

JUDGES OF THE
SUPREME COURT OF JUDICATURE OF GUYANA

1973

COURT OF APPEAL

THE HON SIR EDWARD VICTOR LUCKHOO	-	Chancellor, O.R.
THE HON. MR. JUSTICE GUYA LILADHAR BHOWANI PERSAUD	-	Justice of Appeal
THE HON. MR. JUSTICE PERCIVAL AUGUSTUS CUMMINGS	-	Justice of Appeal
THE HON. MR. JUSTICE VICTOR EMANUEL CRANE	-	Justice of Appeal

HIGH COURT OF GUYANA

THE HON. SIR HAROLD BRODIE SMITH BOLLERS	-	Chief Justice
THE HON. MR. JUSTICE AKBAR KHAN	-	Puisne Judge
THE HON. MR. JUSTICE DHANESSAR JHAPPAN	-	Puisne Judge
THE HON. MR. JUSTICE CHARLES JOHN ETHELWOOD FUNG-A-FATT	-	Puisne Judge
THE HON. MR. JUSTICE HORACE LINCOLN MITCHELL	-	Puisne Judge
THE HON. MR. JUSTICE FRANCIS VIEIRA	-	Puisne Judge
THE HON. MR. JUSTICE KENNETH MONTAGUE GEORGE	-	Puisne Judge

THE HON. MR. JUSTICE RALPH MOWBRAY MORRIS	-	Puisne Judge
THE HON. MR. JUSTICE KEITH STANISLAUS MASSIAH	-	Puisne Judge
THE HON. MR. JUSTICE LINDSAY FRANCIS COLLINS	-	Puisne Judge
THE HON. MR. JUSTICE MAURICE ALEXANDER CHURAMAN	-	Puisne Judge

LAW OFFICERS OF THE STATE

THE HON. DR. M. SHAHABUDEEN, S.C., Ph.D	-	Attorney General
THE HON. GONSALVES-SABOLA	-	Solicitor General

METHOD OF CITATION

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GLADYS TAPPIN v. FRANCIS LUCAS

[In the Full Court, on appeal for an order nisi of mandamus from a decision in the Georgetown Magisterial District (Khan, Fung-A-Fatt and Mitchell JJ) 5 and 13 January 1973]

Magistrate—Criminal Law—Coroner's inquest—Coroner's jury's verdict of no one responsible—Private Information following Coroner's inquest—Right of D.P.P. to intervene by letter to magistrate discontinuing proceedings—Whether discontinuance of proceedings legal—Constitution of Guyana, art. 47 (now art. 187); Summary Jurisdiction (Appeals) Act Cap. 17, s. 37; Coroners Act Cap. 4:03 ss.

The appellant's son was shot by the respondent, a police officer. A coroner's inquest was held in which the jury returned a verdict that nobody was criminally responsible for the son's death. The appellant next filed a private information in which she charged the respondent with murdering of her son. Upon the information coming on before a magistrate, the latter read out a letter in open court purporting to be signed by the D.P.P. and discontinuing the information under art. 47(l) (c) of the Constitution of Guyana. Thereupon the magistrate ordered the discontinuance of the private criminal proceedings and discharged the respondent.

The appellant now appeals to the Full Court for an order nisi for a mandamus against the magistrate's order.

HELD: by the Full Court: (i) The question of the respondent's criminal responsibility was decided at die inquest. The coroner's jury having absolved the respondent from criminal blame by finding he was not responsible, it was not legally competent for the magistrate to enquire into a charge of murder based on the same facts.

(ii) the D.P.P. exercised his power in person and in compliance with art 47(2)(c), he having signed the letter of discontinuance and directed it to the adjudicating magistrate. Further, there was no necessity as contended, to admit the letter in evidence in the proceedings before the magistrate.

(iii) Art. 47(3) does not make it incumbent on the D.P.P. or any officer or agent of his to appear in court.

Order nisi refused.

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Cases referred to:

- (1) *Harold Beresford* 36 Cr. App. R. 2.
- (2) *Connelly v. D.P.P.* 48 Cr. App. R. 183.

Editor's Note: The decision of the Full Court was affirmed on appeal to the Guyana Court of Appeal. See (1973) 20 W.I.R. 229.

S. E. Brotherson, for the appellant/applicant.

JUDGMENT OF THE COURT: This was an application by Gladys Tappin for an Order of mandamus under Section 37(1) of the *Summary Jurisdiction (Appeals) Ordinance, Chapter 17*.

Section 37 of the *Summary Jurisdiction (Appeals) Ordinance, Chapter 17* reads:—

- (1) "Wherever a magistrate or a justice of the peace refuses to do any act relating to the duties of his office, the person requiring the act to be done may apply to the Court on motion supported by affidavit of the facts for an order calling upon the magistrate or justice, and also upon the person to be affected by the act to show cause why the act should not be done.
- (2) If, after proof of due service of the order, *good cause is not shown against it*, the Court may make it absolute and the magistrate or justice upon being served with the order absolute, shall obey it, and do the act required, and the costs of the proceedings shall be in the discretion of the Court".

The application requested an order of mandamus commanding Rudolph H. Harper, Senior Magistrate of the Georgetown Magistrate's Court, *forthwith to continue to hear and determine a charge for murder* instituted against the respondent P. C. Francis Lucas. This application, at one and the same time requested an order of mandamus against the said P.C. 8255 Francis Lucas that *he should show cause why he should not stand trial for murder under the said charge*. The application, in addition to the orders above requested, further requested that Mr. E. A. Romao, the Director of Public Prosecutions, *should show cause how and when the proceedings in respect of the said murder were discontinued*.

We are of the view that the two latter requests for orders in this application are misconceived.

The application went on to state that on 13th day of December, 1972, the said Magistrate, Mr. Rudolph Harper, ordered a discontinuance of the trial of the said murder charge on the erroneous legal ground that the Director of Public Prosecutions had discontinued the said proceedings under paragraph 1(c) of *Article 47 of the Constitution of Guyana* by virtue of a letter and ever since that day had refused to adjudicate on the said murder charge.

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It is to be appreciated, initially, that the extent of the jurisdiction of the magistrate to hear a complaint or information for an indictable offence (and murder is an indictable offence) is limited by the *Criminal Law (Procedure) Ordinance*, Chapter 11 to determine whether upon the whole of the evidence submitted for his consideration a sufficient case or not is made out to put the accused person on his trial. *The magistrate was, thus, not sitting as a Jury* and the exercise of his functions in this matter was in the nature of a preliminary enquiry.

The facts on which the applicant relied are set out in her affidavit in support of the motion and at paragraph eleven (11) of her affidavit she stated that an Inquest was held into the circumstances surrounding the death of Oswald Tappin and *that the Coroner's jury returned a verdict that no one was criminally concerned in the cause of his death.*

In her affidavit, also, she expressed the opinion as distinct from any assertion of fact which may support or justify such an opinion that she did not feel that she had justice at the coroner's court at the inquest. An order of mandamus is not granted *merely* to assuage the feelings of any particular person.

She expressed the opinion also, that she felt that it was a clear case of murder. She was not in a position to determine the legality and sufficiency of and evaluate the evidence and degree of proof in relation to any offence more so, that of murder. That was a matter for a competent jury.

When the motion came up for hearing before this court, counsel for the applicant reiterated what was substantially set out in the affidavit in support of the motion. He said, also, that he was not questioning the *right* of the Director of Public Prosecutions to discontinue the proceedings, but rather was saying that the letter by which the Director of Public Prosecutions purported to have discontinued the proceedings could not have been acted upon by the magistrate because it was not part of the proceedings before the said magistrate.

The letter in question was produced for the benefit of this court by His Worship Mr. Rudolph Harper who was in court at the hearing of his motion.

The power of the Director of Public Prosecutions to discontinue criminal proceedings is a supervening power on the magistrate or any court and is not a factor which the magistrate can question or take into account in the consideration and determination of proceedings before him. The magistrate or court has only the corresponding obligation to comply with the exercise of that power.

Accordingly, the letter from the Director of Public Prosecutions did not have to be admitted in evidence in the proceedings before the magistrate for the magistrate to take notice of its authority and for him to be liable to the exercise of its power.

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The powers of the Director of Public Prosecutions are set out in *Article 47(2) of the Guyana Constitution* which states:—

"The Director shall have power in any case in which he considers it desirable so to do—

- (a) *to institute and undertake* criminal proceedings against any person before any court, other than a court martial in respect of any offence against the law of Guyana;
- (b) *to take over and continue* any such criminal proceedings that may have been instituted by any other person or authority; and
- (c) *to discontinue* at any stage before judgment is delivered in any such criminal proceedings *instituted or undertaken* by him or any person or authority"

Article 47(3) states:—

"The powers of the Director under the preceding paragraph may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions".

In our view, the operative words in 47(2) (a) are "*to institute and undertake*" in 47(2)(b) "*to take over and continue*" and in 47(2)(c) "*to discontinue*". We do not agree with the proposition of counsel for the applicant that in order to "discontinue" the Director of Public Prosecutions has to take over the proceedings. In that regard counsel for the applicant is importing the wording of the English Act which created the office of the Director of Public Prosecutions in England i.e. the Prosecution of Offences Act, 1879, but in that English Act the Director of Public Prosecutions has no power "to discontinue" as is conferred by *Article 47(2)(c) of the Guyana Constitution*. Under the Prosecution of Offences Act, 1879 "it shall be the duty of the Director of Public Prosecutions, under the superintendence of the Attorney-General, to *institute, undertake, or carry on* such criminal proceedings etc." There is no power to discontinue. The Prosecution of Offences Act, 1908, which with the *Prosecution of Offences Act, 1879* and that of 1884 regulate the office of the Director of Public Prosecutions in England, do not mention any power of the Director of Public Prosecutions to *discontinue*.

In our view it was specifically intended to give the Director of Public Prosecutions in Guyana under the Guyana Constitution the power to *discontinue* in addition to the powers conferred under Article 47(2) (a) and (b). It is significant that the word "*and*" as attached to Article 47(2) (b) comes after and outside the semicolon which sets out the power under Article 47(2) (b) and it does not join the power of 47(2)(b) with that of the power of discontinuance under 47(2)(c).

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Thus, we also did not agree with the proposition of Counsel for the applicant that before there was a discontinuance there must have been an exercise of the power under 47(2) (b) by the Director of Public Prosecutions.

Apart from our interpretation of the law, that proposition of counsel for the applicant certainly has some practical difficulties. Assuming that the Director of Public Prosecutions has decided for presumably good reason to discontinue proceedings, it would obviously be against that reason to necessarily take over those proceedings and continue them i.e. carry on such proceedings before discontinuing them. That proposition is not tenable. Again, there is the possibility that someone may refuse to allow the Director of Public Prosecutions to undertake, what then?

Counsel for the applicant also, advanced the proposition that if was necessary for the Director of Public Prosecutions to appear in person before the magistrate or some other person acting either with his general or special authority should have appeared.

Article 47(3) of the Guyana Constitution to which reference has already been made does not make it incumbent on the Director of Prosecutions or any officer or agent of his to appear in court and while in our view the Director of Public Prosecutions might have extended that courtesy to the magistrate as the matter was already before him of appearing or of instructing an officer of his to appear to discontinue the proceedings on his behalf, it was not necessary for him to do so, and his not doing so does not affect the legality and validity of his ministerial act.

Significantly, no procedure is laid down as to how the Director of Public Prosecutions should exercise his power of discontinuance and in any case, the exercise of a power not in accordance with a particular procedure does not necessarily make that exercise of power illegal and ineffective if it is done by the person in whom the power is vested, and there is actual obedience to the exercise of the power by the person liable to be affected as was done in this case by the magistrate.

The cases to which counsel for the applicant referred in support of this proposition do not find favour with us in sustaining his arguments, and indeed, are not relevant to the circumstances of this case.

Again, Article 47(3) is concerned with the *exercise* of the powers conferred by Article 47(2) of the Guyana Constitution and states that the exercise of power by the Director of Public Prosecutions under 47(2) may be in person or through some person under and in accordance with his general or special instructions.

The letter of discontinuance was signed by the Director of Public Prosecutions himself and was directed to the adjudicating magistrate. He exercised his power in person.

Accordingly, we are of the view that he exercised the powers conferred on him under Article 47(2) (c) in compliance with Article 47(3).

In so far as the aspect of personal appearance in court may be concerned it is not inappropriate to mention that under the English Acts to which reference has already been made there is no such requirement and no such requirement is stated in nor could be inferred from the Guyana Constitution. Further, as far as we are aware no such requirement is mentioned in any Guyana Ordinance with regard to the Director of Public Prosecutions. In England there is no requirement in the Acts creating the office of the Director of Public Prosecutions and defining his functions and there is such a requirement only in the *Criminal Appeal Act, 1907* at Section 12, where it is stated that it is the duty of the Director of Public Prosecutions to appear for the Crown on every appeal to the Court of Criminal Appeal under that Act except so far as the Solicitor of a Government department, or a private prosecutor in the case if a private prosecution undertakes the defence of the appeal. There is no comparable legislation in Guyana.

Those might very well be sufficient reasons for us to refuse to grant an order nisi but there were additional reasons why we did so, having regard, also, to the nature of an order *nisi*.

An order according to Dictionary of English Law by *Earl Jowitt* is said to be made nisi when it is not to take effect unless the person affected by it fails to show cause against it within a certain time, that is, unless he appears before the court and gives some acceptable reason as to why it should not take effect. It however, presupposes that an order can be validly and effectively made on what is submitted for the consideration of the court.

Accordingly, in our view, to succeed on the application for an order *nisi*, in this case, the applicant had to satisfy this court that an order which could be perpetuated into an absolute order if that order remained unanswerable to the satisfaction of this court should be made at this initial stage.

In our opinion an order nisi should not either on the face of the order or by the practical effect of the order contravene or be inconsistent with the law—be it statute law or the common law.

It was stated by the applicant in the affidavit in support of this motion that an inquest was held into the circumstances surrounding the death of Oswald Tappin and that the jurors at that inquest returned a verdict that no one was criminally concerned in the cause of his death.

The inquest into the cause of the death of Oswald Tappin was conducted in accordance with the *Coroner's Ordinance*, Chapter 13 of the Laws of Guyana, and there was no suggestion in the affidavit of the applicant that there was not due compliance with all the relevant provisions of that Ordinance.

According to Section 25 of the *Coroner's Ordinance*, Chapter 13 of the Laws of Guyana: —

"The jurors at every inquest, and the coroner at every inquiry, shall inquire when, where, how and after what manner, the deceased person

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came by his death, and also *whether any person is criminally concerned in the cause of the death* ".

That is the nature of the investigation at the inquest.

At Section 34 of the *Coroner's Ordinance*, Chapter 13, it is stated-

- (1) "*After the whole of the evidence is closed and the statement of the accused person (if any), has been taken down the coroner at an inquest shall sum up the evidence and then proceed to take the verdict of the jury, the finding of the majority being for that purpose sufficient, and the verdict shall thereupon be reduced into writing and authenticated by the signature or mark of the jurors finding it and countersigned by the coroner.*
- (2) The coroner at an inquiry shall record in writing his finding on the evidence, and that finding shall have the same effect as if it were the verdict of a jury".

The verdict of the jury after the whole of the evidence, including the testimony of Francis Lucas, wherein (according to paragraph 13 of the applicant's affidavit) he admitted having shot the deceased, absolved the said Francis Lucas from any criminal blame in that it stated no one including the said Francis Lucas was criminally concerned in the cause of the death of Oswald Tappin. Francis Lucas was in jeopardy of being found to be criminally concerned then but he was freed from blame.

It is the view of this court that it was not competent for the magistrate to enquire into another charge of murder against Francis Lucas on the facts upon which the coroner's jury had already deliberated and had already given a verdict exonerating the said Francis Lucas.

The case of *Re: Harold Beresford 36 Cr. App. R2* is illuminating.

In that case on July 8, 1951 the defendant Harold Beresford was the driver of a motor-car which was involved in a collision with a girl pedal cyclist as a result of which the cyclist lost her life. On the following day the coroner opened an inquest on her death, and, after formal evidence had been heard adjourned the proceedings until August 7. On August 2, 1951, the defendant appeared at Wragby Magistrates' Court Lincs., to answer an information for dangerous driving arising out of the same circumstances which had been preferred against him by the police. He elected to be dealt with summarily, pleaded guilty, and was fined £7. 10s. and his licence was ordered to be endorsed.

On August 7, the inquest was concluded, and the coroner's jury, by a majority, returned a verdict of manslaughter against the defendant. The defendant was committed for trial to Lincolnshire Autumn Assizes on that charge on the coroner's inquisition. At the assizes *Cassels J.* directed that the matter should be referred to the Attorney-General, who subsequently directed that a *nolle prosequi* should be entered.

Devlin J. in the course of his learned judgment at page 2 said inter alia.—

"It is common-place that in all cases of sudden death the law requires that an inquest should be held and *as a general rule the inquest should be concluded before any other step is taken.* There is one exception to that rule provided by statute and that is when a charge of murder or manslaughter is preferred. *In any other case the question of criminal responsibility for the death should be decided at the inquest* before any lesser charge arising out of the same circumstances is tried. *It is, I believe, a general practice, and it is certainly the proper practice, that the coroner should hold and complete the inquest unless he is informed that a charge of murder or manslaughter has been preferred.....*"

Applying the judgment of *Devlin J.* to the circumstances of this case we find that the inquest was concluded and no other step was taken by the police, and that the inquest was concluded before the applicant embarked on her private prosecution. No charge of murder or manslaughter was ever preferred against the defendant before the inquest was held so as to possibly preclude the holding of the inquest. The question of the criminal responsibility of Francis Lucas was decided at the inquest.

As a corollary to the principle enunciated by *Devlin J.* in the Beresford case it follows that if a coroner's inquest is held and no charge of murder or manslaughter was preferred before the inquest and there is no verdict of murder or manslaughter arising from the inquest, a person cannot be charged for murder or manslaughter on the *same facts* either by the police or by a private prosecution *after the inquest was held.*

Accordingly, having regard to the legal effect of the *Coroner's Ordinance*, Chapter 13, having regard to the propriety of Francis Lucas being placed in jeopardy for a second time by the applicants prosecution for the same offence in circumstances which may give rise to an application of the plea of *autrefois acquit* on principles as stated in *Connelly v. Director of Public Prosecutions 48 Cr. App. R.183* and in conjunction with our previously considered and stated interpretation of the powers of the Director of Public Prosecution under *Article 47 of the Guyana Constitution*, and in the exercise of our judicial discretion on all the circumstances of this case, we are of the view that we should have refused to make an order *nisi* on this application and did so.

Finally, it may not be inappropriate to mention that under the *Law Revision Bill, 1972* all the rights, privileges and functions of any criminal cause or matter vested immediately before the 26th May, 1966, in the Attorney-General under any written law or the common law or by any custom or practice, shall be deemed as from that date to have become vested in the Director of Public Prosecutions.

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It, therefore, follows that in terms of Section 39 of the *Coroner's Ordinance* Chapter 13, the Director of Public Prosecutions must be presumed to have had all the records and minutes of the proceedings at the inquest transmitted to him and to have addressed his mind to them and to have exercised his mind on them before taking the decision to discontinue the proceedings initiated by the applicant before the magistrate as he did and to have acted on good faith at all times when he did so, *omnia praesumuntur rite.....esse acta.*

Order nisi refused

GRACE BACCHUS v. RAYMON BACCHUS
(Plaintiff) (Defendant)

[High Court (K. S. Massiah, J.),
May 11, 18; September 18, 1973].

Libel—Alleged defamatory words contained in written report to superior officer—Report by subordinate officer to superior about plaintiffs conduct—Whether words incapable of bearing defamatory meaning by ordinary reasonable Guyanese citizen.

Libel—Defence of Privilege—Publication of allegedly defamatory matter of the plaintiff—Manuscript given by defendant to typist in ordinary course of business—Whether publication privileged.

The plaintiff sued the defendant for damages for libel allegedly contained in a report in writing referred in the course of duty by the defendant to the Personnel Officer of Leonora Sugar Estate. Both parties worked at Leonora Sugar Estate—the plaintiff as a nurse midwife, and the defendant as Field Supervisor.

On April 27, 1971, plaintiff went to the office of the Estate's Personnel Officer, Mr. P. Naraine, to discuss with him the matter of electricity charges she shared with her neighbour and co-worker one Hardut Kumar, and about which Mr. Naraine had written her. She was evidently in an indignant mood. Naraine was not in office at the time, and she behaved in a most reprehensible manner because of the fact that she was written to about the high rate of her electricity charges. On the return of the Personnel Officer, plaintiff's deplorable behaviour was reported to him by the defendant who was next in charge of the office and who overheard what the plaintiff said, and saw her behaviour. The report was in writing, and in it the opinion was expressed in confessedly borrowed language—that "her (plaintiff's) behaviour seems to suggest a perverted personality development from sub-cultural socialisation.

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Plaintiff pleaded that these words are defamatory of her in meaning in the respect that she is not a fit and proper person to associate with normal Guyanese citizens. On the other hand, the defendant pleaded in the alternative, firstly, that the words did not bear the meaning ascribed to them; and in any event, they are not capable of a defamatory meaning, and secondly, the words were used on a privileged occasion.

HELD:—(i) the words complained of are incapable of a defamatory meaning and do not bear the meaning ascribed to them by the plaintiff. The test to be applied is the classic one of whether the words complained of would tend to lower plaintiff in the estimation of right thinking members of society generally or would cause her to be shunned and avoided.

(ii) even if the words in the report were defamatory, they were published on a privileged occasion.

Action dismissed with costs.

Cases referred to include:—

- (1) *Cassidy v. Daily Minor* (1929) 2 K.B. 331.
- (2) *Stuart v. Bell* (1891) 2 Q.B. 341.
- (3) *Somerville v. Hawklins* (1851) 10 C.B. 583.
- (4) *Turner v. M. G. M. Pictures* (1950) 1 All E.R. 449.

S. E. Brotherson for the plaintiff.

Ashton Chase, for the defendant.

K. S. MASSIAH, J.: The plaintiff in this action is a nurse/midwife employed by the Demerara Company and serving at Leonora Estate, West Coast, Demerara. She sued the defendant for damages for libel alleged to have been contained in a report put up by him to the Estate's personnel manager. The defendant is employed at the same estate as field supervisor but in April 1971, when this matter arose he held the post of Housing Supervisor.

Hardut Kumar also works at Leonora Estate and is the plaintiff's immediate neighbour. He holds the post of Welfare Officer. The Estate authorities pay the electricity charges incurred by the plaintiff and Kumar and therein lies the root of this entire matter, for Kumar, who shares an electricity meter with the plaintiff, claims that the charges have risen sharply since the plaintiff became his neighbour and began to share the meter.

Kumar said that the plaintiff was in the habit of keeping her lights on even beyond day-break and that he had occasion to speak to her about this. He also reported the matter to the personnel manager, Mr. P. Narine, who appears to have been in charge of administrative matters on the Estate.

The combination of Kumar's complaints and the rising electricity charges appears to have stirred Narine to action and on 23rd April, 1971, he wrote the plaintiff and Kumar a letter (Ex. "D") advising them that lights

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should be turned off not later than 5.30 a.m. and that they would in future be surcharged for high electricity bills.

The plaintiff's reaction to that letter was hostile and articulate. On 27th April, 1971, she went to the Personnel Department in order to discuss the matter with the personnel manager. She discovered that he was out of office, and his secretary to whom the plaintiff spoke testified about the plaintiff's behaviour on that occasion.

I accepted and believed the evidence of the secretary, Savitri Prashad. Without going into details I would say that the plaintiff's behaviour was highly reprehensible. It is clear that she was annoyed over the letter she received and she made her feelings known in no Uncertain terms. I formed the impression that the plaintiff finds it difficult to govern her temper and I had cause to reprimand her for her misconduct in the witness-box when she shouted at counsel.

It was the plaintiff's indecorous behaviour at the office on 27th April, 1971, that eventually led to this suit. No one in the office on that day appears to have escaped her wrath or mordant criticism. Kumar was described as an "auntie man" and a "blasted news carrier" and the clerks as "dam two by two clerks". She asked the rhetorical question: "Who the hell is the personnel manager to send letter to me?".

In his testimony the defendant described the plaintiff's behaviour as disgraceful, and on the day following the incident he reported the matter to the personnel manager to whom he put up a written report (Ex. "A") on 30th April, 1971. In that report the defendant stated, *inter alia*, as follows:—

"One can only draw the conclusion that her behaviour seems to suggest a perverted personality development from sub-cultural socialisation".

Those are the specific words about which the plaintiff complained and which form the subject matter of this action. The plaintiff's contention is that those words bear the defamatory meaning that she is not a fit and proper person to associate with normal Guyanese citizens.

The defence, pleaded in the alternative, is, firstly, that the words do not bear the meaning ascribed to them by the plaintiff, and in any event, that they are not capable of any defamatory meaning, and, secondly, that the words were used on a privileged occasion.

It is my view that the words complained of are incapable of a defamatory meaning and do not bear the meaning ascribed to them by the plaintiff. The test to be applied here is the classic one of whether the words complained of would tend to lower the plaintiff in the estimation of right-thinking members of society generally or would cause her to be shunned and avoided.

The defendant himself did not appear to understand the meaning of what he wrote and may have used those words to add what he may have

thought was intellectual spice to his report. He said that he borrowed the words from a sociologist.

But his reasons for using the words are immaterial in determining his liability for as LORD RUSSELL said in *Cassidy v. Daily Mirror (1929) 2 K.B. 331.* at p. 354:

"Liability for libel does not depend on the intention of the defamer, but on the fact of defamation".

In determining whether or not the words are defamatory one must endeavour to find out whether or not the ordinary, reasonable Guyanese citizen would have so considered them. Would the words, one has to ask oneself, tend to lower the plaintiff in that citizen's estimation or cause him to shun or avoid her? For it is what the average, ordinary, intelligent citizen of Guyana thinks about the matter that is important, not how it is viewed by a Guyana scholar or a professor at the University of Guyana, or by a censorious person or, on the other hand, by the cynic who would treat with a sneer and with contempt the worst that may be said of him or anyone else, but would go no further.

The exact words complained of as I said earlier, are:—

"One can only draw the conclusion that her behaviour seems to suggest a perverted personality development from sub-cultural socialisation"

"Culture" has been defined as "the distinctive way of life of a group of people, their complete design for living"—*Clyde Kluckhohn's "The Study of Culture"*—p. 86.

A sub-culture is a culture that is different and distinguishable from the normal or dominant culture that prevails in a society. So *Leonard Broom* and *Philip Selznick* in their work on "*Sociology*" (3rd edition) write as follows at page 60:—

"Sub-cultures are distinguishable from one another and from the dominant culture-forms by such manifest characteristics as language, clothing, gesture and etiquette".

Sub-cultures may be ethnic, regional, occupational and the like. The Puerto Ricans in the United States of America have their own sub-cultural patterns, and there are those who would consider that many Guyanese who live in humble circumstances have a sub-culture of their own.

In the work just quoted the authors write as follows at page 93 about "socialisation":—

"The process of building group values into the individual is called socialisation. From the point of view of society, socialisation is the way culture is transmitted and the individual is fitted into an organised way of life. . . . From the point of view of the individual socialisation is the fulfilment of his potentialities for personal growth

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and development. Socialisation humanises the biological organism and transforms it into a self having a sense of identity, capable of disciplining and ordering behaviour, and endowed with ideals, values and ambitions.

Socialisation regulates behaviour, but it is also the indispensable condition for individuality and self-awareness".

And later at page 96:—

'Socialisation inevitably produces a degree of conformity. People brought up under similar circumstances tend to resemble each other in habits, values and personality".

The words complained of seem to mean to me, therefore, that the plaintiff's personality is not properly developed because she was brought up in a stratum of society with cultural values and standards below the normal, and that it was these sub-cultural values that now determine the pattern of her behaviour.

What he meant in effect was that the plaintiff behaved the way she did because she was not brought up in what he would have considered to be the right social circles. He seemed to think that she did not possess the refined manners and breeding of those whom he must have thought were her social betters.

In my view, to determine whether or not the reasonable man in Guyana would today look down upon such a person or tend to shun or avoid him one would have to consider the social changes that have taken place in this country over the last decade.

The law is a living thing and must be interpreted and applied in the context of contemporary life and prevailing ideas. Words that were defamatory ten years ago might not be so considered today. In England during the Caroline age it was actionable to call a person a Papist; it is certainly not so today. The proper test, to my mind, therefore, is what would the average Guyanese citizen think today about this matter, not how he would have viewed it ten or fifteen years ago. One has to bear in mind that with the attainment of political independence and the birth of our nation new social ideas have been conceived and social changes brought about.

In this age of the small man and the Guyanese ideal of an egalitarian society to which all appear committed, there has arisen at all levels a commendable awareness of the plight and social condition of the person who used to be called "the common man", and there is a corresponding diminution of the tendency to disparage him because he was considered to have been spawned in a milieu once described as "lower class". A resident of Albouystown or Tiger Bay does not at the present time bear the social stigma which previously derived from the very fact of living in those areas, because today a new and different view is taken of social inequalities.

It is against this background and in the light of this mood of social change and the present stirring of what the sociologists call one's "social conscience" that this matter must be seen and determined, and I am therefore of the view that the words complained of, if believed, would not tend to lower the plaintiff in the estimation of right-thinking members of our society or cause them to shun or avoid her, though, perhaps, a snob might wish to do so.

It must not be understood that I feel that the average Guyanese is indifferent to misbehaviour in our society and that we are approaching a state of decadence. There can be no doubt that the average citizen would frown on misbehaviour and indecency no matter what the cause may be and would no doubt shun a person who so misconducts himself. And there can be no doubt that the plaintiff misbehaved herself at the Estate Office on 27th April, 1971.

But what the plaintiff complains about is the explanation for her misconduct which the defendant suggested, and that is what, in my view, the average citizen would not view unfavourably. In other words, what the average Guyanese would find objectionable is a person's misbehaviour, not the cause of it, at least not if the cause is the social conditions under which the defaulter had the misfortune to have been raised.

Though I was of the view that the words complained of were not defamatory I, nevertheless, considered the plea of qualified privilege which was raised in this matter.

The first thing I wish to point out on this aspect of the matter is that though this defence was specifically pleaded the plaintiff failed to deliver a reply alleging express malice and giving particulars from which malice could be inferred. This was necessary if the plaintiff intended to allege malice—see O. 17, R. 24 of the Rules of the Supreme Court.

It is clear law that once a plea of qualified privilege properly arises there can be no defamation unless the plaintiff can prove express malice on the defendant's part—see *Stuart v. Bell* where LINDLEY, L.J., said as follows; [(1891) 2 Q.B. at p. 351].

"If the occasion is privileged the plaintiff must prove malice in fact; the burden of proving this is on him".

See also *Somerville v. Hawkins (1851) 1Q C.B. 583*, where MAULE J., said at p. 590:

"In cases of privileged communication, malice must be proved, and therefore its absence must be presumed until such proof is given", and *Turner v. M.G.M. Pictures (1950) 1 A.E.R. 449* - (Lord PORTER'S judgment-- p. 451, letter H).

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In respect of qualified privilege I wish to adopt the definition of "a privileged occasion" given by LORD ATKINSON in *Adam v. Ward (1917) A.C. 309 at p. 334*. He defined it as follows:

"A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential".

In this matter the defendant said that he considered the plaintiff's behaviour in the office to have been disgraceful. He said that as the most senior member of the Personnel Department it was his duty to make recommendations as to discipline to the Personnel Manager and that his interest in writing the report (Ex. "A") was to maintain a good standard of conduct and discipline in the office. During cross-examination the defendant said that the Personnel Manager asked him to give his "opinion" as to what happened in the office. He also said that in the absence of the Personnel Manager he is the most senior member of the staff and as such it is his duty to report indiscipline that occurs in the Personnel Manager's absence.

I accepted and believed all of that evidence because it appeals to me as being sensible. It could not be that in the absence of the Personnel Manager things would be allowed to go awry and all discipline thrown overboard, and who could be better suited to preserve discipline in such a case than the next most senior member of the staff. In the performance of that function there must have been a duty cast on the defendant to make a report to the Personnel Manager, Mr. Narine, of any breaches of discipline that occurred in his absence, and there must have been a corresponding duty and interest on the part of Narine to receive it. Ex. "A" was written only after the defendant had made an oral report to Narine and discussed the matter with him.

It is my view, therefore, that the occasion on which the report was communicated was privileged and that the matter complained of has reference to that occasion. Since the defendant's good faith has not been called in question, for there has been no evidence of express malice, the plea of qualified privilege accordingly succeeds.

Counsel for the plaintiff argued that although it is doubtful whether the publication to Narine was made on a privileged occasion it certainly could not be said that the publication to Savitri Prashad was privileged. The evidence is that Savitri Prashad typed the report, Ex. "A", which contains the offending words. It appears that she typed it from a manuscript copy which the defendant gave her, and that the defendant then submitted Ex. "A" to Narine.

The approach to this aspect of the case by counsel for the plaintiff was wrong. Once the communication is considered to have been made on a privileged occasion, then a publication of that communication to a typist

is also sheltered by the privilege once the communication to the typist is reasonably necessary and in the ordinary course of business—see *Boxsius v. Goblet Freres* (1894) 1 Q.B. 842 and *Osbern v. Thomas Boulter and son* (1930) 2 K.B. 266.

In *Boxsius'* case a solicitor acting on behalf of his client, wrote and sent to the plaintiff a letter containing defamatory statements regarding her. The letter was dictated to a clerk in the office, and was copied into the letter-book by another clerk. It was held that the publication to the clerks was privileged since the communication if made direct to the plaintiff would have been privileged.

In the course of his judgment in that matter LORD Esher said as follows at p. 846:

"Where what the solicitor does would be done, as between himself and the person to whom he is writing, on a privileged occasion, because the occasion would be privileged if the client were himself writing, giving a clerk a letter to copy is also an act done on a privileged occasion, and the solicitor is not liable unless malice is shown. Malice has been negatived in this case, and that being so the defendant is entitled to judgment".

LOPES, L.J., concurred with LORD Esher's views. He expressed himself (pp. 846) as follows:—

"In the present case, if the communication had been made direct to the plaintiff, it would have been made on a privileged occasion, and though not so made, but made to a clerk in the office, the occasion was also, in my opinion, privileged. It was reasonably necessary that the solicitor should make such a communication".

In the course of his arguments on this aspect of the case, counsel for the plaintiff referred to and placed reliance on *Pullman v. Walter Hill & Co. Ltd.*, (1891) 1 Q.B. 524 where a merchant had dictated to his clerk certain defamatory statements about the plaintiff and where the court had held that the occasion of the publication was not privileged. But in that matter the court reached that conclusion because it felt that it was not the usual course in a merchant's business to write letters containing defamatory statements and to communicate them to a clerk in his office.

LORD Esher was at pains to point this out in *Boxsius v. Goblet Freres* where he distinguished that case from *Pullman v. Hill* in which both he and LOPES L.J. also sat. At p. 844 of *Boxsius v. Goblet Freres*, LORD Esher said that:-

"In the case of *Pullman v. Hill & Co.*, this court held that if a merchant dictates to a clerk a libellous statement about a customer, which that clerk takes down and gives to another clerk in the office to copy, that is a publication to the clerks, and the occasion of such publication is not privileged. *We so held on the ground that it does*

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not fall within the ordinary business of a merchant to write such defamatory statements, and that if he does so, it is not reasonably necessary, as he is doing a thing not in the ordinary course of his business, that he should cause the statement to be copied by a clerk in his office".

LORD ESHER then proceeded to discuss the differences between the nature of a solicitor's work and that of a merchant and to hold that the solicitor's statement would have been privileged if made to the plaintiff in that case. The position here is the same. The report, Ex. "A", was published to Narine on a privileged occasion, that privilege protects that communication when made to the typist, Savitri Prashad.

At p. 297 of his "*Law of Tort*" (5th Edition) the late Professor Winfield has criticised the *ratio decidendi* in *Boxsius v. Goblet Freres* and preferred to think that *White v. Stone Ltd.*, (1939) 2 K.B. 827 is sounder in principles than *Boxsius v. Goblet Freres*.

In *White v. Stone*, the plaintiff, an employee of the defendants, was dismissed from the company's service in the hearing of another employee on the ground that he had stolen the company's money. In the court at first instance MACNAGHTEN J. held that the statement in the third person's presence was not made on a privileged occasion. The Court of Appeal affirmed his decision on that issue and held that where a statement is made to a person in the presence of a third person, the occasion is not privileged unless the third person has an interest or a duty, legal, social or moral to hear the statement.

The decision in *White v. Stone* appears to be at variance with that of *Boxsius v. Goblet Freres* and *Osborn v. Boulter*, but the odd thing is that neither of those cases was cited or considered in *White v. Stone*.

The late PROFESSOR GOODHART dealt with this issue in an article in 56 *Law Quarterly Review*, 262, under the caption "*Defamatory Statements and Privileged Occasions*" and he expressed the view therein that courts would in future be inclined to follow *Boxsius' case* rather than *White v. Stone* because *White v. Stone* appears to have been decided on the special facts of that matter. I incline to the same view.

However that may be it appears that *Boxsius v. Goblet Freres* is still good law today and it does not appear to have been specifically overruled, though some might argue that *White v. Stone* appeared to do so.

In any case, the decision in *Boxsius' case* is commonsensical and consistent with justice, for no businessman can be expected to write all his letters himself without the aid of a typist and how can he keep proper records unless his typist makes copies of his documents and keeps at least one copy on file. That is the reason why in *Edmondson v. Birch* COZENS-HARDY L.J., said: - [(1907) 1 K.B. at pp. 381-82]

I think that, if we were to accede to the argument for the plaintiff, we should in effect be destroying the defence of privilege

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in cases of this kind, in which limited companies and large mercantile firms are concerned; for it would be idle in such cases to suppose that such documents as those here complained of could, as a matter of business, be written by, and pass through the hands of, one partner or person only".

In that case it was held that since a letter and telegram were sent on a privileged occasion their incidental publication to the sender's clerks was protected—the publication to them was considered to have been reasonable and in the ordinary course of business. I agree with and would follow this statement made at p. 825 of *'Clerk and Lindsell on Torts'* (12th edition) where this subject is discussed:

"The principle seems to be that if the occasion is privileged, a publication by the person exercising the privilege to third persons is protected if it is reasonable and in the ordinary course of business. . . . It is on this ground that publication to clerks, typists or copyists is protected. The mere fact that such third persons have no legitimate interest in the subject-matter will not destroy the privilege".

The same approach is taken in *"Gatley on Libel and Slander"* (5th edition) at p. 251 and 253.

What has to be stressed, I think, is that the position would be completely different if the plaintiff, sheltering under the protective umbrella of privilege, were to publish the defamatory statement to whomever he wished. This is impermissible, for privilege is not a licence for irresponsible and indiscriminate publication, and to be protected, publication to the third person must be reasonable and in the ordinary course of business.

To sum up this aspect of the case, I would say that since the report, Ex. "A", was published to Narine on a privileged occasion, the incidental publication, in the ordinary course of business, to Savitri Prashad who typed Ex. "A" was also made on a privileged occasion.

So far as the entire matter is concerned I held first of all that the words complained of were not defamatory, and secondly, that even if defamatory, that they were published on a privileged occasion. I accordingly dismissed the action with costs.

Action dismissed with costs.

LEONARD BROWNE (Plaintiff)

v.

JOSE. H. WAGNER AND COLWYN WALCOTT

JANICE HALLEY, AN INFANT (Defendants).

HIGH COURT: In the matter of the Estate of Victoria August, deceased. (Bollers, C.J.), February 28; March 13, 25; and April 8, 1972, September 26, 1973.

Will—Plaintiff fully aware will in possession of executors—Action for declaration on invalidity of will—Whether action for declaration appropriate procedure rather than citation of defendants as executors to propound will in solemn form—Action misconceived.

Witt—Executors neglect to deposit will in Supreme Court Registry—Supreme Court of Judicature Consolidated Act, 1925; English Probate Rules, 1954 & 1965; Deceased Persons Estates' Ordinance. Cap. 46, s. 9.

The plaintiff Leonard Browne, brought an action for two declarations in the High Court against the first and second named defendants, the executors of the last Will and testament of Catherine Rebecca August also known as Victoria August. They sought declarations, (a) that the Will in which the executors were named, and under which the added defendant is sole beneficiary is invalid, and should not be admitted to probate; (b) that plaintiff is solely entitled to the deceased testator's estate, and entitled to a grant of Administration. In his statement of claim plaintiff alleges failure on the defendant's part to apply for probate of the Will, and to warn the caveats filed by him. He also questioned the authenticity of the testator's signature, alleging that the Will was not executed in accordance with the Wills Ordinance Cap. 47; and that the deceased did not know or approve of the contents of the Will. The defendants admitted, in defence, possession of a Will made by the deceased, dated December 9, 1967, under which they were named executors, and denied the allegations of undue influence and the alleged non-compliance with due execution of the Will according to law, and contended that, as a matter of law, it is not competent for the plaintiff to seek the declaration sought by him.

HELD: (i) the onus rested on the plaintiff to establish on a balance of probability that the testator did not sign the Will; and that the Will was invalid because of undue influence and from lack of knowledge or approval of its contents; but the onus was not discharged;

(ii) the plaintiff knew at the time of filing the action that the defendants were claiming to be in possession of a Will. So the proper procedure was for him either to have cited the defendants as executors to propound the will in solemn form under the English Probate Rules, 1954, or to have approached the Registrar of the Supreme Court with a view to the issue of a citation to the defendants to deposit the Will in the Registry in according with the Deceased Persons' Administration Ordinance, Cap. 46, s.9;

(iii) the Plaintiff having misconceived his remedy by not following the statutory procedure by electing to prefer an action for a de-

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claration, the action must be dismissed. There will however be no order for costs in view of s. 6 of Cap. 46 providing a penalty for neglect to deposit the Will in the Supreme Court Registry.

Action for a declaration dismissed. Judgment for the defendants without costs.

CASES REFERRED TO INCLUDE

- (1) Guaranty Trust Co. of New York v. Hannay (1915) 2 K.B. 536 C.A.
- (2) Bull v. A.G. for New South Wales (1916) 2 A.C. 564
- (3) Wilkinson v. Barking Corp. (1948) 1 K.B. 721
- (4) Cooper v. Wilson (1937) 2 K.B. 309
- (5) Barraclough v. Brown (1897) AC. 615

F. Ramprashad, S.C., instructed by Mrs. S. Trotman for the plaintiff.

L. John, instructed by *D. Dial* for the defendants.

BOLLERS, C.J.: In December, 1967 Victoria August also known as Catherine Rebecca August an old lady in her 70's lived in a house with her niece Janice Halley at 175 Wismar Housing Scheme. The house in which she lived was provided by her nephew Leonard Browne, the father of Janice Halley and he supported her. Leonard Browne who was not on speaking terms with his illegitimate daughter lived in his own house nearby and carried on a grocery business. Victoria August was a sickly person on the decline, and is alleged to have told Leonard Browne that she had not made a Will and when she dies she would leave all her property to him. She however, did not appear to do so, for on the 9th December, 1967 Victoria August accompanied by Janice Halley in the afternoon, attended St. Aidans Church Office, Wismar, of which she was a parishioner, and there she informed the Vicar that she would like to make a Will. August then handed a Will form to the Rev. Heron Sam and dictated the contents of her Will to him. The Rev. Sam wrote out the details of the Will on the dictation of August and after he had completed his task, he read it out to her and she said she was satisfied and signed it in the presence of Rev. Sam and the attesting witnesses Joseph Wagner and Colwyn Walcott who were named as executors under the Will. The attesting witnesses then each signed in turn in the presence of the testator, Rev. Sam and each other. The Will (Exhibit "G") bore the signature at the top Catherine Rebecca August after the words "as witness my hand this 9th day of December, 1967" and it was only subsequent to the execution of the Will that a similar signature was inserted at the point in the form which indicated the place where the testator should sign. Immediately after this Will was executed a copy of the Will was written out by Colwyn Walcott at the same time and place and it was executed by August who signed it in exactly the same way as she had signed the original, and in the presence of the same persons as in the case of the original Will. The copy was then signed by the same attesting witnesses and in the same manner and in the presence

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of the same persons as in the original. As in the case of the original Will the signature of the testator which appears at the bottom of the Will was signed at a subsequent date.

Sixteen days later on the 25th December, the old lady died, and Leonard Browne in the genuine belief that there had been no will executed by August and that he was the sole person entitled on an intestacy, made all the funeral arrangements and paid all the expenses attached thereto amounting to \$447.00 for the burial of the deceased. On the 11th September, 1968 Browne further expended the Sum of \$50.00 as a deposit with the Public Trustee who undertook to administer the estate and obtained a receipt therefor Exhibit " B " In pursuance of that undertaking the Public Trustee published a notice to that effect in the Guyana Graphic newspaper of July 6, 1968 Exhibit "C". It was not until sometime in 1969 i.e. about 18 months after the death of the deceased when an official of the Public Trustee's office accompanied by Browne paid a visit to the home of the deceased, presumably for the purpose of preparing an inventory of the assets of the estate of the deceased, that both he and Browne were informed by Colwyn Walcott that he (Walcott) was in possession of a Will made by the deceased. When Walcott was asked if he had not seen the notice in the newspapers he made no satisfactory answer. On the 9th April, 1969, 9th October, 1969, and April, 1970 Leonard Browne filed a caveat in respect of this Will which was alleged to have been made by the deceased, but no action was taken by the executors named in the Will.

Leonard Browne as plaintiff now brings this action against Joseph Wagner, Colwyn Walcott, the executors named in the Will as defendants and Janice Halley as the sole beneficiary under the said Will as an added defendant, in which he seeks:

- (a) A declaration that the Will of Victoria August in which said Will the first and second named defendants are named as executors, and the third named defendant as beneficiary, is invalid and should not be admitted for Probate;
- (b) A declaration that he is the person solely entitled to the estate of the deceased on an intestacy and the person entitled to a grant of Letters of Administration.

In the Statement of Claim it is alleged that the defendants from the date of the death of the deceased up to the present time have failed or neglected to apply for Probate of the alleged will of the deceased and have failed to *warn* the caveats of the plaintiff which were filed. It is further alleged that the Will was not duly executed in accordance with the provisions of the Wills Ordinance, Chapter 47, and at the time of the purported execution of the Will the deceased did not know or approve of the contents thereof and the execution was obtained by undue influence exerted over her by the defendants. The defendants in their defence admit possession of a Will duly executed by the deceased dated 9th December, 1967 in which they were named as executors but they deny the allegations of undue influence and the

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execution of the Will not in accordance with the *Wills Ordinance, Chapter 47*. The main averment of the defence is that the contention as a matter of law that it is not competent for the plaintiff to seek the declaration sought by him. Such declarations being unnecessary and an abuse of the court It is to be noted that there is no counter-claim by the defendants in which they seek a pronouncement by the court in favour of the validity of the said Will and an admission to probate of the said Will in solemn form.

It is clear from the issues raised in the pleadings that the onus rested on the plaintiff to establish on a balance of probabilities that the Will dated the 9th December, 1967 alleged to be made by the deceased was invalid. and should not be admitted to probate, and from my findings it must be seen that this onus was not discharged. The plaintiff was not in a position to lead any evidence in relation to the actual execution of the Will, and his evidence was confined merely to an attempt in showing that he supported the deceased and she had promised to leave him all her property, and that it was his opinion that the signature Catherine Rebecca August appearing on the Will was not the signature of the deceased and/or as she was not known by that name. There was however, the strong evidence led in rebuttal by the defendants. who signed the Will as attesting witnesses and who were named as executors thereunder that the deceased testator did sign the Will which was written out by a reverend gentleman and was responsible for the signature Catherine Rebecca August appearing thereon. It is clear that the signature which appeared at the bottom of the Will, was signed by the deceased subsequently and it may well be that the signature at the bottom does not appear to be as firm as the signature above, because at that time the condition of the deceased had deteriorated. There is nothing however, to suggest that the Will was not made in accordance with the *Wills Ordinance, Cap. 47* or that there was undue influence exercised by the defendants over the deceased, or that there was any circumstance which would affect the validity of the Will. See sections 5 and 8 of the *Wills Ordinance, Cap. 47* which renders the appointment of the executors null and void but does not affect the due execution of the Will.

It is true that the first named defendant Wagner stated that Exhibit "F" was the Will written out by the Rev. Sam, and the second named defendant Walcott at first stated that Exhibit "F" was the Will made by Rev. Sam and then corrected his mistake by saying that Exhibit "G" was the Will written by Rev. Sam, but this in my view was a mistake made by the defendants because of the fact that two Wills were written at the same time in the same circumstances, but the evidence of the treasurer of the Anglican Diocese Church who tendered letters written to him by the Rev. Sam and the evidence of the handwriting expert who was of the view that the writing on the face of the Will Exhibit "G" and the letters received by the treasurer of the Diocese, were of common authorship, exhibits "H, J1 & J2" put the matter beyond dispute that the Will Exhibit "G" was in fact written by the Rev. Sam. The handwriting expert did say that the bottom signature on Exhibit "G" could have been made by someone trying to forge the signature at the top of the Will or the top signature was made by someone trying to forge the bottom

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signature, but in my view this carried the matter no further, as that is all that his scientific knowledge would permit him to say, and I am satisfied that the signature at the top of the Will was written by the deceased. The plaintiff through the required officer tendered in evidence a lease Exhibit "D" which purported to be signed by the deceased as V. August in 1959 but this did not assist the plaintiff as no one was able to say positively that it was the deceased who signed the lease or the application Exhibit "E", and it may well be that the deceased did sign those documents but it must be remembered that she was eight years younger at that time, so that the signature on those documents might well vary from the signature on the Will, Exhibit "G".

The plaintiff therefore failed in his bid to show that the Will exhibit "G" dated 9th December, 1967 was invalid, the onus of which lay on him, and on the contrary, strong evidence was led by the defendants to show that the Will was executed by the deceased and made it appear that the Will was executed in accordance with the Wills Ordinance, Cap. 47 after it had been written out by the Rev. Sam on the instructions of the deceased. I however make no firm finding of fact on this aspect as this is not a probate action.

I now turn my attention to the submission made by counsel for the defendants that the plaintiff has misconceived his remedy as he knew at the time of the filing of the action that the defendants were claiming to be in possession of a Will, the proper procedure should have been for the plaintiff to cite the defendants as executors named in the Will to propound the Will in solemn form.

Order 1 Rule 3 of the Rules of the Supreme Court of 1955 states that:

"wherever touching matter of practice or procedure these Rules are silent, the Rules of the Supreme Court for the time being in force, made in England under and by virtue of the Supreme Court of Judicature (Consolidation) Act, 1925 or any statute amending the same shall apply mutatis mutandis".

In this country there are no Probate Rules so it must follow that we must apply the Probate Rules in relation to contentious business made under the *Supreme Court of Judicature Consolidation Act 1925*. The original Probate Rules in England were made in 1862 under the *Court of Probate Act 1857* and the *Court of Probate Act 1858*. The relevant provisions of those Acts have been repealed but the Rules continue in force by virtue of Sec. 226(1) of the *Supreme Court of Judicature (Consolidation) Act 1925*. The present rules were made in 1954 and then amended in 1965. Under Rule 13 of the 1954 Rules citations can only be extracted from the Principal Registry and no citation is to be issued under seal until an affidavit in verification of the averments it contains has been filed in the registry. A citation is defined in *Tristram and Coote's Probate Practice (20th Edn.)* 471 as:

"an instrument issuing from principal probate registry under the seal of the court, and signed by one of the registrars, containing a

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recital of the reason for its issue and the interest of the party extracting it, calling upon the party cited to enter an appearance and take the steps therein specified, with an intimation of the nature of the order the court is asked to and may make unless good cause is shown to the contrary".

Halsbury's Statutory Instruments Vol. 7 p. 240 states that citations are issued (a) to bring in a grant, (b) to propound testamentary papers and (c) to see proceedings; and reference is made to the non-contentious Probate Rules 1954 under the heading "*Citations*".

Rules 45—48 of the non-contentious Probate Rules 1954 deal with citations, and Rule 47 states:

(1) "A citation to propound a Will shall be directed to the executors named in the Will and to all persons interested thereunder, and may be issued at the instance of any citor having an interest contrary to that of the executors or such other persons".

Rees on Probate and Divorce Handbook 2nd Edition 152 confirms this under the head of *Citations*; where the author states:

"When a person, having the prior right to take a grant, delays or declines to do so, the Court, at the instance of another having an inferior right, will call upon the party having such prior right to take the grant, and, on his failing to do so, may make an order in favour of the citor".

See also *Risdon and Hancock on Modern Administration and Probate Practice and Law 2nd Edn. 174* under the heading Procedure on Citations

Purpose—(4) To Disestablish (set aside) a Will, which is believed to be invalid but blocks the path of an Applicant for Letters of Administration, by citing the Executors and all interested persons to appear and propound—another form of compulsory clearing off;

and *Atkin's forms Vol. 13 p. 325* informs that Citations are issued both in non-contentious and contentious business. Their chief object in the former is to compel all persons having a prior equal right to a grant or an intermeddling executor to come and take the grant in default of which administration may be granted to the citor; in the latter to compel a person to bring in a grant to propound testamentary papers or to bring a person before the court to see proceedings. But the matter, does not end there.

Sec. 9 of the Deceased Persons Estates' Administration Ordinance, Chapter 46 enacts as follows:

(9) Where the Registrar or any interested party has reasonable grounds for believing that any person is in possession of a Will which he refuses or fails to deposit, he may, in addition to any proceedings taken under sec. 6 of this Ordinance, apply forthwith by summons or motion *ex parte* to the Court for a rule calling on that person to show cause why he should not forthwith deposit the Will, and at the hearing

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of the matter the Court may make an order (including an order as to costs) it deems proper.

The form which is prescribed for the issue of a citation to propound a testamentary paper is found at No. 79, page 1234 of *Tristram and Coote's Probate Practice* 23rd Edn. and it makes it clear that on the application of a person entitled to Letters of Administration on an intestacy the Registrar issues the citation to the executor of the purported paper writing of the deceased to propound the said paper writing should it be in his interest so to do, or show cause why Letters of Administration should not be granted to the citor. The plaintiff in this case did not follow the Statutory Procedure laid down by the English Probate Rules 1954 and 1965 which apply in this country, nor did he adopt the procedure enacted under *sec. 9 of the Deceased Persons' Administration Ordinance*, Chapter 46, and it follows therefore that he misconceived his remedy when he sought a declaration of the invalidity of the Will dated 9th December, 1967. While it is true that the case of *Guaranty Trust Co of New York v. Hannay* (1915) 2 K.B. 536 C.A., which may be taken as establishing the proposition that the jurisdiction to make a declaration under the Rule (0. 15 Rule 16 (U.K.) Ord. 23 Rule 3 (G) is not confined to cases in which the plaintiff has a complete and subsisting cause of action apart from the Rule, this is subject to the further principle that where a statute provides the mode in which a certain transaction is to be determined, an action claiming a declaration of the validity or invalidity of such a transaction will not be entertained; the procedure indicated by the statute must be followed *Bull v. A.G. for N.S.W.* (1916) 2 A.C. 564. The statutory procedure in the present case was not followed.

In *Bull v. A.G. for New South Wales* (1916) 2 A.C. 564 The Privy Council were called upon to construe *sec. 44 of the Crown Lands Act 1895 of New South Wales* where the operative words were that "certain leases are made voidable and the Board held that the action should be dismissed because the statutory procedure had not been followed; and in *Wilkinson v. Barking Corporation* (1948) 1 K.B. 721 where a statute provided that a certain class of question "shall" be adjudicated upon by a specific tribunal, it was held that the jurisdiction of the courts to declare upon any question falling within that class was ousted. In *Cooper v. Wilson* (1937) 2 K.B. 309 and in *Pyx Granite Co. v. Ministry of Housing and Local Government* (1958)

1 Q.B. 554 the operative word was "may" and it was held that the court had jurisdiction to entertain a claim for a declaration by an aggrieved person who "may seek relief". In the latter case in the Court of Appeal Lord DENNING and MORRIS L.J., took the view that the statutory procedure was not exhaustive and this view was upheld in the House of Lords 1968

2 A.C. 260 where Lord JENKINS said:

"The section is permissive not imperative that in itself is not a circumstance of any positive weight; but the fact remains that it is not in terms made obligatory to apply under *sec. 17*".

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In the earlier case of *Barraclough v. Brown* (1897) A.C. 615 The House of Lords had held that where a statute gives a right to recover expenses in a court of summary jurisdiction from a person who is not otherwise liable, there was no right to come to the High Court for a declaration that the applicant had a right to recover the expenses in a court of summary jurisdiction: he could only take proceedings in the latter court. The House in the *Pyx case* however, distinguished the circumstances of the *Barraclough* case from those of the case with which they were then dealing, and Viscount SIMONDS said at p. 286-287:

"That case differs vitally from the present case. There the statute gave to an aggrieved person the right in circumstances to recover certain costs and the expenses from a third party who was not otherwise liable in a court of summary jurisdiction....The circumstances here are far different. The appellants are given no new right of quarrying by the Act of 1947. Their right is a common law right and the only question is how far it has been taken away. They do not *uno flatu* claim under the Act and seek a remedy elsewhere. On the contrary, they deny that they come within its purview and seek a declaration to that effect. There is, in my opinion, nothing in *Barraclough v. Brown* which denies them that remedy, if it is otherwise appropriate".

In the present case it is true that Rule 47 of the non-contentious Probate Rules merely speak of how a citation to propound a Will "shall be done" and does not state that an interested party "shall" proceed in that manner and sec. 9 of the *Deceased Persons Estates' Ordinance*, Chapter 46 enacts that "the interested party . . . may apply" which seems to suggest that the statutory remedy is permissive and not exhaustive, but in my view the circumstances of the present case seem to fall within the principle stated by the House of Lords in *Barraclough v. Brown* as the statute gives to an interested party the right to call on a defaulting executor to deposit the Will and propound it, which right he would not have had but for the statute, and as Lord JENKINS put it in the *Pyx case* at p. 302 of the report, citing both the dictum of Lord WATSON and Lord HERSCHELL in *Barraclough v. Brown*:

"Where a statute creates a new right which has no existence apart from the statute creating it, and the statute creating the right at the same time prescribes a particular method of enforcing it, then, in the words of Lord WATSON in *Barraclough v. Brown*, the right and the remedy are given *uno flatu*, and the one cannot be disassociated from the other. As Lord HERSCHELL put it in the same case, the party asserting the right cannot claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right. The principle is wholly apposite in cases comparable to *Barraclough v. Brown*".

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I also have much sympathy for the dissenting view of *HODSON L.J.*, who in his judgment in the *Pyx* case said "no significance is to be attached to the use of the word 'may', which is the only word apt for the purpose. Indeed, it would not be sensible to make it compulsory for persons to seek a determination if they did not consider it in their interest to do so. The same permissive word 'may' is contained in the statute under consideration in *Barraclough v. Brown*".

My conclusion is then, that as the statutory procedure was not followed and the jurisdiction of the court is ousted, the plaintiff in this case has mistaken his remedy and the action for declaration cannot be maintained by him. If however, I am in error in this view and the court has jurisdiction to entertain the action for a declaration, in the exercise of my discretion I would refuse to entertain it in disregard of the procedure prescribed by legislation, which I consider to be satisfactory.

The action is therefore dismissed and judgment is entered for the defendants; but I deny them their costs in the action in view of their conduct in their neglect or failure to deposit in the Registry, the document dated 9th December, 1967 purporting to be the last Will and Testament of the deceased, and I do so with particular reference to sec. 6 of the *Deceased Persons Estates' Ordinance*, Chapter 46 which makes them liable to a penalty on summary conviction.

Action dismissed, judgment for defendants.

Solicitors:-

Mrs. S. Trotman for the plaintiff.

Dabi Dial for defendants.

DENNIS GREENE v. MICHAEL DANNS

[In the Full Court (On appeal from the Georgetown Magisterial District (Fung-a-Fatt and M.A. Churaman JJ.) Oct. 13, 27, 1972, January 5, 1973.]

Appeal—Summary Jurisdiction—Ex-parte hearing—Recognisance with consent of accused conditioned for Dec 8, 1971—Subsequently altered to read Nov 24—Non-appearance defendant on Nov 24—Adjournment to Nov 30—Whether ex-parte conviction on Nov 30 a specific illegality and unconstitutional—Summary Jurisdiction (Appeals) Act Cap. 3:04, s. 9(k); Summary Jurisdiction (Procedure) Act Cap. 10:02 s. 13; Criminal Law (Procedure) Act Cap. 10:01, s. 173; Constitution of Guyana 1980 art. 144 (2) (f) (proviso).

The appellant charged with committing a breach of the Motor Vehicles & Road Traffic Act Cap. 51:02, signed a recognisance to appear before the magistrate's court on Dec 8, 1971. Later, the trial date was accelerated and the recognisance altered to read Nov 24, 1971. On default of his appearance on this date, the court received credible evidence proving the alteration to Nov 24 was made in the appellant's presence before he signed the recognisance. Thereupon, the court adjourned the case for hearing on Nov 30, on which day it proceeded *ex parte* when informed that on Nov 24, the respondent had in addition, personally warned the appellant to attend court on Nov 30. The appellant was convicted and appealed to the Full Court on two grounds, (i) that there was a specific illegality in hearing the matter on Nov 30, 1971 in the face of a recognisance requiring the appellant to appear on Dec 8, 1971; (ii) that there was a breach of art. 144 (2) (f) of the Constitution of Guyana because the applicant was tried in his absence without his consent.

HELD: (i) there was no specific illegality; the fact that a police officer had on Nov 29 informed the appellant that the case had been fixed for hearing on Nov 30 was credible admissible evidence, supported by the record, entitling the magistrate to exercise his discretion to hear the matter *ex parte*.

(ii) while art 144 (2) (f) reflects the substance of s. 173 of the Criminal Law (Procedure) Act Cap. 10:01 entitling the accused to be present in court during the whole of his trial, s. 13 of the Summary Jurisdiction (Procedure) Act Cap 10:02 does not conflict with art 144 (2) (f) of the Constitution.

(iii) the remedy by way of appeal is misconceived because the appellant's misconception lies solely in the assumption that he was not aware of the date of hearing, when as a fact, he was so aware.

Appeal dismissed—Decision of the magistrate affirmed.

Cases referred to:

- (1) *Reg. v. Robert James* (No. 2) (1972) 1 W.L.R. 887.
- (2) *Reg. v. Abrahams* (1895) 2 Vict. LR. 343.

See *Perreira v. Cato* (1979) 28 W.L.R. 166, in which s. 13 of the Summary Jurisdiction (Procedure) Act Cap. 10:02 was considered.

M.A.A. Mc Doom, for the Appellant

Cecil Kennard, for the Respondent.

JUDGMENT OF THE COURT

The appellant Dennis Greene was convicted by a magistrate of the Georgetown Judicial District for the offence of Dangerous Driving Contrary to Sec. 36(1) of the *Motor Vehicles & Road Traffic Ordinance*, Chapter 14, in respect of which the appellant was fined \$100.00 with an alternative of three months imprisonment

The pertinent facts in respect of this appeal disclose that the appellant was arrested by the respondent on 23rd November, 1971 at Craig Public Road after what appears to have been gross and protracted recklessness by

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the appellant for a not insubstantial portion of the Mackenzie Highway, during which if the evidence be true, the appellant was content to ignore the warnings of the police siren as he was pursued by the respondent, in the course of which another policeman Elliot, who attempted to signal the appellant to halt was forced to dramatically leap out of the pathway of the appellant's careering vehicle to avoid serious if not fatal bodily injury. The appellant finally halted when he was arrested and charged by the respondent.

The appellant was placed on a recognizance signed by him to appear at Providence Magistrate's Court on 8th December, 1971, which was subsequently altered to read 24th November, 1971, to stand his trial. Police Constable Wilson testified that the alteration of the date of appearance on the recognizance was made in the appellant's presence prior to the appellant affixing his signature thereto. The matter was apparently adjourned on 24th November, 1971, the appellant in default of appearance to 30th November, 1971, for trial, and on that date the hearing proceeded *ex parte* during which the recognizance was tendered in evidence by the prosecution; the respondent testified *inter alia* that he had, additionally, personally warned the appellant on the 29th November, 1971, to attend court on the 30th November, 1971. The appellant was convicted in his absence on 30th November, 1971, and dealt with as above indicated.

On 8th December, 1971, the appellant launched an appeal against the conviction, and on the matter coming up before us the appellant canvassed two grounds of appeal:—

- (a) that the learned Magistrate committed a specific illegality in hearing the matter on 30th November, 1971, in the face of a recognizance requiring appellant to appear on 8th December, 1971.
- (b) that the Magistrate acted contrary to Article 10 (2) of the Constitution of Guyana.

Section 9 of the Summary Jurisdiction (Appeals) Ordinance, Ch. 17 clearly defined the grounds which an appellant may canvass on appeal s. 9(k) of that Ordinance reads thus:—

"Some specific illegality, *other than hereinbefore mentioned*, substantially affecting the merits of the case was committed in the course of the proceedings therein or in the decision". (underscoring ours)

It is clear that this ground of appeal must be read in the light of the other grounds of appeal allowed by sec s. 9 of Chapter 17, and only when *some illegality not embraced or countenanced by the other permissible grounds of appeal* is perceived that the jurisdiction of the Full Court, which is a creature of statute, is or can be invoked. The Full Court does not have an original jurisdiction and its powers and functions are clearly defined by statute. Counsel for the appellant was unable to indicate or define the illegality' complained of save to contend that the appellant was not aware of

the date of trial, a contention which is certainly not apparent on the face of the record inasmuch as there is no such evidence.

An 'illegality' must be clearly traced to some violation of *a statutory provision or some applicable rule of law committed in the course of the proceedings*. It is clearly and simply a question of fact whether the magistrate was satisfied that the appellant was aware of the date of hearing, beyond the comment that this court felt that the significant omission of requesting the appellant to initial the alteration on the recognizance was a troubling circumstance in the light of the appellant's contention before us that he had understood and believed the hearing to have been fixed for 8th December, 1971 and not 24th November 1971, a contention which bears some realism when it is observed that the Notice of Appeal was filed on 8th December, 1971, at 2.40 p.m., and the further troubling circumstance that the original date of hearing annotated on the case jacket was 8th December, 1971: we do not however think that this amounts to an 'illegality' within the meaning of s. 9(k) of Chapter 17. It was an issue of pure fact and nothing else which emerged on legally admissible evidence which was before the learned magistrate for his consideration as matters of fact, and such evidence cannot be said to amount to an illegality. Indeed there was nothing to the contrary.

It is of moment that in the course of arguments, this court attracted the attention of counsel for the appellant to the procedure employed for redress, and invited counsel to consider whether an appeal was the appropriate remedy in the circumstances or rather an application for a rule to review.

Clearly for the appellant to succeed on this ground of appeal, he must show that there was some violation of a statutory provision or some applicable rule of law to amount to an illegality, and that such illegality affected the merits of the case. The contention advanced on this first ground is not embraced by s. 9k of Ch. 17; for this reason the first ground of appeal failed.

The second ground of appeal i.e. that the magistrate assumed a jurisdiction to hear and determine the matter in the absence of the appellant in violation of *Article 10(2) of the Constitution of Guyana*, [now art. 144(2)] was described by counsel for the appellant as the more formidable ground of appeal. Much of the argument was predicated on an *assumption of fact* which clearly did not exist, and it was this mis-conception which persisted in clouding the perspicacity of counsel for the appellant throughout the hearing of this appeal.

Section 12 of the *Summary Jurisdiction (Procedure) Ordinance* Chapter 15 (now s. 13 of Cap. 10:02) sets out the procedure to be adopted by a magistrate when a defendant fails to attend court to stand his trial. The pertinent provisions read thus:—

"12 (1) If the defendant does not appear before the Court at the time and place mentioned in the summons, then, after proof upon oath, to

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the satisfaction of the Court, that the summons was duly served or that the defendant wilfully avoids service, the court may, in its discretion, either—

- (a) unless the statute on which the complaint is founded otherwise directs, proceed *ex parte* to the hearing of the Complaint, and adjudicate thereon as fully and effectually to all intents and purposes as if the defendant had personally appeared before it is in obedience to the summons; or
- (b) adjourn the hearing to some future day: or
- (c) on oath being made by or in behalf of the complainant substantiating the matter of the complaint to the satisfaction of the court, issue a warrant to apprehend the person so summoned or avoiding service, and to bring him before the court to answer the complaint, and to be further dealt with according to law".

The section readily calls to mind the exercise of a judicial discretion by the magistrate as to whether he should proceed *ex parte* or order a warrant of apprehension to issue in clearly defined circumstances: in either case, however, before such discretion is exercised, it is incumbent on the magistrate to satisfy himself that the *summons was duly served on a defendant specifying the date, time and place for his trial*. It follows that the prosecution must establish by *credible evidence* beyond reasonable doubt that the defendant was well aware that hearing of the matter had been fixed for the date, time and place mentioned in the summons.

In the instant matter, the prosecution sought to establish that the appellant was duly charged, signed a recognizance to appear on 24th November, 1971, which he failed to do when the matter was further adjourned to November 30th 1971, and in respect of which adjournment, a police officer had the previous day informed the appellant that the cause had been set down for trial on November 30th, 1971. This was admissible evidence, *which if believed entitled the magistrate in the exercise of his discretion to hear and determine the matter ex parte*. Clearly the learned magistrate accepted this evidence and adjudicated thereon according to law.

It is worthy of note that before the jurisdiction of the magistrate is invoked, there must be proof that there was knowledge in the defendant—in this case the appellant—that he was well aware of the date of hearing of his cause which assumes the nature of a condition precedent to assuming jurisdiction to hear and determine. On reviewing the records before us, we found here was evidence to support the magistrate's conclusion in this respect which afforded the basis for assuming the jurisdiction to hear and determine the complaint in the absence of the appellant.

Counsel for the appellant contended, however, that in view of *art. 10(2) of the Constitution of Guyana*, no criminal offence can be heard by a

court *in the absence of the defendant except with his consent*, and this being in conflict with the provisions of s. 12(1) of cap. 15, the Constitution prevails.

But are the provisions of cap. 15 in conflict with the provisions of *art. 10 of the Constitution*? Art. 10 in Cap. 11 of the Constitution of Guyana is intitled "Protection of Fundamental Rights and Freedoms of the Individual"; this Chapter deals with all the basic freedoms secured to citizens of the State of Guyana, and seek to emphasise a legal authority derived from an Imperial impregnable fortress to maintain the democratic rights freedoms and privileges which have throughout our history characterised our national concept of justice derived from the common law of England.

Art. 10(2) [(now art. 144(2)] of the Constitution of Guyana reads thus:—

"(2) Every person who is charged with a criminal offence:—

- (a) Shall be presumed to be innocent until he is proved or has pleaded guilty;
- (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail of the nature of the offence charged;
- (c) shall be given adequate time and facilities for the preparation of his defence;
- (d) shall be permitted to defend himself before the court in person or by a legal representative of his own choic;
- (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witness to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution: and
- (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge,

and except with his consent, the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence".

What are the fundamental rights herein enshrined? Clearly what the Constitution seeks to enshrine are the "*Rights*" of individuals, rights not to be abrogated or denied. In addition to the rights secured in (a), (b), (c), (d), (e), and (f) is the further qualifying "right" of every accused person to be *present at his trial*; the Constitution expresses this right in negative form to clearly define and emphasise that the trial shall not take place in his absence except in the first proviso of his consent and the second proviso of misconduct during the course of the proceedings so as to *make his presence* i.e. the right

to be present at his trial, impracticable as a result of which i.e. his misconduct, the court orders his removal. This whole concept in this part of the Article clearly reflects the thought incorporated in s. 173 of the *Criminal Law (Procedure) Ordinance* cap. 11 which reads thus: —

"173 (1) Every accused person shall be entitled to be present in court during the whole of his trial, unless he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable.

- (2) The court may if it thinks proper, permit the accused person to be out of court during the whole or any part of the trial on any terms it deems right".

Art. 10(2) really circumscribes the 'right' of the accused person "*to be present at his trial*" as reflected by s. 173 (Supra) with the additional permissiveness to be '*absent with consent*'.

The whole notion in art. 10 shows that once a person is charged he must be made aware of the nature of the offence (art. 10(2) (b)). Additionally, he is secured the right "to be present" at his trial which shall not take place in his absence or to use a colloquialism 'behind his back' i.e. he must not be denied the 'right to be present' unless either of the provisos above discussed exist; and the cumulative effect of art. 10 sharply eclipses an enshrined "right which is the whole object of the Article for an accused person to be present to witness, and to be aware of the proceedings whereby the judicial processes are called into play.

What then is the position of a defendant who wilfully abstains from his trial? Is he to be permitted to abstain or stay away from the place on the date appointed for trial and so thwart the judicial processes necessary for the due administration of Justice, in the sure and complacent knowledge that art. 10(2) deprives the court from adjudicating upon his guilt or innocence? Rather it seems that such wilful abstention *after due proof that he was in due legal form made aware of the date and place of trial* embraces a waiver of his right to be present giving rise to a consequentially 'implied consent' within the meaning of art. 10(2) for the trial to take place in his absence; for where the accused person elects to be absent through caprice or malice or for the purposes of embarrassing the trial, he cannot truly say that he was denied the 'right to be present'.

A somewhat analogous situation arose in the case of *Regina v. Jones (Robert) (No. 2) 1972. 1 Weekly Law Reports at p. 887*. In that case the accused was present throughout the trial up to the stage when legal submissions on his behalf were overruled when he promptly absconded: the trial judge proceeded in his absence without his defence and a verdict of guilty returned. He was subsequently located in. and extradited from. Denmark, when he petitioned the court for an extension of time for leave to appeal. It was contended on his behalf that the accused must always be present in court throughout his trial with certain limited exceptions only, such as described

previously in this decision (suprs). Counsel contended that the trial judge was wrong in allowing the case to continue in the absence of the accused, and sought leave of the court after the accused had been extradited from Denmark to grant an extension of time to appeal and to lead evidence to found an application on the proposed evidence to order a new trial. *Roskill L.J.* declined the motion and said that the applicant *brought that entirely on his own head and he must then take the consequence.* *Roskill L.J.* adopted the language of Williams J. at p. 347 in the case of *Regina v. Abrahams (1895) 21 Vict L.R. 343:-*

".....the judge would in all probability refuse to proceed with the trial in the absence of the accused, notwithstanding that he waives his right, *unless the judge be satisfied that the prisoner elects to be absent and absents himself through caprice or malice, or for the purpose of embarrassing the trial.....*

(underscoring ours)

To take an extreme case by way of illustration: Suppose an accused person to be out on bail, to appear and take his trial for either a felony or misdemeanour and that when his trial comes on he is found to have absconded. *By so doing, I take it, the accused has clearly waived his right to be present....."*

(underscoring ours)

In the instant matter, there was legally admissible evidence before the magistrate to assume the jurisdiction to proceed ex parte. This was admissible and credible evidence and obviously the magistrate accepted it.

We do not agree that the provisions of s. 12 of cap. 15 are in conflict with *art. 10(2) of the Constitution of Guyana* [now art. 144(2) (f)]. The latter deals with Fundamental rights of accused persons generally and reflect the common law rights of every accused person which in the instant matter have not been denied; the former with the assumption of jurisdiction to adjudicate according to law when a person charged with a summary jurisdiction offence fails to attend and stand his trial which in the instant matter had been properly assumed; we found no merit in the second submission which equally failed.

As pointed out previously in this decision, the appellant's misconception lies solely in assuming a fact i.e. that the appellant was not aware of the date of hearing, a fact not established on the face of the record against positive evidence that the appellant was aware of the date of hearing. *The remedy by way of appeal is misconceived.*

For the foregoing reasons we dismissed the appeal and affirmed the conviction and sentence with costs to respondent fixed at \$18.12. Leave to appeal was granted to the appellant.

Appeal dismissed

ABDOOL YASSEEN v. TOOLSIE PERSAUD LTD.
(Plaintiff/Defendants)

[HIGH COURT (VIEIRA J.) November 25, 26, 1970; January 29, March 6, April 5, 1971; June 24, 1972; February 6, 1973].

Negligence—Collision between two vessels—Degrees of fault—Failure of one vessel to keep proper look out—Failure of other to carry regulation siren or whistle—Both vessels to blame for collision.

Collision in river—Damages—Actual fault or privity Limitation of liability—Duty of both vessels when meeting end on to pull to starboard to avert collision—one vessel pulled to starboard—Other vessel to port. Merchant Shipping Act, 1894, s. 503 (1); Merchant Shipping Ord. Cap. 3; River Navigation Ord Cap. 270 and Regulation 53(3); Maritime Conventions Act, 1911 (U.K) s. 1 (1).

On Dec. 2, 1966, there occurred in a river channel a collision between two motor-vessels—between the M.V. Perventure (the tug) owned by the de-

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endants/appellants and the M.V. "Maimoon" (the Sloop) owned by the plaintiff. The collision took place at a point off Ruby on the East Bank of the Essequibo River at 9.00—10.00 p.m.

The tug was southbound proceeding up-river and on the starboard side of the channel, while the sloop was northbound and proceeding down-river on the port or left hand side of the channel, loaded with bags of rice for the Rice Marketing Board's Wharf at Georgetown. The sloop immediately sank, but was salvaged some four days later and repaired. Plaintiff sued for damages for negligence on the part of the defendants' servants and/or agents in their management and control of the tug. The defendants denied negligence, averring that the accident was caused solely by negligent navigation of the sloop; that the sloop had no licensed captain on board; neither navigational lights, nor a regulation siren or whistle at the time of collision. The sloop they further averred swung from starboard to port in the path of, and almost under the bow of the tug. There was also the further averment that if they the defendants, were at all liable, which they denied, then their liability was limited in accordance with the Merchant Shipping Act 1894 (U.K.). The trial judge at first gave an oral judgment in open court for the plaintiff in the sum of \$10,916.00, i.e., \$5,666.00 as special damages, and \$5,250.00 general damages with costs fit for two counsel. He however, when he had put his reasons into writing, altered them to read \$2,472.56 after- being served with notice of appeal.

HELD: (i) the plaintiff, a licensed captain, was at the helm at the time of the collision,

(ii) Although the tug's captain did not testify, his report in writing to the police about the accident, that he "saw a dim mast-light on a vessel" was admissible in evidence as a declaration against interest;

(iii) the sloop did have on its navigation lights which could have been seen from a reasonable distance;

(iv) there was no look-out or proper look-out on the tug; and if both vessels had kept straight courses and each pulled to starboard as the regulations require, there would have been no accident, the tug however, wrongly pulled to port, while the sloop rightly pulled to starboard just before the accident resulting in its being hit amidships on its port side:

(v) both vessel's were to blame for the collision but the defendants are entitled to limit their liability they having proved that the occurrence took place with their "actual fault or privity".

(vi) liability should be found proportionately in the ratio of two-thirds re. the tug, and one-third re. the sloop-since it did not have a whistle or siren on board.

(vii) applying the limitation rule, defendants are entitled to limit their liability under s. 503(1) (ii) of the Act of 1894, which would give a maximum total of $\$124.00 \times 19.94 = \$2,472.56$.

See *B.G. Timbers Ltd v. Toolsie Persaud* (1963) L. R. B. G. 454.

EDITOR'S NOTE: The course adopted by the trial judge can hardly be commended unless he had recalled the parties and had the question of contributory negligence and damages re-argued before him: but this fact does not appear from the record. Judgment was given orally at an earlier date for \$10,916.00, then it was altered for different reasons to read as above.

See *Abdool Latiff v. Tani Persaud* (1968) 14 W.I.R. 50.

CASES REFERRED TO INCLUDE:

- (1) *in the Anselm* (1907) P. 151.
- (2) *Voowaart and the Khedive* (1880) 5 App. Cas. 876.
- (3) *Lennard's Carrying Co Ltd v. Asiatic Petroleum Co Ltd* (1914) 1 K. B. 319 C. A. (1915) A. C. 705
- (4) *Beauchamp v. Turrell* (1952) 1T.L.R. 695
- (5) *The Diamond* (1906) P. 282

J. A. King associated with J. Stafford, for the respondent/plaintiff.

B. O. Adams S. C., for the appellants/defendants.

REASONS FOR DECISION

VIEIRA, J: Between 9.00 - 10.00 p.m. on 2nd December, 1966, in the inner Channel of the Essequibo River at a point off Ruby, East Bank, Essequibo, there was a collision between the M. V. "PERVENTURE", a steel screw motorship of 111.31 tons powered by an oil engine of 250 I. H. P. and manned by a crew of eight (8) (hereinafter referred to as the "tug"), the property of the defendants (appellants) which was empty at the time and which was proceeding south on the starboard or right hand side of the channel on its way from Georgetown to St. Mary's Quarry, Essequibo River, and the M. V. "MAIMOON", a sloop of 19.94 tons powered by a 66 H. P. Lister Marine Diesel engine and manned by a crew of four (4) (hereinafter referred to as the "sloop"), the property of the plaintiff (respondent) which was loaded with about 1168 bags of rice at the time and which was proceeding north on the port or left hand side of the said channel on its way from Leguan Island, Essequibo River, to the Rice Marketing Board's Wharf at Georgetown. As a result of the collision the sloop sank but it was salvaged and raised about four (4) days later and then towed to Good Hope, Essequibo Coast, where it was repaired.

On 27th December, 1967 the plaintiff filed a writ of summons claiming damages in the sum of \$9,381.08 for *negligence* on the part of the defendants' servants and/or agents in their management and control of the tug together with costs. In their statement of defence the defendants denied any negligence and averred that the accident was solely caused by the negligent navigation of the sloop which they alleged had no licensed captain on board

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nor navigational lights nor regulation siren or whistle at the time and they further alleged that the sloop, without any signal or warning, crossed from starboard to port in the path of and almost under the bow of the tug with the resulting collision. The defendants further averred that if they were liable, which was denied, then their liability was *limited* in accordance with the *English Merchant Shipping Act, 1894*, which has been expressly adopted in this country by virtue of the provisions of the Merchant Shipping Ordinance, Chapter 3 of the Laws of Guyana. The plaintiff joined issue with the defendants in his reply and specifically denied the acts of negligence set out by the defendants at particulars (a) to (i) inclusive of paragraph 7 of their defence.

On 24th June 1972, I gave judgment in favour of the plaintiff in the sum of \$10,916.00, being \$5,666.00 as special damages and \$5,250.00 as general damages and I awarded costs to the plaintiff certified fit for two counsel.

It is from this decision that this appeal has been brought and I now give my reasons therefor.

The sloop is 68' long x 17' 6" wide with a wheel-house about 8' high above the deck and about 12' from the stern of the boat behind the main hatch. The laden draught is 8' 9" but the vessel is never sailed into water less than 9' deep. It travels about 8 knots with the tide and about 6 knots against the tide. It was built in 1964 at a cost of about \$25,000.00 which included the price of all the auxiliary equipment. It started to operate around March, 1965, and began regular shipments of rice from Leguan to the Rice Marketing Board's Wharf at Georgetown, making on an average, about five (5) trips per month with about 1200 bags of rice per trip. On an average, each trip takes about 4 1/2 hours and the normal route taken was as follows—the southern tip of Leguan would be circled and the vessel would then proceed to a white flashing light in the "Steamer" channel. A sand bank is then circled and the vessel would then proceed N—E to Parika Stelling from where a course would be laid N-E to the Boerasirie red flash light and then N-N-E- to the No. 9 Pole which has a white flash light. A course would then be laid east to Uitvlugt Koker then north to the No. 5 Pole then east to the Georgetown Lighthouse and then south to the R. M. B. Wharf in the Demerara River at Georgetown. This route was, in fact, the usual one taken by all vessels on their way to and from Georgetown via the Essequibo River.

The defendants are a well-known firm of timber and quarry merchants and have a stone quarry at St. Mary, Essequibo River. The tug is 105.5' overall length and 24' beam.

