased according to the view taken of those factors among others *Roughead v. Railway Executive* (1949) 65 T.L.R. 435; 93 Sol Jo. 514.

Having concluded that the basic figure should be an average of $7.50 per week, the probable annual earnings would then be $390.00. Anjan Persaud's age was given as nineteen (19) years when he died. He therefore, has a possible working life of a further thirty-one (31) years until he was sixty (60) years old which I would take as the working life of a person whose retirement age is not otherwise fixed by statute or contract. Doris Sookwah as a dependant gave her age as forty (40) years and so she would have had a probable period of dependency of twenty (20) years. I would then use a multiplier of ten (10) which would give a total amount of $3,900.00.

I find that Doris Sookwah was a parent of Anjan Persaud within the meaning of the Accidental Death and Workmen's Injuries Compensation Ordinance, Chapter 112, and thus a person for whose benefit this action could have been brought as a lawful dependent.

Doris Sookwah stated that she had to pay the sum of $150.00 (one hundred and fifty dollars) as funeral expenses of the deceased Anjan Persaud. She produced no receipt or corroborating evidence but this amount does not seem unreasonable to me. I am, thus, prepared to take this amount in consideration of what damages she should receive, as permitted in terms of Section 3(3) of Chapter 112.

Having regard to the decision of the Guyana Court of Appeal in *Bhagwandin v. Collins* No. 14 of 1967, I am prepared to consider the amount of $2,000.00 as damages for the loss of expectation of Anjan Persaud's life.

The total amount of damages which may be awarded in the circumstances of this case would then be $3,900.00 plus $150.00 plus $2,000.00 amounting to $6,050.00.

In so far as I find that the liability of the defendants would be limited to no more than twenty (20) per cent. I would accordingly find them liable only in the sum of $1,210.00.

There will thus be judgment for the plaintiff in the sum of one thousand two hundred and ten dollars ($1,210.00) with twenty per cent (20%) of the costs to be taxed.

Judgment for the plaintiff accordingly.

EDWARD WASIM FAZIL GAZNABI *v.* LESLYN BURROWES

[In the Full Court on appeal from a magistrate's court of the Georgetown Judicial District (Bollers, C.J., and Gonsalves-Sabola, J.) October 22, December 10, 1971].

Jurisdiction—Claim in excess of $250.00—Whether claim arising out of Rent Control Ordinance Cap. 186—Whether cause of action a common law one of breach of contract of indemnity.

Magistrate's court—Jurisdiction—Claim brought for sum in excess of $250.00.

EDWARD WASIM FAZIL GAZNABI *v.* LESLYN BURROWES

The appellant was the landlord of one Adams in respect of premises situate at Kitty. In February 1969 Adams left the premises to work in the hinterland. In April 1969 the respondent, a member of the tenant's household, in consideration of the appellant's forbearance to sue Adams for possession on the ground of non-payment of rent agreed to meet personally the obligations of the tenant Adams. A statutory tenancy came into being with effect from 30th November, 1969, on the contractual tenancy having been determined by notice to quit. In June 1970 without any notice to the appellant all members of the tenant's household vacated the premises leaving behind them arrears of rent and the results of certain acts of waste. The appellant brought his claim in the magistrate's court against the respondent for the sum of $756.00—being .$630.00 due as rent and $125.00 as damages for waste. He argued that the claim was one which arose out of the Rent Control Ordinance. The question on appeal was whether the magistrate was right to decline jurisdiction.

HELD: (i) the cause of action pleaded was a common law one of breach of contract of indemnity;

(ii) the appellant would have had to rely on his agreement with the respondent and a breach thereof and not on any provision of the Rent Control Ordinance;

(iii) the claim could not be said to arise out of the Ordinance, and as it was one in excess of $250.00 it was outside the jurisdiction of the magistrate's court.

Appeal dismissed.

O. M. Valz for the appellant.

V. M. Newton for the respondent.

JUDGMENT OF THE COURT: The appellant was aggrieved by the decision of the Magistrate of the Georgetown Judicial District, declining jurisdiction to entertain a plaint claming from the respondent the sum of $756.00.

The plaint, a novel one, recited the following facts—

The appellant was the landlord of one Alton Adams in respect of premises at 34 Shell Road, Kitty, rented at a monthly sum of $35.00. In or about February, 1969, the tenant, Alton Adams left the demised premises to seek for gold and diamonds in the hinterland. On or about 1st April, 1969, the respondent, a member of the tenant's household, in consideration of the appellant's forbearance to sue the tenant for possession on the ground of non-payment of rent, assumed personal liability to the appellant.

By a notice to quit the contractual tenancy was determined with effect from 30th November, 1969, and the tenant having held over, a statutory tenancy came into being.

In the month of June, 1970, without any notice to the appellant, the tenement was vacated by all members of the tenant's household leaving behind them the results of certain acts of waste and arrears of rent outstanding.

The appellant therefore sought to enforce his alleged right to indemnity against the respondent, claiming from the latter the sum of $756.00. Of that sum $630.00 was claimed as rent and $126.00 as damages for waste.

The appellant sought to justify bringing his suit in the Magistrate's court by pleading that after the service of the notice to quit, the respondent again repeated to the appellant and the appellant again accepted the earlier offer of indemnity made on or about 1st April, 1969.

By reason of that pleading, Solicitor for the appellant submitted that the claim brought in the Magistrate's Court arose out of the Rent Control Ordinance. This was how he argued the point: By entering into the contract to indemnify the appellant landlord in relation to the tenant's obligations the respondent became placed by the doctrine of subrogation in the tenant's shoes; and since the tenancy was then a statutory one, the claim brought was one which arose out of the Rent Control Ordinance. By s. 26(1) of that Ordinance, such a claim compulsorily had to be made or instituted in a Magistrate's Court.

The court was referred to the well-known cases of *Small v. Saul and Saul* (1965) 8 W.I.R. 351 and *Evelyne v. Latchmansingh* (1961) L.R.B.G, 12 in illustration of how s. 26(1) of the Ordinance has been interpreted by the courts. It was submitted that once a claim has roots in the Rent Control Ordinance, the magistrate has jurisdiction to entertain it.

This court, consistently with the cases cited, considers that where the cause of action would not have existed but for some provision of the Ordinance a claim can be said to arise out of the Ordinance. Thus, where a contractual tenancy is determined by notice and the tenant holds over so that the Ordinance imposes a tenancy on the landlord a claim by the tenant for damages for breach of the covenant of quiet enjoyment committed during such statutory tenancy, or in a case where the tenant sues to recover excess rent from his landlord, such claims arise out of the Rent Control Ordinance, because it is the relevant provisions of that Ordinance that give those claims birth.

We think it puts it too broadly to say that a claim arises out of the Ordinance where, in order to decide the issue joined, reference may have to be made for some ancillary purpose to some provision or other of the Ordinance. A good case in point is the instant one. Assuming that there existed between the appellant and the respondent a valid and enforceable contract of indemnity, the extent of the respondent's liability, as distinguished from the origin of that liability, may probably be gauged by reference to the liability of the tenant under the Ordinance. But that is a very different matter from saying that the cause of action arises out

of the Ordinance. The cause of action pleaded is a common law one of breach of contract of indemnity.

There is lack of authority for the contention that a third party completely outside the privity of the contract between landlord and tenant could, by virtue of an independent common law contract with the landlord, confer on the landlord advantages under the Rent Control Ordinance. There was no novation of contract to substitute the respondent tenant of the landlord in place of Alton Adams. There was no tripartite agreement among the parties to that end. Alton Adams was a stranger to the contract between the appellant and the respondent, and, as tenant, remained chargeable by the landlord for the very arrears of rent and waste sued for.

It is open to argument whether the alleged contract was really one of indemnity and not an ineffectual attempt at novation dressed up to look like an indemnity. But be that as it may, it is not apprehended how the respondent's indemnification of the appellant landlord in respect of a statutory tenant's obligation to pay rent and to make good waste, could convert the appellant's claim from one arising out of the common law to one arising out of the Rent Control Ordinance. In other words the appellant in order to establish his claim would have had to rely on his agreement with the respondent and a breach thereof and not on any provision of the Rent Control Ordinance Cap. 186.

The plaint, a work of artful legal draftsmanship, pursued a tortuous course to bring the claim within the jurisdiction of the Magistrate's Court, but since we hold that the claim, one in excess of $250.00, does not arise out of the Rent Control Ordinance, it was by s. 3 of the Summary Jurisdiction (Petty Debt) Ordinance, cap. 16, outside the jurisdiction of the Magistrate's Court.

The learned Magistrate was right to decline jurisdiction and that being so, this appeal is dismissed and the ruling of the Magistrate is affirmed. The respondent will have her costs fixed at $18.12.

Appeal dismissed.

FRANK SOOKRAM *v.* THE STATE

[Court of Appeal (Luckhoo, C, Persaud and Crane, JJ A.) October 22, December 17, 1971].

Criminal Law—Wounding with intent—Misunderstanding of defence by trial judge—Defence not adequately put.

Wounding with intent—Defence of self-defence—Functions of judge and jury—Judge to decide as a preliminary issue whether self-defence arises as an issue—Jury to decide whether accused inflicted injuries, and if so whether in self-defence.

The appellant was charged with wounding with intent. The substance of his defence was that he was attacked with a knife by the virtual complainant, and that he blocked the blows which were being aimed at him with a cutlass, as he was unable to run away. The trial judge in summing up to the jury dealt with the defence on two bases; first, that the appellant did not admit that he inflicted the wounds; and, secondly, that he wounded, but in self-defence. In dealing with self-defence, the judge left it to the jury to find whether that defence arose.

HELD: (Persaud, J.A. dissenting): that the judge had misunderstood the defence, and that the only defence raised was self-defence;

(ii) that whether there is sufficient evidence to support an issue of self-defence is within the province of the judge to decide, and not for the jury; but it is for the jury to decide whether the accused acted in self-defence.

Appeal allowed.—New trial ordered.

[**Editor's Note**: This case is also reported in (1971) 18 W.I.R. 195].

Solicitor:
C. L. Luckhoo, S.C., for the appellant.
W. G. Persaud for the State.

LUCKHOO, C: The appellant stood his trial for the felony of unlawfully and maliciously wounding Chatarpaul Panchu with intent to cause him grievous bodily harm or to maim, disfigure or disable him on the 10th November, 1970, for which he was liable to penal servitude for life, and to whipping or flogging [s. 57(a) of Cap. 10]. There was no count for the misdemeanour of Unlawfully and Maliciously Wounding, for which on conviction the punishment was no greater than a sentence of five years (s. 50 of Cap. 10). But according to accepted practice, where the facts so permit, a jury is allowed to consider the alternative of convicting for the lesser offence of Unlawful Wounding, on the basis that—

> "Every count shall be deemed divisible; and if the commission of the offence charged, as is described in the enactment creating the

> offence, or as charged in the count, includes the commission of any other offence, the accused person may be convicted of any offence so included which is proved, although the whole offence charged is not proved, or he may be convicted of an attempt to commit any offence so included . . .” (S. 102 of Cap. 11).

(See *R. v. Rawlins*—Appeal No. 59 of 1966—where this court substituted a conviction of Common Assault when the indictment only charged Wounding with Intent).

As often as is necessary, the felony of Wounding with Intent, contrary to s. 57(a), will be referred to merely as “Wounding with Intent”, and the misdemeanour under s. 50, as “Unlawful Wounding”.

The appellant and the injured man Panchu were not on speaking terms because of some family dispute about lands. They came into conflict with each other on the day in question when apparently no one was around, as a result of which Panchu suffered the following injuries:

1. A lacerated wound about 2 inches long on the front portion of the scalp.
2. A lacerated wound 2 inches long over the right elbow region.
3. A lacerated wound over the right palm about 3 inches long with nearly amputated third, fourth and fifth right fingers.
4. A lacerated wound about 2 inches long over the right axillary region, left arm and left forearm.

These injuries could have caused disability and disfigurement and were thought by the medical officer to be dangerous to life because of the severe bleeding at the time.

For the prosecution, Panchu gave this account:

> “I saw the accused walking coming towards me, he was about 5 rods from me. When we were about 4 feet apart he brought his hand forward. He had a cutlass and he said he would chop off my neck. He had the cutlass in his right hand.
>
> “He made a chop at me and I raised my left hand which had a hand-bag. The hand-bag chopped off and fell to the ground.
>
> “He made a second chop and I received a blow on my left elbow region.
>
> “He made a third chop and I received a wound on my left upper arm.
>
> “I then rushed into him and the two of us fell into the trench. I fell inside the trench and I braced a little on the road.
>
> “The accused then chopped me on my head and I became unconscious.

"When I regained consciousness, the accused brother spoke to me. I then walked out of the trench and I went and sat under a sapodilla tree.

"When I regained consciousness I found I had other wounds including one at the back of my right elbow, right hand, upper left shoulder and one under my left arm." (Shows all marks). "I received two wounds before I fell inside the trench."

He denied such suggestions as that he was the aggressor and that he was armed with an Eddie Polo knife with which he had attacked the appellant. At the close of the case for the prosecution, therefore, a case of Wounding with Intent was made out and the trial judge's direction on the effect of Panchu's evidence could not be seriously questioned. His Honour said:

"Intent is a question of fact for you, the jury, to say. Intent is not capable of positive proof in the sense that no one can come into the witness-box and tell you, 'We know or I know that the accused person intended to do so and so.' You see, for the simple reason that what a man intends is in his mind and no individual is vested with divine powers to read what is in a man's mind, but as reasonable persons, you, the jury, can and you are entitled to form an opinion as to what was the nature of a man's mind from his actions and from his words, and it is for you to say, if you find that it was the accused who inflicted those wounds on Chatarpaul Panchu, it is for you to say from his words and from his actions as described by the witness, Chatarpaul Panchu, what was his intention on that day."

Had nothing been said to create an issue to the contrary, any reasonable jury must inevitable have returned a verdict of Guilty on the indictment as it stood, that is, for wounding with intent.

However, the appellant elected to make a statement from the dock and this is what he said:

"Sir, Chatarpaul attacked me with an Eddie Polo knife and throw me in the trench, and started to choke me. Then I scrambled out the trench. He bore me with the knife in my hand. My cutlass was on the ground and I picked it up. He started firing blows at me, and me barring off the blows with my cutlass. All the time me shouting for help and I could not see no one and I not able to run away. Sir I have nothing more to say."

The only way in which the learned trial judge seeks to explain the distinction between Wounding with Intent and Unlawful Wounding appears in the following passage:

"Now, members of the jury, if you, on the consideration of the whole case, find that the accused inflicted those wounds on this man, Chatarpaul Panchu, and at the time when he inflicted those wounds he did not have the intent to cause him grievous bodily harm, or to maim,

> or to disfigure, or to disable him, then he could not be found guilty of the offence of wounding with intent. In that case, if you find that he did inflict those injuries but he did not have the intent, then he could only be found guilty of unlawful wounding."

Nowhere in the summing-up does His Honour endeavour to relate this test to the facts or to indicate what may or may not be symptoms of a lack of intent. The question will arise later whether this and other directions given were adequate and provided sufficient guidance for a proper determination of what fell to be decided in the light of the issues arising.

What the judge should tell a jury in a case largely depends on what the particular facts prove or have a tendency to prove, for the issues to be debated can only be settled after the nature of what is proved is assessed. It is this assessment which requires such special care. I will then ask those questions:

(a) Did the summing-up adequately cover what it was essential to bring to the jury's mind to secure a fair and just consideration of the issues which arose?

(b) If it did not, to what extent the appellant was or might have been prejudiced?