During 1966 the plaintiff was residing at Good Success, Wakenaam Island, Essequibo River, and the sloop was usually moored at Doornhaag Koker Trench, Leguan Island, Essequibo River.

Having regard to the evidence as a whole, both oral and documentary, and also to the demeanour of the witnesses who testified, I was satisfied on

the balance of probabilities, that the real truth of this matter was as follows:—

(1) about 10.00 a.m. on 1st December, 1966, the crew of the sloop began to load the vessel with bags of rice which were to be shipped to the R.M.B. Wharf at Georgetown. The loading did not finish until about 5.00 p.m. on 2nd December, 1966, at which time about 1168 bags of rice in all had been loaded;

(2) the sloop left Doornhaag Koker about 8.00 p.m. on the said 2nd December, 1966. On board was the plaintiff who was the captain and who is a licensed master of auxiliary vessels, i.e., power-driven and/or sail since 1954, one Nooradeen Ahamad called "Parker", who was the mate, one Cecil Persaud called "Tallboy", who was the engineer and a sailor by the name of Cecil also called "King Kong". Also aboard was a young negro man, name unknown, who had obtained the plaintiff's permission to join the vessel as a non-paying passenger whilst the vessel was being loaded at Doornhaag Koker;

(3) the sloop was fitted with an electrical generator and had five (5) lights in all, one in the engine-room below decks and four (4) navigational lights, viz:— a mast light on the wheel-house and a stern light, both white in colour, a red port light and a green star-board light. In addition, the sloop also carried four (4) emergency kerosene lamps with wicks which were of the same size and shape as the electrical lights and which were stored under the captain's bunk in the wheel house;

(4) the sloop arrived at Parika about 9.00 p.m. but did not stop at the Stelling there but continued on its Way proceeding east on a course towards Uitvlugt Koker *on an ebb or falling tide* which was running at a speed of about 3—4 knots. It was a fairly dark night and, although it was not raining the wind was high and the water was rough. The plaintiff was the steersman and was in the wheel-house with Parker, the mate, who is *not* a licensed captain or master. Cecil called "King Kong" was resting on a bunk in the said wheel-house which has four (4) bunks in all whilst Tallboy, the engineer, was in the engine-room below decks but he later came into the wheel-house and lay down on one of the bunks. There was some uncertainty as to where exactly was the passenger but it was clear that he was either in the wheel-house or outside on deck,

(5) when the sloop was about 3/4 mile east of Parika and about 10 rods off the eastern bank of the Essequibo River, the plaintiff, for the very first time, saw three (3) lights approaching, port, starboard and mast lights, from the opposite direction, which indicated to him the approach of a power-driven vessel, somewhere in the vicinity of the Boerasirie Groyne, about 3-5 miles away. Both vessels were in the inner *channel* which is about 5 miles wide and which, in that area, runs north to south. Both vessels were on their correct sides, the sloop proceeding north on the port side and the other vessel proceeding south on the starboard side;

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(6) the plaintiff became rather worried when he observed that the other vessel was coming on a head-on course and, when the two vessels were about one mile apart from each other, he shouted out "all crew on deck". Both Parker and King Kong were aroused and the plaintiff gave certain instructions to the former who then went on deck and began to plumb the depth of the river by means of a lead line and he discovered that the depth was only about 15'. On receipt of this information the plaintiff realised that it was too shallow to pull over to the starboard which he knew, according to regulations, was the proper thing to do when two vessels were approaching each other on the same course. Accordingly, he gave instructions to Tallboy to slow down the engines which were done and the speed of the vessel was reduced to about 5-6 knots. At this stage the two vessels were about 1/2 mile apart from each other. Parker kept on plumbing the line and when the depth was about 10' he advised the plaintiff that it was dangerous to go any further to the starboard. At this stage the sloop was about 175' west of the eastern bank of the river of which about 150' consisted of a mud flat whilst the other vessel was then about 200' west of the said eastern bank of the river and both vessels were approximately in line with Ruby foreshore, East Bank, Esse-quiibo;

(7) suddenly, without any warning or signal, the other vessel pulled over to port *and its bow struck the portside of the sloop amidships* and the two vessels fastened to each other;

(8) the plaintiff then left the wheel-house and went below to the engine-room where he saw a hole about 36" x 18" from the gunwhale through which the murky waters of the Essequibo River were pouring in. He took an old mattress and attempted to plug the hole with it but without success. The sloop began to sink rapidly and the plaintiff went through an air vent into the river. He then saw that the other vessel was the "Perventure" which he recognised and knew to be one of the defendants' tugs. He then began to shout for help but nobody heard him due no doubt to the general confusion together with the high winds and rough waves. The plaintiff then had the unenviable, if not frightening, experience, of having to swim for dear life and, luckily enough for him, he managed to swim ashore at a point about 11/2-2 miles away at Vergenoegen foreshore near one Quan's saw-mill;

(9) in the meanwhile, Parker, Tallboy, King Kong and the passenger managed to scramble aboard the other vessel which they observed was the tug which began to reverse its engines and, after some time, the two vessels were disengaged. Parker and King Kong then reported to the tug's captain, one Henry Wilson, that their captain was missing and feared drowned and they requested that a search be made in the area. The tug then lowered its anchor and the immediate vicinity was searched for about half an hour by means of the tug's searchlight but without any success,

(10) the tug then proceeded to Parika Stelling where it was moored and Captain Wilson and the crew of the tug then went to Parika Police

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Station which is next to the Stelling and a report was made to ex-Corporal Charles Hazel who was then Subordinate Officer in charge and he caused statements to be taken from them. The three members of the sloop did not go then to the station but instead went directly to the foreshore where they searched the area for about 3-4 hours but without any success. They then went to the station where Corporal Hazel also caused statements to be taken from them;

(11) whilst this was going on, the plaintiff managed to get a drop to Leonora Police Station, the headquarters of "D" Division, West Demerara, where he made a report about 2.00 a.m. on 3rd December, 1966, to Corporal Sowkey and P.C. Teekaram concerning the accident and Corporal Sowkey then telephoned Corporal Hazel since Ruby, off where the accident occurred, is in the Parika Police Station District and the two policemen spoke to each other. As a result of what Corporal Hazel told him, Corporal Sowkey gave instructions to P.C. Teekaram to take a statement from the plaintiff which the constable later did;

(12) the plaintiff was allowed to sleep in the Enquiries Office of Leonora Police Station. He left the said station between 5-6 a.m. on the said 3rd December, 1966, after he was given some small change by the police and he joined a car and went to Vreed-en-Hoop Stelling where he boarded the ferry which took him across the Demerara River to Georgetown where he reported the matter to a corporal of the Customs Guard who gave him some advice as a result of which he then went to the Harbour Master's Office where he submitted a written report;

(13) sometime later that very morning the plaintiff went to the defendants' head office in Lombard Street where he spoke to Mr. David Persaud, a director and brother of Mr. Toolsie Persaud, the Governing-Director. The plaintiff reported the accident that had taken place the night before and Mr. David Persaud told him that he had already heard about it and he then instructed the plaintiff to salvage the sloop and to keep a day to day record of all expenses incurred which he directed him to bring in when everything was finished and he then promised the plaintiff that he would "fix him up";

(14) sometime between 4-5 p.m. on the said 3rd December, 1966, the plaintiff saw Parker, Tallboy and King Kong at Parika Stelling and they told him how they had unsuccessfully searched for him for several hours after they had been rescued by the tug,

(15) about 7-7.30 a.m. on 4th December, 1966, the plaintiff, Tallboy, King Kong and about 7-8 other men went to the wreck where they remained for about half an hour during which time the plaintiff removed the electrical navigational lights;

(16) sometime later that very morning the plaintiff went to Remus Street, Agricola, East Bank, Demerara, to the home of one Inithurn France, a professional diver of 15 years experience and who has salvaged between

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25—30 vessels in the Essequibo River. The plaintiff told France about the accident but did not go into details and France agreed to salvage the sloop for the sum of \$800.00;

(17) on the morning of 5th December, 1966, the plaintiff met France at the Stabroek Market Stelling in Georgetown and the two men then crossed the Demerara River by ferry and then proceeded to the site of the wreck. France took four men with him and they began salvage operations. Lines were put under the sunken vessel which was subsequently raised and slung on to a pontoon owned by the plaintiff and four other persons and the vessel was taken in nearer to shore. According to France's estimation, the wreck was about 300' off Ruby foreshore of which about 250' was mud. He observed the wheel-house sticking out of the water which was about 14' deep at that point. He went down and surveyed and inspected the vessel and he observed that the covering board on the port side amidships and about three planks were broken leaving an opening. The salvage operations finished on 6th December, 1966. The plaintiff hired a tug and the sloop was towed to Wakenaam where it was cleaned up and later it was towed to Good Hope, Essequibo Coast where it was repaired.

(18) the plaintiff kept a book in which he made daily entries covering all the expenses incurred by him and on or about 22nd December, 1966, he went back to the defendants' head office where he spoke to Mr. David Persaud as well as Mr. Toolsie Persaud and he showed them his book and he asked Mr. David Persaud to allow him to use the company's adding machine to add up the total expenses incurred by him. Mr. Toolsie Persaud said nothing but Mr. David Persaud, much to the plaintiff's surprise and disgust, then said that the company's policy was to resist all claims and as all their vessels were insured he would have to make a claim against the insurers if he wanted anything. The plaintiff protested at the way he was being pushed around and he later went and saw his lawyer and he filed this action on 27th December, 1967.

As I saw it, there were two (2) main issues of fact involved here and several minor ones. The two main issues clearly were—(1) was the plaintiff on board the sloop and the actual steersman thereof at the time of the collision?; (2) did the sloop have its navigational lights on that night?

The first question, to my mind, must be answered in the affirmative; Mr. Adams appeared to be very skeptical that the plaintiff could have swum 11/2 miles in the darkness of that night in the Essequibo River. He stressed the fact that the plaintiff himself gave evidence that his report at Leonora Police Station was taken down *in writing* by a constable whereas the Occurrence Book in force at that station at the time (Exhibit "E") clearly showed no such written report at all. Further, the two entries (Exhibits "D1" & "D2") in the Occurrence Book in force at Parika Police Station (Exhibit "D") on the night in question, which were made by the crews of the tug and sloop respectively, made no mention whatsoever of the plaintiff's disappearance. I agree that these were important and pertinent factors

but, as I saw it, these were not, by themselves, conclusive to show that the evidence of the plaintiff and his witnesses was not credit-worthy and thus incapable of belief.

As judge of both law and fact I am entitled to accept and believe certain portions of a particular witness's testimony and to reject other portions of that same witness's testimony. Accordingly, although I did not accept and/or believe that the plaintiff's report was taken down in writing at Leonora Police Station as alleged by the plaintiff, nevertheless, I did accept and believe that he was on the sloop that night and was the actual wheelsman and not Parker, who is not a licensed master, as alleged by the defence. Further, I also accepted and believed that the plaintiff did swim ashore that night and did make a report at Leonora Police Station, albeit an *oral* one, about 2.00 a.m. on 3rd December, 1966, and that Corporal Sowkey and P.C. Teekaram were both present in the Enquiries Office and observed that the plaintiff was only dressed in a singlet and short pants, both of which were *damp*, and that he was bare-headed and bare-footed. For me to have believed otherwise would have meant accepting one of the following two alternatives, viz.—(a) that those two serving members of the Guyana Police Force were bribed to say what they said or (b) that the plaintiff, by some means or other, crossed over during the night from Wakenaam, where he was living at the time, to Parika, and then journeyed to Leonora where, before entering the police Station there, he deliberately wet his clothes and then made a false report to the police. I was not prepared to accept either of these alternatives, either according to the evidence which I have set out above, which I accepted and believed, or as the result of any inductive reasoning based upon logic.

Equally, to my mind, the second question must also be answered in the affirmative. Only three (3) of the tug's crew gave evidence in this matter, viz.—James Persaud, the mate, who has a master's certificate, Winston Levius, the chief engineer and Harold Cossou, the steersman or wheelsman at the time of the accident. Neither Persaud nor Levius saw anything before the actual impact as they were both resting in their bunks. Persaud said that after the impact he went on the bridge and he did not see any lights on the sloop which he observed was locked to the bow of the tug. Levius said that after the impact he first went down into the engine-room and then came up on deck and he saw the sloop alongside which he observed had no lights. Cossou gave evidence that between 9—9.30 p.m., whilst in the vicinity off Ruby about 3/4 mile from the shore he noticed a dark shadow about 40' away from the tug. He saw no lights and then suddenly he felt an impact.

Like Mr. King, I found it extremely difficult to understand why the tug's captain, Henry Wilson, whom Cossou said was on the deck outside the wheel-house and who was present and available throughout the entire trial, was not called as a witness for the defence. It seemed to me that it

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might well have been because in his report to the police at Parika Police Station as recorded in Exhibit "D1" he is recorded as saying —

"When in the vicinity of the Essequibo River off Ruby I saw a *dim mast light* on a vessel".

I must confess that this recorded statement caused me some difficulty in deciding whether it was admissible or not especially having regard to the fact that Captain Wilson did not give evidence and was, therefore, not subject to cross-examination. To admit Exhibit "D1" was, clearly, to admit heresay evidence. Exhibit "D1" could only be admitted if either (a) it was admissible under s. 90 of the Evidence Ordinance, Chapter 25 or (b) it amounted to a declaration against interest on the part of Captain Wilson. In my opinion s. 90 of Chapter 25 did not apply since he was clearly "not out of Guyana and it was not reasonably practicable to secure his attendance" and, also, clearly, he was "an interested person at the time proceedings were pending or anticipated" (vide s. 90(1)(i) & (3) of Chapter 25.

Exhibit "D1" was tendered through the defence and there was no objection by or on behalf of the plaintiff. It was clearly a declaration against Captain Wilson's interest since it amounted to an admission that the sloop did at least have a mast light, albeit a dim one. Speaking for myself, I saw no valid reason why Exhibit "D1" was not admissible under the second head especially seeing that it was tendered through the defence without any objection on the part of the plaintiff.

Assuming but not admitting that I was wrong to have admitted Exhibit "D1", nevertheless, I was satisfied, on the balance of probabilities, that the sloop's navigational lights were on that night as alleged by the plaintiff and his crew *and were bright enough to have been seen for at least three (3) miles* and I considered that the evidence of the diver, Inithurn France, that he saw electric wires on the sloop when he removed the mast head, substantiated the positive assertion of the plaintiff and his crew.

There was no real dispute in this matter that if both vessels had kept their original straight courses then there would have been no accident. Equally, to my mind, there may well also have been no accident if both vessels had pulled over to starboard. It was therefore pertinent to have asked why should the tug *suddenly pull* over to port and not to starboard as I have accepted and believed did really happen. I had no real doubt that the plaintiff did pull over to starboard just before the impact even though he realised that to have done so may well have grounded the sloop in the very shallow water it was travelling in at the time. This manoeuvre on his part resulted in his being hit amidships.

The reason for the tug pulling over to port instead of to starboard, to my mind, was due to two (2) factors, viz:—(a) the tide was ebbing or falling and, as Mr. King rightly pointed out, the force of such a tide running at 3-4 knots would tend to accelerate or aggravate the effect of any steering

movement of the tug which was clearly going against the tide and (b) there was no lookout or no proper lookout on the tug since, in my opinion, Cossou, the steersman, could not under any circumstances be considered as a lookout and here is where it is extremely difficult to understand why Captain Wilson was not called as a witness although present and available throughout the trial since, according to Cossou, Wilson was outside the wheel-house on deck at the time of the collision.

On these two (2) vital issues, therefore, I was satisfied, on the balance of probabilities, that (1) the plaintiff was on board the sloop that night and was in fact the actual steersman and not Parker as alleged by the defence and (2) that the sloop did have on its navigational lights that night which could have been seen with reasonable diligence for some considerable distance.

There were certain other minor or auxiliary issue? that arose in this matter which, as I saw them, were as follows—

(1) the failure of the sloop's crew to immediately report their captain's disappearance to the police on their arrival at Parika Stelling. To my mind, the simple answer to this was simply that they were very worried and anxious about the plaintiff's safety and what more reasonable action could they have taken than to hurry down to the foreshore as quickly as possible rather than first going to the police station to make a report which might well have given rise to some considerable delay. Time was precious and any delay might well have resulted in their captain losing any chance that he might possibly have had of saving his life. Further, when they actually went and made a report at the station which, according to Exhibit "D2" was made about 3.00 a.m. on 3rd December, 1966, Corporal Hazel had already spoken to Corporal Sowkey who had actually seen the plaintiff and had received his report;

(2) the failure of the plaintiff to tell the diver, Inithurn France, that he had been on the sloop at the time when it sank. I entirely agreed with Mr. King that this was a totally irrelevant factor since, clearly, it was the primary and urgent duty of the plaintiff to salvage his vessel as early as possible and not to make a report to France about what had happened;

(3) the plaintiff's removal of the navigational lights. The answer given By him that they were expensive I considered to be a reasonable one;

(4) the time that France said the plaintiff went to him, i.e., about 8-9 a.m. on 4th December, 1966, was obviously not correct since it was difficult to see how he could have reached France's home at Agricola, East Bank, Demerara, at that time after leaving the wreck about 7.30 a.m., that very morning when we have it in evidence that the journey from Parika to Vreed-en-Hoop takes about two (2) hours. To my mind, this was obviously a genuine mistake and I so accepted it;

(5) the site of the damage received by the sloop clearly indicated to my mind, that the tug was struck amidships on her port side which was

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corroborated by the evidence of France and clearly negated the defendants allegation that the sloop was crossing to port across the bow of the tug because, if this was so, then the damage would undoubtedly have been on the sloop's starboard side since the two vessels were travelling in opposite directions;

(6) the sloop, being laden, clearly had the right of way and not the tug which it is admitted was empty at the time.

The failure on the part of the plaintiff to have a regulation siren or whistle, which was admitted in evidence, although it was pleaded that the sloop did have such a warning device, was, I think, the only factor that could have been said to have operated against him to his detriment in this matter. Undoubtedly this was a most unwise and careless act and it was then necessary to consider whether this factor alone would deprive the plaintiff of all or any of the damages that I considered that he was clearly entitled to as the result of this collision.

The law relating to collisions between vessels at sea and in the rivers and coastal waters of Guyana is, undoubtedly, rather complex, largely due to the fact that it is not contained in any one single piece of legislation but in several enactments, both local and English and, in particular, that monumental piece of draftsmanship, Viz:—the *English Merchant Shipping Act, 1894* (57 & 58 Vict. c. 60) (hereinafter referred to as the 1894 Act) which consists of 747 sections and 21 schedules and which has been expressly adopted in Guyana by the *Merchant Shipping Ordinance, Chapter 3* (hereinafter referred to as the Ordinance). The *Merchant Shipping (Liability of Shipowners and Others) Act, 1958* (6 & 7 Eliz. 2c. 62) (hereinafter referred to as the 1958 Act) was introduced into our laws with effect from 6th November, 1965, by Statutory Instrument No. 1868 of 1965 intituled "*The Shipowners Liability (British Guiana) Order 1965*" (vide pp. 253-254 of the 1965 Subsidiary Legislation of British Guiana). By Statutory Instrument No. 1525 of 1965 intituled "*The Collision Regulations (Ships and Seaplanes on the water) and Signals of Distress (Ships) Order, 1965*", which came into effect from 1st September, 1965, the *International Regulations for Preventing Collisions at Sea, 1960*, set out in Schedule I to Statutory Instrument No. 1525 of 1965, except regulation 31 thereof (hereinafter referred to as the 1960 Collision Regulations) became the Collision Regulations for the purpose of the Act as amended by the Civil Aviation Act, 1949 (vide pp. 227-246 of the 1965 subsidiary legislation of British Guiana).

In addition to the above English Acts and Regulations as adapted we also have two (2) local enactments, viz: (a) the *River Navigation Ordinance Chapter 270* (hereinafter referred to as the River Ordinance) and (b) the *River Navigation Regulations, Chapter 270*, Subsidiary Legislation (hereinafter referred to as the River Regulations).

In the Anselm (1907) P. 151, the steamships Cyril and Anselm, travelling in opposite directions, collided in the Para Estuary of the Amazon

River in Brazil on 5th September, 1905. The extant Collision Regulations then in force were "The Regulations for the Prevention of Collisions at Sea, 1897" made under an Order in Council of 27th November, 1896. According to the opening words of that Order in Council the rules were to be followed—

"by all vessels upon the high seas and in all waters connected therewith navigable by sea-going vessels".

Article 3 of the Regulations provided that—

"Nothing in these rules shall interfere with the operation of a special rule duly made by local authority, relative to the navigation of any harbour, river, or inland waters".

LORD ALVERSTONE, L.C.J., said at pp. 161—162—

"It is impossible to read these words without coming to the conclusion that the opening words were intended to include harbours, rivers or inland waters, because those are the waters as to which it is contemplated local rules may override general rules. In those circumstances, it seems to me impossible to give the narrower construction or to say that these rules are not applicable to such a river as that in which this collision took place, having regard to the express words of the regulations, unless we do it on the ground that they were ultra vires. Without going into history, the recognition which has been given to those rules by the greater number, if not all, of the civilised nations of the world, and the fact that they have been constantly applied to harbours, rivers, and inland waters of various kinds, to my mind make it quite impossible for us at the present day to give effect to such an argument as has been addressed to us; and I think we would be upsetting practice that has been acted upon over and over again.

This is not my opinion only, because when dealing with the matter in the case of *The Carlotta* (1) it was pointed out that from the year 1866, in the case of *The Concordia* (2) and many other cases, the regulations were treated as being applicable to the river Thames; and the ground upon which, in *The Hare* (3), the Manchester Ship Canal was excluded certainly does not in any way show that the President thought any doubt was to be thrown upon the applicability of the rules to such a place as that in which this collision occurred".

Now the extant Collision Regulations in force in this country, as already pointed out, are the 1960 Collision Regulations, *Rule 1(a)* of which provides as follows—

"1(a) These Rules shall be followed by all vessels and seaplanes upon the high seas and in all waters connected therewith navigable by seagoing vessels, except as provided in Rule 30.

Rule 30 thereof states—

"30. Nothing in these Rules shall interfere with the operation of a special rule duly made by local authority relative to the navigation

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of any harbour, river, lake or inland water, including a reserved seaplane area".

It is, I think, quite clear, for the purpose of Rule 30 above, that the River Regulations are "*Special rules made by local authority*" and it is necessary to consider the relationship between the 1960 Collision Regulations and the River Regulations.

It would appear that where there is a *conflict* between a local Rule and one of the Collision Regulations then *the local Rule prevails* but where there is no *conflict* then the Collision Regulations are *supplementary* to the local Rules but this is not to be done where a local Rule in fact provides adequately for a situation though *differently* from the Collision Regulations—*Volume 35 of Halsbury's Law of England, 3rd Edition, para. 885 at p. 601; British Shipping Laws, Volume 4, 11th Edition (1961), para. 924 at p. 628.*

Both the River Regulations and the 1960 Collision Regulations set out rules for the carrying of lights and the sounding of signals and, to my mind, the former govern these aspects but the latter supplement and complement the former. Thus Part VI of the River Regulations under the heading "Carrying of Lights" provides as follows in Regulation 51(1)—

"51(1) Subject to the provisions of this sub-regulation and between sunset and sunrise—

- (i) every vessel propelled by steam or other machinery, when plying on any portion of a river shall, when under way, carry—
 - (a) a bright white light on or in front of the awning or funnel where it can best be seen, and at a height above the gunwhale of not less than 5 feet; and
 - (b) a green light on the starboard side and a red light on the port side; or a combined lantern showing a green light "and a red light from right ahead to two points abaft the beam on the starboard and port sides respectively. Such combined lantern shall be carried on or in front of the awning or funnel where it can best be seen, at a height of not less than 3 feet below the bright white light".

The words "*under way*" are not defined in the River Regulations but are so defined in Rule 1(c) (v) of the 1960 Collision Regulations as Follows—

"(v). a vessel or seaplane on the water is "under way" when she is not at anchor, or made fast to the shore, or aground".

It is to be noted that the River Regulations do not state the distance at which the requisite navigational lights of vessels under way are to be visible but merely state that they are to be carried where they "can best be seen". By

virtue of Rules 2 & 7 of the 1960 Collision Regulations it is provided that power-driven vessels of more than 65 feet in length shall have a white light of such a character as to be visible at a distance of at least 5 miles and a green starboard light and a red port light each of such a character as to be visible at a distance of at least 2 miles. It is clear from the evidence in this matter that the sloop was 68 feet in 'length' which by Regulation 8 of the River Regulations means the "overall length from stem to stern". As I have already indicated it is the River Regulations that govern the carrying of lights on vessels in the rivers of this country and, as I see it, the navigational lights on the sloop that night were in fact carried where they could "best be seen". I have found that they could have been seen at a distance of at least 3 miles and if I had to decide what was the *minimum distance* at which lights on vessels under way in the rivers of this country could 'best be seen' I would venture to suggest a distance of *at least 1 mile* having regard to the fact that Guyana is a tropical country with no hazards of a temperate country such as snow hail, fog, sleet etc;

As regards the admitted absence of the siren or whistle or warning device on the sloop we have to look at both the River Regulations and the 1960 Collision Regulations. Part VII of the River Regulations is intitled "Rule of the Road" and Regulation 52 provides —

"52. Except as is hereinafter provided in regulation 53 of these regulations every vessel or boat must comply with "The Rule of the Road at Sea".

Regulation 53(3) provides that —

"53(3). When two vessels are meeting end on or nearly end on the following sound signals must be made -

- (a) one short blast to mean "I require the starboard side of the fairway or mid channel".
- (b) two short blasts to mean "I require the port side of the fairway or mid channel".

The loaded vessel shall always have the right of way and must make the signals first. If both vessels are loaded, then the vessel which has the tide astern shall have the right of way".

Rule 15 of the 1960 Collision Regulations provides that —

"15(a). A power-driven vessel of 40 feet or more in length shall be provided with an efficient whistle, sounded by steam or by some substitute for steam, so placed that the sound may not be intercepted by any obstruction...."

- (b) All signals prescribed in this Rule for vessels under way shall be given —
 - (i) by power-driven vessels on the whistle";

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S. 419(1) of the 1894 Act specifically enacts that owners and masters of ships must obey the regulations, i.e., the 1960 Collision Regulations and, where applicable, local rules, e.g., the River Regulations.

"It is therefore a duty to observe the regulations *and in the absence of lawful excuse disobedience is, generally speaking, EVIDENCE OF NEGLIGENCE*. The regulations are evidence of what it is the duty of a vessel to do under the circumstances, and if it should appear that a vessel, by the breach of one of them, has occasioned or contributed to a collision, such a breach would afford the very strongest reason for holding that a vessel had been guilty of a breach of duty and was to blame for the collision—*British Shipping Laws, Vol. 4 para. 673 at p. 470*.

There are cases, however, where special circumstances exist to make the regulations *inapplicable*, e.g., where the vessel cannot take the step without going ashore or endangering herself or other vessels and, in such cases, the *ordinary rules of seamanship* apply provided that they themselves are not inconsistent with the regulations. This is recognised and preserved by *Rule 29* of the 1960 Collision Regulations which provides as follows —

"29. Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or of the special circumstances of the case".

Part D of the 1960 Collision Regulations is intitled "Steering and Sailing Rules" and covers Rules 17 to 27 inclusive, of which Rules 17 to 24 apply only to vessels "in sight of each other", which words are defined in Rule 1(c)(ix) of the said Regulations as follows —

"1 (c)(ix). vessels shall be deemed to be in sight of one another only when one can be observed visually from the other".

The word "*visible*" when applied to *lights* is defined in Rule 1(c)Ix) *ibid* as —

"1 (c)(x). visible on a dark night with a clear atmosphere '.

There are 4 preliminary rules immediately preceding Rule 17, the first one of which provides —

"1. In obeying and construing these Rules, any action taken should be positive, in ample time and with due regard to the observance of *good seamanship*".

Rule 18 of the 1960 Collision Regulations, states —

"18(a). When two power-driven vessels are meeting end on, or nearly end on, so as to involve risk of collision, *each shall alter her course to starboard, so that each may pass on the port side of the other*. This Rule only applies to cases where vessels are

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meeting end on, or nearly end on, in such a manner as to involve risk of collision and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other. The only cases to which it does apply are when each of the two vessels is end on, or nearly end on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own; and by night, to cases in which each vessel is in such a position as to see both the sidelights of the other. It does not apply, by day, to cases in which a vessel sees another ahead crossing her own course? or, by night, to cases where the red light of one vessel is opposed to the red light of the other or where the green light of one vessel is opposed to the green light of the other or where a red light without a green light or a green light without a red light is seen ahead or where both green and red lights are seen anywhere but ahead".

Rule 27 *ibid* states —

"27. In obeying and construing these Rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances, including the limitations of the craft involved, which may render a departure from the above Rules necessary in order to avoid immediate danger'.

Rule 28(b) *ibid* is as follows —

"28(b). Whenever a power-driven vessel which, under these Rules, is to keep her course and speed, is in sight of another vessel and is in doubt whether sufficient action is being taken by the other vessel to avert "collision, she may indicate such doubt by giving at least five short and rapid blasts on the whistle. The giving of such a signal shall not relieve a vessel of her obligations under Rules 27 and 29 or any other Rule, or of her duty to indicate any action taken under these Rules by giving the appropriate sound signals laid down in this Rule".

Until the enactment of the *Maritime Convention Act, 1911*, (hereinafter referred to as the Act of 1911) *no damages could be recovered by reason of contributory negligence on the part of the plaintiff* under a rule of the Court of Admiralty known as the Rule as to Division of Loss which had been extended to all Courts by section 25(9) of the *Judicature Act, 1873*. The Courts made no attempt to administer distributive justice by apportioning the loss according to the degree of fault of which each ship was guilty. The principle of the rule was said to be equality of participation in a loss arising from a common fault—*British Shipping Laws, Vol. 4 para. 147 at p. 114*.

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Section 1 of the Act of 1911 abolished in all cases the equal division of loss and enacted —

"1(1). Where, by the fault of two or more vessels, damages or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in *proportion* to the degree in which each vessel was in fault; Provided that

—

- (a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and
 - (b) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed; and
 - (c) nothing in this section shall affect the liability of any person under a contract of carriage or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law.
- (2). For the purposes of this Act, the expression "freight" includes passage money and hire, and references to damage or loss caused by the fault of a vessel shall be construed as including references to any salvage or other expenses, consequent upon that fault, recoverable at law by way of damages".

The Act of 1911 applies to proceedings in all Courts and to all vessels and, by section 10 thereof, is to be *construed with* the *Merchant Shipping Acts 1894-1907* (now 1894-1970).

When I gave decision in this matter I held that, although the sloop was clearly in breach of Regulation 53 of the River Regulations, nevertheless, this did not in any way contribute to the accident since I found as a fact that the sole cause of the accident was the failure of the tug to have a lookout of any kind. After careful and serious reflection, at this stage however, I am of the considered opinion that that was a wrong finding and liability should have been found *proportionately in the ratio of two-thirds re the tug and one-third re the sloop*. I have no real doubt that the plaintiff applied the rules of good seamanship by testing the depth of the water and slowing down his engines when he realised that the sloop was travelling in very shallow water and, in addition, he followed the provisions of Rule 18(a) of the 1960 *Collision Regulations* by pulling over to starboard when he saw the tug bearing down on him and on a collision course, even though he realised that by doing so there was every likelihood of his running aground on the nearby mud flat. It may be asked could the plaintiff have done anything more than what he did? The answer, unfortunately, must be 'Yes'.

As I see it now, if he had had a regulation whistle or siren on board the sloop and had given the relevant sound signals under Regulations 53(3) of the River Regulations and/or had given the five short and rapid blasts as provided for under Rule 28(b) of the 1960 Collision Regulations, then it was possible, if not probable, that the tug would have been alerted and there may well have been no accident at all.

The general rule relating to damages in collision cases at sea is based upon the principle of *restitution integrum* and was summarised by the great Admiralty Judge, *Dr. Lushington, in The Clarence (1850)* 3 Wm. Rob. cited at para. 467 at p. 338 of British Shipping Laws, Vol. 4, *ibid.*, as follows—

"the party who has sustained a damage by collision is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered".

Until 1773, by the common law of England and by the maritime law as administered in the Admiralty Court, the liability of shipowners for damages by collision was unlimited but in that year an Act (Responsibility of Shipowners) was passed limiting ship-owners' liability for loss of cargo by theft of master or crew to the value of the ship and freight. In 1813 an Act (Responsibility of Shipowners) was passed whereby, for the very first time, limitation of liability in cases of collision was created. The present law is now contained in s. 503 of the 1894 Act subject, however, to a considerable degree of amendment and, in particular, the 1958 Act. S. 503 as amended by the 1958 Act now reads as follows —

"503(1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say),

- (a) where any loss of life or personal injury is caused to any person being carried in the ship;
- (b) where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;
- (c) where any loss of life or personal injury is caused to any person not carried in the ship through the act or omission of any person (whether on board the ship or not) in the navigation or management of the ship or in the loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or through any other act or omission of any person on board the ship;
- (d) where any loss or damage is caused to any property (other than any property mentioned in paragraph (b) of this subsection) or any rights are infringed through the act or omission of any person (whether on board the ship or not) in the navigation or management of the ship, or in the

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loading, carriage or discharge of its cargo or in the embarkation, carriage or disembarkation of its passengers, or through any other act or omission of any person on board the ship; be liable to damages beyond the following amounts; (that is to say,)

- (i) In respect of loss of life or personal injury, either alone or together with such loss, damage or infringement as is mentioned in paragraphs (b) and (c) of this subsection, an aggregate amount not exceeding an amount equivalent to three thousand one hundred gold francs for each ton of their ship's tonnage; and
- (ii) in respect of such loss, damage or infringement as is mentioned in paragraphs (b) and (d) of this subsection, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding an amount equivalent to one thousand gold francs for each ton of their ship's tonnage;

and the number by which the amount equivalent to three thousand one hundred gold francs mentioned in this section is to be multiplied shall be three hundred in any case where the tonnage concerned is less than three hundred tons.

For the purposes of this section a gold franc shall be taken to be a unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred.

The Minister of Transport may from time to time by order made by statutory instrument specify the amounts which for the purpose of this section are to be taken as equivalent to three thousand one hundred and one thousand gold francs respectively".

By Statutory Instrument No. 1287 of 1958, intituled *The Merchant Shipping (Limitation of Liability) (Sterling Equivalent) Order 1958* the three thousand one hundred gold francs was converted to £73. 8s. 10 5/32 d and one thousand gold francs to £23. 13s. 9 27/32 d. These amounts were themselves increased to £85. 13s. 7 13/16d and £27.12s. 91/2d respectively by Statutory Instrument No. 1725 of 1967 intituled. *The Merchant Shipping (Limitation of Liability) (Sterling Equivalent) Order, 1967*. It seems to me, however, that these increased amounts do not apply in this country since S.I. 1725 of 1967 was issued after this country became an independent sovereign State on 26th May, 1966. In my opinion, therefore, the respective amounts to be paid in this country today under s. 503(l)(i) & (ii) of the Act of 1894 are £73. 9s. and £23. 14s. respectively (putting the sterling equivalent to the nearest shilling). Before the recent devaluation of the British pound the Guyana dollar was equated to sterling at the rate of G\$4.80 to the pound. Since devaluation, the rate is now G\$5.21 to the pound and I can see no

valid reason why the present conversion rate should not be the latter figure and, accordingly, I am prepared to hold that the respective limitation rates today in this country under s. 503(1)(i) & (ii) of the 1894 Act are G\$383.00 and G\$124.00 respectively (calculated to the nearest dollar). It is to be noted that the "300" (three hundred) tons specified in S. 503(1)(ii) has been reduced to "sixty" tons in relation to Guyana by S. 4 of Statutory Instrument No. 1868 of 1965.

The right to limitation of liability under the 1894 Act only exists *where there is a liability to pay damages* and the Act of 1958 has not affected this general principle. Where, however, a party has entered into a contract to the fulfilment of which involves that his liability shall be unlimited, he is not permitted to limit his liability by proceedings under the 1894 Act—*The Satanita* (1897) A.C. 59.

The question that I had to ask myself ultimately was "Were the defendants entitled, to limit their liability as pleaded?" Here again, I must confess that I made another wrong finding by answering this vital question in the negative. As at present advised, this question should have been answered in the affirmative.

The object of the Collision Regulations is to prevent collisions and to minimise their effect—per LORD WATSON in *the Voorwaart and the Khedive* (1880) 5 App. Cas. 876 at p. 903. In *The Beryl* (1884) 9 P.D. 137. BRETT M.R., said in relation to the 1863 Collision Regulations —

"I take it that the basis of the regulations for preventing collisions at sea, is, that they are "instructions to those in charge of ships as to their conduct; and the legislature has not thought it enough to say, "We will give you rules which shall prevent a collision; 'they have gone further and said that for the safety of navigation we will give you rules which shall *prevent risk of collision.*"

Where a party seeks to limit his liability, as the defendants in this matter, he must show that the occurrence took place without his "*actual fault or privity*" under s. 503(1) of the 1894 Act or as "master, member of the crew or servant" under s. 503(3Xa)(b) of the 1894 Act.

The meaning of "fault" and "privity" in s. 502 of the 1894 Act, which in this respect is identical with s. 503, has been authoritatively declared by both the Court of Appeal and the House of Lords in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* (1914) 1 X.B. 419, C.A., (1915) A.C. 705. In the Court of Appeal, BUCKLEY L.J., said at p. 432:-

"The words "actual fault or privity" in my judgment infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents".

HAMILTON L.J., said at p. 436:-

"Actual fault negatives that liability which arises solely under the rule of respondent superior".

In the House of Lords, LORD HALDANE L.C., said at p. 713:-

"So in the case of a Company 'It must be. . . the fault or privity of somebody who is not merely a servant or agent for whom the Company is liable upon the footing respondent superior, but somebody for whom the Company is liable because his action is the very action of the Company itself'".

In *Paterson Steamships, Ltd. v. Robin Hood Mills, Ltd. (1937) 58 Ll. L. Rep. 33* Lord Roche in the Privy Council referred to Lennard's Case (above) and said at p. 36:—

"Before dealing with the specific points involved the general scope and effect of s. 503 of the Merchant Shipping Act, 1894, may be briefly stated. Its scope and effect is not to excuse or except a shipowner from liability for tort or breach of contract, but to limit the amount for which he can be liable for the faults of others than himself. . . Another and very important principle is to be derived from a consideration of the section, namely, that the fault or privity of the owners must be fault or privity in respect of that which causes the loss or damage in question a proposition which was acted upon and "illustrated in Lennard's Case".

In *Beauchamp v. Turrell (1952) 1 T.L.R. 695 (Q.B.D.) Sellers J* held (following *The Admiralty v. Owners of S. S. Divina. The Truculent (1952) P. 1*) that the mere fact that a shipowner is liable in law for the failure of his servants to exercise reasonable care, or for his own breach of the duty, personal to him, to provide his servants with a safe system of work, does not by itself make him guilty of actual fault or privity so as to deprive him of his right of limitation.

The effect of the words "actual fault or privity" is to protect the shipowner not only against the legal consequences of negligence in his servants or agents, but also in many cases against the consequences of imperfections in the ship which caused the collision—*The Diamond (1906) P. 282* (a case decided on s. 502 of the 1894 Act where the same words occur).

It is not any easy matter to apportion the measure of damages to be awarded to the owner of a vessel that has been damaged or sunk by another vessel under the Admiralty Rule of Division of Loss both before and after the Act of 1911 where either or both ships have limited their liability under s. 503(1) of the 1894 Act. In *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co., The Voorwaarts and the Khedive (1880) 5 App. Cas. 876*, two ships, The Voorwaarts and the Khedive, of 3,000 and 3,740 tons respectively, were approaching each other at night

north of Penang Island off the coast of Malaya without risk of collision on nearly opposite and parallel courses, the green light of each being visible to the other on her starboard bow. At this time both vessels were going at full speed. When the vessels were somewhat less than one mile apart the Voorwaarts put her wheel hard-a-starboard and opened her red light to the Khedive. This was a wrong manoeuvre, and caused risk of collision. Thereupon the captain of the Khedive, without easing his engines, put his wheel hard-a-port, and at the same moment gave the order to stand by the engines. One minute and a half afterwards he put his engines full speed astern. The collision occurred a minute and half after this. The engines at the moment of collision were going full speed astern. They ought to have been stopped and reversed, under the article 16 then in force, as soon as the red light of the Voorwaarts appeared, at the moment when the order to put the Khedive's wheel hard-a-port was given. The absolutely right manoeuvre was therefore not adopted by the Khedive, and it was held by the House of Lords that, the "stop and reverse" rule having been departed from without the necessity provided for by article 19 of the 1863 Regulations, the Khedive was in fault under the statute. In the Court of Appeal it had been held that although the captain of the Khedive was wrong in not stopping and reversing at the moment when the Voorwaarts red light was seen, yet that his error did not prove him to be deficient in ordinary care, skill, or nerve, and that, therefore, the collision not having been caused by negligence of those on board the Khedive, the owners of the Voorwaarts were alone liable. In the House of Lords it was held that the Khedive having been within the operation of article 16, and there being no special circumstances (article 19) to justify a departure from the regulations in order to avoid immediate danger, she was by the words of the statute to be deemed to be in fault, and that the question whether the captain or not her captain had been in fact guilty of negligence was immaterial. The Voorwaarts which by her bad lookout and by putting her wheel to starboard brought risk of collision in the first instance, and had kept her engines going at full speed up to the moment of collision, was held in fault both in the Court of Appeal and in the House of Lords. In the final result, the judgment of the Admiralty Court was restored and the rule of equal division of loss applied.

From this case it seems clear that the House of Lords considered that the purpose of the legislature was to substitute a rigid adherence to the regulations for the discretion which a seaman was, under the previous law, at liberty to exercise and that a justification for the harshness of the new enactment was to be found in the number of collisions which would be avoided if a rigid and almost mechanical adherence to the regulations was substituted for the uncertainty which is inseparable from an application depending upon the discretion of seaman—*British Shipping Laws, Vol. 4. para. 621 at pp. 435-436.*

Now Rules 16 and 19 of the 1863 Collision Regulations are, in effect, Rules 23 and 27 of the 1960 Collision Regulations. As I see it now, both vessels were to be blamed for this accident because the tug had no lookout

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or no proper lookout which, if there had been one, would easily have been able to have seen the navigational lights on the sloop and, so also, the sloop, which, if it had the regulation whistle or siren as it clearly should have had on board and which if it had been sounded either under Regulation 53(3) of the River Regulations or Rule 28(b) of the 1960 Collision Regulations, or both, might possibly, if not probably, have averted the accident.

As presently advised, I do not now consider that the plaintiff's contributory negligence should amount to more than one-third at the most since, apart from that one negligent act in not carrying a whistle or siren on board the sloop, he did all that I consider an experienced seaman would or could have done in the particular circumstances under the ordinary rules of good seamanship which does not mean that the seaman concerned is expected to foresee and provide against every accident but merely to use ordinary intelligence and to exercise ordinary skill—*British Shipping Laws, Vol 4, para. 890 at p. 603*. What is good seamanship is a question of fact to be decided on a consideration of all the relevant circumstances—per Lord Wright in the *Heranger (1939) A.C. 94 at p. 101*.

As regards the question of lookout, if a ship is proved to have been negligent in not keeping a proper lookout she will be held answerable for all the reasonable consequences of her negligence; thus, for example, it may be negligence not to see and avoid another ship on a clear night even if that other ship has no lights. If, however, the absence of a proper lookout clearly had nothing to do with the collision, it will not be deemed to be a fault contributing to the collision—*British Shipping Laws, Vol. 4 para. 892 at p. 605*. In ordinary cases one or more hands should be specially stationed on the lookout by day as well as by night. They should not be engaged in any other duty; and, although there is no hard and fast rule, they should usually be stationed in the bows, or in that part of the ship from which other vessels can best be seen and their signals heard—*ibid para. 892 at pp. 605 & 606*.

In his statement of claim the plaintiff claimed the sum of \$9,381.00 being \$8,181.08 as special damages and \$1,200.00 as general damages for prospective loss for 8 weeks @ \$150.00 per week. In his evidence, however, the plaintiff claimed a total of \$10,900.00 being \$7,400.00 a special damages and \$3,500.00 general damages being prospective loss for 10 trips @ \$250.00 per trip.

Having regard to the evidence as a whole I awarded the plaintiff the sum of \$10,916.00 being \$5,666.00 as special damages and \$5,250.00 as general damages.

The special damages awarded were as follows —

- | | | |
|----|-------------------------------|----------|
| 1. | expenses of diver France..... | \$800.00 |
| 2. | hire of pontoon | 1,440.00 |
| 3. | cleaning of vessel | 350.00 |

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4.	hire of 2 watchmen	336.00
5.	hire of 8 labourers	160.00
6.	repairs & materials to hull	880.00
7.	spare parts	200.00
8.	hire of Lister pump	120.00
9.	hire of tug.....	320.00
10.	salvage equipment	260.00
11.	hire of mechanics to repair and re-condition engine	<u>800.00</u>
		<u>\$5,666.00</u>

I awarded general damages in the sum of \$5,250.00, being loss of use for 15 trips at \$350.00 per trip, which I considered reasonable.

In view of my considered opinion now that the sloop was to blame for this accident to the extent of one-third, then the damages awarded should have been as follows —

Special damages - \$5,666.00 - \$1,888.67 = \$3,777.33

General damages - \$5,250.00 - \$1,750.00 = \$3,500.00

Total \$7,277.33

It is to be noted that no damage whatsoever was suffered by the tug and no counterclaim was filed by the defendants which has certainly made my mathematical calculations so very much easier.

Applying the *limitation rule*, it is clear, I think now, that the defendants were entitled to limit their liability to the lower figure of \$124.00 under s. 503(1)(ii) of the 1894 Act, which is limited to the actual tonnage of the ship which, in this matter, is 19.94 tons and this would give a maximum total of \$124.00 x 19.94=\$2,472.56. It would appear, therefore, that the most the defendants were liable to pay in this matter was the sum of \$2,472.56 and judgment should have been given for that amount accordingly.

In view of the voluminous nature of the evidence and the complexity of the subject, I awarded costs to the plaintiff to be taxed certified fit for two (2) Counsel.

Judgment for the plaintiff.

Solicitors:

S.M.A. Nasir for Plaintiff (Respondent).

A. G. King for Defendants (Appellants).

RAJAB

v.

TOOLSIE CHANDRIKA and RADHIA

[High Court (Vieira J.) October 12, 13, 1972; February 1, 1973]

Moneylender—Pro-note executed at place different from registered place of business where loan made—Failure to take out annual licence—Whether transaction illegal.

Moneylender—No interest charged—Isolated transaction—Whether loan made in course of business of moneylending—Whether plaintiff entitled to sue on pro-note. Moneylenders Ord. No. 11 of 1957, ss. 2, 3, 23; Rules of the Supreme Court, 1955, 0.4, r.10.

The plaintiff, a registered moneylender, sued the defendants jointly and severally on a promissory note for \$600, dated Dec. 1, 1965.

The defendants executed the note at 64 Village Corentyne, countersigned by a Justice of the Peace, and delivered it to the plaintiff at his home at No. 55 Village, where his registered money-lending business is conducted and where the money was lent.

In their affidavit of defence, the defendants averred that the actual loan was \$400 and not \$600; that the sum of \$200 was interest charged, and that repayment of the \$400 was to be made in instalments of \$100 in December of the years 1966 to 1969 inclusive, with the interest to be paid in Dec. 1970. It was submitted on behalf of the defendants that plaintiff having failed to take out a licence for 1965, he was still a statutory moneylender with the result that the transaction was illegal for non-compliance with the Moneylenders Ord, 1957 and Rules of the High Court. It was also submitted the transaction was illegal for the reason that the note was executed at a place other than the registered place of business whilst payment was made there.

HELD: (i) the agreement to lend and the actual loan having taken place at plaintiff's registered address at No. 55 Village, the fact of execution at No. 64 Village was not an illegality.

(ii) the loan was for \$600, not \$400 with interest; the transaction was therefore an isolated friendly one for the year 1965 in which no interest was charged and so did not amount to carrying on the business of money lending.

(iii) the plaintiff was entitled to sue upon the note for which the period of limitation is six years.

Judgment for the plaintiff

Cases referred to include: —

- (1) *Kirkwood v. Gadd* (1910) A.C. 422.
- (2) *Blaiberg v. Calvert* (1910) 26 T.L.R. 328.
- (3) *Hamdelman v. Davies* (1937) Ir. Rep. 419.
- (4) *Litchfield v. Dreyfus* (1906) 1 K.B. 584.
- (5) *Newman v. Oughton* (1911) 27 T.L.R. 254.

M. Poonai, for the plaintiff/ Respondent.

Mungal Singh, for the defendants/ Appellants.

VIEIRA J.: This is an appeal from a decision given on 13th October, 1972, in which I awarded judgment to the plaintiff (respondent) in the sum of \$600.00 with costs fixed in the sum of \$250.00 against both defendants (appellants) jointly and severally in relation to a certain *promissory note* dated 1st December, 1965, jointly executed by the two defendants to and in favour of the plaintiff for value received at No. 64 Village, Corentyne, Berbice, and I now give my reasons therefor.

The plaintiff's case, as I understood it, was that he was a registered moneylender since before World War II but, during the year 1965, when this transaction took place, he did not take out the yearly licence that is obligatory for all moneylenders under the provisions of the *Moneylenders Ordinance, No. 11 of 1957* (hereinafter referred to as the Ordinance). He was approached by his wife who asked him to assist the No. 2 defendant who is the mother-in-law of the No. 1 defendant and, on 1st December, 1965, the two defendants went to the home of one Mr. King, a Justice of the Peace, at No. 64 Village, Corentyne, Berbice, where Mr. King made out a promissory note (*Exhibit "A"*) which the No. 1 defendant signed and to which the No. 2 defendant affixed her mark, both being done in the presence of Mr. King who counter-signed same. The two defendants then went with the note to the home of the plaintiff at No. 55 Village, Corentyne, Berbice, which is his registered address as a moneylender, and, there, the plaintiff lent them the sum of \$600.00 charging no interest thereon and he was given the note as security.

The defendants alleged that the actual amount lent was the sum of \$400.00 and not \$600.00 and that the sum of \$200.00 was charged as interest thereon. According to the affidavit of defence, the capital sum was to have been paid back at the rate of \$100.00 per annum in the month of December in the years 1966 to 1969 inclusive and that the interest was not due to be re-paid until December, 1970. Both defendants gave evidence that the capital sum of \$400.00 was re-paid according to the terms and conditions agreed upon and that on each occasion this was done their witness Oudit Narain was present. They further alleged that they were willing and able to repay the \$200.00 interest on the due date but this was not in fact done for the very simple reason that they received the writ in this matter before that date.

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Having regard to the evidence as a whole, including the demeanour of all the witnesses who testified, I accepted and believed, on the balance of probabilities, the story as related by the plaintiff in preference to that given by the two defendants and their witness Oudit Narain. I was not impressed with Narain's testimony and I considered that he was a mere witness of convenience. His evidence, to my mind, conflicted with that of the two defendants especially with regard to the relationship between himself and themselves and the conditions under which he was permitted to reside in their house whenever he was not logging in the Corentyne River.

Mr. Mungal Singh had submitted that the fact that the plaintiff had not taken out a licence for the year 1965 was irrelevant and he contended that the plaintiff was still a moneylender despite such failure and that the transaction, accordingly, was *illegal* since it did not comply either with the Ordinance or Order 4 Rule 10 of the Rules of the Supreme Court, 1955 (hereinafter referred to as the Rules) or both.

The following provisions of the Ordinance I considered relevant and important—

"2. In this ordinance—

"moneylender" includes every person whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business

3(1). Every moneylender, whether carrying on business alone or as a partner in a firm, shall take out annually in respect of every address at which he carries on his business as such, *a licence* (in this Ordinance referred to as "a moneylender's licence") which shall expire on the 31st December in every year, and, subject as hereinafter provided, there shall be charged on every moneylender's licence such duty as may be payable under the provisions of the Tax Ordinance for the time being in force."

3(3) If any person—

- (a) takes out a moneylender's licence in any other than his true name, or
- (b) carries on business as a moneylender without having in force a valid moneylender's licence authorising him so to do, or being licensed as a moneylender, carries on business as such in any name other than his authorised name, or at any other place than his authorised address or addresses, or
- (c) enters into any agreement in the course of his business as a moneylender with respect to the advance or repayment of money, or takes security for money, in the course of his business as a moneylender, otherwise than in his authorised name,

he shall be guilty of an offence and shall be liable on summary conviction thereof, to a penalty not exceeding five hundred dollars."

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- 19. No proceedings shall lie for the recovery by a moneylender of any money lent by him after the commencement of this Ordinance or of any interest in respect thereof, or for the enforcement of any agreement made or security taken after the commencement of this Ordinance in respect of any loan made by him *unless the proceedings are commenced before the expiration of twelve months* from the date on which the cause of action accrued."

- 23(1). Where proceedings are taken in any court by a moneylender for the recovery of any money lent before or after the commencement of this Ordinance or for the enforcement of any agreement or security made or taken in respect of money lent either before or after the commencement of this Ordinance, and there is evidence which satisfied the court that the interest charged in respect of the sum actually lent is excessive, or that the amount charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges are excessive *and that, in either case, the transaction is harsh and unconscionable the court may re-open the transaction.*

.....

Order 4 Rule 10 of the Rules provides as follows —

- "10. Where an action for the recovery of money lent by a moneylender or for the enforcement of any agreement or security relating to any such money is brought by the lender or an assignee, the indorsement on the writ *shall* state, in addition to any other particulars, the fact that at the time of making the loan or contract the plaintiff or (in an action by an assignee) the original assignor *was a licensed moneylender, and if the writ is a specially indorsed Writ shall also state* —
 - (a) the date on which the loan was made;
 - (b) the amount actually lent to the borrower;
 - (c) the rate per centum per annum of interest charged;
 - (d) the amount, if any, charged for expenses, inquiries, fines, bonus, premium, renewals, or other charges;
 - (e) the fact that a note or memorandum of the contract was made, and was signed by the borrower;
 - (f) the date of the promissory note, or of any contract or memorandum in writing of the contract relating to the money lent;
 - (g) the date when a copy of the note or memorandum was delivered or sent to the borrower, if requested;
 - (h) the date and place when and where the money-lending business involved in the action was carried out;
 - (i) the security, if any, taken for the loan;

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- (j) the amount of every payment already received by the moneylender in respect of the loan and the date on which payment was made;
- (k) whether there has been any statement of settlement of account or any agreement purporting to close previous dealings and create new obligations;
- (l) the amount of every sum due or owing to the moneylender but unpaid;
- (m) the date or dates upon which such unpaid sum or sums became or become due;
- (n) the amount of interest accrued due and unpaid on every such sum."

The Ordinance is based upon and derived from the *Moneylenders Act 1900* to 1927 of the United Kingdom Parliament which, by section 19 (1) (2) of the latter, are to be construed as one. The *object* of those Acts was succinctly stated by LORD JAMES OF HEREFORD in the locus classicus *Kirkwood -v- Gadd* (1910) A.C. 422. H.L., as follows at p. 426 -

"Guided by the words of the Act, I would surmise that the object of the Legislature was to preserve the identity of the moneylender so that borrowers might always know with whom they are dealing. To secure that the moneylender should trade in only one name, and carry on business at only one address, would do much, and has done much, to establish the desired personal identity of the persons with whom borrowers were dealing."

Similarly, LORD MERSEY at p. 438 -

"Then I think the object with which this statute was passed is to be remembered. It was not passed either to hinder or to prevent moneylending as a business. It was passed merely to defeat the frauds and to correct the abuses which sometimes attend the business, and with that object in view it requires that the moneylender shall not trade under a changing name or at a shifting address."

LORD LOREBURN, L.C, stated the *mischief* that the Acts sought to prevent in the following language at pp. 423 — 424 —

"We must look at the nature of the mischief disclosed according to the appropriate canons of statutory construction. The mischief is that this dangerous business may be conducted by persons under false names or a variety of names without the security of an ascertained address, or at places where men may be taken unawares or off their guard."

In para. 6 of their affidavit of defence the defendants averred that the transaction was carried out at No. 64 village and not at the authorised address of the plaintiff which, undisputably, was at his home at No. 55

Village. This was in direct conflict with the sworn testimony of the mother-in law who admitted in cross-examination that, although the note was made and executed at the home of Mr. King, J.P., at No. 64 Village, nevertheless, the money itself was actually lent at the plaintiff's home at No. 55 Village. In *Blaiberg -v- Calvert (1910) 26 T.L.R.328*, the negotiations for the loan took place at the registered address, and the cheque for the loan (payable to the borrower's solicitor,) and the promissory note for the amount of the loan and interest were made out there. The cheque and promissory note for the amount of the loan and interest were to be sent to the borrower's solicitor), who gave the borrower his own cheque for the amount of the loan, obtained execution of the promissory note and sent the latter to the lender. *Hamilton J* held that the business was carried out at the registered address. In *Kirkwood -v- Gadd* (ubi supra) LORD MERSEY, in referring to section 2(2) of the Act of 1900, which is in similar terms to section 3(3) of the Ordinance, had this to say at p. 437 —

"Examining this section of the Act, it will be noted that while it prohibits the moneylender from carrying on the money-lending business otherwise than in his registered name, or elsewhere than at his registered address, it contemplates the possibility of the moneylender having to enter transactions "in the course of his business as a moneylender"; and singling out two, namely, entering into an agreement with respect to the advance and repayment of money, and taking a security for money, it enacts that they shall not be entered into otherwise than in the moneylender's registered name. Not a word is said in this part of the section as to the registered address. It is apparently enough to satisfy the requirements of the Act that the transactions mentioned should be in the registered name. This, in my opinion, indicates that the carrying on of the business spoken of in the Act of Parliament is something quite different from the carrying out of the transactions which make up the business.

The carrying on must be at the registered address. The carrying out may be wherever convenient.

It seemed quite clear to me, therefore, on this aspect, that there was nothing wrong or illegal in the note being made and executed at Mr. King's home at No. 64 Village since the agreement to lend and the actual loan took place at the plaintiff's registered address at No. 55 Village.

In this matter I accepted and believed that this transaction was the only one that the plaintiff had involving the loan of money for the year 1965 and I was satisfied that the actual capital sum lent was \$600.00 and not \$400.00 as alleged by the defendants and, further, that the plaintiff charged no interest whatsoever on the said loan. Now the case of *Kirkwood -v- Gadd* (ubi supra) decided that it *was a question of fact in each case* whether a person is carrying on the business of money-lending. In that case the House of Lords had to consider what constituted the "*business*" of money-lending.

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LORD LOREBURN, L.C., said at p. 423 -

"What is carrying on business? *It imports a series of or repetition of acts.* Each separate piece of business may consist of many stages and incidents, and the business as a whole comprises many separate pieces."

LORD ATKINSON said at p. 431 -

"In one sense every step, every item, in a long or complicated financial or commercial transaction may be said to be "business" employed in this section (i.e., sec. 2(1)(b) of the 1900 Act), as in the phrase "carrying on business" employed in the 4th section of the Companies Act of 1862, the words "carries on" must be held to imply a repetition of acts, the sum of which constitutes the "business"; see Brett L.J., in *Smith -v- Anderson* (1)."

Non-compliance with the Ordinance not only gives rise to criminal liability but also to civil penalties, the effect of which is succinctly stated at p. 32 of the Fourth Edition (1952) of *Stone & Meston's Law Relating to Moneylenders* as follows —

"It is clearly one of the principal purposes of the Moneylenders Act, 1927, that every person who seeks to carry on a business of money-lending *shall be licensed*. If the moneylender is not duly licensed, then every contract he enters into in the course of such business is *void*, and every security he takes in pursuance of such contracts being against public policy."

In this matter I considered that (1) the plaintiff lent the sum of \$600.00 to the defendants as an act of kindness and at the insistence of his wife whom I was satisfied, if not family to the No. 2 defendant (which was vehemently denied) was at least a good friend of hers and (2) this was an *isolated transaction* for the whole of the year in 1965 in respect of which no interest was charged by the plaintiff.

In *Hamdelman -v- Davies* (1937) *It. Rep.* 419, it was held that the *Irish Moneylenders Act*, No. 36 of 1933, only applies to transactions of a moneylender made in the course of his business, and a moneylender is not precluded by the Act from lending small sums to his friends without complying with all the formalities of the said Act. *Maguire J.* said at pp. 426, 427 —

"In my opinion, the Act contemplates business dealings, and only advances made in the course of business are within the ambit of the Act. Therefore, a moneylender is not precluded from lending £1, £2, or more to his *friends*, provided that such a loan is not made as a business transaction, e.g., *if no interest is charged on a small loan* made by a moneylender to his friend, such a loan can hardly be said to be a business transaction." (*Reported at p. 3 of Stone & Meston (ibid).*)

In *Litchfield -v- Dreyfus (1906) 1 K.B. 584*, the plaintiff had up to 1903, carried on business as an art and curio dealer and, in the course of this business, he had from time to time taken bills from his customers in payment of their purchases. In 1903 he sold his business and disposed of the stock and trade to various persons and in many cases took bills in payment. After disposing of this business he carried on the profession of adviser in art matters. In addition to this the plaintiff continued the interest he possessed in two other art business by advancing money to the owners and by discounting on behalf of such owners the bills of customers given in respect of purchases. He had also, since giving up his business, lent sums to some ten persons, old friends and business acquaintances, upon terms more favourable to them than they could have obtained in the ordinary course. *Farwell J* held that the plaintiff was not a moneylender. That learned Judge said at p. 590 —

"The Act (i.e.,) the 1900 Act) was intended to apply *only to persons who are really carrying on the business of money-lending as a business*, not to persons who lend money as an incident of another business or to a few old friends by way of friendship. This particular Act was supposed to be required to save the foolish from the extortion of a certain class of the community who are called moneylenders as an offensive term. Money-lending is a perfectly respectable form of business. Nobody says that bankers are rascals because they lend money. It is part of their everyday business. Billbroking is well known in the City of London, and is a respectable business so long as it is carried on in a respectable manner. But the Legislature is casting its net has cast it very wide; and if a man is carrying on the business of a moneylender he is within the Act, although he may be free from all blame morally. The question in each case is. Does he carry on the business of a moneylender? that depends on the facts of the case."

This decision was applied in *Newton -v-Pyke (1908) 25 T.L.R. 127*, where the plaintiff was a solicitor's articled clerk who lent money at a rate of interest or for other substantial remuneration to the defendant on four occasions and to other persons on five or more occasions; but mostly, if not entirely, to persons who could be described as friends or relations, and he had not advertised or announced or held himself out as a moneylender. *Walton J* held that the plaintiff was not carrying on a money-lending business and he laid down that whether a man was carrying on business as a money-lender was a question of fact. He opined that it seemed impossible to lay down any definition or description which would be of much assistance, but stated that it was not enough merely that a man had on several occasions lent money at remunerative rates of interest *and that there must be a certain degree of system and continuity* about the transactions.

In *Newman -v- Oughton (1911) 27 T.L.R. 254*, it was held that an isolated transaction could not constitute a carrying on of a money-lending

business. In that case pawnbrokers made a single isolated loan apart from those made in the course of their business. They had lent money to X upon the security of a bill of sale. Later the plaintiff obtained judgment against X and levied execution upon his goods. The pawnbrokers claimed the goods under the bill of sale. The title of the pawnbrokers was not admitted by the plaintiff and as interpleaders they did not require registration, and that, therefore, they were entitled to the debtor's goods under the bill of sale. In *King -v- Turnbull et anor (1908) 24 T.L.R. 434*, the plaintiff, who was a registered moneylender, met the defendants at a house which was not his registered address, and made an advance to them there, taking from them a promissory note payable at his registered address. This was the only transaction that the plaintiff had outside of his registered address. *Lawrance J* held that, notwithstanding this isolated transaction, the plaintiff carried on his money-lending business at his registered address within the meaning of section 2(1)(b) of the *Moneylenders Act, 1900*, and that therefore the note was valid and judgment was accordingly given in favour of the plaintiff.

In *Ursula Dias-v- James Munroe (1941) L.R.B.G. 107*, the defendant passed two mortgages in favour of the plaintiff, one on 13th July, 1939 for \$800.00 at 10% per annum and the other on 13th March, 1939 for \$900.00 with interest at 8% per annum. On 8th March, 1940, the plaintiff sued to bring the mortgaged properties to sale at execution, and to recover the amounts due on the two mortgages. The defendant pleaded that at the times when the mortgages were passed the plaintiff was a moneylender within the meaning of the *Moneylenders Ordinance, Chapter 68*, and", in support of his plea, alleged quite a number of transactions including promissory notes and mortgages made by the plaintiff over a number of years between 1924 and 1939. *Stuart J* held that the plaintiff did not conduct the business of a moneylender. That learned Judge said at p. 108—

"It is of course quite fatuous to infer that every lender of money is a moneylender. That particular word in that form clearly means primarily what in ordinary parlance it is taken to mean, a man whose business is money-lending. Here in British Guiana the definition is statutory. A moneylender (s. 2 of Cap. 68) is one whose business is money-lending or who holds himself out as a moneylender, except for certain exceptions none of which apply to this case."

The defendant appealed against the decision of *Stuart J* to the West Indian Court of Appeal and the appeal was dismissed on 3rd June, 1942—(1942) *L.R.B.G. 428*. *Sir Charles Gerahty*, Chief Justice of Trinidad and Tobago, the President of the Court, said at p 429—430:-

"In the opinion of this Court the three transactions involving purchase and transfers of mortgages cannot be deemed to be loan transactions in themselves unless it be shown by the defendant that the form of each transaction is in fact a device to conceal that it was a loan transaction by the transferee.

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Furthermore we considered that no inference of money-lending can properly be drawn from the seven mortgage transactions as such unless it is substantiated that they were taken by the plaintiff in the course of his business as a moneylender. See *In re Robinson's Settlement: Grant -v- Hobbs* (1912) 1 Ch. 717.

In our view, however, regarding these mortgages together with and in the light of the remaining transactions between 1924 and 1927 and between 1935 and 1938 the plaintiff's dealings during these periods do not disclose *that system, repetition or continuity* necessary to bring the plaintiff within the ambit of the Moneylenders Ordinance. See *Edgelow -v- MacElwee* (1918) L.T. 177 and *Newton -v- Pyke* (1908) 25 T.L.R. 127.

The onus was clearly upon the defendant in the first instance to prove that the plaintiff was carrying on business as a moneylender. (See Fagot -v- Fine (1911) 105 L.T. 583). This Court agrees with the learned Judge that the defendant failed to discharge that onus and we see nothing in the admissions made by the plaintiff to shift the onus as contended by Counsel for the defendant-appellant."

In *Edgelow -v- MacElwee (1917) 87 L.J.K.B. Mc Cardie J* said at p. 738 -

"A man does not become a moneylender by reason of occasional loans to relations, friends or acquaintances, whether interest be charged or not. Charity and kindness are not the bases of usury, nor does a man become a moneylender because he may upon *one or several isolated occasions* lend money to a stranger. There must be more than occasional and disconnected loans. There must be a business of money-lending. and the word "business" imports the notion of *system, repetition and continuity*; *Newton -v- Pyke* (1908) 25 T.L.R. 127 per Walton J. *Fagot -v- Fine* (1911) 105 L.T. 583 per Bankes J and Lush J., and *Newman -v- Oughton* (1911) 1 K.B. 792 per Ridley J and Avon- J. The line of demarcation cannot be defined with closeness or indicated by any specific formula. Each case must depend upon its own peculiar features, and it is always a question of degree."

It is clear, I think, that even an isolated transaction may amount to a money-lending transaction and if carried out at a place other than at the registered address of the moneylender may constitute a breach of section 3(3) of the Ordinance. This was the view expressed obiter by *Far well L.J. in Blair -v- Buckworth (1908) 24 T.L.R. 474*, but as pointed out by *Stone & Meston* (ibid) at pp. 46-47:-

"This, no doubt, is correct (see ante pp. 39, 40), but *Kirkwood -v- Gadd* makes it clear that *the test of whether a particular isolated transaction is a breach* is not to be found in the answer to

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the question: Where was the transaction carried out?—but—

Where was it *carried on*?

I had and have no doubt that if this transaction did in fact amount to a genuine money-lending transaction (which I am satisfied it did not) then the mere fact that the plaintiff was not licensed would not operate as a bar to the defendants avoiding same on the grounds (a) that it did not comply with s. 19 of the Ordinance, i.e., action was not brought within the 12 month limitation period laid down therein and (b) the indorsement of claim did not comply with 0. 4 Rule 10 of the Rules. As I see it an *unlicensed* moneylender cannot recover any loan properly made in the course of his business as a moneylender and it is clear, on the authority of *Bonnard -v- Dott (1905) 92 L.T. 822*, that the transaction, being void, any security given is also void in the hands of the person taking it, or anyone taking it from him, save and except a *bona fide* holder for value without notice.

In this matter there was no *onus* cast upon the defendants to prove that the plaintiff was a registered moneylender. This was admitted. Equally, as I saw it, there was no question here that the loan was not made at the plaintiff's registered address; the plaintiff said so and this was corroborated by the mother-in-law. I accepted and believed that this was an isolated transaction. But this particular case differs from those cited in that here I found as a fact that *absolutely no interest was charged* by the plaintiff in respect of the loan which I accepted and believed amounted to \$600.00 and not \$400.00 as alleged by the defendants.

Having regard to the facts as I found them and to the law as I understand it, I was satisfied that this particular transaction did not amount to a money-lending transaction and, accordingly, the plaintiff was entitled to sue upon it as an ordinary promissory note for which the period of limitation is six (6) years. For these reasons I gave judgment to the plaintiff for the full amount claimed together with cost fixed in the sum of \$250.00 which I considered most reasonable.

Judgment for the plaintiff

T.A. Morris, for Plaintiff (Respondent).

S.S. Chandra, for Defendants (Appellants).

JOHN DA SILVA et al,
v.
(1) GORDON TODD.
(2) GEORGE DE PEANA.
and
(3) THE CLERICAL AND COMMERCIAL WORKERS' UNION

[High Court (Churaman J. in Chambers)
July 12, 28, 1973]

Trade Union—Interlocutory Injunction—Branch union—Unauthorised strike by Branch Union—Disciplinary Tribunal of enquiry—Branch Union members expelled from Union—Clerical & Commercial Workers Union Rules 7, 8, 18, 25.

Natural Justice—Union secretary frames charges against members of Union—Whether secretary prosecutor, judge and jury.

Trade Union—Right to legal representation—Discretion thereto—Whether discretion judicially exercised.

After due hearing by a tribunal of enquiry ending March 13, 1973, the seven named plaintiffs were expelled from membership of their trade union, the Clerical and Commercial Workers Union. Disgruntled over union affairs in November 1972, they organized a strike and work stoppage at Wm. Fogarty Ltd, not previously sanctioned by the Union. Complaints against the plaintiffs laid by the Union's secretary charged injurious and prejudicial conduct; wilful disobedience, ie. refusing to call off the strike when advised to do so; picketing of the Union's H.Q.; passing a vote of "No Confidence" against the Union's secretary, and the granting of injurious and of prejudicial press releases to the Union's detriment.

The first named plaintiff was the senior Vice-President of the third named defendant Union. He was also Branch Chairman of the Wm Fogarty Branch Union, while the first and second named defendants were the President and Secretary respectively of the Union.

On March 22, 1973, an ex parte interim injunction was granted restraining the Union from expelling the plaintiffs. After the Union had duly entered appearance and answered the allegations, plaintiffs now applied for an interlocutory injunction restraining their expulsion until final determination of an action against the Union, urging two submissions (i) that their right to be legally represented by counsel at the tribunal of enquiry was denied them; (2) that there was breach of the principles of natural justice occasioned by the composition of the tribunal of enquiry's expulsion of the plaintiffs, and by the inclusion of the Union's secretary in the said tribunal he having instituted

the charges thereby acting as counsel, prosecutor and judge. All these matters were revealed in the affidavits in support of the grant for the interlocutory injunction.

The Union on the other hand contended firstly, that the issue of the writ was a nullity in that the first-named plaintiff acted in a representative and not a personal capacity; secondly, as plaintiffs have sued as a Branch Union, the court is precluded from intervening in the internal management of the Union's affairs when the Union has acted within its powers.

HELD: (i) plaintiffs have failed to establish both the right to be legally represented and a case for the exercise of the discretion of the court to grant such representation.

(ii) as the affidavits of neither plaintiffs nor defendants have identified the composition of the tribunal of enquiry expelling the plaintiffs with sufficient particularity, there was no bias or likelihood of bias; and so no breach of natural justice was committed. Plaintiffs are therefore not entitled to the grant of an injunction.

(iii) the authority to solicitor to issue the writ as signed by the first-named plaintiff "on behalf of the other plaintiffs" is bad in that it does not legally sanction the issue of the proceedings insofar as the second-named to the seventh-named plaintiffs are concerned; but insofar as the first-named plaintiff is concerned, the issue of the writ was good.

(iv) defence counsel's submission that as the plaintiffs are suing as a Branch Union, that fact precludes the interference of the court in Union affairs, is not sound because the plaintiffs, as aggrieved parties, have merely bonded themselves together in one action for the reliefs claimed.

(v) the interim injunction will therefore be discharged due to a lack of candour in the disclosure of facts in the affidavits leading to the grant of the ex parte injunction; and the application for an interlocutory injunction must be refused.

Cases referred to include:—

- (1) *Lee v. Showmen's Guild of Gt. Britain* (1952) 1 All E.R. 1180.
- (2) *Sowatilall v. Fraser*, (1960) 3 W.I. R., 70.
- (3) *Board of Commrs of Currency, etc. v. Attg-Gen & D'Aguiar*, (1962) L.R.B.G. 350.
- (4) *Foss v. Harbottle*, (1843) 2 Hare, 461.
- (5) *Pett v. Greyhound Racing Assoc. Ltd.* (1968) 2 All E.R. 545.
- (6) *Mc. Lean v. Workers Union* (1929) All E.R. (Rep) 68.
- (7) *Enderby Town Football Club Ltd v. Football Assoc: Ltd et al* (1971) 1 All E.R. 215.
- (8) *Dickson v. Edward et al*, (1910) 10 C.L.R. 243.
- (9) *Australian Workers Union v. Bowen* (1948) 77 C.L.R. 601.
- (10) *R. v. Justices of the County Cork* (1910) 11 K.B. 658.

(11) *R. v. Handley (1921)* 61 D.L.R. 656.

(12) *McLean v. The Workers Union (1929)* 626.

B.E. Gibson, with *H. Bobb*, for the plaintiffs.

Ashton Chase, for the defendants.

MA. CHURAMAN, J.: The jurisdiction of the Courts in regard to Domestic Tribunals is clearly of a limited nature. Recognition of this fact has long been established, and while it is true to say that Associations among men established for legitimate purposes are free to prescribe rules by which *inter se* they ought to be contractually bound and are even free to oust the jurisdiction of the Courts by providing for the finality of their own decisions, in appropriate cases the Court will assume a jurisdiction to enquire into such decisions, any contrary provision notwithstanding, where the rights of parties are involved. (*Lee v. Showmen's Guild of Great Britain (1952)*, 1 All. E.R. 1180). Generally speaking, the Courts have assumed a jurisdiction over domestic tribunals whenever it appeared that there has been (a) a breach of the principles of natural justice (b) error on the face of the record, (c) fraud or collusion or (d) excess of jurisdiction. (See *Sowatilall v. Fraser (1960)*, 3 W.I.R. 70).

The plaintiffs in this Interlocutory Application for an Interim Injunction invoke the jurisdiction of the High Court on the ground that they had been denied natural justice asserting, as I comprehend, their contention that:—

- (a) they had a right to be legally represented at an enquiry before the domestic tribunal.
- (b) there had been manifest bias in the tribunal's decision inasmuch as the No. 2 defendant was not only among the composition of the tribunal but also a witness as well as a prosecutor against them.

These are substantial allegations of a most weighty character which would clearly invoke the jurisdiction of the Court to enquire into the tribunal's decision, certainly to ascertain whether it had been honestly arrived at and was *bona fide* and untainted.

It is essential to set out at some length the unhappy circumstances culminating in the purported expulsion of the plaintiffs from the Clerical And Commercial Workers Union after due enquiry.

The 1st plaintiff was the Senior Vice-President of the 3rd named defendant hereafter called the Union, and also the Branch Chairman of the William Fogarty's Branch of the Union, (hereafter called the Branch Union) of which Branch Union the other plaintiffs were members. The 1st and 2nd defendants are the President and Secretary respectively of the Union. The plaintiffs, it would appear, were quite disgruntled about certain matters not readily evident appertaining to the Union and apart from organising a strike

or stoppage of work not previously sanctioned by the Union at Messrs. William Fogarty Limited, a commercial firm in the City sometime in November, 1972, appeared to have also caused picketing of the Union's headquarters; passed a 'No Confidence resolution against No. 2 defendant; and also indulged in certain press releases which, if true, can at least be described as injurious and undermining if not acrimonious and divisive.

As a result of the alleged stoppage of work at Fogarty's, the 1st and 2nd defendants visited the scene and advised the plaintiffs to desist from pursuing the unauthorised course of action, but it would appear to no avail. Inevitably but quite understandably the Union through its secretary, No. 2 defendant, preferred certain charges against the plaintiffs for:—

- (a) Injurious and prejudicial conduct;
- (b) Wilful disobedience Re: refusing to call off the unauthorised strike or stoppage of work at Fogarty's,
- (c) Contravention of the rules relating to strike action,
- (d) Injurious and prejudicial press releases.

The hearing of these charges commenced in December, 1972 and was finally concluded on March 13th, 1973 resulting in the expulsion of the plaintiffs and the commencement of these proceedings. On the 22nd March, 1973, I granted an *ex parte* injunction in favour of the plaintiffs on the allegations set out in the plaintiffs' affidavit in support, restraining the defendants from acting on the assumption that the plaintiffs were not members of the Union. The defendants duly entered appearance and answered the allegations.

It is essential to make reference to certain rules, a copy of which was exhibited by the defendants as part of their affidavits. Rule 7 provides for disciplinary measures "if it shall appear to the Committee..... that there is reason to believe that any member has been guilty of conduct injurious or prejudicial to the Union" and the rule goes on to provide the machinery and procedure which bears the imprint of what may truly be said to accord with a fair and just enquiry; for it provides for due enquiry after those accused had been duly informed of the charges and had been afforded an opportunity of answering them.

The "Committee" in Rule 7 means the Executive Committee which by Rule 8 comprises the General President, Todd, Senior Vice-President (in this case No. 1 plaintiff who naturally would be disqualified from sitting being a party answerable), Junior Vice-President, General Secretary, Principal Assistant General Secretary, Assistant General Secretary, Field Secretary Treasurer, Assistant Treasurer and four other members of the Union. It is further provided by Rule 8 (h) that eight members shall form a quorum.

Rule 18 provides for Branch Unions such as the plaintiffs' composition which provide for a Branch Chairman and other officers.

Rule 25 is of pivotal significance in view of counsel for defendants' submission as to lack of candour and I set it out at length:

"25. *Strikes and lock-outs.*

- (a) In the event of any dispute arising the members concerned shall make the same known to the Branch Chairman or Secretary or Sectional Representative *who shall immediately report the same to the General Secretary, but in no case shall a cessation of work take place without the sanction of the General Secretary after he has consulted with the Committee and/or Council,* (Underscoring mine)
- (b) Should any Branch, Section or body of members of the Union desire steps to be taken for an advance of wages, or improved conditions of employment, they shall apply to the Branch Secretary or Representative of Section—who shall immediately report the claim to the General Secretary who shall determine in consultation with the Branch Committee or Representative of Section what action shall be taken."

It is convenient to observe that the plaintiffs both in their affidavits in support and reply studiously avoided reference to this rule and failed to deny or controvert the allegation that their collective conduct was in conflict with this rule.

It remains for me to finally observe that the Rules neither provide for nor specifically disclaim a right to any legal representation at any enquiry relating to discipline as envisaged in Rule 7.

Counsel for the plaintiffs' submissions fall to be considered under two heads:—

- (a) whether the plaintiffs had a right to be legally represented.
- (b) whether there was breach of the principles of natural justice having regard to the allegations raised in the affidavits to justify the grant of an Interlocutory Injunction.

Counsel for the defendants raised a number of points in reply and additionally two points attacking the plaintiffs right to relief. With these two points I shall forthwith deal. The first is that the issue of the writ is bad and consequently a nullity as the 1st plaintiff purports to act in a representative capacity and not a personal capacity; and that in view of non-compliance with *Order 3, Rule 8 of the Rules of the Supreme Court 1955* dealing with authority to solicit the issue of the writ is a nullity. A number of authorities were cited on this point but it is only necessary to refer to *Board of Commissioners of Currency, Br. Caribbean Territories (Eastern Group) v A.G. and D'Aguiar (1962), L.R.B.G. P 350.* where PERSAUD J. (as he then was) held that the authority to solicit having been signed by the Executive Commissioner alone whose duties did not include the commencement of legal

proceedings (while any duty devolving upon and power conferred by the Board may be discharged or exercised by any three members) the authority was fatally bad, and was not a mere irregularity curable by Order 54. The learned judge rejected the contention, as I do, that the Registrar having accepted the writ, it is to be assumed that the rules have been complied with.

In the instant proceedings, the Authority is signed by the 1st plaintiff, Da Silva, alone and purports to speak of authorising solicitor "on behalf of the other plaintiffs." I am of the view that the authority is bad to the extent that it does not sanction the issue of the proceedings in so far as the numbers 2 to 7 plaintiffs are concerned. But what of the 1st plaintiff? There is an authority signed by him and to that extent the claim is clearly maintainable by him. In view of the fact that in so far as No. 1 plaintiff had duly authorised the proceedings at least on his behalf, the submission for the purpose of defeating the entertainment of the Injunction collapses for all practical purposes.

The second point embraces a consideration of the well-known rule in *Foss v. Harbottle*, (1843), 2 *Hare*, P 461. It is the submission of counsel that the plaintiffs are suing a Branch Union and the courts would not intervene in the internal management of the Union acting within its powers when the irregularity complained of can be remedied by the Union itself. This submission overlooks the allegations raised praying for relief, and could not on a fair construction be said to be one touching the internal management of the Union despite Rule 18 (m) and (h). I form the view that the plaintiffs having been all expelled at the one and same enquiry touching one set of circumstances involving all of them collectively merely banded themselves together as aggrieved parties moving the court in one action for the reliefs claimed. This second submission I accordingly reject.

It therefore remains for me to examine the question of a legal right, if any, to legal representation at the enquiry, and the question of any breach of natural justice.

It is trite law that Interlocutory Injunction is granted to preserve matters *in statu quo* pending the final determination of the case. It is of course necessary for a party applying for injunctive relief to assert the violation of some legal right and for this purpose it is quite sufficient if the court finds a case which shows a substantial question to be investigated and that matters ought to be preserved *in statu quo* until the final determination.

When however a plaintiff asserts a right upon which an Interlocutory Injunction is brought he should show a strong *prima facie* case, at least, *in support of the right which he asserts*.

And when it comes to the question of the conduct of the parties, about which I shall have more to say, the attitude of the courts has been expressed in *Halsbury Laws of England (3rd Ed) Vol 21 at p. 367*) thus:—

"In considering whether an interlocutory injunction should be granted, the Court has regard to the conduct and dealings of the parties before application was made to the Court by the plaintiffs to preserve and protect his right since the jurisdiction to interfere being purely equitable is governed by equitable principles."

I must now examine the facts and circumstances and apply the relevant principles thereto to see *whether an injunction ought to be granted*, bearing in mind that the evidence in a matter of this nature as always is in affidavit form.

With respect to the submission of plaintiffs' counsel that the plaintiffs has a right to be legally represented at the enquiry, formidable reliance was placed on the case of *Pett v. Greyhound Racing Association Ltd. (1968), 2 All E.R. at p. 545*. In that case the plaintiff, a trainer had been charged with drugging a dog about to compete in a race. It was a most serious charge as it was based on an allegation that the plaintiff had given dope to the animal in the form of barbiturates. The enquiry was duly fixed, but when the plaintiff appeared with his defending solicitor the tribunal denied the plaintiff the right to be defended by his solicitor as a result of which the plaintiff moved the court for an Interlocutory Injunction. LORD DENNING M.R. took the view (at p. 549) that the plaintiff was facing a serious charge and if found guilty he may be suspended or fail to have his licence renewed and as such the tribunal in dealing with matters affecting a man's reputation and livelihood or other matters of serious import was enjoined by the principles of natural justice to permit him to be defended if he wishes by counsel or solicitor.

Indeed I ought to observe that it was upon this dictum of so eminent a Master of the Rolls that I acceded to the grant of the ex-parte injunction. More-so as the learned Master of the Rolls had this to say in respect of the dictum of MAUGHAM, J. in *Mac Lean v. Workers Union (1929, All E.R. (Rep) 68* "that counsel had no right of audience before a domestic tribunal":—

"All I would say is that much water has passed under the bridge since 1929. The *dictum* may be correct when confined to tribunals dealing with *minor matters* where the rules may properly exclude legal representation."

But in the later case of *Enderby Town Football Club Ltd. v. The Football Association Ltd. et alor (1971) 1.All E.R. at p. 215* much of his dictum in *Pett's* case no doubt conceived out of the panorama of his judicial vision, was placed in its true perspective when the learned Master of the Rolls LORD DENNING took the opportunity in dealing with the very question of

the right to legal representation before a Domestic Tribunal to say this: [(1971)1 All E.R. at p. 218]

"Is a party who is charged before a domestic tribunal entitled *as of right* to be legally represented? Much depends on what the rules say about it. *When the rules say nothing then the party has no absolute right to be legally represented. It is a matter for the discretion of the tribunal.* It is master of its own procedure and if it, in the proper exercise of its discretion, declines to allow legal representation the Courts will not interfere.....I think the same should apply to domestic tribunals and for this reason: in many cases it may be a good thing for the proceedings of a domestic tribunal to be conducted informally without legal representation. Justice can often be done in them better by a good layman than a bad lawyer. *This is especially so in activities like football and other sports where no points of law are likely to.....*" (Underscoring mine).

I would in all humility and with the greatest respect extend the application of this *dictum* to include matters of discipline relating to the conduct of members and officials of a Trade Union such as obtain in the matter at hand.

The learned Master of the Rolls in *Enderby case* further expressed the view that it was largely a matter for the discretion of the Tribunal whether it would or not allow legal representation, and finally distinguished *Pett's case* (supra) by expressing the view that the charge in the latter was so serious and carrying such severe penalties that natural justice demanded that Pett ought to have been allowed representation on the basis of a judicial exercise of its discretion.

Based upon the learned Master of the Roll's reasoning I would with due respect add that the charge against Pett was very much akin to a serious criminal offence and was tantamount to administering drugs to the animal with an intent to defraud or cheat; the import of the charge was both grave and serious and no doubt needed forensic skill and assistance in arriving at the truth.

But what are the circumstances here? The charges relate to the plaintiffs' conduct and behaviour involving acts and omissions calculated to be injurious or prejudicial to the Union. The purview of rule 7 clearly demonstrates that the association reserved the right and quite rightly so, to impose disciplinary sanctions on any member whose conduct appeared inimical to the aims and objects of the Union and calculated to injure and impair its image. It therefore fell for the Committee to determine as an honest body of men acting in good faith to lay down the standards of behaviour necessary to preserve the authority and dignity of, and respect for, association. Additionally, it must not be overlooked that the request for legal representation appears to have been raised very late in the day-sometime around the 6th March, 1973 when the enquiry had reached its closing stages

so to speak and after the plaintiffs had made their defence by way of explanation; but that notwithstanding, the Committee gave consideration to the request and finally denied the motion. Is there any circumstance on the affidavits upon which it can fairly be said that the discretion not to permit legal representation was made whimsically or capriciously or even arbitrarily? I think not; for it seems there ought to be much more material than appears on the affidavits to form any adverse opinion upon the manner of the exercise of the Tribunal's discretion; this it seems can only be properly investigated at the trial of the action when much more may emerge to guide the court. On this aspect I hold that the plaintiffs have failed to establish any right to be legally represented and have equally failed to make out a case for the exercise of a discretion to grant legal representation or that such discretion was improperly exercised.

I have addressed my mind to the contention of counsel for the plaintiffs that the composition of the tribunal was improperly constituted. I have referred to the rule regarding the Executive Committee and I think it appropriate to say that neither the plaintiffs nor the defendants have identified the composition of the tribunal with any particularity. The plaintiff's affidavits, at the highest, point to an objection to one member, Prescott; but the 1st defendant as President of the union avers in his affidavit that Prescott is and was at all material times a duly elected member of the Executive. Is this sufficient to entitle the plaintiffs to a grant of an injunction? Again I think not. This is an area of sharp conflict and until resolved by a finding of fact cannot afford the basis for present relief.

I now move to the second aspect of the matter: was there any bias or impropriety in the conduct of the enquiry sufficient to even excite the suspicion of the court that the principles of natural justice had been breached?

Counsel on both sides have referred me to numerous authorities, a testimony to their respective industry, but I find it necessary to review but only a few.

In *Dickson v. Edward and others*, (1910,) 10 C.L.R. at P. 243, the High Court of Australia held that where a certain rule in a domestic tribunal did not require the District Chief Ranger who was head of a Friendly Society to preside, even formally, over the tribunal hearing the charge, his doing so placed him in the position of a person complaining of an offence involving him personally and therefore violated the principles of natural justice, as no man can be a judge in his own cause. The case, however, is clearly on a different footing from the one under review as the Chief Ranger had been the target of the plaintiff's gross and vulgar abuse, personally directed at the Chief Ranger. Small wonder therefore that the court held that on so intimate and personal a matter his presence on the tribunal, even though formally, vitiated the enquiry, sufficient for the court to set aside its findings. It must not be overlooked also that these conclusions were reached at the hearing of

the substantive action when firm findings of fact were made, enabling the court to make such declaration.

In *Australian Workers Union v. Bowen* (1948) 77 C.L.R., P. 601, the history of events in that case led the learned judges to the conclusion that the secretary of the Union had been so actively engaged in the controversy among the members that he was shown to be invincibly biased against the accused and his role as a prosecutor in the matter made it palpably unjust that he should also have sat as a member of the tribunal. But it is important to bear in mind what *Dixon J.* had to say: [(1948) 77 C. L. R. at p. 630]

"So far as this contention (i.e. bias) is based upon the fact that the executive council promoted the charges and that they were vitally concerned in the controversy not only as members of the Union but as office bearers whose authority had been resisted, there is in my opinion no substance in it. The reason lies in the constitution of the Union. In choosing as a domestic forum a governing body and in authorising it to make enquiries and investigations of such a kind the rules necessarily bring about, if they do not actually contemplate, such a situation. Domestic Tribunals are often constituted of persons who may or even must, have taken some part in the matters concerning which they are called upon to exercise their quasi judicial functions."

In the instant matter with respect to the contention of bias on the part of No. 2 defendant it must be appreciated that there is nothing in the conduct of No. 2 defendant by any act overt or covert to show invincible bias or even bias.

Could a no-confidence resolution by the plaintiffs against the No. 2 defendant passed subsequent to the events at *Fogarty's* but evoking no reaction whatever on his part justify a court on this interlocutory application in coming to any conclusion of bias against him? I am not of that view. Nor can it on any fair interpretation be said that when he attempted to refer the tribunal to legal authority on the question of a right to legal representation when that request was made by the plaintiffs, his conduct bore the imprint of bias; rather I should apprehend that it was an indication of both his industry and general competence as a General Secretary rendering such assistance as may not be within the ready reach or grasp of members of the tribunal. This involvement could not vitiate an enquiry any more than a court may receive assistance on matters of law or practice.

And equally am I of the view that his instituting the charge in the sense of signing same as secretary does not indicate bias. The charge must be in writing, and what more proper person than the General Secretary to do this!

I have considered the authorities of *R. V. Justices of the Country Cork* (1910,) 11 K.B., P. 658: *R. V. Handley*, (1921,) 61 D.L.R., 656 and the other authorities cited involving the question of bias on the part of magistrates or justices. The authorities establish no new principle; it is trite law that no

man shall be a judge in his own cause, and if there should be any circumstance indicating any likelihood of bias, the order of the tribunal shall be set aside.

But I am prepared to draw a distinction between bias in the case of a person exercising judicial function in a court of law and 'bias' affecting a member of a domestic tribunal; in the former justice must not only be done but must manifestly appear to be done. There must be no likelihood of bias. "If there be such likelihood, this court cannot allow a decision influenced by partiality or prejudice to stand. It must keep the administration of, justice-pure and free from just grounds of suspicion"—*dictum of Gibson J. in R v. Justices of Cork (supra)*. In the latter, a domestic tribunal conceived out of the rules of the association, comprised invariably if not always of officers of the association, informed if not fully seised of the circumstances out of which the charges arise and finally, no doubt itself substantially constituting the authority out of whom the charges emanate, to that extent, but no more may it be said in a sense to have bias. But once the tribunal conducts its enquiry *in accordance with the principles of natural justice, affording the party an opportunity to be heard, and then arriving at a decision honestly and in good faith, then bias in this limited sense ought never to defeat or impair the validity of its decision.*

As Maugham, J. expresses the view in *McLean v. The Workers Union* (1929,) at p. 626.

"In many cases the tribunal is necessarily entrusted with the duty of appearing to act as prosecutors as well as judges for there is no one else to prosecute. It may be said that in so acting the Council (Tribunal) are the prosecutors. In one sense they are."

and at p. 627 the learned judge continues:—

". . . and if in taking those steps they were prosecutors, the answer is that the rules contemplate that they should be."

The affidavits disclose at the highest in favour of the plaintiffs that the 2nd defendant 'testified' against them, prosecuted and sat in judgment upon them. Only to the extent that a no confidence motion was passed against No .2 defendant can it be said that any questions of bias possibly arises. The motives inspiring this resolution are not forthcoming, nor is anything said of the nature of his testimony; and in the face of all this, the 1st defendant as President denies that the 2nd defendant sat as a member of the tribunal or deliberated on the matter, and swore positively that the 2nd defendant only submitted a report to the tribunal upon which he was questioned. Is there sufficient material then for me to grant an Interlocutory Injunction? I think not; which is to be investigated which can only be properly conducted at the hearing of the action when the allegations can be probed and definite conclusions emerge therefrom.

Indeed it is only necessary to allude to one fact to point out the inadequacy of material upon which the plaintiffs move the court, and it is this:

the plaintiffs depose that the 2nd defendant prosecuted, testified and took part in the deliberations. There can be no doubt that the enquiry continued up to and including the 13th March, 1973 the date of the final sitting when the plaintiffs retired from the enquiry on being denied legal representation. Deliberations took place after this withdrawal and on 14th March, 1973 the decision was communicated in writing. What therefore is the basis for the allegation that the 2nd defendant took part in the deliberations? On the face of the affidavits as they stand it appears more probable that the plaintiffs were not present when the tribunal deliberated. It consequently appears no more than a vacuous allegation without any basis or substance, as the affidavits stand, and dwells only in the valley of the imagination.

It remains for me to finally deal with the point relating to lack of candour on the part of the plaintiffs. Nowhere in the affidavit in support was mention made relating to any stoppage of work authorised or unauthorised; the defendants answered with a clear and unambiguous allegation touching the plaintiffs' irresponsible conduct in organising a stoppage of work in clear contravention of Rule 25. I must not be presumed to suggest that an unauthorised stoppage of work justifies any arbitrary or capricious exercise of the functions of the tribunal, but I do not consider the plaintiffs' failure to disclose these facts in moving the court for an ex-parte Injunction as sufficient to amount to a lack of candour as to entitle the court to dissolve the ex-parte injunction. I view this with direct reference to the passage in *Halsbury, 3rd Edition at p. 367* cited (supra).

I must finally observe that associations such as these conceived in and inspired by a need for the protection of workers, sustained by a desire to improve and promote the welfare of a large section of clerical and commercial workers, must inevitably flounder upon the rocks of self-destruction unless those charged with the duties and obligations of leadership evince a capacity to deal and to act with a sense of responsibility and dedication.

If the stoppage of work was in fact unauthorised and in breach of the Rules, the plaintiffs have demonstrably shown this lack of responsibility and dedication and a disregard for the tenets of their association.

The Interim Injunction is forthwith discharged, and the application for an interlocutory injunction refused. The defendants shall have their costs to be taxed, certified fit for counsel.

Interim injunction discharged

SOLICITORS

T.A. Morris, for the plaintiffs

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

RE APPLICATION BY GERRIAH SARRAN (No. 2)
FOR AN ORDER NISI OF CERTIORARI

[High Court (Mitchell J.) August 30,31,1973]

Certiorari—Application for issue of writ—order nisi Constitutional Law—Power to hold Enquiry—Delegation by Public Service Commission to Permanent Secretary—Permanent Secretary's delegation to Assistant Secretary—Whether prima facie violation of Constitution disclosed in affidavit for order nisi. Art. 96(2) of the Constitution of Guyana (now art. 201) Guyana Independence Order, 1966, s. 12(1).

In *re. Gerriah Sarran (No. 1)* the Guyana Court of Appeal allowed the applicant's appeal from an order of Mitchell J., in the High Court refusing an order *nisi* for *certiorari* on the ground that her *ex parte* affidavit disclosed a jurisdictional defect on the face of the record which necessitated cause being shown by the Respondent/Permanent Secretary why an order *absolute* should not issue. The matter was accordingly referred to the trial judge with a direction to issue the order *nisi* to the Permanent Secretary as prayed.

It will be recalled the matter concerned a hospital ward-maid's alleged inebriation on duty. She was accordingly dismissed by the Permanent Secretary of the Ministry of Health to whom a sub-delegation was made by the Public Service Commission to hold an enquiry into the matter under art. 96(2) of the Constitution of Guyana, 1966.

The Permanent Secretary then delegated the holding of the enquiry to his Assistant Secretary. The Court of Appeal however, held the Permanent Secretary ought to have appeared before, and to have satisfied the trial judge that the *dismissal* following the power of sub-delegation he purportedly exercised was not defective as it appeared to be; and that the holding of the enquiry by his Assistant Secretary was within the ambit of such delegation.

In the present proceedings the trial judge's findings (Sarran No. 2), have resulted from the Court of Appeal's ruling [see (1969 14 W.I.R. 361.)] that the trial judge erred in not issuing the order *nisi* to the Permanent Secretary to appear and show cause why the order *absolute* should not issue. There was no further appeal in the matter to the Guyana Court of Appeal.

HELD: (i) there was an effectual legal delegation of the power to dismiss by the Public Service Commission to the Permanent Secretary of the Ministry of Health and the power to *dismiss* was not delegated by the Permanent Secretary to anyone else.

(ii) the applicant was given a hearing; she had no property in her appointment entitling her as of right to an enquiry; and the rules of natural justice were not infringed;

(iii) there was no excess of jurisdiction; the affidavits of both applicant and Permanent Secretary satisfactorily showed it was the latter who effected the dismissal and the decision to do so was his own and no one else's;

(iv) the Permanent Secretary had the power to dismiss at pleasure.

Order nisi discharged

[Editor's Note: All that was decided in *re. Sarran (No. 1)* (1969) 14 W.I.R., is that in order *nisi* proceedings where a *prima facie* jurisdictional defect is

RE APPLICATION BY GERRIAH SARRAN (No. 2) FOR AN ORDER
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shown on the face of the record an *onus* is cast on the respondent to show why the order should not be made absolute; that the purported dismissal if based on the findings or recommendations of the enquiry, would be violative of the constitutional provisions (see *West Indian Law Journal*, October 1977, page 51).

In re. Sarran (No. 2), the respondent Permanent Secretary did as directed, and showed cause before the trial judge why he had dismissed the applicant. But the Court of Appeal certainly did not decide what the head-note indicates it did, viz, that it was wrong for the Permanent Secretary to have delegated his functions to his Assistant Secretary on the ground of *delegatus non potest delegare*. The headnote is wrong, because the right to delegate lies at the very heart of the modern system of public service administration.

Further, it is decidedly wrong to say as in (iv) above, that the Permanent Secretary on delegation from the Public Service Commission has the power to dismiss public officers at pleasure. By s. 4 of the Republic Act, 1970, when construed particularly with art. 232(7) of the Constitution, not even the President of Guyana, who now in the public interest exercises that prerogative, can dismiss anyone at his will. That section obliges him to exercise all former prerogatives of the Crown, *subject to the Constitution*. The organic law does not confer on him or on anyone else the Crown's former right to dismiss at whim. See 'Power of Dismissal at Pleasure Reconsidered' *Bar Association Review*, Vol. 14, June 1988, p.6.] *E. Thomas v. D.P.P.* (Endell Thomas (1981) 3 W.L.R. at 610.

B.E. Gibson for the applicant.

Dr. M. Shahabuddeen, Solicitor General, for the respondents.

MITCHELL, J., This is an application by Gerriah Sarran for an order or rule calling upon the Permanent Secretary of the Ministry of Health to show cause why a writ of *certiorari* should not be issued to remove into this Honourable Court the inquiry held in respect of a charge against the applicant for the purpose of its being quashed.

The facts which are alleged in support of the application are set out in the affidavit which the applicant filed in support of the application by way of motion, together with four (4) letters.

The affidavit filed by the applicant in support of the application disclosed that Gerriah Sarran was a maid attached to the Public Hospital Georgetown at a salary of \$1,014.00 per annum, and that on 18th January 1968, a charge was laid against her by the Permanent Secretary of the Ministry of Health to the effect that on 20th July, 1967, while she was still a maid attached to the Georgetown hospital she was under the influence of alcohol while on duty, to such an extent, as to be incapable of performing her duties, to the prejudice of discipline and the proper administration of the service. She replied to the charge made by the Permanent Secretary and on 9th March 1968, she was informed by letter from the Assistant Secretary, Ministry of Health that he had been appointed by the Permanent Secretary to hold an enquiry into the charge against her.

In her application, Gerriah Sarran contended that the Permanent Secretary of the Ministry of Health could not hold an inquiry into disciplinary charges against her unless he was authorised to do so by the Public Service

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Commission under Article 96 (2) of the Constitution of Guyana, and that even if the Permanent Secretary of the Ministry of Health was authorised by the Public Service Commission to hold the said enquiry, he could not further delegate his authority to hold the said enquiry to the Assistant Secretary Mr. Charles Byass. The applicant further contended that the said Assistant Secretary, Mr. Charles Byass by virtue of his executive position was sufficiently interested in the matter against her as not to have been appointed convenor of the enquiry, that the Permanent Secretary to the Ministry of Health could not remove her from the Public Service in view of Article 96 of the Constitution of Guyana, that since the procedure as set out in Article 96 of the Constitution of Guyana was not followed the enquiry was void and should be set aside for excess of jurisdiction.

An order nisi was made calling upon the Permanent Secretary, Ministry of Health, to show cause why a writ of certiorari should not be issued to remove into the High Court of the Supreme Court of Judicature, the enquiry held in respect of a charge against the applicant for being under the influence of alcohol while on duty as a maid at the Georgetown Hospital, for the purpose of quashing the entire proceedings.

The Permanent Secretary of the Ministry of Health filed an affidavit in answer setting out the basis on which it was thought that cause would be shown why an order absolute should not be made and attached other relevant documents to that affidavit.

When the matter came up for actual hearing counsel for the Permanent Secretary, Ministry of Health, in the person of the Solicitor-General of Guyana, argued *inter alia* that the Permanent Secretary as such was not an entity that could have been sued. In support of his contention he referred to *Abrams v. The Members of the Governing Body of Anglican Schools in British Guiana* (1960) L.R.B.G. 78; (1960)2 W.I.R. 187. Counsel for the Permanent Secretary, also, contended that *certiorari* was always issued to quash some *order, judgment or decision* and *in this case the writ was sought to quash the record of a committee of enquiry and that if that record was quashed the decision to dismiss would not be affected* since that decision was taken by the Permanent Secretary and not by the committee of enquiry. A reference was made to *Clarke v. Vieira* (1960) L.R.B.G. 201 as suggesting that *certiorari* will issue only where there is a formal order. Counsel indicated that even if that was too narrow a view there was no authority for suggesting that a writ will extend to quash a record of a committee of enquiry where, as in this case. *such record did not disclose any decision whatsoever.*

Counsel for the Permanent Secretary also, argued that the Permanent Secretary had jurisdiction to dismiss and referred to the *Instrument Delegating the Governor's Public Service Powers*, dated 3rd April, 1962. and Section 12 (1) of the *Guyana Independence Order, 1966.*

In so far as the applicant contended that there was a delegation of authority by the Permanent Secretary, counsel for the Permanent Secretary contended that *mere investigation of facts by another official did not involve*

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a sub-delegation of disciplinary authority. He referred to *De Smith's "Judicial Review of Administrative Action,"* second edition at pages 206 and 208. He, also, referred to the cases of *Osgood v. Nelson (1872) L.R. 5 H.L. 636, 645; Barnard v. National Dock Labour Board (1953) 2 Q.B.D. 18, 39, and Vine v. National Dock Labour Board (1957) A.C. 499, 501, 512* and argued that those cases were distinguishable from the present one because in those cases the bodies vested with the jurisdiction to dismiss never in fact considered the matter and never acted, the entire exercise conducted by unauthorised bodies. He added that the courts ought to take note as to how government business is carried on and that Parliament legislates on that basis.

Counsel for the Permanent Secretary of the Ministry of Health also, said that the applicant's affidavit in support of her application showed that she was a public officer within the meaning of Article 96 of the Constitution of Guyana. All public officers, he further stated, served at pleasure and referred to *Cumberbatch v. Weber (1965) 9 W.I.R. 143 and The Attorney General v. Nobrega (1966) 10 W.I.R. 187, C.C.A.; (1969) 3 All E.R. 1604 P.C.* adding that all appointments in the public service are made at pleasure and that it did not matter what the governmental agency was, once the appointment was made on behalf of the state.

Counsel for the Permanent Secretary advanced the proposition that an officer who was serving at pleasure was not entitled to a hearing before dismissal. He thought that this principle was re-affirmed in *Ridge v. Baldwin (1963) 2 All E.R. at pages 71 and 72.* He, also referred to the cases *R.V. Darlington School Governors (1844) 6 Q.B.D. 682, 684, 694 - 696, 698. 700 - 702, 710, 716-717; Ryder v. Foley (1906) 4 C.L.R. 424, 425, 427, 436; Hogg v. Scott (1947) All E.R. 788; Cumberbatch v. Weber (1965) 9 W.I.R. 143* and to the 67 *Corpus Juris Secundum* 255. The only exception he thought was where statute otherwise required.

The employment of an officer who was serving at pleasure is effectively terminated when he is dismissed by a person who has authority to dismiss him. That, also, was the contention of counsel for the Permanent Secretary of the Ministry of Health. He referred to *Ryder v. Foley (1906) 4 C.L.R. 436, Fletcher v. Nott (1938) 60 C.L.R. 67, 69; Rodwell v. Thomas (1944) 1 All E.R. 704; Barber v. Manchester Hospital Board (1958) 1 All E.R. 322, 331- 332; Vine v. National Dock Labour Board (1957) A.C. 500, 507 - 508.*

He argued, also, that the dismissal of an officer serving at pleasure without a previous hearing is valid. Certiorari cannot issue in such a case since the writ goes to the validity of an order. He said that there was no known instance in which certiorari has been issued in such a case. He cited the case of *Vidyodha University v. Silva (1964) 3 All E.R. 865, P.C. at page 873 G—H,* which involved the relationship of master and servant, as a case in which *certiorari* was refused.

The appointment of the applicant as a ward-maid cannot be treated as *property* so as to attract a right to a hearing. He referred to 67 *Corpus Juris Secundum*, 117 *H S, 196-197; 16 A. Corpus Juris Secundum, 705; 2 Basu,*

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Commentary on the Constitution of India. 4th edn. p. 206; Seervai. Constitutional Law of India, p. 545 para 15. 48: Bailey v. Richardson 182 F 2 d 46, Franck, Comparative Constitutional Process 1968. p. 284: Leeson v. G.M.C. (1889) 43 Ch. D. 366; Ryder v. Foley (1906) 4 C.L.R. 422, 427; Bernard v. N.D. L.D. (1953) 2 Q.B. 18; Vine v. N.D. L.B. (1957) AC 500: Barber v. Manchester Hospital Board (1958) 1 All E.R. 322, 331.

Counsel for the Permanent Secretary of the Ministry of Health in the course of his arguments referred to the decision of the Guyana Court of Appeal in *Evelyn v. Chichester* on 30th January, 1970.

This was an appeal from an order absolute made by a judge (*Chung J.* as he then was) in certiorari proceedings. Commenting on that case he said that *Luckhoo, C* assumed, while *Persaud J.A.*, and *Crane J. A.*, accepted that the department of the Transport and Harbours Department was a department of the Government of Guyana and that the respondent Chichester a deck-hand employed by that department was a public officer. They agreed then, he said *that generally public officers held office at the pleasure of the Crown*, and that the General Manager's power of dismissal in that case was not a power to dismiss at pleasure, being exercisable, in their view, only in accordance with the prescribed disciplinary procedure. He thought that the question arose in this case as to whether the decision of the Court of Appeal was right and the answer to that depended on what validity would be assigned to the following two propositions:

- (1) Gerriah Sarran, a servant of the State, was validly dismissed by the officer concerned in the exercise of a power to dismiss at will and such decision is not reviewable at common law even if the prescribed procedure was not followed;
- (2) Gerriah Sarran was dismissed by the officer concerned in his performance of a function deemed by law to have been delegated to him by the Public Service Commission. Any failure to observe the prescribed procedure did not divest him of that function but went only to the manner of its performance, resulting at most in an invalid performance of it, and judicial enquiry into the validity of such performance is barred by Article 119(6) of the Constitution of Guyana, 1966.

Expanding on his arguments in support of the proposition above-mentioned at (1) he said that the Guyana Court of Appeal having accepted that Chichester was a public officer in the case of *Evelyn v. Chichester* and in the service of the State the normal consequence would follow that such officer was liable to dismissal at pleasure unless this liability was cut down by some provision of the Ordinance. The same would apply to *Gerriah Sarran* in this case. *Evelyn v. Chichester* was no authority for holding that an enquiry was necessary in the case of Gerriah Sarran.

Concluding his arguments, the Solicitor General as counsel for the Permanent Secretary, said that even if the applicant was entitled to a hearing

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she was fully accorded this right in that she was heard both by (a) the investigating Assistant Secretary and (b) the Permanent Secretary himself, when he reviewed the notes of the enquiry (including the applicant's case) both before dismissing her and thereafter by way of review at the request of her representatives, and there was no evidence at all in support of the allegation of bias as stated in paragraph (8) eight of the applicant's affidavits.

Counsel for the applicant in his reply stated that this application has made under Article 19 of the Constitution of Guyana which provides at 19(1) that

"Subject to the provisions of paragraph (6) of this article if any person alleges that any of the provisions of *articles 4 to 17* (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available that person (or that other person) may apply to the High Court for redress, etc".

Counsel for the applicant stated that the essence of the application in this case was stated in paragraph (10) ten of the applicant's affidavit to the effect:

"The Permanent Secretary to the Ministry of Health cannot remove me from the Public Service in view of Article 96 of the Constitution of Guyana."

Article 96 of the Guyana Constitution provides *inter alia*:—

- (1) Subject to the provisions of this Constitution the *power* to make appointments to public offices and to remove and exercise disciplinary control over persons holding or acting in such office shall vest in the Public Service Commission.
- (2) The Public Service Commission may, by directions in writing and subject to such conditions as it thinks fit, delegate any of its powers under the preceding paragraph to any one or more members of the Commission or with the consent of the Prime Minister to any public officer or in relation to any office on the staff of the Clerk of the National Assembly, to the Clerk.
- (3)

Counsel for the applicant stated that only the Public Service Commission can appoint persons to the public service and only the Public Service Commission can exercise disciplinary control.

He pointed out that according to Article 125 of the Guyana Constitution interpretation, "public service means subject to the provisions of paragraph (5) of this art., the service of the Government of Guyana in a civil capacity," and concluded that on construing art. 96 and art. 125 of the

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Guyana Constitution, it would seem that the Public Service Commission has jurisdiction to remove from the Public Service all persons holding appointments in the service of the Government of Guyana save and except those mentioned in paragraph 5 of the said art. 125.

He argued that paragraph 2 of art. 96 of the Constitution *provides for the Public Service Commission* to delegate its powers but that there *must be* a delegation of those powers and paragraph (2) of the said art. 96 provides for the manner in which the delegation should be made. Paragraph 2, previously mentioned, provides that the *Public Service Commission may by directions in writing* delegate any of its powers. If then Gerriah Sarran was dismissed she should have been dismissed by the Public Service Commission, and in so far as the Permanent Secretary of the Ministry of Health (Mr. Franker) purported to dismiss and he did not have authority to do so, that dismissal was a nullity.

Continuing counsel for the applicant submitted that when the new Guyana Constitution came into being on 26th May, 1966., the Constitution of Guyana became the supreme law, and on 26th May, 1966, the present Public Service Commission came into being under art. 95 of the Constitution. He said that the Public Service Commission under the 1966 constitution differed from the one which existed before. (Counsel for the respondent agreed that the two Commissions were differently constituted.) Counsel for the applicant further submitted that there was nothing to show that anything was referred by the Public Service Commission to the Permanent Secretary and that being so it was the Public Service Commission which should have held the enquiry and not the Permanent Secretary. When the Permanent Secretary held the enquiry in those circumstances, there was an excess of jurisdiction.

Counsel for the respondent in his reply pointed out that the Guyana Constitution was brought into being by the *Guyana Independence Order, 1966*, and art. 2 of the *Guyana Constitution* was subject to Section 12 of the Independence Order. He said that the matter did not depend on whether the previous Public Service Commission differed from the present. Section 12 of the *Independence Order 1966*, recognised this. It did not matter how a delegation of power is made under the new constitution provided that a "power" could in some way be delegated. The old delegation of that power was saved by Section 12(1) of the *Guyana Independence Order, 1966*, until rescinded by the new Public Service Commission, or by the Prime Minister. He said that the proviso to *Section 12(1) of the Guyana Independence Order, 1966*, recognised the new ingredient, new procedure and provided that the old delegations of power shall not be discontinued. Section 12, he said, was a novel transitional arrangement designed to ensure continuity.

Concluding his reply counsel for the respondent stated that the applicant being a state servant was not entitled to be heard, with the consequence that the dismissal procedure was not a judgment process and could not thus attract certiorari.

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It is a fact that the applicant was employed in the public service of the Government of Guyana and I find that she was a "public officer" within the meaning of the Constitution.

In her affidavit in support of her application Gerriah Sarran stated that her salary was \$1,014.00 per annum but in the affidavit in answer, Neville Franker, the Permanent Secretary, stated that she was employed at the Public Hospital, Georgetown as a maid at a salary of \$996.00 per annum in salary scale C.

It is a fact that Gerriah Sarran was dismissed from the Government Service by Neville Franker in his capacity as Permanent Secretary of the Ministry of Health of the Government of Guyana and the letter of dismissal dated 6th May, 1968, referred to in paragraph 9 (nine) of the applicant's affidavit and referred to in paragraph (8) eight of the affidavit in answer was sent to her.

It is a fact, also, that an enquiry was held into disciplinary charges made against the applicant by Mr. Charles Byass but the actual dismissal was done by the Permanent Secretary.

It falls to be considered in this case whether the Permanent Secretary had any power or authority in law to dismiss and to exercise disciplinary control over the applicant.

A good starting point, to my mind, is the *British Guiana (Constitution) Order in Council, 1961*, and particularly Section 14 of that Order in Council which provided:

"Until the coming into force of Part VI of the Constitution, the provisions of sections 1 and 92 of the British Guiana (Constitution) Order in Council, 1953, Part VII (other than Section 86) of the British Guiana (Constitution) (Temporary Provisions) Orders in Council, 1953, (as inserted by the British Guiana) (Constitution) (Temporary Provisions) (Amendment) Order in Council, 1956) shall continue to have effect, and accordingly the Public Service Commission and the Police Service Commission established in pursuance of the said provisions *shall continue to exist and shall be constituted and shall perform their functions in accordance with those provisions:*

Provided that the provisions of the said Part VII shall cease to have effect in relation to the offices to which art. 91 of the Constitution applies and the office of the Director of Audit and to persons appointed thereto."

This section 14 of the *British Guiana (Constitution) Order in Council, 1961*, thus recognises the desirability for the continuation of the Public Service Commission and for the Constitution of the Commission and the performance of the functions of that Commission. Part VI of the Constitution abovementioned in Section 14 of the Order in Council refers to "The Public Service including the Public Service Commission.

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Section 17 of the British Guiana (Constitution) Order in Council. 1961. provided:

- (1) "If provision has been made before the date on which this Order is made by or under any law enacted by any Legislature established for British Guiana before the said date *that any public officer shall have power to make appointments to any public offices or to dismiss or exercise disciplinary control over persons holding or acting in such offices*, then to the extent to which the offices to which that provision relates are offices to which article 97 of the Constitution applies, *that power shall as from the date on which Part VI of the Constitution comes into force, be deemed to have been delegated to that officer by the Governor in accordance with paragraph (1) of article 97 and accordingly the power shall be exercisable by that officer unless and until it is revoked by the Governor in pursuance of that paragraph.*
- (2) Any provisions of any law enacted as aforesaid before the date on which this Order is made and any instrument made under any such law before the said date shall, to the extent that it confers any power that by virtue of the last foregoing subsection, is deemed to have been delegated in accordance with paragraph (1) of article 97 of the Constitution, cease to have effect, unless it shall have been sooner repeated or revoked upon the revocation of that power by the Governor in pursuance of that paragraph."

It follows from the subsections above-mentioned that the delegation of power to a public officer to make appointments to public office or to dismiss or exercise disciplinary control was preserved, and that power was exercisable by the officer to whom such power was delegated until it was revoked by the Governor or the law under which the power was delegated was repealed or itself revoked.

Art. 96 of the 1961 Constitution of then British Guiana provided that power to make appointments to public offices and to dismiss and to exercise disciplinary control over persons holding or acting in any such offices shall vest in the Governor acting on the recommendation of the Public Service Commission.

Art. 97 of the said Constitution authorised the Governor acting on the recommendation of the Public Service Commission to direct that power to make appointments to public offices and power to dismiss and power to exercise disciplinary control over persons holding or acting in those offices or any of those powers shall be exercisable by such other authority or public officer as may be specified.

By an instrument under the hand of the then Governor, and dated 14th April, 1962, in pursuance of the powers conferred by paragraphs (1) and (2) of article 97 and of paragraph (1) of article 96 of the said 1961 constitution, the then Governor (Sir Ralph Grey) and acting on the recom-

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mentation of the Public Service Commission, directed that subject to the provisions contained in the schedule attached to the instrument the power to make appointments to each office referred to in the first column of the said schedule and the power to dismiss and the power to exercise disciplinary control over any person holding or acting in that office shall (without prejudice to the exercise of such powers by the Governor acting on the recommendation of the Public Service Commission) until the delegation hereby effected with to the office is *revoked by the Governor* acting on the recommendation of the Public Service Commission by instrument under the Public Seal, be exercisable by the appointor and disciplinary authority respectively mentioned opposite such reference in the second column of the said schedule. Any case of special difficulty, in the opinion of the person to whom any power is hereby delegated, shall be referred to the Public Service Commission for determination.

According to the affidavit in support by Gerriah Sarran she was earning a salary of \$1,014.00 per annum and according to the affidavit in answer by the Permanent Secretary she was in receipt of a salary of \$996.00 per annum. Whether the salary was \$1,014.00 or \$996.00 the office which Gerriah Sarran held in the Public Service of Guyana at the time of her dismissal fell within the salary scales set out at 2 of C of the Schedule attached to that instrument and in such a case under that instrument, power to dismiss and to exercise disciplinary control was delegated to and exercisable by the Permanent Secretary of the Ministry in which she was serving in the Permanent Secretary of that Ministry of Health.

As far as I could appreciate the state of delegated disciplinary authority continued until British Guiana emerged into the independent State of Guyana on 26th May, 1966 by the Guyana Independence Act, 1966.

S. 5(1) of the Guyana Independence Order., 1966, provided:

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."

To my mind, this section would tend to perpetuate the state of legal affairs as they were immediately before Guyana's Independence, and this state of legal affairs would have included the delegation of authority previously conferred on the Permanent Secretary of the Ministry of Health.

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This thinking is specifically expressed in s. 12(1) of the *Guyana Independence Order, 1966* which provided:

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

.....
.....

There is no evidence forthcoming in the circumstances of this case to indicate that the delegation of authority which conferred on the Permanent Secretary of the Ministry of Health the power to dismiss and to exercise disciplinary control over the applicant was revoked, or the law under which it was made nullified or that the Public Service Commission directed otherwise.

I appreciate that art. 95 of the *1966 Constitution* of Guyana established a Public Service Commission for the independent state of Guyana and has set out the composition of that Commission.

I appreciate also, that under art. 96 of the said constitution the power to make appointments to public offices and to remove and exercise disciplinary control over persons holding or acting in such offices shall vest in the Public Service Commission and that the Public Service Commission may, by directions in writing delegate any of its powers to anyone or more members of the Commission or with the consent of the Prime Minister, to any public officer.

There is no evidence of any delegation of authority by the newly established Public Service Commission under art. 95 of the *1966 Constitution* to the Permanent Secretary, Ministry of Health, but that was not necessary as the power previously delegated by the Governor under the instrument dated 14th April, 1962 under the *1961 Constitution* was preserved by art. 12(1) of the *1966 Constitution* until the Commission otherwise directed and to all intents and purposes was exercisable at the time of Gerriah Sarran's dismissal.

So, I do find as a matter of law, that the authority and power to dismiss and to exercise disciplinary control which the Permanent Secretary, Ministry of Health had since 1962 existed and was exercisable at the time when he wrote the letter of dismissal to Gerriah Sarran on 6th May, 1968, and that the *mere* establishing of a new Public Service Commission in 1966 did not bring the power previously conferred on the Permanent Secretary to an end. To do so would have been, in my opinion, to stultify the administrative process and inhibit the actions of those concerned with it. As the learned Solicitor General said, and I agree with him, the work of Government is not carried on in that way.

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So, Gerriah Sarran, was dismissed by someone who had lawful authority and power to do so at the time when he did.

I appreciate that a new Public Service Commission was established under art. 95 of the 1966 Constitution and that this was carried over into the Constitution of the Republic of Guyana.

I appreciate also, that art 96 of the. said 1966 Constitution at paragraph (2) sets out the manner in which the Public Service Commission may delegate any of its powers over persons holding or acting in public affairs and I particularly appreciate that the Public Service Commission *may* delegate any of its powers by *directions in writing* to any one or more of its members *or with the consent of the Prime Minister* to any public officer.

In the circumstances of this case there is no evidence that the consent of the Prime Minister was obtained for the delegation of power to the Permanent Secretary, Ministry of Health, *but in my opinion*, that was also not necessary at that stage to validate or legalise the delegation of power, because the Permanent Secretary was acting under the authority already conferred on him by the 1961 Constitution which was preserved by the said 1966 Constitution, until the Public Service Commission established under the said 1966 Constitution directed otherwise and the new Public Service Commission did not direct otherwise in writing.

In my opinion, the delegation of authority and power under the 1961 Constitution did not automatically come to an end with the establishment of the new Public Service Commission under the 1966 Constitution. There was authority for that delegation to be brought to an end and if there is no evidence forthcoming, as in the circumstances of this case, that there was a revocation or abridgement of that authority and power it would, in my view, be against the intention and spirit of the constitution to presume otherwise and to decide otherwise. Where lawful authority is given to do an act that authority does not cease unless expressly curtailed. It was held in *Barras v. Aberdeen Steam Trawling and Fishing Co. (1933) A.C. 402* that the Legislature knows the state of the law. So, when the 1966 Constitution with arts, 12, 95, 96 and the implications arising from those articles were conceived and embodied in that Constitution, the state of the law as a result of the delegation of authority by virtue of the 1961 Constitution and the Instrument of Delegation dated 14th April, 1962, must have been known and must have been under consideration by the Legislature and must be presumed to have been so, and when the 1966 Constitution was enacted to take effect as it did, it must be presumed, also, that the effect of those pieces of legislation must have been fully appreciated. It was held in *Leach v. R (1912) A.C. 305* that the Legislature does not make any alteration in the existing law (be it in my opinion, the common law or statute law) *unless by express enactment*. The delegation of power to the Permanent Secretary under the 1961 Constitution and under the instrument of 1962 was taken away by express enactment or by any act done under the 1966 Constitution which made provision for that to be expressly done if considered necessary. Accordingly, the delegation

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subsists. It was, also, held in *R. v. Local Government Board. Ex. p. Arlidge (1914) 1 K.B. 160; (1915) A.C. 120*, that *the legislature knows the practice of the executive and judiciary*, and if the delegation of the power of the Public Service Commission was necessary (as it seemed to be in 1962) to the practice *and performance* of the executive arm of government as reflected in the functions of the public service, then it follows to mind, unless, there is a clear indication to the contrary, that that practice and performance would continue and continue to be followed in 1966, 1968 and 1972. It had not been argued and it cannot be argued that in this matter the Legislature has made a mistake and even if that thought is conceived it is not for the Court to correct one or alter one.

The gravamen of the applicant's complaint was that the Permanent Secretary of the Ministry of Health could not have removed her from the Public Service and, in so far as he has done so, there was an excess of jurisdiction and so to my mind, on this aspect the application for an order absolute must be refused.

Counsel for the applicant had stated that there was no delegation according to paragraph (2) of art. 96 of the 1966 Constitution, but I have already indicated that having regard to the state of the law as it applied to the delegation of power immediately before 26th May, 1966, and as reflected in the 1966 Constitution itself and subsequent events, there would be no application of *paragraph (2) of art. 96 of the 1966 Constitution* to the circumstances of the delegation of power in this case. It was not necessary for the Public Service Commission to delegate its power in writing as that power was already delegated by operation of Law.

I am satisfied from the affidavit of the applicant and from the affidavit of the Permanent Secretary that it was the Permanent Secretary who effected the dismissal and the decision to do so was his own and that of no other person.

The method or procedure by which the Public Service Commission should proceed towards the dismissal, removal, or, exercise of its disciplinary control over persons holding or acting in public offices has not been set out in the 1961 Constitution nor in the instrument delegating the Governor's Public Service powers published on 14th April, 1962, nor in the 1966 Constitution.

A Public Service Commission was first established in Guyana under *art. 88 of the British Guiana Order-on-Council, 1953*, Under art. 88—(1) it is provided *inter alia*:

There shall be, in and for the Colony, a Public Service Commission.....
.....”

Under the said 1953 Constitution which for the first time established a Public Service Commission it was stated at art. 87(2):

"Any person appointed to a judgeship, magistracy or public office shall, unless it is otherwise provided by any law for the

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time being in force in the Colony *hold office during Her Majesty's pleasure.*"

Whilst the power to appoint (including power to promote and transfer) and to dismiss and to exercise other disciplinary control over judges, magistrates, and public officers was vested in the Governor under the 1953 Constitution, and even though that Constitution provided for the establishing of a Public Service Commission, public officers still held office *during pleasure and, consequently, were dismissible at will by the Sovereign authority.* The mere establishing of a Public Service Commission did not take away the right or restrict or reduce the power of dismissal at will on the part of the Sovereign authority in the State.

No procedure for dismissal was ever laid down. The Public Service Regulations 1953 made by the Governor under s. 90 of the British Guiana (Constitution) Order in Council 1953. concerned the *membership* of the Commission, the *tenure of office* of its members, the *organisation* of its work et cetera but *there is no provision that it was necessary to hold any inquiry* before making any advice to the Governor as to the appointment, or dismissal or other disciplinary control of any public officer. *Implicit in this lack of provision is the power to dismiss at will.*

The British Guiana (Constitution) Order in Council, 1961, at s. 14, to which reference has already been made in this judgment specifically perpetuated the state of affairs as they existed with regard to the Public Service Commission in 1953 until the Public Service Commission was set up under the 1961 Constitution, and s.17 also perpetuated the state of delegation. Thus, to my mind, under the 1961 Constitution, the holder of any public office in the service of the Crown was still dismissible at pleasure with or without any inquiry as was under the 1953 Constitution.

In *Evelyn v. Chichester* (Civil Appeal No. 29 of 1969) the learned *Chancellor Luckhoo* held that the General Manager's order of dismissal was invalid because:

- (a) "He did not act in accordance with the requirement of an Ordinance which said that he should follow certain rules, which were essential in that case in order to give the respondent an opportunity of being heard in his defence after he had protested his innocence.

In this case there is no requirement of an Ordinance that the applicant should be heard in her defence—no requirement under the Guyana Constitution or any Ordinance.

In the *General Orders 1957*, applicable to Civil Servants there is a Chapter 5 on "Discipline". This chapter was adapted from the old Colonial Regulations and prescribes the procedure relating to the punishment, suspension, dismissal or retirement of an officer. These general orders are

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merely "guidelines" for the civil servant to follow *and do not in themselves have the force of law*. They do not provide a procedure which a civil servant can claim emanates from any Constitution or Ordinance as was claimed that the General Manager in *Chichester's case* was obliged to follow under the *Transport and Harbours Ordinance, Chapter 261* of the Laws of Guyana and the Departmental Orders made thereunder. No one is bound to follow them under pain of punishment from the statute or common law. *The Public Service Commission Regulations 1953*, which are regulations made under the *British Guiana (Constitution) Order in Council, 1957* have the force of law, but they are not concerned with procedure in the public service as I have previously stated.

So the reason at (a) above-mentioned for holding that the dismissal by the General Manager in *Chichester's case* was invalid, in my humble opinion, would not be applicable to this case of the dismissal of Gerriah Sarran by the Permanent Secretary.

Another reason which *Chancellor Luckhoo* held militated against the General Manager's order of dismissal in the *Evelyn v. Chichester* case, was that the General Manager did not have the power to dismiss at pleasure. I have already indicated that I hold the view that the right to dismiss at pleasure was a legacy which the Sovereign authority which evolved into the independent State of Guyana inherited from the Imperial authority of the United Kingdom government under the *British Guiana (Constitution) Order in Council, 1953*, *The British Guiana (Constitution) Order-in-Council, 1961*, *The Guyana Independence Order, 1966*, the *Constitution of Guyana 1966*, and which was delegated by operation of law in the instrument delegating the governor's public service powers, published on 14th April, 1962. Accordingly, the Permanent Secretary, Ministry of Health, to whom the power was delegated under that instrument, had power to dismiss at pleasure.

It follows, therefore, according to my interpretation of the relevant provisions that the second reason which *Chancellor Luckhoo* gave for finding the order of dismissal made by the General Manager in *Chichester's case* invalid would also, not be applicable to this case.

Chancellor Luckhoo had, also, stated in the *Chichester's case* that it was competent for the court to enquire whether the "authority" which had dismissed *Chichester* had acted in accordance with what the "law" had decreed should apply when that function was being performed. In the circumstances of this case there was, or is, no such law, in the form of departmental orders or regulations having the force of statute such as in *Chichester's case*, into which the court would enquire to see whether the Permanent Secretary acted in accordance with them when he dismissed Gerriah Sarran. The Constitution itself also provides no such orders.

Accordingly, *Chichester's case* is distinguishable from this case within the reasons mentioned by *Chancellor Luckhoo*.

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Persaud J.A. in the *Chichester's case* held the view that Chichester was dismissed without having an opportunity of being heard, a clear breach; in his opinion, of the *audi alteram partem* rule and of the principles of natural justice.

In the instant case Sarran was heard, and her matter reviewed. In my opinion, there was no violation of this principle of natural justice. So within that reason of *Persaud J.A.*, this case is also, distinguishable from *Chichester's case*.

The Guyana Independence Act, 1966, was an "Act to provide for the attainment by British Guiana of fully responsible status within the Commonwealth, to make provision as to the effect of certain certificates of naturalisation and for purposes connected with the matters aforesaid and fixed 26th May, 1966 as the appointed day on which the Government in the United Kingdom, ceased to have responsibility for the territory which before that day constituted the Colony of British Guiana and which on and after that day is called Guyana.

The Independence Act, 1966, did not transfer the power to dismiss at will which before 26th May, 1966 existed in the Sovereign authority to any other authority or abrogate it, and while it is silent on this particular aspect of governmental activity, the state of the existing law which immediately before 26th May, 1966, included a power on the part of the Government as the Sovereign authority) to dismiss at will was preserved by section 5 of the Guyana Independence Order, 1966.

Section 5 of the Guyana Independence Order, 1966 provides:

- (1) "Subject to the provisions of this Order, all laws (including laws made or having effect as it 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."

While *Section 5 of the Independence Order, 1966*, preserves the laws existing before 26th May, 1966, including the Sovereign authority's power of dismissal at will, Section 11 of the said order preserves the position of the public officers *vis-a-vis* the sovereign authority. That section does not confer any greater benefit on the public officer than that which he had under the 1953 or 1961 Constitutions or under the common law. It provides

- (1) "Every person who immediately before the appointed day holds or is acting in a public office shall as from the appointed day, *hold or act in that office or the corresponding office established*

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by the Constitution as if he had been appointed to do so in accordance with the provisions of the Constitution etc."

Accordingly, it is my considered opinion that the tenure of the public officer was in no way changed or improved by the change of the Constitution of Guyana and particularly by a mere change in the composition or even in the functions of the Public Service Commission.

I cannot conceive that by the mere granting of Independent status to the Colony of British Guiana there would be conferred a right on the part of the public officer, then serving, which he did not enjoy before in relation to the sovereign imperial authority. Carrying this concept to its logical con-elusion would mean that while the Imperial Government did not fetter itself in its own relations and dealings with public officers in British Guiana, on the grant of independence, in a constitution, it imposed fetters on the new Sovereign Government of Guyana in its relations and dealings with the new government's own public officers. This argument lacks merit when it is realised that there is nothing in the Constitution granted to the emergent State of Guyana which could support such a proposition, and *Section 11(1) of the Independence Order 1966* must be interpreted against it.

It is significant to note that what is conferred on the Public Service Commission under art. 96 of the Constitution is "*the power*" to make appointments etc. Power is the ability on the part of a person to produce a change in a given legal relation "*by doing or not doing a given act*". The correlative of power is "*liability*" and this denotes the position of the person whose legal condition can be altered for better or for worse.

The position of the public officer is that he is *liable* to be affected by the exercise of the power of the *Public Service Commission or the authority to whom such power is delegated* but he has no corresponding "right" in relation to that power. The constitution does not confer on the public officer even the *right to question* his dismissal by the Public Service Commission. One may very well ask the question in this case by what right could he really question even the delegated power to dismiss when dismissal is a fact—to all intents and purposes approved by the State. *Art. 96 of the Constitution* does not confer a "*right*" in the public officer. A *right* in the words of the learned authors of *Dias and Hughes on Jurisprudence* "is always a sign that some other person shall confirm to a pattern of conduct, a power is the ability to produce a certain result. Under art. 96 of the Constitution what is conferred on the Public Service Commission is the "power" to make appointments etc. but this "*power*" to make appointments etc. must have been conferred by an authority that had the legal *right* to do so. That authority is the sovereign democratic state of Guyana *and* that sovereign democratic authority reserved for itself the *right* to deal with its public officers as it thought fit while making the Public Service Commission the enabling instrument or agency in its dealings with its officers. The Public Service Commission had no *right* to dismiss only the enabling *power* to do so. Accordingly, if the dismissal of a public officer is a fact which has received the acquiescence or tacit approval or

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ratification of the State, the questioning of the authority of the agent or instrument would not alter the position for the officer is already dismissed.

There is no *right* conferred on the public officer vis-a-vis the Public Service Commission or the Government by the Constitution. When a person claims a *right* he or she must *show* a "title" thereto. The public officer cannot show title thereto. All rights flow from the law since it is only through the law that a *legal right* gains its efficacy.

The very nature of the functions of a public officer precludes his having a right to his office. One can appreciate how difficult the functions of Government would be if that were so.

In the case *Inland Revenue Commissioners v. Hambrook* (1956) 1 All E.R. 807 LORD GODDARD in deciding the case at first instance considered the legal relationship between the Crown and an established civil servant. LORD GODDARD stated at p. 810.

"An established civil servant whatever his grade, is more properly described as an officer in the employment of Her Majesty"

He goes on to say at page 811,

"It is settled beyond controversy that the Sovereign *can terminate at pleasure the employment of any person in the public service unless in special cases where it is otherwise provided by law.* If authority be needed for what may be considered as axiomatic. I need only refer to *Shenton v. Smith* (1895) A.C. 229; 64 L.J.P.C. 119; 72 L.T. 130;) and *Dunn v. R.* (1806) 1 Q.B. 116; 65 L.J.Q.B. 279; 73 L.T. 695)....."

.....Mr. Stuart Robertson in his work to which I have already referred, after citing numerous cases and instances of petitions of right that have been presented though not "in all cases" says (op. cit. at p. 359). Even if there be a contract of service the Crown's *absolute powers* must be deemed to be imported into it....." LORD ATKIN in *Reilly v. R.* (1934) A.C. 176 at p. 180 that".....a power to determine a contract at will is not inconsistent with the existence of a contract until so determined"

LORD GODDARD went on to say *that no action for wrongful dismissal can be brought by a discharged civil servant* and that he adhered to the opinion which he had expressed in *Terrell v. Secretary of State for the Colonies* (1953) 2 All E.R. 490 at p. 497 that he could recover his salary for the time during which he has served. He said further at p. 812 in the *Hambrook case* (*supra*)

".....an established civil servant is *appointed to an office* and is a public officer, remunerated by moneys provided by Parliament, so that *his employment depends, not a contract with the Crown but on appointment by the Crown.*....."

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Applying the thinking of LORD GODDARD as mentioned in the excerpts quoted to this case, I would say that the Government of Guyana can terminate at pleasure the employment of any person in the public service, unless it is otherwise provided by law as in the case of the Director of Public Prosecutions and the Director of Audit. There was no legal provision which could aid Gerriah Sarran from dismissal at pleasure. The absolute power of the Government to dismiss must, unless excluded be deemed to be imported into the relationship between the Government and those in the public service. Gerriah Sarran was dismissed by the Government or the State. The Public Service Commission and the Permanent Secretary provide only the means or instrument whereby the dismissal is effected.

In the case of *Enver v. R. (1906) 3 C.L.R. 969; 11 Digest (Repl) 598, 267*, an extract from a passage from the judgment of *Griffith C.J.*, in the High Court of Australia, illuminates the position (3 C.L.R. at p. 975)

“.....it never seems to have been thought that a *change in the mode of appointment made any difference in the nature or duties of the office* except so far as might be enacted by the particular statute.”

Even though there have been changes in the mode of appointing persons to public office since 1953, the *nature* of the relationship between the State and the public officer has not changed, unless specifically enacted by the Constitution or Statute.

Civil Servants in India, Pakistan and Malaya may only be dismissed after the observance of procedure *laid down in* the constitutions, even though they hold office at the pleasure of the Head of State. No such provision, or comparable provision exists in the Constitution of Guyana or any statute and, accordingly, in my view a public officer (or civil servant) cannot as a matter of general practice claim as a matter or right that a certain procedure or regulation should be observed whether an inquiry should be held or not.

If, as in this case, the applicant seeks to vindicate her cause by virtue of her right under the Guyana Constitution then the constitution, must reveal that that right exists. In Gerriah Sarran's case the Constitution does not reveal such a right, nor does any other Statute. In my view, the applicant should not specifically invoke the Guyana Constitution in her aid and at the same time try to rely on the Common Law if she fails under the Constitution. In this case, however, the Constitution provides her with no right as to non-dismissal (if I may use the term) and no right as to the procedure to be adopted by the Public Service Commission in dismissing her. Alternatively, there is no common law right of non-dismissal. If she relies on the common law right of being heard, and her not being heard is contrary to the rules of natural justice, she could be met with the argument that the Government also, has the common law right of dismissal at pleasure which does not involve a right on her part of being heard.

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It is generally accepted that a government servant (or public officer) has had a reasonable opportunity to show cause against any disciplinary action proposed to be taken against him or her if he or she has been fairly allowed to dispute both the grounds for and the nature of the disciplinary action. It has, also, been said that the courts are concerned only with the question of reasonable opportunity to show cause (or compliance with the rules of natural justice) and not with the merits of the facts which go to the decision of the disciplinary authority, as the courts are in no position to go into those facts and find out what was in the mind of the disciplinary authority. The courts in India, as reflected in a number of reported decisions, are, in addition, unconcerned as to non-compliance with departmental rules, which, they hold, *is not of itself a denial of reasonable opportunity to show cause*. The thinking of the courts in India may be compared and contrasted with the decision of the Guyana Court of Appeal in *Evelyn v. Chichester* (Civil Appeal No. 29 of 1969) previously mentioned.

In the Indian case *Altafur Rahaman v. Collector, Central Excise Allahabad A.I.R. 1960 All 551*. *Bhargara J* said at pages 556 - 557:

"In my opinion, reasonable opportunity to show cause does not necessarily include the right of personal hearing at every stage. This right may be given and may be in some cases proper, but it will not be an essential condition that in every case it should be either offered or, if not given then in that event dismissal or removal would be bad."

I appreciate that reasonable opportunity to show cause would not exist when the inquiry is held by a person biased against the applicant and in paragraph (8) of her affidavit the applicant stated that the Assistant Secretary, Mr. Charles Byass, by virtue of the executive position which he held was sufficiently interested in the matter and should not have been appointed convenor of the inquiry.

To find that there has been a denial of reasonable opportunity on the ground of bias on the part of the inquiring officer, there must be a *reasonable*, not a fanciful basis for fearing that justice would not be done. Merely being in an executive position is not by itself a fact supporting reasonable bias. I was not satisfied, in the circumstances of this case, that there was bias on the part of the enquiring officer or the Permanent Secretary who made the actual decision. Again, there was no evidence of pecuniary interest, personal hostility or sympathy with one of the parties.

I was satisfied in this case that the Permanent Secretary addressed his mind genuinely and independently to the question which concerned the inquiry conducted by Mr. Charles Byass and then decided to take the action which he did against the applicant. In terms of the Constitution there being no rules of procedure laid down, or, regulations to guide the Permanent Secretary, or, impose a line of conduct on him, there was, in my opinion, nothing improper, or, invalid in the inquiry being conducted by someone on

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his authority, and he himself making the actual decision to dismiss. There was no delegation of the power of dismissal to anyone apart from the Permanent Secretary and that power was not exercised by anyone else.

It has been suggested that the employment of a public officer may be likened unto a "property" right. With this suggestion I disagree, and this suggestion has been found to be out of favour with enlightened judicial opinion in the United States of America as expressed in the case of *Bailey v. Richardson* (1950), 182 F. 2d. 46 (D.C. Cir.) To the plaintiffs claim that the grounds of her dismissal had abridged her First Amendment guarantee of freedom of speech and assembly, the majority of the Court replied that "*So far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations*" 182 F. 2d at 59.

By analogy, as far as the Constitution of Guyana is concerned, there is no prohibition against the dismissal of Government employees at will.

Reviewing the law on the subject in the Bailey Case the court affirmed that *it was fully settled that the tenure of executive employees was exclusively within the discretion of the Executive*. Since, as a constitutional matter, the Executive could dismiss the plaintiff for any reason without notice, evidence or hearing, the court reasoned that *she could claim no special constitutional protection*. The Court of Appeals, also, ruled in that case that *government employ could not be deemed as being either life, liberty or property*. On a review by the United States Supreme Court, the decision of the Court of Appeals in the *Bailey's case* was affirmed.

There are several Guyana cases which I could review and deduce principles, supported by reference to decided English Cases, to fortify my opinion and what I have already said. These include *Abrams v. The Members of Governing Body of the Anglican Schools in British Guiana and others* (1960) L.R.B.G. 78; (1960) 2 W.I.R. 187; *Harry v. Thom* (1965 - 66) 9 W.I.R. 143; *Cumberbatch v. Weber* (1965 - 66) 9 W.I.R. 143; *Nobrega v. A.G.* (1967) 10 W.I.R. 187 C.A; *A.G. v. Nobrega* (1969) 3 All E.R. 1604, P.C; *Re Langhorne, Civil Appeal No. 19 of 1968 of the Guyana Court of Appeal*; *Re Sarran Civil, Appeal No. 80 of 1968 of the Guyana Court of Appeal*; *Hunte v. Evelyn and T. & H.D., No. 28 of 1969*; *Evelyn v. Chichester, No. 1 of 1970*; *In re Arthur and Hermanstyne No. 34 of 1970*, but I have said sufficient to indicate and illustrate that I am satisfied that there was an affective legal delegation of the power to dismiss by the Public Service Commission to the Permanent Secretary, Ministry of Health which was extant at the time when he acted to dismiss Gerriah Sarran. I am satisfied, also, that the *power to dismiss* was not delegated by the Permanent Secretary to anyone else. I am satisfied that the Permanent Secretary exercised the power to dismiss after giving due consideration to all the circumstances of Gerriah Sarran's matter. I am satisfied, also, that Gerriah Sarran had no legal right to the public office in which she served, either by virtue of the Guyana Constitution, simple statute or by simple contract and that it was no property,

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and correspondingly, no obligation to retain her service until an ascertainable event, the breach of which was redressible by her, was imposed on the Public Service Commission, or, the Permanent Secretary or any other governmental agency. I am satisfied, also, that no procedure or rules for her dismissal, or any other set of regulations, which were legally binding on the Public Service Commission or on the Permanent Secretary with regard to the dismissal were laid down by the Constitution or any other legal authority. Accordingly, she was not as such entitled as of right to an inquiry or any other procedure prior to her dismissal and in so far as an inquiry was conducted, I am satisfied that the rules of natural justice were not infringed in this inquiry into her matter. For all the reasons which I have mentioned and after giving due consideration to all the arguments adduced, and in the exercise of my judicial discretion, as is appropriate in a matter of this kind, I shall discharge the order nisi granted and refuse the application of Gerriah Sarran.

As the final paragraph to this judgement, I would wish to adopt the words of *Persaud J.A.* in the case of *The application by Arthur and Hermanstyne (Civil Appeal No. 34 of 1970 of the Guyana Court of Appeal)* when at the concluding sentence of his judgment he said:

".....the function of the courts is to interpret the laws as we find them, not as we or others would wish them to be, nor as they may be expected to be in the future."

There will be costs to the respondent to be taxed certified fit for counsel.

Order absolute refused.

THE STATE V. MARTIN ROBERTSON ET AL

[High Court (Vieira J.)
November 19, 20, 1973]

Criminal Law—Judicial recall of witness—Mistake in testimony of prosecution witness—Testimony relevant to one accused mistakenly ascribed to another—Limitation on principle of recall—Interests of justice—Probability of adverse verdict if no recall—Criminal Evidence Ord. Cap. 25, s.88.

At the Demerara Assizes, in the presence of the jury, prosecuting counsel requested the recall of its witness, Sgt. Ignatius Mc Rae to give further evidence. The trial judge then directed that both jury and Mc Rae should be withdrawn in keeping with defence counsel's request, so that prosecuting counsel might be heard. Whereupon the latter informed the court

that Mc Rae had intimated to him during the week-end recess that he had made a mistake in his testimony in the respect that evidence he (Mc Rae) had given concerning the fifth-named accused was properly applicable to the first-named accused. This error had occurred, he said, because Mc Rae had mistakenly erred in relation to the order in which the accused persons were seated in the dock. This caused him to refer to the accused in descending order from right to left, instead of from left to right as he ought to have done.

Prosecuting counsel further informed the judge that as a result of Mc Rae's mistake, certain receipts were stated to be in the handwriting of the first-named accused. Justice, he said, demanded Mc Rae's return to the witness-stand to clear up the position for the benefit of the jury. Counsel for the first-named accused vigorously voiced objection to Mc Rae's recall.

Curia Adversari Vult.

HELD: (i) the power of judicial recall in criminal trials is not limited to cases *suo motu*, but includes cases the judge gives leave to do so.

(ii) so long as the exigencies of justice demand it, a judge's discretion to recall witnesses is without fetter and can be invoked at any stage of the trial;

(iii) it would be a grave injustice not to allow Mc Rae's recall in the particular circumstances to rectify what was mistakenly ascribed to the fifth-named accused since his liberty may be endangered by an adverse verdict based upon circumstances that never existed.

Witness recalled to testify

Cases referred to include:

(1) *R. v. Harris* (1927) All E.R. Rep. 473.

(2) *R. v. Seigley* (1911) 6 Cr. App. R. 106.

Odel Adams, State Counsel, for the State

C.A. Massiah for the first-named accused

S.E. Moore for the second-named accused *D.A. Robinson* for the third-named accused

J.O.F. Haynes, S.C., with Miss C. La Bennett for the fourth and fifth named accused.

VIEIRA, J.: Yesterday morning in the presence of the jury and before the trial stated Mr. Adams requested that the witness, Sergeant Ignatius Mc Rae, who had given and completed his evidence last Friday, be recalled to give further evidence.

Mr. Massiah then stated that he would like to know, in the absence of the jury and of the witness McRae, what was the reason why this witness was being recalled having regard to the fact that he had completed his evidence fully.

The jury then retired under the sworn charge of the Marshal and Mc Rae left the courtroom at the court's request.

Mr. Adams then informed the court that after the week-end recess he was approached by Sergeant Mc Rae who told him that he had made a *mistake* in his evidence before the jury in that what he had ascribed to the No. 5 defendant was, in fact, really applicable to No. 1 defendant and that this had occurred as a result of his mistaking the order in which the defendants were sitting in Court, he having taken the order from right to left instead of from left to right as it has been throughout the trial. As a result of this mistake the prosecution will have to tell the jury that the three (3) unofficial receipts (Exs. "D1—D3") which, according to the depositions, the prosecution's case and Mc Rae, is in the handwriting of the No. 1 defendant, was that of the No. 5 defendant and Justice demands that Mc Rae be permitted to come back into the witness box and rectify this obviously genuine mistake and he could then be cross-examined by defence counsel if they so desired. Mr. Adams referred me to para. 1398 appearing at p. 536 of the *36th Edition of Archbold's Pleading, Evidence and Practice in Criminal Cases* and, in particular, the first paragraph thereof.

Mr. Massiah vigorously objects to having Sergeant Mc Rae recalled under any circumstances whatsoever. He contends that there is no authority for permitting a witness to be recalled to change his evidence. It is quite easy to say that Mc Rae has made a mistake. How can it be known that there are not in fact mistakes in the original depositions themselves, the core of which is to demonstrate to the court that a witness has made a previous inconsistent statement? He submits that if this court were to look at the depositions to decide whether what a witness said was a mistake or not then this would, in effect, prevent this court acting as an impartial referee since it would amount to this court, actually entering the arena. He argues that a witness ought never to be recalled unless the court, of its own motion, feels that something unsatisfactory has taken place, but he concedes that a witness may be recalled if the purpose is to give new evidence in which case an accused person would have the right of cross-examination.

Mr. Moore referred me to para. 1398 of *Archbold* (ibid) but submits that although he concedes that a Judge has a wide discretion, that discretion must be exercised like all judicial acts according to settled principles of law. He argues that this application is based upon the premise that what is stated in the depositions is true and correct, but it is trite knowledge that on innumerable occasions it has been clearly demonstrated that such depositions were either false, inaccurate or, sometimes, downright lies. Further, the ipse dixit of Mc Rae that he made a mistake was not made on oath. Mc Rae said he mistook No. 5 defendant for No. 1 defendant but, on enquiry, this court itself unearthed that there were at least three (3) mistakes, viz: that the specimen handwriting made by No. 5 defendant was in fact made by No. 1 defendant, secondly, nothing was said at the Preliminary Inquiry before the magistrate about any specimen handwriting having ever been taken from No.

5 defendant and, thirdly, at the Preliminary Inquiry, Mc Rae said that specimen handwriting was taken from the No. 2 defendant whereas he told the jury that those same specimens were in fact taken from No. 1 defendant.

Mr. Robinson declined to say anything.

Miss La Bennett argues that this court is being asked to exercise its discretion upon a consideration of facts not properly before it, i.e., on a statement made by Mc Rae to Mr. Adams that he had made a mistake when he gave his evidence and, also, upon a perusal of the depositions.

These arguments are directly related to an involve the power of a judge to recall witnesses at a trial. This power is not absolute but discretionary which must be exercised judicially and not capriciously.

According to Co: Litt: 227B, Discretion is —

"to discern by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion."

A distinction must be drawn between the exercise of a judge's discretion to recall witnesses in civil actions as opposed to criminal trials. This was well-expressed in *R. -v- Harris (1927)* All E.R. Rep. 473 at p. 475 —

".....it was clearly laid down in the Court of Appeal in *Re Enoch & Zaretzky, Boch & Co. (6)* that in a civil suit the judge has no power to call a witness not called by either side unless with the consent of both parties. It also appears to be clearly established that that rule does not apply at a criminal trial, where the liberty of the subject is at stake, and where the *sole object* of the proceedings is to make certain that *justice is strictly done* between the Crown and the accused."

in *R -v- Seigley (1911)* 6 Cr. App. R. 106 at p. 107 *Hamilton J* said -

"A prisoner, when once he has made himself a witness, is liable, like any other witness, to be recalled for the purpose of answering such questions as the judge permits to be put to him."

Para. 1398 at p. 536 of the 36th Edition of Archbold states -

"The judge has a discretionary power of recalling witnesses at any stage of the trial prior to the conclusion of the summing-up and of putting such questions to them as *the exigencies of justice require*, and the Court of Criminal Appeal will not interfere with the exercise of that discretion unless it appears that an injustice has thereby resulted: *R -v- Sullivan (1923)* 1 KB. 47; 16 Cr. App. R. 121; *R -v- McKenna*, 40 Cr. App. R. 65. If a witness for the Crown is recalled by the judge *or by leave of the judge*, the prisoner's counsel is allowed to cross-examine him on the *new evidence* given; *R. -v- Watson*, 6 C & P 653."

The first part of this para., is taken from para. 1477 of Volume 2 of the 12th Edition of *Taylor on Evidence* and was approved by the Court of Criminal appeal.

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Section 88 of the *Evidence Ordinance*, Chapter 25, provides as follows—

"88. 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 evidence, and may impound any document or other thing he considers material."

The marginal note to this section states—"General power of judge as to calling for evidence."

I am quite satisfied that a judge's power to recall witnesses in criminal trials is not limited to cases where he does so of his own motion but includes case where he grants leave so to do and, in either case, counsel would have a right of cross-examination. So long as the exigencies of Justice demand, a judge's discretion to recall witnesses is, in my considered opinion, without fetter, and can be invoked at any stage of the trial although it should not be done or granted after the case for the defence is closed except where a matter has arisen *ex improviso* which could not possibly have been foreseen *R -v- Harris* (supra); *R -v- Day* (1940) 1 All E.R. 402:

On a consideration of the law as I understand it, it is, I think, quite clear that the really important and overriding consideration in the exercise of a judge's undoubtedly wide discretion in criminal trials in this country is to make sure, as least as far as is humanly possible, that *Justice is strictly done between the State and all its citizens*, however humble may be their circumstances and whatever may be their ethnic origin or religious beliefs, if any. This is a fundamental right given to all citizens of Guyana by the *Constitution* which, by Article 2, is described as 'the supreme law of Guyana.'

To my mind, in the particular circumstances of this case, it would be a grave injustice not to allow Sergeant Mc Rae to be recalled to give further evidence especially to rectify what he has ascribed to No. 5 defendant since, if this is not done, there is a possibility that the very liberty of the No. 5 defendant may be unfairly endangered by an adverse verdict by the jury based upon circumstance that never in fact took place. That factor alone, I consider, is sufficient reason for this court to grant Mr. Adams' application and I so rule.

The jury will now be directed to return and Sergeant McRae will be recalled to further testify in the presence of the jury.

Witness recalled to testify

JASMATTIE LALL v. SHARIFAN CHUNG

[High Court (Vieira J.,)

February 2, 6; November 30, 1973]

Slander—Plaintiff alleges defamation falsely and maliciously—Alleged slander in presence of named and 'divers other persons'—Named person not called in evidence—Two 'divers others' testified—Whether absence of named person justifies dismissal of action without investigation into merits of case.

Slander—Publication to divers other persons—Whether onus on defendant to apply for particulars of divers persons identity.

In her statement of claim plaintiff complained that the defendant slandered her by having "falsely and maliciously" spoken and published defamatory language of her to and/or in the presence and hearing of one Mavis Jaundoo and "divers other persons". Mavis Jaundoo did not testify, but two divers other persons, neither of whom was named in the pleadings, did so.

The point that arose is whether Jaundoo's absence from the witness-box warranted dismissal of the case without the merits of it being explored. That was the view of counsel for the defendant, while the contrary was argued by counsel for the plaintiff. Counsel cited a case where X and one A, both of whom, though not named in the statement of claim, testified as to publication. Whilst X spoke about an incident occurring on Oct 5, 1967, A corroborated plaintiff's story about an incident on September 13, 1967.

Argument then followed on whom was the onus of demanding particulars of the identity of those "divers other persons" present, who overheard the alleged slander. Defence counsel submitted he was not required to do so as counsel for plaintiff urged, because of the fact that Mavis Jaundoo was named in the statement of claim.

HELD: (i) it was the duty of the defendant's counsel to have asked for particulars concerning the identity of those "divers" persons; and to do so promptly, because the defendant was entitled to such particulars.

(ii) if publication is alleged to have been made only to one named person and that person does not give evidence then, clearly, there is no proof of publication and the action must necessarily be dismissed with costs. But where, as here, the named person does not give evidence, but other persons come forward, who, although not named in the statement of claim, give evidence concerning the publication then the defendant cannot, in such circumstances, complain that he is unprepared to meet the case against him at his trial if in fact he has not sought, firstly, by letter, and, subsequently, if no particulars are given, by an application by way of summons in Chambers, to have the offending paragraph struck out with costs.

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(iii) the only real point in the matter about not calling Mavis Jaundoo goes to credibility and not weigh, and no question of a dismissal other than on its merits arises in the matter.

Costs of ruling in sum of \$150.00 to be paid to plaintiff by defendant in any event.

Cases referred to include:

- (1) *Chander Mangal v. Inderjeet Singh* (No. 2859/1967) (Unreported High Court decision No. 44/1970.
 - (2) *Brandbury v. Cooper* (1883) 12 Q.B.D. 94
 - (3) *Roselle v. Buchanan* (1886) Q.B.D.656
 - (4) *Gouraud v. Fitzgerald* (1888) 37 W.R.265
- J.O.F. Haynes S.C.*, with Miss C. La Bennett for the plaintiff.
H.S. Chan, for the defendant.

VIEIRA, J.,: This is an action for *Slander* in which the plaintiff, a married woman, claims damages in the sum of \$5,000.00 together with costs and the usual consequential injunction, in respect of the following words alleged to have been uttered by the defendant of an concerning her on 11th February; 1970, at Triumph, East Coast Demerara—

"You are a whore. You live with men when your husband gone out."—*para. 3 of Statement of Claim.*

The plaintiff further alleges that those words were —

"falsely and maliciously spoken and published of the plaintiff to and/or in the presence and hearing of *MAVIS JAUNDOO and divers other persons—para. 3 (ibid).*

Mavis Jaundoo never gave evidence in this matter and the plaintiff called as witnesses one Harrylall Durga called Dilip and one Karam Chand neither of whom are named in the pleadings.

The interesting point that arises is whether the fact that Mavis Jaundoo did not give evidence warrants a dismissal of this action without going into its merits. Mr. Chan says yes but Miss La Bennett says no and both of them have referred me to a decision of this Court, viz:—*Chander Mangal -v- Inderjeet Singh* (No. 2859/1967) (unreported High Court decision No. 44/1970). In that case, para. 2 of the statement of claim alleged that the defamatory words were spoken of and published by the defendant on 13th September, 1967, in the presence of X, Y & Z. The plaintiff called X and one A who was not mentioned in the statement of claim. X spoke about an incident that occurred on 5th October, 1967, whilst A corroborated the plaintiff's story about what happened on 13th September, 1967. After the close of the plaintiff's case and after the defendant had given evidence but before he had

closed his case, counsel for the plaintiff sought leave to amend para. 2 of the statement of claim by inserting A's name before that of X or, alternatively, that the date be amended from 13th September, 1967 to 5th October, 1967. I considered that were these amendments granted they would work a grave injustice on the defendant out of all proportion to what ever were the merits of the case and, accordingly, they were disallowed.

The position here, as rightly pointed out by Miss La Bennett, is quite different. True enough Mavis Jaundoo did not give evidence but no amendment was ever sought here by the plaintiff. It is trite law that not only is a defendant entitled to particulars of the date or dates on which, and of the place or places where, the slander was uttered but also the names of the person or persons to whom the slander was uttered and an order for particulars will, in a proper case, be made by the court before defence—*Gatley on Libel and Slander, 5th Edition (1960), para. 832 at p. 460.*

In *Bradbury -v- Cooper.*, the plaintiff alleged that the defendant delegated to one Timson to utter the slanderous words and the plaintiff sought particulars of the persons to whom Timson uttered them. *Grove J* said: [(1883) 12 Q.B.D. at p. 95]

"I am not satisfied that the modern practice has been to order particulars of the names of the persons to whom the slanders were uttered. Where the defendant is alleged to have uttered them himself he may be supposed to know to whom he did utter them. In the old days it was no doubt the rule that where the plaintiff claimed special damage by reason of the slander having been uttered to particular persons, he must give the names of those persons. However I give no opinion upon the question which would arise if the defendant was accused of having uttered the words himself. But the present is a different and unusual case. The words are said to have been uttered by Timson "at the request and by the direction of the defendant", and particulars are asked of the persons to whom Timson uttered them. The defendant cannot tell where or under what circumstances Timson uttered the words, and may therefore come to trial in entire ignorance of the persons to whom they were uttered, and unprepared to meet the case made against him. He might not be able to call Timson, and could not meet the plaintiff's claim for damages—whether general or special—without knowing to whom Timson was alleged to have uttered the slanders complained of. This case, therefore, is unlike any cited before us in argument. I am of the opinion that the defendant is entitled to the particulars he asks for, and that the order of the Judge at Chambers should be affirmed."

Smith J said at pp. 95—96—

"This is certainly a peculiar case. The Plaintiff does not allege

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that the defendant himself slandered him, but says that the defendant delegated to another to utter the slanderous words. Some of the words are alleged to have been uttered in 1881—the action having been brought in 1883. Under these circumstances the defendant asks for particulars of the persons to whom Timson is alleged to have uttered the words. He seeks in effect to know the case against which he has to defend himself at the trial. Apart from authority I should think the defendant's demand a very reasonable one."

It is significant that by 1886, just three years later, *Grove J* was quite sure what the modern practice was when he gave the leading judgment in *Roselle -v- Buchanan (1886) Q.B.D. 656.*, at p. 657 as follows —

"But for the practice at Chambers I think that I should have agreed with the view put forward by the plaintiff's counsel, because where the defendant himself is alleged to have uttered the words complained of he may be supposed to know to whom they were uttered. But, having made enquiry, it seems clear that the modern practice is to order particulars to be given of the names of the persons to whom the words were uttered."

Grove J remarked that his observations in *Bradbury -v- Cooper* were merely obiter and he stated that he was inclined to follow the practice in chambers, if it existed, *Stephen J* concurred in the judgment.

The proper way in which particulars should be applied for is, in the first instance, by letter before a formal application is made by way of summons in chambers. In the summons itself a formal request should be made for the allegations to be struck out of the statement of claim or that the plaintiff be precluded from giving any evidence in support of them at the trial if there is default in delivery of the particulars as requested—Vide *Gatley (ibid) para. 838 at p. 463.*

What has happened here is that the named person, Mavis Jaundoo, was not called and did not give evidence but two other persons, not named in the statement of claim, gave evidence concerning the publication which must be pleaded and proved by a plaintiff in a slander action. On this particular aspect it is instructive to consider and compare the cases of *Barham -v- Lord Huntingfield (1913) 2 K.B. 193, C.A.*, and *Davies -v- Rolleston (1920) 1 W.N 29., C.A.* In the former case, the defendant imputed immoral conduct to the plaintiff, a married woman. The statement of claim alleged publication to one named person and publication also during three specified years to various other persons unnamed. The plaintiff sought to administer interrogatories asking whether the defendant had in any of the three years uttered the words complained of or words to the same effect to any persons, other than the person named, and the name of the other persons, if any. Held, that the interrogatories were inadmissible. Both *Kennedy L.J.*, and *Farwell L.J.*, referred to the decision of the House of Lords in *Russell -v- Stubbs (1908)*

52 *Sol Jo.* 580., Lordships were careful to point out that that decision was no authority for the oft-mooted proposition by text-book writers that the general proposition was that the statement of claim in an action for defamation may contain an allegation of publication to persons unknown and that the plaintiff may then interrogate the defendant as to whether he has published the defamatory matter to any other and what persons. Their Lordships pointed out that that case was treated in the Court of Appeal and in the House of Lords as an exceptional case depending upon special facts and they both bemoaned the fact that the report was sketchily reported only in the Solicitors Journal. In the latter case, para. 4 of the statement of claim averred —

- "4. Further, on divers occasions at present unknown to the plaintiff the defendant falsely and maliciously spoke and published of and concerning the plaintiff in the way of his profession and his conduct therein to divers persons at present unknown to the plaintiff the words following, that is to say: 'I consider that Doctor Davies (meaning the Plaintiff) murdered my husband.' The plaintiff is unable to give further particulars until after discovery."

The Master made an order, on a summons taken out by the defendant, that para. 4 of the statement of claim should be struck out unless full particulars of dates and places and names of the divers persons were given in 10 days. The plaintiff appealed but the Judge in Chambers, LORD COLERIDGE J, dismissed the appeal. On further appeal to the Court of Appeal with leave of the learned Judge, the appeal was dismissed, their Lordships being of the opinion that the words relied on by the appellant were ambiguous and did not point to a repetition of the slander so clearly as to induce the Court to overrule the discretion of the Master and the Judge in Chambers.

Mr. Chan submits that, here, the defendant was not required to ask for particulars because of the fact that a named person is named in para. 3 of the statement of claim. With all due respect I cannot accept this contention. Although this Court frowns upon the use of the word "divers", unless there is a genuine lack of knowledge as to the identity of the persons to whom publication was made, nevertheless, it was the duty of the defendant to have asked for particulars concerning the identity of those "divers" persons and it is to be noted that particulars must be asked for promptly—*Gouraud -v-Fitzgerald* (1888) 37 *W.R.* 265. *C.A.*

If publication is alleged to have been made only to one named person and that person does not give evidence then, clearly, there is no proof of publication and the action must necessarily be dismissed with costs. But where, as here, the named person does not give evidence but other persons come forward, who, although not named in the statement of claim, give evidence concerning the publication then it seems to me that the defendant cannot, in such circumstances, complain that he is unprepared to meet the

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case against him at his trial if in fact he has not sought, firstly, by letter, and, subsequently, if no particulars are given, by an application by way of summons in Chambers, to have the offending paragraph struck out with costs. Like Miss La Bennett, I cannot find any authority for the proposition as expounded by Mr. Chan and I entirely agree with her that the only real point in this matter about not calling the named person merely goes to credibility and not weight.

For these reasons, therefore, I hold and rule that no question of a dismissal other than on its merits arises in this matter and I now propose to fix a mutually agreed date for addresses by counsel. I certify and fix the costs of this ruling in the sum of \$150.00 to be paid by the defendant to the plaintiff in any event. By consent postponed to Friday 7th December 1973 at 3.00 p.m. for addresses.

SOLICITORS:

L.L. DOOBAY for Plaintiff.

DABI DIAL for Defendant.