It is not difficult to ascertain the focal points in this case on which a jury would be required to fasten their attention. Inferentially, certain aspects of the prosecution's case could almost be treated as common ground, especially when it is observed that there was no challenge or dispute either under cross-examination or in the statement of the defence. Thus, for example, the proof that Panchu's injuries were caused by a sharp-cutting instrument and were as described in the medical testimony, remains undisputed, as does the fact that the injuries occurred from an encounter between the two when no one else was present. What then is the natural inference from the appellant's admission that he was barring the blows from Panchu with his cutlass picked up from the ground at the vital point of time when Panchu was continuing his attack on him with an Eddie Polo knife (bearing in mind that there was never any suggestion that the injuries were self-inflicted)? Surely it could only be (if one is to be realistic) that the injuries were either caused accidentally or in necessary self-defence! And hardly that the injuries were never caused at all!

The trial judge, somehow or other, seems to have taken a certain view of the defence which appears to be somewhat, if not substantially, inconsistent with its true import. His Honour said this:

> "Now, he has given a statement from the dock and he told you his side of the story. I did not hear him say how the wounds were inflicted, but there was the suggestion raised in the cross-examination about the accused acting in self-defence. I would put the question of self-defence when I come to deal with his defence. But, members of the Jury, at this stage you must bear in mind the defence put forward by

the accused. He is not saying here that he inflicted those wounds on the man Chatarpaul Panchu."

Such an interpretation of the defence put forward seems to be far removed from what, in the circumstances, the appellant was endeavouring to convey, viz., that Panchu's injuries were sustained after Panchu had attacked him, choked him, thrown him in a trench, bored him with a knife, and continued to attack him with the same; and that he was forced to pick up a cutlass to defend himself under circumstances which did not permit of retreat.

Let me now examine the further statement of the trial judge (after referring to what the appellant had said in his statement from the dock), which is as follows:

> "Well, Members of the Jury, if this can be construed that he did not inflict any blow on this man, if what he is saying here you take to mean that he did not inflict any blow on this man Chatarpaul Panchu, then, Members of the Jury, you must acquit."

The two aforementioned directions, in my view, do not do justice to the defence in that they fail to capture what is basically embodies, what is fundamentally imparts, and what its primary purpose was, namely, to say: "Not that I did not do it, but I did it in circumstances which would, in law, excuse me." The trial judge was, virtually, through a misconstruction, misdirecting the jury when he interpreted the statement from the dock to mean—"He," (the appellant) "is not saying here that he inflicted those wounds on the man Chatarpaul Panchu." In my view, nothing which the appellant said or failed to say could (except in a very remote sense) be fairly construed as meaning that he did not inflict the wounds in question. Would not the jury, when asked to give their opinion as to whether the appellant in his defence meant to contend for self-defence remember the judge had told them to bear in mind "the defence put forward by the accused", and that the accused was not saying "that he inflicted those wounds"?

This direction was somewhat unfortunate, as from it a jury might well conclude that the main theme of the defence amounted to a denial of causing the injuries from which there would be no necessity to examine self-defence.

But it could well be argued that any possible harm from this wrong impression would have been corrected by the following subsequent direction:

> "If on the evidence you come to the conclusion that the accused inflicted those wounds on Chatarpaul Panchu at the time when Chatarpaul was attacking him, then, Members of the Jury, you must consider the defence of self-defence."

Let me therefore assume that the jury would, from what was so said, feel themselves compelled to proceed to consider self-defence in any event, irrespective of anything which the appellant might have said which could have led to the conclusion that he had not inflicted the wounds. How were they to proceed to examine the question? Obviously, they would have to weigh

what they found to be credible, make their conclusions of fact and then apply relevant legal principles. But how was it left for their consideration, in this succeeding passage?

> "You see you will have to examine the evidence very carefully to see if you can find self-defence raised in the defence. If you find that you must consider the question of self-defence, then, Members of the Jury, I will give you certain directions. I will give you directions on the law relating to self-defence, that is, if you are going to consider self-defence. That is a matter entirely for you."

The meaning of this passage is precise and self-explanatory. It seeks to impose a qualification on the liberty of the jury to examine the defence of self-defence. It conveys that such an exercise was not to occur in any event, but only if they considered that "self-defence raised in the defence" (after examining the evidence very carefully). Was this not another opportunity given to the jury to say that self-defence was not raised because the defence, carefully construed, amounted to a denial of causing the injuries? The matter is, in effect, left for their decision in two stages: Firstly, to make a discovery as to the existence or non-existence of self-defence from the defence put forward. And, secondly, to apply the directions on the law relating to self-defence if, and only if, they were to find that self-defence is being asserted. This approach is wholly wrong and could cause a serious upset in the process of proper adjudication. Let me revert to elementary concepts. What issues are fit to be left for the jury's consideration is a matter of law for the judge. How those issues should be decided is for the jury. In the first place then, the capacity of the evidence to lead to a particular conclusion constitutes a judicial function, after which its factual evaluation falls within the province of the jury.

There is no room for any interplay between judge and jury of these functions. There must be strict observance of what falls to the lot of each. Left as it was, the jury might have erroneously said: Since we do not construe the defence to mean that the accused inflicted the injuries, he could not be raising "self-defence"; hence the necessity neither exists to make findings on the circumstances alleged, nor to apply the legal principles stated by the judge. Any such form of reasoning must seriously imperil what is vital to the defence, viz., to have considered what it purports to raise.

Even if the appellant had expressly said in his defence that the cutlass which he had used to bar Panchu's blows had caused no injury, the question would still, in law, require the jury's opinion as to whether (despite his denial), (a) he had, in fact, caused the injuries, and (b) he had done this in necessary self-defence.

A few cases of accepted authority would illustrate what I have in mind.

In *Joseph Bullard v. R.,* (1957) A.C. 635, Lord Tucker (at p. 644) said:

> "Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a

verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice, and it is idle to speculate what verdict the jury would have reached."

In *Kwaku & Mensah v. R.*,(1946) A.C. 83, Lord Goddard (at p. 92) said:

> "If on the whole of the evidence there is nothing which can entitle a jury to return the lesser verdict, the judge is not bound to leave it to them to find murder of manslaughter. But if there is any such evidence, whether the defence have relied on it or not, the judge must bring it to the attention of the jury because if they accept it or are left in doubt about it, the prosecution have not proved affirmatively a case of murder.

In *R. v. Porritt*, (1961) 1 A.C. 1372, at his trial the appellant alleged that the shooting was in defence of a near relative in danger of his life, and that it was also in defence of his property, his own home, which was being attacked by armed raiders. It was never suggested that the appellant had been provoked or that a verdict of manslaughter was open to the jury on the evidence. The appellant was convicted of capital murder and sentenced to death. On appeal, it was held that notwithstanding the fact that the issue of provocation and possibility of a verdict of Manslaughter were not raised at the trial, it was incumbent upon the judge, if the evidence justified it, to leave such issue to the jury; and that as there was evidence on which the jury could have concluded that the killing was done after provocation justifying a verdict of Guilty of Manslaughter, such verdict would be substituted in place of the verdict of Guilty of Manslaughter. At p. 1377, Ashworth J. said, "The issue is whether there was on the evidence any material which made it incumbent on the judge to leave that issue."

And in Lee *Chun-chuen v. R.,* (1962) 3 W.R. 1461, the remarks of Lord Devlin (at p. 1469) are illuminating. After referring to the above cases, he said:

> "These are all cases in which, as in the present case, the accused was putting forward accident or self-defence as well as provocation. The admission of loss of self-control is bound to weaken, if not destroy, the alternative defence, and the law does not place the accused in a fatal dilemma. But this does not mean that the law dispenses with evidence of any material showing loss of self-control. It means no more than that loss of self-control can be shown by inference instead of by direct evidence. The facts can speak for themselves, and if they suggest a possible loss of self-control, the jury would be entitled to disregard even an express denial of loss of temper, especially when the nature of the main defence would account for the falsehood. An accused is not to be convicted because he has lied."

I would, finally, refer to *Palmer v. R.,* (1971) 1 A.E.R. 1077. (At p. 1080) Lord Morris of Borth-y-Gest said:

> "He" (the trial judge) "left the question of self-defence to the jury, even though it was never suggested by or on behalf of the appellant that he had killed this deceased in self-defence. It was his case that he was not responsible for the firing which killed the deceased. As, however, there was evidence that made possible the view that whoever it was that fired might have done so in self-defence, the learned judge very fairly left the matter to the jury. It is always (he duty of a judge to leave to the jury any issue (whether raised by the defence or not) which on the evidence in the case is an issue fit to be left to them."

I am, therefore, constrained to the firm view that the trial judge misdirected the jury when he left it for them to decide as a preliminary question whether self-defence arose as an issue. There should have been a ruling (1) that self-defence was an issue which was fit for consideration; (2) that it was for the jury to decide from the evidence on the whole case (and not from the defence only)—(a) whether the accused inflicted the injuries, and if so (b) whether it was in self-defence, having regard to the principles of law relating thereto, and the burden of proof which the prosecution had to discharge.

Although self-defence does not appear from the case for the prosecution, nevertheless it was a grave mistake to say, in effect, that it could arise from the defence only if the appellant was saying there that he had caused the wounds. The fact that he had inflicted the wounds could have been found from the case for the prosecution, and the justification therefor, if at all, from the defence.

It seems to me that two further aspects of the summing-up ought to be mentioned. The first is that too little was said as to how or in what circumstances the lack of intent to constitute the lesser offence of unlawful wounding might be inferred, e.g., that if excessive force was used when the appellant was primarily engaged in defending himself, and that it was not through revenge but more recklessness, that unlawful wounding and not wounding with intent will have been committed. The consequence of a state of mind which did not go beyond recklessness was never indicated. I would, therefore, wish to refer to the following passage in RUSSELL ON CRIME, Vol. 1, 12th Ed., (at p. 626) in which this authoritative statement is made:

> "It has been judicially confirmed that in any statutory definition of a crime 'malice' means either (i) an actual intention to do the particular kind of harm that was in fact done, or (ii) recklessness as to whether such harm should occur or not. From this it follows that no one may properly be convicted of the felony under section 18 (which expressly requires malicious intent) if no more than recklessness can be proved against him; and that his offence, in that event, will be the misdemeanour under section 20, *infra*."

The second aspect is that the jury should have been told that if they had a reasonable doubt on the whole case as to whether the offence was one

of wounding with intent or unlawful wounding, the doubt should be resolved in favour of the appellant to the extent of finding him guilty of unlawful wounding only. Whilst they were, on the burden of proof, directed generally on the larger issue of innocence or guilt, they were not so specifically directed as to that burden on the subsidiary issue as to what should happen if they were in doubt as to whether there was malice under the indictment or under the lesser offence of unlawful wounding. Nothing was said as to what should be done if they were unable to reach a clear finding one way or the other.

In this regard I would like to repeat what was said by Wooding, C.J., in *Johnson v. R.*, (1966) 10 W.I.R. 402 (at p. 417):

> "In our opinion a trial judge cannot be too careful in his charge to the jury so as to ensure that they are not left in any doubt that not only on the general issue but ordinarily also on every issue the onus rests squarely on the prosecution. As we have said, therefore, we think that in this respect the summing-up was again defective."

And in *R. v. Steane*, (1947) K.B. 997 (at p. 1004), Lord Goddard said:

> ". . . The jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction and if on a review of the whole evidence they either think that the intent did not exist, or they are left in doubt as to the intent, the prisoner is entitled to be acquitted.

In my view, this case called for such a direction.

In conclusion, I would say this: that the case for the defence was not properly put in matters which were essential to a fair assessment of the issues. In view of the serious omissions and express misdirection, it would be impossible to say whether a reasonable jury properly directed would have inevitably come to the same conclusion, as that would depend so much on how they weighed the evidence etc. The summing-up was of such a character as to deprive the appellant of the substance of a fair trial for reasons already given. An opportunity should be given to have the case properly put to the jury.

I would, therefore, propose that the conviction and sentence be set aside, and that a new trial be ordered in order to allow the defence to be put in its proper perspective, and to give the jury an opportunity of assessing what arises naturally therefrom. The interests of justice so require.

Accordingly, the conviction and sentence are set aside and a new trial ordered.

PERSAUD, J.A.: I regret that it has fallen to my lot to dissent from my learned and esteemed brothers.

The appellant was charged and convicted with wounding with intent.

The evidence given by the injured man (Chatarpaul Panchu) was that he was walking along a dam in the direction of his home when the appellant approached him with his hands behind his back. As the appellant got to within four feet of him, he (the appellant) removed his hands from behind

his back, and he was seen to be carrying a cutlass. He threatened to cut off the witness's neck, and proceeded to deal him several blows with the cutlass. The injured man fell into a trench where he was dealt a chop on the head after which he became unconscious. He regained consciousness while still in the trench; he walked out of the trench, and sat under a tree, after which he was taken to receive medical attention.

The doctor's evidence was to the effect that the injured man suffered four wounds, viz., (1) a lacerated wound about two inches long on the front portion of the scalp; (2) a lacerated wound two inches long over the right elbow region; (3) a lacerated wound over the right palm about three inches long which nearly amputated the third, fourth and fifth right fingers; and (4) a lacerated wound about two inches long over the right axillary region, left arm and left forearm. The doctor deposed that the injuries could have been caused by a sharp-cutting instrument, would cause disability and disfigurement, and were dangerous to life because of the severe bleeding at the time.

The defence was (and I quote the statement made by the appellant from the dock):

> "Chatarpaul attacked me with an Eddie Polo knife and throw me in the trench, and started to choke me. Then I scrambled out of the trench. He bore me with the knife on my hand. My cutlass was on the ground and I picked it up. He started firing blows at me, and me barring off the blows with my cutlass. All the time me shouting for help and I could not see no one and I not able to run away. Sir, I have nothing more to say."

In spite of the fact that the appellant did say, "I not able to run away," thereby possibly implying that he might have acted in self-defence, this was not put categorically by him, and the defence not having been given on oath, there was not the opportunity to elicit from the appellant what he meant exactly by the words he used. The judge could not therefore be sure whether the defence was a complete denial of inflicting the wounds, or whether the appellant was saying that he had been acting in self-defence, notwithstanding the line the cross-examination took, for suggestions made in cross-examination cannot be substituted for evidence. So he put both possibilities to the jury, that is to say, if they understood the defence to mean the former and they accepted that, then the appellant was entitled to be acquitted; on the other hand, if they understood him to be saying that he had been acting in self-defence, then they must give consideration to that defence also, and he proceeded to give them what, in my opinion, are adequate directions on self-defence in the particular circumstances of the case. The appellant might very well have meant to say that he had been acting in self-defence, but no judge has the right to select just one interpretation which arises out of the defence raised when there are other possible meanings. Were a judge to do this, he can justifiably be criticised for failing to leave findings of facts to the jury.

Only two points have been argued in this appeal: The first is that the judge did not give the jury adequate directions as regards the difference between the *mens rea* for wounding with intent and that required to ground a conviction for unlawful wounding, a verdict which was open to them on the indictment; and the second point, as I apprehend it, is that in giving the directions on self-defence, the judge ought to have gone further, and ought to have told the jury that if the force used by the appellant in defending himself was excessive, then they should convict of unlawful wounding and not wounding with intent.

In my judgment, the judge did draw a distinction between wounding with intent and unlawful wounding adequately for the purposes of this case. After describing to the jury what the various intents meant, and reminding them that the question of the appellant's intention was a matter of fact for them to determine, he addressed them in these words:

> ". . . if you, on the consideration of the whole case, find that the accused inflicted those wounds on this man Chatarpaul Panchu, and at the time when he inflicted those wounds he did not have the intent to cause him grievous bodily harm, or to maim, or to disfigure, or to disable him, then he could not be found guilty of the offence of wounding with intent. In that case, if you find that he did inflict those injuries and he did not have the intent, then he could only be found guilty of unlawful wounding."

In my opinion, by use of that language, the judge was drawing a distinction between the two offences, and was telling the jury that the lesser offence was open to them if they found no malicious intent.

The question, however, remains whether the judge was required to instruct the jury on what was meant by the term 'maliciously' as contained in s. 50 of Cap. 10 [the section which makes it an offence for unlawfully and maliciously wounding another], that is, whether he should have told them what is the meaning attributed to that expression when used in a statute. As we know, when used in a statute, 'maliciously' means either an actual intention to do the particular kind of harm that is in fact done, or recklessness as to whether such harm should occur or not, i.e., the accused must have foreseen that the particular kind of harm might be done and yet gone on to take the risk of it. It is neither limited to, nor does it require any ill-will towards the person injured, that is to say, it does not carry the same connotation as malice aforethought. And it is necessary in a case of unlawful wounding to show that the wounding was malicious, but it may be malicious although the prisoner had no spite or ill-feeling towards the prosecutor, and did not even intend to wound him. As the matter was put by Barry, J., to the jury in *R. v. Charlson* [(1955) 39 Cr. App. R. at p. 40]:

> "In relation to that charge the prosecution need not prove a specific intent. They do have to prove however that the grievous bodily harm was caused by the prisoner unlawfully and maliciously. This means that there must be a conscious act on the part of the

prisoner. Malice does not necessarily involve the existence of some hostility to the person injured. It does, however, mean that the act must be done consciously. In order to commit an unlawful and malicious act, the prisoner must know what he is doing and must realise that he has no lawful justification for doing the act."

In *R. v. Mowatt,* [(1967) 3 All E.R. 47], where the question arose as to whether it is incumbent on a judge, where the prisoner is charged under s. 20 of the Offences against the Person Act, 1861 (U.K.) [our corresponding section is 50 of the Criminal Law (Offences) Ordinance, Cap. 10] to direct a jury as to the meaning of the word 'maliciously,' Diplock, L.J., said [(ibid) at p. 50]:

". . . where the evidence for the prosecution, if accepted, shows that the physical act of the accused which caused the injury to another person was a direct assault which any ordinary person would be bound to realise was likely to cause some physical harm to the other person (as, for instance, an assault with a weapon or the boot or violence with the hands) and the defence put forward on behalf of the accused is not that the assault was accidental or that he did not realise that it might cause some physical harm to the victim, but is some other defence such as that he did not do the alleged act or that he did it in self-defence, it is unnecessary to deal specifically in the summing-up with what is meant by the word 'maliciously' in the section. It can only confuse the jury to invite them in the summing-up to consider an improbability not previously put forward and to which no evidence has been directed, to wit—that the accused did not realise what any ordinary person would have realised was a likely consequence of his act, and to tell the jury that the onus lies, not on the accused to establish, but on the prosecution to negative, that improbability, and to go on to talk about presumptions. To a jury who are not jurisprudents that sounds like jargon. In the absence of any evidence that the accused did not realise that it was a possible consequence of his act that some physical harm might be caused to the victim, the prosecution satisfy the relevant onus by proving the commission by the accused of an act which any ordinary person would realise was likely to have that consequence."

I would wish to add that in giving his directions to a jury, a judge is only required to give assistance on the issues raised (whether expressly or by inference) by the evidence (and this would include any unsworn statement an accused person might have made). What he is not expected to do, and should not do, is to lead the jury into an intellectual exercise into the labyrinth of legal principles and factual circumstances not relevant to the case in hand, for to do so would only tend to confuse the jury and to move their minds away from the issue or issues they are required to determine.

In the old case of *Reg. v. Odgers*, (1843) 174 E.R. 355, where the prisoner was indicted for maliciously cutting and wounding with intent to do grievous bodily harm, the head-note reads thus:

> "Where a party having a deadly weapon lawfully in his possession, in his own defence, but without having previously retreated as far as possible, cuts a person who is assaulting him, he is guilty of felony. . . if he intended grievous bodily harm."

In the course of his summing-up, Creswell, J., told the jury that the law was perfectly clear that 'maliciously' did not mean premeditated malice, as in murder; an intention to do the mischief unlawfully will satisfy the statute. In Driscoll's case [174 E.R. 477], Coleridge, J., in his summing-up to the jury used language which has ever since been consistently held to be the law. He said [(ibid) at p. 477]:

> "If one man strikes another a blow, that other has a right to defend himself, and to strike a blow in his defence, but he has no right to revenge himself: and if, when all the danger is past, he strikes a blow not necessary for his defence, he commits an assault and a battery. It is a common error to suppose that one person has a right to strike another who has struck him, in order to revenge himself, and it very often influences people's minds. . ."

My view is that if self-defence simpliciter is raised, and it is rejected by the jury, the prisoner is liable to be convicted for the offence charged, and not for a lesser offence. The matter was put thus in *Palmer v. Reg.*, [(1971) W.L.R. at p. 839]:

> ". . . in many cases where someone is intending to defend himself he will have had an intention to cause serious bodily injury or even to kill and if the prosecution satisfy the jury that he had one of these intentions in circumstances in which or at a time when there was no justification or excuse for having it—then the prosecution will have shown that the question of self-defence is eliminated. All other issues which on the facts may arise will be unaffected.
>
> "An issue of self-defence may of course arise in a range and variety of cases and circumstances where no death has resulted. The tests as to its rejection or its validity will be just the same as in a case where death has resulted. In its simplest form the question that arises is the question: Was the defendant acting in necessary self-defence? If the prosecution satisfy the jury that he was not then all other possible issues remain."

And the issue which remained in the case now engaging our attention if the jury rejected self-defence, was whether the appellant had any of the intents alleged. And if self-defence was rejected, it seems to me inevitable that the jury would have found one of the intents necessary, in which case

the appellant would have been liable to be convicted of the offence charged. This, it must be repeated, is where self-defence simpliciter is raised.

In the instant case if the jury found that the appellant did the act, then the only lawful justification would have been self-defence, and if they found self-defence, or were in a reasonable doubt whether this was so or not, then an acquittal must have followed. It is true to say that where the occasion warrants it, a judge should acquaint a jury as to the meaning of the term 'malicious' as used in a statute, but in my judgment it was unnecessary to do so in this case having regard to the defence led.

Now, therefore, to the second question. I will repeat it at this juncture: Ought the judge to have told the jury that if the force used by the appellant in defending himself was excessive they could have convicted him of the lesser offence of unlawful wounding?

An accused person is entitled to raise the defence of self-defence on a charge of assault, whether it be common assault, or an assault of a more aggravated nature. But, it must be remembered that although self-defence is a good defence, the law is that the prisoner must have retreated as far as was possible in the face of the attack, and the force used to repel the attack must be proportionate to the fierceness of the attack. If either of these conditions is non-existent, then the defence is of no avail.

The defence of self-defence, as I understand it, admits the assault, but pleads justification, which, if accepted, would exculpate the prisoner completely; or if the plea raises a reasonable doubt in the minds of the jury, he would also be entitled to be acquitted. It seems to me, therefore, that where the plea of self-defence is raised in the case of an assault to cause grievous bodily harm, and it fails, there is no room for a conviction for an offence of a lesser degree than that charged if the intent is proved, which is then the only issue remaining before the jury. And when regard is had to the nature of the injuries in this case, what other intent, in the absence of self-defence, could he have had but to inflict grievous bodily harm? If this is so, then it was not open to the jury to convict of unlawful wounding in this case if they rejected the defence of self-defence. This does not mean, however, that the jury could not have convicted of unlawful wounding if they found any of the intents not proved, which is a completely different thing.

The remaining point discussed by my learned brothers was not one that I understood to have been taken by learned counsel expressly. But I will give it full consideration, for I agree that even though a point has not been taken, if it is apparent from the record that there has been a miscarriage of justice due to some omission on the part of the trial judge whereby, for example, the defence was not adequately put, then it is the duty of an appellate court to give consideration to the matter, and if the defect is found to be fatal, to allow the appeal. The books abound with authorities to this effect, and it serves no useful purpose to set them down in this judgment.

After dealing with one possible meaning of the defence led, that is, that the appellant did not inflict the injuries, the judge went on to tell the jury of self-defence, which was in his opinion an alternative defence, having regard to the suggestions made in the cross-examination to the complainant that he had attacked the appellant, which he denied. The judge said: "If on the evidence, you come to the conclusion that the accused inflicted those wounds on Chatarpaul Panchu at the time when Chatarpaul Panchu was attacking him, then, members of the jury, you must consider the defence of self-defence." I pause here to observe that what I understand the judge to be saying is that if they took a certain view of the evidence, then they must consider self-defence. For my part, I can find no fault with this, as self-defence must be raised by the evidence adduced, either by the defence, or by the prosecution itself; but raised it must be from the evidence or else the necessity for directions thereon will not arise. The judge went on: "You see, you will have to examine the evidence very carefully to see if you can find self-defence raised in the defence. If you find that you must consider the question of self-defence, then members of the jury, I will give you certain directions," and he went on to give them directions to which, as I understand the position, no criticism is levelled. My understanding of the latter direction is that it is intended to be in contradistinction to the other possible finding with which the judge had already dealt, namely, that the appellant had not inflicted the wounds, and that the jury must go on to see whether they can find self-defence raised, which, in my judgment, is the only proper thing for them to have done before they could give consideration to it. It is a question of fact whether or not an accused person acted in self-defence, which is a matter for the jury to find from the evidence, subject always to proper directions as to the law applicable to such a defence. As it has been put by Wooding, C.J., in *Johnson v. R.*, [(1966) 10 W.I.R. at p. 409]:

> ". . . as the final requirement of the plea, the jury must consider, lastly, *quo animo* was the act done: was it really with the intention to defend or protect or with the intention to kill or inflict grievous bodily harm which constitutes malice aforethought? To resolve this, due account will have to be taken of the totality of the evidence relating to the prisoner's intent."

With the greatest respect, I cannot see any fault in the manner in which the matter was put to the jury in the instant case, even though, I suppose, it could have been put differently.

In *de Freitas v. R.*, (2 W.I.R. at p. 531), the Federal Supreme Court approved of a statement regarding directions to a jury when self-defence is raised given by Menzies J. in *R. v. Howe*, (1959) C.L.R. 448, and it is this:

> "A man who is attacked may use such force as on reasonable grounds he believes is necessary to prevent and resist attack, and if in using such force, he kills his assailant, he is not guilty of any crime even if the killing is intentional. In deciding in a particular case whether

> it was reasonably necessary to have used as much force as in fact was used, regard must be had to all the circumstances, including the possibility of retreating without danger or yielding anything that a man is entitled to protect."

But the Federal Court disapproved of the necessity of a jury having to go through a complicated and difficult process in reaching their verdict, and said [2 W.I.R., at p. 531]:

> "The conduct of the prisoner in such cases should be judged according to the standard of a reasonable man. If he has done no more than was, in the opinion of the jury, reasonably necessary in self defence he is entitled to be acquitted (*R. v. Lobell*). If he has gone further, his crime should only be reduced to man-slaughter if, by reason of the provocation he received, he had lost his self-control."

The desirability for simplicity in putting the defence of self-defence to a jury was further stressed in *Palmer v. Reg.*, [(1971) 2 W.I.R., at p. 843]. In that case, Lord Morris of Borth-y-Gest said:

> "In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may do only, what is reasonably necessary. But everything will depend on the particular facts and circumstances. Of these a jury can decide . . . of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence."

Later, Lord Morris said (at p. 844):

> "A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence."

To my mind, the authorities are clear that self-defence must be raised from the evidence, and as evidence is a matter for the jury to assess, it is for them to say as a matter of fact whether an accused person acted in self-defence. In this matter the judge used the words "self-defence raised in defence," which can be interpreted to mean before the jury could consider self-defence, it must have been raised by the defence only. If this is the meaning to be attached to those words, then the judge was clearly wrong, and I would have allowed this appeal and quashed the conviction. But when regard is had to the fact that in no way can it be said that self-defence arose

from the evidence for the prosecution, then it must follow that for it to have been raised at all the defence had to raise it. And the judge, it must be borne in mind, had told the jury that it was not the case that the burden of proving the absence of self-defence shifted from the State, but that they must come to a verdict upon the whole of the evidence. I cannot, therefore, see any harm done to the defence by the language used by the judge in these circumstances. I really am unable to see a different answer to the problem, for it is not the duty of the trial judge, as I conceive it, to determine whether there is enough from the evidence to raise a successful plea of self-defence, far less is it a matter for him to determine whether self-defence succeeds.

In the result, and with great respect to the views expressed to the contrary, I would move for a dismissal of this appeal, and the affirmation of the conviction and sentence.

CRANE, J A.: I have had the opportunity of reading in the judgment of the Chancellor the facts and circumstances on which the jury found the accused guilty of wounding Chatarpaul Panchu with intent to cause him grievous bodily harm or to maim, disfigure or disable him. I will not repeat them, but will accept the benefit of his narrative.

In my judgment there should be a remit of this case to the High Court and a fresh trial ordered there. The defence was misconceived by the trial judge. I think it is only fair that the jury should have the opportunity of having it properly explained to them.

Briefly, the defence from the dock was:

> "Sir, Chatarpaul attacked me with an Eddie Polo knife and throw me in the trench, and started to choke me. Then I scrambled out of the trench. He bore me with the knife in my hand. My cutlass was on the ground and I picked it up. He started firing blows at me, and me barring off the blows with my cutlass. All the time me shouting for help and I could not see no one and I not able to run away. Sir I have nothing more to say."

Immediately following this, the learned trial judge charged the jury as follows:

> "Well, members of the jury, if this can be construed that he did not inflict any blow on this man, if what he is saying here you take that to mean that he did not inflict any blow on this man, Chatarpaul Panchu, then, members of the jury, you must acquit."

In the light of so clear a statement from the dock, I should have thought it would have been apparent to anyone that what the accused was raising was the defence of self-defence. That is why it is difficult to see how the learned judge could have invited the jury to consider the matter just as they would normally do in making a finding of fact on a bare denial of the commission of any act, viz., that the accused was claiming he did not inflict any blows on Panchu, and if they found he did not, then they should

acquit him'. That this was a misdirection is clear, and it is even more apparent from a previous passage in the summing-up at page 22 of the record:

> "Now, he has given a statement from the dock and he told you his side of the story. I did not hear him say how the wounds were inflicted but there was the suggestion raised in the cross-examination about the accused acting in self-defence. I would put the question of self-defence when I come to deal with his defence. But, members of the jury, at this stage you must bear in mind the defence put forward by the accused. He is not saying here that he inflicted those wounds on the man, Chatarpaul Panchu."

At page 11 of the transcript, the suggestion admittedly does arise from the cross-examination of the injured man that it was he, a violent man, who first had attacked with an Eddie Polo knife when the accused was shouting for assistance. But, as is well-known, self-defence may also be gathered from cross-examination, although in the normal case it is specifically raised by an accused himself either under that name or in words (like in the present case) suggestive of that defence. In the present case, however, the suggestion made to the injured man under cross-examination that the accused was acting under self-defence was repeated by the accused in his statement from the dock. Unfortunately, however, this was not appreciated, I respectfully say, by the learned trial judge, who appeared to think of, and to treat the statement from the dock as a bare denial that the wounds were inflicted by the accused. The clear result of the judge having fallen into this error caused him to misconstrue the functions of judge and jury, and to relegate self-defence to a matter of secondary importance in the minds of the jury, who were left free to choose whether they would consider it as a defence or not. Instead of the traditional question as to whether there is any evidence which raises a question of self-defence being left for judicial determination for submission to the jury, they were told they were entirely free to determine whether they could find evidence of self-defence, and if they did so find, it was entirely a matter for them to consider whether they were going to consider it. This was how the learned trial judge left the matter of self-defence to the jury:

> "If, on the evidence, you come to the conclusion that the accused inflicted those wounds on Chatarpaul Panchu at the time when Chatarpaul Panchu was attacking him, then, members of the jury, you must consider the defence of self-defence. You see, you will have to examine the evidence very carefully to see if you can find self-defence raised in the defence. If you find that you must consider the question of self-defence, then members of the jury, I will give you certain directions. I will give you directions on the law relating to self-defence. That is if you are going to consider self-defence. That is a matter entirely for you."