CROMWELL SHEPPARD v. MILTON GRIFFITH

[High Court (K.S. Massiah, J.)
October 9, 10; December 20, 1973]

Nuisance—Neighbouring dwelling-house used as hotel and night-spot—Unreasonable and excessive degree of noise from customers musical instruments and juke-box on premises—Unavailing complaints from plaintiff occupying adjacent premises—Material discomfort of plaintiff's enjoyment of his property.

Nuisance—Absence of malice—Test for nuisance one of degree.

In the High Court, plaintiff sued his neighbour, the defendant, for nuisance claiming \$10,000 damages and an injunction to restrain him from causing excessive noise by electrical and other instruments on the defendant's neighbouring business premises.

The defendant's premises are situate at Charles Place, New Amsterdam, Berbice, and are also known as "The Fountain." They were originally used as a dwelling house until about May 1970 when they were converted into an hotel and night-spot. There, at all hours of the day and night music is played by string-bands and juke-boxes played from about midnight to 4.00 a.m.

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during which time drinking, dancing, the clapping of hands and noisy talk are carried on, much to the annoyance of the plaintiff and interference with his comfort and enjoyment of his property.

In an effort to alleviate his suffering plaintiff made frequent protests; but to no avail. Accordingly, he was forced to seek the court's assistance in the matter.

HELD: (i) the noise complained of materially interferes with the ordinary comfort of the plaintiff. The defendant cannot with justification play his juke-box and make noise of an unreasonable and excessive degree to his neighbour's detriment, although done in pursuance of his business interests;

(ii) while one has freedom to make some noise on his premises, one does not have an absolute right to make as much noise as one pleases;

(iii) the question of malice does not arise. The juke-box is an important facet of the defendant's business; but the degree of noise was excessive and unreasonable and disturbing to the plaintiff's comfort and enjoyment of his premises;

(iv) the juke-box must not be played after midnight, and at a moderate pitch.

Judgment for the plaintiff. Compensation in sum of \$800.00 with costs fixed at \$600.00.

Cases referred to include

- (1) *Titus v. Duke* (1963) 6 W.I.R. 135
- (2) *Torquay Hotel Co. Ltd v. Cousins* (1968) 3 All E.R. 43
- (3) *Allen v. Flood* (1898) A.C. 1
- (4) *Christie v. Davey* (1893) 1 Cap. 316.
- (5) *Hampstead and Suburban Properties Ltd. v. Diomedous* (1968) 3 All E.R. 545

M. Poonai, for the plaintiff.

J. Haniff, for the defendant.

K.S. MASSIAH, J.: In this matter the plaintiff sued the defendant for \$10,000 (ten thousand dollars) as damages for nuisance by noise caused by electrical and other instruments operated by the defendant on his business premises. He also prayed for an injunction restraining the defendant from making the noise.

The defendant runs an hotel called "The Fountain" in Charles Place, New Amsterdam, Berbice, and the plaintiff lives in Harkman's Lane which lies immediately south of and runs parallel to Charles Place. Both streets run from east to west. The defendant's hotel is situated on the southern side of Charles Place while the plaintiff lives on the northern side of Harkman's Lane. "The Fountain" is about eight feet north of the plaintiff's house and a drain and fences separate the two buildings.

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Originally, the defendant used his premises only as a dwelling-house but sometime about May, 1970; he began to run a hotel on the premises. Guests occupy the upper storey and there is a bar on the lower storey. When the defendant began to run the hotel he extended the lower storey of the building southwards. From time to time dances were held in this extended portion which the plaintiff described as "an open air shed". I accepted and believed the plaintiff's evidence that string bands performed at those dances on a stage in the shed which is quite near to the plaintiff's northern window and runs right up to the fence that separates the plaintiff's land from the defendant's.

In particular there was evidence that music was provided by string bands and juke boxes at dances held every Saturday night at the hotel from 9 p.m. to 4.45 a.m. and that there was much noise on those occasions.

But there has been a cessation of those activities, and according to the plaintiff there has not been a Saturday night dance at the hotel since sometime about December, 1972. The issues were therefore narrowed to a consideration of the playing of a coin-operated juke box in the lower storey of the hotel proper, as distinct from the shed. To operate this juke box one has to insert a coin and press a button and the selected record is then played automatically, a process known colloquially as "punching" the records.

The plaintiff's evidence, which I accepted, is that the coin-operated juke box is played every day and at all hours, but mostly after the cinema shows from about midnight to 4 a.m.; and during that time there are "drinking, dancing, clapping and noisy talking". Sometimes fights begin and, perhaps as tempers rise, drinking glasses and bottles land in the plaintiff's yard, presumably having missed their mark.

When this is going on the plaintiff and members of his family can speak to one another only by shouting. Besides, the noise compelled the plaintiff to give up the comfort of his northern bedroom and sleep on the floor of a southern gallery, where he appears to be less tormented, if uncomfortable.

In an effort to alleviate his suffering the plaintiff protested to the defendant, tried to get the defendant's friends to help and even complained to the Police. His protests, however, came to nothing and the noise continued.

I had no hesitation at all in accepting the plaintiff's evidence. He testified without bitterness and impressed me as an honest and truthful witness. His demeanour revealed much of that old world courtesy and form which are almost anachronistic today.

Fitz Simon who lives in Charles Place opposite "the Fountain" supported the plaintiff's testimony. Simon said that the coin-operated juke box is played very loudly "almost every night until about 4 a.m.". He too spoke to the defendant about the noise without avail. I accepted and believed his evidence as well.

I found the factual position to be, therefore, that almost every night the coin-operated juke-box is played very loudly in "The Fountain" until about 4 o'clock in the morning, and that during that time there are dancing,

clapping and loud talking, and that sometimes fights break out during which bottles and drinking glasses are often thrown about

The issue for determination was whether or not that situation constitutes a nuisance to the plaintiff. In my judgment it does. Generally speaking a nuisance is an interference with a person's use or enjoyment of land or of some right connected with it (*see Titus v. Duke (1963) 6 W.I.R. 135 (p. 136)*) but such interference must, of course, be substantial if the plaintiff is to succeed—see *Torquay Hotel Co. Ltd. v. Cousins (1968) 3 All E.R. 43 (p. 61-61-62)*.

One cannot define what degree of noise in terms of decibels constitutes a nuisance. The circumstances of each case must be closely examined and the position determined thereby and not by an abstract consideration of the particular, offending act, per se. I had to weigh up and consider, therefore, all the circumstances of this matter, including the respective interests of the parties, bearing in mind the fact that the defendant runs a hotel and that music must obviously be good for his business. It may well be that many of the hotel's patrons who are devotees of music and with whom this nightly playing seems to have become almost a cult would not go there if there were not a coin operated juke-box on the premises. The defendant said that he requires a juke-box for his business, and I believe him.

But this does not give the defendant the right to make as much noise as he cares. The juke-box has to be played with due consideration for the peace and quiet to which the defendant's neighbours are entitled. That is not to say that the plaintiff must expect to enjoy absolute and permanent stillness as if living in a classic void; he would have to bear a reasonable degree of noise from "The Fountain", occasioned by the juke-box and the patrons for whom the hotel caters, but he must not be made to suffer the nightly torment of loud noise which persists until almost dawn.

It appears to me that it is in this civilised balancing of the competing and divergent interests of the respective parties that the tort of nuisance has its jurisprudential roots. For though it is true that one has freedom to make some noise one does not have an absolute right to make as much noise as one pleases. The restraint which the law in its wisdom accordingly imposes was explained with admirable felicity by Lord Watson in *Allen-v- Flood (1898) A.C 1*. He said as follows at page 101:

"No proprietor has an absolute right to create noises upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public. If he violates that condition he commits a legal wrong".

I regard that as a correct statement of the law and I would adopt it.

This question is discussed at page 136 of *Halsbury's Laws (Third Edition) (Volume 28)* under the heading "General principles". The passage reads thus:

"Apart from any limit to the enjoyment of his property which

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may have been acquired against him by contract, grant, or prescription, every person is entitled, as against his neighbour, to the comfortable and healthful enjoyment of the premises owned or occupied by him whether for pleasure or business. In deciding whether in any particular case this right has been invaded and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions...."

The next passage on the same page under the heading "Noise and vibration" reads thus:—

"The making or causing to be made of such a noise or vibration as materially interferes with the ordinary comfort of the neighbouring inhabitants, when judged by the standard previously stated, is an actionable nuisance, and one for which an injunction will be granted".

In my view the noise of which complaint is made materially interferes with the ordinary comfort of the plaintiff. In reaching that conclusion I addressed my mind generally to the circumstances of the case and in particular to the following factors, that is to say, the nearness of the buildings to each other, the time when the noise is made, the frequency of the noise, the nature and degree of the noise and the effect produced by the noise. I shall deal briefly with each of those heads.

A. *Nearness of the buildings.*

"The Fountain" is about eight feet north of the plaintiffs house and is separated from it by a fence ten feet high. The fence does not appear to reduce the noise very much, if at all.

B. *Time when noise is made.*

The plaintiff's evidence is that the coin-operated juke-box is "mostly played after cinema hours, from about 12 midnight until 4 a.m. next day". That bit of evidence weighed very heavily with me. Night is meant for sleep and although one's neighbour would have to endure some noise during the night, and perhaps even up to midnight, it is wrong to expect him to put up with loud noise after midnight and up to 4 a.m. (In *Christie v. Davey (1893) 1 Cap. 316* the court expressed the view that a neighbour should cease playing a violoncello at 11 p.m. (p. 328)—houses separated by a party wall).

C. *Frequency of noise.*

The plaintiff's evidence is that the noise from the juke box is heard every day; Simon said "almost every night". This continuous situation is clearly an interference with the comfort to which the plaintiff is entitled.

D. *Nature and degree of noise.*

The noise comes from a juke-box and is very loud. Loud music, even when euphonious, can be disturbing. But quite apart from that, the plaintiff had to cope with clapping, noisy talking and sometimes crashing bottles and drinking glasses.

The noise produced by these collective sources in the early hours of the morning must be quite unbearable.

E. *Effect of the noise.*

The noise prevents the plaintiff from listening to his radio and makes normal conversation in his home impossible. But much worse than that, it affects his sleep and has forced him *for three years now* to give up the comfort of his bedroom and sleep on the floor in a southern gallery. This situation appears to be permanent.

In his defence the defendant generally denied the material facts alleged, but he admitted in evidence that there is on the premises a coin-operated juke-box which he says is always played at moderate volume, and, in any event, is not usually played after midnight. He said that after midnight the juke-box is played softly. The defendant claimed that "The Fountain" is quiet after midnight I have already said that I found to the contrary.

In the course of his address counsel for the defendant urged on me that "unless there is malice or motive to disturb, then the defendant's intention must be considered as well as his conduct". He was no doubt referring to the principle that a degree of noise not otherwise actionable may be regarded as an actionable nuisance if it is caused maliciously—See *Christie -v- Davey* (p. 326 - 327); *Hollywood Silver Fox Farm Ltd. -v- Emmett* (1936) 2 K.B. 468 (p. 474-476)—and was asserting that in this case the defendant was not acting maliciously. Counsel stressed that the defendant obtained police permission to hold the dances and that the plaintiff did not oppose the defendant's application for a hotel licence or for its renewal.

The true position is that if there is no malice the test for nuisance by noise is one of degree. *Lord Selborne* put it this way in *Gaunt -v- Fynney* (1873)37J.P. 100 (p. 100):

"A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree. If my neighbour builds a house against a party wall next to my own, and I hear through the wall more than is agreeable to me of the sounds from his nursery or music-room, it does not follow (even if I am nervously sensitive or in infirm health) that I can bring an action to obtain an injunction. Such things, to offend against the law, must be done in a manner which beyond fair controversy, *ought to be regarded as exceptional and unreasonable*".

On this aspect of the matter the words of *Lord Loreburn, L.C.*, in *Polsue and Alfieri, Ltd. -v- Rushmer* (1907) A.C. 121, are worth repeating. He

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was dealing with a complaint that noise from a printing works situated in an industrial environment specially devoted to the printing trade amounted to a nuisance to the plaintiff who lived next door. The court at first instance found for the plaintiff and the House of Lords affirmed that decision. The following portion of *Lord Loreburn's* speech appears: [(1907) A.C. at p. 123]

"The law of nuisance undoubtedly is elastic, as was stated by Lord Halsbury in the case of *Colls -v- Home and Colonial Stores*. He said: 'What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases *it becomes a question of degree*, and the question is in each case whether it amounts to a nuisance which will give a right of action'. This is a question of fact".

And later on the same page he said as follows:

"I agree with Cozens-Hardy L.J. when he says: 'It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked' "

I accept that the defendant obtained police permission for the dances he used to hold and no one questions that his premises are properly licensed, but it cannot be too strongly emphasised that the defendant cannot with justification play his juke box and make noise of *an unreasonable and excessive degree* to the detriment of his neighbour although this is done in pursuance of his business. To think otherwise is to misconceive the legal position. I agree with the opinion expressed by *Blackburn J.* at p 351 of *Scott -v- Firth (1864) 4 F and F (Nisi Prius) 349*. He said as follows:

"A further point has been raised by the plea that the grievances complained of were caused by the defendant in the reasonable and proper exercise of his trade in a reasonable and proper place. My opinion is that in law that is no answer to the action. I think that that cannot be a reasonable and proper exercise of a trade which has caused such injury to the plaintiff as she complained of".

In that case the plaintiff complained that the defendant had built a mill near to her cottages and fitted it with steam hammers, the vibration and noise from which had caused her tenants to abandon the cottages. The evidence was that the vibration had cracked the cottage walls. (See also *Ball -v- Ray (1873) 37 J.P. 500* where a stable keeper was restrained from using his stable in such a way as to be a nuisance to the plaintiff; *Broder -v- Saillard (1876) 2*

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Cap. D 692 (p 701); and *Thorpe v. Leacock (1965) 9 W.I.R. 176*- loud noise caused by hammering and welding machine in the defendant's workshop).

It is true that in this matter the question of malice did not arise and that the juke-box is an important facet of the defendant's business, but I found, for reasons already stated, that the degree of noise was excessive and unreasonable, and disturbing to the plaintiff's comfort and enjoyment of his premises.

Finally, on a different aspect, reference should perhaps be made to *Hampstead and Suburban Properties Ltd. -v- Diomedous (1968) 3 All E.R. 545*. The decision in that matter turned on a covenant which forbade the defendant from playing music in his restaurant in such a manner as to be a nuisance to his neighbours. The plaintiffs (the defendant's landlord) complained that in breach of that covenant the defendant played music loudly from about 9 p.m. to 2 a.m. and that the noise was a nuisance to other tenants who lived in flats above the restaurant. The plaintiffs therefore prayed for an injunction to restrain the defendant from making the noise.

The court found for the plaintiffs, resting its judgment on the ground that the defendant was in clear breach of the covenant, but it is interesting to see how *Megarry J.* dealt with the question of the interests of the parties. His words are of some relevance. He said as follows: [(1968) 3 All E.R. at p. 551].

"The point has not been argued and I do not rest my decision on it. But it seems to me that it is of some relevance to consider whether it is more important for the plaintiffs' tenants to have the relative peace and quiet in their homes to which they have been accustomed, or for the defendant's customers to have the pleasure of music while they eat, played at high volume. When this comparison is made, it seems to me that it is the home rather than the meal table which must prevail. A home in which sleep is possible is a necessity, whereas loud music as an accompaniment to an evening meal, is, for those who enjoy it, relatively a luxury. If, of course, the two can peacefully co-exist, so much the better; but if there is irreconcilable conflict, as there is at present in this case, I think it is the home that should be preferred".

I think *Megarry J.* was right. However, in this matter, I was satisfied that the defendant had committed a wrongful act and that the plaintiff had suffered damage. I found, therefore, for the plaintiff and awarded him damages in the sum of \$800.00 (eight hundred dollars). Further, I ordered that the coin-operated juke-box shall not be played after midnight and that when played the volume be regulated at a moderate pitch. There was evidence that the volume can be regulated. I also granted costs to the plaintiff in the sum of \$600.00 (six hundred dollars).

CROMWELL SHEPPARD v. MILTON GRIFFITH

This matter presented the usual difficulty of assessing damages for intangible injury but I considered that the sum of \$800.00 (eight hundred dollars), in all the circumstances of the case, represents fair and reasonable compensation for the plaintiff's injury.

Judgment for the plaintiff. Compensation \$800.00, fixed costs \$600.00.

JANET JAGAN AND ANOTHER
v.
LINDEN FORBES SAMPSON BURNHAM

[Court of Appeal (Luckhoo, C, Bollers, C J. and Crane, J.A.)
January 30, 31: February 15, 1973]

Libel—Damages—Newspaper publication—True meaning and implication of words used—No evidence of loss of reputation—Finding that plaintiff was lowered in estimation of right-thinking members of the public—Whether award supportable

Libel—Newspaper publication—Rashness and lack of contrition—Apology—No full and frank withdrawal of charges and suggestions conveyed—Special plea—Defamation Ordinance 1959 (No. 17), SS. 11 & 12.

Libel—Damages—Substantial damages awarded by court of first instance—Whether justified in circumstances of case—Principles on which appellate court will intervene.

Constitutional Law—Fundamental rights—Freedom of expression—Liberty of the press—Libellous statements of no social value—Contravention of fundamental rights—"Protecting the reputation"—Constitution of Guyana arts. 10, 12 (2).

The respondent, who is the Prime Minister of Guyana and senior counsel at the Guyana Bar, sued the appellant, who is the editor of a daily newspaper called *The Mirror*, and the printers and publishers for libel contained in an issue of that newspaper, and was awarded damages in the sum of \$25,000. The offending publication was to the effect that the respondent had caused a wire fence which was installed around his farm to be electrified with the object of warding off prowlers and thieves, and that a cow had stepped on the wire and had been electrocuted. After the writ was served upon them, the appellants caused an apology to be published in a subsequent issue of *The Mirror*, and deposited a certain sum of money into court.

At the trial, the appellants, while admitting the publication, submitted that the words were incapable of the imputations placed on them by the respondent; that there was really no loss, of reputation, and that they could avail themselves of the protection of s. 11 of the *Defamation ordinance 1959* (No. 17). The trial judge found against the appellants on all grounds. It was also urged that the appellants were entitled to freedom of expression under art. 12 of the Constitution of Guyana.

On appeal, affirming the decision of the court below:

HELD: (i) there was no need to prove loss of reputation once the words complained of were capable of bearing the meaning and implication alleged; the award of damages may be supported.

(ii) The appellants had not discharged the onus which s., 11 of the Defamation ordinance 1959 (No. 17) cast upon them; they failed to establish publication of a "full apology".

(iii) art. 12 of the Constitution of Guyana, which guarantees freedom of expression was not contravened by the court in finding the appellants liable to damages.

Judgment of the High Court affirmed.

Cases referred to include:

- (1) *Lewis v. Daily Telegraph* (1964) A.C. 234.
- (2) *Capital & Counties Bank v. Henty* (1882) 7 App.Cas. 741.
- (3) *Cassidy v. Daily Mirror Newspapers* (1920) 2 K.B. 331.
- (4) *Cassel v. Broome* (1972) 1 All E.R. 801.
- (5) *Rookes v. Barnard* (1964) A.C. 1129.

Dr. F.H.W. Ramsahoye, S.C. for the appellants

Sir Lionel Luckhoo S.C. with *J.T. Clarke S.C.* for the respondent.

CHANCELLOR:

The Prime Minister of the Republic of Guyana, the Honourable L.F.S. Burnham (the respondent) sued Mrs. Janet Jagan, the Editor of "The Mirror", a daily newspaper circulated in and out of Guyana, and the New Guyana Co. Ltd., its printers and publishers, for libel contained in an issue of that newspaper of 8th February, 1972, and was awarded damages in the sum of \$25,000.

The offending publication consisted of what purported to be a news item on the front page highlighted by a banner-spread caption:

"P.M.'S COW ELECTROCUTED"

and gave the following information:

"A hefty 300-lbs. zebu cow was electrocuted when it stepped on the live electric wire surrounding the spacious farm of the Prime Minister aback of the Botanical Gardens on Sunday evening.

"The animal has been identified as belonging to the P.M. On instructions it was sent to the zoo where the lions and tigers were to have it for their evening meal. So far there are conflicting reports as to what exactly happened to the carcass, though it is widely rumoured that the meat was carted away by a few persons connected with Congress Place.

"The live electric wire, it is reported, has been installed with the purpose of warding off prowlers and thieves from entering the P.M.'s private farm. Now that crops of eschallot and tomatoes are near their harvesting period it is understood that the current has been put on in full blast. The unfortunate cow, only one in a large herd of cattle reared in the farm, came near the fence to graze but was thrown some ten feet in the air when it came in contact with the wire."

It was claimed from these words that in their ordinary, natural and common meaning, they meant and were understood to mean and convey the following imputations, viz.:

- (a) that within his said farm live electric wires were installed and concealed on the ground, for the purpose of warding off prowlers and thieves from entering his farm;
- (b) that the Prime Minister was privy to, answerable for, and had connived at, this said act;
- (c) that this said act was dangerous *per se* and calculated to cause harm and fatality to all and sundry who might chance to come into contact with the said installation;
- (d) that the said act constituted a trap set in a public place to which the public had access, namely, the Botanical Gardens;
- (e) that the said act was wanton and reprehensible and calculated to cause substantial annoyance, and to endanger the lives of innocent subjects of the State who might chance to tread on the live wires of the concealed device;
- (f) that the said act provided for sufficient power of electrical energy to electrocute a 300-lbs. cow, to the extent of throwing it aloft 10 ft. in the air and causing its death;
- (g) that all or any of the said acts, (a) to (f) above, amounted to a public nuisance and constituted criminal offences, for which the Prime Minister was not only put in jeopardy of criminal prosecution, and therefore liable to penal consequences, but also to social ostracism,
- (h) further that the said act provided for the said electric wires to be at full blast, to increase its destructive power;
- (i) that the said act was morally and legally indefensible;

- (j) that the Prime Minister was prepared by the said act, which was shameful and inhuman, to jeopardize the lives of man and beast, for the selfish purpose of merely protecting his kitchen garden.

The consequences of these imputations, it was said, represented the respondent to be —

- (i) unfit for the high office of Prime Minister of the Republic of Guyana, or to be a member of Parliament or to hold any office involving responsibility and concern for the welfare of the people of Guyana;
- (ii) unfit to be a Senior Counsel and barrister-at-law by which callings he should have been acquainted with the Laws of Guyana, and realised the impropriety of his infamous and disreputable deed,

and brought him into public odium, contempt and ridicule.

Ten days after the service of the writ on the appellants, the solicitor for the appellants, by letter dated 17th March, 1972, to the respondent's solicitor, said:

"My clients are prepared to make a full apology for the libel contained in the issue of the 'Mirror' of Tuesday, the 8th February, 1972. It would appear in the Sunday issue of the 19th March, 1972."

In pursuance of this communication, an apology was duly made in the following terms:

"In the issue of the 'Mirror' newspaper of Tuesday, the 8th February, 1972, under the heading of 'P.M.'S COW ELECTROCUTED', it was stated that a cow belonging to the Prime Minister was electrocuted when it stepped on a live wire surrounding the spacious farm of the Prime Minister aback of the Botanical Gardens. It was also stated that the said wire had been installed for the purpose of warding off prowlers and thieves from entering the said farm and that now that certain crops were near harvesting period the current had been put on in full blast

"The 'Mirror' is now fully satisfied that the said statements were wholly unfounded and desires to express its regret to the Prime Minister and to apologise for any embarrassment and inconvenience which may have been thereby caused to him."

The appellants, by virtue of their admission that the news item complained of constituted a libel, were in effect virtually acknowledging that it was printed and published of and concerning the respondent; that it was essentially false; and that it contained such defamatory imputations as could not be justified. The extent of its falsity, and the depth of its defamatory content can in certain measure be gauged from those statements in the apology itself which will reveal to what extent the publication was "wholly unfounded" and how little truth there was in it. In this predicament the defence could hardly do more than seek to minimise and/or mitigate damages

which became inevitable in the circumstances. In taking this course, it was said:

- (a) that the words were incapable of the imputations placed on them;
- (b) that there was not any loss of reputation having regard to the retraction; and
- (c) that the special statutory plea in mitigation of damages under s. 11 of the Defamation Ordinance, No. 17 of 1959 (which combined s. 2 of LORD CAMPBELL'S Libel Act, 1843, with s. 2 of the Libel Act, 1845) was available in that —
 - (i) the publication was made without actual malice and without gross negligence;
 - (ii) at the earliest opportunity after publication a full apology for the libel was inserted in the paper concerned; and,
 - (iii) payment of money into Court in the sum of \$1,500 was made by way of amends for the injury sustained.

When, therefore, the matter came on for trial, the appellants were in effect saying: "We accept responsibility for the publication and admit that it was libellous but not to the extent claimed. Further, we would show, as it was on us to do, that there was no actual malice and no gross negligence, and that at the earliest opportunity we inserted a full apology with a deposit adequate to make amends for the injury sustained by and through the publication of the said libel."

If indeed they could have satisfied this burden, they would have been entitled to an award of judgment and costs in the action, and the respondent would have had to be content with the amount of \$1,500 deposited in court.

At the trial, the respondent's only witness was the Archivist, Mr. Hugh Payne, who produced copies of seven different issues of the 'Mirror', viz., between the 13th January, 1972, and 19th March, 1972, and testified that there was a morning and an evening publication of the said newspaper on each Tuesday, Wednesday, Thursday and Friday of the week.

The appellants, on the other hand, relied on the evidence of the subeditor of their newspaper, one Mr. Mohamed Ali (hereinafter referred to as 'the sub-editor') to discharge the onus on the special plea.

The grounds argued in this appeal could be said to fall mainly under four heads:

- (a) That the trial judge's estimate of the extent of the defamation could not legally be sustained.
- (b) That the conclusion reached by him that the appellants had failed to prove that the libel was inserted without malice and without gross negligence and that the apology was not full and frank, could not legally be justified.

- (c) That the award of damages was in all the circumstances so manifestly excessive that it should not be allowed to stand.
- (d) That fundamental rights of the appellants to which they were entitled under Art. 12 of the Constitution were contravened.

Counsel for the appellants, Dr. Ramsahoye, stressed in the course of his arguments that the respondent had led no evidence to show how the publication was understood by the ordinary reasonable man with the ordinary man's general knowledge. This submission would have been well based if the meanings sought to be attributed depended on special circumstances or extrinsic evidence, but this was not so. The respondent's case was that the sting in the libel arose not so much in the words themselves, nor in any meaning to be derived from other circumstances, but in what the ordinary man would infer from the publication, which would in law be regarded as part of the burden. [See *Lewis v. Daily Telegraph*. (1964) A.C. p. 258.] It is settled law that there must be added to the implications which a court is prepared to make as a matter of construction all such insinuations as could reasonably be read into them by the ordinary man, and so one must consider not what the words are, but what conclusion could be reasonably drawn from them. A man who issues a document is answerable not only for the terms of it but also for the conclusion and meaning which persons will draw from and put upon it. [See *Capital & Counties Bank v. Henty*, (1880) 5 C.P.D. at p. 536, approved in *Cassidy v. Daily Mirror*, (1929) 2 K.B. at p. 339 (C.A.) and *Grubb v. Bristol United Press*, (1965) 1 Q.B. at p. 327 (CA.)] When it is merely said of a man that he had entered a brothel, the conclusion is open to be drawn that he had done so for an immoral purpose because this is the interpretation which the ordinary man would place on such a statement made. That is why LORD REID said in *Lewis v. Daily Telegraph* (supra) see p. 33: "The ordinary man does not live in an ivory tower and is not inhibited by a knowledge of the rules of construction."

One does not merely look at the bare statements of fact made but what they may, in their context, be taken to convey, what inferences can be drawn, and what is attached to them in their natural and reasonable meaning.

Dr. Ramsahoye, in addressing the learned trial judge, agreed that there was "imputation of libel" but not as pleaded. He said:

"At its highest, this libel has to be that the Prime Minister went further than was proper in dealing with persons stealing his property....."

"The highest that can be put on it is that he was callous in dealing with thieves."

But he omitted to examine *in what way* the ordinary reasonable man would think that the Prime Minister went "further" than was proper, or was "callous" in dealing with thieves. Counsel, however, admitted, and rightly so, that it was necessary for the court to formulate as best as it could what really

was the libel and the gravity of the imputation, as it was in the final analysis on the gravity of the imputation that damages would be granted. The critical question then would be: How serious was this libel? Mr. Ramsahoye asked the trial judge to place little store on the insinuations which it was said the words bore, as consideration would have to be given to the way "how ordinary people will react as they think of a man in Guyana who takes an extreme measure against thieves who never sow, but after the farmer sows, appear to reap". He submitted that: "In the climate of the people in this country the ordinary man would have no sympathy towards a thief."

But even if ordinary people are prepared to applaud farmers who take "extreme measures" against thieves, would they countenance the actions of any farmer whose "extreme measure" might contemplate the extreme penalty of death for a prospective thief or prowler? Even the sub-editor reacted this way to the publication when he said under cross-examination:

"I realised it was a serious matter endangering the lives of men. This struck me so when I read the article....."

"If Mr. Burnham had caused the wire on his fence to be electrified, this would have been a bad thing."

In his judgment, the trial judge, in interpreting and assessing with his jury mind how the ordinary reasonable man would react, found that all the meanings contended for on behalf of the respondent (set out earlier in this opinion) were borne by the libellous words—save one, viz., that at (d).

Dr. Ramsahoye, however, has asked this court to say that the words are not capable of these meanings. In so doing one has to be sure that the trial judge did not assess the imputation arising in a spirit either unusually suspicious or unusually naive, but between the two extremes, and considered the whole context of the words complained of. It would be wrong for him to attempt to construe the words as would a lawyer—".....the layman's capacity for implication" being "much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely, and unfortunately, as the 'law of defamation has to take into account, is especially prone to do so when it is derogatory." [Per Lord Devlin in *Lewis v. Daily Telegraph*, p. 277, supra.] The trial judge, therefore, in placing himself in the position of ordinary reasonable men and women of normal intelligence, with different temperaments and outlooks, would have to try to envisage what is the most damaging meaning they would put on the words in question.

Let me then look at the words complained of as a whole, to see from their context what defamatory meaning they are reasonably capable of conveying according to their ordinary and natural sense, and what are the implications and insinuations the ordinary man would reasonably read into them.

The almost sensational banner-spread caption—"P.M.'s COW ELECTROCUTED" - appearing as it did in a position of marked prominence

on the front page, must have had the desired effect of focusing the attention of all readers to an item of news likely to be of more than passing interest. The language used was unmistakable in its import.

It sought to bring to light the conduct of the Prime Minister in installing or permitting, or causing to be installed live electric wire of some destructive power around his spacious farm for the protection of his crops. That wire was set, or placed, or caused to be set or placed "near" to the fence of his farm situate aback of the Botanical Gardens (from common knowledge a public place to which the public has access); the Prime Minister's cow was electrocuted and died because it stepped on this live electric wire "installed" around his farm; the potency and destructive power of that wire was so great that it caused the cow which stepped on it to be thrown some 10 feet in the air "when it came in contact with the wire": the current had been "put on in full blast" because the crops of eschallots and tomatoes were "near their harvesting period"; and it was intended that this "live electric wire" should be the means of warding off prowlers and thieves from entering the said farm.

It is a statutory criminal offence, and a misdemeanour against the law of this country, for anyone to set or place, or cause to be set or placed any spring-gun, man-trap or other engine calculated to destroy human life or to cause grievous bodily harm, with intent that *it may*, or whereby it does, destroy or cause grievous bodily harm to a trespasser or other person coming in contact therewith. [*See s. 61(a) of Cap. 10.*] And a person so guilty shall be liable to a term of incarceration for five years. This provision of the law is illustrative of the way how certain acts which seek to endanger the lives of others are made criminal and punitive. But the pertinent question is: How would right-thinking members of society tend to view the conduct of the Prime Minister of this country who sets up such deadly trap calculated to destroy the lives of prowlers or thieves, or inflict grievous bodily harm on them, not within, but outside and "near" to the fence of his farm: not on his own land, but where the public has access, merely as a protection for his farm!

Would not the inference arise that as the "trap" was not in the farm itself or even on the fence, but "near" to it in a place that was public, that innocent persons could just as easily as trespassers come into contact with that "live" wire with as little chance of escape from its highly destructive electrical power? Was not then the act imputed of such a kind as would be thought of as "savage", "diabolical", or even "barbaric", and cause a substantial and respectable proportion of society to be so outraged by the import of such a dreadful deed, as to wish to despise and shun him? Surely it would not require an insight into the criminal law of this country for the ordinary man to feel that this must be conduct so heinous as to be deserving of punishment by the State, not only if someone were to be killed or injured, but because of the very high degree of prospective danger to which the public was exposed through an act which not only bore the characteristics of a

"nuisance" but was designed to destroy or inflict grievous bodily harm to human lives!

I entertain little doubt that the trial judge's estimate of the extent of the defamation is substantially within the true meaning and implication of the words used and therefore should not be disturbed.

Now to the second question at (b), as to whether the special plea, under *s. 11 of the Defamation Ordinance, 1959*, in mitigation of damages, was established.

Dr. Ramsahoye, as a preliminary to this question, argued that the trial judge erred in applying the provisions of *s. 12* of the said Ordinance to the plea under *s. 11*, and in so doing found that affidavits by the appellants or by anyone authorised by them setting out the facts relied on should necessarily accompany the offer of amends before the plea could be considered, to determine whether there was in fact an absence of malice or gross negligence. Counsel said that the trial judge totally confused the provisions of *ss. 11 and 12* and treated them as if they were together, and took the view that the statutory plea raised was not open because affidavits were not filed. This, he said, was enough to warrant a new trial, as the case was tried on a basic misconception, and the judge's judgment was infected by legal error.

Undoubtedly, there was a two-fold confusion in the mind of the trial judge when —

- (a) he thought that affidavits required under *s. 12* (which dealt with unintentional defamation and "true innuendoes") were also necessary under *s. 11* (where the defamation arose merely from the publication itself, and did not depend on the existence of extrinsic evidence to render the publication defamatory), and
- (b) when he gave the impression that publication without 'actual malice' and without 'gross negligence' could be equated with 'innocence'.

It would be necessary, therefore, to seek to ascertain whether the appellants' case was so prejudiced by this confusion as to require a new trial.

If there was a failure to consider what was relevant, and material and/or extraneous considerations in actuality deprived the appellants of the opportunity of having the issues under *s. 11* fairly determined, then a new trial would be required to remedy the defect.

The judgment reveals that immediately after his ruling that the appellants did not discharge "the burden placed on them by statute" for failure to file the affidavits, the trial judge, on the assumption that he was wrong, nevertheless proceeded to examine the evidence to determine its

significance and effect on the issue raised by the plea, and said this of the sub-editor's evidence:

"..... any reasonable person, much less a sub-editor who looks for libel in news items, could have seen that, if the facts in the news item were not true then there was libel staring him straight in the face. At the least, any experienced editor or sub-editor, looking at the offending article would have entertained some second thoughts as to believing that the contents were true even if he had confidence in his reporters.

"He himself said that as a careful editor he would like to know that what he published in his paper is practically true and as such he would make enquiries as to the truth of anything he may entertain doubts. Yet in this case, neither he (the sub-editor) nor anyone concerned with the paper made any enquiries to see if there was any truth in the facts contained in the news item. *This to my mind is not merely a case of failure to enquire. If it was a case of just failure to enquire then malice could not be imputed. But a failure to enquire as to the truth of the statement or to try to verify it may be so extreme that a defendant cannot be regarded as really believing his statement to be true, for a belief induced by continuously shutting one's eyes to the facts which tell in the opposite direction is not an honest belief. In fact it is no belief at all.* (Underscoring mine.)

"Now if the witness had wanted to check, he could have done so. He said that he saw no need to check as he believed that what was written in the news item was true and that he had confidence in his reporters. This surely does not come within the ambit of just failure to enquire, *but to my opinion is a case where he purposely abstained from enquiring into the facts and from availing himself of the means of information which he no doubt could have got with the slightest enquiry, and the slightest enquiry would have shown that the whole news item was fictitious.* " (Underscoring again mine.)

Implicit in this question is the finding that there was not only what amounts to 'actual malice' but also to 'gross negligence'. The appellants then could not have suffered in any way from any want of consideration of evidence advanced on their behalf. And despite the confusion which might have prompted a reference to, and misunderstanding of s. 12, what was vital in s. 11 was, in effect, understood, examined and dealt with (albeit *ex abundante cautela*), *and it was after doing this that the trial judge expressly concluded that the appellants had failed "to prove that the libel was inserted without malice and without gross negligence"* Were it not for this alternative exercise which, ensured that there was no prejudice to the appellants in regard to their special plea, it would have become necessary to order a new trial.

The trial judge then went on to consider the only other aspect of the plea, viz., whether the apology was sufficient. And this is what he said:

"I will now deal with the question of the apology. The apology should amount to a full and frank withdrawal of the charges or suggestions conveyed and contain an expression of regret that such charges or suggestions were ever made and must cover all the charges conveyed.

It should be so worded that an impartial person would consider it reasonably satisfactory in all circumstances. The apology should be given as much publicity as the original libel. For instance, if the libel appeared in a newspaper, the apology should be inserted in that newspaper, in as large a type and as prominent a position as the libel, and not so that people would not be likely to see it, but in a manner as to counteract as far as possible the mischief done by the libel and to be inserted in such a manner as to attract attention.

In this case the apology was located at the back page of the Sunday issue of the 'Mirror' of the 19th March, 1972, whereas the defamatory article was in the front page. This is tantamount to not giving the apology the same prominence as the libel."

For myself, I would not wish to condemn the sufficiency of the apology for the reasons so advanced by the trial judge, as there are other reasons which appear to me to be more cogent, with which I shall deal later.

The third ground of appeal attacks the quantum of award as being manifestly excessive, and such as no court could properly have made.

It is well settled law that an appellate court is always reluctant to interfere with a finding of the trial judge on any question of fact, but it is particularly reluctant to interfere with a finding on damages, especially in cases where damages are a matter of impression and of common sense. Of course if it is out of all proportion to the circumstances of the case, that would be another matter. In an action for defamation, the award of a judge is so much a matter of individual choice involving the exercise of a discretion that an appellate court would be particularly slow to disturb it except satisfied that he acted on a wrong principle of law, or has misapprehended the facts, or has, for these or other reasons, made a wholly erroneous estimate of the damages. [*See Davis v. Powell Duffryn,*] (1942) 1 All E.R. at p. 664]. It is enough that there exists a difference of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency. [*See Flint v. Lovell,* (1935) 1 K.B. at p. 360.

As LORD RADCLIFFE so eloquently put it in *Associated newspapers v. Dringle*, 1 1962) 2 All E.R. 737 (at p. 742):

"A trial judge's awarding damages for this kind of tort (defamation) is habitually allowed a certain pre-eminence for his assessment above the assessments that might independently commend them-

selves to an Appeal Court An Appeal Court rejects his figure only in 'very special' or 'very exceptional' cases.....A libel action is fundamentally an action to vindicate a man's reputation on some point as to which he has been falsely defamed and the damages awarded have to be regarded as the demonstrative mark of that vindication."

And in the same vein LORD HAILSHAM, in *Cassell v. Broome*, (1972) 1 All E.R. 818, examined the question as to whether a total award of £40,000 was so far excessive that twelve reasonable men could not have so decided, and said: [(1972) 1 All E.R. 818]

"I cannot disguise from myself that I found this an extremely difficult point in the case, and have only decided that the verdict should not be disturbed with great hesitation because I am very conscious of the fact that I would certainly have awarded far less myself, and possibly, to use a yardstick which some judges have adopted as a rule of thumb, less than half the £25,000.....These matters are very highly subjective, and I do not feel myself entitled to substitute my own subjective sense of proportion for that of the constitutional tribunal appointed by law to determine such matters. Quite obviously, *the award must include factors for injury to the feelings,.....or the reaffirmation of the truth of the matters complained of, or the malice of the defendant.* What is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages, in defamation are described as being 'at large'....." (Underscoring mine.)

And it is easy to see why damages must be 'at large', for apart from a number of other factors —

"the jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in court during the trial." [Per LORD ESHER, M.R., in *Praed v. Graham*, (1889) 25 Q.B. 1 at p. 53.

It would, therefore, be quite wrong to think that damages could be categorised within the confines of levels of awards previously made in other cases as if those constituted precedents to be followed. No such limitation in law exists, for each case must be considered in the light of all its relevant factors and prevailing circumstances, and without the impediments of inapplicable restraints. That is why in recognition of this freedom the law says that damages are to be "at large"—judged on the merits and the impression and common-sense of the particular case, which would take into account its special features, that is, the heinous nature of the defamation, the position and standing of the person defamed, the resulting harm and hurt caused, the motivation behind the publication, the extent of its falsity and

circumstances of aggravation, and the conduct of the defamers before action, after action, and in court during the trial, etc.

It should be here noted that whilst several aspects of aggravation appeared, there was no evidence for the imposition of exemplary damages, as contemplated by such cases as *Rookes v. Barnard and others*, (1964) A.C. 1129 and *Cassell v. Broome* (supra), and the trial judge correctly declined the invitation of counsel for the respondent to consider this aspect of damages.

But in aggravation of damages the trial judge could well, in my view, have taken into account certain publications in two issues of the 'Mirror' (tendered in evidence) which were capable of providing evidence of actual malice. If from them the existence of such an ill disposition by the appellants towards the respondent could be inferred (libel apart), the further inference would be open that the appellants wronged the respondent deliberately to hurt, distress and humiliate him, i.e., from an "indirect" motive, as evidenced by those two publications. When this was argued in this Court, Dr. Ramsahoye submitted that the respondent had not in any part of his pleadings alleged the existence of 'actual malice', and so this aspect of the case, he said, could not properly be looked at.

The case of *Smith v. Lewis*, (1917) 33 T.L.R. 195, however, leads me to the view that counsel's submission is untenable. In that case an important point of pleading was raised. Smith had sued Lewis for damages for alleged libel. The statement of claim alleged that the defendant "falsely and maliciously wrote and published" the words complained of. The defendant pleaded that such publication was on a privileged occasion, and set out the circumstances on which he based that contention. The plaintiff delivered no reply alleging express malice. When the pleadings had been opened, counsel for the defendant submitted that the case should be stopped. He contended that as the plaintiff had delivered no reply raising the issue of express malice, that issue was not raised by the pleadings, the allegation of malice in the statement of claim being merely formal. He referred to *Dawson v. Dover and County Chronicle (Ltd.)*, 29 T.L.R. 373. Counsel for the plaintiff argued that the issue of malice was raised as it was pleaded in the statement of claim, and the pleading ceased to be formal as soon as the defendant pleaded privilege. He referred to the *Annual Practice*, (1917) p. 364, and *Odgers on Libel*, 5th Ed., 648. And I quote from the report [(1917) 33 T.L.R. 195]:

"Mr. Justice Shearman said the case raised a very serious question. Certain text-books said that in such circumstances as existed in this case it was unnecessary for the plaintiff to allege express malice in a reply. On the other hand, he had been referred to *Dawson v. Dover and County Chronicle (Limited)* (supra). It was clear that in the course of the argument in that case LORD JUSTICE VAUGHN WILLIAMS expressed an opinion that no issue of malice could be raised unless it was specially pleaded in a reply. That was one of the grounds of his judgment. But when the judgments of the other Judges were examined it appeared that they expressly declined to go that length, and based

their decision on other grounds. The Annual Practice. 1917 (p. 419), treated the question as doubtful. On the whole he thought that it was not necessary in such a case for the plaintiff to plead malice in his reply to enable the issue of malice to be raised. There was an allegation of malice in the statement of claim, and since privilege was pleaded the particular issue of malice was defined. The defendant could have got any particulars of the malice which were necessary on the pleadings as they stood, because by the defence of privilege the allegation of malice in the statement of claim became not merely a nominal but an effectual issue. The case must therefore proceed."

In the issue of the *'Mirror'* of January 13, 1972, there was this signed letter:

"SPITEFUL TO BAN SPLIT PEAS AND POTATOES

"Dear Editor,

I consider the intention of the P.N.C. Government to place a ban on split peas and English potatoes malicious and spiteful against the Hindu and Muslim community. Hindus especially as is known, don't eat fleshy foods at their religious functions. Split peas and potatoes are two 'must' dishes in all their activities.

"The Prime Minister said he will save 12 million dollars in the country. I cannot see the sense of doing it: the idea is only to avail some money for someone else to make hauls as usual and inconvenience the public as well as making a few richer. Sooner or later it seems as if the small man will be given ration cards to purchase food rather than being a real man.

"The P.N.C. Government is installing oppression on our shoulders".

"Suppose, importers say they are not buying our sugar, rice and timber, what will we do with them? Turn around and eat them? Government should consider this."

Here obviously is a publication in which the words in their ordinary and natural meaning are clearly derogatory of the respondent. His integrity is flagrantly assailed by the imputation that his set purpose in saving 12 million dollars was ill motivated to provide an opportunity for others to enrich themselves unjustly. In this way, the appellants have unequivocally demonstrated a state of mind from which factual malice could be readily inferred.

Again, in the editorial of the *'Mirror'* of 15th May, 1972, there was the following publication:

"THE basis of the 'breakdown' must be traced in the history of the coming to power of the People's National Congress.

"THE People's Progressive Party, in our view, has always been and continues to be, the majority Party in Guyana. The P.N.C. in

order to capture political power, has played the most treacherous role to achieve this. The P.N.C. colluded with imperialism, planned and executed violence, and finally, although a minority Party, was able to entrench itself in power.

"THE 'breakdown of our society' commenced when the P.N.C, Anglo-US imperialism and local reaction launched total war against the P.P.P. and the majority of Guyanese. Since then, it has been accepted by some, that naked violence and the breakdown of law and order are a necessary aspect of Guyanese culture.

"ALTHOUGH the P.N.C. is becoming increasingly unpopular, it is a widely held view, that that Party would rig any future general election to maintain itself in power. It did it in 1968 and there is every likelihood that it will do it again.

"THE view is also held that if the PNC is fearful of not being able to successfully rig the next general election it will not hold it. Or, if it held a general election and lost, it would not relinquish power, for it would use the arms and police against the people, just as it would do if no general election was called.

"THEREFORE, when a governing Party behaves as the PNC does, and gets away with it, the society is 'sick, sick, sick', at its core.

"THE brutal attacks on nurses look like minor offences when compared to the vicious savage and sadistic rape of the nation by the P.N.C. since December, 1964.

"THE Mirror unreservedly and categorically denounces the violent attacks on our nurses. But we hasten to add that unless the P.N.C. ceases to thrive on the 'breakdown of our society', ordinary citizens will continue to be influenced by its behaviour and commit the most despicable crimes."

Is it possible to dissociate the scathing insinuations here made on the 'P.N.C from its leader and governmental head? Was it not intended to insinuate that the respondent in his said capacities was the person primarily responsible for the decadent state of affairs complained of?

My concern is not whether libel exists in either or both of those two publications (for damages must not be visited for other libels), but to ascertain whether they contain some demonstrative aspect of factual 'malice' capable of affecting damages. *Tindal, C.J.*, as long ago as 1843 laid it down in *Pearson v. Lemaitre*, 5 M. & G. 700 that—"Either party may, with a view to the damages give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter." This factual 'malice', in whatever form it appears, could not but serve to aggravate the quantum of damages, for in estimating the injury done to a plaintiff, it could hardly be fit to ignore "the spirit and intention" of a party publishing a libel. [See *Gatley on Libel*, 6th Ed., p. 1260.]

The trial judge viewed the matter this way:

"On the question of damages, LORD WATSON in the case of *Bray v. Ford*, (1896) A.C. 44 page 50 said, '*the assessment of damages does not depend on any legal rule.*' But in assessing damages a judge sitting both as judge and jury will naturally be governed by all the circumstances of the particular case. He is entitled to take into consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence of refusal of any retraction and apology and the whole conduct of the defendants for the time when the libel was published down to the very moment of the verdict.

"The judge may also take into consideration the conduct of the defendants before action, after action and in court at the trial of the action, and the judge should - as LORD RADCLIFFE in *Associated Newspapers v Doyle*. (1964) A.C. page 329 puts it - '*allow for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused.*'

"Dr. Ramsahoye referred me to a number of local cases and asked me to be guided by the tenor of these decisions:

"In *D'Aguiar v. Jagan*, (1963) B.G.L.R.404, the sum of one thousand dollars (\$1,000) was awarded whilst in *Ramsahoye v. Peter Taylor*, (1964) L.R.B.G. 329 where plaintiff did not suffer any humiliation, the sum of one thousand four hundred and forty dollars (\$1,440) was awarded.

"Again in *Dr. L Ramsahoye v. Taylor* (unreported), the sum of twenty thousand dollars (\$20,000) was awarded. This case he submitted was an entirely different one and the facts are also completely irrelevant. Here the defendant pleaded justification up to the last minute.

"Again in *D'Aguiar v. New Guiana Co. Ltd.*, (1963) B.G.L.R. 365, one of the defendants in this case, the sum of fourteen thousand four hundred dollars (\$14,400) was awarded. Mr. Luckhoo referred to the case of *Husbands v. The Barbados Advocate*, 12 W.I.R. where the sum of twenty thousand dollars (\$20,000) was awarded.

"I have considered these cases and have taken into account the circumstances surrounding these cases along with their peculiarities. This case, however, concerns the person of the Prime Minister of this State. He is not a University Lecturer as in the case of *Dr. L. Ramsahoye v. Taylor*, nor is the D.P.P. as is the case of *Husbands v. Barbados Advocate*, nor the leader of a minor opposition party as in the case of *D'Aguiar v. New Guiana Co. Ltd.* I have taken into account all the circumstances mentioned earlier and I would make an award of twenty-five thousand dollars (\$25,000) with costs to be taxed fit for two counsel."

To translate injury to an attack on reputation in monetary terms is at all times a difficult exercise. In this case, it could be seen from the above that His Honour was fully aware of what had taken place in the past in those libel actions to which his attention was directed, and had examined the awards in relation to the circumstances; although he was not required to restrict the exercise of his discretion by adopting what was done by others in different circumstances. At least he has chosen his award advisedly where the libel was of a serious nature and the conduct of the appellants could not be viewed but with sharp disfavour.

It can hardly be disputed that the public conduct of a public man might be discussed with the fullest freedom. It might be made the subject of hostile criticism and of hostile animadversions provided the language of the writer is kept within the limits of an honest intention to discharge a public duty and not as a means of promulgating defamatory and malicious accusations. [See *Seymour v. Butterworth*, (1862) 176 E.R. 166.] Whoever fills a public position renders himself open to public reference, and if any part of what he does is wrong, he must accept the attack as a necessary, though unpleasant, circumstance attaching to his position. [See *Kelly v. Sherlock*, (1865) L.R. 1Q.B.686.]

But by the same token, if a false and unwarranted attack is maliciously levelled at an individual who holds high office, designed not only to discredit him, but to encourage disrespect for his office through allegations of disreputable conduct in that capacity, damages must be suitably assessed to be a sufficient demonstrative mark in the vindication of his reputation, clothed as it may be with the garb of that office.

Let me now look at the circumstances of the publication in the light of the evidence of the sub-editor, Mr. Mohamed Ali, to see what foundation there is for Dr. Ramsahoye's oft repeated submission that, "No court could properly have made the said award if the retraction of the publication had been taken into account."

One who defames another must, if he wishes to receive the full benefit of contrition, hasten to apologise as soon as is practicable after he realises that a wrong was done. In this case, the apology was not published until 39 days after the libel, and 11 days after a writ was filed. Why was there this delay, bearing in mind the provision of the *Defamation Ordinance, 1959*, that "if the newspaper in which the said libel appeared is ordinarily published at intervals exceeding a week," the publisher of the libel should offer "to publish the apology in any newspaper to be selected by the plaintiff in the action?"

In this case, if the falsity of the news item was known at the time of publication, or realised very shortly afterwards, the retraction should have been made promptly. The sub-editor admitted that he was seised of the defamatory nature of the publication from the beginning. He said (to quote his words): "I realised it was a serious matter endangering the lives of men.

This struck me so when I read the article.....if Mr. Burnham had caused the wire on his fence to be electrified; this would have been a bad thing." But at the time of the publication, surely he must have appreciated that readers could hardly have failed to draw the inference that the Prime Minister was in one way or another responsible for the destructive electrical power contrivance which it was said was put into operation at full blast to protect his farm. Which workman would be so bold as to install such a hazard except ordered by his master? If then he must have realised that the publication was in reality "of and concerning the Prime Minister", then he could hardly have failed to appreciate that it was libellous of the respondent except it was true and could be justified. But he said at one stage that he believed at what was published was true! The law is, that although the fact that a defendant has no reasonable grounds for believing his statement to be true is not in itself conclusive evidence of malice, yet honest belief must be founded on some reasonable basis, and therefore in determining whether such honest belief did in fact exist, the judge would be entitled to take into consideration the grounds on which it was founded. The defendant's belief may have been so groundless that the judge may come to the conclusion that he could not, and did not, honestly believe the statement he made to be true, and so from that imply 'malice' on his part.

LORD HERSCHELL, in *Derry v. Peek*, [(1889) 14 A.C. at pp. 369. 375, said:

"When a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained."

Even at trial the appellants (at least at one stage) were prepared to persist in their original allegations and virtually sought to justify what was admittedly false. This is undoubtedly a deeply aggravating factor and shows that there could not have been a sincere intention to repent of the libel, and that their apology was not seriously meant. The evidence that, "Until this moment I believed what the reporter wrote was true as regards the whole article", makes but a sham of the apology, for to say in one breath there was regret, and in the next there was belief in what was said renders the retraction farcical and no more than a course adopted for expediency. And this is borne out by his further statement: "At this stage I was not sorry for the publication....., but my lawyers told me that the matter might be libellous. As a result, I am prepared to be guided by them. I am personally apologising. I now say I am sorry for the publication."

In the apology published on the 19th March, 1972, it was stated that, "The Mirror is now fully satisfied that the said statements 'were wholly

unfounded'. From the sub-editor's evidence, the word "now" would appear to be questionable, for he had never made any checks, had always relied on his reporter, and at one stage at trial believed the report to be true, but eventually at trial made this confession: "I say now the publication is fictional. I did not check." When then did he become aware of its falsity? In all the circumstances, would it not be open to draw the inference that from the beginning he knew it to be fictional, and not subsequently? He himself said:

"As an individual I would not have published the article in which the Prime Minister has electrified his fence, but as an editor I would have to publish it. This news item was published on the first page because it made good reading from my point of view."

In all the circumstances examined, the retraction could therefore hardly have possessed the value which counsel has sought to place on it.

Perhaps it would be well to remember the advice of LORD DENNING that, "Newspapers must not speak ill about people for the spice it gives their readers," and the warning of *Farwell, L.J.* in *Hulton v. Jones*, (1910) A.C. 20 that, "Such newspapers as publish libellous statements do so because they find it pays: many of their readers prefer to read and believe the worst of everybody, and the newspaper proprietors cannot complain if juries remember this in assessing damages."

One other matter is now left for consideration, viz.: Were any fundamental rights of the appellants to which they were entitled under *Art. 12 of the Constitution* contravened?

In their grounds of appeal the appellants said that the award was a violation by the High Court itself of the constitutional guarantee provided by *Art. 12 of the Constitution*, in that the award could not with any justification have been properly made or given by any court under the law of libel applicable to Guyana by virtue of the provisions of the *Civil Law Ordinance Cap. 2*, and continued in force by the *Guyana Independence Order, 1966*. Under the *Constitution of Guyana, Art. 12* says:

"(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 —

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons . "

Dr. Ramsahoye's argument was that: "The law of libel is now set against *Art. 12 of the Constitution*.....The law in this country is like this. You get blanket protection for what you say. If you make an award or do anything that is not embraced in the law of defamation you contravene the art. If you do anything that is not tenable under the law then Art. 12 is contravened. If a court does something that is not tenable under the law of libel the court contravenes a fundamental right the award in this case is in its nature exemplary or punitive whereas it should be nominal or at the highest general and for that reason impugns the provision of *Art 12(1) of the Constitution of Guyana*The trial judge himself in determining the actual merits of the case rejected the defence as a result of a misapprehension of the provisions of ss. 11 and 12 of the *Defamation Ordinance, 1959*, and founded the award on erroneous legal principles thereby contravening the provisions of *Art. 12(1) of the Constitution* and this contravention went against both appellants.

Few would wish to be deprived of the cherished rights conferred under this article. No court would think of denying them to anyone. But first the article must be understood. In recognising the value of enjoying the various facets of "freedom of expression", that article seeks to preserve what is vital to a free society wherein the right to speak, to propagate and to circulate ideas belong to everyone and will be protected for everyone subject only to the qualifications under the very article itself.

What it is sought to accomplish here is what the common law of England has similarly devised in another way but without having it embodied in a constitutional document or in any particular rule of statute.

Blackstone, in his classic statement, sets out the method of achieving this result. His words are:

"The liberty of the press..... consists in laying no previous restraints upon publications, and not in freedom from censure from criminal matter when published. Every free man has an undoubted right to lay what sentiment he pleases before the public: to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser,.....is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and Government. But to punish..... any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of pernicious tendency, is necessary for the preservation of peace and good order, of Government and religion, the only solid foundations of civil liberty. Thus, the will of individuals is still left free: the abuse only of that free will is the object of legal punishment."

Odgers puts it this way:

"Our present law permits anyone to say, write, and publish what he pleases; but if he make a bad use of this liberty he must be punished. If he unjustly attack an individual, the person defamed may sue for damages; if, on the other hand, the words be written or printed, or if treason or immorality be thereby inculcated, the offender can be tried for the misdemeanour either by information or indictment."

Art. 12 similarly acknowledges the right of a citizen to speak or write without hindrance what he chooses provided the "law", as described under the Constitution, is not infringed, and this would include the law of defamation.

For the appellants then to claim any relief under this article, they must show that they were hindered in the enjoyment of the freedom of expression, which covers freedom to hold opinions and to receive or impart ideas and information without interference. The steps taken by an editor of a newspaper to impart ideas and information would include the expression of ideas and information in words, followed by the printing of such words in the paper, followed by the publishing of the paper and followed by circulating it.

But nowhere in any proceedings brought, nor in any allegation made before the learned trial judge, was it alleged that there was any hindrance in any way of the rights set out above and encompassed by art. 12.

On the contrary, the case before the trial judge was not that anyone had wronged the appellants constitutionally or otherwise, but that the appellants had wronged the respondent by injuring his reputation in contravention of the law of libel, which is a qualification to their right of freedom of expression. That wrong there was the appellants admitted, and sought to make amends. Whether their offer of amends was adequate, or whether their plea that the libel which they admitted was published without actual malice or without gross negligence, and whether the apology made was sufficient, was an issue which fell within the civil law of libel and not within the confines of constitutionality. So that the consideration of the existence or non-existence of any fundamental rights under the Constitution becomes wholly irrelevant. Had not the appellants themselves, as already pointed out by their unequivocal admission of liability, renounced any claim of right to any protection under art. 12? And, in any event, where is the hindrance complained of?

I find Dr. Ramsahoye's submission to be not only untenable but grossly misconceived and patently unmeritorious. He is virtually asking this court to rewrite art. 12 to say that whenever the High Court decides a point in an action of defamation wrongly, that would amount to a contravention of art. 12; but to what purpose, except it be only to provide for a further appeal which at the moment does not exist? To put the matter simply, art. 12 is only concerned with an act of hindrance which interferes with the enjoyment

of free speech, but not when there has been an abuse of free speech to injure the reputation of another.

In the present case, there has been no hindrance, and the right to free speech has been abused, so that no contravention could possibly arise if the meaning of this article is not to be wholly distorted.

But before leaving the matter I would refer to a case in India, that is, the case of *Jang Bahadur v. Principal, Mohindra College*. *Teja Singh, C.J.* said that, apart from the qualifications contained in clauses (2) to (6) of art. 19, there was the further qualification that the rights conferred by art 19(1) must not violate the rights of others. In that case, the petitioner had written a highly defamatory circular defaming, among others, the respondent, who was the Principal of the College in which the petitioner was studying. The respondent rusticated the petitioner, who contended that such restriction violated the freedom of speech guaranteed to him under art 19(1) (a).

In repelling the contention, the court said that the rights conferred by art. 19(1) were subject to the qualification that they did not violate the rights of others; thus the right to move freely throughout the territory of India did not confer the right to walk over other people's property. In any event, art. 19(1)(a) did not entitle the petitioner to defame the respondent, and the action taken by the respondent was in the interest of discipline and did not violate art. 19(1)(a).

In the result, I find no difficulty in overruling this submission and the others, for the reasons already stated, and would dismiss the appeal, with costs.

CHIEF JUSTICE:

In this appeal which arises out of an action for damages for libel brought by the Prime Minister of the Country against a Company which is the printer and publisher of a newspaper named "The Mirror", and the Editor of that newspaper. I agree with the conclusions and the reasons advanced therefor by the learned Chancellor.

In the court below the appellants (defendants) set up the plea of mitigation of damages to the alleged libel under S. 2 of *LORD CAMPBELL'S Libel Act, 1843*, which is reflected and enacted in *Section 11 of Ordinance No. 17 of 1959 of Guyana*.

Section 11 of the Ordinance reads as follows:—

11(1) "In any action for libel contained in any newspaper, the defendant may plead that the libel was inserted in that newspaper without gross negligence, and that, before the commencement of the action or at the earliest opportunity afterwards he inserted in the newspaper a full apology for the said libel, or, if the newspaper in which the said libel appeared is ordinarily published at intervals exceeding one week, had offered to publish the apology in any newspaper to be selected by the plaintiff in the action.

- (3) No defendant in the action may file any such plea without at the same time making a payment of money into court by way of amends for the injury sustained by the publication of the libel, and every plea so filed without payment of money into court shall be deemed a nullity and may be so treated by the plaintiff in the action".

It is trite that in the law of defamation an apology affords no defence to an action for libel or slander. A defendant may, however, prove in mitigation of damages that he has published or made a retraction of or apology until after the writ was issued. It follows therefore that this plea which is afforded to a defendant in an action against a newspaper is not *strictu sensu* a defence to liability but is loosely referred to in the text books as a defence under the section," and is in reality a plea in mitigation of damages, and in that sense if proved to be genuine is a defence to any award of substantial damages claimed by a plaintiff. In *Oxley v. Wilkes 1898 2 QBD 56 at p. 60, Chitty L.J.* stated "if the matters which by the statute be pleaded be proved, they amount to a defence". I take that however to mean a defence to an award of damages, for even if successful the defamatory matter remains a libel, the damages for which are satisfied by the amount paid into court. For as *Vaughn Williams L.J.* said in the same case "if liability is admitted payment into court may be pleaded in libel as in any other action. A defence does not the less admit liability because together with such an admission, it states facts in mitigation of damages". Quite apart from this provision however, a defendant may show in mitigation of damages that he has published or made a retraction of or apology for or offered to make such apology or retraction even though he did not publish, make, or offer to make such retraction until after the commencement of the action.

The appellants however proceeded under s. 11 of Ordinance No. 17 of 1959; and it is clear and has been conceded by counsel for the appellants that the onus was placed upon them to establish on a balance of probabilities —

- (a) That the libel was inserted in the newspaper without actual malice and without gross negligence.
- (b) That they published a full apology before the commencement of the action or at the earliest opportunity afterwards.
- (c) That at the time of the filing of the plea they made a payment of money into court by way of amends for the injury sustained by the publication.

In this case no letter of demand was sent by the respondent (plaintiff) to the appellants complaining of the libel before the action was filed, and the learned judge found therefore in favour of the appellants that the appellants had satisfied the requirement of the statute in relation to the issue in (b) (*supra*) as to the earliest opportunity, and this finding has not been contested in the appeal. The learned judge, however, although he confused s. 11 with s. 12 of the Ordinance, which was introduced into this Country in 1959, based

on *s.4 of the Defamation Act, 1952*, and deals with innocent and unintentional publications of defamatory matter, nevertheless addressed his mind correctly to the requirements of s. 11 of the Ordinance in respect of the plea of mitigation of damages, and arrived at the conclusion that the appellants had failed to prove that the libel was inserted without malice and without gross negligence and that the apology was not a full and frank apology. It need hardly be observed that the two sections are mutually exclusive and s. 12 of the Ordinance had no bearing on the matter.

It is submitted in this court that the trial judge erred in holding that the statutory defence set up by the appellants (defendants) had not been established by them in that he had not discussed the question of malice, or indeed of gross negligence in his decision before arriving at his conclusion, nor had he expressly stated that he had not accepted the evidence led by the appellants (defendants) through the mouth of the sub-editor of the newspaper.

When the decision of the learned trial judge is read it is revealed that he analysed the evidence led by the appellants, found that the sub-editor had not shown contrition, and applied his mind to the question whether the appellants had satisfied the requirements of s. 11, and came down on the side that they had failed to do so. He then proceeded to award substantial damages having taken all the circumstances of the publication into consideration, and specifically stated that he was not awarding exemplary damages i.e. damages on a punitive basis.

In speaking of the degree of cogency which evidence must reach in order to discharge the burden of proof in a civil case *Denning J.* (as he then was) in *Miller v. Minister of Pensions* [(1947) 2 All E.R. 372 at p. 373-4] stated:—

"That degree is well settled. It must carry a reasonable degree of probability not so high as is required in a criminal case.

If the evidence is such as a tribunal can say: 'We think it is more probable than not', the burden is discharged, but if the probabilities are equal it is not".

In *Vol. 15 of the Halsbury's Laws of England 3rd Edn. at paras. 488-492*, it is stated that the general rule is that he who asserts must prove, and a distinction is to be drawn between proof of issues, and adducing evidence during the various stages of the trial. The former burden is fixed at the commencement of the trial by the state of the pleadings, and never changes under any circumstances whatever; and if, after all the evidence has been given by both sides, the party having this burden on him has failed to discharge it, the case should be decided against him. The latter burden may shift from one party to the other, or may remain suspended between them; it has been judicially described as a provisional burden which is raised by the state of the evidence, from which the court may draw an inference one way or the other but is not bound to do so. This burden rests upon the party who

would fail if no evidence at all or no more evidence as the case may be, were adduced by either side. In other words the burden of adducing evidence rests before any evidence whatever is given, upon the party who has the burden of proof upon the pleadings that is upon the party who asserts the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given if no further evidence were adduced by either side.

The evidence in this case must therefore be analysed to see whether the appellants on whom the legal burden was placed to show that the publication had been made without actual malice and without gross negligence and a full apology made, had begun to discharge that provisional burden by first adducing evidence of the absence of malice and gross negligence and a full apology made. As *Denning J.* (as he then was) explained it in *Huyton-With-Roby U.D.C. v. Hunter* (1955) 2 All E.R. p. 398 at p. 400 where the question was whether the Local Authority in an action for charging *frontagers* with the cost of making up a road had proved that it was not a street repairable by the inhabitants at large, they were called upon to prove the negative, that it was not repairable by the inhabitants at large. That was the legal burden which rested on them throughout the case from beginning to end. He went on to say that although the legal burden rested throughout on the Local Authority, they had gone some way to discharge it when they called evidence to show that no public money had ever been spent on the road. When this was done, a provisional presumption arose that it was not a public road, but this was by no means conclusive. This learned judge then put the legal situation graphically when he stated —

"As the case proceeds, the evidence may first weigh in favour of the view that it is not a public road, and then against it, thus producing a burden—sometimes apparent, sometimes real—which may shift from one party to the other, or may remain suspended between them. That is not a legal burden, however, but only a provisional burden—a burden raised by the state of the evidence—from which the court may draw an inference one way or the other, but is not bound to do so. At the end of the case the court has to decide as a matter of fact whether the road is repairable by the inhabitants at large or not. If it can come to a determinate conclusion, no question of the legal burden arises; but, if at the end of the case the evidence is so evenly balanced that the court cannot come to a determinate conclusion, the legal burden comes into play and requires the court to say that the local authority have not proved the case".

In the present appeal as I understand it, where the legal burden was placed on the appellants to establish that they had satisfied the requirements of the statute, they had in fact to establish a negative i.e. that the publication was made without malice and without gross negligence, and a full apology i.e. a not insufficient apology made. In other words those matters were presumed

to exist and if, at the end of the day they had not discharged their initial burden of adducing evidence showing that these matters did not exist.

Now to an analysis of the evidence and the law relating thereto to see whether the appellants had discharged the legal burden placed upon them and in so attempting whether they had surmounted the first hurdle of adducing evidence in relation to the negative averment or to put it another way had discharged the provisional burden as *Denning, L.J.* termed it.

Malice in this connection in the law of Defamation is known as actual or express malice and does not necessarily mean personal spite or ill-will. As the learned authors of *Gatley on Libel and Slander*, 5th Ed. p. 564. have stated, "Malice in the actual sense may exist even though there be no spite or desire for vengeance in the ordinary sense. Any indirect motive other than a sense of duty is what the law calls malice. Malice means making use of the occasion for some indirect purpose." Defamation inspired by malice loses its protection of privilege, and it is the case dealing with the defence of qualified privilege where the plaintiff is called upon to show malice existing in the mind of the defendant at the time of the publication that must be consulted in order to ascertain what in the particular circumstances would amount to actual malice.

In *Clark v. Molyneux*, (1877) 3 Q.B.D. 237, *Brett, L.J.* stated that the defendant is not entitled to the protection of privilege if he uses the occasion not for the reason which makes the occasion privileged, but for an indirect or wrong motive, and *Cotton, L.J.* described the motive as an improper motive. In the South African case of *Rose v. Brewer*, (1933) C.P.D. 49. the court adopted the view of *Barnwell, L.J.* in the aforementioned case and described it as some motive other than that which alone would excuse him. The indirect or improper motive may be proved by intrinsic evidence which consists of the terms of the defamatory statement itself, and which indicates the mind of the writer at the time of the publication. In this case the language of the writer was so excessively strong and violent against the respondent, who happened to be the Head of Government, that in my opinion it can be safely presumed that there was malice existing in the mind of the appellants who, on the pleadings, admitted the publication. Justification for this view falls from the lips of the appellants' witness who testified that when he read the news items he realised it was a serious matter endangering the lives of men. The extrinsic evidence of malice emerges from the evidence of a sub-editor who gave evidence on behalf of the appellants and who stated that when the reporters bring in copies of reports and news, they are submitted to him and he checks for grammatical mistakes and for libel. His evidence is that when he checks for the latter he looks "for anything that is in bad light for any person's character". This statement by him could bear no semblance to the truth for, as the learned judge pointed out, there was a libel staring him in the face, which reflected on the character of perhaps the most important member of the community, yet he proceeded to publish it, on his own admission, without inquiry as to its veracity or without reference to the editor. His excuse for

not referring the news item to the editor was as lame as it was audacious, when he said that he did not do so because he felt that the Prime Minister was not connected in any way with the matter. He thought that the cow was the respondent's cow and the farm belonged to him, and the electrifying of the fence was done by a workman, and the Prime Minister was not personally involved, as he was too busy a person. How he could reasonably have reached this conclusion is astounding, and surpasses my comprehension as the offending publication specifically mentions the Prime Minister and states that the cow was electrocuted when it stepped on a live electric wire surrounding the farm of the Prime Minister, which had been installed for the purpose of warding off prowlers and thieves from entering the Prime Minister's private farm. He however, did not insert in the publication that a workman was responsible for the electrification of the wire, nor did he insert his present statement that at the time of the publication he believed the electrification was done without the Prime Minister's knowledge. He could not explain why he believed that the electrification of the wire had been done and the current put on at full blast by a farm worker. I suggest that this explanation proffered by the sub-editor is incredible and would not have fooled a ten-year old child. His statement that he did not think that people reading the newspaper would have thought that the Prime Minister was involved cannot bear scrutiny, and in my opinion all this evidence by him that I have set out was strong evidence of the actual malice that existed in his mind and that of the appellants (who must bear the responsibility) at the time of the publication, rather than any proof of the absence of malice. It appears to me that the evidence of this witness did the appellants' case more harm than good, more especially when he stated that the news item was not referred to the editor, the first-named appellant when he overlooked the fact that in the pleadings the appellants had admitted that they were responsible for the offending publication.

There is this other aspect of the matter that in the apology which appears in the amended defence the appellants had stated that "*The Mirror* is now fully satisfied that the said statements were wholly unfounded and desires to express its regret to the Prime Minister", yet at the trial the subeditor in his evidence stated that no inquiries up to the present date had ever been made and he believed that publication to be true. It seems to me to be pellucidly clear that the apology was saying that inquiries had been made and as a result the appellants were satisfied that the statements in the offending publication were without foundation, yet here was the sub-editor stating on oath that no inquiries had been made and he believed the publication to be true. This to my mind was strong evidence of actual malice existing at the relevant time in the mind of the appellants at the time of the publication. Before the appellants could begin to discharge the burden placed upon them they would have had to have shown that they honestly believed that the publication was true, and that belief was based on reasonable grounds. It could not be seriously contended that there were reasonable grounds for believing the publication to be true when no inquiries whatever

as to its veracity had been made by anyone. In *Clark v. Molyneux* which was a case where the defence of qualified privilege arose for consideration, *Brett L.J.* in the course of his judgment said "I wish to remark that a person may honestly make on a particular occasion a defamatory statement without believing it to be true, because the statement may be of such a character that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it". This principle could however have no application to the circumstances of the present case where there was no duty-cast on the appellants to make a publication of this character to a particular individual who ought to be informed. This is not such a case, this is a case of publishing a defamatory statement of the most damaging character of a highly placed individual to the public at large and to whom the appellants were under no duty to communicate. On the other hand the fact that the appellants made no inquiries to verify the truth of the libel in publishing it on information received from obviously unreliable sources, may be a relevant consideration for the jury in determining the question of malice, for as *Scrutton L.J.* in *Lyle Samuel v. Odhams Press* [(1920) 1KB 135 at p. 149] stated:—

"The informant may be a person who has been convicted of perjury, or a well-known libeller who has frequently been cast in damages; he may be a person of such a character that, if called as a witness, any jury would say that anyone who acted on that person's information deserved what happened to him".

In this case the appellants have not produced as a witness the reporter who it is alleged gave the information to the sub-editor nor have they disclosed to the court even his name.

On a survey of the evidence of the sub-editor which consisted of a series of contradictions, inconsistencies and incredible statements, the inevitable conclusion must be that the appellants knew that the news item was false at the time of the publication or at the least that they had no genuine belief in its truth when they made it, which would be conclusive evidence of malice, *Clark v. Molyneux*. It must not be overlooked that in relation to proof of malice each piece of evidence must be looked at separately, and even if there are a number of instances where a favourable attitude is shown, one case tending to establish malice would be sufficient evidence on which a jury could find for the plaintiff, per LORD PORTER in *Turner v. MGM* (1950) 1 All E.R. 449 p. 455.

Notwithstanding that the evidential burden had not shifted onto him, the respondent nevertheless strengthened his position in relation to the presence of malice in the mind of the appellants, by introducing into the evidence issues of the same newspaper published both before and after the offending publication, which showed that the appellants were carrying on a campaign of acrimonious attacks on the policy of the Peoples Notional Congress Government which is the ruling political party in power in the

Country and of which the respondent is the leader and as a result Prime Minister of this Country.

The learned trial judge however thought quite erroneously and I quote his language "to say that these derogatory statements made against the party of which the Prime Minister is the leader is defamatory against the Prime Minister as a person would be stretching it too far, and it cannot be said that anything derogatory of the party is derogatory of the leader of that party". In so saying the learned judge missed the point completely as to the purpose for which these articles were tendered in evidence. They were not tendered as statements defamatory of the Prime Minister as a person or otherwise, they were tendered for the purpose of showing the animosity that the appellants held for the respondent, in order to establish the malice that existed in their mind at the time of the offending publication. In attacking the policy of the People's National Congress Government of which the respondent was leader, the appellants were by inference including an attack on the respondent who as leader of the party must bear some responsibility for its policy; nor according to the law need those articles include statements defamatory of the respondent, it would be enough if they were derogatory statements which would reveal the animus of the appellants towards the respondent. As long ago as 1843 *Tindal C.J.* in the celebrated case of *Pearson v. Lamaitre* (1843) M & G 700 laid down the correct rule that "Either party may give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter, but that, if the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of it. And if such evidence is offered merely for the purpose of obtaining damages for such other injury, it will be properly rejected". Thus the learned authors of *Mayne & McGregor on Damages*, 12th Edition at 889 and paras. 890 and 891 point out that malice may be shown by the defendants' conduct generally, and this may be shown by any other derogatory statements made of the plaintiff by the defendant. The author makes it clear that other derogatory statements are admissible whether prior or subsequent to the statements sued upon, and even although not in substance the same as or related to the statement sued upon. It was *Tindal C.J.* in *Pearson v. Lemaitre* who cited the words of LORD ELLENBOROUGH in *Rustel v. Macquister*, 1 Campb 49 that "you may give in evidence any words, as well as any act of the defendants to shew quo animo he spoke the words which are the subject of the action", and this learned judge went on to say "But upon principle, we think that the spirit and intention of the party publishing a libel, are fit to be considered by a jury in estimating the injury done to the plaintiff; and that evidence tending to prove it, cannot be excluded simply because it may disclose another and different cause of action".

As to the aspect of gross negligence, the appellants through the subeditor have admitted that no inquiries of any kind were made as to the veracity of the statement. The sub-editor went so far as to say that it had

never been submitted to the editor for review. According to him in relation to things like libel the editor consults the lawyers, yet a news item such as this containing what was obviously a libel did not find its way to the editor. Such a statement of affairs cannot then reveal an absence of gross negligence but rather a state of mind of recklessness in the publication. Gross negligence in the publication of a libel is interwoven with the question of malice and the learned author of *Gatley*, 5th Edn. at p. 568 para. 1039, reminds us that if a man through anger or gross prejudice has allowed his mind to become so obsessed as to cast reckless aspersions on others which but for such a state of mind he could not have honestly believed to be true, the jury may well find that he has acted maliciously.

Was the apology full? *Odgers on Libel and Slander* suggests that in order to be full the apology need not be an abject one, but it does at least require a complete withdrawal of the imputation and an expression of regret for having made it. The apology does express regret and apologises, for any embarrassment suffered by the respondent and any inconvenience which may have been caused to him, but it does not demonstrate a complete withdrawal of the imputation which the offending publication sought to disseminate as it omits its last paragraph, which is perhaps the most damaging statement of all, and that is that the unfortunate cow which was only one in a large herd, came near to the fence to graze but was thrown some ten feet in the air when it came in contact with the wire. Implicit in that statement is the further suggestion that other cows in the herd might suffer a similar fate if any of them happened to come in contact with the wire.

The offending publication appeared on the front page of the newspaper for which a banner head was reserved. In bold type it read "PM'S COW ELECTRO-CUTED" but in contrast the apology appeared on the back page under the heading "Apology". It is at once noticeable that while the abbreviation 'PM' on the front page might at once attract the attention of the reasonable reader it cannot be said with equal conviction that the word "Apology" at the back page would attract the notice of such a reader, as he might see the caption but not bother to ascertain to whom the apology is being made. One would expect that if the apology is to occupy a place of equal prominence in the newspaper as the offending publication *Lafone v. Smith* (1859) 4H & N 159, that it would have appeared on the front page under a similar caption that would clearly demonstrate that the apology referred to the Prime Minister. For these reasons then the apology could not be said to be a full apology. My conclusion must be that in attempting to discharge the legal burden of proof placed upon them by the statute the appellants did not even reach the first stage in their task of discharging the provisional or evidential burden and there is no position here of the burden remaining suspended between the parties. No question therefore arises as to the difficulties experienced by an appellate court (which has not seen and heard the witnesses) when a judge fails to state whether he has accepted certain evidence or not, or when the matter turns on the credibility of witnesses, for as the matter now stands I hold as a matter of law that the evidence led by

the appellants was not sufficient to discharge the initial burden cast upon them. Furthermore the respondent by effective cross-examination through his counsel of the sub-editor and the introduction of other issues of the same newspaper was able to show the existence of strong and positive evidence of actual malice and gross negligence. I hold that the learned judge was right when he found that the appellants had failed to prove that the libel was inserted without malice and without gross negligence and that the apology was not a full and frank apology. The judge examined the popular innuendoes pleaded by the respondent and arrived at the conclusion that with the exception of (d) of paragraph 4 all of them were capable of the inference put upon them by the respondent and I cannot say that he was wrong. Furthermore, I have no doubt in my mind that right thinking members of society when reading the article would understand the words in their ordinary and natural meaning to convey the interpretation as set out in the innuendoes, any one of which could give rise to an award of heavy damages if the jury found that the words did in fact convey that meaning.

The learned judge then proceeded quite rightly to take the apology for what it was worth into account in his consideration of the mitigation of damages, and assessed substantial damages to the tune of \$25,000.00 *Limon v. Bennett* (1900) 21 NSWLR 164.

It should be observed at this point that it has been laid down that if at the trial, a defendant pleading the statutory apology fails to prove either the absence of malice or the absence of gross negligence or the sufficiency of the apology, the jury must assess the damages irrespectively of the sum paid into court, and the plaintiff is entitled to judgment for such sum as the jury award, even though the sum awarded be less or no greater than the amount paid into court. See the following cases mentioned for this proposition in "*the Law of Defamation*" by *O'Sullivan & Brown at p. 124. Oxley v. Wilkes* (1898) 2 QB 56, *Jones v. Mackie* (1867) LR 3 Exch., *Veale v. Reid* (1904) 117 LTJ 292.

It is submitted in this court that the award is wholly excessive and completely out of proportion to the injury suffered. It is urged that no actual damage was proved to have been suffered by the respondent and that as the learned judge did not award exemplary damages i.e. damages on a punitive basis it must follow that the damages are wholly excessive. The law on this topic is as clear as it can be and has always been considered to be accurately stated by *Scrutton L.J. & Greer L.J.* in the celebrated case of *Youssouf v. MGM* (1934) 50 TLR 581. The former in the course of his learned judgment said:—

"Then one comes to the third point, and that is the amount of damages. It is the law that in libel, though not in slander, you need not prove any particular damage in order to recover a verdict. What, then, is the position, the jury being the tribunal in libel or no libel, and, following from that, the tribunal as to the

damages caused by libel, whose verdict is very rarely interfered with by the Court of Appeal? What have the jury to do? They have to give a verdict of amount without having any proof of actual damage. They have to consider the nature of the libel as they understand it, the circumstances in which it was published. and the circumstances relating to the person who publishes it, right down to the time when they give their verdict, whether the defence has ever been withdrawn the whole circumstances of the case. It is not the judge who has to decide the amount. The constitution has thought, and I think there is great advantage in it. that the damages to be paid by a person who says false things about his neighbour are best decided by a jury representing the public, who may state the view of the public as to the action of the man who makes false statements about his neighbour, the plaintiff. It is for that reason that it is extremely rare for the Court of Appeal to interfere with the verdict of the jury as to the amount of damages when the libel is established. It is very often the case that the individual judges of the Court of Appeal, if they had been asked their verdict on the amount of damages, would have given a smaller sum. Sometimes they would have given a larger sum, but the question is not what amount the judges would have given. The question is what amount the jury, as representing the public, the community, have fixed, and it is extremely rare to have that amount interfered with by the court A test has been formulated, and it is this, as has been correctly stated several times: the courts will interfere only if the amount of damages is such that in all the circumstances no twelve reasonable men could have given it. If the court comes to that view, it will interfere with the verdict, but even then it cannot fix the amount itself, but must send the case back to another jury who may very easily repeat the first verdict, and the court cannot go on sending the case back to a jury until at last they get a verdict with which the judges agree. Those are the reasons which justify the relation of the Court of Appeal to the amount of damages found by juries" .

The latter also expressed the view that —

"if the Court of Appeal comes to the conclusion that the damages are so large that no reasonable jury could have given them without taking into consideration something which they were bound to exclude from their consideration, or are in any other way unreasonably excessive, the Court of Appeal is entitled to interfere and order a new trial on that ground, however unfortunate it may be for the parties if they are compelled to do so".

Applying that test to this case, I find it impossible to say that the amount of damages awarded is such that no reasonable jury could have given it.