Ever since the functions of judge and jury became separated, the question whether there is "any sufficient evidence" to support an issue of self-fence arising either from the defence proper or from cross-examination, is

always left within the province of the judge to decide. The cases of *Bollard*, (1957) A.C. 635, and *R. v. Porritt*, (1961) A.C. 1372, and many others, all show that it is within the province of the judge to find whether there is sufficient evidence of self-defence, even if the issue is not specifically raised by the accused. Once the judge finds there is sufficient evidence of it, he must so instruct the jury who are in duty bound to consider it particularly as it may result in the acquittal of the accused. So the remark of the learned trial judge can never be justified that it is entirely a matter for the jury to say whether they would consider self-defence. On the other hand, it is solely within the province of the jury in the event of their being an affirmative ruling by the judge to say whether that evidence ought to be believed. If there is no evidence, or no sufficient evidence of self-defence, it is the duty of the trial judge not to put that defence before the jury; but a judge may never, as has been done here, abdicate his function of deciding whether there is evidence of self-defence in favour of the jury doing so.

The defence having been thus misconceived, the resultant position seems to be this: Evidence of self-defence having been wrongly left to the jury to find, this court is not in a position to say with any degree of certainty whether the jury in fact did seek for any such evidence, or whether they found any, and if so, whether they considered and rejected what they found. However, it being very clear to us that there is evidence of self-defence on record, it is very likely a miscarriage of justice may have occurred in that the jury left unshepherded by the judicial hand, did seek for but did not find any. In that event, we cannot feel sure the accused has not lost the chance of an acquittal if the jury were minded to accept his defence of self-defence. The important point to bear in mind is, I think, that if there was some material on which a reasonable jury could have returned a verdict of self-defence, it cannot be said with certainty they had properly convicted the accused of wounding Chatarpaul Panchu with intent to cause him grievous bodily harm or to maim, disfigure or disable him. This is why I feel there has not been a fair trial. It cannot be said that the jury did address their minds to the only possible defence revealed in the statement from the dock which I have highlighted above. I find myself in full accord with what fell from the lips of Bell, C.J. in *Samaroo & Ezaz v. The Queen,* (1953) L.R.B.G., at pp. 150 and 151 where he said:

> "Now, it is clearly settled law that it is of paramount importance that the summing-up must fairly put the case for the defence, whatever it may be. No matter how trivial or stupid, or unlikely the defence may be, it is of paramount importance that the judge in his summing-up must fairly put that defence to the jury. If authority were needed for that proposition, there is plenty of it in the books; for instance, the cases of *Totty* (1914) 10 C.A.R.; *Immer* (1917) 13 C.A.R., and *Dinnick* (1909) 3 C.A.R. . . .
>
> It must be, we feel, the duty of this court to ensure that judges trying cases with juries do not overlook that important principle. We would reiterate that it is the function of the court to make sure that a

judge sitting with a jury never loses sight of the fact that at some stage of his summing-up and in some language and method he must alert the jury to the defence which has been offered to them by the accused. That is a very fundamental duty which we, as a Court of Appeal, would fail in if we did not emphasise it.

Now, we have given very earnest consideration to the question whether the proviso to the Criminal Appeal Ordinance should be applied in this case and after that careful thought and consideration we have come to the conclusion that it would not be a proper case in which to apply the proviso. We have been unable to satisfy ourselves, on the principles laid down in the cases of *Haddy* (1944) K.B., *Stirland* (1944) and *R. v. Farid*, that had there been proper direction the jury would have come to the same conclusion as they did which is really the test that we must apply. For these reasons we feel that the appeal in each case must be allowed and the convictions and sentences quashed. That being so, we direct the discharge of the appellants."

Just as the Court of Criminal Appeal did in *Samaroo's* case, I consider it would be inappropriate to apply the proviso. I have always thought that the proviso is never meant to be applied to a case where, as here, a man's defence has not been adequately put or at all left to the jury, or where, as sometimes happens, there has been no direction on, or a misdirection on the burden of proof. In the latter case, so far as I am aware from the majority of decided cases, the invariable practice is to allow the appeal and discharge the prisoner, though I have seen cases where a re-trial has been ordered. In the former, since there has never been really a trial, the logical course is to remit the case to the High Court with directions for a new trial. True, in *Samaroo's* case the appellants were discharged and the proviso not applied, but today, an accused will not be entitled to be discharged solely for the reason that his" defence has not been properly put before the jury. Today, we have the power to order a re-trial, which the now defunct Court of Criminal Appeal Ordinance No. 29/1950, under which Samaroo's appeal was heard, did not have.

I agree with the Order the Chancellor proposes.

Appeal allowed.

OGLE COMPANY LTD., *v.* MANGRI RAJNARINE

[Court of Appeal (Luckhoo, C, Persaud and Crane, JJA.) October 26, 27; December 17, 1971]

Workmen's Compensation—Cause of death—Not traceable to employment—No proof that injury was result of accident.

Evidence—Medical report—Doctor absent from country—Not available—Not reasonably practical to secure witness's attendance—Admissibility of report—Evidence Ordinance, Cap. 25, s. 90.

Evidence—Application for workmen's compensation—Medical chart—Issued by doctor—Doctor in employment of employers—Whether doctor was a person interested in the result of the proceedings—Evidence Ordinance Cap. 25, s. 90(3).

The deceased workman, together with others, was employed clearing canals on the employers' land. To do so, it was necessary for the workman to stand in water in trenches. The deceased was observed to be trembling, and his teeth chattering. He was unable to leave the trench by his own efforts, and had to be assisted out. He was next seen lying in an unconscious state in the hospital where he died 24 hours later. There was no evidence as to how he got to the hospital after he left the trench, or what happened to him during that period. At the hearing of an application by the deceased's wife for workmen's compensation, an attempt was made by the employers to put in evidence the medical chart and medical report on the grounds that the doctor who had prepared those documents was out of the country. Objection was taken that there was not enough proof that the doctor was out of the country and that the doctor was an interested person.

HELD: On appeal, (i) both documents were admissible in that there was enough evidence before the court to satisfy the condition that the doctor was out of the country and his attendance was not reasonably practical, and even though the doctor was employed by the employers, he was not a person interested in the result of the proceedings within the meaning of the rule;

(ii) (Crane, J.A., dissenting) there was not enough proof upon the evidence led upon which to make the finding that the deceased suffered the injury which caused his death out of and in the course of his employment.

Appeal allowed.

Editor's note: This case is also reported in (1971) 17 W.I.R. 530]

G. M. Farnum, S.C., for the appellants.

D.C. Jagan for the respondents.

PERSAUD, J.A.(Luckhoo, C, concurring): This is an appeal from a judgment of the Full Court in which that court affirmed an award made by a magistrate against the appellants on an application by the respondent who is the widow and dependant of the deceased workman, Sugrim Rajnarine.

Apart from the medical evidence over which there is acute controversy, and which therefore will be dealt with later in this judgment, the evidence is as follows: The deceased who then appeared to be in good health was together with others employed by the appellants in the job of clearing canals at the back of Pln. Ogle. They were required to stand in water 5 to 6 feet deep while working; it was cold as rain was falling, and the deceased was observed to be trembling and his teeth chattering. As he attempted to climb out of the trench in which the men were working, he was unable to do so (the reason is not apparent), and one of his comrades assisted him out. He spoke in a trembling voice saying he was cold and that the others should continue working. They did so, leaving the deceased sitting on the dam. It was still raining. The last time he was spoken to was about midday. The others continued working until about 2.30 to 3.00 p.m., and when they returned to the dam, they did not see Sugrim Rajnarine.

There is no evidence as to what transpired between midday and 4.00 p.m. on that day, but at 4.00 p.m. the respondent went to the Lusignan Hospital where she saw her husband lying on a bed but incapable of speech. He died about 24 hours later.

After the factual evidence was led, and after Mr. Hulbert Hugh a surgeon, had given as his opinion having listened to the evidence, that the deceased had died from acute pneumonia, and that it was unlikely that he had died from subarachnoid haemorrhage, counsel for the appellants informed the court that his only witness, Dr. Brahman, was then out of the country, and applied for an adjournment. This application was opposed but nevertheless one month's adjournment was given.

When the matter was called again, the assistant personnel manager gave evidence and an attempt was made to tender Dr. Brahman's medical report through this witness; nothing was said of the doctor's absence from the country. Counsel for the respondent objected to the admission of the report on the ground that s. 90(3) of the Evidence Ordinance, *Cap.* 25, rendered it inadmissible. The magistrate admitted the medical report. I digress here to state that both before the Full Court and this Court, counsel based his objection not only on non-compliance with the Ordinance, in that there was no satisfactory proof that Dr. Brahman was out of the country, but also that he was an interested party. The Full Court accepted both submissions.

The next step was the calling of Dr. Beadnell who was in charge of the Lusignan Hospital at the relevant time, and through whom it was sought to put in the medical chart written up by Dr. Brahman as part of the records of the hospital, and as having been written up contemporaneously. Again objection was taken to the admission of this evidence on the ground that Dr. Brahman was an interested person. The magistrate admitted the docu-

ment, but the Full Court ruled that it was inadmissible for the same reason. However, that Court, in giving its reasons for so doing, seemed to have concentrated on the report (Ex. "A"), rather than the Chart (ex. "B"), and held that when Dr. Brahman signed Ex. "A", proceedings were actually pending, that from the evidence, Dr. Brahman could not be said to have been indifferent to the results of the proceedings as he was personally interested to see that his medical report or certificate was maintained, and that his skill and competence did come into question because he had performed a lumbar puncture on the deceased and this showed blood-stained cerebro-spinal fluid which confirmed his diagnosis of subarachnoid haemorrhage, whereas Mr. Hugh's evidence was that pneumonia would not have caused blood to be present in the cerebrospinal fluid but a technical error (presumably in administering the lumbar puncture) could cause this. The Full Court also expressed the view that even if both documents were admissible, there appeared a conflict between Dr. Brahman's evidence and that of Dr. Beadnell in that the former spoke of subarachnoid haemorrhage while the latter of cerebral haemorrhage, and the appellants not having pleaded the cause of death as that described by Dr. Beadnell, the magistrate was justified in coming to the conclusion that the deceased had come to his death as a result of bronchopneumonia, which was triggered by exposure to cold water as testified to by Mr. Hugh.

I will deal first with the question of the admissibility of the medical report (Ex. "A"). I will not trouble myself with a recital of s. 90 of the Evidence Ordinance under which it was sought to put the document in. Suffice it to say that the ground advanced for its admission was that the witness was at the time of trial 'outside of Guyana and it is not reasonably practical to secure his attendance'. For my part, I am inclined to agree with the Full Court that the conditions laid down in the statute must be properly proved, and by proof I mean properly admissible evidence. Of course if in a civil case a statement made by one side at the Bar table is accepted as a fact by the other side, there would appear to be no need for further proof.

In *Enmore Estates Ltd. v. Solomon* (unreported), the note made by the magistrate appertaining to the doctor who had examined the workman was as follows:

> "Mr. Stafford says that Dr. Persaud who examined the patient left the country in August, 1968, and left the employment of the Sugar Producers' Association on 15th June, 1968".

The note was made on 11th February, 1969. The meaning intended to be conveyed by that statement made by counsel is that the witness was out of Guyana, and it was not reasonably practical to secure his attendance. No objection was taken, and the magistrate admitted a certificate and certain cards, all written up by Dr. Persaud. But the Full Court held that those documents were inadmissible in relation to the truth of their contents as they had not been tendered in evidence by the person who had prepared them, namely. Dr. Persaud; there was no proof that the documents formed part of a record purporting to be a continuous record nor was there proof that the

maker of the statement was beyond the seas and it was not reasonably practical to secure his opinion (attendance?). On appeal to this Court, the matter was sent back to the magistrate with directions to admit the documents, and to come to a decision after giving them due consideration. This Court did not deliver a written decision, but it is apparent from the order made that it was felt that there was sufficient to satisfy the condition that the doctor was out of the country and his attendance was not reasonably practical.

In the instant case, objection was taken to the admission of this document after it was stated that Dr. Brahman was out of the country and was not expected to return until about two months' time. The magistrate records—"Mr. Jagan opposed the application as this matter was filed since 16th January 1967, and the respondent must have known that Dr. Brahman who is employed by the respondent was leaving the country, and could have asked that his evidence be taken before leaving." Later Mr. Jagan objected on the ground that the doctor's report was inadmissible because it was opinion evidence, and still later on the ground that Dr. Brahman was an interested person. Faced with these series of objections, Mr. Farnum took up the position that he was not seeking the document's admission to show the cause of death, but would call Dr. Beadnell to give opinion evidence, presumably based on the document. Later, however, Mr. Farnum sought to put in through Dr. Beadnell the medical chart (Ex. "B") as a contemporaneous record made by Dr. Brahman as to the facts then existing.

In my judgment, no objection was taken before the magistrate on the ground that there was no proof that Dr. Brahman was out of the country and that it was not reasonably practical to secure his return. If this is so, I fail to see how the objection on that ground can be taken on appeal. The truth of the matter is that counsel seemed to have been concentrating on grounds other than this one, and might very well have overlooked it. If I am to follow this court's decision in *Enmore Estates, Ltd., v. Solomon,* then I must hold that there was enough proof of absence from the country and that it was not reasonably practicable to secure the witness's attendance, in which case the medical report (Ex. "A") would be admissible.

The question whether Dr. Brahman was an interested party was canvassed as regards both documents. Perhaps it would be useful to set out subsection (3) of s. 90 of Cap. 25. That subsection reads:

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

This question has come up for consideration in several English cases, where the enactment is the same as ours, and has also been dealt with in some detail in A*lly v. Hand-in-Hand Insurance Co. Ltd.,* [(1965)9 W.I.R. 242]

I will commence by quoting from the judgment of Wallington J. in *The Estate of Hill, Brahman v. Haslewood,* [(1948) All E.R. at 490]:

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

It is true to say that in *Plomein Fuel Economiser Co. Ltd. v. National Marketing Co.,* [(1941) 1 All E.R. at p. 313], Morton J. suggested a useful test, though not perhaps the only test, was whether it had been better for a deceased watchman that the plaintiff company should succeed in the action, or whether it had been a matter of indifference. But this test was held to be too wide by Devlin L. J. in *Bearmans, Ltd. v. Metropolitan Police,* [(1961) 1 All E.R. at p. 393]. And it has been held in both *Kelleher v. T. Wall & Sons,* [(1958) 2 All E.R. 686] and *Constantou v. Frederick Hotels Ltd.,* [(1965) 3 All E.R. 847] that the mere fact that the maker of the statement tendered is in the employ of a party to the action does not by itself make him a person interested in the proceedings within the meaning of the statute.

In the *Bearmans* case, Master Jacob sought to categorise the type of person who can be described as a person interested in the result of the proceedings. He described these categories:

> "(1) Where the maker of the statement has, or can properly be considered as having any financial or pecuniary interest, whether direct or indirect, or whether to be gained or lost, in the outcome of the proceedings.
>
> "(2) When the result of the action may render him personally liable for the events being litigated . . . because the judgment would tend to establish his liability.
>
> "(3) Where his skill, competence or conduct in relation to the events litigated in the action, and the result of the action would, or even might, reflect whether favourably or unfavourably, on him."

On appeal, Devlin L.J. suggested a negative approach ". . . not witness", said the Lord Justice, "ought to be held to be 'a person interested' on a ground which would not be taken into consideration as affecting the weight of his evidence if he was actually called into court." I would hold that had Dr. Brahman been called, it could hardly have been urged with success that he is an interested person because he was in the employ of the appellants, and the fact that he was so employed, could not by itself be taken into account in assessing the weight of his evidence.