The learned judge was entitled to take into consideration in his assessment the high position of the respondent in the community, the grave and serious injury to the respondent both in his personal capacity and that of his office and which must have found its way not only throughout the whole Country but to all the Countries to which the newspaper was sent making it more difficult than ever to track down the poison and in respect of which those persons abroad who read it might well not have seen the apology, the lack of sincerity in the apology and the conduct of the appellants who showed no contrition but who through the sub-editor were still prepared to believe the truth of the publication up to the time of the trial all of which would go to aggravate the damages. The learned judge also bore in mind the words of LORD RADCLIFFE in *Associated Newspapers v. Doyle* (1964) AC p. 329 who said that "the judge should allow for the sad truth that no apology retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused". He did consider all these things when he cited LORD WATSON'S dictum in the case of *Gray v. Ford* when that learned LORD stated: [(1896 AC at p. 50)]

"The assessment of damages does not depend on any legal rule, but in assessing damages a judge sitting both as judge and jury will naturally be governed by all the circumstances of the particular case. He is entitled to take into consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction and apology and the whole conduct of the defendants from the time when the libel was published down to the very moment of the verdict".

I cannot here find that the learned judge misdirected himself on any principle, nor can I say that he took into consideration any extraneous matter which he ought not to have done nor can I say that no reasonable jury could have awarded that amount having regard to the circumstances.

The result must be that his award cannot be properly disturbed.

To counsel's comment that this is the highest award of damages ever made in this country in a libel suit; at this stage of our history, the reply must be what was stated a century ago by *Cockburn C.J. in Campbell v. Spottiswoode* 1863 3 QB 769 at 777 -

"It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character, and made without any foundation".

The supposed question of constitutional law raised by counsel for the appellants I consider unmeritorious and I merely refer to it in order to say that I consider that the learned Chancellor has effectively disposed of it I there agree with the terms of the order proposed by the Chancellor and would dismiss the appeal and affirm the order made by the trial judge.

CRANE, J.A.: On the front page of the "Mirror", a newspaper circulating in and out of Guyana, there appeared under a banner headline the following news item:

"P.M.'S COW ELECTROCUTED

"A hefty 300-lbs zebu cow was electrocuted when it stepped on the live electric wire surrounding the spacious farm of the Prime Minister aback of the Botanical Gardens on Sunday evening.

"The animal has been identified as belonging to the P.M. On instructions it was sent to the zoo where the lions and tigers were to have it for their evening meal So far there are conflicting reports as to what exactly happened to the carcass, though it is widely rumoured that the meat was carted away by a few persons connected with Congress Place.

"The live electric wire, it is reported, has been installed with the purpose of warding off prowlers and thieves from entering the P.M.'s private farm. Now that the crops of eschallots and tomatoes are near their harvesting period it is understood that the current has been put on in full blast. The unfortunate cow, only one in a large herd of cattle reared in the farm, came near the fence to graze but was thrown some ten feet in the air when it came in contact with the wire."

The plaintiff, who is the Prime Minister of Guyana and distinguished senior counsel at the Guyana Bar, complained in the High Court he was libelled in the above publication. This was why he issued his writ on the 7th March, 1972, followed by a statement of claim containing the familiar allegation that the above publication was "falsely and maliciously printed and published" of and concerning him both in his office as Prime Minister and senior counsel at the Bar.

The statement of claim sets out the offending publication together with ten points of inference wherein, it is alleged, the words in their ordinary, natural and common meaning were meant, and are understood to mean and convey the following inferences:

- (a) That within the plaintiff's said farm live electric wires were installed and concealed on the ground, for the purpose of warding off prowlers and thieves from entering his farm.
- (b) That the plaintiff was privy to, answerable for, and had connived at, this said act.

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- (c) That this said act was dangerous per se and calculated to cause harm and fatality to all and sundry, who might chance to come into contact with the said installation.
- (d) That the said act constituted a trap set in a public place to which the public had access, namely the Botanical Gardens.
- (e) That the said act was wanton and reprehensible and calculated to cause substantial annoyance, and to endanger the lives of innocent subjects of the State who might chance to tread on the live wires of the concealed device.
- (f) That the said act provided for sufficient power of electrical energy to electrocute a 300-lbs. cow, to the extent of throwing it aloft 10 ft in the air and causing its death.
- (g) That all or any of the said acts, (a) to (f) above, amounted to a public nuisance and constituted criminal offences, for which the plaintiff was not only put in jeopardy of criminal prosecution, and therefore liable to penal consequences, but also to social ostracism.
- (h) Further that the said act provided for the said electric wires to be at full blast, to increase its destructive power.
- (i) That the said act was morally and legally indefensible.
- (j) That the plaintiff was prepared by the said act, which was shameful and inhuman, to jeopardise the lives of man and beast, to the selfish purpose of merely protecting his kitchen garden.

It is further alleged by reason of his "shameful and inhuman conduct", the plaintiff has shown unfitness for the high office of Prime Minister and the honour of senior counsel, or any office involving responsibility for the welfare of the people of Guyana; he has been brought into public odium, contempt and ridicule and has been damnified in the sum of \$50,000.

The defendants, who are respectively the editor and proprietors, printers and publishers of the "Mirror", while admitting in their amended statement of defence the printing and publication, avail themselves of the statutory special plea for libel in newspapers. They claim plaintiff's reputation has remained unaffected in view of the fact they have published an apology regretting the publication which they admit was "wholly unfounded". In fact, they raise as one of their principal grounds of appeal the absence of an express finding by the trial judge of either a loss of reputation or the degree or extent of it when he awarded the highest quantum of damages ever to be awarded for libel in a court in Guyana, namely, \$25,000. This, they strenuously contend, is unfair in view of the fact that no witness was called on the plaintiff's behalf to testify to any loss of reputation, even in the slightest degree. Admittedly, the sole witness called on behalf of the plaintiff testified only in proof of eleven copies of the "Mirror" newspaper which he produced bearing dates between the 13th

January, 1972, and the 19th March, 1972, including the publication complained of and apology thereto; but I am not in the least doubtful, and will presently show, that the conclusion of the learned trial judge can be supported, namely, that with the exception of (d) in the ten points of inference (above), "all the others are capable of the inference put by the plaintiff." I will show, too, that in finding the publication libellous, the trial judge must have adverted to the principle that the law recognises in every man a right to have the estimation in which he stands in the opinion of others protected from false statements to his discredit. And by necessary implication he must have found that the plaintiff suffered a loss of reputation since he found the publication libellous.

The special plea for libel in newspapers is contained in *s. 11 of the Defamation Ordinance, 1959* (hereinafter called 'the Ordinance'). It was adapted from *s. 2 of LORD CAMPBELL'S Libel Act, 1843*, and *s. 2 of the Libel Act, 1845*, and first appeared locally as sections 5 and 6 in the now repealed *Slander and Libel Ordinance, Cap. 22*, of the year 1846. To sustain this plea, it is necessary for the defendants to establish in their entirety four matters to the satisfaction of the Court - (i) that the libel was inserted in the newspaper without actual malice, and (ii) without gross negligence: (iii) that before commencement of the action or at the earliest opportunity afterwards, they inserted in the newspaper a full apology for the said libel, and (iv) they paid such sum of money into court by way of amends for the injury sustained by publication of the libel. [See *Oxley v. Wilks*, (1898) 14 T.L.R. at p. 402.]

Formerly, it was not permissible to pay money into court in a libel action with a denial of liability. A denial was considered inconsistent with that plea. Today, however, this is no longer the case. A defendant may make use of this special plea, as indeed the defendants have done here, with specific denials as to the meaning the words are capable of conveying. But it is important to observe when a defendant pleads *s. 11*, he is considered to be admitting liability for both the falsity of the publication and the printing and publishing of it wrongfully without just cause or excuse. It is also important to observe that the term "maliciously" in the statement of claim is a technical term of pleading meaning intentionally, wilfully, and is to be distinguished from "actual malice", the burden of disproof of which the defendants are saddled under *s. 11*. There, 'actual malice' or, as it is also called, 'malice in fact' or 'express malice', means spite, ill-will or improper motive. 'Express malice' is explained by LORD ESHER, M.R., in *Nevill v. Fine Art & General Insurance Co., Ltd.*

[(1895) 2 Q.B. 156 (at p. 169)] as follows:

"Express malice' . . . exception has been taken to the term; but I think that judges using it have always explained its meaning to the jury by telling them in substance that there must have been actual malice, *which is a state of mind.*"

I find myself in agreement with the learned trial judge that there is an admission of libel in the statement of defence, because a plea under *s. 11* is,

in reality, nothing but an admission in answer to the allegation in the statement of claim that the defendants have "falsely and maliciously printed and published" of and concerning the plaintiff. [See *Gatley on Libel and Slander*, 4th Ed., Precedent of Defences No. 75, at p. 778.]

With regard to the ten points of inference on which the defendants have joined issue, it must be explained that these are not innuendoes in the true sense of the term. Admittedly, the trial judge has referred to them as 'innuendoes', but that alone cannot make them true innuendoes. No extrinsic facts were proved, nor was there need for proof in the form of oral testimony in support of them, i.e., by facts which went beyond or altered their natural and ordinary meaning which could be regarded as a secondary or as an extended meaning. This constituted another ground of complaint comprising ground 4 of the appeal: That the trial judge misconceived the nature of the alleged libel and founded the award on incorrect premises.

I will deal with the matter of the award of damages later on, but, quite briefly, it is contended in ground 4 that the above ten points of inference were not sufficient to form the basis on which the trial judge could make a satisfactory award. Oral testimony, it is said, ought to have been led to the effect that persons considered the Prime Minister was the person referred to in the publication and that he suffered in reputation thereby. In my view, that was decidedly unnecessary. For the plaintiff to lead oral evidence from persons who read the publication showing that after reading it they got the impression it referred to some particular person was unnecessary, because, on the face of it, the publication itself showed that only one person was meant—and that was the Prime Minister. That it is unnecessary for a plaintiff to lead evidence of what a defendant admits is shown by *Tripp v. Thomas*, (1824) 3 B. & C. 427, a case for words imputing subornation of perjury. There, the defendant allowed judgment to go by default. At the execution of the writ of enquiry the plaintiff (just as the plaintiff has done in the instance case) offered no evidence, and the Sheriff's jury assessed damages at £40 after his counsel addressed them. In the same way as it is being contended in the instant case that the trial judge is not justified in doing, it was contended the jury were not justified in awarding damages without some evidence by which they might be guided in fixing the amount. *Abbott, C.J.*, in a short judgment in an inquiry as to the damages, held as follows:

"I think that we cannot disturb the finding of the jury. The defendant by suffering judgment by default *admitted the speaking of the words as alleged in the declaration. It was, therefore, unnecessary to give evidence to that effect. The plaintiff did not produce any evidence in aggravation, it cannot therefore be presumed that the jury were misled, or that they estimated the damages on erroneous grounds.*"

So, after it became clear to the trial judge that the publication referred to the plaintiff, the only other questions he had to consider were: (i) Was the publication capable of the meanings ascribed to it by the 'innuendoes'? If Yes, then, (ii) Did the publication have the meanings so ascribed to it?

In his statement of claim the plaintiff has expressly stated that the publication is *ex facie* defamatory, i.e., it can be understood by ordinary readers to convey and express the meanings set out in the above ten points of inference, which means to say, he regards these inferences as part and parcel of the natural and ordinary meaning of the publication. On decided authority, this would make it clear that plaintiff is primarily relying on the publication and not on any secondary meaning of it. As *LORD MORRIS* emphasised in *Lewis v. Daily Telegraph*, (1963) 2 All E.R. 151 (at p. 160):

.....once it was clear that the contention of the plaintiffs was that the words *themselves* would be understood by ordinary readers to be conveying and expressing the meanings recorded in those paragraphs, then the case for the plaintiffs was direct and straight-forward and was not in any way advanced or assisted by any mention of an innuendo.

In the case, *LORD REID* explained why it is sometimes necessary in the statement of claim to set out the inferences (just as has been done here) which the ordinary reasonable man is allowed to draw from allegedly libellous publications in this way (at p. 154):

"What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is.....their natural and ordinary meaning. Here there would be nothing libellous in saying that an inquiry into the appellants' affairs was proceeding: the inquiry might be by a statistician or other expert. The sting is in inferences drawn from the fact that it is the fraud squad which is making the inquiry. What those inferences should be is ultimately a question for the jury but the trial judge has an important duty to perform."

With respect to the "innuendoes" or, preferably, in *LORD REID'S* words, to the sting in those inferences drawn from the publication, the trial judge said:

"The innuendoes are contained in paragraph 4 of the statement of claim. I agree with the submission of learned senior counsel for the defendants that the libel does not necessarily consist of the inference the plaintiff puts, but consists in the opinion the court reaches as to what right thinking people in society may feel they mean. This is good law. I have examined the innuendoes and I have come to the conclusion that with the exception of (d) of paragraph 4 *all the others are capable of the inference put by the plaintiff.*"

Here, the innuendoes not being true ones are indistinguishable from, and identified with the words of the offending publication of which there are

allegations in the statement of claim of "falsely and maliciously printing and publishing" libellous matter of and concerning the plaintiff. This, as I have already observed, the defendants by their special plea are considered to have admitted. To sustain them, these 'innuendoes' need no support from extrinsic evidence. Just as has been pleaded, they are part of the natural, ordinary and common meaning of the published words. This being so, once the judge found that all save one of the ten points of inference are susceptible in point of law of the meanings stated therein, it became inevitable that he should apply the test referred to by *LORD SELBORNE, L.C.*, in *Capital and Counties Bank v. Henty & Sons*, (1882) 7 App. Cas. 741 (at p. 745) viz.:

"The test according to the authorities is whether, *under the circumstances in which the writing was published*, reasonable men to whom the publication was made would be likely to understand it in a libellous sense."

It was necessary sitting without a jury, that the trial judge would perform his function by first considering whether the publication was capable of having the meaning ascribed to it, and secondly, view the circumstances in which the writing was published before concluding whether the words complained of were in fact printed and published of and concerning the plaintiff in a libellous sense with resultant loss of reputation.

Evidence of those circumstances was furnished on behalf of the defendants by their sub-editor, Mr. Mohamed Ali, who said the offending publication was brought to the editorial office of the "Mirror" by one of its reporting staff and handed to him. It was his duty to check it for grammatical errors and libel before approving publication. He checked the publication but saw nothing amiss. In point of fact, it was his duty, if he so found, to consult the editor, the first-named defendant, who, in her turn, would consult the company's solicitors. Mr. Ali, however, did not consult the editor. He saw no reason to do so because he did not consider the Prime Minister was in any way involved with what was said in it. Though reference was made to the Prime Minister's cow being electrocuted on his farm by an electric wire charged with a "full blast" of current, he did not associate electrification of the fences with any act of, or authority from the Prime Minister personally, but considered it was the act of one of his servants. Of course, it is no defence that the defendants did not intend to defame the Prime Minister if reasonable people would think the language of the publication referred to him. [See *Hulton & Co. v. Jones*, (1910) A.C. 20.]

It was in this way Mr. Ali authorised the publication, arranged its format and put the headline to the article without carrying out any inquiry whatever as to the truth of the matter. He believed in the truth of what was published both at the time it was and right up to the moment he testified because of the trust and confidence he reposes in his reporters. He believed the fences of the farm were indeed electrified, but that act was done without the knowledge of the Prime Minister, and though he fully realised the

presence of live wires on the farm was "a serious matter that could endanger men's lives", he did not think of speaking to the Prime Minister by telephone and telling him what he thought of its seriousness. I pause to make what I think is an observation of some importance. It is that if Mr. Ali, up to this very moment, as he says, persists in his belief in the truth of the publication, what really can be the value of the apology he caused to be printed and published in the "Sunday Mirror" of the 19th March, 1972? For certain, that apology cannot be sincere if, despite the fact that subsequent investigation proved the publication to be wholly unfounded", he still believes he was in receipt of trustworthy information. It appears to me from his own lips Mr. Ali's apology was nothing more than a barren expedient to facilitate compliance with statutory requirements, which can only mean it was farcical to have printed and published it. Yet, Mr. Ali believes "until this moment what the reporter wrote was true as regards the whole article." This is why I can find no fault with the judge's finding that he was not contrite. It seems to me all he cared about was publishing news and so long as "it made good reading", he did not seem to mind whom it affected and what were the likely consequences.

Now, it seems fairly obvious to me that for the judge to have considered the publication libellous, he must of necessity have borne in mind the definition of libel, that is to say, the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tends to make them shun and avoid him. Accordingly, it is reasonable to say, I think, the trial judge must have considered the following question suggested by *LORD ATKIN* in *Sim v. Stretch*, (1963) 2 All E.R. 1237 (at p. 1240): "Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" When any person is lowered in another's estimation, I think he must inevitably suffer a loss of reputation. So if the judge concluded that plaintiff was lowered in the estimation of right-thinking members generally, when finding the publication libellous, then, it seems to me, he must have found plaintiff had suffered a loss of reputation. But this notwithstanding, it is well-known that a plaintiff in an action for libel need not allege or prove he has suffered damage. If he has been libelled without lawful justification or excuse, as the defendants have admitted libelling plaintiff in this case, the law presumes the publication of the libel has of itself a natural tendency to injure the plaintiff's reputation. It was to this aspect that *Greer, L.J.* turned when considering the question of the award of £25,000 as exemplary damages in *Youssouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* The Lord Justice said [(1934) T.L.R. at p. 586].

"No doubt the damages are very large for a lady who lives in Paris, and who has not lost, so far as we know, a single friend *and who has not been able to show that her reputation has in any way suffered from the publication of this unfortunate picture play*, but, of course, one must not leave out of account a great many other things. One of

them is that it is very difficult to value the reputation of any human being."

Another ground of appeal is that the trial judge erred when he applied s. 12 to s. 11 of the Ordinance, and held that because of the defendants' noncompliance with the provisions of s. 12, the ingredients of the special plea contained in s. 11 were not established.

It was conceded by learned counsel for the plaintiff that the trial judge had wrongly introduced s. 12 into the matter, because innocent defamation was not the defence. It appears to me from an examination of the record. 12 was not argued, and that the trial judge introduced it *ex mero motu* when it was neither pleaded nor even mentioned before him. To my mind, that was taking too much on himself. Unless the matter was fully argued and the history of the legislation explained to him, it was not unlikely he would err in applying s. 12. I will presently show, however, that this judicial error does not assist the defendants.

Before the *Defamation Act of 1952*, liability for libel depended not on the defamer's intention but on the fact of defamation. A sort of strict liability, as it were, then prevailed and still prevails in the law of defamation, subject to s. 12 of the Ordinance. A newspaper is printed and published at its own peril, however innocent or honest its intention or motive to act in the interest of the public. [See the cases of *Hulton v. Jones*, (1910) AC. 20; *Cassidy v. Daily Mirror Newspapers*, (1929) 2 K.B. 331; *Newstead v. London Express Ltd.*, (1940) 2 K.B. 507.] The purport of s. 12 is to introduce a new defence to a defamatory statement that is made unintentionally. Its object is to enable a person who, notwithstanding the exercise of all reasonable care, has innocently defamed another to make amends instead of paying damages. An offer of amends under s. 12, unlike under s. 11, means an offer to publish or join in the publication of a suitable correction and apology and to take all reasonable steps to notify persons to whom copies of the document containing the alleged libel have been distributed that the words are alleged to be defamatory of the party making the complaint. This section was enacted to protect the editors of newspapers who, though required by the nature of their service to be up to date with news, nevertheless, were not protected from liability for any false statements which they might inadvertently make in their haste to meet the public demand for the latest news. *Cassidy's* case in 1929 might well have been decided differently had the Defamation Act of 1952 been in force at the time.

The learned trial judge, I respectfully say, thoroughly confused the plea of payment into court by way of amends under s. 11 for the injury sustained by the publication of the libel, with an offer of amends under s. 12. A defendant who makes use of the plea under s. 11 is considered to admit liability for the publication of the libel in the newspaper and to plead in mitigation therefor, the four particulars mentioned in that section under s. 12, however, the position is entirely different. There, the offer of amends is in

respect of unintentional defamation *and is expressed to be made for the purposes of that section only*. Under s. 12, there is no payment of money into court by way of amends as there must be under s. 11. While the defendants under s. 12 are urging publication was innocent, they do so in the sense that they did not intend to publish those words of and concerning the plaintiff; that they did not know of the circumstances by which the words might be understood to be defamatory of him; and, in either case, they had exercised all reasonable care in relation to the publication [s. 12(5)]. But they are by no means alleging in the alternative, as the learned trial judge appears to think they are doing in the present appeal when he says—"that the offending news item was published without malice and without gross negligence *or to put it in another way, innocently.*"

Pleas under ss. 11 and 12 of the Ordinance are not in the alternative. They are distinct and separate *pleas*, having distinct and separate origins and designed to meet entirely different situations; they are unconnected with each other, and the purpose of the affidavit of facts required by s. 12 is not as the trial judge thought in misdirection—"to afford the plaintiff an opportunity to study those facts in order for him to determine whether or not there was in fact absence of malice or gross negligence.....they should have gone on further and submitted an affidavit with the offer of amends setting out the facts that they wished to rely on to establish that the publication was done without actual malice and gross negligence. I therefore, come to the conclusion that they have not discharged the burden placed on them by the statute."

In other words, the thinking of the trial judge is, that failure to file the affidavit under s. 12 had led to a failure on the part of the defendants to establish that the libel was inserted in the publication without actual malice and without gross negligence. In my view this is a serious misdirection on those two matters, for notwithstanding s. 12 was not pleaded, on the plain wording of subsec. 2 of that section, an offer of amends by way of affidavit specifying facts relied on showing that the words complained of were innocent, is required only for the purposes of that section; it does not entail specifying the libel was inserted in the newspaper without actual malice and without gross negligence. Because of this judicial error, I think the defendants should ordinarily be entitled to succeed in the appeal, but on the true construction of s. 11, there is judicial authority for saying it is obligatory on them to succeed in establishing all four particulars in that section. Failure to establish any one or more must result in a verdict for the plaintiff.

But though the defendants have successfully established payment into court by way of amends, they have failed to establish publication of a "full apology". This means to say, being themselves at fault, they cannot say they have been prejudiced by the trial judge's error of construing together ss. 11 and 12 of the Ordinance, because whether the judge erred or not, they themselves will have failed to establish in its entirety their plea under s. 11. Save that in the present appeal there was shown to be, in addition, rashness in publication

and a lack of contrition on the part of the defendants which undoubtedly increased damages, precisely the same thing happened to the defendants in the case of *Lafone v. Smith & Others*, (1858) 3 H. & N. 735. There, the defendants in endeavouring to establish their plea under s. 2 of *LORD CAMPBELL'S Act*, published an apology that was not up to standard as to type and prominence in a later newspaper publication, and although they succeeded in establishing the other three ingredients of their plea, the plaintiff was held entitled to succeed. *Baron Channel* said:

"The plea being disproved, the plaintiff remains unanswered, and was therefore entitled to have the verdict entered according to the direction of the learned judge."

It is said of an apology that though it need not be abject, it must at least be a complete withdrawal of the imputation and an expression of regret for having made it. In *Risk Allah Bey v. Johnstone*, (1868) 18 L.T. 620 (at p. 621), *Cockburn, C.J.* said: it should amount to "a full and frank withdrawal of the charges or suggestions conveyed". *Reparation must be ungrudging if it is to have any marked effect in mitigation of damages.* It is essentially a jury question and should be so worded that an impartial person would consider it reasonably satisfactory in all the circumstances. In *Lafone v. Smith* (above), it is said that a full apology means an apology not merely sufficient in its terms, but inserted in a proper manner as to type and position. With these principles in mind to be drawn from decided cases, I am in agreement with learned counsel for the plaintiff that the apology inserted by the defendants in the "Mirror" of the 19th March, 1972, was not a full apology since it was deficient in two important respects.

In the first place, it was not inserted on the front page in the same way as the offending publication of the 8th February, 1972. It was inserted on the lower left part of the back page. So how can it be said with any degree of certainty that readers who saw the publication read the retraction of it on the 19th of March? Some may have read only front page news on that day. That is why it is stressed in *Lafone v. Smith* that an apology must be inserted in a proper manner as to type and position. Failure to give it the same prominence as the publication was a serious fault of the defendants who did not even take the trouble to apprise the plaintiff's solicitors beforehand of its nature nor the position it would assume in the newspaper on its date of publication. As far as I am aware, this is a courtesy which is invariably shown to a plaintiff in matters of this sort. From a defendant's standpoint it has the advantage of providing an adequate safeguard should his *bona fides* be questioned in litigation later on. But it may well be that failure to give the publication front page prominence was due to the reason the trial judge found as a fact to exist, namely, the defendants' sub-editor "was not really and in fact contrite". But there is a second reason why the apology falls short of the standard of a full apology. This was not stated by the judge, but by learned counsel for the plaintiff. It is that the apology lacks fullness in the respect that it does not seek to withdraw the totality of the charges or suggestions conveyed; it omits

to mention the last sentence of the publication. This sentence, it is contended, contains the gist of the libel, namely, the fate of the unfortunate cow that had been electrocuted and thrown ten feet in the air by a "full blast" of current. I must agree with counsel's contention that on the clear wording of the apology the last sentence of the offending publication has not really been retracted because regret is expressed for only those statements specifically mentioned in the issue of the "Sunday Mirror" of the 19th March, 1972.

This aspect naturally leads me on to a consideration of the vexed question of damages which, in one respect or another, comprises the majority of the grounds of appeal. In his attempt to show the judge's award as unreasonable and excessive as a solatium out of all proportion to the hurt received by the plaintiff, counsel for the defendants has adopted several lines of approach. He has cited several local libel cases and compared their awards with the present contending, as he did so, that the trial judge ought to have used them as a guide as to the quantum to be awarded in the instant case. One such case was *Gonsalves v. Argosy Co., Ltd.*, (1953) L.R.B.G. 61. the case of a dentist/legislator who had failed to prove special damages in an action for libel against the defendants who, he claimed, had published a defamatory statement concerning him. He received an award of \$480 as general damages. But perhaps more appropriately cited in the case of *D'Aguiar v. New Guiana Co. Ltd. et al.* (1963) L.R.B.G. 365. In this case the defendants printed and published a defamatory libel concerning the plaintiff, Mr. D'Aguiar, the leader of a political party, the United Force. The trial judge found the libel grave and serious and considered it must have greatly damaged Mr. D'Aguiar in his capacity as a politician and businessman, and awarded him exemplary damages in the sum of \$14,500. It has been said that comparisons are odious and, for myself, I think that truism is not at all out of place here, where we are considering the awards made in the cases of the plaintiffs Gonsalves and D'Aguiar (above) with the instant case, because no one can fittingly compare the reputations of a dentist, in the one case, and the leader of a minority political party, in the other, with that of a Prime Minister. In my view, no comparisons are afforded by those cases.

Nevertheless, it is contended that our legal system has set its own pattern of awards from which it would be wrong for us to depart unless there is some good reason justifying that course. I myself have never understood our decided cases to have established any pattern of awards of damages to successful plaintiffs in cases of defamation. Were that so, I should be one of the first to condemn the practice as erroneous and devoid of either principle or authority. Notwithstanding our egalitarian society, I should be very sorry to see our courts take the view that damages for defamation must be standardized and awarded as an invariable quantity, regardless of the true bearing the character and reputation of each individual should have on the assessment. It must not be forgotten that libel is essentially a wrong to a man's reputation. So on principle, it seems to me, in just the same way a man ought not to receive an award out of all proportion to a reputation he does

not enjoy, he must not be refused an award for a reputation he clearly possesses. I am afraid in libel cases particularly, we cannot, as is suggested, compare awards from case to case in order to arrive at meritorious solatia simply because every man's reputation is not the same in the eyes of his fellowman. Each case must be considered in accordance with its own facts and circumstances and a measure appropriate to the particular case awarded in keeping with the well-established principle—"*The bigger the man the bigger the libel*", and, I should add, *the bigger his quantum of damages*.

Now, let us try to see what motivated the judge in granting what counsel acclaimed to be the highest quantum ever to be awarded by a court in Guyana in a libel case. It seems to me one of the chief factors was the enormity and baseness of the libel. I will observe that not once has the publication referred to the plaintiff, *Mr. Linden Forbes Sampson Burnham*, even though it would have been equally libellous for it to have done so. Apart from the title 'Prime Minister' in the caption, there are three such other references in the body of the publication. For this reason, I think I am not assuming too much when I say that the Prime Minister and not Mr. Burnham is the focal point of the libel, the pivot around whom the libellous publication revolves, so much so that, apart from the title 'Prime Minister', the libel would not have been considered the spicy bit of news and the attraction it was. It may not even have occupied valuable front-page space of the newspaper. When one looks at the entirety of the publication, it seems to me a grave and serious libel to suggest that any man, let alone a Prime Minister and leader of a nation who should know better and set an example, is possessed of so callous and inhuman a nature and so misguided by economic self-interest that he is prepared to go to any length, even to inflict violent death on thieves and trespassers in order to protect his crops from their depredations. To convey the impression to readers that the Prime Minister employs such drastic methods as the installation of high-powered electric wires to protect his crops of eschallot and tomatoes, and that death was actually caused to an animal by the "full blast" of electricity, so much so that the unfortunate animal was thrown ten feet in the air, when there was not the vestige of truth about the matter is, in my opinion, to perpetrate a libel of the basest and rankest species against him.

When the electric wire was lightly charged with current, there might have been some difficulty in suggesting there was an intention of causing death or serious harm to prowlers and trespassers. However, with the current switched on at "full blast", the effect of which is evidenced by the cruel fate of the cow, I think no reasonable man can impute to plaintiff any other than a deliberate intention to cause death or grievous bodily harm to man or beast, and, if I am correct, the liability of the plaintiff cannot be in doubt for an occupier who intentionally harms a trespasser by creating on his premises a source of danger is liable for the harm so done, unless the danger so created by him can be justified as being nothing more than a reasonable and therefore lawful measure of self-defence. It is recognised that a trespasser is not without

rights. While he has no positive rights at common law, I owe him only negative duties; I am not allowed to throw stones at him because he crosses my land without permission; nor must I intentionally set a trap for him whereby he may, when trespassing, bring mischief upon himself. I must not shoot him. These are some of the acts I must refrain from doing to a trespasser.

In *Bird v. Holbrook*, (1828) 4 Bing. 628, the defendant placed a spring-gun in his garden to protect it from the depredations of thieves and trespassers. The plaintiff was a boy who went over defendant's wall to catch a stray fowl. He came into contact with a wire which discharged a gun and was held entitled to recover damages at common law for the injury he sustained. I have referred to *Bird's* case in order to stress the application of the principle of humanity in that decision when *intentional* harm was caused to a trespasser by the act of setting a spring-gun or other man-trap to scare him away, and particularly to show how legitimate are the inferences alleged as 'innuendoes'; especially in paragraph 4(j) of the statement of claim—that the words of the publication were understood to mean and convey to readers that the plaintiff had been guilty of a "*shameful and inhuman act*" when he installed or caused to be installed a concealed device, to wit, a full charge of electric current in a wire fence surrounding his kitchen-garden with the intention of causing death to prowlers and trespassers. With us, in Guyana, it is also a criminal offence to "set a spring-gun, man-trap or other engine" with intent to destroy human life or to cause grievous bodily harm. [*See s. 61 of the Criminal Law (Offences) Ord., Cap. 10.*] Invoking the common law principle of humanity as the authority for basing his decision, Chief Justice Best declared [(1828) 4 Bing at p. 643].

"But we want no authority in a case like the present; we put it on the principle that it is inhuman to catch a man by means which may maim him or endanger his life, and, as far as human means can go, it is the object of English law to uphold humanity and the sanctions of religion."

Eight years earlier in *Ilott v. Wilkes*, (1820) 3 B. & Ald. 304, *Best J.* (as he then was) had been just as outspoken on the same principle concerning the inhumanity of a concealed danger when the plaintiff in a somewhat similar manner as the cow in the instant case, *trod on a latent wire* causing a gun to be fired. He said then: "Humanity requires that the fullest notice possible should be given, and the law of England will not sanction what is inconsistent with humanity."

See also the recent House of Lords case of *Br. Railways Board v. Herrington*, (1972) 1 All E.R. 749, where *Lord Morris* invokes principles of "common sense and humanity" to dismiss an appeal against an award of damages in favour of a child trespasser. The British Railway Board, the defendant/occupiers, were held to be under a duty to take steps to protect a trespassing child from the potential and concealed danger of an electrified railway line since they knew of circumstances that made it likely that

trespassers would come on to the line. What better idea of the inhumanity of harbouring concealed danger on one's premises can be given than the manner judges themselves look upon it? They, after all, are the people who, in our system, are to speak on behalf of right-thinking persons, and we shall see that when they award damages they do so on behalf of these persons.

In points of inference (a) and (e) above, counsel for the defendants has taken objection to the use of the word "concealed" and the phrase "concealed device", but I am at a loss to know what expression better befits a wire-fence surrounding a farm in which there is an invisible electric charge. Surely, without unduly straining one's imagination, there lies concealed danger since it is not visible to the naked eye! The learned trial judge found point (d) was not established, but I am not sure he is right. In my view, so long as there is the existence of concealed danger to the public, in legal contemplation that constitutes a danger in the nature of a trap if no steps are taken to warn trespassers of its presence.

It seems very clear to me what can reasonably be conveyed to readers in the publication by "full blast" of current is, that the plaintiff went beyond the creation of a "deterrent" danger, that is to say, a danger which he is entitled to create by a normal charge of current, not for the purpose of injuring, but for the sole purpose of emphasizing to trespassers that the property belongs to him and it is not worth their while trespassing and stealing his crops. The expression "full blast" indicates that the Prime Minister created or, rather, was privy in creating not merely a "deterrent" but a "retributive" danger for the purpose of *intentionally* injuring trespassers and thieves by a concealed device of electricity in the fence of his property, and that so intent was he to ensure serious injury or even death to trespassers, that he increased the normal charge of current to its fullest extent. The implications of an accusation of such conduct on the Prime Minister's part are self-evident. Clearly, it cannot be conduct befitting a Prime Minister, one in charge of the destiny of a nation, and one to whom citizens must look for moral leadership! Applying LORD ATKIN'S test above, was it such conduct as would tend to lower him in the estimation of right-thinking members of society, generally? Without any doubt at all, I think the publication was plainly discreditable and intended as a personal attack on the Prime Minister with a view to instilling in the minds of readers his unfitness to hold such a position, and I think the learned judge was quite justified in so finding. Admittedly, throughout his cross-examination the sub-editor was at pains to point out (although he knew the publication was a serious matter he did not think the Prime Minister was in any way involved in the matter, chiefly for the reason that he believed the electrification of the fence was done without his knowledge. The law is, however clear that so long as a reasonable man is of opinion the words refer to the plaintiff and are reasonably capable of a defamatory meaning (a question for the judge), it matters not what the subeditor thought or intended. [See *Hulton & Co. v. Jones*, (1920) A.C. 2C.]. The only relevant matter would be whether a reasonable man would believe

that so serious and drastic a method of excluding trespassers and thieves from the farm could have been authorised by anyone other than the Prime Minister, the owner of the farm.

In his assessment of damages, the judge was clearly right when he took the apology into account despite the failure of the defendants to make good their statutory plea under s. 11 of the Ordinance. His authority for so doing is s. 9 *ibid*. I think he was also right to reject in aggravation of damages those newspaper publications as "other derogatory statements" tendered on behalf of the plaintiff with a view to showing the defendants were actuated by malice in the printing and publication of the libel complained of. In my opinion, every one of those articles contains scurrilous and libellous attacks on the ruling party, the People's National Congress, of which the Prime Minister is leader, but I readily agree with the judge it would be "stretching it too far" to say derogatory statements against the People's National Congress are derogatory statements against the Prime Minister as a person. There is no need for authority to show that malice against the Government cannot be malice against the Prime Minister personally. Had the trial judge paid regard to those statements and not rejected them. I, for my part, would have considered it misdirection serious enough to entitle the defendants to a substantial reduction of damages. I am decidedly of opinion those "other derogatory statements" may not properly be used to show *quo animo* the defendants published the offending article and to aggravate damages, simply because they are not relevant to the context. It will presently be my concern to show that the damages awarded are quite justifiable without resort to a consideration of any other publications than that complained of. and if I am right in so thinking, it must follow the trial judge was quite right to exclude them from his consideration. In the context, such spite or ill-will as is evidenced in those other publications concerning alleged statements and acts by the Prime Minister himself, is so inextricably bound up with libellous attacks on the Government as to be inseparable therefrom. These libellous attacks are subject to both fine and imprisonment. [See s. 113 of Cap. 10] This is why I think it would be unjust to say that the malice concerned in those statements is malice against the Prime Minister personally, and why it would be unjust to transpose malice arising therefrom to a libel which, at least on the face of it, appears to touch and concern him personally. It may be a fine distinction, but, nevertheless, it was one that the trial judge necessarily had to draw in the interest of justice.

It is clear to me the learned judge rested his award on the basis of exemplary damages when he considered the decision of the House of Lords in *Rookes v. Bernard*, (1964) 1 All E.R. 367 [approved in *Cassell & Co. Ltd. v. Broome*, (1972) 1 All E.R. 801], in which there is propounded two categories for the award of damages of that nature. And although he did not say so, it is quite obvious, in view of the fact that sales of the offending publication were offered to the public, he based his award on the second category in *Rookes'* case "in which the defendants' conduct has been calculated by him to make a profit for himself which may well exceed the

compensation payable to the plaintiff". This is undoubtedly a factor to be taken into account in the assessment of damages for libel, because "one man should not be allowed to sell another man's reputation for profit."

As far as I can see, we are being asked to interfere in a situation very comparable to that which arose in *Youssouf's* case (above), where it appears from the judgments of the Court of Appeal that the plaintiff had not proved she suffered a loss of reputation in any way. The exemplary damages awarded her were heavy—£25,000—for what was considered to be a very foul libel. She was a Russian princess and alleged she was libelled in a sound film entitled "Rasputin, the Mad Monk". It was said the defendants had published in the film pictures and words which were understood to mean that she, therein called "Princess Natasha", had been seduced by Rasputin. On the matter of the quantum of damages, *Scrutton, L.J.* said (Vol. 50, Law Times Reports, at p. 584):

"It is the law that in libel, though not in slander, you need not prove any particular damage in order to recover a verdict. What, then, is the position, the jury being the tribunal as to the damages caused by libel, whose verdict is very rarely interfered with by the Court of Appeal? What have the jury to do? They have to give a verdict of amount *without having any proof of actual damage. They need not have any proof of actual damage. They have to consider the nature of the libel as they understand it, the circumstances in which it was published, and the circumstances relating to the person who publishes it, right down to the time when they give their verdict, whether the defence made is true, and, if so, whether that defence has ever been withdrawn—the whole circumstances of the case. It is not the judge who has to decide the amount. The constitution has thought, and I think there is great advantage in it, that the damages to be paid by a person who says false things about his neighbour are best decided by a jury representing the public, who may state the view of the public as to the action of the man who makes false statements about his neighbour, the plaintiff.* It is for that reason that it is extremely rare for the Court of Appeal to interfere with the verdict of the jury as to the amount of damages when the libel is established. It is very often the case that the individual Judges of the Court of Appeal, if they had been asked their verdict on the amount of damages, would have given a smaller sum. Sometimes they would have given a larger sum, but the question is not what amount the Judges would have given. The question is what amount the jury, as representing the public, the community, have fixed, and it is extremely rare to have that amount interfered with by the court. A test has been formulated, and it is this, as has been correctly stated several times: the courts will interfere only if the amount of damages is such that in all the circumstances no twelve reasonable men could have given it. If the court comes to that view, it will interfere with the verdict, but even then it cannot fix the amount itself; but must send the case back to another jury who may very

easily repeat the first verdict, and the court cannot go on sending the case back to a jury until at last they get a verdict with which the Judges agree. These are the reasons which justify the relation of the Court of Appeal to the amount of damages found by juries."

I have already shown from the cases of *Tripp v. Thomas* and *Youssouppoff* (above), that though a plaintiff offers no evidence of actual damage, the jury are not obliged to award him nominal damages only. In *Tripp's* case, the jury awarded general damages; in *Youssouppoff's*, their award was exemplary.

Counsel for the defendants, citing *Lafone's* case, referred, by way of analogy, to the award of only 1s. as nominal damages. In that case, the defendants had established all the other ingredients of their plea under the English equivalent to our s. 11, but failed to do so with respect to then-apology, just as the defendants in the instant case have done, with the result that the plaintiff was held entitled to succeed. It is for this reason that *Lafone's* case, says counsel, supports his contention for reduction of the award under appeal to a nominal award. I have already observed, however, there were at least two other additional factors in the instant case, viz., recklessness in the publication and lack of contrition, both of which were in the judge's mind, and must have greatly militated against a nominal award in the present case. So it appears to me the amount of damages in a libel action must always remain at large—entirely at the jury's or judge's discretion, as the case may be. The passage from the judgment of *Scrutton, L.J.* (above), which I respectfully adopt, shows the law considers it eminently desirable that right-thinking members of the public in whose estimation the plaintiff's reputation has been lowered, should be given the right to assess damages. In England, this is achieved by jury-men and jury women who represent the community in court. In Guyana, where there is no "jury representing the public who may state the view of the public as to the action of the man who makes false statements about his neighbour, the plaintiff", the law relegates the function of assessment of damages to the trial judge who is just as supreme in this sphere and subject to the self-same limitations as a jury.

The learned trial judge also took into account the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of the publication and the absence or refusal of any retraction and apology along with the entire conduct of the defendants. But what strikes me as a factor which must have greatly affected the quantum of the award is the finding of a lack of contrition on the part of the defendants, for if a man make an apology that is quite consistent with his continuing to believe what he said in his defamatory statement, he cannot be considered to be in the same position as if he had never uttered the libel. He cannot be considered to have regretted the making of the statement. Remorse is the essence of apology—no remorse, no apology.

But I understand counsel for the defendants to say that because libel is essentially a wrong to reputation, one man may libel another, and so long as

he apologises the wrong is expiated. Therefore, it is contended, provided reputation has been restored by apology, on principle, damages ought to be kept to a minimum—nominal, usually, but at the most, general. In my view, there has never been any such principle in the assessment of damages, and, if only for the sake of the reputation of honest and decent-minded citizens, I hope there will never be. The fact that it has never been in vogue is to be seen from the following passage in the judgment of *the LORD PRESIDENT KINROSE* in *Malcolm v. Moore*, (1901) 4 F. 23 (at p. 26):

"If a person is charged with having made a calumnious statement, and by way of tender or retraction only says 'I withdraw it,' or 'I regret that I made it', that will not suffice, because such an expression of regret and retraction is quite consistent with his continuing to believe what he had said, and the person against whom the calumny is uttered is not placed in the same position as if it had never been uttered. But when a man not only unreservedly withdraws what he has said but expresses his regret for having said it and admits there was no ground for it, the position is wholly different, because when it is admitted that there is no ground for the statement, or in other words that it is untrue, the person injured is put in so far as the person who made the statement can do it, in the same position as if the statement had never been made."

So it is clear from the above that he who apologises must be penitent and contrite of heart. He must no longer continue to believe in what he had printed and published. If he does, and there is evidence of it from his written apology, or, as here, from the witness-box, he will not have retracted his statement.

For myself, I am satisfied the learned trial judge bore all relevant principles in mind in the assessment of the damages he awarded. Having read the cases of *Rookes v. Barnard* and *Cassell & Co. Ltd. v. Broome* (above), it is clear he considered the plaintiff was the victim of "punishable behaviour", and from the quantum of his award he clearly showed he was minded to bring home to the defendants the fact that tort does not pay. Having so satisfied myself, I think we are powerless to interfere with his award for a libel which has been proved to the hilt. As was so truly said by *Lord Radcliffe* in *Associate Newspapers v. Dingle*, (1962) 2 All E.R. 737 (at p. 743):

"I therefore approach the trial judge's figure of £1,100 on the assumption that he fixed this sum as damages for a libel imputing sharp practice but not a criminal offence. A trial judge awarding damages for *this kind of tort* is habitually allowed a certain pre-eminence for his assessment above the assessments that might independently commend themselves to an appeal court. The principles that establish his preeminence are laid down in the two decisions of *Davies v. Powel Duffryn Associated Collieries, Ltd.* (No. 2) and *Nance v. British Columbia Electric Ry. Co. Ltd.* An appeal court rejects his figure only

in 'very special' or 'very exceptional' cases. Such cases are embraced by the formula that the judge must be shown to have arrived at his figure either by applying a wrong principle of law or through a misapprehension of the facts or for some other reason to have made a wholly erroneous estimate of the damage suffered, so that where an underestimate is in question, it is 'unreasonably small' or 'wholly inadequate'. Neither *Davies* case nor *Nance's* case was a case of damages for defamation, but it is common ground that damages assessed by a judge in such cases are governed by the same principles. The damages are, to quote Lord Wright in *Davies'* case, essentially 'matter of impression and common sense'."

Moreover, when one comes to think of it, there was the element of *recklessness* in the publication of the libel for it is clear the sub-editor never attempted at any time to verify, as indeed he could well have done the truth of his information in the publication which he himself was forced to admit was "fictional". Without doubt, it was such rash and hasty conduct coupled with his lack of contrition in the witness-box. that has brought disaster of such magnitude on his employers, and I must emphasize *recklessness* was one of the factors which influenced the decision of the House of Lords to decline to interfere with the quantum of damages in *Hulton & Co. v. Jones*, even though damages were considered "heavy", *LORD LOREBURN. L.C.* said: [(1910) A.C. at p. 24].

"The damages are certainly heavy, but I think your Lordships ought to remember two things. The first is that the jury were entitled to think, in the absence of proof satisfactory to them (and they were the judges of it), that *some ingredient of recklessness*, or more than recklessness, entered into the writing and the publication of this article, especially as Mr. Jones, the plaintiff, had been employed on this very newspaper, and his name was well-known in the paper and also well-known in the district in which the paper circulated.....I think the damages are certainly high, I am not prepared to advise your Lordships to interfere, especially as the Court of Appeal have not thought it right to interfere with the verdict."

There are two remaining grounds of appeal which I regard as really one, and I am not prepared to say much about them they being so glaringly misconceived. They complain the award of damages violated fundamental rights provisions contrary to art. 10 relating to (i) a fair hearing before an independent and/or impartial tribunal, and further or alternatively, contrary to art. 12 which guarantees, *inter alia*, (ii) protection of freedom of expression.

As I understand it, counsel's main contention on these grounds is that the trial judge, in determining the actual merits of the case, rejected the statutory plea as a result of a misapprehension of the provisions of ss. 11 and 12 of the *Defamation Ord., 1959*; he therefore founded his award on erroneous legal principles thereby contravening the provisions of art 12(1) of the *Constitution*.

In the first place, I think the short answer to this is, that the guaranteed fair hearing under art. 10 refers to a "person charged with a criminal offence". It therefore cannot apply here. In the second place, I will observe one has no absolute right to express himself. Fundamental rights are not absolute, but qualified rights. They are subject to such limitations as are contained in the entrenched provisions themselves, limitations which operate to defeat a claim to the fundamental right the guarantee of which ensures only so long as the individual does not prejudice the rights and freedoms of others or the public interest. [Art. 3.] Thus, I conceive the role of free expression in the democratic process under *art. 12(1) of the Constitution* to be, that a man may without interference from anyone express himself either orally or in writing as freely as he may wish, only so long as he does not in so doing injure the reputation of another. Here, his fundamental right to express himself is subject to his not telling lies which will cause injury to his neighbour's reputation. He is not free to tell lies to his neighbour's injury. He must speak the truth concerning him if he wants to exercise his guaranteed right to express himself freely. He must not call his neighbour a thief, unless he is a thief and he can prove it, for freedom of speech does not include the right to damage a man's reputation or his business by false statements. *Art. 12(1) of the Constitution* speaks of protection for "freedom to receive and to communicate ideas and information", but the important thing to observe about libellous utterances is that they are not considered as expressing any "idea". So, they are not really considered "speech", and, consequently, not within the area of constitutionally protected speech. Falsehood, too, has never been afforded protection in the name of free speech. In every case, it behoves the trial judge to scrutinize the interest to see whether protection is afforded it under the fundamental right. *Mr. Justice Murphy* of the United States Supreme Court, speaking for the majority of his brethren in *Chaplinsky v. New Hampshire*, [(1942) 315 U.S. strongly emphasized this aspect of the matter when he said: 568]

"..... it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, *the libellous* and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

I must, therefore, interpret the phrase "protecting the reputations" in art. 12(2.) (b) in the light of social value, i.e., the use and benefit to the community at large of such reputations as are sought to be protected thereunder. Libellous statements, therefore, having little or no social value as

regards truth and morality "cannot raise any constitutional problem". They cannot hinder the enjoyment of freedom of expression. This is why I respectfully adopt the view of *Murphy, A.J.* This is how I understand and interpret the nature of the underlying philosophy of freedom of expression in our democratic society under *art. 12 of the Constitution of Guyana*.

Lastly, it seems to me that if counsel's contention were to prevail, it would mean that in every case where a trial judge misinterprets any law that makes provisions that are reasonably required either in the interests of, or for the purpose of protecting any of the matters within the savings clause of the article itself (e.g. in this case, *ss. 11 and 12 of the Defamation Ord., 1959*), the judge would not be considered as acting "under the authority" of that law, but as contravening the fundamental rights of the article.

But a distinction must be drawn between the case where judicial error has, *ab initio*, hindered or interposed obstacles to the exercise of the fundamental right of freedom of expression, and the case (like the present) where the right of freedom of expression, having been already exercised, is judicially misinterpreted. It is only in the first case, I think, it can with any reason be contended that the fundamental right has been contravened because judicial misinterpretation has prevented the right from being exercised. Outside of obscenity, fraud, and libel and slander, the right to free speech may be limited only under very special circumstances, but it can never be totally prohibited *in advance*. If an attempt is made to do so, a constitutional problem will surely arise.

In the second case (which is the instant case), it seems to me there can really be no contravention of the Constitution, because, having admitted printing and publication of the libel, the defendants cannot justly say they have been hindered in any way in the enjoyment of their freedom of expression. They, having already spoken, their freedom of expression can be in no need of protection. As I see it, *Art. 12 of the Constitution* is intended to protect free expression, that is to say, the means by which healthy and virile opinion is developed. The protection afforded thereunder is intended to avert resentments and hostilities which otherwise might give vent to more dangerous forms of expression that might prove destructive to free society.

In my opinion, the learned trial judge came to the right conclusion, and I, too, would dismiss this appeal with costs.

Judgment of the High Court affirmed.

Solicitors

M.A.A. Mc Doom for the appellants

M.E. Clarke for the respondent

THE STATE v. DHANNIE RAMSINGH

[Court of Appeal (Luckhoo, C, Bollers, C.J.,
Persaud, Cummings, and Crane, JJ.A)
February 1, 5, 6, 7, 9, 12, 14, March 22, 1973]

Criminal Law—Statement allegedly made by accused—Challenge to voluntariness of statement—Voir dire—Denial by accused of making statement—Whether accused is entitled to raise both issues of voluntariness and the question whether in fact he made the statement at the voir dire—Whether trial judge is required to rule on voluntariness of statement.

Criminal Law—Confessional statement—Admissibility—Refusal of judge to rule on—Whether accused compellable to give evidence—Whether presumption of innocence violated—Art 10 (2) (a) (7) Constitution of British Guiana, 1970.

Murder—Agreement between accused and another person to break and enter and steal—Excessive use of force on occupier of house by other person—Whether issue of manslaughter should be left with jury.

Recent possession—Articles recently stolen—Articles belonging to person killed—Directions to be given to jury.

The accused Ramsingh and another man were charged with the murder of one B, a house-holder whose property was found in his possession shortly after the murder.

At the police station where he was taken after arrest, he made a caution statement in which he admitted agreeing with the other man to rob the deceased. He said it was the other man, and not he, who had killed the deceased while he kept watch. He himself had killed no one, he said; he intended only to rob the deceased.

At the trial objection was taken on the voir dire to the statement's admissibility in the absence of the jury. It was contended that the statement was not free and voluntary; and that it was induced by promises and threats. The accused said he did not make the statement; he had only made portions of it. Thereupon, the trial judge recalled the jury and admitted the statement in evidence without ruling on the voluntariness. He ruled it was simply a matter of fact for the jury to decide whether he in fact made the statement or not

Summing up, the trial judge directed the jury that if a man commits a felony involving violence and death results, he is guilty of murder even if he did not intend to kill or cause grievous bodily harm. He further told them that recent possession of articles stolen from the deceased's home could raise the inference that the person in whose possession the articles were found might well be not only but the murderer as well, if they were satisfied that the robbery was incidental to, or accompanied the murder. The accused was convicted of murder on appeal.

HELD: (i) (Cummings and Crane JJ.A dissenting) an accused person is not entitled to raise at the voir dire both the question of voluntariness of his statement and the question of fact whether or not he had made the statement: once it is apparent that an accused person is in truth raising the latter issue, it becomes a matter of fact for the jury to determine, and the judge need not rule on voluntariness.

(ii) the law affecting mens rea in the offence of murder in Guyana is as was laid down in *D.P.P. v. Beard*, wherein it was stated that where a man causes death to another in the course of furtherance of committing a felony involving violence, the offence is murder; but that in the circumstances of this case, the judge ought to have left the issue of manslaughter to the jury;

(iii) the directions relating to the possession of articles recently stolen were contradictory, but the accused was not prejudiced thereby.

(per Cummings & Crane, J.J.A.)

(iv) failure to rule on voluntariness is a violation not only of the general law of confessions, but also of fundamental rights provisions;

(v) the Constitution having cast the burden of proof of guilt on the prosecution, had cast the correlative duty on the trial judge to see that no confession statement is admitted unless voluntarily made.

Appeal allowed. Conviction for murder set aside and a conviction for manslaughter substituted. Accused sentenced to 10 years' imprisonment.

(Editor's Note: This appeal was reversed, and the minority view upheld by a Full Bench in the *State v. Gobin and Griffith* (1976) 23 W.I.R. 256; and also upheld in the Trinidad Privy Council's appeal of *Seeraj Ajodha v. The State*, (1981) 3 W.L.R.I.; R.v. Sang (1979) 2 All E.R. at 1230..

Cases referred to, are stated in the judgments.

Rex Mc Kay for the appellant.

G.H.R. Jackman, Senior State Counsel, for the State.

CHANCELLOR: I agree with the conclusions reached by my brother, the learned Chief Justice, and my brother Persaud, and would only wish to say this:

It could hardly be denied that, historically, the separation of the functions of judge and jury in deciding aspects of law and fact has left a deep mark on English jurisprudence. Whether there is evidence fit to go to the jury to decide a question of fact would be a question of law for the judge: whether ultimately the evidence is sufficiently satisfying on a particular issue, a question of fact for the jury. And so in regard to confessional statements, a judge would have to decide as a matter of law whether there was evidence fit to go to the jury that the statement was made by the accused, which normally would present but little difficulty, as the *prima facie* proof would consist of the simple averment by the person tendering the statement that it was so made. All aspects of challenge to this would have to be within the hearing of the jury whose province it would be to decide the question. But when the question of "voluntariness" becomes an issue, the judge would require proof beyond the mere *ipse dixit* of the witness, of a positive and affirmative nature that it was not in law improperly obtained to comply with the rule so classically formulated by LORD SUMNER in *Ibrahim v. R.*, (1914) AC. 599, "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."

In this case, Detective-Sergeant Mc Lean, before attempting to tender the statement in question, said: "He (the accused) elected to make a statement after caution which I reduced into writing at his request. This is the statement."

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Here then was, *prima facie*, evidence sufficient to discharge the initial evidential burden that the statement was made by the accused. But when objection was taken on the specific ground (in the words of counsel) that "it was induced by promises and threats used and/or directed to the accused who was coerced and/or induced into making the said statement" and that "the statement was not taken down in writing by the witness Sgt. McLean, but was taken down by another person, Sgt. Lovell," it became imperative for the trial judge to determine at a *voir dire* whether such improprieties appeared as would legally affect its admissibility.

At the *voir dire*, evidence was given by Sgt. Mc Lean that the accused was not coerced or induced into making the statement. Another witness, Sgt. de Abreu, provided supporting evidence. There were a number of suggestions put in cross-examination to seek to undermine the initial weight and value of this evidence, but apparently to no avail, nor am I able to discern any circumstances elicited from which it could reasonably be inferred that the statement was improperly taken from the accused. It was therefore open to the accused to offer any available evidence in rebuttal of what was shown by the prosecution to have been a voluntary statement.

That the accused appreciated the situation could hardly be doubted. He testified and in the first instance placed before the judge evidence which unequivocally amounted to inducements. He said:

"Sgt. Lovell told me that only when I give a statement doesn't matter how short it was only then would be release my wife to go and look after the baby. If I had not been told this I would not have made any statement. I was afraid that if I had not made the statement then the baby might have indeed died.

"I made a statement then to Sgt. Lovell and he wrote down my statement and I signed it. At this stage only myself and Sgt. Lovell was present in the barrack room....."

"I see Ex. 'W' I can read and write. It is the statement written out by Sgt. Lovell in the Barrack room which I signed."

This stand embodied an acknowledgement that he had indeed given the statement sought to be tendered, but was seeking to avoid its admissibility on the ground that it had been induced by promises held out by Sgt. Lovell without which it would not have been given. Evidence of this kind goes to the root of the question of admissibility which falls within the province of the judge to decide as a matter of law and would necessarily require a ruling on the issue. But would this necessity still arise when the accused had himself chosen to substitute allegations of so different a character as virtually amounted to a withdrawal of what he had originally projected? For, as it transpired in his further evidence, he said:

"I gave only a part of Ex. 'W'. I did dictate certain parts of Ex. 'W' to Sgt. Lovell and he wrote those parts down. I never mentioned

anything whatsoever about any robbery or murder or being involved in either of the two. Those parts of the statements concerning the robbery and the murder were written by Sgt. Lovell not on my dictation and I was forced to sign those parts because I was afraid that if I had not done so then the baby would have died at home without its mother's attention."

And,

"The statement is not mine and what is contained in it is not mine....."

"Lovell did not write down what I said and when he was writing I was saying nothing.

"After Lovell told me this and before he began to write, he asked me questions which I answered."

In my respectful view, this evidence was of a different hue and import to what was originally said and insinuated. Through it the accused had himself succeeded in destroying the effect of his original answers by wholly retracting their implications. Apart from discrediting himself in the eyes of the trial judge, what he was virtually saying was, "I do not wish my original answers to stand. I wish to withdraw them. What I am saying now is that I did not make the statement."

An accused person cannot be restrained from inconsistencies. He might boldly wish to switch his defence from time to time, in which case it would be for the trial judge to measure his credibility and determine (if it is possible to do so) what it is that he really wishes to have considered. In this case the accused had eventually said that he had never made the statement in question and that nothing which was recorded in that statement was his. In this way he had, so to speak, succeeded in wholly removing from judicial consideration the question raised in his earlier statement that he had made Ex. 'W' but under conditions which would in law justify its exclusion, bearing in mind that there was no other evidence adduced to lend support to the original allegation. But this was not all. Sgt. Lovell was called as his witness before the end of the *voir dire* with the object of seeking to prove what was suggested, viz., that it was he, Sgt. Lovell, who had written the statement and not Sgt. Mc Lean. A specimen handwriting was taken from Sgt Lovell whilst he was in the witness-box at the request of counsel for the accused, who also called a handwriting expert, one Mr. Hinds, to compare these specimens with the handwriting on the statement (Ex. 'W') in an effort to establish this allegation. But not only was Mr. Hinds' conclusion to the contrary, but Sgt. Lovell positively confounded the allegation. At the end of the *voir dire* then the position was this: The accused had, so to speak, abandoned his allegations that he had made the statement but was induced to do so. *Instead, he put forward the story that Sgt. Lovell had written down what he did not say; that the statement was not his; and that what was contained in the statement was not what he had said.*

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In these circumstances, when the trial judge ruled at the end of the voir dire that *what the accused was in effect saying was that he did not make the statement*, that this was a question of fact for the jury to decide and not a matter of law to be decided on a voir dire, could it be said that the trial judge had ignored some legal principle in making a ruling of this kind to the prejudice of the accused? And could it be said that when the jury returned to court and the trial judge informed the jury that from the evidence taken in their absence "the court has ruled that whether the accused made the statement sought to be tendered or not is a question of fact for them to determine", that he had mis-stated any thing or failed to state something which he ought to have stated? *Was he required, in the face of the ultimate categorical denial of the accused at the voir dire that he did not make that statement, to rule on the original issue of voluntariness*, in the absence of other evidence or circumstances which would call for a pronouncement? In my humble view, on the evidence as it was, the *trial judge was not in error*.

I would wish to refer to the cases of *R. v. Dunne*, (1929-1930) 21 Cr. App. R. 176, where the judge withdrew to his private room of his own motion in order to question a witness of tender years so as to ascertain whether she was competent to testify; and *R. v. Reynolds*, (1950) 1 K.B. 606, where the judge dismissed the jury when a similar question was being considered. In both cases the ensuing convictions were quashed. In the latter case, *Goddard, L.C.J.* (at p. 611) drew attention to what seems to be well settled in law, namely, "that it should be regarded as most exceptional that any evidence should be given in a criminal trial otherwise than in the presence of the jury." But His Lordship was at pains to point out that, "There is one well-known exception, an exception which has been laid down in mercy and fairness to prisoners, viz., that evidence on the question whether a confession was properly made ought to be given in the absence of the jury. The class of evidence given in the present case ought to be given in the presence of the jury in open court." What falls within the "exception" referred to is not whether the statement was made at all, but whether it was "*properly made*". It is on the basis that a statement is "*actually*" made that an enquiry is permitted in the absence of the jury to ascertain affirmatively whether it was "properly made" or not. And to do this, the circumstances under which it was alleged to have been made are bared to satisfy the conscience of the judge that it was not improperly obtained. If in the course of this exercise it becomes apparent that the defence is no longer raising the question of want of voluntariness, but is setting up the defence that the accused was in no way responsible for the making of the statement, then the judge's task would become simplified. He merely looks to see whether the prosecution has positively and sufficiently in law laid the foundation of "voluntariness". If so satisfied, he admits the statement as one which was not improperly obtained and leaves the remaining question for the jury to decide whether indeed it was the statement of the accused or not. But he is not called upon to rule

whether it was made by the accused or not, as such a ruling would embody a finding of fact which is exclusively reserved for the jury on settled principles.

It is true, as has been pointed out in the judgment of my learned brothers, that there does appear in the Canadian case of *R. v. Mulligan*. (1955) O.R. 240—the actual report of which I do not have, but which case I have read from a copy submitted by counsel—that it was argued on behalf of the appellant that the trial judge on the trial within a trial must determine two matters: (1) whether or not the statement was made, and (2) if the statement was made, whether it was made in circumstances that rendered it admissible. The position taken by the defence in that case was, that the alleged statement was not in fact made, or, if made, was not true. *Mc Kay, J.A.*, in delivering the judgment of the court, said (1955) O.R. at p. 248

"I am of the opinion on the facts of this case that the trial judge should first have ruled, whether, in his opinion, there was some evidence fit to go to the jury that the statement alleged to have been made by the appellant was his statement: if he thought there was not. he should have rejected the statement, and not permitted evidence of it to be given before the jury."

If this pronouncement was intended to decide that the judge is called upon at the *voir dire* to evaluate and rule on evidence of affirmation and denial on the question as to whether the statement was that of the accused or not, I would respectfully disagree as it would be against the authority of the cases of *Dunne* and *Reynolds* (already referred to), and to mention the West Indian cases of *R. v. Charles*, (1962) 3 W.I.R. 534. *R. v. Farley*, (1962) 4 W.I.R. 63, *Herrera & Dookeran v. R.*, (1968) 11 W.I.R. 1 and *Williams v. Ramdeo & Ramdeo*, (1968) 10 W.I.R. 397, fully set out in the judgments of my learned brothers.

Before I leave this question, there is one other matter to which I would allude, and that is, the ruling of *Devlin J.* (as he then was) in the case of *R. v. Roberts*, (1953) 2 All E.R. 340, in view of the reliance placed on it by learned counsel for the appellant in trying to bring home the point that it is within the competence of an accused person to raise the question as to whether he made the statement or not on a *voir dire*, seek to obtain an enquiry on the issue, and then if that issue will have been decided against him, to raise the subsequent question as to the voluntary character of the statement, or vice versa.

As I understand that eminent judge, he did not propose to investigate the authorship of the statement in the absence of the jury, but only its voluntariness in the usual way, that is, by a *voir dire*, *if there was evidence fit to go to the jury that the accused had made the statement*. Why should it be assumed that His Lordship would go behind cases like *Dunne* and *Reynolds* by carving out a new form of jurisdiction? On the contrary, I would be inclined to think that His Lordship was dealing with the matter according to the letter and spirit of those decisions. He was doing what ordinary common

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justice demanded in the circumstances of the case, which concerned a deaf and dumb mute from birth, who was incapable of instructing his counsel. His Lordship wanted to be assured that there really was some evidence fit to go to the jury that the accused person was capable of communicating by token or some form of sign language so that what he wanted to say could properly be understood for the purpose of being reduced into writing and treated as the statement of the accused. And that was an essential aspect to be first settled in the special circumstances of that case. If satisfied that the deaf mute did so communicate, the obligation to hold a *voir dire* as to voluntariness could not be ignored, as counsel was in no position to receive instructions from the accused, and the necessity to be assured in the circumstances that improper means were not used to obtain the statement would arise naturally. In which case, in fairness to the accused, the "exception" of embarking on a *voir dire* would be inevitable if prejudice was not to accrue were the contents of the statement itself to form a part of the enquiry. This would be "the ordinary way" of investigating voluntariness and testing for improprieties, that is, in the absence of the jury—on a *voir dire*.

As I understand the law, before a confessional statement is tendered, the prosecution must lay the foundation for its admissibility by leading some *prima facie* evidence—evidence fit to go to the jury that the statement was that of the accused and that it was made freely and voluntarily without inducements or threats. If counsel wishes to dispute the authorship of the statement, he must do so in the presence of the jury; if its voluntariness, he must do so at the *voir dire*. But he might well wish to raise the issue of "voluntariness" at the *voir dire* without renouncing his right to contest "authorship" before the jury. And I cannot be persuaded that there would be anything to prevent him from so doing. As I see it, an objection to "voluntariness" does not necessarily embody an admission of "authorship". It might well be intended to put the prosecution to the proof by making available the opportunity of a *voir dire* for the purpose of cross-examination, and if it is not taken beyond this point and the judge is satisfied as to "voluntariness", then I can find nothing inconsistent with a contest in open court as to "authorship" *vel non*. For counsel would be entitled at the *voir dire* to elicit such circumstances from the prosecutor's own evidence as to affect the conscience of the judge as to whether the proof tendered was positive and affirmative beyond reasonable doubt. In other words, the effect of cross-examination at a *voir dire* might well be the means of causing a judge to refuse to admit a statement without any evidence from the defence. If, however, an exploratory attitude proves unsuccessful, a defence which has committed itself to nothing, could well return to open court and properly raise the issue of authorship.

In this case, if there was evidence at the *voir dire* which was capable of affecting the foundation evidence of Sgt. McLean and Sgt. deAbreu, or if such circumstances had been elicited as could reasonably affect the conscience of the judge on the question of voluntariness, then I would have said that it

would have been the duty of the trial judge to have ruled on this issue. But inasmuch as the original suggestions put on behalf of the accused were wholly rejected, and the accused himself had virtually withdrawn and abandoned his original evidence as to want of voluntariness by substituting the allegation that he did not make the statement, there was nothing for the trial judge to really rule on. In any event, the judge by admitting the statement must impliedly be taken to have ruled that he was satisfied that there was no improper means used to obtain it. Indeed, as I have said before, the evidence at the voir dire all went one way, and it was inevitable that the statement should have been admitted. What is more, in open court the initial evidence of Sgt. McLean at the voir dire as to voluntariness was repeated by him. He said that he held out no inducement nor threat nor did anyone do so in his presence, and there was not a single question asked by Sgt. McLean by counsel for the accused to indicate otherwise. Neither was a single question asked by counsel for the accused at the trial to indicate or suggest that the accused did not in fact make that statement. There was then no challenge after the voir dire in the presence of the jury, and all that remains to be observed is that when the accused came to give his statement from the dock, he never denied making the statement tendered, nor did he say a word to indicate that it was obtained from him properly.

For the reasons which I have attempted to state, I do not think that the accused in this case can complain that anything which was done by the trial judge had redounded to his prejudice. The accused sought to avail himself of every device possible at the voir dire to see whether he could gain for himself a particular advantage or not. Each line of his approach collapsed completely and he was left eventually without a peg on which to hang his hat, to the point that it might well have been of some embarrassment to his counsel to have attempted to raise before the jury any question, under cross-examination or otherwise, to advance the accused's original complaint at the voir dire that his confessional statement was improperly obtained, having regard to his subsequent *volte face* that he did not make the statement at all.

In my view, for the reasons given by my brothers, the Chief Justice and Justice Persaud, on the other aspects of the arguments raised by counsel for the appellant, the summing-up of the trial judge was adequate. I am also satisfied that the appellant should have had the benefit of a direction on manslaughter put to the jury because of what he said in the very statement which he seeks to argue now should never have been admitted. If that statement had not been admitted in evidence, there could only have been the question of murder or acquittal.

I would support the order proposed by the learned Chief Justice.

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CHIEF JUSTICE: The appellant, Dhannie Ramsingh, was convicted before a judge and jury of the offence of Murder, contrary to *s. 100 of the Criminal Law (Offences) Ordinance, Cap. 10*, and sentenced to death. It is from this conviction that he now appeals to this court on three main grounds of appeal:

- (a) "The learned trial judge erred in admitting in evidence the accused's statement to the police, inasmuch as the learned trial judge ought to have given a ruling on the voluntariness of the statement on the voir dire.
- (b) The learned trial judge erred in not directing the jury that if there was a common design to use unlawful violence, short of the infliction of grievous bodily harm and the deceased's death was an unexpected consequence of the carrying out of that design then the appellant would be guilty of manslaughter.
- (c) The learned trial judge erred in law when he directed the jury on the doctrine of recent possession without proceeding to tell the jury-
 - (i) that it must be established that the articles were in possession of the deceased person at the time of the alleged murder;
 - (ii) that if an explanation as to the possession is given by the accused which the jury believes or leaves them in reasonable doubt then the doctrine would no longer apply."

The evidence led by the prosecution against the appellant revealed that one Etwaroo and his wife Basmattie, the victim in this case, lived with their grandson, Gertam, in a small house 25 rods west of the Nismes public road, which runs north to south.

West of the public road and adjoining it there is a side road known as the Middle Walk Dam which runs east to west, and the house is on the southern side of the Middle Walk Dam and about five rods away from it. This couple kept money and jewellery in two Lactogen tins under the floor boards of the house, and on the 13th July, 1970, the floor boards were removed and Etwaroo and his wife checked the money and the jewellery. There was then \$2,100 made up of \$20 and \$10 bills current money of the Country. Etwaroo took out \$10 from this sum leaving \$2,090, replaced the balance of the money and the jewellery in their original position and nailed down the boards. The jewellery consisted of one tillarie with galahar, three pairs of gold bangles, two pairs of gold earrings, two gold chains, six gold brooches and two gold finger rings, to the total value of \$760.

Etwaroo and his grandson then left the home at about 8.30 a.m. when he took the boy to school at Bagotville and then journeyed to his sister's home at Leonora. Basmattie was left alone at home. At about 3 p.m. Etwaroo left his sister's home and eventually returned home with his grandson at

about 4.30 p.m. Gantam went to the southern door of the house and pulled the door. He shouted and Etwaroo entered the house noticing that the chain was still on the door but not the padlock. On entering the bedroom he found that the wooden bed was broken up and thrown on to the floor. Two pieces of board were ripped up from the flooring and the two Lactogen tins were nearby, but both the money and the jewellery were missing. He then made a search of the house and found his wife lying dead on the ground inside the kitchen. Two rice bags covered the body, and when he removed them he found blood on his wife's mouth, ears and nose. He re-covered the body and then went to the police station where he made a report. The police arrived at the house and removed the body along with the rice bags and a white towel which was found on top of the mattress of the bed. also a paper bag with two \$10 bills inside. They also removed a white handkerchief and a short piece of wood north of the body which appeared to have bloodstains on it. The police found a lath on top of the bed, two grips open and clothes scattered all over the floor, and the two empty Lactogen tins. A crow-bar was also removed from the house along with the spectacles of the deceased which was found two feet away from the body.

The medical evidence revealed that Basmattie had sustained: (1) a depressed fracture of the left lateral region of the skull; (2) an abrasion of the right leg, and (3) haematoma on the right shoulder. Death was due to a depressed fracture of the temporal region of the skull with haemorrhage and brain damage, and could have been caused by a hard blow with a solid blunt instrument such as a piece of wood or an iron bar. It was admitted, however, that it was possible that the injury described could have been caused by the deceased coming into contact with a hard solid object and was consistent with a fall.

It appears that the appellant had visited Etwaroo's home four or five times before the day in question in company with Brijmohan Singh, the last occasion being sometime in 1970 when Brijmohan admittedly bought a cow for \$155 from Etwaroo who wrote a receipt therefor at the house. Brijmohan, however, denied that the appellant was present at that transaction.

The witnesses for the prosecution reveal that on the day in question at about 12.30 p.m. the appellant and an Amerindian man called 'Buck man' went to Brijmohan's house. Brijmohan lived at Nismes in the vicinity of the home of the deceased and knew the appellant well. The latter had at one time worked with an employee of the Drainage & Irrigation Board, was a regular visitor of Brijmohan's home, and had actually stayed in his home for a short period. 'Buck man', however, was unknown to Brijmohan and had never been seen in the district before that occasion. On the occasion in question, the appellant announced that he had come for a walk, and the three men commenced to drink from a bottle of rum supplied by 'Buck man'. The appellant enquired whether his brother, one Bhagwan Singh, who also lived in the area, was at home, and on being answered in the affirmative Bhagwan Singh was sent for, and when he arrived he joined the group in a drink. The

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appellant had also stayed with Brijmohan Singh for a period of about two weeks, about one and a half months before this date. Subsequently that afternoon the appellant and 'Buck man' were seen to leave Brijmohan's house and go north. The two men then crossed the bridge leading from Nismes to Bagotville, and they walked some distance and then turned back. They then stood up on the Middle Walk Dam and began to look around.

At about 3.30 p.m. the appellant and 'Buck man' were seen on the public road at Nismes to be walking closely together on the eastern side of road about half a mile south of Etwaroo's house. The appellant had a black hand-bag in his hand and the two men appeared to be looking at a ranger who was then passing on the road.

At about 10 p.m. that night Detective-Sergeant 2629 Mc Lean found the appellant standing on Eccles public road, East Bank, Demerara. He asked the appellant if he had a brother at Nismes and, if so, when last was he there. The appellant replied that he was last there about two months ago. Sergeant McLean then informed the appellant that he was in possession of a warrant to search his home, and he read the warrant to him and asked him whether he had any of the articles mentioned, and the appellant replied, "No." A search was then carried out in the presence of the appellant and his wife Kamalpattie, and in a grip in the bedroom was found a bottle containing \$420.11 made up of twenty-one \$20 bills, one 10c piece and one cent Guyana currency, one gold brooch, and a piece of broken gold necklace. Kamalpattie's bosom appeared bulky and when she was asked what she had there she took out seven pawn-tickets, one pair of gold bangles and \$50 made up of two \$20 bills and one \$10 bill. She stated that the appellant had given them to her. The appellant who was present made no reply. Two receipts dated 13th July, 1970, and purporting to be signed by one Dularie, were also found. The appellant said that Dularie was his landlady who lived upstairs. Dularie, subsequently, on being shown the receipts, handed over to the police \$60 made up of three \$20 bills. The appellant was asked where he got the money and jewellery from, and he said he knew nothing of the jewellery and that he had borrowed \$600 from one Doodnauth of James Street, Albouystown. The appellant was later confronted with Doodnauth, and before Doodnauth could be asked anything, the appellant said to him, "Ain't you lend me \$300 this morning?" Doodnauth then denied lending any money at all. In the pocket of the appellant was also found a \$20 bill and 41 cents Guyana currency.

At about 2.20 a.m. on the following day, 14th July, 1970, Sergeant McLean told the appellant that he had reason to believe that the money and jewellery were stolen from the house of Basmattie who was robbed and murdered on the 13th July, 1970, at Nismes, West Bank, Demerara. The appellant was then cautioned and he said that he had nothing to say.

At about 12 midday on the said day, the appellant told Sergeant McLean that he would like to tell him all about the money and jewellery and all that he knew of Basmattie's death. He was then cautioned, and he elected to make a statement which was reduced into writing and signed by him. In that state-

ment the appellant made what was virtually a confession. He said that 'Buck man' had come to him and told him that he had heard that some old couple who were living at Nismes had got a lot of money and jewellery and he wanted the appellant to accompany him to go to rob them. He then agreed to go with 'Buck man' and they went to a rumshop and bought a bottle of rum. They then joined a car and journeyed to Nismes and while driving 'Buck man' pointed out the house where the couple were going to rob lived. They then went to Brijmohan's house where they had drinks, and they were later joined by Bhagwan Singh. At about 2 o'clock Bhagwan Singh left the house and walked down the dam to Etwaroo's house. They found no one at home. Just then, however, they saw the old lady coming home, and she passed, 'Buck man' locked her off about her neck and dragged her round the western side of the building and left her by the door. 'Buck man' was away for about five minutes and came back and told him everything was all right. 'Buck man' had a key in his hand, and he opened the padlock of the door and went inside, and he (appellant) stayed to see if anyone was coming. Fifteen minutes later 'Buck man' came out of the house and told him everything was all right and they could go away. They then walked to Wales, crossed the river by launch to Grove and joined a car. While they were in the car, 'Buck man' handed him many \$20 bills, a piece of gold bangle and a galahar which he put into his pocket. They then drove to Bagotstown where he lived. 'Buck man' then went home. He put the money along with other money that he had won on a bet on a race, and it amounted to \$500. He paid his landlady \$60 for the rent which he owed her; he put \$20 in his pocket and the balance of money with the jewellery he put in a bottle which he placed in a grip. He gave \$50 and a pair of gold bangles to his wife.

The statement concluded, "Sir, ah really go with 'Buck man' to rob the old lady because ah ain't working and I say ah gon get some money fuh help meself. I did not go to kill anybody."

To this evidence the appellant replied in a statement made from the dock in his defence, in which he said that on the morning of the 13th July, 1970, he went to Nismes, West Bank, Demerara, to visit his relatives. They had a few drinks and returned home later that day, and about 10 p.m. that night he was approached by the police and arrested outside of a bar. The jewellery and money they found in his possession belonged to him. Part of the money he had won on the last race of the Trinidad meeting that was run on the 3rd July. The other portion he had borrowed to make a special investment later the coming week. The statement concluded that he did not go across to Nismes to take part in any crime.

It will be seen that the case for the prosecution against the appellant depended, *firstly*, on the circumstantial evidence that he was well-known in the district of Nismes where the deceased lived and had visited that home on a previous occasion; that on the day in question he was in the district in company with an unknown Amerindian man at the time when the deceased was killed and was seen along with this man in the area of the home of

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deceased looking around and was later seen with a black bag in his hand; that subsequently a large quantity of money in notes similar to the denomination of the notes taken from the house of the deceased and jewellery identified as having been stolen from that house were found in his possession; and that he had lied to the police when he had said that he had borrowed the money from Doodnauth and that he did not know anything about the jewellery, and he was last in Nismes two months ago; *secondly*, the direct evidence of the statement in which he had confessed to participating in the robbery of the deceased.

The case for the defence, on the other hand, was that while he had gone to Nismes on that day to visit his relatives and had had a few drinks, he had not taken part in any crime, and the money and jewellery found in his possession belonged to him.

The appellant was subsequently indicted jointly with Oscar Kunath, the Amerindian, for the murder of Basmattie, but the case proceeded against the appellant alone as the other accused had since died.

At the trial when the prosecution sought to tender in evidence the confessional statement alleged to have been made by the appellant, objection to its admissibility was taken by counsel for the appellant on the ground that it was not a free and voluntary statement as it was induced by promise and threats used and/or directed to the accused who was coerced and/or induced into making the said statement. There was a further objection that the statement was not taken down by Sgt. McLean but by Sgt. 4994 Lovell. At the request of counsel, the issue was tried by the judge on the voir dire. In the absence of the jury the evidence was led by the prosecution **that the** statement was taken in the Enquiries Office of the La Grange Police Station in the presence of Sgt McLean and Sgt. de Abreu, who had signed the statement as witnesses, the appellant and his wife. The appellant, after telling Sgt. McLean that he would like to tell him all about the money and jewellery and what he knew about Basmattie's death, was then cautioned, and after signing the caution which was reduced into writing, he was told that he could either write the statement himself or ask someone else to write what he had to say. The appellant then made the request that the Sergeant write down what he had to say. He then made the statement which was reduced into writing by Sgt. McLean. When the statement was completed the accused read the statement himself, said it was true and correct, and signed it, after being instructed to make additions, corrections, or alterations if he wished to do so. No threats were made or inducements held out to the appellant.

The two police officers were cross-examined by counsel for the appellant to suggest that Sgt. McLean at 2 a.m. that morning had banged on the cell door of the appellant and told him that he wanted a statement from him and had said to the appellant. "Tek time, you gwine talk. We got your wife here, you know." It was also suggested that Sgt. Lovell had said, "Leave it to me," and he had said to Sgt. McLean, "You got to know how to do things," and that it was Sgt. Lovell who had taken a statement from the appellant.

Under cross-examination, Sgt. de Abreu did admit that the wife of the appellant had told him that she had a baby which was nursing, and she expressed great concern for the child whom she said she had left with a relative.

In reply to this evidence the appellant gave evidence on oath in which he stated that both he and his wife were arrested and taken to Ruimveldt Police Station, and their two children, 18 months and 6 months, were left at home. That night he could not sleep, and at 2 o'clock the next morning Sgt. Mc Lean told him he wanted a statement from him. He then told the sergeant that he was unwell and could not give a statement. About 7:20 a.m. he was told that he would be taken to La Grange Police Station. He told the police that he was not feeling well and he was suffering from the drinks he had had the previous day. After they were taken to La Grange Police Station. Sgt. Mc Lean again told him he wanted a statement, and he told him he was hungry and not well and that he had not slept the previous night. He then told the sergeant that he was very disturbed about the little baby being at home without the mother, whereupon Sgt. McLean told him that the baby would have to go where Basmattie had gone. He understood this to mean that the baby would have to die. Later he heard Sgt. Lovell say to Sgt. McLean "Don't worry with anything. Leave everything to me." He was then taken to the barrack room by Sgt. Lovell who pressed him for a statement, and he replied he was not in a condition to give any statement as up to that time he had not been given anything to eat or drink and he was still suffering from the effects of the drinks he had the previous day. He was worried about the baby being left alone at home, and Sgt. Lovell repeated the threat that the baby would have to go where Basmattie had gone. He became fearful about the baby's safety, and as he left his wife at the Enquiries Office, he then decided to make a statement. Sgt. Lovell told him that only when he gave a statement, no matter how short, would he release his wife to go and look after the baby, and if he had not been told this he would not have made a statement. He was afraid that if he had not made a statement then the baby might have died. He then made a statement to Sgt. Lovell who wrote down the statement and he signed it. At that time only Sgt. Lovell and himself were in the barrack room. Subsequently Sgt. Lovell went outside and spoke to Sgt McLean telling him, "You will have to know how to do things to get what you want." The appellant then identified the statement, Ex. 'W', as the statement written down by Sgt. Lovell in the barrack room which he had signed. He concluded his examination-in-chief by saying, "Had I not considered my baby's life was in danger, I would not have signed Ex. 'W'."