Mr. Hugh, who gave evidence for the respondent and who did not have the benefit of the medical report or the chart, said that 'doing a lumbar puncture of drawing off cerebro-spinal fluid, you may get blood in the specimen if the needle punctures a blood vessel'. He also said that pneumonia will not cause blood in the cerebro-spinal fluid, but on account of a technical error there may be blood in the cerebro-spinal fluid. But he conceded that if there is blood-stain in the cerebro-spinal fluid, then there was haem-

orrhage in the subarachnoid space. How from this evidence it can be said that Dr. Brahman's reputation as a doctor was at stake is difficult for me to appreciate. However eminently qualified a witness may be, he cannot speak of the possibility of a technical error *in vacua;* he must base his opinion on some concrete piece of evidence, and not indulge in rash views. Why, for instance, must a court in the face of the evidence before it, say that Dr. Brahman might have committed a technical error, rather than he was certain of his diagnosis? With great respect to the views expressed by the Full Court, I cannot find that there was enough on which to find that Dr. Brahman was an interested person. I would therefore hold that Ex. "B" was also admissible.

This then takes us to the cause of death. There can be no doubt that the deceased died from pneumonia, and there is enough to show that this was a secondary disease, the primary disease being subarachnoid haemorrhage. For the respondent to succeed in this case she must show either that pneumonia was contracted by the deceased in the course of his employment, or that the subarachnoid haemorrhage was so caused. In my opinion, once it is admitted that the pneumonia was secondary, and it has not been proved that the haemorrhage was as a result of an accident out of or in the course of the deceased's employment, she will not succeed. There is a lacuna in the chain of causation. The fact that the deceased was cold and shivering does not necessarily mean that there would have been a resulting haemorrhage. Haemorrhage in the subarachnoid space can be caused by a multiple of reasons, one of them being 'natural causes', and may be spontaneous. As I have indicated, if the plaintiff could have proved that the haemorrhage was brought on or could have been brought on by the exposure to cold, then she was bound to succeed. But this is not the state of her evidence. Her case is a simple one; her husband died from pneumonia as a result of exposure to the rain and being in the water for some time. The medical certificate and chart indicate otherwise. In my judgment, even though the result may cause her severe hardship, she cannot succeed on the facts.

Counsel for the respondent relies upon the case of *Walker v. Bairds & Dalmellington Ltd.,* [(1935) 38 B.W.C.C. 213]. There the principal point for decision was whether broncho-pneumonia caused by the sudden and unexpected onset of a chill contracted in conditions normal in carrying out the workman's job in the accustomed manner and frequently experienced by him on previous occasions without ill results, was in the nature of an accident arising out of and in the course of the workman's employment. It was held that it was. But in that case it is important to bear in mind that there was evidence that the disease arose directly from the workman's occupation, a finding which in this matter the Court is asked to imply from the circumstances and based on Mr. Hugh's evidence as opposed to the evidence recorded on the medical certificate and chart, and Dr. Beadnell's evidence. Mr. Hugh did not have the benefit of the symptoms recorded by Dr. Brahman, and expressed his opinion based on the evidence of a lay witness who described what he had seen before the deceased was examined by Dr. Brahman. On the chart, Dr. Brahman set down the condition of the patient, and from

what he found, recorded his diagnosis, which was confirmed by a lumbar puncture which he did.

Mr. Farnum relies on *Hawkins v. Powells Tillery Coal Co. Ltd.,* [(1911) 1 K.B. 988] where an elderly man employed as a timberman at a colliery was engaged in helping to push empty trucks up an incline. He then set to work to cut a timber prop into shape. Ten minutes later he complained of being in pain, and he died in the evening of the same day of angina pectoris. Held that this accident did not arise out of and in the course of the employment, Fletcher Moulton L.J. saying (at p. 995 ibid): "They (meaning the applicants) must prove their case; that is to say, they cannot show with reasonable clearness that the accident did come from the employment."

Counsel for the applicant in this case has drawn attention to the fact that in the later case of *Treloar v. Falmouth Docks & Engineering Co. Ltd.,* [(1932) 25 B.W.C.C], Slesser L.J. used language suggesting that the Hawkins case may be disregarded, but it is my opinion that there is no assailing the dictum of Fletcher Moulton L.J. (supra). In any event, Slesser, L.J. said that the true principles are to be found in the cases of *Mc Farlane v. Hutton Bros.,* [(1926) 20 B.W.C.C] and *Muscroft v. Stewart & Lloyds, Ltd.,* [(1928) 21 B.W.C.C. 274].

In the Mc Farlane case, a stevedore, who for many years had done his work satisfactorily, whilst employed unloading a ship had to fill a tub with iron ore. While fitting the tub into the right position, he suddenly said, 'Oh!' and ceased work for a moment, but recovering, put some iron ore into the tub, when he again felt ill and stopped. He lay down and within half an hour of his saying 'Oh!', died. It was held that on the evidence death resulted from a strain incurred in the ordinary exercise of a man's work, and this amounted to an accident within the meaning of the Act.

In the *Muscroft* case, a miner, who was known to be suffering from valvular disease of the heart, returned to work against his doctor's advice. His condition was such that he was liable to collapse or sudden death at any moment. He went down the mine at 10.30 p.m. and was alive and apparently well at 3 a.m. At 4 a.m. he was found dead in his stall, lying back as though asleep. There was no evidence of any fall of roof and he had no pick in his hand. He was alone at the time and there was no evidence of what the man was actually doing. It was held that there was no evidence that the man's death was caused by any strain at work, and therefore no evidence that death resulted from any injury by accident arising out of employment.

The distinction between these two cases is readily apparent. If there is evidence of a workman dying in the course of his employment by a condition which he might have had before, but which is worsened by his employment resulting in death, then he is regarded as coming within the Act; but where a workman dies during his employment by a disease unrelated to that employment, and is not aggravated thereby, he does not fall within the Act.

In the instant case, it is true that the deceased died from pneumonia, but that is not traceable to his employment but to subarachnoid haemorrhage which itself is not so traceable. I repeat, had there been evidence that the pneumonia was contracted by the exposure he underwent, then that would have been a different situation.

Before leaving this case, I would like to refer to two other cases that were cited in the course of the arguments. The first is *Kerr v. Ayr Steam Shipping Co., Ltd.,* [(1914) 7 B.W.C.C. 801]. In that case, the deceased was a cook on board a ship lying in harbour. He was resting on his bunk at 4 p.m. when he was told by the Captain to prepare tea. At 5.30 the Chief Officer, on going to see what kept him, could not find him. On the next day his body clad only in under-clothing was found in the sea near to the spot where the ship had been lying in the harbour. Other articles of his clothing had been found together with his purse and watch in the saloon of the ship. There was evidence that he was subject to sudden attacks of sickness. It was held by the House of Lords (Lords Atkinson and Dunedin dissenting) that the arbiter was justified on the facts stated as admitted or proved in finding that the accident arose out of the employment. With great respect, I doubt the force of this decision on the point under discussion, for apart from the fact that it was not a unanimous one, the majority decision seemed to have turned on the question whether the finding of the arbiter was one which could have been made from the evidence led and a refusal to reverse that finding. As Lord Loreburn (for the majority) said (at p. 805):

> "The point is that the arbiter took the view, and though I could understand his taking a different view, I think there was evidence which justified him in inferring that the man died by accident arising out of his employment."

And (at p. 819 ibid) Lord PARMOOR said:

> "I wish to express no opinion either way on the reasonableness of the findings in itself so long as it is a possible finding for a reasonable man. This consideration is not only in my opinion irrelevant, but to enter upon it in any form opens a door which should be kept shut."

While I note the view expressed by Lord Atkinson that the evidence left the accident entirely unexplained, it may be that the majority of the court felt that the state of the law appertaining to appeals to the House of Lords being what it was, they were not prepared to reverse a finding of fact once it was a finding that was possible from the evidence.

The other case is *Martin v. Manchester Corp.,* 5 B.W.C.C. decided in the Court of Appeal. The workman was a porter in a fever hospital, and part of his duties was to clean out the mortuary and attend in the scarlet fever wards. He fell ill with influenza necessitating his staying away from work. Upon his

resumption, he fell ill again. He developed scarlet fever which totally incapacitated him for several weeks. It was held that there was no evidence to support the finding of the County Court Judge that this was an accident arising out of and in the course of the workman's employment. In the course of his judgment, Cozens-Hardy, M.R., said (at p. 261 ibid):

> "A workman cannot recover compensation under the Act unless he can satisfy the Court that there is a particular time, place, and circumstances in which the injury by accident happened. Unless he can do that, he must fail."

And Buckley, L.J., said (at p. 262 ibid):

> "The most that can be said here is that this man was employed in a scarlet fever hospital, and it may be more probable that he contracted the complaint in the place where there were scarlet fever patients than in the street or his aunt's house. But that will not do. You must not say, 'It is very likely that I did contract it here;' you cannot show that you did contract it there. Even if he contracted it in the hospital, it is not enough, because you must show that he contracted it by accident."

Of course, I need hardly add that if from the evidence it can be fairly inferred that an injury was suffered as a result of an accident, that will be enough. It is my view that *Martin v. Manchester Corp.* (supra) is a very weighty authority against the respondent (applicant) in this matter.

This case is probably a hard case, and though my sympathy may be with the applicant, I cannot find it convenient to depart from what, in my opinion, are clearly defined principles of law.

The appeal should, in my judgment, succeed, and both the judgments of the Full Court and that of the magistrate reversed. The claim should be dismissed. Each party to bear his own costs.

CRANE, J.A.: This is an appeal from the judgment of the Full Court which affirmed the decision of a magistrate of the Georgetown Judicial District before whom a claim for workmen's compensation was preferred by the wife of a deceased workman, Sugrim Rajnarine. The claim was for personal injury by accident arising out of and in the course of employment with the appellants.

There is no dispute about the facts of this case. They are very simple. They were narrated to the learned magistrate by a co-worker called Prem who was not cross-examined on them.

It was about 7 am. on the 9th August, 1966, when the deceased, who from all appearances was well and healthy, proceeded on orders to Pln. Ogle backdam to clean canals belonging to the appellants. Messrs. Ogle

Company Ltd. Work began at 9 a.m. in cold conditions and falling rain in water some five to six feet deep in which he was required to stand. Sugrim Rajnarine was approximately 5′ 4″ tall, and as he worked was sometimes seen to be completely immersed in the water. At about 10 a.m. he complained of the cold; his teeth chattered and his body trembled as he did so; he tried to leave the trench alone but was unable to do so without assistance, so Prem pushed him out of the canal on to the nearby dam where he remained while the others continued working until noon. At that time they returned to find the deceased still lying on the dam, but missed him at 3.30 p.m. when work ceased for the day.

From Prem's testimony and from the first entry on the admission card (Ex. "B") of Pln. Lusignan Hospital where the deceased was taken and where he died on the following day, one can, I think, readily infer that he was carried directly there from the dam sometime between midday and 3 p.m. on the 9th August, 1966. The following entry was made on the card: "9 Aug. '66. Was found unconscious by side of a trench this P.M. No history available apart from this." This entry, which forms part of a continuous record made in the course of duty, surprisingly does not bear the time of the deceased's admission.

On examining him, Dr. Brahman, the estate doctor, found hydration to be normal though the deceased was unresponsive to any stimulus. Cheyne strokes respiration was observed with "blood pressure at 160/100 and a bounding pulse 80 at regular." There was no abnormality about the abdomen, but the central nervous system showed constricted pupils that were non-reacting to light. There was no rigidity of the neck save a flaccid left side with a left facial paralysis. Reflexes were not elicitable. There were no external signs of injury nor haemorrhage, though the ears and nose were clear. It was in these circumstances that Dr. Brahman considered an urgent lumbar puncture necessary, and the result of that operation was to reveal the presence of blood in the cerebrospinal column. This, according to his report, confirmed a diagnosis of subarachnoid haemorrhage from which broncho-pneumonia developed causing death on the following day. So positive was Dr. Brahman about the correctness of his diagnosis that he considered it unnecessary to conduct a post-mortem examination which, *ex concessis,* was the only sure way of proving there was, in fact, subarachnoid haemorrhage.

While Prem was testifying in the Magistrate's Court, Mr. Hulbert Hugh, F.R.C.S., was allowed to sit in with the Court's permission. Mr. Hugh is a registered medical practitioner of 27 years' standing, and is much experienced in industrial matters. Sitting in court, he overheard what Prem said, and having been afterwards called on to testify as an expert witness, said that assuming the deceased died at about 4 p.m. on the day after his admission in a comatosed state to hospital, it was his opinion he was in a dying condition

when so admitted, and that the cause of death was an acute infection such as pneumonia, which had its onset at the time he was trembling and chattering in the water. Such a condition, Mr. Hugh continued, "is commonly known as 'ague', but technically known as 'rigor'"; it is indicative of an acute bacterial invasion of the body which eventually manifests itself as acute pneumonia. The doctor then went on to say that assuming the deceased was getting cold at 10 a.m. on the 9th August, his firm opinion was that bacteria "triggered by exposure to cold water" invaded the blood-stream in mass and was responsible for the ague or rigor. He would, nevertheless, maintain this opinion even if the deceased had as a fact developed pneumonia on the 10th August; although he himself thought the pneumonia was present at the inception, notwithstanding it was not detected until the next day.

Expressing an opinion on the result of the lumbar puncture which Dr. Brahman considered necessary, Mr. Hugh considered subarachnoid haemorrhage most unlikely as an injury which contributed to pneumonia, the cause of death, for the reason that he did not hear from the evidence of either Prem or Mangri, the deceased's wife, any history of a head injury; in fact, he considered subarachnoid haemorrhage is not easily detectable without a post-mortem examination because there is the possibility that blood may appear in the cerebro-spinal fluid on account of a technical error such as the puncturing of a vein. The possibility of such an error was admitted by Dr. Beadnell another estate doctor, who was summoned in the Magistrate's Court to put in evidence the hospital chart, to which I have already referred, and on which the first entry and subsequent progress reports of the deceased were written. It was found necessary to summon Dr. Beadnell, the officer in charge of Lusignan Hospital, because during the hearing in the Magistrate's Court Dr. Brahman was out of Guyana and objection was taken to the introduction in evidence of a report signed by him relative to the condition of the deceased workman. That report (Ex. "A") is dated 7th February, 1967, nearly six months after the death, and was obviously made up from the hospital chart (Ex. "B"). I shall have something more to say of both these documents later, both because the Full Court, *ex mero motu,* as an alternative reason for supporting the magistrate's decision, considered them inadmissible under s. 90 of the Evidence Ordinance, Cap. 25, and because that reason has been attacked in what had originally been the only ground of appeal before us.

After outlining the evidence before him, the magistrate said he entertained no doubt that the deceased had, in the course of his employment while cleaning a canal on the 9th August, contracted pneumonia which was "triggered by exposure to cold water", that is to say, the result of having taken a chill. In so concluding, he gave consideration to the fact that Prem's evidence was unchallenged by cross-examination; to the absence of any

proof that the deceased was sickly or otherwise in poor health when he entered the water; to the absence of a post-mortem examination with dissection; and, above all, to the medical evidence on both sides that a lumbar puncture is not an entirely positive means of determining subarachnoid haemorrhage as an injury contributory to pneumonia, the cause of death. The magistrate therefore came to the conclusion there was a preponderance of evidence in favour of the widow of the deceased workman that his death on the 10th August was caused by accident arising out of and in the course of employment on the previous day when he sustained personal injury by chill in cold water whilst cleaning the respondents' canal, and that the chill developed into broncho-pneumonia from which he died.

Two sets of reasons were given by the Full Court for affirming the magistrate's decision. I have said the second formed what was originally the sole ground of appeal before us. The first reason was that there was a conflict of medical opinion between Dr. Brahman and Dr. Beadnell on the matter of the cause of death. It was the former's view that the deceased died from broncho-pneumonia following a subarachnoid haemorrhage, whereas the latter thought that the deceased died from a stroke due to cerebral haemorrhage; however, because there was no such allegation on the pleadings, the Full Court considered the magistrate justified in adhering to Mr. Hugh's opinion—that the deceased died from broncho-pneumonia "triggered by exposure to cold water".

The second and alternative reason of the Full Court was that both Dr. Brahman's report and the patient's hospital chart (Exs. "A" and "B"—previously referred to) were inadmissible in evidence under s. 90 of the Evidence Ordinance, Cap. 25. As I said, it will be necessary for me to refer to these reasons since they originally formed the sole grounds of appeal before us. Dr. Brahman's report was considered inadmissible on the ground that the required foundation for its reception in evidence had not been laid, while the medical chart was so considered on the ground that Dr. Brahman, who was concerned with writing it up, was a 'person interested' under s. 90 (3) of the same Ordinance. S. 90(3) reads as follows:

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

But whatever doubt one can entertain about the admissibility of counsel's statement from the Bar table that the doctor was out of the country, and the point that there was the absence of any positive evidence that it was not reasonably practicable to secure the doctor's attendance before his report was received, I think there can be no doubt that the medical chart was properly received into evidence by the magistrate. The Full Court, however,

rejected it on the ground that Dr. Brahman was a "person interested" in the proceedings. It is, however, difficult to see how that doctor could have been so regarded when the medical chart was written up by him at a time when the deceased was still alive, and when there was absolutely no ground for anticipating litigation. The chart is a document made *ante litem motam.* S. 90(3) of Cap. 25 under which evidence of any statement made by a person interested is rendered inadmissible in evidence, requires legal proceedings to be either pending or anticipated and that they involve a dispute as to any fact which such statement may tend to establish. So to be considered a person interested, it must be shown that there was a *lis mota* in which the witness had a motive to misrepresent the facts sought to be established by the statement. This precaution is obviously intended to obviate any bias on the part of the maker of the statement in the document; but for the subsection to become operative, there must be evidence that a person who is a witness is exposed to a "real likelihood of bias". There must be a "real possibility of bias," said Slade J., who, when he was interpreting s. 1(1) of the Evidence Act, 1938, which is in almost identical respects similar to our S. 90(3), suggested the following test in *Bearman Ltd. v. Metropolitan Police etc.* (1961) 1 All E.R. at p. 394:

> "The subsection seems to me to involve a similar inquiry to that which arises in the so-called 'bias' cases. It is now well settled that, to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest, other than pecuniary or proprietory interest, a 'real likelihood of bias' must be shown (see *R. v. Camborne JJ., Ex p. Pearce*). I suggest that a similar test might well be applied in deciding whether a document complying with the provisions of sub-s (1) is disqualified by 'interest' within the meaning of sub-s. (3)."

I am therefore of the view that the Full Court erred in the alternative reasons it gave for excluding both those documents. The medical chart was both written up and kept by Dr. Brahman; it was the medium through which the report was drawn up; it contains the deceased's case-history and purports to be a document made in the course of a public duty containing a continuous record of entries by Dr. Brahman, the person whose duty it is to make them and who, at the time they were made, no one can doubt, must have satisfied himself as to their truth. (See Phipson on Evidence, 10th Ed., para. 1121, page 429, caption "Public Registers and Records"). I can well recollect it was only November last year when we dealt with the case *of Enmore Estate v. Arnold Solomon* (Civil Appeal No. 4/1970, dated 16th November, 1970). We then had occasion to remit that matter to the Magistrate's Court with directions to admit a similar medical chart which had been rejected by the Full Court as inadmissible in very similar circumstances. Speaking for myself, I can only hope we have seen for the last time the error of rejecting medical charts in similar circumstances.

During the course of the hearing before us, it became quite evident to the appellants that they, having based their grounds of appeal solely on the Full Court's second or alternative reason, could not succeed even if they were to establish that the documents were admissible in evidence. On that ground alone, they could not get the decision of the magistrate reversed, because he had properly admitted the documents. So that merely to show that the Full Court was wrong in ruling the documents inadmissible would only serve to prove they had been properly admitted by the magistrate and to confirm and strengthen his decision. It therefore became clear that an amendment of the grounds of appeal was necessary so as to include a challenge to the magistrate's finding that the deceased died from personal injury by accident arising in and out of the course of employment. Hence, the following amendment at a very late stage of the hearing of the appeal before us:

> "In any event the award of compensation cannot be sustained because the applicant failed to prove the deceased workman had died by accident arising out of and in the course of his employment."

It was vigorously contended in support of this amended ground that Mr. Hugh's opinion that the deceased died from broncho-pneumonia "triggered by exposure to cold water" was speculative and ought not to have been received in evidence. It was said that the evidential value of the medical chart far outweigh Mr. Hugh's conjectural opinion which was unreasonable because there is no evidence that the cerebral haemorrhage was caused by an accident arising out of and in the course of employment. For my part, I must say that I am unable to follow this line of reasoning. There is no allegation on the respondent's part requiring any proof from her that her husband died from subarachnoid haemorrhage which arose by an accident out of his employment. So to demand of her, is to assume that she has so alleged and has undertaken the burden of proving that fact when the truth is she has not done so.

Admittedly, Mr. Hugh had not himself seen nor examined the deceased, but that by itself is not a factor disqualifying him from giving expert opinion evidence. The authorities are clearly to the effect that it is not required that he should have seen the deceased as a condition precedent to giving admissible evidence. In the case of Thomas Mason, (1911) 7 Cr. App. Rep. 67, which was a trial for homicide, a Mr. Pepper, an expert medical witness from the Home Office who had not seen the deceased but had heard his condition described by a witness in Court, was allowed to state his opinion that death was not self-inflicted. In the Court of Criminal Appeal, the Lord Chief Justice held, *inter alia,* "The evidence was clearly admissible, and was rightly dealt with in the summing-up as an opinion based on an assumed state of facts."

That is on the criminal side; but on the civil, the position is no different. Long ago, in the celebrated case of *Folkes v. Chadd,* (1782) 3 Douglas 159, a

decision of the King's Bench Division, the status of the professional man as an expert was firmly established. The question which arose there was whether a certain bank erected for the purpose of preventing the sea overflowing certain meadows, contributed to the choking and decay of a certain harbour. In receiving the opinion of Mr. Smeaton, the celebrated engineer on the subject, Lord Mansfield said:

> "That is a matter of opinion; the whole case is a question of opinion, from facts agreed upon. Nobody can swear that it was the cause; nobody thought that it would produce this mischief when the bank was erected; . . . Mr. Smeaton is called. A confusion now arises from a misapplication of terms. It is objected that Mr. Smeaton is going to speak, not as to facts, but as to opinion. That opinion, however, is deduced from facts which are not disputed—the situation of banks, the course of tides and of winds, and the shifting of sands. His opinion deduced from all these facts, is, that, mathematically speaking, the sand may contribute to the mischief, but not sensibly. Mr. Smeaton understands the construction of harbours, the causes of their destruction, and how remedied. In matters of science no other witnesses can be called . . ."

Again, perhaps more appropriate, in the Law of Workmen's Compensation by Crane, (1937) at p. 305, the status of a medical opinion is stated to be as follows:

> "All the facts on which the medical or other scientific witness acted and any experiments made by him for the purpose of arriving at an opinion are examinable in court in order to corroborate or rebut his opinion. The cause of death, disease or injury may, of course, be ascertained from the opinion of experts who did not themselves examine the workman or his dead body upon facts proved in court by witnesses who inspected or examined the dead body of the workman."

Once it be conceded that it was proper for the magistrate to allow Mr. Hugh to give his opinion on Prem's evidence heard by him in court, then the authorities are clear that there could be nothing conjectural in the opinion expressed by him on that evidence. Mr. Hugh was not merely being asked to say the deceased died from broncho-pneumonia because there is really no dispute that the deceased did die from that cause. That fact is admitted in para. 1 of the appellants' answer, and is to be found thus recorded in the following entry on Form 1 of the Sugar Estates Medical Service Chart—"10 Aug. '66. Patient has developed broncho-pneumonia. Expired." Clearly, then, what Mr. Hugh was being asked for was his opinion on the following factual premises: Assuming the' deceased did die from broncho-pneumonia and having been told by the witness Prem about the symptoms exhibited by him in cold water at the time when he was being assisted out of it in a helpless

condition on to the side of the canal where he remained in an exposed condition for at least two hours, and from where he was taken to hospital, what was the nature of the injury or disease which the deceased received or contracted at the time? Put another way: Mr. Hugh was being asked for his opinion on the causal connection between the cause of death (i.e. bronchopneumonia) and the type of personal injury received by the deceased. That was the opinion evidence which I think was sought of him on the uncontradicted facts as testified to by Prem and heard by him while sitting in court. The doctor answered this by saying the disease of pneumonia was "triggered by exposure to cold water". That can only mean, I think, that the deceased contracted a chill while working in rain and cold water from which death from broncho-pneumonia followed. To my mind, it is clear that this opinion is based not on any conjectural hypotheses, but on a natural and reasonable inference to be drawn from the undisputed facts as testified to by Prem, facts on which by special study and experience, as the authorities show, Mr. Hugh is quite competent to express his opinion. I say quite confidently, Mr. Hugh's evidence being based on a legitimate inference that is well grounded on premises of assumed fact, there can be no question of "*conjecture, probability, guess* and *surmise*". I use these four words in the identical sequence as did the Earl of Loreburn in *Kerr of Lendrum v. Ayr Steam Shipping Co. Ltd.,* (1915) A.C. at p. 223, when his Lordship, thinking that an award of compensation ought to have been made, rejected the contention that it would be conjectural to say that a seaman, who had fallen into the sea, after being last seen in his bunk, had died by accident in the course of employment. That a chill due to exposure to cold or damp is a personal injury has been too long established within the meaning of the Workmen's Compensation legislation to admit of any dispute. In *Walker v. Bairds & Dalmellington Ltd.* (1935) 28 B.W.C.C. 213, a workman was engaged in cleaning out the sludge in a sump of water in the workings of a colliery. He stood in the sump as was usual, waist deep in water. During the day he developed symptoms of broncho-pneumonia from which he subsequently died. In a claim by his relations for compensation for personal injury arising by accident in and out of the course of his employment, it was held, per Lord TOMLIN in the House of Lords, as follows:

> "The disease resulted from the sudden and unexpected onset of a chill contracted in conditions normal in carrying out the workman's job in the accustomed manner and frequently experienced by him on previous occasions without ill results. The onset of the chill, the direct result of doing the work, was an 'unto-ward event' and not 'expected' or 'designed'. . . . The injury was in these circumstances the result of accident."

See also, *Drylie v. Alloa Coal Co.,* (1913) 6 B.W.C.C. 398.

In like manner, I consider that it has been clearly, sufficiently and legally shown from Mr. Hugh's evidence that the injury suffered by the deceased workman was directly due to the sudden onset of a chill from which he contracted broncho-pneumonia while he worked in a cold canal in inclement weather; and it is here I think the above words of Lord Tomlin are most appropriate. The onset of the chill taken by Sugrim Rajnarine in the canal was an "untoward event, not expected or designed"; it was therefore personal injury by accident that arose in and out of the course of his employment within the meaning of s. 3(1) of the Workmen's Compensation Ordinance, 1952.

But the employers having shown that the injury to the workman, as discovered by the lumbar puncture, was subarachnoid haemorrhage, an injury which, it must be observed, was peculiarly within their own knowledge, are strenuously contending that the application for compensation ought to have been rejected because the applicant had not established that the haemorrhage was caused by an accident within the course of employment. In other words, as it seems to me, what the employers are seeking to do is to saddle the applicant with the onus of proving an injury by accident of which she knew nothing, nor possessed the means of knowing, but which was known only to them. My own view, however, is that no such onus can legitimately be placed on the respondent/applicant who, for her part, has both alleged and proved by means of the expert opinion evidence of Mr. Hugh that the deceased workman contracted an injury in the nature of a chill from which he developed broncho-pneumonia and died whilst he was engaged in the course of his employment. This is why I believe it is a mistake to think that the respondent has ever undertaken to prove, as is suggested, that the deceased died by accident from subarachnoid haemorrhage, and has failed to prove it.

For my part, I feel that unless the evidence of Mr. Hugh can be regarded as nugatory, no such onus can properly arise for the applicant to discharge, simply because the evidence in this case is not merely that the deceased was found unconscious by the side of a trench and when examined found to be suffering from brain haemorrhage. If that were indeed all, then I would readily concede that the burden of proof would rest on the respondent to adduce evidence to show that the brain haemorrhage was caused by an accident that arose within the course of the employment since that evidence would have revealed that was the only injury received. But there is the uncontradicted evidence of co-worker Prem, supported as it is by the entry on the medical chart which must not be lost sight of: this simply is that the workman remained by the side of the canal, in the condition already described, for at least two hours before being rushed to hospital. It was on this evidence as he heard it that Mr. Hugh expressed an expert opinion. I am decidedly of

the opinion that Mr. Hugh's testimony was based not on any conjectural hypotheses, as it is urged, but on a legitimate inference from uncontroverted facts proven before him, which I think cannot be ignored.

Nor, as I see it, is there any conflict of equal degree of probabilities in respect of the two injuries as alleged by both sides; or of any inferences to be drawn from them, such that it can be said that choosing between them is a mere matter of conjecture. I think, however, it is highly improbable that the deceased could have commenced work on the morning of the 9th August when affected by either injury; and though it was admitted that both were equally capable of causing broncho-pneumonia, yet, I believe both the magistrate and the Full Court were right in preferring Mr. Hugh's opinion to Dr. Brahman's. Mr. Hugh's was the more positive; it was the more reasonable, and had a direct bearing on the cause of death, namely, that at the time when the deceased was immersed in water, there was a mass invasion of bacteria in the blood-stream causing ague or rigor, and that pneumonia came on at that very time. So positive is the nature of this evidence that I agree it can hardly be displaced by evidence of subarachnoid haemorrhage that is based on the result of the lumbar puncture which medical opinion on both sides conceded is liable to error, and that the only sure way of saying there was a haemorrhage of that kind was by the conduct of a post-mortem examination which was not performed.

I would dismiss this appeal with costs and affirm the order of the Full Court sustaining the widow's claim.

Appeal allowed.

GODFREY BENN

v.

THE DRAINAGE AND IRRIGATION BOARD (DEFENDANTS) AND LEWIS ALBERT ET AL (ADDED-DEFENDANTS)

[High Court (Vieira, J.) September 26, November 4, 1970; December30, 1971]

Immovable property—Rival claims for compensation for land compulsorily acquired by Government—Land awarded to added-defendants by partitioning officer under the District Lands Partition

and Reallotment Ordinance Cap. 173—Appeal by plaintiff against award dismissed—Estoppel per rem judicatam pleaded.

Land partitioning—Claim based on adverse possession—Whether partition officer competent to entertain claim—Whether court should re-open partition proceedings—Gross delay in bringing claim for prescriptive title amounting to acquiescence.

The plaintiffs claim brought in October 1968 was for $20,686.50 deposited with the State Solicitor as compensation for land compulsorily acquired by Government. The added-defendants also laid claim to this amount in their defence which included a counterclaim. No reply and defence to the counterclaim was filed. The land in question was lot 17 part of Pln. Epsom, Corentyne. It was allotted by a partition officer under the District Lands Partition and Re-Allottment Ordinance to the added-defendants. The plaintiff had in action No. 312 of 1953 appealed against that award but the appeal was dismissed and the award confirmed by Hughes, J., in May, 1953. Hughes, J., however, gave the plaintiff (among others) a period of two years within which to apply for prescriptive title but proceedings were not instituted. The order of Hughes, J., was formally entered in March, 1966. Counsel for the added-defendants submitted *in limine* that an estoppel *per rem judicatam* arose on the pleadings and that effectively barred the plaintiff from proceeding with his claim any further. Counsel for the plaintiff argued that the award in favour of the added-defendants was invalid since it was based upon possessory rights which the partition officer was not competent to inquire into, and that the court was entitled to have the entire partition proceedings re-opened.