It will be seen at once that this evidence of the appellant did not coincide with the line of cross-examination of the police officers, for there it was being suggested that the appellant was being threatened, that the police wanted a statement from him and he was being told that he would talk because the police had his wife there, and that Sgt. Lovell had told Sgt. Mc Lean that he had to know how to do things. Whereas, the evidence of the

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appellant was that he was told that it was only after he had made the statement that his wife would be released to go home and look after the baby.

Under cross-examination he had first maintained his stand that he had told Sgt. Lovell, who had asked him for a statement, that he was not feeling well and he was disturbed about the baby being at home without its mother, and it was only when Sgt. Lovell told him that the baby would have to go where the body had gone that he decided to give a statement. He then stated that he did not give Sgt. Mc Lean a statement after Mc Lean had mentioned about the body because he could not give a statement about something he knew nothing about.

At this point it must be observed that the appellant was retreating from his original stand, as at one time he said he made the statement only because he was fearful about his baby's safety at home, and he was promised if he made the statement his wife would be released; now he was asserting that he had said he could not give a statement about something he knew nothing about. He further retreated when he said he only gave part of the statement and that part was written down by Sgt. Lovell, but he never mentioned anything about the robbery or murder or being involved in either of the two; the part of the statement dealing with the robbery and murder were written in by Sgt. Lovell, but not at his dictation, and he was forced to sign because he was afraid that if he had not done so the baby would have died at home without the attention of the mother.

At this stage the appellant was asked by counsel for the State to point out the part of the statement which he admitted that he had made and the part which he did not admit but which he swore was written out by Sgt. Lovell. His counsel objected to this question on the ground that the statement was not severable and even though certain parts of the statement were admitted to be made by the appellant, the whole statement was tainted by the inducements alleged to have been held out by Sgt. Lovell. Further, the statement was a narrative and was so inextricably interwoven that it was not receivable without irreparable prejudice to the appellant.

The learned judge ruled in favour of the objection by counsel for the appellant and said that he thought that the statement was not divisible. Then followed the categorical statement made by the appellant under cross-examination when he said, "The statement is not mine, and what is contained in it is not mine." On re-examination by his own counsel, the appellant said, "Lovell did not write down what I said, and when he was writing I was saying nothing. When Lovell told me about not allowing my wife to go home to the baby unless I signed, this was actually before he began to write. After Lovell told me this, and before he began to write, he asked me questions which I answered."

On this evidence being given, the learned judge permitted the appellant to lead all his further evidence, and Sgt. Lovell was recalled in order to suggest that he had written the statement, and a handwriting expert was also called

to give his opinion as to whose handwriting appeared in the statement. His opinion was that the statement was in the handwriting of the specimen given by McLean. The appellant then closed his case on the issue and the learned judge ruled that what the accused was saying was that this was not his statement and this being so it was clearly a question of fact for the jury to decide and not a matter of law to be decided on a *voir dire*. The jury was then returned to court and were informed by the judge that from the evidence taken in their absence the court had ruled that whether or not the accused made the statement sought to be tendered was a question of fact for them to determine.

It is submitted by counsel for the appellant under the first ground of appeal that the learned judge had misinterpreted the evidence of the appellant when he said the statement was not his, and all that the appellant meant was that the statement was not his, because he had been induced to sign it as he was told that only if he gave a statement would his wife be released to go home to look after the baby; the learned judge should therefore have ruled on the question as to whether the statement was a free and voluntary one.

I cannot agree with this submission as from the evidence given by the appellant on the *voir dire*, it appears clear to me that the appellant appreciated the difference between making a statement under an inducement and not making a statement at all. First of all, it must be presumed that he heard his counsel object to the admissibility of the statement, that he had been induced or coerced into making the statement. Then he himself said that he told the police on more than one occasion that he was not feeling well and not in a condition to make a statement, and it was only when he was told that the baby would have to go where Basmattie had gone that he decided to make a statement. There was a gradual process of withdrawal from the original position taken when he said that he had only dictated a portion of the statement. Then there was a final denial of the authorship of the statement and the categorical statement that what was contained therein was not his and that when the person was writing the statement he was not saying anything. I consider the stand then taken by the appellant to be that despite the inducements held out to him and the coercion used on him, he had said nothing and had not made a statement. What more could the learned judge do in the situation that existed here?

The law is settled that where the admission of a statement is objected to on the ground that it is not the statement of the accused person, it is the duty of the judge to admit the statement and leave it to the jury to say whether the accused made the statement or not, and if they find that it is his statement it is for them to say what weight should be placed on it. If, however, they find it is not his statement, then they should disregard it entirely.

In *R. v. Baldwin*, (1931) 23 Cr. App. R. 62, it was laid down that a statement cannot be successfully objected to merely because the prisoner

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intends to deny it when the time comes. Whether or not he made the statement is, in that case, a question of fact for the jury to determine like any other fact, and all the evidence bearing upon that question must be given in the presence of the jury. [See the interpretation of *Baldwin's* case by Archer J. in *R. v. Farley*, (1962) 4 W.I.R. 63 at p. 65. It was submitted by counsel for the appellant that the situation that existed here was similar to that in *The State v. Harper*, (1972) 16 W.I.R. 353, where the majority decision of this court was that it was the duty of the judge to have tried the issue of voluntariness on the *voir dire* when at one stage the appellant Harper had said that he was handed a written statement and asked if he would sign it and he had said yes, because he had been told that if he signed it everything would be all right. Under cross-examination he stated that he never gave the statement to the inspector of police, but immediately after that he said that he did not give the statement of his own free will and a promise was held out to him.

As I pointed out in *The State v. Fowler*, (1972) 16 W.I.R. 452 (at p. 464), that evidence was interpreted by me to mean that the appellant Harper was saying that the statement was not freely and voluntarily made by him; in other words, that he had made the statement but it was not a free and voluntary statement. The situation here is quite different, for the appellant was not saying that the statement was made by him and it was not free and voluntary; he was stating categorically that the statement was not his at all, and the contents of it were not his. He was therefore denying authorship of the statement. As I see it, the appellant abandoned his original objection that the statement was not free and voluntary and was assuming the position that it was not his statement and it had not emanated from him. I agree that when an accused person states that he signed a statement, *prima facie* the inference is that he is saying that he adopted the statement as his own, but when he goes on to say that the statement is not his, that inference is clearly rebutted and he is then denying the authorship of the assertions in the statement and making it clear that the assertions therein have not flowed from his mind.

I cannot protest too strongly at the suggestion that when the objection is made the judge must enter into a dialogue with the accused person in order to comprehend the true nature of the objection. A judge is riot there to act as an interpreter but is there to see that justice is done between the state and the accused, and if the accused denies the authorship of the statement, he must be taken to mean what he says.

It is further submitted that as the issue of voluntariness of the statement was raised, the learned judge ought to have proceeded to determine that issue and ought to have reached the conclusion as to whether or not there had been an inducement held out to the appellant. In my view, the cases of *R. v. Charles*, (1962) 3 W.I.R. 534 and *R. v. Farley* (supra), are against that proposition. In both of these cases the objection of the appellant to the admission of the statement in evidence was on the ground that he had not made it, and the learned judge in the absence of the jury tried the issue of voluntariness of the statement, and on the return of the jury informed them that he had ruled the statement admissible as a free and voluntary statement.

The Federal Supreme Court in each case allowed the appeal as that court held that on the objection there was no issue to try, and the question whether the accused had or had not made the statement was an issue of fact which the jury had to determine and the withdrawal of that issue from them was an irregularity affecting the validity of the trial.

In *R. v. Charles* (supra). Lewis J., who delivered the judgment of the court, pointed out that the appellant had objected to the admissibility of the statement on the ground that he had not made the statement, but such an objection was not, in law, proper ground for attacking the admissibility of a statement but merely raised an issue which must be tried by the jury. In *R. v. Farley* what was of great importance in the decision was that the court made it clear that the judge and jury must be present throughout the giving of evidence and every part of it upon which issues of fact are to be determined, and as this was an issue of fact to be decided by a jury, an illegality was committed when they were not present when the evidence was given.

Two decisions of the Trinidad Court of Appeal—*Herrera & Dookeran v. R.*, (1968) 11 W.I.R. 1 and *Williams v. Ramdeo & Ramdeo*, (1968) 10 W.I.R. 397 are dead against this submission. In the former case the objection was taken to the admission of a statement by the appellant Herrera on the ground (a) that the prisoner never made the statement at all; and (b) that the paper was produced to him which he was savagely beaten into signing without knowing or being allowed to know anything of its contents whatever, i.e., after the beating he was tricked into copying in his own handwriting the document handed to him by the police and signing it as a statement of his own. The Court of Appeal held that the issue whether the statement was made by the appellant or not was properly left by the judge to the jury and that the issue raised did not go to the admissibility of the statement but rather to its acceptability as being genuine, and was therefore an issue to be resolved by the jury and not by the judge.

In my view, the circumstances in the present appeal as to the allegation by the appellant that the statement tendered was not his statement approximates closely to the circumstances in *Herrera & Dookeran's* case. In the latter case the appellant had objected to the admission of a written statement allegedly given by him on the ground that it had not been given voluntarily. When he gave evidence on the voir dire, he alleged the statement never had been given at all and that he had been beaten into signing a statement. The Court of Appeal held that the magistrate was wrong in refusing to admit into evidence the statement of the appellant and by so doing he had rejected legal evidence substantially affecting the merits of the case. The court in its judgment made it clear that the appellant was alleging not that he had given the statement under duress, but that he had been beaten into signing a piece of paper and that he had in fact given no statement at all, and went on to say that in the case of an allegation by a person charged that he made no statement at all, the statement must be admitted and the allegation will fall to be considered along with the rest of the evidence in the case, and a verdict must be reached after consideration of the whole.

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In my opinion the appellant cannot have it both ways. He cannot object to the admissibility of the statement on the ground that it is not a free and voluntary statement and when that issue is tried on the voir dire in the absence of the jury then set up the objection to the admission of the statement that he did not make it, which is an issue of fact to be determined by the jury, the evidence in relation to which must be given in their presence.

In *Phipson on Evidence*, 10th Ed., p. 19, para. 22, the learned author points out that questions as to the admissibility of evidence are questions of law and determinable by the judge. As it is almost impossible to discuss such questions without revealing the nature of the evidence objected to, it is common for the jury to retire during the argument. On their return the questions should be repeated and a formal ruling given in their presence. Where, however, the point can be discussed without such a risk, as in the case where a judge examines a witness on the voir dire to decide whether he understands the nature of an oath or the duty to tell the truth, the jury must be present. It follows, therefore, that in relation to an objection to the admissibility of a statement made by an accused person on the ground that it is not a free and voluntary statement, that issue must be determined by a judge on the voir dire in the absence of the jury, and the trial within a trial commences at the point when the jury retires. Otherwise, there is a risk that they may hear evidence prejudicial to the accused person which they ought not to hear.

In *Cornelius v. The King*, (1936) 55 C.L.R. 235, the High Court of Australia made it clear that the question of fact in relation to the admissibility of a confession is collateral and irrelevant to the issues which the jury are to pass and the question may therefore be heard and determined in the absence of the jury. In simple cases it may not be necessary to do this in the absence of the jury if it appears that no prejudice to the prisoner could arise from the jury's hearing the evidence and discussion relating to the voluntary nature of the prisoner's statement. But otherwise the evidence should be taken as upon a voir dire and the admissibility determined in their absence. When a confession is admitted in evidence, the weight to be attached to it is a question for the jury, and upon that question the circumstances in which it was made are relevant and may be proved before the jury.

Counsel for the appellant went further and submitted that on the voir dire an accused person can properly raise both issues by objection on the ground that—(a) he did not make the statement; (b) that if it is found by the learned judge that the accused did make the statement, then it is not a free and voluntary statement. He urged that the case of *The State v. Fowler* (Criminal Appeal No. 37 of 1970) was wrongly decided where the majority decision held that an accused person could not object to the admissibility of a statement on both ground, and counsel urged, to use the phrase coined by Persaud, J.A. in *The State v. Harper*, that it was quite proper for the appellant in this case to raise a double-barrelled attack on the admissibility of a statement on the ground—(a) that it is not his statement, and if that failed, then (b) that it was not a free and voluntary statement.

In my opinion, the law on the question 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. [See *R. v. Cowell*, (1940) 2 K.B. 49 C.C.A.] 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*, (1953) 1 All E.R. 1064]

The authorities show that the prosecution is called upon to prove beyond reasonable doubt that the statement is free and voluntary in the sense that it was not made under an inducement, or under a threat or duress or compulsion of any kind by a person in authority.

In *R. v. Warringham*, Parke B. said to counsel for the prosecution [(1851) 2 Den. 447:]

"You are bound to satisfy me that the confession which you seek to use in evidence against the prisoner was not obtained from him by improper means. I am not satisfied of that, for it is impossible to collect from the answers of this witness whether such was the case or not." In *R. v. Thompson*, Cave J. Said: [(1893) 2 Q.B. 12: (18914) All E.R.

Rep. 376:

"By the law of England to be admissible a confession must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. If it flows from hope or fear, excited by a person in authority, it is inadmissible.....The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point begin in its nature preliminary, is addressed to the Judge, who will require the prosecutor to show affirmatively, to his satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of a doubt subsisting on this head, will reject the confession.....If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford the magistrates a simple test by which the admissibility may be decided. They have to ask, is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement to make a statement held out by a person in authority? If so and the inducement has not clearly been removed before the statement was made, evidence of the statement was inadmissible."

In *R. v. Murray*, where objection was taken to the admissibility of a statement on the ground that it was not a free and voluntary statement made by the accused person, and the judge held a voir dire, and ruled the statement admissible but ruled that counsel could not again cross-examine the accused

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regarding the circumstances in which the confession had been made, *LORD GODDARD*, in the court of Criminal Appeal laid down the law as follows: [(1950) 2 All E.R. 925.

"It has always, so far as this court is aware, in such a matter as this been the right of Counsel for the defence to cross-examine again before the jury the witnesses who have already given evidence in the absence of the jury, because, if he can induce the jury to think that the confession has been obtained by some threat or promise, its value is enormously weakened. The weight of the evidence and the value of the evidence is always for the jury. The jury in this case were told that they were not to consider that question at all. That seems to the court to be a complete misdirection on a point of law."

It is to be noted that in *R. v. Murray*, while *LORD GODDARD* pointed out that the weight and value of evidence is always for the jury, there was no clear statement by him that the question of voluntariness was not a matter for the jury to determine. In *R. v. Bass*, however, where the judgment of the court of Criminal Appeal, of which *LORD GODDARD* was a member, was delivered by *Byrne J.* the law was re-stated as follows: [(1953) 1 All E.R. 1064].

"It is to be observed, as this court pointed out in *R. v. Murray*, that while it is for the presiding judge to rule whether a statement is admissible, it is 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 their consideration of it the principle as stated by *LORD SUMNER* and he should further tell them that if they are not satisfied that it was made voluntarily they should give it no weight at all and disregard it."

It seems, therefore, that the court of Criminal Appeal was saying that voluntariness of the statement as a test of admissibility by the judge was the same question that the jury had to consider in deciding what weight was to be placed on the statement, for if they found it was not voluntary they should disregard it completely. In *Sparks v. R.*, *LORD MORRIS*, who delivered the judgment of the Privy Council, in referring to the admissibility of statements made by the appellant, partially maintained that stand when he stated: [(1964) A.C. at p. 983].

"If they were held by the judge to be admissible, it was still open to the prosecution and the defence to allow the jury to hear the testimony as to the circumstances under which they came into being so that the jury, forming their own opinion as to the testimony, could decide what weight to give to the statements or could decide not to give any weight at all to them for the reason that they (the jury) were not satisfied that they were voluntary statements. An accused person is, however, entitled in the first place to have evidence excluded if on the

view of the facts which is accepted by the judge at the trial it is not shown that the evidence is legally admissible."

The Privy Council, in the subsequent case of *Chan Wai-Keung v. The Queen*, (1967) 1 All E.R. Rep., approved of *LORD GODDARD'S dictum* in *R. v. Murray*, but disapproved of that of *Byrne J.* in *R. v. Bass*, and expressed the view that the passage cited from *Sparks'* case (above) was consistent with the distinction which could be drawn from the cited cases, between voluntariness as a test of admissibility and as a matter to be considered by the jury in arriving at the truth. In this judgment the classic statement by *LORD SUMNER* in *Ibrahim v. R.* was referred to and it was stated that the principle of voluntariness was essentially concerned with admissibility. In *Ibrahim v. R.*, *LORD SUMNER* had 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 comment of the Privy Council on this dictum was that *LORD SUMNER* was dealing with the admissibility of evidence and not its truth or weight. The truth of the confession is not directly relevant on the *voir dire* although it may be a crucial question for the jury if the judge admits it. Voluntariness, therefore, is only a test of admissibility. It is not an absolute test of the truth of the statement. It is therefore not correct for the judge to direct the jury that if they are not satisfied that the statement was made voluntarily they should give it no weight at all and should disregard it. Such language is susceptible of the construction that a jury must always be told to disregard a confession which was not in their view voluntary, even if they should consider it to be true. This court then approved of the dictum of the High Court of Australia in *Basto v. The Queen*, when *Dixon, C.J.* said: [(1954) 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 deciding that the statements were voluntary. Moreover the question

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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 being 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."

It is noticeable that this *dictum* speaks of the jury's view being independent of the judge's view only in relation to the probative value of the statement and not in relation to its authorship.

LORD HODSON, who delivered the judgment of the Privy Council in the *Chan Wai-Keung* case, makes the point that on the general issue the accused may have a second chance of attacking the confession, but that is a long way from saying that the jury must be directed specifically that the prosecution must satisfy them beyond reasonable doubt that the confession is voluntary, otherwise they must disregard it. This would be to disregard the fact that voluntariness is a test of admissibility, not an absolute test of the truth of the statement. The position now is, as *Parker, L.C.J.* put it in the Court of Appeal in the case of *R. v. Burgess*, [(1968) 2 All E.R. 55 (at p. 55)]:

"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."

Accordingly, a jury should not be directed when considering the weight of the evidence unless they are satisfied that the confession was made voluntarily, they should disregard it. [*R. v. Overnell*, (1968) 1 All E.R. 938].

It is true that in *R. v. Francis & Murphy*, (1959) 43 Cr.A.R. 174 (at p. 176), *Parker, L.C.J.* reiterated the principle that where objection is taken to the admissibility of an alleged confession, it is essential that the judge should hear evidence in the absence of the jury and give a ruling whether the confession should be admitted or not, and that the evidence of the alleged confession should not be put before the jury unless the judge has first ruled that it should be admitted. And the judgment of the court goes on to say that if the evidence is admitted, the weight and value of the confession be made matters for the jury.

It is quite clear, therefore, that a prisoner is entitled to both a ruling on admissibility from the judge, and also to hearing the verdict of the jury on the weight and value of the confession. This case, however, does not support the proposition that an accused person can object to the admissibility of a statement on the voir dire on both grounds, as LORD PARKER there was speaking of the ordinary case where an accused person maintains an objection on the ground that the statement is not free and voluntary. LORD PARKER was not addressing his mind to a situation where an accused person was objecting to the statement that it was not free and voluntary, and then taking up the position that he had not made the statement at all. This case, therefore, does not assist counsel for the appellant in his argument.

Counsel for the appellant criticized my dictum in the case of *The State v. Fowler*, where I said, "The judge, having made a finding of fact that the statement is free and voluntary and admissible, he cannot then leave it to the jury to say whether it is the statement of the accused or not as that would involve two findings of fact on the same issue which may indeed turn out to be contradictory," and urged that whether a statement is free and voluntary is a question of law and not of fact. This submission I consider has no merit as the question whether a statement is admissible or not is a question of law which must be determined by the judge on a finding of fact that the statement is free and voluntary. As I pointed out in *Fowler's* case immediately before this passage, the admissibility of a statement depends upon matters of fact and a judge must ascertain the facts by legal evidence. If the proof is by witnesses, he must decide on their credibility. If counter-evidence is offered, he must receive it before he decides. As was stated in the Canadian case of *R. v. Orel*, (1944) 2 W.W.R 378, although the admissibility of a confession was a question of law for the judge, all that the judge had decided was whether the statement had been made freely and voluntarily. In *R. v. Roberts*, (1953) 2 All E.R. 340 (at p. 344), *Devlin J.*, in stating that he would enquire into the question whether a statement was freely and voluntarily given, described it as a conclusion of fact which he would reach in the ordinary way. If, therefore, the fact of voluntariness is established when both the judge and the accused himself are saying that the statement is that of the accused, with what logic can the judge in these circumstances leave it to the jury to say whether it is the statement of the accused or not?

I now proceed to examine the cases cited by counsel in support of his submission that an accused person is entitled to raise both issues on the voir dire. In *R. v. Roberts* (supra), the accused on being arraigned was found by a jury to be mute by visitation of God, having been deaf and dumb from birth, and the Crown conceded that unless purported statements by the accused came before the jury, they could not be asked to convict. Evidence of such statements was therefore called for at the suggestion of *Devlin J.* It was debated whether an objection to this evidence that the accused could not have made and did not make the purported statements was triable by the judge or was a matter for the jury. Objections going to the voluntary character of the purported statements (such objections being always triable

by the judge) were also raised. *Devlin J.* then gave the following ruling: [(1953) 2 All E.R. at p. 344].

"I shall inquire into the two questions whether the statements which are alleged to have been made by the defendant were, in fact, his statements, and, if so, whether they were made voluntarily and in accordance with the Judges' Rules, and I shall reach that conclusion of fact on the latter question in the ordinary way. On the former question, it seems to me, subject to anything which Counsel for the defence may say, that it would be right that, if I think there is some evidence fit to go to the jury that they were his statements, I shall admit the statements and let them go to the jury. If I do not think that there is any evidence fit to go to the jury that they are his statements, I shall rule them out"

It is suggested here that this learned judge was saying he would embark on a *voir dire* to try both issues—(1) whether the statements were in fact the statements of the accused person, and, if so, (2) whether they were freely and voluntarily made. With great respect to all those who may think otherwise, I disagree. All that *Devlin J.* was saying was, in this unusual case where the accused was found to be deaf and dumb from birth, it was amazing that statements could be attributed to him when his counsel had stated that there was *no* communication between his client and himself. He would, therefore, in the interest of justice, *take evidence in the presence of the jury* as to the *manner* in which this accused person came to give these statements, which would involve no risk of a jury hearing any evidence prejudicial to the accused, and if he found there was no *prima facie* evidence that the accused person had made the statements, then he would try the issue on the *voir dire* as to whether the statements were made voluntarily which is the ordinary way of deciding such a question. If he found they were voluntarily made, he would then let them go to the jury.

In the Canadian case of *R. v. Mulligan*, (1955) O.R. 240, the prosecution sought to give evidence of an oral statement alleged to have been made by the accused to police officers after his arrest and some nine months before his trial. There were inconsistencies and discrepancies on the *voir dire* in the evidence of the two police officers who were present when the statement was alleged to have been made. The trial judge admitted the evidence of the statement on the ground that nothing had been shown before him on the *voir dire* to indicate that if made it was not voluntary, although he said there was a great deal of doubt as to whether or not the accused had said anything. It was contended in the Court of Appeal for Ontario that before a trial judge could decide that an alleged statement was voluntary, he must decide that it was in fact made, whereas the judge had appeared to think that the only thing he had to decide was whether the statement was voluntary, and having done so he admitted it. It was argued that the learned trial judge should first have determined whether or not the statement was made by the accused, and, secondly, if the statement was made, whether it was made in

circumstances that rendered it admissible; and that the burden was on the Crown to prove affirmatively to the satisfaction of the trial judge, both that the statement had been made and that it was a free and voluntary statement. The appellate court accepted this argument and allowed the appeal. *McKay, J.A.*, in delivering the judgment of the court stated that—[(1955) O.R. at pp. 248, 249].

"the trial judge should first have ruled whether, in his opinion, there was some evidence fit to go to the jury that the statement alleged to have been made by the appellant was his statement; if he thought there was not, he should have rejected the statement, and not permitted evidence of it to be given before the jury. If, on the other hand, he thought there was evidence fit to go to the jury that the accused had made the alleged statement, he should have allowed the evidence to be given before the jury

In arriving at this view, the court considered the case of *R. v. Roberts* (supra). In my view, the Court of Appeal for Ontario misconstrued the ruling of *Devlin J.* in *R. v. Roberts*, when it appeared to them that Devlin J. was saying that the trial judge should rule on the voir dire whether there was some evidence fit to go to the jury that the statement alleged to have been made by the accused was in fact his statement. It may very well be that this mistake was made by the Court of Appeal because the procedure in Canada when a statement is challenged on the ground of voluntariness differs from that of the English procedure. Reading the cases of *R. v. Mulligan* and *R. v. Mandzuk*, (1946) 1 D.L.R. 521 C.A, I gain the impression that in Canada in the province of Ontario when a statement alleged to have been made by an accused person is proffered in evidence by the prosecution, even without objection, the judge is called upon to hold a *voir dire* to determine three questions—(1) whether the statement is a confession or not, i.e., whether it is inculpatory or exculpatory; (2) whether there is *prima facie* evidence that the accused made the statement; (3) whether the statement is a free and voluntary statement. If on the first question he finds that the statement is exculpatory, then the statement is ruled in and the trial proceeds in the ordinary way. If he finds that it is inculpatory, that is to say, incriminating and amounts to a confession, then he determines whether there is *prima facie* evidence fit to go to the jury that the accused made the statement. If he finds there is not, he rules the statement out. If he finds that there is such evidence, then he determines whether it is freely and voluntarily made before admitting it. If he finds that it is not a free and voluntary statement, then he rules it out.

No such position, as I understand it, exists under the English common law, and it is noticeable that in the judgment of *Mc Kay, J. A.* in the Court of Appeal, after a consideration of the English cases, it reads, "In these cases the question was whether or not the statement was a voluntary one. However, I think the same reasoning and principles apply to a case such as this where the position taken by the defence was that the alleged statement was not in fact

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made, or if made, was not true." It is clear, therefore, that the English cases were only followed in regard to the voluntariness of the statement and not otherwise, but the Court of Appeal then applied the same reasoning and principles to the position of an objection being taken that it was not the statement of the accused person. I agree, therefore, with the view taken by the Court of Appeal in Trinidad in *Campbell v. R.*, (1968-9) 14 W.I.R. 507, where that court followed *Herrera & Dookeran v. R.*, *R. v. Farley* and *Williams v. Ramdeo & Ramdeo*, and *Fraser, J.A.*, who delivered the judgment of the court, then stated:

R. v. Mulligan differs from the approach adopted by West Indian courts and we hold that in considering the admissibility of a statement where the issue is not whether it is voluntary but rather whether it was in fact made, the tribunal must admit that statement and leave the issue of fact to be determined by the jury."

I would add, however, that the Canadian approach differs not only from the approach adopted by the West Indian courts but also from the English procedure as well, which is settled by the common law. While it is true that the Canadian courts appear to have adopted the English common law principle as to voluntariness, they have put a gloss on it in holding that the judge should also determine whether there is *prima facie* evidence fit go to the jury that the accused made the statement. It is noteworthy that the learned author of *Cross on Evidence*, 2nd Ed., at p. 54, merely uses *R. v. Roberts* and *R. v. Mulligan* as authority for the proposition that if an issue is raised as to whether a confession relied on by the prosecution was ever in fact made by the accused, the proper course is for the judge to decide whether there is *prima facie* evidence that it was made and for the jury to determine whether it was, in fact made, but no mention is made there of holding a *voir dire*. I would observe here that whenever a judge holds a *voir dire*, he is called upon to make findings of fact to which he applies the relevant law. Where, however, he decides whether there is evidence fit to go to a jury, this is a question of law and no firm finding of fact is made by him. How then can it be successfully urged that a *voir dire* is necessary for this purpose?

Counsel depended heavily on the dictum of *Archer J.* in *R. v. Farley* (already referred to in this judgment), where that learned judge of the Federal Supreme Court stated: [(1962) 4 W.I.R at p. 65].

"The judge treated the objection as one made on the ground that it was not free and voluntary. That was not the ground put forward by the applicant and there was nothing for the judge to try in the absence of the jury when the objection was made. It would have been different if the applicant, while only stating one ground, had also relied on the other, but he persisted with the first ground and did not set up the second ground."

It is urged that *Archer J.* was saying there that the accused person could properly have made objection on the *voir dire* to the admissibility of the

statement on both grounds. I cannot agree that this learned judge was saying any such thing. All the judge was saying was that as the trial judge had committed an illegality in hearing evidence in the absence of the jury on the objection being taken that it was not the statement of the accused person, which issue had to be decided by the jury and not the judge, the position would have corrected itself if when the time came to give evidence on the *voir dire* the accused had changed his stand and the true nature of his objection had revealed itself as being one that he had made the statement, but it was not freely and voluntarily given. It is important when scrutinizing this dictum to note the position of the adverb "also" in the context in which it is used, which suggests that what the judge was saying was that if the accused, while stating the ground that the statement was not his, had later relied on the ground that the statement was not a free and voluntary statement, then the illegality of the position would have corrected itself. Had the adverb "also" been placed immediately after the word "other", then it might have suggested that the accused person could rely on both objections on the *voir dire*, as, coming after the word "other" in the context in which it was used, the word "also" would be equivalent to saying that the accused person could rely not only on the one ground but on the other as well. I therefore disagree with the interpretation placed on the dictum of *Archer J.* in *R. v. Farley* by counsel for the appellant, and would conclude this matter by repeating what *Persaud, J.A.* said in *The State v. Harper* (above) (at p. 630)—that even if the language used could bear the interpretation asked for by counsel for the appellant, it was *obiter* and does not bind this court.

One must bear in mind that when an accused person objects to the admissibility of a statement on the ground that it is not a free and voluntary statement, implicit in the objection is an admission by him that he made the statement but he made it under an inducement or duress or compulsion. How then could he properly object to the admissibility of the statement on both grounds and say *in uno flatu* to the judge, "I ask you to find on the *voir dire* that the statement made by me is not a free and voluntary statement," and then say *in proximo*, "If you find that it is a free and voluntary statement, then I ask you to say it is not my statement." I need hardly say that where an accused person objects to the admission of a statement on the ground that it is not his statement, a judge should always bear in mind *LORD SUMMER'S* dictum in *Ibrahim v. R.* and take some preliminary evidence in the presence of the jury as to whether it is the statement of the accused, and, if so, whether it was freely and voluntarily made, before admitting the statement and leaving it is in fact the statement of the accused person or not. But in deciding whether there is evidence fit to go to the jury that the statement is that of the accused, there is *no compulsion* on the judge under the rules of procedure, as I understand it, to hold a *voir dire*.

I am prepared to concede that when the objection is that the statement is not a free and voluntary statement and that issue is tried on the *voir dire* in the absence of the jury, if it turns out that the witnesses for the prosecu-

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tion themselves say that it is not the statement of the accused person, then the judge should rule the statement out and not let it go before the jury, for the simple reason that when he embarks on the *voir dire* he approaches the issue on the basis that it is the statement of the accused, But that is a far way from saying that an objection on both grounds can be made to the admissibility of a statement and should be tried by the judge on the *voir dire*. There can conceivably arise a situation where objection is taken to the admissibility of a statement by an accused person on the ground that it is not a free and voluntary statement and after the issue has been determined by the judge on the *voir dire* and the statement ruled admissible, the accused person then in his defence either on oath or from the dock seeks to maintain that he is not the author of the statement i.e. the statement is not his. In such a case the credibility of the accused would come sharply under review and it would be open to the judge to tell the jury that the accused person was at one time objecting to the admissibility of a statement made by him on the ground that it was not free and voluntary and was now saying that the statement was not his, in which case they might think that his evidence in his defence was not worthy on belief.

In none of the authorities I have consulted, including *R. v. Mandzuk*, (1946) 1 D.L.R. 521 (C.A.), *Cornelius v. The King*, (1936) 55 C.L.R. 235 and *Basto v. The Queen*, (1954-55) 91 C.L.R., is there anything to support the proposition advanced by counsel for the appellant that both issues can be raised on the *voir dire*, and in the latter case, which is not reported as well as it might be, the judge, it appears, did hold a *voir dire* when counsel objected to the admissibility of an oral statement made by the accused person and later left it to the jury, in the general issue, to say whether it was a statement of the accused or not, and this course was approved of by the Appellate Court, i.e., the High Court of Australia, but it turned out that the accused had denied making any statement, in which case, as I see it, there was justification for leaving that issue to be determined by the jury.

In *R. v. Mandzuk*, the Appellate Court of Ontario was more concerned with laying down the direction that the judge is called upon to give to the jury after he has admitted a statement on the ground that it is a free and voluntary statement, and the assistance in relation to the evidence that he should give them in deciding what weight they should put on it.

I hold, therefore, that the learned judge in the present appeal was right when he refused to rule on the question whether the statement was a free and voluntary statement and took the view that the true nature of the objection was that the appellant was saying that it was not his statement, in which case it was a question of fact for the jury to determine. Having heard and considered the arguments advanced by counsel for the appellant, I am more convinced than ever that the authorities of *R. v. Farley*, *Herrera & Dookeran v. R.*, *Williams v. Ramdeo & Ramdeo* and *The State v. Fowler* were correctly decided, and to hold otherwise would lead to utter confusion.

In support of the second ground of appeal, counsel cited *Lovesay & Peterson v. R.*, (1969) 2 All E.R. 77, and submitted that there was no evidence that the appellant embarked on any other felony but one of Larceny from a dwelling-house, despite the language used in the statement that he went to rob the people in the house. Counsel went further in submitting that even if the appellant did embark upon a felony involving violence, then death ensuing during the course or furtherance of a felony involving violence is not murder unless there is proof by the prosecution that there was an intention to inflict grievous bodily harm. In this country the English *Homicide Act of 1957* has not been introduced, and the law must be as laid down by the House of Lords in *Director of Public Prosecutions v. Beard*, (1920) A.C. 479, wherein it was stated that where a man causes death to another in the course or furtherance of committing a felony involving violence, the offence is murder, and the only intention that need be proved is the *mens rea* of the felony. Thus, to kill accidentally while committing the offence of Rape or Robbery is automatically murder. It is necessary, therefore, to prove only an intention to rape or steal, as the case may be. Thus where two or more persons embark upon a joint enterprise with a common design to commit robbery with violence, if one person causes death while another is present aiding and abetting the felony as a principal in the second degree, both are equally guilty of murder although the latter had not specifically consented to such a degree of violence as was in fact used. [*R. v. Betts & Ridley*, (1931) 22 C.A.R. 148].

In the latter case, *Avory J.*, in delivering the judgment of the Court of Appeal, referred to the case of *Director of Public Prosecutions v. Beard* (supra), where the accused was charged with causing the death of a young girl while he was committing rape upon her. In order to prevent her screaming he placed his hand over her mouth and his thumb upon her throat. There was no intention to kill or cause grievous bodily harm beyond his intention to ravish the girl, and the House of Lords held that the evidence established that the prisoner killed the child by an act of violence done in the course of or in the furtherance of the crime of rape, i.e. a felony involving violence and the offence was murder. This common law principle is known as the doctrine of constructive malice and is the law of this country up to the present day.

In *R. v. Vickers*, LORD GODDARD in the Court of Criminal Appeal explained what was meant by the expression "constructive malice" which had crept into the law when he said (at p. 193): [(1957) 41 Crim., App. R. 193].

"I do not think it will be found in any particular decision, but it is to be found in the text books—and is something different from implied malice. The best illustration of constructive malice which has been generally given is that, if a person causes death during the course of his carrying out a felony which involves violence that has hitherto always amounted to murder. There may be many cases in which a man is not intending death, as, for instance, where he gives a mere push or where a person falls down and most unfortunately strikes his head or breaks his neck, although the push would never have been considered in

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the ordinary way as one which would cause death, yet if it was done in the course of burglary, it would hitherto have amounted to murder."

In *R. v. Grant & Gilbert*, (1954) 38 Cr. App. R. 107, the cases of *Beard an Betts & Ridley* were referred to and the principle was clearly enunciated that if several persons embark on an enterprise to commit a felony and have also the pre-conceived common intention to use violence of any degree, if necessary for the purpose of overcoming resistance, and death results from such violence, all are guilty of murder, even though the felony be one that does not in itself involve violence, such as larceny. The learned judge in the present appeal gave adequate directions to the jury along these lines on this aspect, and his directions thereon cannot be faulted. (At p. 118 of the record) he stated what he described as the felony murder rule and said, "What is that rule, member of the jury? That rule is simply this: if a man commits a felony involving violence and death results, even though he did not intend to kill or cause grievous bodily harm in the sense of really serious bodily harm, in law he is considered a murderer." Then he continued: [(1954) 38 Cr. App. R. at p. 118],

"But this, again, is not quite such a straightforward case because originally, as I told you, there were two accused and whenever two or more persons are charged in one indictment there is a very convenient doctrine that the State relies upon and that doctrine is known as the doctrine of common design and that doctrine is simply this:

"If two or more persons plan to murder or rob or rape, then they are all murderers or robbers or rapists, even though, in fact, only one of them actually murdered, robbed or raped, provided you are satisfied that they are confederates acting together with a common purpose or design.

"A simple example, members of the jury: A and B plan to burgle C's house. A goes into the house whilst B remains outside as a lookout. In the eyes of the law the look-out is as equally guilty as the man who broke and entered as if he himself had gone into that house. So this as I understand it is what the State is saying here; that these two men planned to rob that house; that they used violence and that, as a result of that violence, that old lady died.

"If, members of the jury, you accept and believe that the accused was a party, a co-conspirator with 'Buck man' to enter and rob that old woman and that violence was used and intended by them to effect that felony and death ensued as a result, and you are satisfied that they were confederates acting together for that purpose or design and death ensued as a result, whether you cannot positively state which of them or whether both of them actually killed that old woman, then, members of the jury, you may properly bring in a verdict of murder against the accused. This is very technical law.

"If, however, members of the jury, you are not satisfied or you have any reasonable doubt that the accused intended to use violence, that is to say, you accept that he went to rob but that he had no intention to use any violence and that this act was committed by the other man without his knowledge and/or consent, then I think the proposition put by counsel for the defence is a true one and however you may think that he is clearly a robber he would not in law be a murderer.

In *R. v. Vickers*, (1957) 41 Cr. App. R 189, which was decided by the Court of Criminal Appeal after the enactment of the Homicide Act, 1957, the law in England was changed. S. 1 of the Act of 1957 stated:

"(1) Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

The court laid it down that where a person kills another in the course or furtherance of another offence, in order to render the killer liable for murder, it has *now* to be shown that, independently of the fact that he was committing another offence, the act which caused the death was done with malice aforethought, express or implied. It is *now* not sufficient that the killing should have been done in the course of a felony unless it is done in such a manner as would amount to murder apart from the felony. If, however the killer in the course or furtherance of some offence other than the killing (such as burglary) has assaulted his victim intending to do him grievous bodily harm and grievous bodily harm has been inflicted by the killer from which the victim died, there is still implied malice sufficient to constitute "malice aforethought" and the killing will still be murder.

Thus, in *R. v. Lovesay & Peterson*, it was laid down by the Court of Criminal Appeal that a common design to use unlawful violence, short of the infliction of grievous bodily harm, renders all the co-adventurers guilty of manslaughter if the victim's death is an unexpected consequence of the carrying out of that design. Where, however, the victim's death is not a product of the common design but is attributable to one of the co-adventurers going beyond the scope of that design, by using violence which is intended to cause grievous bodily harm, the others are not responsible for that unauthorised act. [*R. v. Anderson & Morris*, (1966) 2 All E.R. 644.] It follows that the cases of *Vickers*, *Lovesay & Peterson* and *Anderson & Morris* can have no application to the law in Guyana where the doctrine of constructive malice still remains. The submission of counsel on this ground of appeal must, therefore, be overruled.

On the third ground of appeal, the learned judge admittedly gave contradictory directions in relation to the circumstantial evidence of the appellant being found in possession of the jewellery shortly after the theft from

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Etwaroo's house, but in my view the directions were favourable to the appellant. He addressed the jury as follows:

"Members of the jury, it was laid down as the law of this country as long ago as 1897 that if it is proved to the satisfaction of the jury that articles properly identified are found in the possession of an accused person soon after the commission of the crime and the jury are further satisfied that the robbery was incidental to or accompanied the murder, then it was open for the jury to say that the possession of that jewellery raises an inference that the person in whose possession it was found may well be not only the robber but the murderer as well."

And then (on pp. 140-141) he stated:

"I shall now give you certain directions on this statement that was tendered as Exhibit 'W' This statement, members of the jury, undoubtedly is of absolute and vital importance in this case because, members of the jury, if this statement were not admitted, if this statement does not form part of the evidence for the State in this matter, there is in fact no evidence against the accused at all and he would be entitled as of right to be acquitted without sympathy whatsoever for the deceased or her family and relatives. Please understand that clearly."

This latter direction was in clear negation of what he had first told the jury, for on the former direction which was taken from the case of *Regina v. Hookumchand & Sugar*, (1897) 7 L.R.B.G. 12, he was directing the jury that the appellant's possession of the jewellery which was identified as being stolen from the home of Etwaroo at the time that the deceased came to her death, so shortly after, could raise the presumption or inference that the appellant was a murderer; yet in the latter direction he was telling them that if the statement alleged to be made by the accused was ruled out from the evidence, then there was no evidence against the appellant and he would be entitled to be acquitted. In my view, the correct direction to the jury should have been that where property or goods shortly after they are missed or stolen are found in the possession of the prisoner, then the presumption arises under the doctrine of recent possession, that the prisoner is either the thief or receiver, and in the absence of a reasonable explanation or if the prisoner gave no explanation, he may be convicted of the offence of larceny. If, however, he gives a reasonable explanation which is consistent with innocence, even though they are not convinced of its truth, he is entitled to be acquitted. They might therefore in this case, if they accepted the evidence for the prosecution, find that the appellant was found in possession of the jewellery shortly after it was stolen from Etwaroo's home and that it was stolen at the time the deceased came to her death. And if they believed the further circumstantial evidence that the appellant was seen in the district at the relevant time with 'Buck man', and was subsequently seen walking away some distance from the house with a black bag in his hand, and had given an unreasonable explanation for his possession of the jewellery, or had given no

explanation at all in that he had given inconsistent accounts as to his possession, they could properly draw the inference that he was either the murderer or had participated in the murder.

A similar situation is to be found in the principle laid down in the case of *R. v. Loughlin*, [35 Cr. App. R. 69, 1 C.L.C. 2281] which is stated as follows:

"Where premises have been broken into and property stolen therefrom and very soon after the breaking the prisoner has been found in possession of that property, it is open to the jury to convict him of the breaking and entering."

The direction that was given by the learned judge was, however, favourable to the appellant, and this ground of appeal must therefore fail.

The learned judge did not leave the issue of manslaughter with the jury but considered that the matter was one of murder or no murder, and in so doing it was argued by counsel for the appellant that he was in error. The law is clear, as laid down in *Bullard v. The Queen*, (1958) 42 Cr. App. R. 1 and 5, that "Every man on trial for murder has the right to have the issue of manslaughter left to the jury, if there is any evidence on which such a verdict can be given. To deprive him of that right must of necessity constitute a grave miscarriage of justice." Even if the verdict of manslaughter might be an improbable result, so long as it is a possible result, that issue must be left with the jury to determine.

In *R. v. Porritt*, (1961) 3 All E.R. 463, it was decided by the Court of Criminal Appeal that notwithstanding that a verdict of manslaughter was not sought by the defence, it was incumbent on the judge to leave that issue with the jury. This court approved of the dictum of LORD TUCKER in the Privy Council in *Bullard's case* where that learned judge stated: [(1958) 42 Crim. App. R. 1.

"It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked."

The appellant in his statement to the police had said that he had agreed to go with 'Buck man' to rob the old people living at Nismes, and the house in which the old people lived had been pointed out to him by 'Buck man', and at the end of the statement he made it clear that he had gone to rob the old lady as he thought he would get some money to help himself, but he did not go to kill anyone. In the local parlance, all he may have meant was that he had agreed to go and steal from the house where these people lived, *but he*

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did not agree to use any violence. When, therefore, he narrated that as soon as the deceased was about to pass, 'Buck man' locked her off around the western side of the building leaving him at the door, and had returned five minutes later with the key in his hand telling him that everything was all right, in my view if the jury believed that that was the true position of what actually had taken place, then a verdict of manslaughter was possible as the jury might then have found that the appellant was consenting to an unlawful act being committed on Basmattie, death resulting therefrom.

It follows, then, that the proper direction that the learned judge should have given the jury was that, if on the statement made by the appellant they felt that he had gone to the house at Nismes merely to steal from the house and had not agreed to use violence, and when he and 'Buck man' were there 'Buck man' had assaulted the deceased by gripping her around the neck and dragging her to the other side of the building, which would be an unlawful act, and the appellant did not dissociate himself from the unlawful act committed by 'Buck man', then it was open to them to take the view that at that stage the appellant was agreeing to the unlawful force being used against the deceased, in which case, if death was a consequence of that unlawful act, then the proper verdict would be one of manslaughter.

This direction was not given to the jury where there was room for them to have brought in a verdict of manslaughter, and as a result the appellant was deprived of a consideration by the jury of a verdict of the lesser offence of manslaughter, and lost his chance of acquittal of the offence of murder with an ensuing conviction for the offence of manslaughter. Put another way, the jury were offered no scope in their deliberations for finding guilt in the appellant to a lesser degree than the capital offence of murder.

As the learned judge was in error in withdrawing the issue of manslaughter from the jury, then this court could properly substitute a verdict of manslaughter. In the result, I would allow the appeal, set aside the conviction for the offence of murder, and substitute a conviction for the offence of manslaughter. I would propose that the appellant be ordered to serve a period of 10 years' imprisonment.

PERSAUD, J.A:

Without intending to add unnecessarily to the burden of those persons who may read the decision of this court, and refraining from setting down the facts and circumstances of this case in any great detail, if at all, I feel impelled to record my views upon the points canvassed, if only to re-affirm the stand I took in *Harper v. The State*, (1970) 16 W.I.R. 353. This I will do in as short a compass as I am able to in the circumstances.

Three points were taken in this matter by learned counsel for the appellant. The first is that the trial judge ought to have ruled on the admissibility of the statement which the State sought to put in evidence inasmuch as the appellant had complained, and there were certain facts from

which the judge could have found, that the statement was not free and voluntary, notwithstanding the appellant had later said he had not made the statement. The circumstances pertaining to the tendering of the statement have already been narrated in detail, so I shall content myself with dealing with the principles of law only. The second point was that the judge ought to have told the jury that death, which occurred during the course of a crime involving violence, is not murder unless there is an intention to do grievous bodily harm. And thirdly, that there should have been a direction on manslaughter provided a possible view of the evidence was that there was a tacit agreement between the appellant and his collaborator that some force should be used against the deceased, but that the collaborator exceeded the degree of force agreed upon.

The first point concerns what, I would have thought, was, before the hearing of this appeal, settled law. And I record my views because I refuse to contribute to what may be regarded as some confusion in thinking upon this matter. Nor am I prepared to foster the opinion that seems to be held in some quarters that a criminal trial is a game in which the prosecution must flounder from rock to rock, leaving the defence to sail through serenely without troubling itself to observe the rules which attend such trials. This concept is, I believe, far removed from the true nature of things which is to arrive at the truth, and to ascertain whether the prosecution has proved the guilt beyond reasonable doubt of an accused person, bearing in mind that the burden of so doing rests on the prosecution throughout the trial, and observing also the various rules governing such trials, particularly those concerning the receipt of evidence.

The question as to the admissibility of a statement made by an accused person is, undoubtedly, a question of law for the judge to decide. When such questions arise, it is common for the evidence to be given and the matter debated in the absence of the jury, as it would not be in the interest of the accused that the nature of the evidence being objected to be disclosed to the jury at that stage. Indeed, in *Reg. v. Francis & Murphy*, (1959) 43 Cr. App. R. 174, it was held that where objection is taken to the admissibility of an alleged confession, it is essential for the judge to hear evidence in the absence of the jury, and give a ruling whether the confession should be admitted or not. The enquiry so held by the judge is called a *voir dire*, and must be distinguished from a *voir dire* held to determine whether a witness understands the nature and obligation of the oath which is conducted in the presence of the jury. But the real question here is whether an accused person is entitled to take the objection as to admissibility of his statement and at the same time to raise the issue of fact whether or not he made the statement on the *voir dire*, and if he is so, entitled, but before the judge rules on the admissibility, whether the accused can jettison that ground of objection and the judge must nevertheless rule on the admissibility question.

There are some cases from which it may be said that the statement of the law as submitted by counsel for the appellant has some support, but I am

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bound to say that upon a close scrutiny they do not. In *Ibrahim v. the King*, LORD SUMNER is recorded as saying: (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."

No one can fault that enunciation of the law, and it has been observed as a sound proposition of law both in the English and Commonwealth courts for ever so long. But it certainly is no authority for saying that the judge is required to make a finding as to whether the accused did or did not make the statement in the sense that the jury is required to when that issue is committed to them. As was pointed out by LORD HODSON in the *Chan Wei-Keung* case, (1967) 2 A.C. 160, LORD SUMNER dealt with the admissibility of evidence, and not its truth or weight. And I would like to say that when a judge is called upon to investigate the admissibility of a statement, the clear implication that the defence is accepting the authorship of the statement but grounding its submission as to inadmissibility on the circumstances surrounding the making of the statement. Of course, prosecution must on the *voir dire* prove that the accused made the statement, for how else can they hope to prove that it is admissible? But that proof comes from the mouth of the defence itself, and what better proof can the prosecution need?

A dictum of LORD PARKER, in *R. v. Francis & Murphy*, (1959) 43 Cr. App. R. at p. 176, has, I believe, been misunderstood, merely because it has been read out of its context. The dictum is as follows: [(1959) 43 Cr. App. R. at p. 17].

"It is quite clear that a prisoner is entitled both to a ruling on admissibility from the judge and also to hear the verdict of the jury on the weight and value of the confession. Although the criterion is the same, namely whether it is a voluntary confession, there may well be cases where the judge might not think it right to allow the confession to be put before the jury at all."

But earlier in the same paragraph, the Chief Justice had said in clear and unmitigated language that it has always been the settled practice in cases of that sort for a challenge to be made to the admissibility of the statement at an early stage of the trial. Quoting from *Archbold's*, the Chief Justice said: "If the evidence is admitted 'the weight and value of a confession remain matters for the jury'." It is important to observe that the point being canvassed in the instant case did not arise in the *Francis & Murphy* case, and this was quite readily recognised by LORD HODSON in the *Chan Wei-Keung* case. Nor did the question arise in *Sparks v.Reg.*, (1964) AC. 564, where

LORD MORRIS used language (ibid at p. 983) to the effect that the jury could decide not to give any weight at all to the challenged statements of an accused person 'for the reason that they (the jury) were not satisfied that they were voluntary statements. Dealing with this dictum, LORD HODSON said in *Chan Wei-Keung* that it was 'consistent with the distinction which can be drawn from the cited cases, between voluntariness as a test of admissibility and as a matter to be considered by the jury in arriving at the truth.' Surely, this is what is meant when the rule is stated that where an accused person challenges a statement on the ground that it was not voluntary, it is for the judge to rule in the absence of the jury on that issue, but such a ruling does not preclude the defence from cross-examining all over again in the presence of the jury as to the circumstances surrounding the making of the statement in order to assist the jury to assess the weight—if any—which they will give to the statement for they may, notwithstanding that the judge has admitted the statement, not give any weight whatever to it, and refuse to act upon it, all because of the view they take of the circumstances.

A dictum of Finnemore J. in *R. v. Cleary*, (1963) 48, Cr. App. R. p. 116, had the effect of leaving one with the impression that the law is not what my view of it is. That learned judge said, in dealing with whether certain words used by the accused's father to the accused was an inducement, said: "What we have to decide is whether the words were capable of being an inducement. In the view of this court, they were capable. It would be then for the jury to decide whether in fact there was an inducement, and whether in fact the prosecution has proved that the appellant was not affected by the inducement." If this was intended to mean that the jury must take into account the circumstances surrounding the making of the statement in order to assess its weight, I can have no quarrel. But if it is intended to say that the jury must decide voluntariness, then with the greatest of respect I must disagree. In any event, the matter has been put beyond dispute in *Chan Wei-Keung*, (1967) 2 A.C. 160, and re-stated in *R. v. Burgess*, (1968) 52 Cr. App. R. 258

In *Basto v. Reg.*, (1954) 91 C.L.R. 628, the High Court of Australia comprising five judges was very positive in its approach to this question when it said, in disapproving of the dictum of *Byrne, J.* in *Reg. v. Bass*, (1953) 1 Q.B. at p. 684: "The admissibility of evidence is not for the jury to decide, be it dependent on fact or law; and voluntariness is only a test of admissibility." And I would like to commend to those who may still entertain any doubts upon the matter, the dictum which appears in the Report which is: [(1954) 91 C.L.R at 640].

"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 statement 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."

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I believe I have shown so far that two different functions arise to be performed by two separate entities comprising the court depending upon the nature of the objection. I am not to be understood to be saying that an accused person who has raised the issue of voluntariness and had the issue decided against him on the voir dire, is debarred from raising the question of fact whether he did or did not make the statement when he comes to lead his defence. Perhaps he can. But this is a far cry from saying that he is entitled on the voir dire to raise both issues; on the voir dire, as I apprehend the legal position, he is only entitled to raise the question of admissibility based on voluntariness which is a question of law for the judge to decide. And it must follow, in my judgment, that if during the course of the voir dire, it is made to appear that the real objection is one of fact, there can be no necessity for the judge to rule on the question of voluntariness as that issue is no longer alive. He must then leave the matter for the jury to decide as a question of fact. Were the judge to rule that the statement was a voluntary one in these circumstances, he may very well be the author of an injustice to the accused, for then the jury may regard themselves estopped from considering the question of fact, by reason of the judge's ruling, or they may in some way be influenced by the ruling. The error which occurred in the court of trial in *R. v. Murray*, (1950) 2 All E.R. 925, should be avoided. In that case, upon an objection as to voluntariness of a statement being made, the judge embarked upon the voir dire, after which he found that it had been made voluntarily. He denied counsel the right to cross-examine in the presence of the jury as to the circumstances of the making of the statement, and when he came to sum up to the jury, in referring to his ruling he said: "That is my ruling and you must take it from me in this court.....Therefore you must approach the matter on the footing that there was a confession properly obtained according to our very zealously guarded rules of evidence so that no unfairness was done in the matter." It was held in the Court of Appeal that the judge was wrong in the course he took, and that counsel had a right to cross-examine the witnesses in the presence of the jury, in an effort to weaken the value of the statement.

This question has arisen from time to time in the Caribbean. In *R. v. Charles*, (1961) 3 W.I.R. 534, where the accused was objecting to the admissibility of a statement on the ground that he had not made it, it was held that such an objection was not, in law, a proper ground for attacking the admissibility of the statement, but merely raises an issue which must be tried by the jury.

R. v. Farley, (1964) 4 W.I.R. 63, a case much discussed in the arguments in this case, also went the way of *R. v. Charles*. I did not understand counsel to go as far as saying that *Farley* was wrongly decided. What he did say was that Archer, J. was saying that where the issue of voluntariness has been raised, the judge must rule, and then leave it to the jury to determine the fact whether the statement was made. If this submission implies—as I believe it is intended to—that the accused can raise both issues on the voir dire, then I

disagree. In any event, I do not understand the learned judge to have been expressing the view attributed to him when he said (at p. 65 *ibid*): "It would have been different if the applicant, while only stating one ground, had also relied on the other, but he persisted with the first ground and did not set up the second ground." I considered this statement in *Harper v. The State*, (1970 16 W.L.R 353, where I have expressed my views to which I adhere. [See p. 360 *ibid*.]

Counsel has submitted that the later cases of *Williams v. Ramdeo & Ramdeo*, (1966) 10 W.I.R 397, and *Herrera & Dookeran v. R.*, (1967) 11 W.I.R. p. 1, were wrongly decided. I do not agree. Both cases were instances of the application of the rule as has been understood throughout a long line of cases. In the former counsel objected to a statement on the ground that it was not voluntary. Accordingly, the magistrate embarked on what must have been a *voir dire*. It turned out, however, that the defendant was alleging that he had been beaten into signing a piece of paper, and had not, in fact, given a statement at all. Following *Farley*, the Court of Appeal of Trinidad and Tobago, through *Fraser, J.A.*, said: [(1966) 10 W.I.R. at p. 398]

"In our judgment, a clear distinction falls to be drawn between an objection that a statement made by a person charged with an offence was not made voluntarily and an allegation that he never made any statement at all.....In the case of an allegation by the person charged that he made no statement at all, the statement must be admitted and the allegation will fall to be considered along with the rest of the evidence in the case and a verdict must be reached after consideration of the whole."

If I may be permitted to say so, *Fraser, J.A.*, stated the law governing the matter accurately.

Herrera & Dookeran v. R., (1967-68) 11 W.I.R, followed *R. v. Farley* and *Williams v. Ramdeo & Ramdeo* as did *Campbell v. R.* (1969-70) 14 W.L.R. 507, in which it was declined to follow the Canadian case of *R. v. Mulligan*, 111 Can. Crim. Cas. 173.

In *R. v. Mulligan* great reliance was placed on the English case of *R. v. Roberts*, (1953) 37 Cr. App. R. 86, an alternative reference of which is (1954) 2 Q.B. 329. So I will examine these two cases together with another Canadian case to which our attention has been adverted, *viz.*, *R. v. Mandzuk*, (1946) 1 D.L.R. 521, C.A., and make my own observations thereon.

It will be necessary to refer to several extracts from the judgment of *Mackay, J.A.*, in *R. v. Mulligan* to show that he seemed to have stated the principles correctly in certain passages, and where it would appear that he might have mis-stated them, he was in effect trying to apply the principles to the peculiar facts of the case. The only evidence in the case involving the accused in the offence of robbery with two other men was a statement alleged to have been made by him to two police officers. The alleged statement was not taken down in writing, nor did the officers make any notes at

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that time or later. In addition, there were many inconsistencies and discrepancies in the evidence of the two officers, and the appellant did not give evidence either on the hearing to determine the admissibility or before the jury. The trial judge said, when he came to rule upon the matter: "What was said might be open to a great deal of suspicion and doubt, there is a good deal of doubt as to whether he said anything or not, but I think that is a matter for the jury, not for me." With respect, if the judge entertained 'a good deal of doubt' as to whether the accused had made the oral statement, he ought to have rejected it on the basis that before he could rule on the question of admissibility, he had to find a prima facie case that the appellant had made the statement. In two instances, after expressing a preference for the principles set out in *R. v. Murray* and *R. v. Bass*, the learned Justice of Appeal made statements which seem to suggest that the rule is as has been advocated by learned counsel in the instant case. On one occasion, he said:

"In these cases the question was whether or not the statement was a voluntary one. However, I think the same reasoning and principles apply to a case such as this where the position taken by the defence was that the alleged statement was not in fact made, or if made, was not true. The learned trial judge in his charge to the jury correctly instructed them as to the general law relating to criminal cases and to the offences charged, but did not tell them that if they had, on the whole evidence, a reasonable doubt as to whether the appellant had in fact made the statement alleged to have been made by him, or if they had a reasonable doubt as to its truth, they should acquit."

And later:

".....I am of the opinion, on the facts of this case, that the learned trial judge should first have ruled whether, in his opinion, there was some evidence fit to go to the jury that the statement alleged to have been made by the appellant was his statement. If he thought there was not, he should have rejected the statement, and not permitted evidence fit to go to the jury that the accused had made the alleged statement, he should have allowed the evidence to be given before the jury, but he should have reviewed the evidence which, if accepted, might indicate that the statement, even if the accused did make it, might not be true. He should then have told the jury that it was for them to say whether or not the accused had in fact made the statement, and if he did make it whether or not it was true, and that if on the whole of the evidence they had a reasonable doubt either as to the statement having been made or as to its truth, they should disregard the statement entirely....."

With respect, I do not agree with the views as expressed in the earlier passage, but I cannot fault the second, if it is remembered that the learned judge's opinion was restricted to the facts of the case he was dealing with.

The judge seemed to appreciate that the situation might be quite different where the statement is in writing when he said:

"It is obvious that where a statement has been reduced to writing and signed by the accused, the question whether or not the statement has in fact been made will be unlikely to arise."

As I have said, in other places in his judgment, the learned judge has utilised language which accords with the principle that I have myself sought to state in this judgment.

In *R. v. Roberts* (supra), *Devlin, J.*'s approach to the matter in hand must be seen in the light of the facts peculiar to that case, viz., that the accused was found to be mute by the visitation of God upon the verdict of a jury. And to achieve a clear understanding of the case, it is right that the whole report be read. *Devlin, J.* did say that he would inquire into the two questions whether the statements alleged to have been made by the accused were in fact his statements, and if so, whether they were made voluntarily and in accordance with the Judges' Rules, and that he would reach a conclusion of fact upon the latter question in the ordinary way. The ordinary way of trying the issue of voluntariness would be by holding a voir dire. But *Devlin, J.* went on to say: [(1953) 37 Cr. App. R at p. 94.

"Upon the former question, it seems to me....that this would be right, that if I think there is some evidence fit to go to the jury that they were his statements, I shall admit the statements and let them go to the jury. If I do not think there is any evidence fit to go to the jury that they are his statements, I shall rule them out"

I understand *Devlin, J.* to be saying no more than that he would have to find a prima facie case that the accused had made the statements, and in my view, he had to in view of the fact that the accused had been found mute by the visitation of God. Surely the position is different where an accused person does not suffer from such an affliction, and challenges the statement on the ground of voluntariness! In the latter case, the judge starts off his inquiry with a ready-made finding, so to speak viz., the admission by the accused that he had made the statement. Before parting from this case, I would take the opportunity of pointing out that when *Devlin, J.* spoke of inventing a procedure, he was not referring to the question of the admissibility of statements. The learned judge was examining the situation whether an accused person in the position of *Roberts* would be compelled to have the issue whether he was fit to plead tried before the general issue. The judge held that he could not be, as he may be able to secure a not guilty verdict on the general issue, in which case he would be entitled to be discharged, whereas if he were found unfit to plead, he might be faced with a detention order.

The main questions discussed in *R. v. Mandzuk*, (1946) 1 D.L.R. 521, were whether an exculpatory statement made by the accused to the police was a 'confession' coming within the scope of the rules peculiar to the use of

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confessions, and whether the prosecution had proved affirmatively that it was voluntary in that on the *voir dire* the accused did not give evidence. *O'Halloran, J.A.* gave what may be regarded as the main judgment of the court. He dealt with the distinctive functions of judge and jury with regard to confessions. Referring to the function of the judge, he said [(1946) 1 D.L.R. at p. 525]

"He is confined to determining whether the statement in itself is a confession in whole or in part, and if so whether it is voluntary. He is not concerned with its truth or its untruth as such or the good or bad effect it may ultimately have upon the minds of the jury. *He is of course concerned with the truth of testimony as to whether the statement was or was not made and as to what statement was made.*" (Underlining mine.)

Counsel urges the italicised portion of the above statement as support for his proposition. Had it stood by itself, it might have had that effect, in which case I would have felt forced to disagree with it. But when the next following paragraph is read, it will be seen that *O'Halloran, J.A.* did not mean anything more than that there must be a *prima facie* case of the making of the statement. That paragraph reads thus, and in my opinion, correctly states the law [(1946) 1 D.L.R. at p. 526]

"In my opinion once it appears the prosecution seeks to adduce a statement in evidence, it is the duty of the Judge—the jury (if there is one) being first withdrawn—to learn what the statement is, and then to decide as a matter of law whether the statement is or is not 'a confession'. If he decides it is not a confession then there is no need for a 'trial within a trial', as the statement is as admissible as any other communication of the accused, and the jury can be recalled and the trial proceed. If the Judge decides it is a confession—then a 'trial within a trial' must be held to determine whether it was made voluntarily. This of course tends to avoid confusion, delay and uncertainty in the trial."

During the argument in the instant case, counsel took up the stand that an accused person may challenge the voluntariness of a statement on the *voir dire*, and then deny making the statement when he comes to lead his defence. He cited *R. v. Mandzuk* as authority for this proposition. For myself, I do not doubt that an accused person can adopt this course if he wishes, though he may severely weaken his credit as a result. But this is not the same as saying he can take up both positions on the *voir dire*. This is all this case concerns and this is all I wish to express my firm opinion on. In the *Mandzuk* case the accused led no evidence on the *voir dire*, but when he came to lead his defence, he denied that any warning had been given to him and also that he had made the statement in question at any time or under any conditions. The learned Justice of Appeal said such evidence particularly as regards the warning, ought to have been given on the *voir dire*, but that when he led his defence, he became a part to the re-opening of 'the trial within the

trial'. And having taken that course, he could not recede from the consequence and complain that he was not given an opportunity to testify on the voir dire. The learned judge concluded this part of his judgment with these words [(1946) 1 D.L.R. at p 530].

"Nor can I see any grounds upon which the learned judge's finding of fact that the statement was given as testified by the police officers can be successfully attacked."

This statement does not, as I apprehend its meaning, indicate that the learned Justice of Appeal was saying that the finding of fact when an accused person denies the authorship of a statement is a matter for the judge to determine.

The last case to which I would refer on this point is this court's decision in *The State v. Fowler*, (1970) 16 W.I.R. 452, if only to say that it has been held that where an accused person denies making a statement or states categorically that the statement which the prosecution seeks to tender as a voluntary statement made by him is not his, the law is clear that the issue is one for the jury to decide.

It is essential that a trial judge faced with an objection to the admission of a statement by an accused person should know the precise nature of the objection, that is, whether the accused is saying that he did not make the statement, or whether it is not admissible on the ground that it is not voluntary, and the grounds being advanced for such an objection. For my part, I know of no principle which would preclude a judge from asking questions either of the accused or his counsel, as the case may be, with a view to ascertaining the true position. In such a situation, a judge cannot be accused of interfering in any way with the conduct of the defence. As I have indicated earlier in this judgment a trial is not a game in which one side or the other sets a trap for the judge as it would appear to happen on occasions. I for one would not tolerate such a situation, nor would I encourage it.

In this case, the judge was satisfied in his mind from the answers given by the accused that the stand he was taking in the ultimate was that he did not make the statement, which would be a matter for the jury. I would only add that if from the language used and other circumstances, a fair inference is that the objection remains non-voluntariness, the judge should conclude the voir dire and give his ruling. The person in the best position to ascertain the true state of affairs would be the trial judge.

On this submission I am of the opinion that the judge was right in leaving the matter for the jury to decide for I have already exposed the danger to the accused had the judge ruled that the statement was a voluntary one.

I agree with the opinion of the learned Chief Justice as to what the judge's directions should be where an accused person is found in recent possession of stolen property, and as to the possible inferences the jury can draw in such circumstances. I do not wish to add anything thereto.

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The only account of the events which transpired causing the death of the dead woman comes from the statement of the accused in which he tells of an agreement between him and another person called 'Buck man' to go to the premises and rob the owners of their money and jewellery, etc.

The details of the statement have already been recounted, and I have no wish to embark upon another examination of those details except to point out that the accused said that he remained at the door to see if anyone was coming, and that he shared in the spoils of the break and enter and larceny.

In dealing with this aspect of the matter, the learned judge gave the directions to be found in the decision of *Director of Public Prosecutions v. Beard*, 14 Cr. App. R. 159, that is, if a person causes death during the course of his carrying out a felony which involves violence, that is murder. Then he went on to tell them that they can only convict the accused of murder if they found that he and 'Buck man' had planned to use violence and that the old lady died as a result of that violence; but if they could not find that the accused intended to use violence, he may be a robber, but not a murderer.

It is submitted before us that this court should hold that death which occurs during the course of a crime involving violence is not murder unless there is an intention to do grievous bodily harm, and that the trial judge should have summed up in accordance with *R. v. Lovesay & Peterson*, (1970) 1 Q.B. 352, where *Widgery, L.J.* expressed the opinion that a common design to rob "would not suffice to convict of murder unless the common design included the use of whatever force was necessary to achieve the robbers' object.....even if this involved killing or the infliction of grievous bodily harm on the victim."

In view of the directions of the learned judge in the instant case, to convict the accused of murder, the jury must have found that there was a plan to use violence to effect the robbery, even if it meant killing, or at least inflicting grievous bodily harm. But I will interpret 'robbery' as used in the accused's statement to mean stealing from the dwelling-house, or housebreaking, as is quite possible, and not 'robbery' in its technical sense, which would involve the use of some force. The circumstances as described by him indicate that he was not averse to the use of force in order to carry out the crime planned, namely, stealing, if this became necessary. There is nothing remote in two persons agreeing to one course of action to perpetrate a crime, but changing their plan at the scene to suit a situation that they did not contemplate before, if this can be inferred from the evidence. There is everything to indicate here that the accused is a principal in the second degree to the felony of housebreaking, and if it can be inferred that he agreed that the old lady must be removed from the scene, it was inevitable that a finding of fact that he agreed that she be removed by force, if necessary, be made. Where two people had formed a common design to do an unlawful act, and death results by an unforeseen consequence, they are guilty of man-

slaughter. To put the matter another way: Anyone who, while committing an unlawful act or felony not likely to cause danger to others, unintentionally kills another person, he is guilty of manslaughter.

In my judgment, the circumstances of this case should have compelled the learned judge to leave manslaughter also with the jury. They might very well have remained unimpressed by such an invitation, but that is not for us to say. I have not overlooked the dictum of *LORD PARKER, L.C.J., in R. v. Anderson & Morris*, to the effect that: [(1966) 2 All E.R. at p. 648)

"It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today."

The operative words in that dictum are 'has departed completely' and 'has suddenly formed an intent to kill'. This is not the situation in the case under review. As is well-known, if there are circumstances which would suggest that manslaughter is a possible verdict, depending on what view the jury take of the facts, the judge is under compulsion to leave that issue with the jury. Not to do so would be to deprive an accused person of a right which the law recognises,

I agree, therefore, that this appeal should be allowed on this ground only, and that a verdict of Guilty of manslaughter be substituted.

CUMMINGS, J.A.: The facts in this case have been fully set out in the judgments which have preceded mine. Consequently, I do not propose to repeat them here. The appellant appealed on several grounds, but, having regard to the conclusion at which I have arrived concerning the ground which deals with the admissibility of his alleged incriminating statement to the police, that is the only ground I propose to deal with in this judgment.

It is of the utmost importance to appreciate at the outset the basis upon which the appellant's counsel founded his arguments on this ground and, to do so fully, I make no excuse for quoting verbatim the relevant portions of the proceedings at the trial within the trial—the *voir dire*, as it is commonly called. The notes of the learned trial judge in this connection are as follows:

"GEORGE MCLEAN sworn states:

I am Detective Sergeant 6269 stationed at Ruimveldt Police station About 10 p.m. on 13th July. 1970.....I saw the accused standing on Eccles Public Road. . . .I told the accused I was in possession of a warrant to search his house at Eccles Old Road, East Bank, Demerara. I read the warrant to him and asked him whether he had any of the articles mentioned therein and he said, 'No.'

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"In his presence we searched the accused's home. His wife Kamalpattie was also present."

The constable went on to say that he found jewellery on the wife of the accused and money to the extent of \$420.11 in a bottle and \$20.41 on the accused himself. He then took them, together with the money and jewellery, to Ruimveldt Police Station. He continued:

". . . .At 2.20 a.m. on 14th July, 1970, I told the accused that I had reason to believe that the money and jewellery found were part of money and jewellery stolen from the home of one Basmattie who was robbed and murdered on 13th July, 1970, at Nismes, West Bank, Demerara. I then cautioned the accused and he said he had nothing to say but declined to have this put in writing.

"About 8.15 a.m. on 14th July, 1970 I took the accused, his wife and the exhibits to La Grange Police Station where I handed them over to Sergeant 5020 de Abreu, the Subordinate Officer in charge.

"About 12 midday on the said 14th July, 1970, whilst still at La Grange Police Station the accused told me that he would like to tell me all about the money and jewellery and all that he knew about Basmattie's death. I then cautioned the accused and he elected to make out a statement which I reduced into writing at his request. He read the statement over himself and said it was true and correct and signed his name to it in my presence and that of Sergeant 5020 de Abreu. This is the said statement. . . ."

As he was about to tender the statement, the learned trial judge's note continues as follows:

". . . .(at this stage Mr. dos Santos objects to the admissibility of this document on the ground that it is not a free and voluntary statement on the ground that it was induced by promises and threats used and/or directed to the accused who was coerced and/or induced in making the said statement—requests that this be argued in the absence of the jury.

"Further the statement was not taken down in writing by this witness but by Sergeant Lovell (4994)."

The judge then held a voir dire in the absence of the jury, at which McLean continued his testimony as follows:

"The statement was taken in the Enquiries Office of La Grange Police Station. Sergeant 5020 de Abreu, myself, the accused and his wife were present. Nobody else was present.

"I myself took down the accused's statement in writing.

"The accused told me he would like to tell me all about the money and jewellery and what he knew about Basmattie's death. I then

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told the accused that he was 'not obliged to say anything unless he wished to do so but whatever he said would be put into writing and may be given in evidence'.

"The accused signed the said caution. After signing the caution that he can either write the statement himself or ask someone to record what he had to say, he told me I must write down what he had to say and he signed this request.

"He then made a statement which I reduced into writing.....I wrote the statement. . . This is the said statement tendered for identification only as Exhibit 'W'."

In cross-examination, McLean continued:

".....Sergeant Lovell was not present at the home of the accused on the night of 13th July, 1970. . . I do not admit that the accused was under the influence of alcohol. His breath smelt strongly of alcohol. He was not drunk but he was sweet. He was under the influence of alcohol to some extent.

"I saw two children at the accused's home aged about 2 years and 8 months. It came to my attention that the youngest child was still nursing. I am aware that these children were the children of the accused and his wife.

"I took both accused and his wife into custody. I did not bring along the children. The only occupants at the accused's home when we went there were his wife and the two children. . .

"Up to 2.20 a.m. on 14th July, 1970, there was opportunity for the accused to sleep but I can't say whether he had in fact slept. When I spoke to him about 2.20 a.m. he was sitting on a chair. . .The accused said nothing when I cautioned him at 2.20 a.m. . . .He and his wife sat on the bench.

"I had no conversation with the accused before 12 midday. He then said he wanted to say what happened. I don't recall Sergeant de Abreu saying anything.....

"It is not true that the accused was in a cell and at 2 a.m. on 14th July, 1970, I banged on the cell door and told him I wanted a statement from him. I never told the accused 'Tek time, you gwine talk. We got your wife here you know.'

"I did speak to Sergeant Lovell at La Grange. It is not true that after our conversation Lovell said to me, 'Leave it to me.' It is not true that after that it was Lovell who dealt with the accused wholly.

"I don't know if between 10 p.m. on 13th July, 1970, and the time Exhibit 'W' was made on 14th July, 1970, that the accused was not given a morsel of food....."

Sergeant Eustace de Abreu said on his oath:

"I see Exhibit 'W'. I signed it as a witness.

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"On Tuesday, 14th July, 1970, about 12 midday I was in the Enquiries Office at La Grange Police Station. The accused was there as well as his wife and Detective Sergeant McLean. Detective Sergeant Lovell was not present but he was somewhere in the district

I was at my desk on the south-west corner of the Enquiries Office. I heard the accused tell Sergeant McLean that he wanted to tell him about the death of Bas-mattie and her jewels. In my presence Sergeant Mc Lean cautioned the accused. I removed from my chair which was on the western side of the desk. Sergeant McLean took my chair. The accused was east of the desk and in front of it. I sat on a chair north of the desk and the accused's wife was on a bench about 7 feet north-east of the desk. There was a duty sentry present about 13 feet away but I can't remember who" it was.

"The accused made a statement and he asked Sergeant McLean to write it down for him and this was done. The accused read the statement over and he said it was true and correct and signed his name to it in my presence and Sergeant McLean and I signed.

"No threats were made to the accused either by myself or Sergeant McLean. No promise was held out to the accused by either Sergeant McLean and myself.

"Exhibit 'W' is the statement and it was written down by Sergeant McLean and not Sergeant Lovell."

Cross-examined by Mr. dos Santos, he said:

"Sergeant Lovell was the detective at the station. He is a very experienced detective.

"He did take part in the investigations into this matter.

"I saw Sergeant Lovell during the morning hours at the station about 8-9 a.m. He reported to the station.

"I would not be able to say if Sergeant Lovell was detailed over the East Bank.

"The accused's wife told me she had a small baby who was nursing. She did express great concern for that child who she said she had left with a relative....."

"He was not smelling of alcohol when I saw him. I did pay particular attention to this. It was not brought to my attention that the accused was sweet....."
(Underlining mine.)

The accused, giving evidence on oath on the voir dire, said:

"I am the accused. On 13th July, 1970, about 10 p.m. I was on Eccles 'Old Road, East Bank, Demerara. I was standing up on the road. I was sweet. I was under the influence of alcohol. I had been drinking for the whole day

"Sergeant McLean (identified) and Sergeant Lovell spoke to me. That is Sergeant Lovell (called and identified). They took me to my home. They arrested myself and my wife and took us to Ruimveldt Police Station.

"At my home was myself, wife and two little children aged 18 months and 6 months, the latter was still being breast-fed. The children were left at home.

"I was hungry as I had hardly anything to eat for the whole afternoon. Sergeant McLean spoke to me and asked me questions. He spoke to me so fast that I could not understand what he was saying.

"I was sitting on a bench but my wife was not with me. She had been taken to another part of the station.

"I was very fond of the two children and in particular of the baby. As a result I could not sleep for the night. I was very troubled about leaving those two small children unprotected.

"Early next morning Sergeant McLean came to me about 2 a.m. I was still sitting on the said bench. He said he wanted a statement I said that I was not feeling well and could not give a statement. I told him I wanted to vomit. After this Sergeant McLean went away.

"On the said 14th July, 1970, about 7.20 a.m. Sergeant McLean and Sergeant Lovell came to me. Sergeant McLean said that he was taking myself and my wife across to La Grange Police Station. I told both of them that I had had nothing to eat or drink up to then. I was not given anything to eat or drink. I was feeling bad from the drinks the previous day.

"We were escorted to La Grange Police Station accompanied by Sergeant McLean and Sergeant Lovell.

"About 12.30 p.m. on the said 14th July, 1970, Sergeant McLean came to me and said he wanted a statement. I told him I was hungry and not feeling well and I had not slept the whole of the previous night I told him I was very much disturbed about the little baby at home without having her mother with her. Sergeant McLean then said that the baby would have to go where Basmattie gone. I understand he was saying that the baby would have to die.

"Sergeant Lovell and Sergeant McLean then had a conversation between themselves which I did not hear. As they left each other I heard Sergeant Lovell say, 'Don't worry with anything. Leave everything to me.'

"Sergeant Lovell then took myself into the barrack room in the said building. Nobody else was present besides Sergeant Lovell and myself.

"I then saw Sergeant de Abreu (identified in court). He was not in the barrack room at the time. He was somewhere outside. I could not

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see outside from the barrack room. Sergeant de Abreu was in the Enquiries Office before I was taken to the barrack room.

"In the barrack room, Sergeant Lovell said to me that he only wanted a short statement. I told him that I was not feeling well and that I was not in a condition to give any statement. Up to that time I had not been given anything to eat or drink. I was still suffering from the effects of the liquor I had taken the day before.

"I then told Sergeant Lovell that I was very disturbed about the baby being left alone at home and Sergeant Lovell then told me that the baby would have to go where Basmattie gone. I was fearful of the safety of the child.

"At this time my wife was in the Enquiries Office. I had left her sitting on a bench in the said Enquiries Office.

"I then decided to make a statement for the safety of the baby. Sergeant Lovell told me that only when I gave a statement doesn't matter how short it was only then would he release my wife to go and look after the baby. If I had not been told this I would not have made any statement. I was afraid that if I had not made the statement then the baby might have indeed died.

"I made a statement then to Sergeant Lovell and he wrote down my statement and I signed it. At this stage only myself and Sergeant Lovell was present in the barrack room.

"Sergeant Lovell then called Sergeant McLean and he went outside and the two of them met outside. I heard Sergeant Lovell telling Sergeant McLean that 'you will have to know how to do things to get what you want.'

"I see Exhibit 'W'. I can read and write. It is the statement written out by Sergeant Lovell in the barrack room which I signed.

"It is not true that Sergeant McLean wrote the body of Exhibit 'W' in my presence.

"Had I not considered my baby's life was in danger J would not have signed Exhibit 'W'."

Under cross-examination by Mr. Lester, the accused said:

". . . My mother-in-law lives about 40-50 rods away from my house. We did not leave the children with my mother-in-law that night.

". . . They took me and my wife to La Grange Police Station.

"Both my wife and myself were taken to the Enquiries Office. I was asked for a statement there by Sergeant McLean about 12.30 p.m. I declined to give a statement. Sergeant McLean told me the baby would have to go where Basmattie went. According to the report Basmattie had died.

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"Sergeant McLean and Sergeant Lovell then had a conversation away from me which I did not hear.

"Sergeant Lovell then told me, 'Come with me' and he took me to the barrack room which is about 3 rods from the Enquiries Office. Sergeant McLean and my wife were left in the Enquiries Office.

"In the barrack room Sergeant Lovell asked me for a statement and I told him I was not feeling well and was not in a condition to give a statement as I was disturbed about the baby at home without his mother. Sergeant Lovell then said that the baby would have to go where the body gone. Then it was I gave him the statement

"I did not give McLean a statement after he mentioned about the baby because I could not give a statement about something I know nothing about.

"I gave only part of Exhibit 'W'. I did dictate certain parts of Exhibit 'W' to Sergeant Lovell, and he wrote those parts down. I never mentioned anything whatsoever about any robbery or murder or being involved in either of the two.

"Those parts of the statements concerning the robbery and the murder were written by Sergeant Lovell not on my dictation and I was forced to sign those parts because I was afraid that if I had not done so then the baby would have died at home without its mother's attention.'

The learned trial judge then made the following note:

"[At this stage Mr. Lester asks the witness to show which part of Exhibit 'W' he admits he made and the parts he does not admit he made but which were in fact written out by Sergeant Lovell.

"Mr. dos Santos objects on the ground that the statement is not simple because even though there may be parts admitted to have been made by the accused only the whole statement is tainted by the inducements as those made by Sergeant Lovell. Further the statement is a narrative and is so inextricably interwoven that it is not receivable without irreparable prejudice to the accused.

"Mr. Lester in reply submits that the accused has said he has made part of the statement which he admits is Exhibit 'W' and clearly therefore it is relevant and admissible to ask him what are the parts he admits making and the parts he does not admit making as he is the person most competent to make this distinction.....

". . . . Court rules that it will not permit the witness to say which part of the statement he made and which part he alleges that he did not make—the statement in other words is not divisible.]"

Further sworn and further cross-examined by Mr. Lester, the accused stated: "The statement is not mine and what is contained in it is not mine."

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Re-examined by Mr. dos Santos, he said:

"Lovell did not write down what I said and when he was writing I was saying nothing.

"When Lovell told me about not allowing my wife to go home to the baby unless I sign this was actually before he began to write.

"After Lovell told me this and before he began to write, he asked me questions which I answered.

‘ The defence then closed its case on the issue, and the learned trial judge noted as follows:

"Court rules that what the accused in effect is saying is that this is not his statement and this being so is clearly a question of fact for the jury to decide and not a matter of law to be decided at a *voir dire*.

"Issue concluded but no ruling made as a matter of law

"[At this stage court informs the jury that from the evidence taken in their absence, the court has ruled that whether the accused made the statement sought to be tendered or not is a question of fact for them to determine.]"

It is to be observed from the above *verbatim* narrative of the *voir dire* that —

(a) The issue raised by the accused was inadmissibility on the ground that the statement was not free and voluntary.

(b) This aspect was vigorously pursued by counsel in his cross-examination and by the appellant in his evidence on oath on the

voir dire.

(d) The appellant admits that he made certain parts of the statement, but steadfastly maintains that the incriminating portions of the statement were written down by the policeman who took the statement, at a time when he was not saying anything, and were only adopted by him because of his wife's detention at the station and the fear for the safety of their 6-month old breast-fed baby, as the police told him they were not releasing his wife until he had made the statement. Hence, he put his signature to the document

The accused at all times adhered to his testimony that it was Detective-Constable Lovell who took the statement from him, but both Lovell and McLean maintained that it was McLean who took the statement and that Lovell was not present at the time. A handwriting expert supported McLean and Lovell and the learned trial judge found as a fact that the statement was in McLean's handwriting. It seems strange to me that the senior experienced detective in charge of the investigation of so serious a crime would leave the

recording of such important incriminating evidence to a less experienced detective. Furthermore, what does it avail the accused to select Lovell instead of McLean as the "person in authority" who took the statement? Be that as it may, the learned trial judge had sufficient evidence upon which to find the statement was in McLean's handwriting, and I can see no justification for any interference with that finding.

It matters not, however, which policeman took the statement. They were both "persons in authority". The questions to be asked here are:

- (i) Was the statement proved affirmatively to have been an incriminating statement made by the accused?
- (ii) Was it free and voluntary?
- (iii) Did the trial judge, in arriving at his judgment, look at all the facts and circumstances connected with the making of the statement?

The evidence of the accused to the effect that he "did not give McLean a statement after he mentioned about the baby because I could not give a statement about something I know nothing about" calls for comment at this stage. It seems quite clear to me that the effect of this answer must depend on —

- (a) the question put to him in cross-examination in the light of the context of all the evidence on the *voir dire* up to that point, and
- (b) the fact that the accused was at all times contending that the statement he signed was written down by Lovell and not McLean, that he told certain things in the statement to Lovell, but not the incriminatory portions.

He only signed the whole document because he feared that the safety of his child was in danger through the absence of its mother's attention. The question which evoked his answer may well have been, "Did you not in your statement tell Sergeant McLean that you were present at the scene of the crime and saw certain things take place as narrated in the statement? "

The answer of the accused to that question, as quoted above, is quite consistent with his story that he made certain parts of the statement, but not the incriminating portions.

It was only after the learned trial judge had ruled—in my view, with great respect, erroneously, albeit upholding a submission of appellant's own counsel—that the statement was not divisible, thereby preventing the accused from pointing out what portions he admitted making and those which he did not admit, that he said, in answer to counsel for the prosecution: "The statement is not mine and what is contained in it is not mine." What else could he say in those circumstances?

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It might, perhaps, be apt here to illustrate this aspect by a short mathematical proposition:

Let statement = S.

Let uncontradicted portion = A.

Let contradicted portion = B.

Therefore $A + B = S$.

Therefore, if A is missing, then S must become S—A.

Therefore, when accused says he did not make S, having been told that A could not be separated from B, in the context of his previous explanations, he could say nothing other than that he did not make S and that S did not contain what he said, otherwise S would be equal to S—A, and this is a mathematical absurdity.

In other words, what the man is saying is that while he did make a statement, he did not make it in the form in which it appeared in Exhibit 'W'. It seems to me to be unreasonable in this context for the learned trial judge to have ruled "that what the accused in effect is saying is that this is not his statement and this being so is clearly a question of fact for the jury to decide and not a matter of law to be decided on a *voir dire*. Issue concluded but no ruling made as a matter of law."

As has already been stated, the issue raised and pursued was inadmissibility on the grounds of duress and threats. The cross-examination of the prosecution witnesses, as well as the evidence of the appellant, established the anxiety of both his wife and himself for the safety of their six-month old breast-fed baby. Whether the child was left with relatives or both children were left at home, the parental anxiety was occasioned mainly by the fact that the baby had not been breast-fed since some time on the day prior to the making of the statement when the mother was taken to the police station, where she remained until the time when the accused gave his statement. Was this not reasonable anxiety, and ought not the learned trial judge, in the application of the well-established legal principles involved, to have directed his mind as to whether or not the statement or any part of it was free and voluntary and ruled on that issue? *A fortiori* as Sergeant McLean had testified "that the only occupants in the house were the appellant, his wife and two children, aged about two years and eight months and his attention was drawn to the fact that the baby was being breast-fed," should the learned trial judge not have asked himself—How was the Sergeant's attention drawn to this fact? Was it by what he saw or was it told to him by the appellant or his wife while at the house?

Could not the accused have meant that he did not make the statement but he was forced to adopt it by appending his signature thereto because of duress? The signing of the statement and the issue of voluntariness seem here to be inextricably bound up.

Let it be emphasized at the outset that it was open to the learned trial judge, upon an examination of the evidence, having seen and heard the

witnesses and weighed the inherent probabilities that arose from the evidence, to either believe the police and disbelieve the appellant, or believe the appellant and disbelieve the police on the issue of voluntariness and then rule one way or the other as to the admissibility or inadmissibility of the appellant's statement on the legal issue raised, but with respect, rule he must.

Counsel's objection on the severability of the statement was premature, but it certainly would have been open to argument later on if the answers had been obtained as to whether or not the whole statement was so tainted that the whole document would not have been affected by the portions he denied making and, therefore, wholly inadmissible. In my view, although the learned trial judge's ruling was in favour of defence counsel's submission, he was wrong to have so ruled. Consequently, the learned trial judge, having misdirected himself as a result of his own erroneous ruling, took the last statement of the appellant out of its context, thereby clouding his vision so as to prevent him bringing his mind to bear on the real issue based upon the facts and circumstances of the case upon which he then refused to rule—the voluntariness or otherwise.

In considering this matter, I appreciate that the relevant judicial norm must be applied in the light of the facts of the particular case.

The facts of this case, as disclosed on the *voir dire*, cry out for a ruling on the question as to whether the statement was free and voluntary and, consequently, admissible, having regard to the duress alleged with which the adoption of the statement by appending his signature thereto is, I again emphasize, inextricably bound up. So that any finding on the issue as to whether or not the accused made the statement could not be justified in isolation to the reason for his adopting it by appending his signature thereto.

In my view, the law on the admissibility of confessions is now well settled. I essayed an analysis of the case on this point in my dissenting judgment in this court in the case of *The State v. Fowler*, (1970-71) 16 W.I.R. 452 (at p. 466 et seq.). I apply the conclusions reached therein and most of the reasons therefor to the instant case.

I am reinforced in those conclusions which accorded with the majority judgment of this court in *The State v. Harper*, (1970) 16 W.I.R. 353, by the additional cases, cited in the instant case, with which I shall deal hereunder.

Through, no doubt, the judge's erroneous ruling on the question of severability and his failure to rule on whether or not the statement was free and voluntary, counsel for the accused, apparently, did not realise that it was open to him to cross-examine again on the issues raised in the absence of the jury, and the accused, quite likely for the same reason, in his statement from the dock, made no reference to the statement and/or the circumstances under which he alleged it was made. He seems to have regarded that he could not question the judge's ruling by continuing to pursue that issue. The result is that he was deprived of a chance of these matters being put to the jury so that they could themselves decide—their own special, private and peculiar

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function—whether, in the circumstances, the statement was, in fact, made by the accused and, if made, whether it was true and what was its weight and probative value, in accordance with the decision of the Privy Council case of *Chan Wai-Keung v. Regina*, (1967) 1 All E.R. 948 and *Basto v. R.*, (1954) 91 C.L.R. 628, which was approved in the former.

The learned trial judge, having found some evidence fit to go to the jury on the issue of whether or not the accused made the statement, ought to have ruled, having regard to the circumstances, whether it was voluntary or not, and if he found that it was voluntary, he ought, after the *voir dire*, to have invited counsel to repeat in the presence of the jury his cross-examination, and the accused to repeat what he had said on oath on the *voir dire*.

In *R. v. Campbell*, (1968-69) 14 W.I.R. 507, the case of *Mulligan* was cited in the Trinidad Court of Appeal, but Fraser J.A., delivering the judgment of that court, after reciting the facts and principles applied in *Mulligan's* case, said: [(1968-69 14 W.I.R. at p. 508].

"In considering *Mulligan's* case it is important to understand that the law now applied by this court is different from what the Court of Appeal for Ontario held to be the law in 1955.....That is not our view of the law and the course pursued by courts in the West Indies has been different. Where there is raised the issue as to whether or not a statement was made it seems to us that such an issue is clearly one of fact to be determined solely by the jury in their consideration of the evidence as a whole. It is an issue which obviously touches the credibility of the witness who propones it and of the accused who denies it."

This view taken by the West Indian courts, as expressed by Fraser J. A., seems to have originated from a decision of the Federal Supreme Court in the case of *R. v. Charles*, (1961) 3 W.I.R. Pt. 4, at p. 534, where *Lewis J.*, delivering the judgment of the court, made a similar statement In my view, his statement was obiter. In that case, the learned trial judge had held a *voir dire* in the absence of the jury concerning the admissibility of the accused's statement on the ground that he alleged that he did not make it. During the *voir dire*, the accused gave evidence on oath which was, of course, in the absence of the jury. The learned trial judge did not, when the jury returned, invite counsel to repeat his cross-examination of the relevant witnesses, nor indicate that the accused could have repeated that evidence again on oath in the presence of the jury. The effect is that he made a finding of fact in the absence of the jury that the accused had made the statement and, in his direction to the jury, told them that he had done so and that it was only open to them to consider whether the statement was voluntary or not, thereby depriving them of their right and obligation to treat that evidence as they should treat all the other evidence in the case. In other words, he omitted the usual injunction, "Members of the jury, the question whether the accused made the statement or not is a question of fact which, like any other fact (other than voluntariness upon which I have ruled and

which ruling you must accept), must be determined by you in accordance with the directions on the law which I have given you."

The *ratio decidendi* in *Charles* falls squarely within the principle applied in *R. v. Dunne*, (1930) 21 Cr. App. R. 176, which was followed in *R. v. Reynolds* (1950) 1 K.B. 606.

It was unnecessary for me to refer to this aspect of *Farley's* case in my judgment in *Fowler* as, in the latter, the issue of voluntariness had been raised and pursued, which accorded with the court's view on that aspect in *Farley's* case.

In these cases, the *ratio decidendi* was the fact that evidence vital to the jury's assessment of the weight and probative value of it was received in their absence. In *Dunne's* case, they did not have the opportunity of hearing from the witness, who was in charge of the institution in which the young girl lived, anything about the nature of her environment, her mental development, and they did not have a chance of assessing her demeanour, etc., while the judge was considering whether she understood the nature of an oath or, if not, whether she was otherwise competent to give evidence in accordance with the provision of the relevant act

The quashing of the conviction by the Court of Appeal is, therefore, with great humility and respect, understandable.

Although these were cases dealing with the competency of witnesses, the applicable principles seem germane to this topic, but, with respect, that does not justify the sweeping obiter of *Lewis J.* in the case of *Charles* cited above. There is one English reported case cited by *Archer J.A.* in *Farley's* case (1961) 4 W.L.R. Pt. 163 (at p. 65)—*R.v. Baldwin* (1932) 23 Cr. App.R. 62—in which a similar pronouncement was made. The report is very bald, consisting of no more than half a page and does not appear to have set out all the facts and circumstances. Moreover, this case was criticized and not followed in the Court of Criminal Appeal in *R. v. Cowell*, where *Hawke J.*, delivering the judgment of the court said: [(1940) 2 All E.R at p. 600].

"..... The court wish to say this. In the absence of the jury during the discussion as to the admissibility of this statement, the question arose as to whether the prisoner himself could be called as a witness. Counsel for the prisoner, bowing to what he understood to be laid down in *R. v. Baldwin*, himself hesitated as to whether he should call the prisoner. Humphreys, J. thought that he could, and indeed it is only fair to the judge to say that he encouraged counsel to call the prisoner. Whatever *R. v. Baldwin* decided, this court is of the opinion that in such circumstances, it is proper to allow the calling of the prisoner himself as a witness if the justice of the case requires that it should be done. I might perhaps read a passage from what was said by Humphreys, J.:

I think, upon this evidence, that this statement is admissible, but it may not be true. That is not for me to decide. It is admissible,

and, therefore, I think counsel would be entitled to go into all the circumstances hereafter before the jury. I will add that it will be open to counsel for the appellant, in my view, to ask the jury not to accept that statement, or these statements, if he is so advised, on any ground which he chooses to put before the jury. All I am ruling now is that, upon the evidence which is before me, and which must necessarily be incomplete at this stage, there is on ground for saying that the statement is inadmissible in law upon any of the well-known grounds referred to by Cave, J. in *R. v. Thompson*, which still remains the leading authority upon this matter. I would just desire to add this. I have been referred to *R. v. Baldwin*. That case seems to me to be unsatisfactorily reported. The head-note is as follows: "If the judge at the trial is satisfied that the defendant was properly cautioned before he made a statement, that statement is admissible in evidence."—that is a platitude, of course—"the defendant is not entitled at that stage to give evidence that the statement was improperly obtained." Nevertheless, I find great difficulty in understanding how a judge can be satisfied about a thing when he has heard only one side. I venture to say, with the greatest respect, that I should follow that decision loyally if that was in fact the decision of the court, but I cannot help thinking that it may not be, and that what the law is, is this. It may be that what a judge has to be satisfied of is that there is *prima facie* evidence before him that a statement is admissible in that it was not made as a result of any inducement or threat, and that it was made after the proper caution, if a caution was necessary in law in the circumstances. If, on the other hand, the law is—but I do not think this is so—that the judge must be satisfied that in truth and in fact the statement was made not as the result of any improper inducement, then, for my own part, I fail to see how any judge, either to his own satisfaction or to that of others, could decide such a question without hearing both sides.

I may say that, although the cases do not appear to have been reported, this is a principle upon which Hilbery, J. and I have had to act on previous occasions. It is a very unpleasant duty to have to perform, particularly in a murder trial, because very often the admission or exclusion of the evidence is decisive of the case. However, that being the position, this evidence was admitted by Humphreys J., who thought that he could not exclude it. The matter is strengthened by the fact that thereafter there was the most complete discussion before the jury as to whether this statement was obtained by any unfair means, and the judge told the jury very plainly to disregard the whole statement if they thought that it might have been induced by unfair means. They must have decided that what was said in the statement was freely said by this man, and was the truth, for they convicted him."

With great respect to the Trinidad Court of Appeal in *R. v. Campbell*, I am unable to agree with the pronouncement made through *Fraser, J.A.* to which I have referred above. Indeed, in his admirable annotation to the judgment of the court in *R. v. Godwin*, (1924) 2 D.L.R. 362, *Powell, K.C.* said [(1924) 2 D.L.R. at p. 375]

"This is a rule of law and has been settled authoritatively for Canada by the Privy Council in *Ibrahim v. The King*, (1944) AC. p. 599. LORD SUMNER who delivered the judgment of the court thus laid down the law 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 shewn 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.'"

In *Rex v. Tutty*, (1905) 9 Can. Cas. 544, a Nova Scotia case, it is there laid down that—[(1905) 9 Can. Cr. C as at p. 547-8].

"The onus was upon the prosecution to establish that the statement of the prisoner was entirely free and voluntary, and I think it was not sufficient for this purpose that the officer should swear to this. He should have proved if by negative the possible inducements by way of hope or fear that would have made the statement of the prisoner inadmissible."

Not only was the possibility of an inducement not negated in the instant case, but the prosecution witnesses revealed the strong possibility of the existence of an inducement.

In the Canadian case of *R. v. Godwin*, 362. McKeown, C.J. said: (1924)2 D.L.R at p. 371.

"We must start with the understanding that the burden is always upon the Crown to shew that statements made by an accused person in custody, and sought to be put in evidence, are voluntary statements. When statements are spoken of as 'voluntary' in this sense, it means that they have not been elicited from the accused either by fear of prejudice to him if he does not speak, or from any hope of advantage he may gain if he does speak. It is in this sense that the word 'voluntary' is used.

"The question whether or not a statement is voluntary must be determined in relation to the mental attitude of the accused when he made the statement in question, rather than from the standpoint of his hearers or questioners, who, in this case, testify they made no threats to him nor did they hold out to him any inducement to speak. No doubt that is so. The officers speak very clearly upon this point and I believe what they say; but that does not throw much, if any, light on the decisive question, which is—How did the accused himself regard the

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inquiry, or what result did he think his answers or silence might lead to? The question of whether such statements are voluntary is a conclusion of fact, which must be deduced from all the circumstances of each case. In drawing that conclusion, the court must have regard to all the conditions which prevailed when the statements were made, and several factors enter into one's mind in coming to a conclusion. In the first place, I think I should inquire how the statements came to be made; were they volunteered by the accused, or were they made in response to inquiries put to him? If they were volunteered, if nothing induced the prisoner to make the remarks, a conclusion could be drawn from the fact that he so made them, which might not be justifiable if they were elicited by question and answer. In the present case the statements were made in answer to questions put to the accused by the police officers while he was in their custody, and whatever weight is to be attached to that circumstance, makes against its voluntary character.

"But in my opinion this does not conclude the matter. Several other considerations enter into it, as for instance:— Where was the statement made? In whose presence was it made? Both of these facts may contribute to the voluntary character, or detract from the voluntary character, of a statement made by a person in custody. Again, was it made in a place, and under circumstances in which the accused, although in custody, was at ease and under conditions which would lend themselves to an unforced disclosure? Was it made in the presence of persons before whom he could express his thoughts freely and clearly? Such conditions furnish some further test in coming to a conclusion. Among the matters proper to be taken into consideration by a trial judge in deciding whether statements made by a person in custody are voluntary or not in my opinion are these, viz.:— Under what circumstances were the statements made? Where were they made? In whose presence were they made? To whom were they made? How were they made? Were they volunteered, or responsive to questions put to the prisoner? Was a caution given?"

In the case of *R. v. Mandzuk, O'Halloran, J.A.* said: [(1946) 1 D.L.R. at p. 525].

". . . . Once these distinctive functions of the Judge and jury (which apply equally in principle . . .) are appreciated, it becomes apparent that in determining the admissibility of a statement which may be a confession, it is not the function of the Judge to consider its likely effect upon the minds of the jury. He is confined to determining *whether the statement in itself is a confession in whole or in part and if so whether it is voluntary*. He is not concerned with its truth or its untruth as such or the good or bad effect it may ultimately have upon the minds of the jury. He is of course concerned with the truth of testimony as to whether the statement was made. But once the confession is

admitted in evidence, then it is to be weighed and judged in the same way as any other testimony which may affect the minds of the jury advantageously or adversely to the accused.

"In my opinion, once it appears the prosecution seeks to adduce a statement in evidence, it is the duty of the judge—the jury (if there is one) being first withdrawn—to learn what the statement is, and then to decide as a matter of law whether the statement is or is not 'a confession'. If he decides it is not a confession, then there is no need for a 'trial within a trial', as the statement is as admissible as any other communication of the accused, and the jury can be recalled and the trial proceed. If the judge decides it is a confession—then a 'trial within a trial' must be held to determine whether it was made voluntarily. This course tends to avoid confusion, delay and uncertainty in the trial." (Underlining mine).

In the Canadian case of *R. v. Mulligan, Mackay, J. A. followed the ruling of Devlin, J. in R. v. Roberts*, (1953) 2 All E.R. 340, which he set out verbatim in his judgment. He then went on to say: [(1955) Ontario Rep. 240].

"..... *The purpose of the trial within a trial is only to determine whether certain evidence should be admitted for consideration by the jury. Once admitted it stands in no higher or different position than any other evidence, and is subject to the same rules as generally apply to evidence in criminal cases. Any question as to the statement having been in fact made, whether it is true, or the weight to be given to it, are all matters for consideration by the jury.*

"In many cases the statement made by the accused is only part of the evidence against him and even if little or no weight were given to the statement, the jury might conclude that on the whole of the evidence the accused had been proved guilty beyond a reasonable doubt. But in a case such as this, where the only evidence implicating the accused is the alleged statement, the jury should be instructed that if they have a reasonable doubt on the evidence as to the statement having been made, or as to its being true, they should acquit.

"*In Rex v. Murray*, LORD GODDARD, C.J. said: [(1951) 1 K.B. at 392; (1950) 2 All E.R 925; 34 Cr. App. R. 203].

"The recorder was wrong in the course which he took. 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 which it had been obtained.....It has always, as far as this court is aware, been the right of counsel for the defence to cross-examine again

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the witnesses who have already given evidence in the absence of the jury, for if he can induce the jury to think that the confession was obtained through some threat or promise, its value will be enormously weakened. The weight and value of the evidence are always matters for the jury.

"Here the jury were told that they were not to consider that matter at all. That is a complete misdirection on a point of law, and this court has always taken the view that if a complete misdirection on an important point of law is given, that must make the conviction bad; because as Channell, J. pointed out in this court in *Rex v. Cohen and Bateman*, (1909) 2 Cr. App. R. 197, 207, it deprives the prisoner of a chance of an acquittal from the jury if the law had been otherwise stated. We feel, therefore, that although there is no reason to doubt that the confession was true, the conviction on the felony count must be quashed as the jury were not given the opportunity of considering the matter.'

"

Mckay, J. A. then continues:

".... To sum up, I am of the opinion, on the facts of this case, that the learned trial judge should first have ruled whether, in his opinion, there was some evidence fit to go to the jury that the statement alleged to have been made by the appellant was his statement. If he thought there was not, he should have rejected the statement, and not permitted evidence of it to be given before the jury. If, on the other hand, he thought there was evidence fit to go to the jury that the accused had made the alleged statement, he should have allowed the evidence to be given before the jury, but he should have reviewed the evidence as to the statement and the circumstances leading up to its having been made. He should also have pointed out and reviewed the evidence which, if accepted, might indicate that the statement, even if the accused did make it, might not be true. He should then have told the jury that it was for them to say whether or not the accused had in fact made the statement, and if he did make it whether or not it was true, and that if on the whole of the evidence they had a reasonable doubt either as to the statement having been made or as to its truth, they should disregard the statement entirely and, since it was the only evidence implicating the accused, acquit him." (Underlining mine.)

In the Canadian case of *R. v. Ferguson & Willoughby*, (1967) 67 W.W.R. 408, referred to in the Continuation Volume C of the English & Empire Digest, (1967-70), at page 212, under para. 3083a, the following passage appears:

"Admissibility question of law for judge.—Trial within a trial to determine the admissibility of inculpatory statements allegedly made by one of the accused in the presence of his co-accused and a police officer. In evidence on the *voir dire* the accused, as did his co-accused,

denied that the statement as alleged by the police officer was made and swore that he had merely asked whether bail could be arranged. There was no suggestion that the statement, whatever it was, was made as a result of any inducement, promise, threat or violence. It was argued that it was the duty of the court on a *voir dire* to determine the actual words that were spoken, and that they were spoken voluntarily; and it was urged that the Crown had failed to prove the voluntary nature of the statement by its failure to produce every person in authority from the moment of the arrest of the accused until the statement was *Held*: the statement was voluntary and must be admitted, the authorities are to the effect that it is the duty of the trial judge on a *voir dire* to decide whether in fact a statement allegedly made by the accused was free and voluntary; if on the evidence the question is answered affirmatively, by proof beyond reasonable doubt, then the statement should go to the jury, who alone may decide whether the statement was in fact made, whether it was true, and who may give it such weight as they think fit; it is no part of the function of the trial judge on a *voir dire* to determine the truth of an alleged confession."

I have not had the advantage of reading the full report, but it appears to accord with the views expressed in the earlier Canadian case, which, I emphasize, are all clearly based upon the English common law.

Consequently, if there has been a departure by the West Indian courts, referred to above by *Fraser, J.* from the law on the topic as applied by the Canadian courts, then there has been, in effect, a departure from the common law of England, the applicability of which to Guyana is set out in s. 4 of the *Evidence Ordinance* of British Guiana (as the Republic of Guyana was then known), Cap. 25. This provides as follows:

"Subject to the provisions of this Ordinance and of any other statute for the time being in force, the rules and principles of the common law of England relating to evidence shall, so far as they are applicable to the circumstances of the Colony, be in force therein."

As I interpret the Constitution of the Republic of Guyana, this provision has been expressly saved by the Constitution in Art. 18, which saves existing laws. The question to be answered, then, is this: Is such "departure" constitutional vis-à-vis Guyana? Obviously not, but the matter does not end there. The topic attracts further examination of the Constitution, endowing, as it does, the citizen with certain fundamental rights with regard, inter alia, to trials for criminal offences. These are expressed in the following terms:

"Protection of Fundamental Rights and Freedoms of the Individual."

"Art. 10—(1) If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

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(2) Every person who is charged with a criminal offence —

(a) shall be presumed to be innocent until he is proved or has pleaded guilty.

(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial."

What is the meaning of a "fair hearing"? Surely, it must mean a trial conducted in accordance with the well-established laws of the country. Moreover, is not the presumption of innocence, involving as it does the proof of guilt and a fair trial, inextricably bound up with both the substantive and adjective laws of the Country? Could it then be said that there was adherence to the Constitution in this case?

The fundamental rights provided in the Constitution are, in effect, to a very great extent, in accord with the "due process" clause of the Fourteenth Amendment to the American Constitution. I hazard the opinion that American jurists would say that a trial at which the judge had failed, upon evidence such as that in the instant case, to rule on the voluntariness of a statement incriminating the accused was a violation, not only of the general common law of the Country, but also of the "due process" clause of the American Constitution, a violation which went to the very root of a fair trial to such an extent as to vitiate the trial and result in the quashing of the conviction by the Supreme Court of the United States of America.

I invoke as a useful aid Art. 20(3) of the Constitution of India, which provides as follows: "No person accused of any offence shall be compelled to be a witness against himself."

The scope of this Article was considered by a panel of eight judges—*Mehr Chand Mahajan, C.J., Mukherjea, S.R. Das, Vivian Bose, Ghulam Hasan, Bhagwati, Jagannadhadas and Venkatarama Ayyar, J J.* in the Supreme Court of India in the case of *M.P. Sharma and others v. Satish Chandra, District Magistrate, Delhi, and others*, where Jagannadhadas, J., delivering the judgment of the court said: [(1954) S.C.R. at p. 1079].

". . . In view of the above background, there is no inherent reason to construe the ambit of this fundamental right as comprising a very wide range. Nor would it be legitimate to confine it to the barely literal meaning of the words used, since it is a recognised doctrine that when appropriate a constitutional provision has to be liberally construed, so as to advance the intendment thereof and to prevent its circumvention. Analysing the terms in which this right has been declared in our Constitution, it may be said to consist of the following components: (1) It is a right pertaining to a person 'accused of an offence'; (2) *It is a protection against 'compulsion to be a witness', and (3) It is a protection against himself.* The case with which we are concerned has been presented to us on the footing that the persons against whom the

search warrants were issued, were all of them persons against whom the First Information Report was lodged and who were included in the category of accused therein and that therefore they are persons 'accused of an offence' within the meaning of article 20(3) and also that the documents for whose search the warrants were issued, being required for investigation into the alleged offences, such searches were for incriminating material. It may be noticed that some of the accused enumerated in the First Information Report are incorporated companies. But no question has been raised before us that the protection does not apply to corporations or to documents belonging to them—a question about which there has been considerable debate in the American courts. On the above footing, therefore, the only substantial argument before us on this part of the case was that compelled production of incriminating documents from the possession of an accused is compelling an accused to be a witness against himself. This argument accordingly raises mainly the issue relating to the scope and connotation of the second of the three components above stated.

"Broadly stated the guarantee in art. 20(3) is against 'testimonial compulsion'. It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in art. 20(3) is 'to be a witness'. A person can 'be a witness' not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see s. 119 of the Evidence Act) or the like. 'To be a witness' is nothing more than 'to furnish evidence', and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes. So far as production of documents is concerned, no doubt s. 139 of the Evidence Act says that a person producing a document on summons is not a witness. But that *Section is meant to regulate the right of cross-examination. It is not a guide to the connotation of the word 'witness', which must be understood in its natural sense, i.e., as referring to a person who furnishes evidence. Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the court room. The phrase used in article 20(3) is 'to be a witness' and not to 'appear as a witness'. It follows that the protection afforded to an accused in so far as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the court room but may well extend to com-*

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elled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution. Whether it is available to other persons in other situations does not call for decision in this case.

Considered in this light, the guarantee under article 20(3) would be available in the present cases to these petitioners against whom a First Information Report has been recorded as accused therein. It would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against them." (Underlining mine.)

With great humility and respect, I adopt and apply *mutatis mutandis* this view in interpreting the scope of Art. 10(7) of the Constitution of the Republic of Guyana quoted above.

Accordingly, I consider the failure of the learned trial judge to rule on the issue of voluntariness and his statement "No ruling made as a matter of law" in the instant case is a violation, not only of the general law of this Country relating to confessions, but also of the fundamental rights duly conferred upon the accused by the Constitution of this Country. In those circumstances, based upon either or both of these conclusions, I would allow this appeal, quash the conviction and set aside the sentence of the learned trial judge.

CRANE, J.A.: The appellant was indicted with a man called Oscar Kunath for the murder of Basmattie, a housewife. Before the matter came to trial Kunath died, and this was why on the 10th May, 1972, the appellant stood his trial alone at the Demerara Assizes where he was convicted and sentenced to death.

Among the many grounds of appeal is the complaint that—"The learned judge erred in admitting in evidence the accused's statement to the police inasmuch as he ought to have given a ruling on the voluntariness of the statement on the *voir dire*." Throughout this judgment, I shall confine my attention solely to this ground because I consider there is such merit and substance in it as to make it unnecessary for me to consider any other ground of appeal.

The statement in question is confessional in nature and purports to have been given by the accused after caution in the presence of two police officers one of whom wrote it at his request and on his behalf at the La Grange Police Station on the day following the murder of Basmattie. If it does not directly implicate the accused with acting in concert with his deceased co-accused to murder Basmattie, the statement certainly does so with respect to the crimes of robbery and theft of her money and jewellery. In that statement the accused admitted how he and Kunath planned to "rob

some old people" at Nismes of their money and jewellery and how they together set out on the 13th July, 1970, with that intent for Basmattie's house at Nismes, West Bank, Demerara. He also related how he and Kunath went to Basmattie's home during her husband's absence, encountered Basmattie there; how Kunath "locked her off around her neck while he (the accused) stood by outside to signal the approach of anyone; how Kunath spent some fifteen minutes in Basmattie's house where he had dragged her before returning to tell him that "everything is alright"; and how they both afterwards joined a motor-car in which Kunath gave him "plenty of \$20 notes" and the pieces of jewellery belonging to Basmattie, which were afterwards found in his possession. The accused, however, was at pains to stress that he accompanied Kunath only "to rob the old lady" because he needed money; but he did not go to kill anyone. In passing, I would observe the word 'rob' is noteworthy in the statement, because if the accused did not use it in the colloquial sense of 'steal' (which was the impression he gave the police officer who took his caution statement), it cannot be doubted that both men would, on established authority, be guilty of murder if they went with the preconceived intention to rob Basmattie of her money and jewellery, that is, to commit a felony of violence on her.

At the trial, as the impugned statement was about to be tendered, defence counsel objected to its admissibility on the ground that it was not a free and voluntary statement, that it "was induced by promises and threats used and/or directed to the accused who was coerced and/or induced into making the said statement." After a further objection that the statement was taken by an officer other than the one by whom it was purportedly taken, counsel requested that the jury be withdrawn so that he could argue his objection. Thereafter, the judge began the *voir dire* or, as it is called, "the trial within a trial". Then Sgt. McLean, in proof of the voluntariness of the statement, outlined the circumstances in which it was taken by him from the accused. These were, that at the time of the accused's arrest, it was necessary to take his wife into custody also and for her to leave her two infant children one of whom was a six-month old breast-fed baby at home; that after a caution was administered at the station, he (McLean) reduced the statement into writing at the request and with the consent of the accused in the presence of Sgt. de Abreu and the wife of the accused. It was not true that Lovell was present, so he could not have written the statement. In fact, Lovell was not at the Inquiries Office throughout the whole of the 14th July. When he had completed writing what the accused narrated to him, the accused read it over saying it was true and correct, and on being told he was free to make any additions, corrections or alterations, signed his name to it. Neither threats nor promises were held out to induce the making of the statement

In the accused's version of the affair, the judge was informed of the circumstances attendant on his arrest at his home at Eccles, East Bank, Demerara, where he resided with his wife and their two infant children, ages eighteen months and six months, the younger of whom was breast-fed. The

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judge was told how he and his wife were taken to the Ruimveldt Police Station on the night of their arrest and of how he was very perturbed in mind over the plight of the children because they were left behind unprotected; although I must observe the evidence of the policemen is that the children were left in charge of a relative.

From the Ruimveldt Police Station both he and his wife were taken by Sgts. McLean and Lovell to the La Grange Police Station where, at half an hour after midnight on July 14, McLean demanded a statement from him. He was unable to give one as he was hungry, had not slept the whole of the previous night, and was disturbed in mind over the little baby being left at home without its mother. It was then Sgt. McLean said to him, "The baby would have to go where Basmattie gone," which he understood McLean to mean that his baby would have to die. The two police sergeants then began to confer with each other, though he did not hear what they said, and as they took leave of each other, he overheard Sgt. Lovell advising McLean, "Don't worry with anything. Leave everything to me." Whereupon, Lovell took the accused into the barrack-room where he told him he was only required to give a short statement. Nevertheless, he insisted he was still very much disturbed about his baby being left alone at home, and it was then that Lovell repeated the identical threat McLean had a little while before made to him—"The baby would have to go where Basmattie gone." Thereafter, his fear for the safety of his child increased and he decided to make a statement for the sake of its safety when Sgt. Lovell told him that his wife would be released only when he gave it, no matter how short it was. He was afraid his baby would have died had he not made the statement, otherwise he would not have made it. Such were the circumstances in which the accused came to make his statement to Sgt. Lovell, not to Sgt. McLean, and as he narrated them to the trial judge.

There can be no doubt the accused's wife had expressed great concern over the fact that she was forced to leave her breast-fed baby at home. The police officers themselves admitted this fact, and so I think it is not unreasonable to conclude that concern would have been equally shared by the accused who, the evidence shows, was almost continuously in the company of his wife at the station when he was making his statement. When cross-examined on the statement, which admittedly bears his signature, the accused admitted making only certain parts of it. He said he dictated certain parts of it to Sgt. Lovell who wrote them down, but he never dictated those parts which speak of robbery and murder, though he was forced to sign the whole because he feared had he not done so, his baby would have died at home without its mother's attention.

What happened at this juncture is astonishing, but, nevertheless, does occasionally occur: State prosecutor requested the accused to explain to the court those parts of the statement he admitted and those parts written by Sgt. Lovell he did not admit making. Thereupon, defence counsel objected on the ground that the contents of the statement were incapable of being so

severed. He contended that the whole of it was so tainted by inducements and so inextricably interwoven that separation of the narrative would be prejudicial to the accused. The judge thought the submission worthwhile considering, so he took time during the luncheon recess to do so. On his return to court, he upheld defence counsel's submission. He ruled the contents of the statement were not to be severed, which meant the accused would not be permitted to say what parts were made by him and what parts were made by Lovell, i.e., what parts were unauthorised.

For myself, I think it would tax one's imagination to the peak to discover what possible prejudicial effect could have been occasioned the accused by ordering him to comply with the kind of request made by the prosecutor, but the judge agreed it would be to the prejudice of the accused so to order, and that was his ruling. But I have no doubt the refusal was directly responsible for the ruling which is the subject of this appeal. I think it was clearly wrong to refuse the request, for quite apart from any question of prejudice, which is a matter within the trial judge's discretion, nobody can deny that separation of admissions from denials would have been of tremendous assistance to the prosecution in helping him to decide the question of voluntariness. The objection having come from the accused, I am inclined to think the judge thought if he were going to err, it would be safer to do so on the side of the defence on the principle of "fairness to the accused". But while that is a praiseworthy inclination, it must not be exercised at the expense of procedures which are designed to ensure a fair trial to both sides. It seems to me the learned judge bent too far backwards to meet the objection of the defence and, in so doing, handicapped himself in the satisfactory performance of his function. The concept of fairness at a criminal trial must be evenly balanced. What is regarded as fair to the accused must not be unfair to the prosecution, and *vice versa*.

In order to show it was the trial judge's duty on the *voir dire* to determine whether the statement was either *wholly* or partially of a confessional nature, the following passage is cited from the judgment of *O'Halloran, J.A. in Rex. v. Mandzuk*, (1946) 1 D.L.R. (at pp. 524-525):

"..... it becomes apparent that in determining the admissibility of a statement which may be a confession, it is not the function of the judge to consider its likely effect upon the minds of the jury. *He is confined to determining whether the statement in itself is a confession in whole or in part and if so whether it is voluntary.* He is not concerned with its truth or its untruth as such or the good or bad effect it may ultimately have upon the minds of the jury. *He is of course concerned with the truth of testimony as to whether the statement was or was not made and as to what statement was made.* But once the confession is admitted in evidence, then it is to be weighed and judged in the same way as any other testimony which may affect the minds of the jury advantageously or adversely to the accused."

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Non-inculpatory parts of a statement may always, despite objection from the defence, be proved in the ordinary way and put before the jury for their consideration. However, if one or more parts of it is, or are, confessional in nature, the judge is in duty bound to require proof from the prosecution of its voluntary character before he can properly put that part or those parts of it before the jury. But it is apparent that by refusing the prosecutor's request to sever the statement, the trial judge has neglected to avail himself of the opportunity to edit it if possible [see *R. v. Weaver*, (1967) 1 ALL E.R. at p. 279]; and to direct his mind to all disputed confessional parts of it which it is incumbent on the prosecution to prove were voluntarily made. But what exactly were those parts? Unfortunately, the learned judge by his ruling frustrated inquiry into them and thereby denied the prosecution the opportunity of proving the voluntariness of them, and, as I will show later, of discharging the burden of proof of guilt.

However, immediately after the ruling refusing separation of the admitted from the disputed parts, the accused on being asked whether he had made the statement, replied in this crucial manner: "The statement is not mine and what is contained in it is not mine."

Two further witnesses were called to testify on behalf of the accused before the close of the voir dire. One was an expert handwriting witness who testified it was Sgt. McLean and not Sgt. Lovell who wrote the disputed caution statement at the accused's request, whereafter the trial judge ruled and recorded the course of the proceedings as follows:

"Court rules that what the accused in effect is saying is that this is not his statement and this being so is clearly a question of fact for the jury to decide and not a matter of law to be decided at a voir dire.

Issue concluded but no ruling made as a matter of law.

Jury return at 2.18 p.m.
Checked—all present."

"[At this stage Court informed the jury that from the evidence taken in their absence, the Court has ruled that whether the accused made the statement sought to be tendered or not is a question of fact for them to determine.]

Immediately thereafter, Sgt. McLean tendered without further objection the challenged statement and the trial judge accepted it as voluntary in that it was not induced by threats or promises by a person in authority.

Such were the circumstances under which the statement was admitted and which inspired the ground of appeal I have already set out above. The question for us now to decide is whether the above ruling is right. It is a question which has arisen time and again before courts of first instance and of appeal in Guyana, Barbados and Trinidad where, it is said, the law is settled

and is peculiar to West Indian jurisprudence. We in Guyana, however, cannot make that claim, there being a division in our Court of Appeal on the matter. That is why we are seated here *en banc* to have it settled once and for all.

There can be no doubt that in ruling as he did the learned trial judge was keeping in step with a long line of authority beginning with *R. v. Charles*, (1961) 3 W.I.R. 534, in which it is held that an objection to the admissibility of a statement on the ground that an accused has not made it, raises no proper objection in law for attacking its admissibility; it merely raises an issue which must be tried by the jury. *Charles' case was obviously applied, although not mentioned in R.v. Farley, (1961)4 W.I.R. 63, which has been consistently followed both in courts of first instance and appeal here and in Trinidad. It will be my purpose in this judgment to show there was no warrant for the proposition that when a man says he did not make a statement, as is said in the present case, and in Charles' and Farley's cases that—"such an objection is not in law a proper ground for attacking the admissibility of a statement but merely raises an issue which must be tried by the jury."*

It is always important for a trial judge to determine when an accused person says a statement is not his, or he did not make it, what he really means. As I see it, he may mean either one of two things:

Proposition (i)—that although he himself wrote the statement or agreed that someone else should write it for him and signed his name to it, he did not make it because someone either forced him to do so, or dictated to him what to write in it or to somebody else writing on his behalf (duress); or that the statement was induced from him by some promise, hope, fear or threat held out by a person in authority.

Proposition (ii)—that he knows nothing whatever about it; that the statement is a fabrication by those who seek to tender it in so far as it purports to be written in his handwriting and signed by him, or in so far as it purports to be written by someone else and bears both the handwriting and the signature are not his; he is dissociating himself from the handwriting altogether; it is a fabrication and in this sense he is saying he did not make the statement.

If an accused person alleges, simply, on his taking objection to the admissibility of a statement he did not make it or it is not his statement, his objection is, in the light of the above analysis, clearly equivocal, for he may be raising either a question of law or a question of fact Proposition (i) above raises a question of law, while proposition (ii) raises one of fact Nevertheless, it behoves the trial judge to give a ruling after enquiring into and considering both situations on the *voir dire*, and not just saying, as did the Federal Supreme Court in the cases of *Charles* and *Farley*, that a bare denial of making it is not in law a proper ground for attacking the admissibility of a statement.

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The effect of a bare denial of having made a statement will be to throw the onus on to the prosecution to prove the voluntary character of it and this will necessarily call for evidence to be led on the voir dire on the matter of its admissibility. So a bare denial does not, as we are told, "merely raise an issue which must be tried by the jury". In the light of the above analysis, it may raise either a question of law or a question of fact pertaining to the admissibility of the confession statement. In either of these situations, the trial judge is obliged to apply a judicial mind and as a matter of law to rule on its voluntary character before he admits it.

But it is not true to say the accused raises *both* issues on the *voir dire*. Only *one* issue automatically arises for determination there, and that is voluntariness, in the determination of which it is required of the judge to find out whether, in the first place, there is *prima facie* evidence that the accused made the statement. It is not true to say the accused asks the *judge* to say the statement is not his, and that he did not make it. That is the function of the jury. The accused merely asks the judge to perform his own function in determining whether there is "some evidence" that he made it, and, if there is, to let the jury determine as their function whether he *in fact* made the statement.

The moment there is a challenge to the admissibility of a statement, its voluntariness is automatically put in issue. The ground of challenge is immaterial. It does not matter whether the accused himself challenges the voluntary character of the statement by alleging duress and/or inducement, or whether he alleges simply that the statement is not his, he knows nothing about it, and did not make it. In either case, voluntariness will be in issue because its admissibility is in issue. Voluntariness being the test for, is synonymous with admissibility, and once objection is taken, the "long established positive rule of English criminal law", of which LORD SUMMER spoke, and declared to be as old as LORD HALE, comes into play. According to that rule, no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to be voluntary "in the sense that it has *not* been obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority." [See *Ibrahim v. The King*, (1914-15) All E.R 887.] So that as soon as admissibility of a statement is challenged on any ground whatever, voluntariness is put in issue and the onus of proof thereof lies on him who seeks to tender it in evidence against the accused.

It is for the above reasons I prefer the submission of the Attorney General, as revealed in the judgment of *R. v. Farley*, (1961) 4 W.I.R 63 (at p. 66), to the effect that "the judge took the proper course in conducting an inquiry in the absence of the jury as soon as the admission of the statement was objected to, for the purpose of determining whether it was a voluntary statement or not", and why I think both *Charles* and *Farley* have been wrongly decided by the Federal Supreme Court.

In *Farley's* case, objection was taken to the admissibility of a caution statement tendered by police officers. The ground of challenge was merely that the accused "knows nothing about it, that he never made any statement". I have already observed this was the identical ground raised in *Charles'* case in which not a single authority was cited for its remarkable proposition, and from the bare report of that case it would certainly appear that insufficient reflection was given the decision, for its very short judgment was apparently delivered either on the very next day after the conclusion of the arguments or possibly on the very same day.

Considering and rightly so in my view, the issue of voluntariness was raised by the above objection, the trial judge in *Farley's* case heard evidence on the *voir dire* at the conclusion of which he ruled the statement admissible. On the jury's return to court, he told them of his ruling and informed the accused of his right to repeat his cross-examination of the witnesses in their presence. Holding that an issue of fact was raised for the jury to try, the Federal Supreme Court speaking through *Archer J.*, said [(1961) 4 W.I.R. at p. 65].

"The judge treated the objection as one made on the ground that it was not free and voluntary. That was not the ground put forward by **the** applicant and there was nothing for the judge to try in the absence of the jury when the objection was made. It would have been different if the applicant, while only stating one ground, had also relied on the other, but he persisted with the first ground and did not set up the second. Still less was it for the judge to rule that the applicant had made the statement and merely leave it to the jury to say whether or not he had made it voluntarily. The result of the judge's ruling is that the issue whether or not the applicant made the statement has been withdrawn from the jury and evidence, notably the evidence of the applicant himself, has been heard in the absence of the jury."

With great respect, I find myself at variance with the views as expressed above. While the form of challenge in both *Charles'* and *Farley's* cases admittedly posits a question of fact for the jury, I find on both principle and authority, it also raises an issue of law for the trial judge personally to decide, since it pertains to facts affecting the admissibility of evidence.

Whenever there is a challenge to admissibility, there invariably arises a question of law for the trial judge to decide, irrespective of whether what is sought to be admitted relates to documentary evidence or to oral admissions or confession statements of an accused person. [See *Basto v. The Queen*, (1954) 91 C.L.R. at p. 634]. It will be my purpose to show that *when admissibility depends on certain facts, then the judge must himself adjudicate upon those facts before submitting them to the jury*. This is a well-settled and deeply-rooted principle of the common law relating to the admissibility of evidence which is amply borne out by the case of *Doe v. Davies*, (1847) 10 Q.B. 315. There, the question raised in an ejectment land case was, whether

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Elizabeth Stevens, deceased, was legitimate or not, a fact which would determine whether she came within the description in a will as the "right heirs" of the testator and so had a right to convey certain real property. A certificate of the marriage of her alleged father, John Davies, to her mother was produced by John White, an attorney, who said he received it from Elizabeth. John White was then asked whether Elizabeth made, at the time, any statement respecting her mother's marriage. In spite of objection, Coltman J., evidently on the *voir dire*, admitted Elizabeth's declaration to John White in evidence. On a motion for a new trial on the ground of the improper reception of evidence, it was held by Lord Denman, C.J. that White's answer was admissible, it having been proved before the satisfaction of the judge, *ante litem motam*, that Elizabeth was a member of the family.

On the point of *Coltman J.*'s holding a *voir dire* to determine the particular matter he had to decide as a "condition precedent", namely, the admissibility of the evidence of Elizabeth Stevens' legitimacy, Denman, C.J. said [(1847) 10 Q.B. at pp. 323 6324].

"He (John White) was then asked whether Stevens made any statement respecting her mother's marriage; and the question was objected to on various grounds. First: that she was not yet conclusively proved to be a member of the family. The answer is, that it was the duty of the judge to decide whether it was proved to him: and he decided that it was. *There are conditions precedent which are required to be fulfilled before evidence is admissible for the jury.* Thus an oath, or its equivalent, and competency, are conditions precedent to admitting *viva voce* evidence; and the apprehension of immediate death to admitting evidence of dying declarations; and so is consanguinity or affinity in the declarant to declarations of deceased relatives. *The judge alone has to decide whether the condition has been fulfilled.* If the proof is by witnesses, he must decide on their *credibility*. If counter-evidence is offered, he must receive it before he decides: *and he has no right to ask the opinion of the jury on the fact as a condition precedent.* See *Bartlett v. Smith*, 11 M. & W. 483. In this case the judge thought the condition had been fulfilled; and we are of the same opinion.

"It was further objected, that the question, whether Elizabeth Stevens was a member of the family, was in fact the issue for the jury, as she was not contended to be so unless she was legitimate: and, if she was decided to be legitimate, her declarations to prove her legitimacy were superfluous. The answer is, that neither the admissibility nor the effect of the evidence is altered by the accident that the fact which is for the judge as a condition precedent is the same fact which is for the jury in the issue."

This principle of the necessity for a trial judge to adjudicate on the preliminary issue when admissibility depends on certain facts constituting a condition precedent to the acceptance of statements and admissions of a confessional nature is also evident in *R. v. Roberts*, (1953) 2 ALL E.R. 340. There, evidence for the prosecution on an indictment for murder included certain statements alleged to have been made by the defendant, deaf mute. These statements were inculpatory because the Crown conceded that unless those statements came before the jury, they could not be asked to convict. The defence objected to this evidence on the ground that the defendant could not have made, *and did not make, the statements*. The objection whether the defendant did or did not make the statement was obviously factual, and on the question whether it was to be tried by the judge or was a matter for the jury, *Devlin J.* gave the following ruling: [(1953) 2 ALL E.R. at 344].

"I shall inquire into the *two* questions whether the statements which are alleged to have been made by the defendant were, in fact his statements, and, if so, whether they were made voluntarily and in accordance with the Judges' Rules and I shall reach that conclusion of fact on the latter question in the ordinary way. On the former question, it seems to me, subject to anything which counsel for the defendant may say, that it would be right that, if I think there is some evidence fit to go to the jury that they were his statements, I shall admit the statements and let them go to the jury. If I do not think that there is any evidence fit to go to the jury that they are his statements, I shall rule them out."

From the report of *Roberts'* case, it is to be observed that "objections going to the voluntary character of the purported statements were also raised". These, *Devlin J.* said he would dispose of "in the ordinary way", which I take to mean, he would inquire into them in the absence of the jury. But supposing no objections going to the voluntary character of the statements had been directly raised so that there was before *Devlin J.* only one of the *two* questions, viz., whether the statements were made by Roberts, would his ruling have been any different? For myself, I am of opinion his ruling would have been identical and that it would have been still necessary for him to hold a *voir dire*, for the reason that voluntariness of the statement would, as I have already shown, have been automatically put in issue by the mere challenge of the accused that he did not make it, could not have made it, and he knew nothing about I entirely dissent from the view as expressed in *R. v. Charles* (above), that an objection to admissibility on the ground that an accused has not made a statement is not a legal and proper ground for attacking its admissibility, and that voluntariness cannot be considered unless specifically raised by the accused by way of challenge. On the contrary, there is a presumption of involuntariness in every confession statement which the prosecution must remove by affirmative proof of its voluntariness

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Devlin J.'s ruling was considered and discussed by the Court of Appeal for Ontario, Canada, in *Regina v. Mulligan*, (1955) O.R. 240, in which it was argued and held, just as it was before Devlin J., that on the *voir dire* the approach of a trial judge must be to determine *two* matters: first, whether or not the statement was made, and, secondly, if the statement was made, whether it was made in circumstances that rendered it admissible, i.e., that the burden was on the prosecution to prove affirmatively to the satisfaction of the trial judge *both* that the statement had been made and that it was a free and voluntary statement.

When one closely examines the situation, it seems to me it ought to be very clear that both *Roberts'* and *Mulligan's* cases that on challenge, the principle in *Doe v. Davies* (above), viz., that on challenge, the preliminary issue of the facts pertaining to admissibility of a confession statement must first be determined on the *voir dire* by the trial judge as a condition precedent before he submits it to the jury for decision as to its weight and value. *Mulligan's* case was, however, not followed by the Court of Appeal for Trinidad & Tobago in *Campbell v. R.*, (1969) 14 W.I.R. 507; although the reason given for not doing so, I respect fully say, is unconvincing. It is that the law *now* applied in West Indian courts is different from that which applied in Ontario when *Mulligan's* case was decided in the year 1955. That is not a satisfactory explanation of the present situation.

In the report of *Campbell v. R.*, it is stated. [(1969) 14 W.I.R. at p. 510].

"In *Herrera & Dookeran v. R.* this court approved of it *v. Farley* and followed *Williams v. Ramdeo*. It should therefore be abundantly clear that what was said in *R. v. Mulligan* differs from the approach adopted by West Indian courts and we hold that in considering the admissibility of a statement *where the issue is not whether it is voluntary* but rather whether it was in fact made, the tribunal must admit that statement and leave the issue of fact to be determined by the jury."

With respect, I must strongly dissent from this view and the decisions of *R. v. Farley*, *Williams v. Ramdeo & Ramdeo* and *Herrera & Dookeran v. R.*, on which the Court of Appeal for Trinidad & Tobago relied in support. Quite frankly, I am unable to think of any case concerning the admissibility of a confession statement where the matter in issue does not touch and concern its voluntary character, bearing in mind that it cannot be admitted into evidence unless it is proven to be voluntary by the prosecution. Voluntariness, like the onus of proof of guilt in a criminal case, is always in issue.

In 1955, the law relating to the admissibility of confession statements as it was applied to *Mulligan's* and to all West Indian cases was indubitably English law. How then did it come about that the "law now applied" in West Indian courts is different from English Law? That is the point on which the judgment in *Campbell's* case, I should have thought, ought to have enlightened us in justification of its pronouncement. *Campbell's* case

certainly indicates there is now a law peculiar to the West Indies which differs from English common law dealing with the admissibility of confession statements when, as I understand it, the rules and principles of the common law of England relating to evidence are, subject to statutory enactment, preserved in all common law jurisdictions in the West Indies. [See, for example, our own *Evidence Ordinance*, s. 4 of Cap. 25, the Trinidad Evidence Ordinance, s. 2, Cap. 7 (No. 9), and their Criminal Procedure Ordinance, s. 77, Gap. 4 (No. 3) in force at the time of the decision in *Campbell's* case.] But what seems to be obviously lacking in that judgment, apart from the recitation of the facts of *Mulligan's* case, was any attempt to distinguish from that case those West Indian decisions referred to above, and to trace the steps through which courts in these parts have come to depart from the application of the rules and principles of the common law of England relating to the reception in evidence of statements containing admissions and confessions. What was the reason for West Indian courts launching out in a field of jurisprudence which, it is claimed, is now peculiarly their own when, in the past, they had adopted and applied the rule of law that has been authoritatively settled for those parts of the Commonwealth in which English criminal law obtains, namely, the Privy Council's decision in *Ibrahim v. The King*? On this point, *Campbell v. R.* is silent.

I have shown above that the approach of Devlin J. to the two questions he had to consider in *R. v. Roberts* was followed in *Mulligan's* case. Without saying more, does this not show that in 1955 a Canadian court followed and applied an English decision which the Court of Appeal for Trinidad & Tobago would itself have considered and applied? Moreover, passages from such cases as *R. v. Murray*, (1951) 1 K.B. (at p. 392) and *R. v. Bass*, (1953) 1 Q.B. 680 (at p. 684), both of which concerned the admissibility of confession statements, were also cited with approval.

It is a significant fact, I think, that not one of these English cases, which were all cited in *Mulligan's*, was cited in the cases of *Charles* and *Farley*. To me, it seems this can only mean that in 1969 when *Campbell v. R.* was decided, it ought to have been very clear that the decision in *Farley's* case was given *per incuriam*. In fact, only two decisions are referred to in the report of that case, neither of which was cited in *Mulligan's*. Further, we must remember that the Federal Supreme Court was a travelling Court of Appeal in those days, a fact which makes me doubt whether the eleven days which elapsed between the conclusion of the hearing and the decision, gave the judges adequate time for reflection. So it does not seem there is justification for the claim that the law *now* administered in the West Indies is any different from the law as it was applied in *Mulligan's* case in 1955, which, I think there is ample authority for showing, is the same as English law. Certainly, *Farley's* decision has not been standing for so long a time that we must accept it on the principle of *communis error facit jus*.

In another Canadian authority—*Rex v. Godwin*, (1924) 2 D.L.R.—it may be seen that the principles of English law relating to the

admissibility of confession statements as expounded in the light of the celebrated decision of LORD SUMNER in *Ibrahim v. The King*, (1914) A.C. 599, are part of the jurisprudence of that country. Indeed, so important is *Godwin's* case that it was thought fitting to have it annotated by learned senior counsel who appeared for the defence. At p. 375 of the report it is stated that—"The proposition that the statement of an accused person to be admissible in evidence must be 'voluntary' is a rule of law that has been authoritatively settled for Canada by the Privy Council in *Ibrahim v. The King*."

In *Godwin's* case, four propositions identical with those propounded in *Ibrahim's* case were accepted and applied by the Court of Appeal for New Brunswick. They were as follows:

- (i) "Any statement by an accused party and sought to be tendered against him must be a voluntary one.
- (ii) "The onus rests upon the Crown or prosecution to show that the statement is a voluntary one *before it can be received in evidence*.
- (iii) "The question as to whether the statement is voluntary or not is a question for the trial judge whose judgment unless clearly wrong is final.
- (iv) "The trial judge in arriving at his judgment must look at all facts and circumstances connected with *the making of the statement*"

When one examines these four propositions and observes how they are applied in the authorities cited above, one cannot fail to see that when an accused says he did not make a statement or the statement is not his, he is doing no more than to invite an investigation on those facts and circumstances by the trial judge in terms of propositions (i)—(iv) above. Whether he did make the statement or not, is indeed a question of fact relevant to its voluntariness and admissibility; but one thing is very clear, and that is, that a trial judge cannot shirk the responsibility of *himself* investigating the facts and circumstances attendant on the making of it by casting that function on the jury. Obviously, he must inquire, first, into whether the accused made the statement before he can properly determine whether or not he made it voluntarily. He may find there is no evidence that the accused made it under any circumstances whatever, in which case, he will reject the statement. But if the judge finds "there is *some evidence* fit to go to the jury that they were his statements", i.e., *prima facie* evidence that the accused made them, he must admit them and let them go to the jury for their decision as to weight and value on the question whether they are, in fact, the accused's statements. [See per Devlin J. at p. 344 of the report in *Roberts' case* (above)].

Some of the factors a judge must take into consideration before exercising his judicial function to admit or reject the statement are: Under what circumstances were the statements made? Where were they made? How were they made? In whose presence were they made? To whom were they made? Were the statements volunteered or made in response to questions put

to the accused? Was a caution put to him? Were the Judges' Rules complied with? This latter inquiry is of much importance, particularly as "it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope for advantage exercised or held out by a person in authority, or by oppression." [See paragraph (e) of the 'Principles' prefacing the Judges' Rules].

The principle set out in paragraph (e) above is overriding and applicable in all cases. It is within that principle the Judges' Rules are used as a guide to police officers conducting investigations. Non-conformity with them may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

If the accused by saying he did not make the statement means to convey that although he did in fact make it he does not regard it as his because he did not give it of his own free will, this is unquestionably legitimate and suggestive of an attack on the voluntariness of it. It is not raising two issues on the *voir dire*. In such an event, it is inconceivable that the judge could do otherwise than investigate the facts and circumstances attendant on the making of it.

The principles governing the admissibility in evidence of confessions on the *voir dire* were examined in *Rex v. Mandzuk*, (1946) 1 D.L.R. 521. In this case, *O'Halloran, J. A.* gives a useful guide to determine when an admission or a confession can be admitted without proof of its voluntary character according to whether it is inculpatory or exculpatory (at pp. 524-525): [(1946) 1 D.L.R. at pp. 524-525].

"In my judgment the test whether a statement is admissible without proof that it is voluntary must depend not upon its eventual truth or untruth, but upon its character and nature at the time it was made. If it is inculpatory when made it is subject to the rules relating to confessions. If it is exculpatory when made it is not so subject and may be received as any other evidence."

I take what the learned justice of appeal is saying to be very apposite to the case in hand. It would be quite wrong, in my view, for a trial judge to abdicate his function of legally admitting the statement by leaving it for the jury's consideration when it incriminates the accused, unless it was proven to have been freely and voluntarily given. The fact that the jury have considered and given their verdict on a statement that was wrongly left to them cannot give *ex post facto* validity to reception without proof of its voluntary character. A jury's verdict can never make amends for, nor cure the fact that it was submitted to them wrongly because it is the judge who must himself determine, for purposes of admissibility, the nature and character of the statement at the time it was made. If a judge passes on to the jury the

function of admitting the statement, he puts it out of his power to determine the nature and character of the statement, with the result that inadmissible evidence may be put before them. An improperly admitted statement which goes before the jury may contain matter poisonous to the jury's minds and will inevitably result in a miscarriage of justice. At p. 526 in the report of *Mandzuk 's* case there are some helpful suggestions for the holding of a *voir dire*, and I will commend them to judges at Assizes. These are as stated by *O'Halloran, J.A.* as follows: [(1946) 1 D.L.R. at 526].

"In my opinion, once it appears the prosecution seeks to adduce a statement in evidence, it is the duty of the judge—the jury (if there is one) being first withdrawn—to learn what the statement is, and then to decide as a matter of law whether the statement is or is not 'a confession'. If he decides it is not a confession, then there is no need for a 'trial within a trial' as the statement is as admissible as any other communication of the accused, and the jury can be recalled and the trial proceeds. If the judge decides it is a confession, then a 'trial within a trial' must be held to determine whether it was made voluntarily. This course tends to avoid confusion, delay and uncertainty in the trial."

To this I would respectfully add that when the judge decides the statement is not of a confessional nature, the *voir dire* has not yet commenced, so that the judge may quite properly recall the jury without giving a ruling on the voluntary character of the statement. It only commences when he has decided the statement is confessional and when he swears the first witness to speak the truth on the issue. In days gone by, an oath different from the usual oath to witnesses, known as the *voir dire*, used to be administered at the trial within a trial; although today with us, the form of oath is the same as generally issued.

Apart from those cases referred to above, the authorities, which are legion, all show that in a 'trial within a trial' the judge *himself* must make a clear and definite ruling one way or the other on the question of voluntariness and admissibility; he cannot simply leave it for the jury to decide. [See *R. v. Richards*, (1967) 1 All E.R. 829, 830, and *R. v. Francis & Murphy*, (1959) Cr. App. R. 174.] In *Francis & Murphy*, objection was taken before the Recorder of Bristol to the admissibility of an alleged confession statement. The Recorder said he would postpone his ruling until all the rest of the evidence relating to the confession was put before the jury. In so doing, he was held to have committed an irregularity which vitiated the trial. The learned Recorder in fact never gave his ruling. On appeal against conviction, LORD PARKER, C.J. explained why it is always necessary for a trial judge to rule on the matter of the admissibility, as follows: [(1959) Cr. App. R. at p. 176].

"It has always been the settled practice in cases of this sort for a challenge to be made to the admissibility of the statement at an early stage in the absence of the jury. The matter is set out in the 34th (1959) edition of Archbold's *Criminal Pleading*, etc., at paras. 1114 and 1115. 'The proper course,' it is said there, 'where objection is raised to

the admissibility of an alleged confession, is for the judge to hear evidence in the absence of the jury and to rule upon that evidence whether the alleged confession should be admitted or not.' The passage goes on to say that the evidence of the prisoner may be admitted at that stage. Then, if the evidence is admitted, 'the weight and value of a confession remain matters for the jury.' *It is quite clear that a prisoner is entitled both to a ruling on admissibility from the judge and also to hear the verdict of the jury on the weight and value of the confession.* Although the criterion is the same, namely whether it is a voluntary confession, there may well be cases where the judge might not think it right to allow the confession to be put before the jury at all. If the course adopted in this case were adopted in all cases, something would come before the jury which the judge might at a later stage have to rule to be inadmissible. In the result, either the jury would be left with minds poisoned against the prisoner or they would have to be discharged and the trial started again. The court is of opinion that no departure should be made from what has always been the settled practice in these matters."

The observation in *Farley's* case that there was an irregularity vitiating the verdict, does not seem to me to be correct, because when Farley gave evidence on the *voir dire* saying he did not make the statement, that he knew nothing about it, the trial judge, it seems to me, rightly exercised his discretion in allowing him to testify [see *R. v. Cowell*, (1940) 2 All E.R 599], even though that issue was for the jury ultimately to decide on. For myself, I think it would have been difficult, owing to the equivocal nature of the words of the challenge shown by my two propositions above, for the trial judge to have properly performed his function of admitting the statement, unless he heard *Farley's* version on the point as to why he did not make the statement. Furthermore, I think he properly dismissed the jury and conducted the *voir dire* in their absence. This is invariably the practice when evidence of a prejudicial kind is to be considered. The reason is not hard to see. The obligation to withdraw the jury was explained by LORD GODDARD in *R. v. Reynolds*, (1950) 1 All E.R. at p. 377, as being out of "mercy and fairness to prisoners". It is: that one can hardly expect their minds to be prejudicially unaffected if the judge were to reject the statement after hearing argument on its admissibility. Confession evidence is the one well-known exception (referred to by LORD GODDARD at p. 377) to the rule that all evidence must be given in the presence of the jury. And though details are not given, I think it is reasonable to conclude from the headnote and report read as a whole, that *Farley's* caution statement must have contained incriminating matter of a confessional nature which would have biased the jury's minds. At any rate, the trial judge must have so thought when he exercised his discretion to have the jury withdrawn from court while he conducted a *voir dire*. So there was clearly no irregularity in the course he took, for the statement being confessional in nature, it cannot be said *Farley's* case contained, as in *Reynolds'*, the class of evidence which ought to have been given in open

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court in the presence of the jury. As Goddard, C.J. pointed out in *Reynolds*, the evidence of the school attendance officer on the matter of the child's competence to testify was of the kind which the jury had every right to hear. On the contrary, the jury had no right to hear *Farley's* confession statement unless the judge ruled it voluntary. This is how I distinguish *Farley's* from *Reynolds'* case. If I am right in so thinking, then *Farley's* evidence could not really be said to have been given "in the absence of the jury".

With respect to Charles and Farley, both gave confession statements. But these could not be put before the jury until they were proven voluntary. This is why evidence of them cannot be said to have been heard in the jury's absence. In both cases the *voir dire* procedure adopted by their respective trial judges cannot be faulted. Though the outcome was identical, the material difference between the two cases lies in the way the confession statements were treated after admission. Whilst Charles' statement was treated as though it had never been challenged at all, in the respect that the accused not being informed of his right, the jury were deprived of the benefit of hearing him and the prosecution witnesses cross-examined on the statement, the judge advised Farley he had a right to repeat his cross-examination in the presence of the jury. [See (1961) 4 W.I.R. at p. 64 H.] Of course, unlike in *Farley's*, the non-direction in *Charles'* case went to the root of the matter and vitiated the verdict.

It is evident it was wrong to conclude Farley had testified in the jury's absence and to place reliance for that finding on the case of *R. v. Baldwin*, (1931) 23 Cr. App. R. 62, the ratio of which suggests that an accused is not entitled to testify on the *voir dire* that his caution statement was improperly obtained. But the trial judge has a clear discretion to call the accused at the 'trial within a trial'. As Hawke J. said in *R. v. Cowell* (above)—"It is proper to allow the calling of the prisoner himself as a witness if the justice of the case requires that it should be done." Moreover, *Baldwin's* case has been doubted and criticized in *Cowell's*. (At p. 600) Humphreys J. declined to follow it. He considered it unsatisfactorily reported and as not representing the true decision of the court. This is why, in my way of thinking, *Tameshwar v. Reg.*, (1957) 2 All E.R. 683, on which the Federal Supreme Court relied, had no application in *Farley's* case. As a matter of fact, on the jury's return, Farley was informed of his right to have repeated in their presence all cross-examination that transpired on the *voir dire*. I must therefore respectfully disagree with the view of the Federal Supreme Court and venture the opinion that on the authorities to which I have referred, the trial judge in *Farley's* case was perfectly right in adhering to the established practice of holding a *voir dire* and of treating the objection as one made on the ground that it was not free and voluntary. On the authorities, there was a live issue on the voluntary character of the statement to be tried in the absence of the jury, notwithstanding they would be required to try the same issue as the judge had already tried, namely, whether the accused had made the statement

It follows I must also reject the Federal Supreme Court's view that "it would have been different" if the accused had also relied on the ground that the statement had been unfairly obtained, i.e., by threats and/or inducements or acts of violence. While it is true so to allege may also be said to raise voluntariness, I think that course was unnecessary. Voluntariness was already in issue by virtue of the mere challenge. Setting up that ground was unnecessary in view of the fact which is easily overlooked, that the onus lies on the prosecution to disprove the facts of the challenge to the admissibility of the statement by affirmative evidence that it was freely and voluntarily given. As explained above, I believe it was this very important principle that eluded the Federal Supreme Court and caused it to reject the submission of the Attorney General. So it was erroneous to hold both Farley and Charles had not raised in their grounds of challenge the issue of voluntariness only because they had not pointedly used that expression. The objection in both their cases, in my view, was quite legal and proper, and the ratio in both those cases, which is clearly to the effect that before a trial judge is entitled to consider voluntariness that issue has to be specifically raised by the accused, is entirely wrong. But, as I said, it is my opinion that ratio has misled both first instance and Court of Appeal judges in Guyana, Barbados and Trinidad for the past twelve years with obvious injustice to accused persons. It has brought about confusion in thought and the application of the law relating to the reception of confession statements on the *voir dire*, and I think it is high time we set all controversy concerning it at rest by overruling and refusing to follow both the cases of *Charles* and *Farley*. In my opinion trial judges should return to the ancient and well-established method of inquiry into the facts and circumstances constituting conditions precedent to admissibility on the *voir dire*. Only by returning thereto can justice be assured to accused persons. In England, that principle was born of the common law having been forged by judges wary and wise. It has been established by reason of the injustices at the Bloody Assizes in the days of the 'rack' and the notorious Judge Jeffreys. It is designed to ensure the protection of law to the subject Woe unto us if we betray such a principle either in Guyana or in the West Indies!

This point has not been canvassed at the hearing, but after the matter became *sub judice*, counsel communicated with us in writing, having previously expressed the desire to have the proceedings re-opened so he could address us on the point of the violation of the Constitution, if we were disposed to hear him further. But though he was not permitted so to do, I for myself, can see no reason why I should refrain from expressing a firm opinion on the point because I think it is the inevitable accompaniment of the present ground of appeal and a point one would naturally take from the way the judge ruled on the *voir dire*, and, particularly, because it appears that a fundamental right securing the protection of law to the subject has been infringed. Admittedly, it is not directly raised as a ground of appeal, but I can see no impediment to my doing so since the presumption of innocence is inherent in all criminal cases. In fact, it is one and indivisible from the ground taken on appeal. For that reason, I take the view that once a notice of

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appeal is addressed to this court, especially in a criminal case involving a fundamental right, all points, subject to any limitations we ourselves may impose, are open to us for decision. [See per LORD DENNING in *Attorney General for Northern Ireland v. Gallagher*, (1961) 3 All E.R. at p. 314, *infra*. Also *Rolf Brandt v. Attorney General of Guyana*, (1971), where we permitted the appellant to recast his grounds of appeal. He was allowed to set up an entirely new case on a point he deliberately refrained from pursuing before the trial judge. Also *R. v. Taylor*, (1950) 2 K.B. (C.C.A.), where, on their own motion, a full court, *in favorem libertatis*, granted and allowed an appeal on a point counsel had not raised.]

The right in question is contained in Art. 10(2) (a) of the Constitution of Guyana. It is that, "Every person who is charged with a criminal offence.....shall be presumed to be innocent until he is proved or has pleaded guilty."

Under the above article, the presumption of innocence is the right of every accused person on a criminal charge to be considered innocent until proven guilty. The corollary thereto is the traditional maxim of the common law which is with us a guaranteed right. It is—that the burden of proof of guilt lies on the prosecution. [See *Cross on Evidence*, 3rd Ed., Cap. VI, p. 102—"The Presumption of Innocence."] With the thought in mind that both the onus of proof of guilt and its concomitant, the onus of proof of the voluntariness of a confession, lie on and must be discharged by the prosecution, the latter being a condition precedent to the former, I am not in the least doubtful the judge's refusal to rule on the *voir dire* must have been instrumental in the violation of the presumption of innocence. Since refusal to rule has affected the burden of proof, it follows it must have adversely affected the presumption of innocence.

I take this view because, for a judge to submit a confession statement for a jury's consideration without having addressed his mind to whether he had before him *prima facie* proof, firstly, that the accused made it, and, secondly, that it was voluntarily made, is tantamount to admitting evidence without legal proof and proper treatment, in violation of the presumption of innocence. It appears that now the burden of proof is written into the Constitution as a self-evident inference from the presumption of innocence, an infringement of the former is automatically a violation of the latter. I believe I am right when I say the presumption of innocence may be rebutted only with proof by legally admissible evidence. The theory of the presumption as it is enshrined in Art. 10, seems to me, as I view in perspective the trilogy of concepts of *innocence*, *guilt* and *proof*, to posit that guilt shall not be established in rebuttal of the presumption save by evidence of a legally admissible character. If guilt be otherwise established, then the presumption of innocence will have been violated.

Innocence is the antithesis of guilt. Innocence can only be converted into guilt by proof. Proof, however, must be established solely by legitimate means; otherwise the presumption of innocence remains undisturbed. Speak-

ing of the requirement of proof under the due process clause of the Fourteenth Amendment of the American Constitution, with reference to a fair trial, Mr. Justice Frankfurter said:

"Due process says that convictions cannot be brought about by methods that offend a 'sense of justice'Ours is the accusatorial as opposed to the inquisitorial system.....Under our system society carries the *burden of proving its charge against the accused not out of his own mouth*. It must establish its case, not be interrogation of the accused even under judicial safeguards, but by evidence independently secured through a skilful investigation."

[See *Rochin v. California*, 342 U.S. 165, 173 (1952).]

I understand the expression "until he is proved.....guilty" in Art.10(2) (a) to mean proof by legal means; proof that is admissible, such as by statutory provision, or by "the rules and principles of the common law of England relating to evidence". [See s. 4 of the *Evidence Ordinance*, Cap. 25.] Here, I must not be understood to mean the Constitution is necessarily violated whenever a judge neglects to apply s. 4 of the Evidence Ord., Cap. 25, an "existing law". To produce that effect, such neglect must go to the root of the matter and affect a fundamental right, such as here—the burden of proof, which is an evidential concept

In the light of the above, I pose the following question: Can it be said the jury have deliberated upon legally admissible evidence, i.e., proof such as would justify them in reversing the presumption of innocence, when the trial judge has bluntly refused to rule on the admissibility of confession evidence which he immediately afterwards submits to the jury, the burden of proving the voluntariness of it being cast on the prosecution? For myself, I would rather say not; for to my mind, in the circumstances, legally admissible evidence upon which a conclusion of guilt may be justified by a jury, can only be looked upon as "proved" if the trial judge has brought his mind to bear on it, and exercised his judicial function by ruling it as voluntarily made.

I am clearly of opinion that if, as in the instant case, an accused is found guilty on evidence so lacking in the exercise of a judicial function with respect to the burden of proof which rests on the prosecution to prove as a condition precedent to admissibility, the presumption of innocence has not been rebutted by proof. The prosecution has not discharged the burden of it, and the verdict of the jury cannot be justified.

In my judgment, *art. 10(2) (a) of the Constitution* having cast the burden of proof of guilt on the prosecution, has simultaneously and impliedly cast the duty upon the trial judge to see justice is attained by ensuring that the confession statement was put before the jury only after the prosecution had discharged the onus of proof of voluntariness. The Constitution has conferred positively no discretion on the trial judge to say whether or not he would receive such proof. Rather, it conferred on the judge a power coupled with a duty, a power, the exercise of which is obligatory, not in his own

interest, but to meet the demands of the rights of the accused and to prevent a failure of justice. The test for when a power is coupled with a duty was laid down by *Earl Cairns, L.C.* in *Julius v. Bishop Oxford*, thus: [(1874-1830) All E.R. Rep. (at p. 47).

"They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

And the test for when the repository of the power is bound to use it for the benefit of those for whom he has received it, is laid down by LORD SELBORNE thus: [(1874—1880 All E.R. Rep. at p. 540.

"The question whether a *judge* or a public officer to whom a power is given by such words is bound to use it upon any particular occasion, or in any particular manner, must be solved aliunde, *and in general it is to be solved from the context, from the particular provisions, or from the general scope and objects of the enactment conferring the power.*"

Accordingly, using the context approach, I interpret art. 10(2) (a), being a fundamental right, as obligatory on all judicial officers. They must apply the principle that the onus is on the prosecution to prove guilt beyond reasonable doubt in the case of every person charged with a criminal offence. Both the onus and standard of proof must be proved by the prosecution before the presumption of innocence can be displaced, for it cannot be said the onus has been discharged unless the standard is attained.

In Art. 10(2) (a) there is a direction addressed to all those charged with the administration of criminal justice to ensure that an accused person is not convicted "until he is proved.....guilty", Containing as it does the presumption of innocence, the effect of the article is to shift the burden of proof. It "throws the burden of proving the contrary, that is, in such case, of proving a negative on the other side" [See per LORD ELLENBOROUGH' C. J. in *Williams v. East India Co.*, (1802) 3 East 192 at p. 199.] The article therefore confers on the judge a power coupled with a duty, in the exercise of which he is under a duty not to admit the confession unless he receives from the prosecution evidence in accordance with the well-recognised onus and standard of proof that have been discharged and attained. The judge has no discretion; and although the language of the article is couched in a form that is merely directory, I have no hesitation in interpreting it as imperative, relating as it does to the due course

of administration of justice. In fact, this was the test enunciated by *Coleridge J. in R. v. Tithe Commissioners*, (1849) 14 Q.B. (at p. 474):

"The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom that in public statutes" words only *directory*, permissive, or enabling may have a compulsory force where the thing to be done is for the public benefit or *in advancement of public justice*."

Guilt must always be properly proved by due process of law before the presumption of innocence can be displaced. It is for this reason that a judge can never be justified in giving the "go-by" to the well-settled rule of the burden of proof of voluntariness of a confession statement as a condition precedent to its admissibility. It is all part and parcel of the ultimate burden of proof of guilt.

Another way to explain the matter is to say that by his refusal to rule, the trial judge has given an unfair advantage to the prosecution by relieving them of the necessity to discharge the evidential burden of proof the law imposes on them of adducing evidence to show that the confession was voluntary. The legal or persuasive burden of proof and the presumption of innocence, on the other hand, are complementary concepts—two sides of the same coin, so to speak. To my mind, so closely allied are they in operation and effect, that whenever there is misdirection or non-direction on either evidential or legal burden of proof resulting in a finding of guilt, there is an automatic violation of the presumption of innocence. The difference between these two burdens of proof is well stated in *IX Wigmore*, p. 284, as follows:

"The important practical distinction between these two senses of 'burden of proof' is this: the risk of non-persuasion operates when the case has come into the hands of the jury, *while the duty of producing evidence implies a liability to a ruling by the judge disposing of the issue without leaving the issue open to the jury's deliberations*."

Cross on Evidence, 3rd Ed., at p. 69, expresses in a useful metaphor the inextricable relationship and operation between them in a criminal case in this way: The prosecution, he says, have "*two hurdles to surmount*". Firstly, the duty of the prosecution is to adduce sufficient evidence to prevent the judge from withdrawing the issue from the jury. In relation to our present problem, this means it is the duty of the prosecution to satisfy the judge that the challenge to admissibility is unfounded by proving to him affirmatively that the confession was voluntary according to the principles expounded in such cases as *R. v. Thompson*, (1893) 2 Q.B. 12, and *Ibrahim v. R.*, (1914) AC. 599. Otherwise, he should withdraw the confession from the jury. Secondly, says Cross, the prosecution must convince the jury. True it is, even though the prosecution may surmount the first hurdle, they may, for reasons best known to the jury, well fail on the second. But it seems to me impossible to hold on the above hypothesis the prosecu-

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tion can fail on the first hurdle and still justly surmount the second, because failure on the first, which is a condition precedent to admissibility, would warrant an automatic removal of the issue from the jury.

In my view, the trial judge's refusal to rule on the issue must be regarded as indicative of either one of two things: (i) that the prosecution had failed to surmount the first hurdle, i.e., failed to convince the judge that the statement was free and voluntary—(clearly in this case the issue should have been withdrawn from the jury); or, (ii) that the judge lost sight of the rule of the common law that the burden of proof lies on the prosecution to establish before him the voluntariness of a confession statement as a condition precedent to its admissibility. Whichever view be taken, the point I seek to make is, that the burden of proof will have been violated by misdirection or non-direction.

For myself, I am at a loss to know how it can ever be said the prosecution have convinced the jury beyond reasonable doubt about the matter of the accused's guilt when, in the first place, they had not succeeded in their duty of "passing the judge" by convincing him of the need for proving the statement free and voluntary. I think the important point in the above quotation from *Wigmore*, in so far as we are concerned, is the implication in the evidential burden of an obligation on the trial judge to make a ruling disposing of the particular issue before he leaves it to the jury, particularly where, as here, the onus of proof of it lies on the prosecution. To express it in terms of a right: There is a corresponding right in the accused to expect that the judge would so rule.

Another instance where a court has been misled by *Farley* is provided by our own Court of Appeal in *Fowler v. The State*, (referred to by counsel in the argument). There, the Chief Justice said (at p. 465): [(1970) 16 W.I.R. at p. 465].

"The judge having made a finding of fact that the statement is free and voluntary and admissible, he cannot leave it to the jury to say whether it is the statement of the accused or not *as that would involve two findings of fact on the same issue which may indeed turn out to be contradictory.*"

With respect, I have already intimated in *Kirpaul Sookdeo et al v. The State* 19 W.I.R. 407 that I am in full agreement with the dissenting judgment of my brother Cummings in *Fowler's* case, save that I have now found out that *R v. Farley* is no longer good law. It seems to me the above excerpt reveals a judicial misunderstanding of the respective functions *pi* judge and jury on the subject of findings on a *voir dire*. For myself, I would rather prefer the reasons given by the same judge in his decision in *Harper v. The State*, (1970) 16 W.I.R. 353, when he acted as Chancellor. I think *Harper's* case was rightly decided.

When a judge has ruled a statement to be free and voluntary, all that he has found is that duress has not indeed been exercised on, nor has any

inducement been held out to the accused by a person in authority causing him to make the statement. Admittedly, he has to examine facts to arrive at that finding, but nevertheless his is a finding of law. The judge finds nothing else. His finding certainly cannot be considered to include a finding on genuineness or authenticity of the statement, i.e., that it has not been fabricated or otherwise forged, and therefore must indeed have been voluntarily made contrary to the plea that it is not his statement and that he did not make it. The truth of the statement is not relevant on the *voir dire*, though it is of crucial relevance for the jury. Were the judge to express a finding on the *truth* that would be going outside of his province.

For myself, I can see no contradiction whatever between findings of judge and jury on the question whether the accused made the statement or not or whether it is his statement, for the reason I am unable to understand how it can be said there would be involved for their consideration "two findings of fact on the same issue which may indeed turn out to be contradictory". As I see it, there is no contradiction on the facts of the same issue. The only issue for the jury to decide is whether the confession statement can be relied upon as being true. And to so determine, they are solely required to consider what weight and probative value are attributable to it. See *Basto v. The Queen*, (1954) 91 C.L.R. 628, in which the following was said in the High Court of Australia and approved by the Judicial Committee of the Privy Council in *Chan Wei-Keung v. Regina*, (1967) 1 All E.R. 948 (at p. 953):

"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 informed 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.*"

The functions of the judge with regard to the admissibility of the statements on the *voir dire* are entirely separate from the jury's. This has already been emphasized by *Mandzuk's* case, and again in the above statement, and that is why I think it is so patently wrong to say, as has been said in *Fowler's* case, that once a trial judge has admitted as free and voluntary he cannot afterwards leave to the jury the question whether in fact the accused made the statement or not, for the reason that two findings of fact may turn out to be contradictory. It is wrong because in a case where, as here, there is identity of the preliminary fact with the fact in issue, a judge does not have to find *conclusively* on the *voir dire* whether *in truth* the accused did nor did not make the statement.

An authority for showing that when the facts constituting a "condition precedent" on the *voir dire* is the same as the facts on which the jury must

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ultimately decide, the trial judge must not arrive at a definite decision on the facts, is to be found in the case of *Stowe v. Querner*, (1870) L.R. 5 Exch. 155. The judge must decline an invitation to do so and content himself with *prima facie* evidence from that party contending for admissibility. In *Stowe v. Querner*, the issue in an action on a policy being the execution of the policy, the plaintiff, having given the defendant notice to produce the policy, tendered in evidence a document which he had received from the defendant then tendered evidence to show that no such policy had ever been executed, and asked the judge to decide whether that were so or not, as a necessary preliminary to the admissibility of the copy. The judge refused to do so, and admitted the copy, leaving the question whether the policy had ever been executed ultimately to the jury. In holding he was right in so doing, the Court of Appeal said (at p. 158): [(1870) L.R. 5 Exch at p. 158].