HELD: (i) a partition officer could only legitimately inquire into the claims of persons who were 'owners' within the definition of S. 2 or who were 'claimants' or 'mortgagees' within the ambit of S. 16(1) of the Ordinance, and 'possessory owners' were excluded;

(ii) Hughes, J., had given the appellants (including the plaintiff) a period of two years within which to apply for prescriptive tide, and the gross delay on the part of the plaintiff in so doing amounted to acquiescence;

(iii) to re-open the partition proceedings would, in effect, amount to the court sitting as a court of appeal upon the decision of Hughes, J., in the partition appeal, and that was an untenable proposition;

(iv) the plaintiff's claim would be dismissed and judgment given in favour of the added-defendants in terms of their counterclaim.

Judgment for the added-defendants.

C. M. L. John and *Pearlene Roach* for the applicant (plaintiff).

J. A. King for the respondents (added-defendants).

GODFREY BENN
v.
THE DRAINAGE AND IRRIGATION BOARD
AND LEWIS ALBERT ET AL

Vieira, J.: On 31st December, 1968, the plaintiff filed a writ of summons against the Drainage and Irrigation Board (hereinafter referred to as the Board) and the Attorney-General, who entered appearance under protest, seeking (1) a declaration that he was entitled to the sum of $20,686.50 being half of the sum of $41,373.00 deposited by the Board with the then Crown Solicitor (now State Solicitor) on 6th June, 1964, being compensation for land alienated to the then British Guiana Government for the purpose of digging the Mibikuri Canal in the Black Bush Polder Land Development Scheme, Corentyne, County of Berbice; (2) an order requiring the defendants to pay over to him the said sum of $20,686.50; (3) an injunction restraining the defendants, their servants and/or agents from paying out of hand the sum of $41,373.00 as aforesaid unless the said sum of $20,686.50, representing one-half thereof, be paid over to him and (4) costs.

On 6th December, 1968, the State Solicitor filed a summons in Chambers seeking, *inter alia*, the following orders—(a) that the action be dismissed against the second-named defendant, *i.e.*, the Attorney-General and (b) that the added-defendants (whose names are set out in the rubric herein) (hereinafter referred to as the added-defendants) be joined as defendants under Order 14 Rule 15 of the Rules of the Supreme Court, 1955 (hereinafter referred to as the Rules).

On the 10th December, 1968, Fung-A-Fatt, J., with the consent of the parties, granted the orders prayed for at (a) and (b) above and granted leave to the plaintiff to file his statement of claim on or before 10th February, 1969, failing which, the action was to stand dismissed with costs to the added defendants and, in such an event the State Solicitor was at liberty to pay over to the added-defendants or their Solicitors the sum of $20,915.00.

On 10th February, 1969, the plaintiff filed his statement of claim in compliance thereto and the added defendants filed their defence which included a counterclaim on 28th March, 1969.

The matter first came up before me for call-over on 26th September, 1970, when it was put down to 4th November, 1970, on which date I upheld an objection *in limine* made by Mr. King and dismissed the claim and ordered the State Solicitor to pay over to the added-defendants the sum of $20,915.00 and costs were awarded to the Board fixed in the sum of $350.00 and to the added-defendants to be taxed certified fit for Counsel.

It is from this decision that this Appeal has been brought and I now give my reasons therefor.

No evidence was taken in this matter, which I did not consider necessary having regard to the pleadings including the affidavits and other documents filed in support thereof and, to my mind, the following facts were clear and undisputed—

1. Plantation Epsom on the Corentyne Coast of Berbice was partitioned in 1953 under the District Lands Partition and Re-Allotment Ordinance, Chapter 173 (hereinafter referred to as the Ordinance) by P. A. Cummings, Esq., Barrister-at-Law (now Cummings, J A.) and Lot 17, being a part thereof (hereinafter referred to as Lot 17) was allotted to the added-defendants, notice whereof was published in the Official Gazette of 14th March, 1953.
2. The plaintiff, in Action 312 of l953, appealed against this award but this appeal was dismissed and the award confirmed by Hughes, J., on the 10th May, 1953 (hereinafter referred to as the partition appeal).
3. Lot 17 was compulsorily acquired by Government in 1959 under the Acquisition of Land for Public Purposes Ordinance, Chapter 179 and compensation for the said Lot 17 was authorised by the then Governor-in-Council in the nett sum of $20,915.00 and a cheque for this amount was deposited by the Board with the then Crown Solicitor on 6th June, 1964.
4. On 19th March, 1966, the order of Hughes, J. in the partition appeal was formally entered.
5. This present action was brought by the plaintiff on 31st October, 1968.

Two (2) points were taken before me by Mr. King. **Firstly,** he submitted that in view of para. 8 of the added-defendants' defence and counterclaim, a new issue was raised thereby, viz: the partition appeal which had not been mentioned at all in the plaintiff's statement and claim and, consequently, this necessitated a reply and a defence to the counterclaim which had not in fact been done. **Secondly,** the partition appeal operated as an estoppel in *rem judicatam* and could not be made the subject-matter of an action as the plaintiff has done here. He pointed out that the partition appeal was disposed of since 1955 and it was not until 1968, i.e., 13 years later that the plaintiff saw fit to bring this action and he contended that what the plaintiff was really seeking was, in fact, to re-open the proceedings before the partition officer which had been completed since 1953.

In reply, Mrs. Roach, who. actually argued the matter before me, submitted that a reply was not necessary since the whole matter had to be put in issue but she requested permission *ex abundanti cautela,* to file and serve a reply and a defence to the counterclaim within 14 days.

Mrs. Roach argued that this matter was not *res judicata* for the following reasons—

(a) for a matter to be considered *res judicata* it must be in respect of the same parties and the same *res* and the matter must have been heard on its merits. She conceded that the parties were virtually

the same but she did not concede that the *res* was the same since it had subsequently been converted into money. She pointed out that no Transport or other title had been passed to the awardees since the award was never considered as being final and conclusive and/or satisfactory to the claimants. She referred me to Actions 284, 285 and 312 of 1953 which were all appeals against the awards made by the partition officer and which were all heard by HUGHES, J. who, before dismissing the appeals, gave all the appellants, including the plaintiff, two years within which to apply for prescriptive title, a course which in fact was not adopted by any of them. She contended that this court was entitled to enquire into the proceedings before the partition officer since it was clear that in these proceedings he must have enquired into the rights of possessory owners, including the plaintiff, which he clearly could not have done having regard to the provisions of the Ordinance and to the decision of the Federal Supreme Court in *Barrow v. Benjamin* (1960) 2 W.I.R. 511.

(b) that the plaintiff was in possession since the land was excavated by the contractors and, consequently, had a right to oppose any title provided, of course, he could show that he was in possession for at least 12 years *nec vi, nec clam, nec precario.* As the award was not perfected by Transport then the mere award itself would not and could not stop possession running in the plaintiffs favour.

In answer, Mr. King argued that to say that the partition appeal was not heard on its merits presupposed that Hughes, J. did not exercise his discretion properly. The fact that that learned Judge went so far as to put the matter down for two years clearly indicated that there must have been an allegation of prescriptive title before him. Further, the fact that the plaintiff did not see fit to appeal to the Full Court must be taken as an acceptance of the Judge's award.

Mr. King further contended that *Barrow v. Benjamin* (*ubi supra*) was no authority for the proposition that partition officers cannot have regard to possessory titles and, *a priori*, that Judges in partition appeals cannot decide questions of possessory titles.

Mr. Rahaman endorsed the distinction drawn by Mr. King in relation to this matter and to the facts of *Barrow v. Benjamin* and pointed out that this matter went to appeal before a Judge who must be taken and who must in fact have power to enquire into possessory rights.

The function and object of pleadings is to ensure that all parties will have proper notice of what are the real points in issue upon which the Court will have to adjudicate in order to determine the matter or matters in dispute and, to this end, it is necessary that each party give all relevant information to his opponent so as to prevent surprise at the trial. The general rule of pleading is that each party must plead all the material facts upon which he intends to rely at the trial in as summary a form as possible and not the evidence by which they are to be proved and will not, normally, be allowed to prove any facts which is not set out in the pleadings.

In this country pleadings generally are governed by Order 17 of the Rules which are based upon and derived from Order 19 of the English Rules of the Supreme Court, 1883, as amended (hereinafter referred to as the 1883 Rules). Order 17 Rule 3 of the Rules provides as follows—

> "3. Subject to the provisions of rule 16 of Order 19, a defendant in an action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such setoff or counterclaim sound in damages or not, and such set-off or counterclaim shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim.

Rules 6, 8, 11, 15 and 17 of Order 19 of the Rules which govern "Defence and Counterclaim" provide as follows—

> "6. If the defence contains nothing more than a denial or that which amounts only to a denial of the claim, there shall be no reply, and issue shall be joined by the claim and defence".
>
> "8. Except in cases governed by rule 9 of this Order when a statement of claim has been delivered to a defendant he shall deliver his defence within fourteen days from the day on which the statement of claim is delivered or from the time limited for appearance, whichever shall be the later."
>
> "11. Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall in his defence state specifically that he does so by way of counterclaim."
>
> "15. Any person named in a defence as a party to a counterclaim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim."
>
> "17. If, in any case in which the defendant sets up a counterclaim, the action of the plaintiff is stayed, discontinued, or dismissed, the counterclaim may nevertheless be proceeded with."

Rules 1 and 2 of Order 21 of the Rules which govern "Reply and Subsequent Pleadings" provide as follows—

> "1. Where the plaintiff desires to deliver a reply, he shall deliver it within fourteen days from delivery of the defence."

"2. When a counterclaim is pleaded a reply thereto shall be subject to the Rules applicable to defences".

Rule 11 of Order 25 provides as follows—

"11. The provisions of the preceding rule shall not apply to a reply to a counterclaim and, unless the plaintiff delivers a reply to a counterclaim, the statement of fact contained in such counterclaim shall at the expiration of fourteen days from the delivery thereof or of such time (if any) as may by order be allowed for delivery of a reply thereto be deemed to be admitted, but the Court or a Judge may at any subsequent time give leave to the plaintiff to deliver a reply."

Order 19, Rule 15 of the 1883 Rules, as amended, is the modern rule governing all special defences including estoppel and is almost in identical terms as Order 17 Rule 15 of the Rules which provide as follows—

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

It was, as is, abundantly clear to me that, having regard to the rules set out above, it was encumbent upon the plaintiff to file a reply and a defence to the added-defendants' counterclaim and, accordingly, not having done so he must be taken to have admitted the new issue raised thereon, viz: the partition appeal which was not mentioned at all in his statement of claim and, this being so, the added-defendants were entitled to judgment on their counterclaim in accordance with Rule 17 of Order 19 of the Rules as set out above. Although I am satisfied that I did have power to grant Mrs. Roach's application to file a reply and a defence to the counterclaim, even at that late stage, having regard to the provisions of Order 25 Rule 11 of the Rules (ubi supra), nevertheless, I did not consider that any useful purpose would be served by so doing in view of the fact that, in my opinion, the second point taken by Mr. King was fatal, viz: that an estoppel *per rem judicatam* arose on the pleadings themselves which effectively barred the plaintiff from proceeding with his claim any further.

The added-defendants have specifically pleaded an estoppel *per rem judicatam* in para. 8 of their defence as follows—

> "8. By a partition of plantation Epsom under the provisions of the District Lands Partition and Re-Allotment Ordinance, the said Lot 17 was allotted to these defendants notice whereof was published in the Official Gazette dated 14th March, 1953. The plaintiff appealed from the said allotment and on 10th May, 1955, the Honourable Mr. Justice Hughes dismissed the said appeal and affirmed the said allotment. From that decision there was no appeal. These defendants will contend that by virtue of the above the issue of the title to Lot 17 is *res judicata* and the plaintiff is estopped from denying these defendants' title to the said Lot 17."

An estoppel in *rem judicatam* is a rule of evidence and may be defined as—

> "A final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the parties to, and the subject-matter of, the litigation, which prevents any party or privy to such litigation, as against any other party or privy thereto; and, in the case of a decision in *rem*, any person whatsoever, as against any other person, from disputing or questioning such decision on the merits."
>
> —Spencer Bower's Doctrine of *Res Judicata*, 1st Ed. (1924) at pp. 1—3.

In *Lockyer v. Ferryman* (1877) 2 App. Cas. 519, H.L., Lord BLACKBURN said at p. 530—

> "The object of the rule of *res judicata* is always put upon two grounds—the one public policy, that it is the interest of the State that there should be an end to litigation, and the other, the hardship on the individual that he should be vexed twice for the same cause."

Any party desirous of setting up *res judicate* by way of estoppel must establish each and every of the following essential elements—

1. that the alleged *res judicate* was pronounced by a judicial tribunal in the exercise of its judicial functions;
2. that there was a decision or determination or adjudication of some question of law or fact;
3. that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;
4. that the judicial decision was final in the sense of being absolute, complete and certain and not subject to subsequent rescission, review or modification by the tribunal pronouncing same;

5. that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised, and

6. that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceedings in which the estoppel was raised, or their privies, or the decision was conclusive in *rem.*

—Spencer Bower (ibid) p. 9.

The *res indicate* pleaded here by way of estoppel was the partition appeal and, to my mind, all the six elements set out above were present on the pleadings before me including the best evidence thereof, viz: a certified copy of the order of Hughes, J. in the partition appeal. As I see it, oral evidence is not required or necessary on a plea of *res judicata* where the issue are specific and clear cut on the pleadings as was, to my mind, the position here.

The plaintiff was not awarded Lot 17 and he did not appeal to the Full Court as he could so easily have done under the provisions of section 16(13) of the Ordinance. Mrs. Roach's argument, as I understand it, was that the award of Lot 17 to the added-defendants was invalid since it was based upon possessory rights which the partition officer was not legally competent to enquire into and, therefore, this Court is entitled to have the entire partition proceedings re-opened.

In *Barrow v. Benjamin* (1960) 2 W.I.R. 511, the appellant claimed that he became the transported owner of a lot of land under the provisions of section 15 of the Ordinance and had thereby acquired an indefeasible title. The respondent's defence was that he had been in undisturbed possession of the said lot of land for 40 years. In his reply the appellant joined issue with the respondent on his defence. Gordon, J. found on the evidence as a whole that the respondent had been in complete possession and control of the said lot of land '*nec vi nec clam nec precario'* since 1915. It was argued on behalf of the appellant that since the respondent did not appeal against the award of the partition officer he must thereby be taken to be bound by the said award which was final and that by virtue of section 23 of the Deeds Registry Ordinance, Chapter 32, the full and absolute title to the land was vested in him as transferee. Rennie, J., who delivered the first judgment with which HALLINAN, C.J., and MARNAN, J.A., concurred, said at pp. 512—513—

> "From the provisions of s. 3(1) it seems clear that only an owner as defined in s. 2 can set the machinery of the Ordinance in motion. The question then is whether a person who has prescribed title to an area of land is an owner within the meaning of the Partition Ordinance. I think

not. He has not acquired the land by transport, letters of decree, inheritance, or devise nor has he purchased it.

The next step is to see whether he is a claimant or mortgagee and so enable to appeal against the award of the Partition Officer. He is certainly not a mortgagee, the one point therefore is so far as the Partition Ordinance is concerned is whether he is a claimant. The respondent's contention which the trial judge accepted was that he had prescribed title to the whole area of the lot of land. He was accordingly not a claimant to share in land to be partitioned. But apart from that contention this court was informed by leading counsel for the appellant that in an unreported case No. 528 of 1955 it was held that an officer deciding partition proceedings is not competent to consider prescriptive rights.

The principles of natural justice require that before one can be bound by a proceeding he must at least be given an opportunity of being heard in that proceeding. If the Partition Officer cannot consider prescriptive rights it must necessarily follow that any award made by him cannot affect such rights. And if such rights are not affected by such an award then no question of appeal can arise. The case mentioned by counsel for the appellant is not the only "authority in this matter. Counsel for the respondent referred this court to an unreported case No. 492 of 1950 in which Hughes, J. held that a person in possession is not a claimant under the Partition Ordinance."

I did not and do not agree with Mr. King's contention, which was supported by Mr. Rahaman, that *Barrow v. Benjamin* is no authority for the proposition that partition officers cannot have regard to possessory titles when making awards under the Ordinance. Having regard to the clear and unambiguous language of the Ordinance itself, it seems abundantly clear to me that a partition officer can only legitimately enquire into the claims of persons who are "owners" within the definition laid down in section 2 or who are "claimants" or "mortgagees" within the ambit of s. 16(1) of the Ordinance respectively, which terms to my mind, exclude possessory owners. This being so, then a possessory owner has no right of appeal to a Judge in Chambers and, accordingly, a Judge in Chambers would have no jurisdiction to entertain any appeal from such a possessory owner. It seems to me that the reason why Hughes, J. gave all the appellants, including the plaintiff, a period of two years within which to apply for prescriptive title, as is conceded, was for the sole purpose of having those negative rights declared.

All the parties to this action are claiming and have claimed through a common ancestor; the plaintiff through one Adam Caesar and the added-defendants through one James Albert, which would bring them within the meaning of "owners" and/or "Claimants" under the Ordinance and, to my mind, both the partition officer and Hughes, J. must be taken to have enquired into the opposing claims brought by the plaintiff and the added-defendants in respect of Lot 17 in accordance with the express and

meaning of those terms as defined. It is a rebuttable presumption of law that all judicial and official acts have been done properly and regularly—*omnia praesumuntur rite esse acta*—and I cannot agree with Mrs. Roach, therefore, that the partition officer must have been taken to have enquired into possessory rights.

This is an untenable proposition after so many years of silence and this gross delay on the part of the plaintiff, to my mind, amounts to *acquiescence.* Further, for me to re-open the partition proceedings would, in effect, amounts to my sitting as a Court of Appeal upon the decision of Hughes J. in the partition appeal, an equally untenable proposition.

For these reasons, therefore, I dismissed the plaintiff's claim and gave judgment for the added-defendants in terms of their counterclaim. Costs were awarded to the Board fixed in the sum of $350.00, and to the added-defendants to be taxed certified fit for Counsel.

Claim dismissed.

SOLICITORS:

Dabi Dial for Plaintiff.

J. A. Jorge, State Solicitor, for Defendant.

Messrs Cameron & Shepherd Solicitors, for Added-Defendants.

THE STATE *v.* GORDON GILL AND OTHERS

[High Court (Vieira, J.), January 18, 20, 25, 1971]

Criminal Law—Procedure—Preliminary inquiry—Magistrate's duty to ask accused whether he wished to call any witnesses—Whether duty also to record that he had done so—Onus on accused to rebut presumption of regularity—Motion to quash indictment—Criminal Law (*Procedure*) *Ordinance Cap. 11* (*now Cap. 10:01*) *ss. 65*(*1*), *66*(*1*).

This was a motion by the accused Gill, who was indicted along with two other accused persons for the offence of larceny, to quash the indictment on the ground that it was preferred on a bad and unlawful committal order made by a magistrate who had conducted the preliminary inquiry. His counsel submitted that as nothing was recorded in the depositions to indicate that the magistrate did ask the accused whether he wished to call any witnesses on his behalf, in keeping with the requirements of S. 66(1) of the Criminal Law (Procedure) Ordinance Cap. 11, the purported committal of the accused was not lawful but was a nullity. State counsel submitted that it was for the defence to prove that it was the magistrate's duty to record the fact of the statutory compliance and that the onus was on the accused to rebut the presumption of regularity.

S. 66(1) of the Criminal Law (Procedure) Ordinance Cap. 11 provides:

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

HELD: (i) there was no statutory duty imposed upon a magistrate to record the factum of his having asked an accused person whether he wished to call any witnesses on his behalf;

(ii) a motion to quash the indictment could not be properly maintained without evidence being adduced on the part of the accused to rebut the presumption of regularity;

(iii) the accused had failed to lead evidence to rebut the presumption of regularity and, accordingly, the motion would have to be dismissed.

Motion dismissed.

N. J. Bissember for accused Gill.
Nos. 2 and 3 accused in person.
C. Kennard and *L. Rockliffe* for the State.

VIEIRA, J.: The three accused are indicted for the felony of larceny contrary to s. 164 of the Criminal Law (Offences) Ordinance, Cap. 10.

After this matter was first called but before the accused were arraigned, Mr. Bissember, Counsel for No. 1 accused, moved a motion to quash the

Indictment on the ground that it was preferred on a bad and unlawful committal order in that the Preliminary Enquiry before the magistrate was conducted in a manner that contravened the provisions of the Criminal Law (Procedure) Ordinance, Cap. 11 (hereinafter referred to as the Ordinance) and, specifically, s. 66 thereof.

His argument, as I understand it, is that as there is nothing recorded on the depositions to indicate whether the Magistrate did in fact ask the No. 1 accused whether he wished to call any witness or witnesses on his behalf, which is a mandatory requirement under s. 66(1) of the Ordinance, then the purported committal of the No. 1 accused (and indeed of the other two accused as well) was not a lawful and/or a legal committal and, accordingly, amounts to a complete nullity.

He contends that after the statutory caution is put to an accused person by a Magistrate under s. 65 of the Ordinance, he must then enquire of the accused whether he wishes to call any witnesses or not in accordance with s. 66(1) of the Ordinance. He points out that the operative words in s. 66(1) are "shall ask", which, he submits, clearly indicates that the Magistrate has no discretion in the matter at all and is therefore bound to make such a statutory requirement and privilege available to the accused.

Mr. Bissember stresses that the original depositions now before the court is not only the primary but, indeed, the best evidence, which cannot be varied, added to or altered by parol evidence and he would strongly object to any attempt on the part of the State to call any witnesses to give evidence as to what actually took place before the Magistrate and, in particular, whether the Magistrate did or did not in fact comply with the law.

Reference was made to certain passages in the 9fh Edition of Phipson on Evidence and the 16th Edition of Roscoe's Criminal Evidence as well as to the following cases—*R. v. Bourdon* 2 C. & K. *366; Mash v. Darley* (1914) 3 K.B. 1226; R. *v. Gee et al* (1936) 25 Cr. App. Rep. 198 *R. v. Hussain: Ex. parte D.P.P.* (1965) 8 W.I.R. 65.

Mr. Rockliffe, in reply, submitted that the authorities cited were not relevant to the point in issue and that it was for the defence to prove that the Magistrate was under a duty to record the fact whether he asked the No. 1 accused if he wished to call any witnesses or not.

He contends that the absence from the record of any indication whether the No. 1 accused was in fact asked by the Magistrate whether he wished to call any witnesses or not is not conclusive or the fact that this was not in fact done. Sub-ss. (1) & (2) of s. 66 of the Ordinance imposes on the Magistrate a duty to make a record only if a witness shall have testified.

He points out that the form for the statutory caution under s. 65(1) of the Ordinance is Form 3 of the Fourth Schedule and that the actual committal form (Magisterial #221) is not in fact a statutory form but a mere administrative one.

Mr. Rockliffe further contends that as the point has been raised in this forum then the onus is upon the accused to rebut the presumption of regularity and, if no such evidence is called, then the submissions ought to be over-ruled and the trial should proceed in the normal way.

Reference was made to *R. v. Rickford Douglas* (Indictment No. 17940) before CHUNG, J., (as he then was) and to *R. v. Reid et al* (1959) L.R.B.G. 306.

I do not intend or propose to give a lengthy ruling in this matter since much of the arguments and authorities cited were fully gone into by me in the case of *The Queen v. Stephen Hunte* (Indictment No. 17504) (unreported decision No. 14 of 1967) and I adhere to the ruling I gave then, viz:—

(1) where an accused person is unrepresented by Counsel or Solicitor at a Preliminary Enquiry, then failure on the part of the Magistrate to comply strictly with the provisions of ss. 65 and 66 of the Ordinance in the sequence set out therein will render a committal under s. 71 thereof a nullity;

(2) where an accused person is represented by a Counsel or Solicitor and Counsel or Solicitor intimates to the Magistrate that it is not proposed to lead a defence, whether such intimation is made before or after the statutory caution is put to the accused in accordance with s. 65(1) of the Ordinance, then failure on the part of the Magistrate to ask the accused personally whether he wishes to call any witnesses in accordance with s. 66(1) of the Ordinance will not render a committal under s. 71 a nullity;

(3) where an accused person is represented by Counsel or Solicitor and no request is made by them for evidence to be taken from witnesses and there is no intimation by them as to whether it is proposed to lead a defence or not, then the failure on the part of the Magistrate to comply with the requirements of s. 66(1) of the Ordinance will render a committal under s. 71 a nullity.

What is now being argued before me has, in fact, taken the matter much further and, as far as I am aware, has never been the subject-matter of a ruling before in this country.

It seems to me that what has to be actually decided now is—

(a) does the failure of a Magistrate at a Preliminary Enquiry to record the factum of his having asked an accused person in accordance with s. 66(1) of the Ordinance whether he wishes to call any witnesses on his behalf or not vitiate the subsequent committal of that accused person?

(b) If the answer is in the negative, can a motion to quash the indictment be properly maintained without evidence being adduced on the part of the accused person to rebut the presumption of regularity expressed in the maxim "*omnia praesumuntur rite et solemniter esse acta*?"

In my considered opinion, the answer to both (a) and (b) must be answered in the negative. As I see it, there is a statutory duty on the part

of the Magistrate under s. 66(1) to ask an accused person whether he wishes to call any witnesses on his behalf except where he is represented by a lawyer who intimates that he is not calling any witnesses or leading any defence. Equally, there is a statutory duty on the part of the Magistrate under s. 66(2) to take down in writing the depositions of any witness called on behalf of an accused person. But there is no statutory duty imposed upon a Magistrate to record the factum of his having asked an accused person whether he wishes to call any witnesses on his behalf. To hold otherwise, to my mind, would be contrary to logic and common sense.

If the record contains the depositions of witnesses called by an accused person then I fail to see what other conclusion one can come to but that the Magistrate did in fact ask that accused person whether he wished to call any witnesses on his behalf and that that accused person gave an affirmative intimation that he would. Witnesses do not appear by magic neither do Magistrates, who in this country are all trained lawyers, take down evidence willy nilly from any and every person who may happen to find themselves in the witness box. I am fortified in my opinion by the fact that there is no statutory form in relation to s. 66(1) in the Fourth Schedule to the Ordinance similar to Form 3 thereunder which relates to the statutory caution under s. 65.

To my mind, the importance of s. 66(1) is that a Magistrate must ask, not that he must record that he has in fact, asked, an accused person whether he wishes to call any witnesses on his behalf. As I said in Hunte's Case (ubi supra) the whole purpose of s. 66(1) is to let an accused person know that he has a right to call witnesses on his behalf if he so desires.

It is clear from the record in this matter that No. 1 accused was represented by Counsel (Mr. R. Hanoman) at the Preliminary Enquiry Nos. 2 and 3 accused were not so represented. It is equally clear (and this is conceded by Counsel for the State) that nowhere on the face of the depositions is there any written record that the learned Magistrate did in fact ask the No. 1 accused whether he wished to call any witnesses on his behalf or not in accordance with s. 66(1) of the Ordinance.

In *The Queen v. Rickford Douglas* (Indictment No. 17940) Mr. C. A. Massiah, Counsel for the accused moved the court to quash the Indictment before the accused was arraigned and the plea taken. He made three submissions only one of which we are concerned with and that was the first submission which was that there was non compliance with s. 66(1) of the Ordinance and, as a result, the committal would be irregular and, therefore, all proceedings thereafter would be a nullity. Mr. Kennard was then Crown Counsel and he argued that s. 66(1) did not and does not impose a duty on a Magistrate to make a record in the depositions that he did in fact inform the accused of his right to call witnesses on his behalf if he so desired. He submitted that, in this respect, the onus would be on the defendant to lead evidence and he referred to *R. v. Reid et al* (*ubi supra*) and p. 234 of the 35th Edition of Archbold. CHUNG, J. overruled the submissions and the

accused was arraigned and the matter proceeded to trial. Unfortunately, no written or oral decision was given by CHUNG, J., neither was this particular aspect argued before the Court of Appeal which dismissed the appeal and affirmed the conviction and sentence on 8th May, 1969.

What is the true legal position in this matter, therefore? It seems abundantly clear to me that where, as here, the record is silent as to whether the learned Magistrate did comply in fact with s. 66(1) of the Ordinance, then the presumption of regularity necessarily arises and can only be displaced by sworn testimony to the contrary.

As I understand it, the maxim "*omnia praesumuntur rite et solemniter esse acta*" means that all things are presumed to be done correctly until the contrary is proved. It is a rebuttable presumption of law (*praesumptiones juris*) and is chiefly applied to judicial and official acts. The chief features of this presumption are—

(a) it derives its force from law;

(b) it applies to a class, the conditions of which are fixed and uniform;

(c) it is drawn by the court and in the absence of opposing evidence are conclusive for the party in whose favour they operate—Phipson on Evidence, 9th Edition (1952) at pp. 698-699.

A perusal of the record in this matter shows that, after the statutory caution was put to them by the magistrate under s. 65(1) of the Ordinance, the No. 2 accused said "I reserve my defence" and the No. 3 accused said "I wish to say nothing". When we look at the Form 3 in relation to the No. 1 accused, we see nothing recorded at all—there is a complete blank and then his signature follows. To my mind, this indicates that the No. 1 accused kept silent when the statutory caution was put to him; this I consider a reasonable inference to draw and can, I think, only be rebutted by evidence on oath.

In the course of his arguments, Mr. Bissember made it quite clear that the No. 1 accused would not be giving evidence neither would he be calling any witnesses to prove what actually took place before the magistrate. Equally, Mr. Rockliffe emphasised that the State also would not be calling any witnesses on this particular issue.

In the final analysis, therefore, for the reasons I have given, I hold and rule that the onus is upon No. 1 accused (and indeed on all three accused) to rebut the presumption of regularity that, to my mind, clearly arises in this matter by sworn evidence to the contrary before this court but, as the No. 1 accused has seen fit to decline to do so then the committal by the magistrate must be taken to have been done both lawfully and legally and, therefore, the motion to quash the Indictment is not sustainable and is, accordingly, dismissed.

Motion dismissed.

THE LAW REPORTS OF

GUYANA

1971

EDITED BY

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B.A. (HONS.) (OXON.),

JUSTICE OF APPEAL.

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1971

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2.	THE HON. MR. JUSTICE GUYA LILADHAR BHOWANI PERSAUD	—	Justice of Appeal
3.	THE HON. MR. JUSTICE PERCIVAL ARTHUR CUMMINGS	—	Justice of Appeal
4.	THE HON. MR. JUSTICE VICTOR EMANUEL CRANE	—	Justice of Appeal

HIGH COURT OF GUYANA

1.	THE HON. MR. HAROLD BRODIE SMITH BOLLERS	—	Chief Justice
2.	THE HON. MR. JUSTICE AKBAR KHAN	—	Puisne Judge
3.	THE HON. MR. JUSTICE DHANESSAR JHAPPAN	—	Puisne Judge
4.	THE HON. MR. JUSTICE CHARLES JOHN ETHELWOOD FUNG-A-FATT	—	Puisne Judge
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10.	THE HONOURABLE MR. KEITH STANISLAUS MASSIAH	—	Puisne Judge
11.	THE HON. MR. JUSTICE LINDSAY COLLINS	—	Puisne Judge

CITATION

These reports may be cited as 1971 G.L.R.