"Where the objection to the reading of a copy concedes that there was primary evidence of some sort in existence.....the judge must, before he admits the copy, hear and determine whether the objection is well founded. But where the objection goes to show that the very substratum and foundation of the cause of action is wanting, the judge must not decide upon the matter, but receive the copy and leave the main question to the jury."

The truth of the statement is not relevant on the *voir dire*. All the judge finds is whether there is "some evidence", *i.e.*, *prima facie* evidence, fit to go to the jury that the accused made the statement in order to admit it as voluntary. [See per Humphreys J. in *R. v. Cowell* (above) at p. 600, *infra*.] So if the jury finds differently from the judge in these circumstances, there can really be no contradiction on facts with the judge's finding. To put it in another way. If, as I have endeavoured to show through the authorities, the trial judge is precluded from making a positive decision on the truth of the facts, quite plainly, it must follow that it is untrue, as was said in *Fowler's* case, that his ruling can ever come into conflict with, or be contradictory to any decision the jury may ultimately arrive at on the facts.

Overruling *Charles'* and *Farley's* cases presents no problem for us now we are free from the binding force and effect of the advice of Her Majesty's Privy Council. In *Glen v. Sampson*, (1972) (Civil Appeal No. 8/1971, dated 23rd October, 1972), I considered that since we have abolished the Privy Council as our ultimate appellate tribunal as from July 3, 1970, when the President gave his assent (see Act No. 14/70), it behoves us not only to decline to follow, but to overrule decisions of former courts of co-ordinate jurisdiction, when they are contrary to the express thinking of our own Court of Appeal. We are obliged to overrule them if our law is to develop with certainty. For the reasons which I gave in that case, I am decidedly of opinion both *R. v. Charles* and *R. v. Farley* cannot be allowed to stand alongside of this decision; they must be entirely overruled.

As it seems to me, it is immaterial whether an accused person means to convey that he did not make a statement because he did not give it of his own

free will, of that a statement is not his because it is fabricated by those who seek to tender it in evidence against him. In 1961 when the Federal Supreme Court concluded in *Charles'* case that a bare denial of the statement was no legal basis for attacking its admissibility, that Court neither referred to, nor considered a single authority for that astonishing proposition when there was an abundance of authority to the contrary. That was really the beginning of all the trouble we are now experiencing, and I am sorry to say it all began here in Guyana where *Charles'* case was decided. Three months later, the same court applied the case of *Charles* to *Farley's*, though without referring to it.

I will own that I once expressed a contrary view to that which I now hold. It was the Kitty bank robbery case in which I expressed that view—the case of *Kirpaul Sookdeo et al v. 19 W.I.R. 407*. But this sometimes happens when a court or judge is not fully informed. In that case, having myself been misled by the ratio in *Farley's* case (although it made no difference to my conclusions in the bank case), I drew this distinction: I considered it is not necessary for a trial judge to hold a *voir dire* and to rule on admissibility when it is clear that an accused person is challenging a confession on the ground that he did not make it, i.e., on the ground that it was fabricated because, that being essentially factual, is a matter for the jury to decide upon. I followed the decision in *R. v. Farley*. However, in the light of fuller argument and a review of all the authorities, I am forced to abandon that view. At that time I considered following *R. v. Farley* and *Campbell v. R*, that unless an accused person specifically raises the issue of voluntariness, he is not entitled to have it considered by the judge on the point of admissibility. However, upon mature deliberation, it seems to me that view is entirely wrong. Whether an accused raises either proposition (i) or proposition (ii) in my analysis above, the facts and circumstances of his ground of challenge have got to be investigated by the trial judge at the 'trial within the trial', and a ruling given there, one way or the other, on the admissibility of his statement in evidence, simply because a mere challenge puts the prosecution to proof of the voluntary character of the statement.

Now, it seems to me on either view of the matter, i.e., whether or not *R. v. Farley* be regarded as good law, this appeal must be allowed. In the first place, I think there can be no justification for the trial judge's finding that the accused had raised a naked question of fact in view of all that had transpired prior to his saying he did not make the statement and what it contained was not his. All along, as I have shown, his case was that he dictated certain parts of the statement of his own volition, that is to say, he had given them voluntarily, and certain other parts he had not made at all, because Sgt Lovell wrote them down without his authority. However, he signed all parts under duress and/or inducement so as to ensure the safety of his child. He unequivocally repudiated that part which seeks to implicate him as an accomplice with Oscar Kunath in the crimes of murder, robbery and theft, namely, that which he insisted Lovell wrote without his authority and which

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he was coerced into signing. So it is reasonable to conclude, I think, that was not the only part he was denying because when there was a request by the prosecutor for further information on the other parts he denied, his counsel immediately objected to his furnishing any for the reasons I have already given.

But even supposing *Farley* was rightly decided, in spite of what I have shown above, this was obviously a case where the accused had himself raised the issue of voluntariness and so was entitled, on the ratio of that case, to have it considered by the judge. Instead, the judge refused to consider it, and specifically noted on the record that he did so at the close of the *voir dire* - "*Issue concluded but no ruling made as a matter of law.*" On the jury's return the subsequent admission of the statement, albeit without further objection from the defence, plainly cannot be regarded as an implied ruling because the judge expressly said he was not ruling. *Expressum facit cessare tacitum.*

In my view, the learned trial judge severely handicapped himself from pursuing a proper inquiry on the making of the statement when he ruled it was one and indivisible. On the admitted parts of the statement, one cannot see any issue on the making of them arising, though the contrary is the case with regard to those parts which the accused said Lovell wrote. But separation of admissions from denials having been disallowed, it seems to me only reasonable to hold that the making of the whole statement became one issue.

Therefore, had the accused been ordered to furnish evidence of those parts he made from those which he did not, the prosecution may well have produced "some evidence", namely, of his own voluntary admissions. This may have, on the ruling of Devlin J. in *R. v. Roberts* (above), prompted the trial judge to let the statement go to the jury after he had admitted it as voluntarily made. But, as we have seen, the judge made no such ruling, and it is to be regretted we cannot make one for him, he having frustrated his inquiry and so thwarted proof of voluntariness. Had he simply admitted the statement at the 'trial within a trial', I would have certainly interpreted that as an implied ruling on its voluntariness, for quite apart from the rule in *Ibrahim v. R.* to which I will always presume a trial judge has directed his mind, the fact that the accused had specifically raised the issue of voluntariness leaves me in no doubt the judge must have so directed his mind. Nevertheless, he did not think that issue arose, or even if it did arise, that it was still in existence after the accused denied making the statement. He ruled the question was factual, and, in the presence of the jury, *after* the close of the *voir dire*, only then admitted the statement. But he had already expressly recorded he would not rule on voluntariness when he wrote—"Issue concluded but no ruling made as a matter of law." In my judgment this is where the trial judge fell into error. He cannot have it both ways. His duty on the *voir dire* was to act one way or the other—either to admit the statement as voluntarily, or reject it as not voluntarily made. But, as it seems to me, there is no half-way house; he cannot say he makes no ruling on its voluntary

character. Clearly then, since "voluntariness is the test for admissibility," and there being no ruling in that respect, I think it follows convincingly that the statement has been improperly admitted.

In the circumstances, there is no doubt at all in my mind that the learned judge has not only misdirected himself, but has deprived the accused of the benefit of his ruling on the vital matter of admissibility of the statement. In my judgement, the following statement of Parker, C.J. in *R. v. Francis & Murphy*, (1959) (above), to the effect that (p. 176):- "It is quite clear that a prisoner is entitled *both* to a ruling on admissibility from the judge and also to hear the verdict of the jury on the weight and value of the confession," reinforces the conclusion to which I have come.

Though only a minority opinion, it is my firm belief this matter is far from closed. Fully confident there can be no compromise wherever the application of fundamental legal doctrine is ignored, and having every confidence in the ability of both the legal profession and the common Law, "the perfection of right and reason" to fight and survive any crisis, I will conclude my judgment as I find solace and contentment in my loneliness in two quotations from text-writers of eminence:

"It is a dangerous thing," said LORD COKE, "to alter or shake any of the fundamental rules of the common law, which in truth are the main pillars and supporters of the fabric of the commonwealth." [Coke, 2 Inst., 74].

And Allen's prediction that —

"The isolated example which 'alters or shakes a fundamental rule of the common law' will itself soon fall to the ground and become neglected as a worthless ruin....For all practical purposes, a precedent which ignores law is no precedent.....If it be derived merely from a strained or fanciful interpretation, it may succeed in perpetuating an anomalous or, so to say, an eccentric doctrine; but if it offends against one of the axiomatic precepts of law or reason" (as does *R. v. Farley*) "*it may maintain itself for a short and harassed existence, but the collective displeasure of the profession will kill it in the end; and usually the end will not be long in coming.*" [See 'Law in the making', 5th Ed., pp. 272-275].

In the result, I would allow this appeal by setting aside the conviction and sentence since I am unable to say that if the inadmissible statement had not been put before the jury, they, being properly instructed and with minds unaffected by it, would have inevitably returned the same verdict

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Court of Appeal (Bollers C J., Persaud and Crane, JJ A.)
 November 16, 18, 1971: April 13, 1973]

Patent—Specification—Manufacture of drugs—Formulae—Description of processes—Proof of infringement—Patents & Designs Ordinance Cap. 342, ss. 54, 58, —Companies Ordinance Cap. 328; Patent Act, 1949. (U.K), ss. 101,44,38 (G).

The plaintiffs are a Swiss company, and carry on the business of chemical manufacturers. They obtained the grant of a patent in the United Kingdom in respect of benzodiazepine derivatives after which they secured registration of the said patent in Guyana under the Patents and Designs Ordinance Cap. 342, which provides for such registration. Registration confers all the rights and privileges subject to all conditions established by the law of Guyana as though the patent had been issued in the United Kingdom with an extension to Guyana. Some time later the Delmar Company obtained from the United Kingdom patent office, the grant of a patent in respect of the method for the preparation of benzodiazepines. This patent was not registered in Guyana. The defendants, who are a company incorporated in Barbados, carry on business in Guyana as manufacturers' representatives and commission agents. They sold in Guyana tablets called "Tran-Q-Will" tablets which contain a benzodiazepine derivative, whereupon the plaintiffs sued for an infringement of their patent.

HELD: Notwithstanding a disclaimer in a specification, a patentee who alleges an infringement of his patent, must prove that the process of manufacture utilised by his adversary is substantially his own process as described in his specification. Evidence which falls short of such proof will not be enough.

(ii) (per Crane J.A.) unless there was chemical analysis of the Tran-Q-Will tablets or alternatively, proof that Delmar's process was substantially the same as, or a colourable imitation of the plaintiffs/appellants', it was virtually impossible to prove an infringement by sale of the Tran-Q-Will tablets.

Appeal dismissed. Judgment of first instance affirmed.

Cases referred to include:

- (1) *Steers v. Rogers* (1893) A.C. 232
- (2) *Unwin v. Heath* (1855) 5 H.L. Cas. 505
- (3) *Bovill v. Pimm* (1856) 156 E.R. 1019
- (4) *Daniel Adamson & Co. Ltd. & Kerfoot's Application* (1932) 50 R.P.C 171.
- (5) *Palmer v. Wagstaff* (1854) 9 Exch. 494.

J.A. King with Paul de Freitas, for the appellants.

Sir Lionel Luckhoo, S.C. with B. Commissiong for the respondents.

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PERSAUD, J A.: S. 54 of the Patents and Designs Ordinance, Cap. 342, enables the grantee of a patent in the United Kingdom to apply to have the patent registered in Guyana, and upon such application, accompanied by the prescribed documents being filed, the Registrar of Patents and Designs is required by s. 56 to register the same and issue of certificate of registration. Acting under the provisions mentioned, the plaintiffs, a Swiss company, incorporated in Switzerland, and carrying on the business of chemical manufacturers, having secured the grant of a patent in the United Kingdom in 1960 with specification No. 972,968 in respect of benzodiazepine derivatives, applied for and received a certificate of registration numbered 667. By virtue of s. 57 of the Ordinance, such certificate of registration confers all the rights and privileges subject to all conditions established by the law of Guyana as though the patent had been issued in the United Kingdom with an extension to this country; and s. 58 provides that such privileges and rights shall date from the date of the patent in the United Kingdom and shall continue in force only so long as the patent remains in force in the United Kingdom.

Some four years later (in 1964) a company called Delmar Chemicals Ltd., of the Province of Quebec in Canada, obtained from the United Kingdom Patent Office, the grant of patent with specification No. 1,063,891 in respect of the method for preparation of benzodiazepionones. This patent has not been registered in Guyana. The defendants are a company incorporated in Barbados and registered in Guyana under the *Companies Ordinance, Cap. 328*, and they carry on business in Georgetown as manufacturers' representatives and commission agents.

It is the allegation of the plaintiffs that the defendants have infringed their patent by the possession for sale, offer for sale and sale in Guyana of 'Tran-Q-Will' tablets which contain 'diazepam' which is benzodiazepine derivative, and whose formula is *7-chloro-1 methyl-5 phenyl 1-2, 3-dihydro-H-1, 4-benzodiazepinone-(2)*, which formula is patented in their name in patent specification No. 972,968.

The defendants admit production and possession of the tablets called 'Tran-Q-Will', but not the sale or offer to sell. However, the judge found that they had sold, the evidence being that an employee of the plaintiffs' agents in Guyana had bought two bottles of 'Tran-Q-Will' from the defendants. The defendants have also pleaded the ownership of United Kingdom Patent No. 1,063,891, the registration of which has been confirmed in Barbados, and in accordance with, and by the authority of which said patent, Delmar Chemicals, Ltd. produced 'Tran-Q-Will' tablets; that the invention relates to the method for the production of *5-phenyl-1, 4-3H-benzodiazepin-2(1H)-ones*. The labels on the bottles containing the 'Tran-Q-Will' tablets carried the word 'Diazepam' which counsel for the plaintiffs has named a description of convenience, and a non-proprietary trade name. I thought it best to mention this aspect early in the judgment, because counsel for the defendants seems to have been under the impression that as the word 'diazepam' has not been patented, in that it does not appear on the plaintiffs' specifications, nor for

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that matter, on the defendants' specifications, the plaintiffs' claim ought to fail. It is true that there is no evidence as to what is meant by the term 'diazepam'; perhaps it is a term with which the plaintiffs came to associate their product, and by this means were alerted when the expression appeared on the defendants' labels. But the plaintiffs do not claim any patent rights in the expression; they cannot. Perhaps, with the proper registration as a trade mark, they may have been able to claim such rights, but that is another matter with which we are not here concerned. A patent relates to an invention and not to a name. An invention is defined by *s. 101 of the Patents Act, 1949 (U.K.)* to mean, "any manner of new manufacture the subject of letters patent and grant of privilege within *s. 6 of the Statute of Monopolies* and any new method or process of testing applicable to the improvement or Control of manufacture, and includes an alleged invention". *S. 2 of our Patents and Designs Ordinance, Cap. 342*, defines an invention in similar terms. A patent prevents the public from making or using the patented article or the process itself. Referring to the right of a patentee in *Steers v. Rogers* (10 R.P.C. 245 at p. 251), LORD HERSCHELL said: That is a right which he would equally effectively have if there were no letters patent at all—only in that case all the world would equally have the right. What the letters patent confer is the right to exclude others from using a particular invention." So that the fact that in their pleadings the plaintiffs lay no claim to the expression 'diazepam' does not put an end to the matter. Nor does it end with the fact that the constituent parts of the tablets have not been proved to be the same as any of the formulae contained in the plaintiffs' patent. The defendants have admitted that the tablets have been manufactured under a patented formula which belongs to their principals; the plaintiffs say that formula is really the same as their formula, which is the subject-matter of a patent granted to them some time before the grant made to the defendants; and they claim finally that both the substance which they have produced and the process by which that substance is produced are protected, that is to say, they claim both substance and process protection.

Counsel for the defendants contends that in view of section 44 of our Ordinance, (Cap. 342), the plaintiffs cannot claim substance protection. But before examining the provisions of section 44, it is necessary to consider Title II of the Ordinance, and the implications of some of the provisions contained therein. Sections 54 and 55 provide for the application for registration in Guyana of any patent granted in the United Kingdom provided the application is made within three years of the date of the issue of the patent. Section 56 enjoins the Registrar of Patents and Designs to register the application, to issue a certificate of registration, and to give notice of that fact in the Gazette. Section 57 says: "Such certificate of registration shall confer on the applicant privileges and rights subject to all conditions established by the law of this (country) as though the patent had been issued in the United Kingdom with an extension to this (country)."

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S. 44(1) specifically precludes from substance protection substances prepared or produced by chemical processes or intended for food or medicine, "except when prepared or produced by the methods or processes of manufacture particularly described and ascertained or by their obvious chemical equivalents;" and also provides that a mere admixture of the known properties of the ingredients shall not be deemed a method or process of manufacture.

Counsel for the plaintiffs maintain that the above subsection does not apply to the United Kingdom patents, in that subsection (4) of s. 44 provides that the section relates only to locally granted patents applied for after the commencement of the Ordinance, and not United Kingdom patents registered under Title II, and therefore his clients are entitled to substance protection. He further contends that assuming—but not admitting—that subsection (1) applies, then subsection (2) must be relevant in that the chemical composition and constitution of the 'Tran-Q-Will' tablets are the same as the plaintiffs' formula, and therefore the tablets must be deemed to have been produced by the plaintiffs' process. Subsection (2) provides: "In any action for infringement of a patent where the invention relates to the production of a new substance, any substance of the same chemical composition and constitution shall in the absence of proof to the contrary be deemed to have been produced by the patented process."

When s. 44 is carefully examined, it will be seen that there are occasions when both substance and process are protected. In the case of s. 44(1) a specification shall not include claims for the substance itself where the invention relates to substances prepared or produced by chemical processes or intended for food or medicine, *except* when prepared or produced by the methods or processes of manufacture particularly described and ascertained or by their obvious chemical equivalents. But any such substance, which is really a mere admixture resulting only in the aggregation of the known properties of the ingredients, shall not be regarded as a method or process of manufacture. S. 44(2) puts the matter beyond doubt, for it clearly gives protection to a new substance. But it is my opinion that s. 44 does not apply to United Kingdom patents. When it is recalled that at the time of the enactment of Cap. 342, this country was a colony, it should come as no surprise to find provisions such as s. 57 referred to above. The object of Title II of the Ordinance was to give protection against locally granted patents, as is evidenced by section 59 which speaks of 'exclusive privileges and rights conferred by such certificate of registration' and 'the law for the time being in force in the United Kingdom' Perhaps it is time that our Ordinance be amended to accommodate our independent status. Further, I can see a distinction between 'patents applied for' in s. 44(4) and applying 'to have such patent registered in the (country).' The former must refer to original applications made in this country.

Therefore it is necessary to examine the English legislation under the provisions of which the plaintiffs' patent was granted. S. 10(1) (c) of the

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Patents Act, 1949 (U.K.) provides that if it appears to the Comptroller (of Patents, Designs and Trade Marks) that an application for a patent claims as an invention a substance capable of being used as medicine, which is a mixture of known ingredients possessing only the aggregate of the known properties of the ingredients, or that it claims as an invention a process producing such a substance by mere admixture, he may refuse the application. In effect s. 10(1) (c) of the United Kingdom legislation is hardly different from our legislation, save that the former has now removed the restriction which once existed, that is to say, 'substances capable of being used as food or medicine' is a much wider expression than 'substances intended to be used as food or medicine', which latter expression is to be found in our statute. Whichever statute applies, it is apparent from the state of the case that the substance is intended to be, and is capable of being, used as a medicine.

Now, with these matters in mind, I will pass to the specifications themselves in an endeavour to see what they really claim, for this is the first question to be resolved in cases of this kind. Dealing with this question in *Unwin v. Heath*, LORD CHIEF BARON POLLOCK treated the matter thus: [(1855) 5 HLC at 540.

"The first question that presents itself is, what is the Plaintiff's invention? What has he discovered? Or rather, what invention, discovery, or process is protected by the patent? To solve this, we must look at the title and specification of the patent. Strictly speaking, nothing is protected by the patent that is not found in the specification, either directly expressed in terms, or reasonably to be inferred from what is so expressed, by persons skilled in the subject to which the patentee relates. The right of the Plaintiff does not turn upon the extent of his claim, but upon the communication made to the public as to the mode of accomplishing his object; and he has no right to claim anything but that which he has communicated to the public, however large in point of language his claim may appear to be."

Baron Pollock expressed the same views in the later case of *Bovill v. Pimm*, (1856) E.R. 1019, where the dispute centered around a patent for 'improvements in grinding wheat and other grain'.

The plaintiffs' specification is headed "*Benzodiazepine Derivatives*", and says: "We.....do hereby declare the invention, for which we pray that a patent may be granted to us, and the method by which it is to be performed, to be particularly described in and by the following statement: The present invention is concerned with novel benzodiazepine derivatives. The novel benzodiazepine derivatives provided by the invention are compounds of the general formulae." The general formulae are set out. Then there are detailed illustrations of the processes, followed by the claims of the patentee.

Delmar's specification is headed "*Method for Preparation of Benzodiazepines*" and states: "We. . .do hereby declare the invention for which we pray that a patent may be granted to us, and the method by which it is to be performed, to be particularly described in and by the following

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statement: The present invention relates to a method for the production of 5-phenyl-1, 4-3H-benzodiazepin-2 (1H)-ones. It further relates to a method of production of substituted 5-phenyl-1, 4-3H-benzodiazepin-2 (1H)-ones and more particularly to the production of the above 5-phenyl-1, 4-3H-benzo-diazepin-2 (1H)-ones on the fused aromatic ring." Two formulae are then set out to be followed by illustrations and the claim. The patentees disclaim in their specification the diazepinones which conform to their first formula saying that those compound *per se* are claimed in Specification No. 972.968, which is, it will be recalled, the plaintiffs' patent, and continue: "The object of this invention is, therefore, to provide an economical and easy method for the preparation of benzodiazepinones corresponding to the above shown Formula I in high yields after a short processing time."

I had better deal at this juncture with disclaimers and their effect on the grant of patent, the specification of which contains a disclaimer.

A disclaimer is the exclusion of anything from a claim. A specific disclaimer, or a specific reference (as is the case here) "is inserted in order to warn the public and to call attention to a relationship between the invention described and claimed in the specification in which such reference appears and the invention described and claimed in the letters patent the subject of such specific reference." [Per Luxmoore, J. in *Daniel Adamson & Co. Ltd. and Kerfoot's Application*, (1932) 50 R.P.C. 171.]

Counsel for the plaintiffs has asserted that the effect of the disclaimer is to have recognised the existence of his client's patent, but that the defendants have utilized a formula substantially similar to the plaintiffs' in the manufacture of Tran-Q-Will' tablets, in which event, the plaintiffs would be entitled to the remedies which they have claimed. So it becomes necessary, while bearing the effect of a disclaimer in minds, to examine the evidence of the expert witness called on behalf of the plaintiffs, and to see whether the trial judge's findings based thereon can be supported. No evidence was called on behalf of the defendants.

I must say at the outset that the evidence of the expert does not appear to have been given in enough detail to allow one unfamiliar with matters scientific to understand the intricacies of the processes as described in the specifications. Nevertheless, the evidence was—and the judge so found—that the starting materials used in the plaintiffs' patent were different from those used in the defendants' patent, and the general methods of processing were different one from the other. Based upon this finding, and upon the fact that the tablets had not been analysed—although he expressed the view that the results of the analysis would not have altered his opinion—trial judge held that there was no substantial identity and, consequently, no infringement. In the course of his judgment, the judge said:

"It would seem, therefore, that it could not be said with any certainty that the tablet Tran-Q-Will incorporates what is set out in the

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plaintiffs' patent and that there is that *substantial identity* necessary to give rise to the probability of an infringement.

"On the facts and circumstances of this case I have concluded that there was no infringement of the plaintiffs' patent and I am fortified in my conclusion by a reference to the case of *Palmer v. Wagstaff*....."

Drawing upon the evidence of Dr. Walcott, one finds certain matters of importance established. The plaintiffs' patent relates to certain compounds, and their methods of manufacture, and those compounds are all derived from benzodiazepine (hence benzodiazepine derivatives), which is itself a chemical compound made up from basic materials. A person trained in chemistry can make benzodiazepine by compounding certain basic materials, and it would appear that one can use different basic materials in the process. The important fact is that there is no patent attached to benzodiazepine. Therefore it must be fairly obvious that patent rights will be attached to the derivatives produced and to the processes of manufacture used to produce those derivatives. Dr. Walcott has also said that there are seven starting materials used in the plaintiffs' patent and these are different from the defendants' starting materials; and the seven general methods of processing which the plaintiffs use are different from the general method used by the defendants, but closely related. *Benzodiazepinones* is one type of derivatives of the parent material benzodiazepine, and Formula I of the defendants' patent sets out the details for the production of diazepinones. According to the plaintiffs' patent, the only type of benzodiazepine derivatives covered by the plaintiffs' patent are those known as *benzodiazepinones*, while the defendants' patent refers to certain types of benzodiazepinones. Whether they are the same as those covered by the plaintiffs' patent is not clear from the evidence; but Dr. Walcott did express the opinion that item 9 in the defendants' patent is identical with item 6 in the plaintiffs' patent in that the chemical composition of the substances in the defendants' patent are all referred to in the plaintiffs' patent.

What seems to emerge from this evidence is, to put it succinctly, that the plaintiffs' patent speaks of the formulae and processes for and the production of benzodiazepine derivatives which, when the specification is examined, are those derivatives known as benzodiazepinones; whereas the defendants' patent speaks of the method of the production of *benzodiazepinones*. It would seem to follow that if the defendants have adopted the plaintiffs' method of producing benzodiazepinones, they would be in breach. This must be on the basis that the end product is the same in either case, even though I am in grave doubt that this is so, having regard to the nature of the evidence.

The proposition that a method or process of itself, apart from the thing produced, or result, can be the subject-matter of a valid patent was established in *Crane v. Price*, where Tindal, C.J., in dealing with a patent related to the

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use of antracite in conjunction with a hot-air blast for the smelting of iron said: (12 L.J.C. P. 81)

"We are of the opinion that, if the result produced by such a combination is either a new article, or a better article, or a cheaper article to the public than that produced before by the old method, such combination may well become the subject of a patent"

And in *Curtis v. Platt*, Lord Westbury. dealing with the same problem, said: [(1863) L.R. 3 Ch. D. 139]

"If the invention be, as I have already described, nothing more than a particular means to attain a given result which is perfectly well known, then you can no more say that the invention of one distinct set of means interfere with the invention of another than you could say originally that there ought not to be patents for the inventions of distinct means to an end. I would illustrate it familiarly by this example. If we suppose a patent may be for a ladder to go down a pit, that patent may be made to comprehend all ladders, whether constructed of wood or of iron, or of hemp or of wire; but if another man invented a mode of letting men down the pit by a rope and pulley, it would be impossible to say that the one means of attaining that particular end was to be regarded as identical with or comprehended in the other.....It is extremely desirable that when a beneficial idea has been started by one man he should have the benefit of his invention, and that it should not be curtailed or destroyed by another man simply improving upon the idea; but if the idea be nothing in the world more than the discovery of a road to attain a particular end, it does not at all interfere with another man discovering another road to attain that end, any more than it would be reasonable to say that if one man has a good road to go to Brighton by Croydon, another man shall not have a road to go to Brighton by Dorking."

Similar sentiments were expressed in the cases cited to us in this appeal, viz., *Seed v. Higgins*, (1860) 11 E.R. at p. 552 per LORD CHELMSFORD; *Palmer v. Wagstaff*, (1854) 156 E.R. at p. 214 per Pollock, C.B.: and *Dominion Bedstead Co. v. Gerlter*, (1924) S.C.R. at p. 161 per Andette, J. To take the same principle further, it was said in *Re J.F. Macfarlan & Co. Ltd.'s Application*, (1954) 71 R.P.C. 429 that where a chemical substance has been claimed in an earlier claim, an applicant who devises some new process for making the *same chemical substance* is not entitled to claim that substance *per se*, but he is not, of course, debarred from claiming the new process which he has devised, subject to a proper acknowledgement of the earlier patent. The force of the dictum in *Macfarlan's* case is doubted in *Hals. Vol. 29*, P. 78, note (c) Be that as it may, the fact remains that in their specification the defendants disclaimed the diazepinones conforming to their Formula I by stating that those compounds, *per se*, were claimed in the plaintiffs' specification. A disclaimer means what it says: it says that the applicant for a patent recognises, and is aware of an existing patent in relation to certain

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substances to which the applicant lays no claim. But the fact that an applicant recognises, and is aware of, an existing patent, does not necessarily mean that he infringes that patent. In *Nobel's Explosives Co. v. Anderson*, 11 R.P.C. at p. 127, Romer, J. said: "In order to make out infringement, it must be established, to the satisfaction of the court, that the alleged infringer, dealing with what he is doing as a matter of substance, is taking the invention claimed by the patent; not the invention which the patentee might have claimed if he had been well advised or bolder, but that which he has in fact and substance claimed on a fair construction of the specification." And it is well to bear in mind what was said by Mr. Justice Parker in *Marconi, etc. v. Br. Radio-Telegraph & Telephone Co. (Ltd.)*, (1911) T.L.R. at p. 277:

"It is a well-known rule of patent law that no one who borrows the substance of a patented invention can escape the consequences of infringement by making immaterial variations. Again, where the patent is for a combination of parts or process, and the combination or process, besides being itself new, produces new and useful results, every one who produces the same results by using the essential parts of the combination or process is an infringer, even though he has in fact altered the combination or process by omitting some unessential part or step, and substituted another part or step which is in fact equivalent to the part or step he has omitted."

A decision along similar lines was given in the much more recent case of *Beecham Group Ltd. v. Shewan Tomas (Traders) Ltd. & others (Hong Kong)*, (1968) R.P.C. 268, a matter which concerned the manufacture and distribution of certain drugs. The facts shortly were these: The plaintiffs obtained patents, the claims of which covered penicillanic acid derivatives and their preparations. The patents were registered in Hong Kong. The first defendants were an American pharmaceutical company who were the plaintiffs' licencees for the manufacture of synthetic penicillins in a number of countries, excluding the British Commonwealth, under the plaintiffs' corresponding foreign patents. In 1967 the first defendants marketed a novel compound called hetacillin which was admittedly made by the reaction of one of the plaintiffs' patented compounds with acetone and which admittedly decomposed when the compound was administered to a patient into the patented compound which was apparently the active antibiotic. The plaintiffs were granted interim injunctions in Hong Kong restraining the defendants from infringing the patents. On appeal the defendants contended unsuccessfully that the patented process was but a trivial part of the whole process of manufacture of hetacillin, and that the process claims were therefore not infringed, and as hetacillin was chemically a distinct compound from the claimed compounds, the product claims were not infringed. Having examined the evidence in great detail, the Supreme court of Hong Kong held the view that as regards one claim at least, ampicillin was, to use the language of LORD CAIRNES in *Clark v. Addie*, (1873) L.R. 10 Ch. 667, the 'pith and marrow' of hetacillin, and therefore there was a prima facie case of infringement in respect of both process claims and the product claims.

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Although *Beecham's* case was concerned merely with the granting of interlocutory injunctions, and therefore the plaintiffs need only to have raised a prima facie case of infringement, it is interesting to note the dictum of the court: [(1968) R.P.C. at p. 283.

"When a court grants an interlocutory injunction, it is simply a case of first impression on the material and arguments then before it. It does not make findings of fact; but a court is quite entitled to express a provisional view as to the probable result of the trial and to decide questions of law if the essential facts do not appear to be seriously in dispute. A court should not shirk its duty simply because the evidence is of & highly technical nature or because the affidavits reveal that there are some questions of fact to be resolved."

[See also the dictum of LORD DENNING in *Baldwin & Francis Ltd.'s Application*, (1959) R.P.C. at p. 236.]

The question is whether by reason of their disclaimer, and from the evidence adduced, it can be said that the defendants have infringed the plaintiffs' patent. My own view is that there is not sufficient to support such a conclusion. I will repeat the plaintiffs' claim. They claim an infringement of their patent No. 972,968 (U.K.) by the possession by the defendants for sale, offer for sale and sale in Guyana, of Tran-Q-Will' tablets which contain *diazepam*, or *7-chloro-1 methyl-5 phenyl 1-2-3-dihydro H-1, 4-benzodiazepinone-(2)*, which is a benzodiazepine derivative, such infringement being evidenced by the defendants' pleading that the tablets are manufactured in accordance with their patent (No. 1,063,891 U.K.) in which one of the specific examples is *7-chloro-1 methyl-5-phenyl-1, 4-3-H-benzodiazepin-2(1H)-one*. But they have overlooked the rest of that particular formula, viz., the words, 'when obtained by the process of any one of claims 1 to 5', which would suggest, even assuming that the formulae are the same, an additional process. Thus it would appear to fall within Macfarlan's case (*supra*). Dr. Walcott's evidence is that the specific examples mentioned above are the same, his reason being that the chemical composition of substances in the defendants' patent are all referred to in the plaintiffs' patent. For myself, I would not have thought that this was enough.

The proper way in which a court ought to approach a matter of this nature has been admirably set down by LORD CHANCELLOR WESTBURY in *Hills v. Evans*, where he said: [(1862) 31 L.J.R. (Pt. I) at p. 460]

"It is undoubtedly true as a proposition of law that the construction of a specification, as the construction of all other written instruments, belongs to the court; but a specification of an invention contains most generally, if not always, some technical terms, some phrases of art, some processes, and requires generally the aid of the light derived from what are called surrounding circumstances. It is, therefore, an admitted rule of law that the explanation of the words or technical terms of art, the phrases used in commerce, and the proof and

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results of the processes which are described (and in a chemical patent the ascertainment of chemical equivalents), that all these are matters of fact upon which evidence may be given, contradictory testimony may be adduced, and upon which undoubtedly it is the province and the right of a jury to decide. But when those portions of a specification are abstracted, and made the subject of evidence, and therefore brought within the province of the jury, the direction to be given "to the jury with regard to the construction of the rest of the patent, which is conceived in ordinary language, must be a direction given only conditionally, that is to say, a direction as to the meaning of the patent upon the hypothesis or the basis of the jury arriving at a certain conclusion with regard to the meaning of those terms, the signification of those phrases, the truth of those processes, and the result of the technical procedure described in the specification."

This statement of the law must, of course, be read subject to the qualification that in Guyana a judge sits both as judge and jury in a civil matter. But the principles there enunciated remain the same. Unfortunately, in the instant case, the trial judge did not have the benefit of the type of evidence that Vimadalal, J. had in the Bombay High court in *Farbwerke-Hoechst A.G. v. Unichem Laboratories*, (1969) R.P.C. 55. In that case, if one were to assume that the trial judge had no specialised knowledge of matters scientific, and this is a fair assumption, coupled with the rule that he is required to base his decision on the evidence before him, it would appear that he had the benefit of very full scientific evidence on both sides. This enabled the judge to understand the ramifications of the formulae, and to appreciate the meanings of the various scientific terms. I would hope that if, in future, cases of this sort are to be presented to the courts of Guyana for trial, the courts will enjoy the benefit of as full evidence as possible.

In my view, in the circumstances, the judge was right in holding that the plaintiffs had not proved an infringement of their patent. I would, therefore, dismiss this appeal and affirm the judgment of the court below. The defendants must have their costs of this appeal.

BOLLERS C.J., -I Concur

CRANE, J.A.: Messrs. F. Hoffman La Roche & Co., the appellants, were plaintiffs in the High court. They are chemical manufacturers and the registered proprietors of complete patent specification No. 972,968, published in the United Kingdom on the 21st October, 1964.

On the 26th April, 1967, the Registrar of Patents, Designs and Trade Marks duly registered the above specification as Guyana patent No. 667, pursuant to an application under s. 54 of the Patents and Designs Ordinance,

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Cap. 342 ('the Ordinance') dealing with the registration in Guyana of United Kingdom patents. Thereafter, a certificate was issued in terms of s. 57 of the Ordinance, the purport of which is, that "subject to all conditions established by the law of Guyana", the plaintiffs are entitled to the same "privileges and rights" as though patent 667 had been issued in the United Kingdom with an extension to Guyana.

The respondents, Messrs. S.P. Musson & Co. Ltd. (referred to hereafter as 'the defendants') are incorporated in Barbados, West Indies. They are registered under the *Companies Ordinance of the Laws of Guyana, Cap. 328*, and carry on business here as manufacturers representatives and commission agents.

Patent 667 is concerned with an invention called "novel benzodiazepine derivatives" which are compounds of two general formulae contained in the body of its complete specification. Before the High court it was the plaintiffs' claim, just as it is now before us, that patent 667 was at all material times valid, subsisting and of full force and effect both in the United Kingdom and in Guyana; that the defendants have infringed it, and, unless restrained, will continue to do so. It was on these premises they sought, firstly, an injunction restraining the defendants by themselves or their directors, officers, servants or agents from infringing the patent; secondly, an order for the delivery up or destruction on oath of all infringing chemical compounds, pharmaceutical preparations and materials within the respondents' possession, custody or control; and, thirdly, an order for damages and costs.

In the particulars of breaches, an infringement subsequent to the grant of the Registrar's certificate is alleged, viz., that the defendants have in their possession for sale, offered for sale and sold in Guyana under the registered trade name, "Tran-Q-Will tablets which contain *diazepam* or *7-chloro-1 methyl-5 phenyl 1-2, 3-dihydro-H-1, 4-benzodiazepinone-(2)*, which is a novel benzodiazepine derivative, the invention described in the complete specification of the said patent (i.e. patent 667) and claimed in the claim thereof." In other words, what the plaintiffs are contending is that the defendants have produced in each Tran-Q-Will tablet two milligrams of a substance called *diazepam* which is identical with one of the plaintiffs' chemical compounds, a novel benzodiazepine derivative from their general formulae and claimed in claim No. 6 of their complete specification.

The particular acts of infringement of which the plaintiffs complain are the sale and supply of those tablets by the defendants to the public; in particular (which is denied) two bottles each containing 100 Tran-Q-Will tablets to a Mr. George Cheddie, as evidenced by a cash-sale bill. It is said that the offer for sale and sale of the same was in the course of business and continued right down to the date of the Writ.

At the trial the defendants did not lead a defence, but were content to rest their case on the submissions of counsel. In their statement of defence,

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however, they denied the infringement or that they were threatening to infringe patent 66?, as alleged, or at all. But while they admitted producing and having in their possession for sale Tran-Q-Will tablets, they claimed they were entitled to do so under the authority of another United Kingdom patent, No. 1,063,891, which the owners, Messrs. Delmar Chemicals Ltd. (hereinafter called 'Delmar'), a Canadian Body Corporate, have registered in Barbados, though not in Guyana. Delmar's invention concerns the "*Method for Preparation of Benzodiazepinones*", that was published in the United Kingdom on the 5th April, 1967. This invention, the defendants say, is concerned with—to quote the exact words from the body of its complete specification—"a method for the production of *5-phenyl-1,4-3H-benzodiazepin-2(1H)-ones*. It further relates to a method for the production of substituted *5-phenyl-1, 43H-benzodiazepin-2(1H)-ones* and more particularly to the production of the above *5-phenyl-1, 4-3H-benzodiazepin-2(1H)-ones* substituted on the fused aromatic ring. It also refers to a method

for the preparation of the above-mentioned substances substituted on the amido N atom, and/or in position 3"; and they further plead that patent No. 1,063,891 was confirmed in Barbados in September, 1967, and registered there as patent 555 without objection from the plaintiffs or anyone else to its registration there. The insinuation is, for what it is worth, that the plaintiffs had full opportunity, if they so desired, of challenging patent 555 both in England and in Barbados, and their failure to do so must be considered that it would have availed them naught.

After outlining the respective cases for both parties, the learned trial judge, in stating how he intended to approach the construction of the claims, quite properly, I think, directed himself in the following manner:

"It is necessary to construe the claim in the patent and compare the alleged infringement with the claim in the plaintiffs' patent to determine whether the alleged infringement falls within the scope of the plaintiffs' claim. If it does not, there is no infringement."

In the Grounds of Appeal there are, however, the following two complaints, *inter alia*, with regard to the judge's findings on the terms 'process' and 'product' and their interrelationship to each other:

- (a) "The learned judge erred in finding that there is no infringement where a similar product is produced by a different process."
- (b) "The learned judge erred in finding that the appellants' and respondents' processes are dissimilar."

In order to determine whether there is justification for these complaints, it will be necessary to construe, as the trial judge has rightly said, both the plaintiffs' and Delmar's specifications in order to see whether the claim alleged to be infringed falls within the scope of the monopoly. In so doing, the first thing is to find out from the plaintiffs' specification just exactly what is claimed and what is the nature of the protection afforded by patent 667. Is it protection for *product* (substance) or for *process* by which the

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compounds are made, or *both*? The solution must, of course, be sought in the orthodox way, by looking at the title, the body of the specification and the claim, but with this caution in mind that is well recognised in patent law: A patentee who describes an invention in the body of his specification obtains no monopoly unless he specifically includes it in his claim. The reason is because the function of the claims is to define clearly and with precision the monopoly claimed, so that others may know the exact boundaries of the areas within which they will be trespassers.

I commence with the observation that the title to patent 667, i.e., the patent in suit, is '*benzodiazepine Derivatives*', and in the body the method by which the invention is described is that concerned with the production of 'novel benzodiazepine derivatives', i.e., compounds of two general formulae, symbols and numerals of which are laid out therein. In order to produce a derivative, a process must be employed, i.e., a method of synthesis whereby two or more substances represented by symbols and numerals in a formula are converted into a compound, the latter being the composition of two or more elements so united that the whole has properties of its own which are not necessarily those of its constituents. Both general formulae embody a quantity of substances (detailed below) belonging to certain specified chemical groups in terms of the letters R1, R2, R3, R4, N, O, OH, to all of which are attached established chemical connotations. These, when synthesized by specified methods or processes, produce compounds known as 'novel benzodiazepine derivatives'.

The nature of benzodiazepine was explained by Dr. George Walcott, a Ph.D. in organic chemistry, attached to the University of Guyana. He testified on behalf of the plaintiffs and described benzodiazepine as a chemical compound which may be produced by anyone from basic materials. While all compounds of the general formulae are derived from a benzodiazepine structure, he said, all benzodiazepine derivatives are not really known. In fact, it is his opinion that it is highly unlikely they all appear in the two general formulae in the body of patent 667, or in the sixty-nine examples of illustrated detailed processes contained therein. Benzodiazepinones, on the other hand said Dr. Walcott, are one type of derivative of the parent material benzodiazepine, the knowledge of which anyone may procure from chemical literature available to the public. Benzodiazepinones would therefore be included in benzodiazepine derivatives.

I find this bit of Dr. Walcott's evidence particularly important because, as frequently happens in the field of organic chemistry, where a chemist has prepared one compound and finds it useful, he can enumerate enormous numbers of derivative and analogous compounds which may likewise be useful. He cannot, however, claim protection for all those vast numbers of derivatives and analogues owing to the short time available for developing them and the expense involved in so doing before patenting his invention. The development of such vast numbers would take years to effect. In this state of affairs, it happens that a later inventor comes along (as I am inclined

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to think is what has happened in this case), and discovers that a small portion of the substances of the group are particularly useful in having some special advantage. None of these substances has been made before, nor even specifically suggested, and then the later inventor patents either the substances *per se* or their use for the purpose.

After comparing the first and second formulae of patent 667 with the two formulae in patent 555 and the specific examples of illustrated detailed processes given in each, it was Dr. Walcott's opinion they are the same; though he thought in the case of patent 555 there are about seven starting materials and seven methods of processing which, though closely related to, are different from those used in patent 667. Delmar's starting materials are all closely related to, although different from those of the plaintiffs, though Dr. Walcott, who could not say of what kind of substance diazepam was composed because he made no chemical analysis of the Tran-Q-Will tablets.

As I understand the position in the light of the doctor's evidence, and from the true interpretation of both patent specifications, there is an overlapping of claims in the respect that both parties have undertaken to produce benzodiazepines, i.e., benzodiazepine derivatives. From the plaintiffs' specification, this is evidenced in every one of the sixty-nine examples of detailed processes in the body of patent 667, while from Delmar's, the undertaking is to produce benzodiazepinones and diazepinones "by removing by bydrizinolysis in the presence of an inert solvent the phtyalozl group from a phthalamidoacetamide represented by the general formula II, where R1, R2, R3 are the same as in general formula I." However, in view of Walcott's evidence that all benzodiazepinones are not known, I think it is not beyond possibility there may well be subject-matter, and so inventive step in Delmar's method of producing such a species of benzodiazepinones as is yet unknown and not claimed by the plaintiffs; although there is one thing Delmar is not allowed to do, as I will show later from the decided cases, and that is to produce benzodiazepinones, or diazepinones, by means of any process that is substantially the same as the plaintiffs' or by means of such chemical equivalents that are known at the date of the plaintiffs' patent. The onus of proving Delmar has so done will, of course, rest on the plaintiffs.

As I say, it could well be Delmar has indeed produced in diazepam one of these unknown benzodiazepine derivatives referred to by Dr. Walcott. But this plaintiffs must disprove. The onus is on them to disprove the claim of Delmar's method to be a new and more advantageous way of producing—"substituted 5-phenyl-1 4-3H-benzodiazepin-2 (1H)-ones," and to do so "more particularly on the fused aromatic ring". So in order to succeed the onus is on the plaintiffs to show just as did the plaintiff in *von Heyden v. Neustadt*, (1880) 50 L.J. Ch. 126 (the salicylic acid case), that Delmar's method is no different from, and is a mere colourable imitation of theirs. In *von Heyden's* case, a patent had been granted in England, just like in the instant case, for a new process for producing more cheaply a chemical product which was previously known, viz., salicylic acid. It was held the

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importation and sale in England of salicylic acid made in Germany according to the patented process was an infringement, it having been proved that the new process was nothing but a colourable imitation of the prior patented process.

Accordingly, infringement can take place only if it be shown either (a) that Delmar has, in effect, adopted the plaintiffs' method or process when producing what they claim to have produced by a new and advantageous method, or (b) that there is established a substantial identity between the respective chemical composition and constitution of diazepam as produced by Delmar and the compound in plaintiffs' claim No. 6 from which, as we shall later see, it may be presumed by virtue of s. 44(2) of the Ordinance that the patented process had been employed by Delmar in the manufacture of diazepam. Therefore, as it seems to me, any attempt of Delmar to use the plaintiffs' process will result in their invention being declared invalid for obviousness and lack of novelty, for, in that case, Delmar will have made "no useful addition to the stock of human knowledge". [See *B.P. Thomson-Houston v. Duram*, (1918) 35 R.P.C. 161 at p. 184 (H.L.)] In that event Delmar's will not have been "any manner of new manufacture," the *sine qua non* for the grant of a monopoly. [See s. 2 of the Ordinance where the definition of "invention" is given].

The plaintiffs' claim being thus specifically limited to novel benzodiazepine derivatives from their two general formulae, and to thirteen specific compounds, it is evident there is revealed in the scheme of patent 667 a group of chemical substances for the compounds of which claims have been made, and that Delmar's patent may be relegated to the class of chemical selection patent, because in their specification they have expressly declared their inventive step to lie in the selection of one or more members from amongst the plaintiffs' substances, a known class, and declared it to have special advantages.

This, I think is clear, because, quite apart from making a specific reference to the group they have selected, viz., *7-chloro-1-methyl-5-phenyl-1, 4-3H-benzodiazepin-2 (1H)-one*, and declaring it to be "especially useful", Delmar had defined with reference to *diazepinones*. the nature of the characteristics possessed by the group for which their monopoly is claimed, which, as Maugham J. said, is essential to the validity of their monopoly. [See *I.G. Farbenindustrie A.G.'s Patents*, 47 R.P.C. 289 at p. 323, and also the body of patent 555 which shows compliance].

It seems also clear from the width of their claim that the plaintiffs have only product claims for benzodiazepine derivatives; not the processes by which the claimed compounds have been produced. This appears to be so from the following description of the utility and limitation on the width of the claim to the invention:

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"PATENT SPECIFICATION

COMPLETE SPECIFICATION 972,968

BENZODIAZEPINE DERIVATIVES

We, F. HOFFMAN-LA ROCHE & CO., AKTIENGE-SELLSCHAFT, a Swiss Company of 1240184 Grenzacherstrasse, Basle, Switzerland, do hereby declare the invention, for which we pray that a patent may be granted to us, and the method by which it is to be performed, to be particularly described in and by the following statement:

The present invention is concerned with novel benzodiazepine derivatives.

The novel benzodiazepine derivatives provided by the invention are compounds of the general formulae wherein R represents an alkyl, alkenyl, hydroxy—alkyl group, R represents an alkyl, alkoxy or trifluoro—methyl, alkyl, alkoxy, alkyl—thio, hydroxyalkyl—thio, nitro, amino, alkylsulphinyl, alkylsulphonyl, hydroxy or acyl—amino group or a halogen atom and R⁴. which can only be present if R³ is other than the trifluoro—methyl group, represents any of the values of R³ except the latter value and wherein the broken lines denote that the R-substituents and hydroxyl group attached thereby are optional and the double headed arrow signifies that, in the absence of the hydroxy substituent on the nitrogen atom in the 4—position, the optional bond indicated thereby may exist as an additional bond in the 4, 5—position, and acid addition salts of those compounds which are basic. These substances are useful as sedatives, muscle relaxants and anticonvulsants. They may also be used for the relief of tension. They may be utilized by administering a therapeutic dosage (adjusted to route of administration and individual requirements) in a conventional liquid or solid vehicle to provide elixirs, suspensions, capsules, tablets or powders according to conventional pharmaceutical practice.

The preferred derivatives are those compounds of the foregoing formulae, and acid addition salts of the basic members, in which R is either absent or is a lower—alkyl group or a halogen atom in the 2—position, R³ is either absent or is a trifluoro-methyl group (in which case R⁴ is absent) or a lower alkyl—thio, lower hydroxy-alkyl—thio, lower alkylsulphinyl or lower alkylsulphonyl group; the term 'lower' being used in this description and in the claims appended hereto to indicate that the groups qualified by same contain up to seven carbon atoms. The lower-alkyl groups and lower-alkenyl groups may be straight chain or branched chain groups such as methyl, ethyl, propyl, isopropyl, butyl, isobutyl, terbutyl, amyl and hexyl and allyl and butonyl. The preferred aralkyl group is the benzyl group. The aryl group can be the

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phenyl group. The preferred alkylthio—alkyl groups are the methylthio—alkyl groups. The preferred halogeno substituents are chloro and bromo.

"The compounds which are basic form acid addition salts with mineral acids; for example hydrohalic acids (such as hydrochloric acid and hydrobromic acid), nitric acid, sulphuric acid and phosphoric acid.

"The compounds of a limiting case of the second formula given herein, namely the case where R (when present) is an alkyl, alkenyl or aralkyl group and R1 (when present) is an alkyl group can be manufactured in accordance with the process described and claimed in the specification of our copending application for Letters Patent No. 42399/60 (now serial No. 972,961). This process, described using R and R1 values consistent with the limitations aforesaid, comprises reacting a 2—amino—benzophenone betaozime of the general formula."

Patent specification- 667, accordingly makes specific reference to seven earlier copending application for letters patent, viz., Nos. 972,961—972,967, wherein there are claims for *processes* relative to those compounds in their first and second general formulae in patent 667. These references are important, for when considered in the light of the absence of any specific claim for the processes which have produced the derivatives claimed in patent 667, it is a clear indication, in my view, that the plaintiffs had no intention of claiming them having probably considered they were already sufficiently protected. What is not claimed is disclaimed. In *Nobel's Explosives Company Ltd. v. Anderson - The "Cordite" case*, (1894) 10 T.L.R. 277 affd., (1895) 11 T.L.R. 266 (H.L.), it was held that as the process combining *soluble* nitrocellulose with nitro-glycerine was specifically claimed, it excluded *insoluble* nitro-cellulose since the latter substance was not specifically claimed. In *Electrical & Musical Industries Ltd. v. Lissen Ltd.*, LORD RUSSELL stated the principles governing the construction of claims in a complete specification to be as follows: (56 P.C. at p. 39)

"What is not claimed is disclaimed. The claims must undoubtedly be read as part of the entire document and not as a separate document; but the forbidden field must be found in the language of the claims and not elsewhere. It is not permissible, in my opinion, by reference to some language used in the earlier part of the specification, to change a claim which by its own language is a claim for one subject matter, which is what you do when you alter the boundaries of the forbidden territories."

I find these words particularly informative. They assist in great measure in the construction of patent 667. I think what they mean when one applies them to the instant case is, that the processes by which the compounds in the first and second general formulae are made, having been already claimed in the seven previous specifications of copending applications, cannot by a mere reference in the body of specification No. 667 be considered as having been incorporated in patent 667 so as to form part of the claims and afforded

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process protection therein. I have thought it relevant to quote from LORD RUSSELL'S speech because I believe it supports the view I hold that on the true construction of its specification the protection afforded in patent 667 is only in relation to product and not to the process, even though the latter is clearly set out in the body of the specification.

Patent 555 (Delmar's patent), on the other hand, acknowledges, by way of a specific reference in the body of its specification, those compounds claimed in the first general formula of patent 667.

In this respect in the body of patent 555, it is stated *inter alia*:

"PATENT SPECIFICATION

Inventors: CTIRAD PODESVA and ERNEST CULLEN

1,063,891

COMPLETE SPECIFICATION

Method for Preparation of Benzodiazepinones

We, DELMAR CHEMICALS LIMITED, a Canadian Body Corporate, of 9321 Airlie Street, Ville la Salle, Province of Quebec, Canada, do hereby declare the invention for which we pray that a patent may be granted to us, and the method by which it is to be performed to be particularly described in and by the following statement:

The present invention relates to a method for the production of 5-phenyl-1, 4-3H benzodiazepin-2(1H)-ones. It further relates to a method for the production of substituted 5-phenyl-1, 4-3H-benzodiazepin-2(1H)-ones, and more particularly to the production of the above 5-phenyl-1, 4-3H-benzodiazepin-2(1H)-ones substituted on the fused aromatic ring. "It also refers to a method for the preparation of the above mentioned substances substituted on the amido N atom, and/or in position 3.

"The diazepinones corresponding to the following general formula I, in which R1 represents a hydrogen atom, a methyl group or an ethyl group, R2 represents a halogen atom and R3 represents a hydrogen atom or a lower alkyl, phenyl or p-hydroxy-benzyl group, are, according to the present invention, prepared easily and in excellent yields by *removing by hydrazinolysis* in the presence of an inert solvent the phthaloyl group from a phthalimidoacetamide represented by the general formula II, where R1, R2 and R3 are the same as in general formula I. The removal of the phthaloyl group is effected by *reacting*, preferably by refluxing, the phthalimidoacetamide with more than one mol equivalent of hydrazine hydrate. This method has the advantage over the previously known hydrolytic methods for removing phthaloyl groups in that only the phthalimido group is affected while the second

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amido group present in the molecule remains untouched. Moreover, excellent yields of the final product are obtained by this method.

Certain of the intermediate phthalimidoacetamides and their preparation are described and claimed in our copending application No. 1693/64 (Serial No. 1,056,289).

The diazepinones conforming to the general formula I are useful as chemotherapeutics, especially for the treatment of some nervous disorders. These compounds *per se* are claimed in Specification No. 972,968. Especially useful is 7-chloro-1-methyl-5-phenyl-1, 4-3H-benzodiazepin-2(1H)-one.

The object of this invention is, therefore, to provide an economical and easy method for the preparation of benzodiazepinones corresponding to the above shown general formula I, in high yields after a short processing time:

The reaction may be carried out in a number of common solvents, in which both the starting material and hydrazine hydrate are soluble and which are inert to the reactants. Preferred as easily available solvents are lower aliphatic alcohols, e.g., ethanol. The reaction may be satisfactorily completed in about two hours.

In this specification' the word 'lower' as applied to alkyl groups and aliphatic alcohols means such groups and alcohols containing not more than 3 carbon atoms."

On the matter of the burden of proof, of which something has already been said above, more will be said later on, but it will be convenient to point out at this stage that where a defendant has used and sold articles alleged to have been made by a patented process, the onus of proving that they were in fact made by that process is on the plaintiff. The case of *Saccharin Corp'n. Ltd. v. Wild*, shows that the onus of proof in a patent case, like any other, lies on the plaintiff, and seeing that the appeal under review is concerned with the burden of proof and the sufficiency of evidence to sustain a *prima facie* case in a patent case, I think the following statement is of tremendous help. Collins, M.R., in stressing this aspect of the matter, said (at p. 421): [(1903) ICh. 410, at p. 421]

"The burden of showing that he has a cause of action lies upon the plaintiff in a patent case just as much as upon the plaintiff in any other case. It is upon him to show that he has a cause of action by reason of the defendant having infringed his patent. He obtains certain privileges under the patent law by being the owner of the patent. That may involve also certain disadvantages, but he cannot, because he is placed in a difficulty by reason of the nature of the patent right or monopoly which the Legislature has given him, pray that in aid as a ground for imposing on a defendant a burden which the Legislature has not imposed upon him. That burden rests on the plaintiff, and there is

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machinery in these courts by which within certain well-defined limits he can interrogate his opponent; and if and so far as the principles upon which procedure is regulated in this country do not enable him to make out his cause of action from the lips of the defendant, he must simply acquiesce in the burden that rests upon him. That is part of the law of the land; and if he cannot prove his case by the ordinary methods and within the rules the courts impose, it is no reason whatever for throwing any additional burden on the defendant."

Patent 667, being concerned solely in respect of product claims, will afford protection only to that extent. This is, however, immaterial, because, regardless of whether plaintiffs enjoy such protection or not, if they are to prove an infringement of their product, it is incumbent on them to adduce evidence of an infringement of their own process of manufacture. It will be shown presently that for the reason that the law permits a claim to a new use of an old substance or process, once it is not obvious, it was very essential for the plaintiffs, in the absence of an analysis of the chemical composition of the tablets, to have proved infringement of their product.

It is urged on behalf of the defendants that the plaintiffs have not made out a *prima facie* case of infringement in that they have failed to adduce proof of their method of synthesis of the product in claim No. 6, and as a result there is no evidence to serve as a comparison between Delmar's method or process and the old process of theirs; nor is there evidence to link the chemical composition or constitution of diazepam in the Tran-Q-Will tablets with the compound the subject-matter of claim 6 in the plaintiffs' specification above-mentioned and so prove infringement. The argument is that neither the mere fact of similarity of compounds in the respective claims of the two patents, nor Delmar's mere user of the word 'diazepam' on the labels on the bottles of Tran-Q-Will tablets, is sufficient to reverse the onus on to the defendants to show there was no infringement of the plaintiffs' patent.

On the other hand, it is contended on behalf of the plaintiffs there was no necessity on their part to do as suggested, nor was it obligatory on them to lead evidence at all on the chemical composition or constitution of the tablets in view of the admissions in the statement of defence, viz., that the defendants have in their possession for sale and do sell Tran-Q-Will tablets containing diazepam manufactured by Delmar's patent in the manner indicated therein. This plea, contend the plaintiffs, is tantamount to an admission proving that the defendants have produced through their principals, Delmar, Tran-Q-Will tablets containing diazepam, i.e., the compound in claim 6 of their complete specification; further, in the light of Dr. Walcott's evidence, and by the "disclaimer" in the Delmar's specification of those very substances in claim 6, their case against the defendants for the infringement of patent 667 by sale is amply established. In fact, say the plaintiffs in their reply, "any activity with preparations containing diazepam not manufactured by them is an infringement of their Guyana patent 667 which relates to *diazepam*".

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It therefore seems to me that if plaintiffs are to prove that patent 667 "relates to *diazepam*", a novel benzodiazepine derivative from their first or second general formula, to proof of which, as we have seen, they have committed themselves by joinder of issue in their reply, it is incumbent on them to show not merely a similarity of substances in the compounds in the product claims (Nos. 6 and 9) of patents 667 and 555, respectively, by a statement from Dr. Walcott to that effect. Merely to show that would be inconclusive, I think, because, as I will show below, a patentable combination may well consist of the production of either a new result, or in arriving at an old result in a better or cheaper way, which, on the true construction of patent 555, appears to be really what Delmar had undertaken to do. So that in keeping with the description in the body of their specification to produce as their invention a "method for preparation of benzodiazepinones", Delmar has plainly limited all their product claims (including claim 9) to their process claims by judiciously inserting after all product claims the words, "when obtained by the *process* of any one of claims 1 to 5". I will have something to say about the validity of this expedient later, in view of the decision in *Re Macfarlan (J.F.) & Co. Appln*, 71 R.P.C. 429, which has been cited to us in the course of the argument. Thus has Delmar undertaken to produce an invention by the discovery of a particular means for attaining a result which is already perfectly well-known (i.e., the compound in plaintiffs' claim No. 6) in a more "advantageous" and "economical" way. (See extract from Delmar's specification above.) There can be no doubt such patents may be granted and have, in fact, been a long while known to patent law.

In *Crane v. Price*, Chief Justice Tindal, in delivering the judgment of the court of Common Pleas, said of them: (4 Man & G. 603).

"We are of opinion that if the result produced by such a combination is either a new article, or a better article, or a cheaper article, to the public, than that produced before by the old method, such combination is an invention or a manufacture intended by the statute, and may well become the subject of a patent.....There are numerous instances of patents which have been granted where the invention consisted in no more than the use of things already known, the acting with them in a manner already known, *the producing effects already known, but producing those effects so as to be more economically or beneficially enjoyed by the public.*"

But even earlier yet, in *Hill v. Thompson*, (1817) 3 Mer. 630, LORD ELDON, L.C., had expressed the same view with even more clarity in the following propositions: [(1817) 3 Mer. 630].

"On the other hand, there may be a valid patent for a new combination of materials previously in use for the same purpose, or for a new method of applying such materials. But, in order to its being effectual, *the specifications must clearly express that it is in respect of such new combination or application, and of that only, and not lay claim to the merit of original invention in the use of the materials.*"

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In modern times, these principles have been re-stated in a selected chemical patent case. They are relevant here, I think, seeing we are dealing with a similar type of case. In *May v. Baker*, Jenkins, J. said: [(1948) 65 R.P.C.255 at p.281.

"Before referring to this evidence, I should, I think, endeavour to state the principles on which, and limits within which, an invention consisting of the production of new substances by known methods from known materials can be supported from the point of view of subject-matter. I understand them to be these:

(i) An invention consisting of the production of new substances from known materials by known methods cannot be held to possess subject-matter merely on the ground that the substances produced are new, for the substances produced may serve no useful purpose, in which case the inventor will have contributed nothing to the common stock of useful knowledge (the methods and materials employed being already known) or of useful materials (the substances produced being, *ex hypothesi*, useless).

(ii) Such an invention may, however, be held to possess subject-matter provided the substances produced are not only new but useful, though this is subject to the qualification that the substances produced must be truly new, as opposed to being merely additional members of a known series (such as homologues) and that their useful qualities must be the inventor's own discovery as opposed to mere verification by him of previous predictions.

(iii) Even where an invention consists of the production of further members of a known series whose useful attributes have already been described or predicted, it may possess sufficient subject-matter to support a valid patent provided the somewhat stringent conditions prescribed by Maugham J. in *I.G. Farbenindustrie A.G.'s Patents*, (1930) 47 R.P.C. 289 as essential to the validity of a selection patent are satisfied, i.e., the patent must be based on some substantial advantage to be gained from the use of the selected members of the known series or family of substances, the whole (or substantially the whole) of the selected members must possess this advantage, and this advantage must be peculiar (or substantially peculiar) to the selected group."

It seems to me, Delmar has, by specific reference, undoubtedly expressed in the body of the specification of patent 555, what has been laid down by LORD ELDON above, as an essential condition to the validity of their patent. *Prima facie*, at least, their claim possesses subject-matter, for we have seen from what the LORD CHANCELLOR says above, Delmar has duly stated their method for preparation of benzodiazepinones to be a new and improved one that "has the *advantage* over the previously known hydrolytic methods for removing phthaloyl groups in that only the phthalimido group is affected while the second amido group present in the molecule remains untouched.

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Moreover, excellent yields of the final product are obtained by this method", which will be more economically and beneficially enjoyed by the public since, "the object of this invention is, therefore, to provide an *economical* and *easy method* for the preparation of benzodiazepinones corresponding to the above shown general formula I, in high yields after a short processing time," which means to say, that Delmar's claim is to an improved patent. So at least on the face of it, Delmar has not laid claim to the merit of the plaintiffs' invention. In point of fact, their specification expressly refers by specific reference to those substances claimed in the plaintiffs', emphasising that their invention is related to the production of a substituted version of the plaintiffs' by the application of a new and improved method, i.e., the preparation of a new substance (diazepam) from known materials by known methods.

In such a case, I think it was incumbent on the plaintiffs to show [just as did the plaintiffs in *Beecham Group Ltd. v. Shewan Tomes (Traders) Ltd. (Hong Kong)*, (1968) R.P.C. 268], that the process used by Delmar in the preparation of diazepam was not, indeed, as alleged, a different and improved process for producing substituted 5-phenyl-1, 4-3H-benzodiazepin-2(1H)-, contained in claim 6 of patent 667, but was, in fact, a method or process substantially identical with the plaintiffs' or a colourable imitation of it. In the *Beecham Group* case, unlike the present, the plaintiffs' process was specifically claimed, though this makes no difference. The facts of that case which are taken from the head note are as follows:

"The plaintiffs obtained patents the claims of which covered penicillanic acid derivatives and their preparation, which patents were registered in the colony of Hong Kong. The first defendants were a large American pharmaceutical company who were the plaintiffs' licensees for the manufacture of synthetic penicillins in America and a number of other countries, excluding the British Commonwealth, under the plaintiffs' corresponding foreign patents. In 1967 the first defendants marketed a novel compound called hetacillin which was admittedly made by the reaction of one of the plaintiffs' patented compounds with acetone, and which admittedly decomposed when the compound was administered to a patient into the patented compound which was apparently the active antibiotic. The plaintiffs applied for and were granted interim injunctions in Hong Kong restraining the defendants from infringing the patents. On appeal the defendants contended that patented process was but a trivial part of the whole process of manufacture of hetacillin, and that the process claims were therefore not infringed, and as hetacillin was chemically a distinct compound from the claimed compounds, the product claims were not infringed. Held, dismissing the appeal, (1) that as the reaction of the claimed process was one out of admittedly only two reactions involved in the manufacture of hetacillin, it was not a trivial part of the process, and therefore the process claims were infringed.

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(2) That the evidence showed such a degree of similarity between the properties of the claimed compounds and hetacillin as to establish a *prima facie* case that hetacillin was an equivalent of the claimed compounds, and its sale an infringement of the product claims and accordingly the interim injunction had properly been granted."

It is very evident from the above that one of the problems with which the Appeal Court of Hong Kong was seized is in many respects akin to that which now confronts us, viz.: Was the new process used by the defendants in arriving at the old result in the improved and cheaper way substantially identical with or a colourable imitation with the patented process? The *Beecham Group* case, however, is easily distinguishable from the present in that there was an admission in the first defendant corporation's affidavit in reply to Beecham's application for an interim injunction that there was an infringement of their *process claim*.

In *Beecham's* case, the penicillin nucleus, 6-aminopenicillanic acid isolated since 1957 and called, "6-APA" for short, was contained in a general claim protecting *inter alia* the process whereby a-APA is reacted with amino-phenylacetyl chloride, i.e., a carboxylic acid chloride. The defendants admitted that the process whereby they produced hetacillin was started with 6-APA, so the only question was whether it involved the process of reacting the 6-APA with a carboxylic acid chloride. The trial judge found that it did, because in the defendants' affidavit there was the admission that alpha-amino-benzylpenicillin is formed "by the reaction of molecules of 6-amino-penicillanic acid with molecules of *D(-)-2-amino-phenylacetyl chloride hydrochloride*." This, the judge held to be a clear admission on the defendants' part that the first chemical reaction involved in the manufacture by them of hetacillin was the reaction of 6-APA with a carboxylic acid chloride protected in the plaintiffs' process claim. Thus, it was proved by an admission that what the defendants called hetacillin was in reality ampicillin, a product for which the plaintiffs had claimed and were afforded protection in their specification. In the judgment of the Supreme Court of Hong Kong there appeared these passages:

"The question is: have the first defendant corporation, in making hetacillin, used the plaintiff company's patented process as described in claim 1 of patent No. 870,395? They admit that they start with the penicillin nucleus (6-APA), and, on a plain reading of Mr. Sadoff's affidavit, the first stage in the manufacture of hetacillin is an acylation reaction involving 6-APA and a carboxylic acid chloride. As the evidence stands, there seems to be no room for argument."

And later (at p. 283):

"The real question is: Have the defendants made use of the plaintiffs' inventions? Counsel for the plaintiffs' company put his position thus: he urged the court to take the view that hetacillin was a colourable imitation of ampicillin; and that, bearing in mind the

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chemical compounds from which, *and the processes by which, hetaciilin is manufactured*, and bearing in mind that, before the peak level of antibiotic activity is reached, by far the greater part, if not all, of the hetaciilin injected into the blood stream is hydrolysed back to ampicillin, the court should say it is the equivalent of ampicillin within the framework of the purpose for which it is intended to be used. We have no hesitation in saying that this appears to us to be a correct conclusion on the face of the evidence before us."

See also, *Farbwerke Hoechst A.G. v. Unichem Laboratories et al*, (1968) R.P.C. 55, which was an action of a somewhat similar kind for an infringement of a chemical patent. The plaintiffs were legal owners and proprietors of Indian patent No. 58,716 in respect of the manufacture of a new sulphonylureas, salts of those compounds and of antidiabetic preparations containing such compounds. One of the chemical compounds comprised in the said patent was a substance called *tolbutamide*, which possessed blood sugar lowering properties. It was alleged, somewhat like in the present case, that one of the defendants wrongfully and with full knowledge of the plaintiffs' patent No. 58,716, infringed it by producing and selling *Uni-Tolbid* tablets or *tolbutamide* manufactured in accordance with and by the use of the invention disclosed in plaintiffs' patent and claimed in claims I and II of their claims.

In their statement of defence the defendants admitted the manufacture and sale of the tablets sub-nom, *Uni-Tolbind* or *tolbutamide* claiming, just like the defendants have in the instant case, that they had been manufactured by the application of a different process mentioned in another patent for the preparation of substituted benzenesulphonylureas from the corresponding substituted benzenesulphonylthioureas by desulphurisation with hydrogen peroxide. In view of the admission that the defendants had manufactured and sold *Uni-Tolbid* for *tolbutamide*, i.e., the *same* drug for which the plaintiffs had obtained patent No. 58,716, the trial judge held that to be presumptive proof in absence of proof from the defendants to the contrary that they had made use of the plaintiffs' process in the manufacture of *tolbutamide*.

But, as I see it, there are important distinctions between the cases of *Beecham*, *Farbwerke Hoechst A.G.* and the present which operate against any like presumption being drawn. It is important to note there is no claim by Messrs. Hoffman La Roche & Co. in the instant case to the manufacture of the substance diazepam in the same way as there was, respectively, in *Beecham* or *Farbwerke Hoechst A.G.*, claims for product protection for ampicillin and *tolbutamide*. I think this fact really makes all the difference. In *Beecham's* case, it was the admission of infringement of *process* that proved infringement of *product*, whereas, in *Farbwerke Hoechst A.G.*, it was the admission of an infringement of the *product* *tolbutamide* by manufacture that proved by presumption an infringement of process. In the instant case, however, there is no admission by the defendants of infringement of either process or product. Thus, an infringement of neither having been proved by the admissions of, or

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presumption against the defendants, the onus remains on the plaintiffs to prove the alleged infringement by positive evidence.

Diazepam, it is conceded, is an international nonproprietor's trade-name, and, although the defendants have admitted producing it, i.e., through their principals, Delmar Chemicals, and themselves selling it, they have not by any means, it seems to me, admitted the allegation in para 1 of the particulars of breaches—that diazepam is an alternative for, or the chemical equivalent of *7-chloro-1 methyl-r, phenyl 1-2, 3-dihydro-H-1, 4 benzodiazepinone-(2)*, which is claimed to be a benzodiazepine derivative, the invention described in claim No. 6 of the complete specification of the plaintiffs' patent. Rather, far from admitting it, the defendants have specifically denied that allegation in para. 7 of their statement of defence. There can therefore be no presumption, as in *Farbwerke Hoechst A.G.*, that in the absence of proof to the contrary, diazepam is deemed to have been produced by the patented process, simply because the defendants have not admitted, nor have the plaintiffs affirmatively proved that diazepam is of the same chemical composition as *7-chloro-1 methyl-r, phenyl 1-2, 3-dihydro-H-1, 4 benzodiazepinone-(2)* in the same way as the defendants in *Farbwerke Hoechst A.G.* admitted manufacturing *Uni-Tolbid* tablets or *tolbutamide*, the product protected in the claim.

I have shown that the plaintiffs' patent on its true construction affords them no process protection, no claim having been made in respect thereof. But that notwithstanding, quite apart from the defendants' admission they are in possession of Tran-Q-Will tablets for sale, I think proof was essential that Delmar's method of preparation of substituted *5-phenyl-1, 4-3H benzodiazepin-2(1H)-ones* was either substantially identical with, or the chemical equivalent of the plaintiffs' process. Here, counsel for the plaintiffs submitted the judge was in error when he found there was no substantial identity to give rise to the probability of infringement, and suggested the proper course was for the plaintiffs to prove an infringement of process by analysis of the end product, i.e., the Tran-Q-Will tablets. Counsel urged that the clear effect of the "disclaimer" (already mentioned) was an admission by Delmar, and so the defendants, that they had employed the plaintiffs' process. In my view, this cannot be so. There is a distinction between an express disclaimer of and a specific reference to a prior specification. In the former, in the body of the specification, the disclaiming clause not merely refers to the earlier invention, but expressly declares that it is to be treated as excluded from the later. In the latter, the presence in one specification of a specific reference to another means only that something described in the latter specification might appear to fall within a claim of the earlier that is not obviously valid. A specific reference does not in any way admit that the earlier claim is valid, nor that there is not some simple way of avoiding infringement in practice. With respect to a specific reference in a United Kingdom patent such as we are dealing with, the position is governed by s. 9 of the *Patents Act, 1919*, which gives the Comptroller of Patents power to direct an insertion of it in a specification in case of potential infringement if

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"an invention cannot be performed without substantial risk of infringement of a claim of any other patent". Indeed this may well have been the case at the time when Delmar Chemicals sought the issue of its complete specification No. 1,063,891 (i.e., Guyana patent 555) in England.

In my judgment proof was necessary that some method or process belonging to the plaintiffs had been employed by Delmar in the manufacture of diazepam. It was obligatory on the plaintiffs to show, just as hetacillin was shown to be a penicillin derivative in relation to ampicillin in the *Beecham Group* case (above), that diazepam is a benzodiazepine derivate of the first or second general formula, or at least a colourable imitation of it. To my mind, had the plaintiffs adduced some cogent evidence, that it was by means of any of those sixty-nine detailed processes described, but not claimed in the body of patent 667, that diazepam was produced, then I think they will have made out their case for infringement of their protected derivative. For example, suppose they were able to show that a benzodiazepine derivative from either their first or second general formula was produced by reaction, i.e., the interaction of the starting materials in Delmar's product claim (i.e., claim No. 9 of patent 555 which Dr. Walcott says is in substance identical with their own product claim No. 6 of patent 667) either by means of heating or the use of some solvent, or that Delmar's "method for the preparation of benzodiazepinones" as claims 1-5 of their specification was *a priori* obvious in the sense that it was known or capable of being known to a chemist skilled in the prior art at the date of the specification of patent 667, then, in that case, I think they will have shown the substance which defendants call diazepam is really and truly an infringement of their monopoly for the method of synthesis applied for the production of "substituted 5-phenyl-1, 4-3H-benzodiazepin-2(1H)-ones substituted on the fused aromatic ring or on the amido N atom and/or in position 3", will have been devoid of subject-matter and so lacking in inventive step.

The question, however, whether there is subject-matter in the case of a new chemical substance like diazepam is generally dependent on whether its production lies within the routine practice of some existing trade or manufacture. [See *Re I.G. Farbenindustrie A.G.'s Patents*, (1930) 47 R.P.C. 449.] But, even so, there may yet be subject-matter if diazepam was proved to be possessed of valuable properties the existence of which were not obvious *a priori*, even though its method of synthesis is a known one, so long as it has not previously been applied to the particular starting materials concerned. However, in this case that can never be known since there has been no chemical analysis of the Tran-Q-Will tablets.

There remains to be considered para. 10 of the statement of defence wherein objection is taken to the formal validity of the claim in this manner—"The defendants will contend that the plaintiffs' claim is not tenable in law and may not properly be brought in its present form or at all." It seems to me from the arguments adduced, what the defendants are seeking to establish is that this being the case of an invention relating to substances prepared or

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produced by chemical process, the plaintiffs' specification includes claims which cannot lawfully be made.

As a prelude to resolving this question, it is pertinent to have settled a matter on which counsel on both sides have expressed different opinions. It is whether s. 44 applies only in respect of applications for local patents as distinct from applications for registration of United Kingdom patents in Guyana. The purport of s. 44 in so far as it is relevant is, that a chemical-patentee is not afforded substance or product protection where his invention relates to substances prepared or produced by chemical processes or intended for food or medicine, *except* when such substances are prepared or produced by the methods or processes of manufacture particularly described and ascertained in the specification or by their obvious chemical equivalents; save that in relation to a substance intended for food or medicine a mere admixture resulting only in the aggregation of the known properties of the ingredients of that substance shall not be deemed to be a method or process of manufacture. It is however clear that s. 44(4) restricts the operation of the section to "patents applied for" after January 1, 1938, by stating that—"This section applies only to patents applied for after the commencement of this Ordinance." But does this mean the section is not applicable to the United Kingdom patents as counsel for the plaintiffs has forcefully contended?

Having construed s. 44 along with secs. 2, 3, 5, 54 and 55 of the Ordinance, the learned trial judge came to the conclusion it is restricted to patents that have actually been *applied for in Guyana*. Thus, he excludes the operation of the section to United Kingdom patents by restricting it to local patents. His chief reason is, that a United Kingdom patent is, strictly speaking, not "applied for" in Guyana since it has already been applied for and issued in the United Kingdom. What happens, the judge says, is that on application to the Registrar of Patents, Designs and Trade Marks, a United Kingdom patent is merely "registered" in Guyana in compliance with secs. 54 and 55 of the Ordinance.

For myself, I consider that is too narrow a view to take of the matter. If allowed to prevail, it will seriously affect the "rights" of all United Kingdom patents registered in Guyana and conferred by s. 57 of the Ordinance. In my view, the expression "patents applied for" in s. 44(4) is not only wide enough, but is intended to include both patents applied for in Guyana (local patents), and also those already applied for in the United Kingdom which have been registered in Guyana (United Kingdom patents). Accordingly, s. 44 also embraces such United Kingdom patents as have already been applied for in the United Kingdom and registered here *on and after* 1st January, 1938. I can see positively nothing in the Ordinance to exclude this view, and no valid reason for placing any restriction on s. 44's application to local patents when the patents of both countries are being dealt with by the Ordinance; and, more particularly, when there is no specific exclusionary reference to United Kingdom patents.

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In substance s. 44(1) of the Ordinance first appeared in the now repealed s. 38A(1) of the *Patents & Designs Act, 1907*, and remained there until 1949, when it was excluded from the Patents Act of that year. It is, however, my view that this omission is no indication that the law of England does not now afford such process or product protection, as it formerly did, to new substances prepared and, produced by chemical processes. On the contrary, as I will try to show later on, I believe the Patent Act, 1949, has been enacted on the basis that it does indeed afford such protection. In this respect, I respectfully share the view of a well-known text-writer—T.A. Blanco White. (See *Patents for Invention 1955*, 2nd Ed., p. 63, footnotes 91 and 92.) Further, it is important to note that "it is the practice of the Patent Office in chemical cases to insist upon a detailed example of the synthesis of new compounds claimed or the carrying out of a new process claimed, even when a skilled chemist would not require such assistance. In the case of selection patents, the specification is insufficient unless it states the advantage secured by the selection." [See Vol. 29, *Halsbury's Laws of England*, 3rd Ed., p. 70 para. 147.]

In my judgment, the true view of what s. 44(4) does is that it indirectly states that the section is not intended to have a retrospective operation with respect to such local or United Kingdom patents as have been applied for *before* 1st January, 1938; although with respect to those local and United Kingdom patents as have been applied for *after* January 1, 1938, i.e., the date when the Ordinance came into force, the section is fully operative. In other words, s. 44(4) is merely another way in which the Legislature expresses its intention that the section is to operate prospectively and not retrospectively. I think the situation is easily understood when one pays regard to the history of the legislation under consideration. Nowhere in our principal Ordinance No. 31/1903 (see Major Ed. Cap. 62), is legislation of the nature of s. 44 to be found affording either process or product protection to inventions relating to chemical substances. With us, this lacuna existed until our principal Ordinance of 1902 was repealed and replaced by the present consolidating enactment which came into force on the 1st January, 1938.

From this historical background of the section, I think it ought to be perfectly clear all s. 44(4) does is to serve notice on those applying the section after 1938 that the well-known presumption pertaining to consolidating legislation is to be given effect to, viz., that the legislature is not to be considered as having altered the law, but merely as having collected all former sections of the principal Ordinance and fitted them into one enactment. As I see it, in s. 44(4) the legislature is merely warning that it was never its intention to alter the law by extending s. 44 to such local and United Kingdom patents as have been applied for *before* the 1st January, 1938. The true purport of s. 44(4) is that after the 1st January, 1938, all patents applied for would thenceforth be prospectively considered in relation to s. 44. To my

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mind this is only reasonable and in keeping with the well-known presumption that legislation is generally prospective and not retrospective unless there is an indication to the contrary. Furthermore, it is obvious that the learned judge has overlooked the importance of s. 57 of the Ordinance which makes all privileges and rights conferred on the applicant, "subject to all conditions established by the law of Guyana". I will presently show the relevance of this clause. In passing, it may not be without some significance that an application for the grant of a local patent is dealt with in Title I of the Ordinance, whereas an application for registration of an issued United Kingdom patent is dealt with in Title II, although I believe this is immaterial in view of the subordinating clause in s. 57 just mentioned for the reference to local law will render s. 44 applicable.

I construe s. 57 conjointly with s. 58 to mean that the grantee of a United Kingdom patent on receipt of the certificate of registration is to be granted privileges and rights conterminously with all such as would have been granted him in the United Kingdom, but "subject to all conditions established by the law of Guyana". This means that if at the date of the issue of the patent to him in the United Kingdom, after January 1, 1938, he would have been entitled to a right to substance or process protection there, then if the Guyana law affords such (as indeed our law plainly does since that date), he shall likewise have that protection here. For example, see secs. 41 and 10(1) of the Patents Act, 1949, which gives to a patentee the right to both substance and process protection in the case of an article capable of being used as a food or medicine.

It would, however, appear from the decision of *Re Macfarlar (J.F.) & Co. Ltd.'s Application*, (1954) 71 R.P.C. 429, cited to us in support of the plaintiffs' case, that it is not at all permissible to register claims to a previously patented chemical substance in the same way as Delmar has done in patent 555, that is to say, by the formula—"whenever prepared by the process claimed in any of the preceding claims", and that as a consequence all product claims of theirs so worded are invalid. In that case, it was held that an unrestricted claim for a chemical substance is a claim for the substance "however it may be prepared" (i.e., by any method or process whatsoever), and anticipates under s. 8 of the Patents & Designs Act, 1949, a claim for the same substance which is of later priority date and is limited by reference to a particular method of preparation of the substance. It was also held that a statutory reference to a prior French specification must be inserted unless the claim to the substance was cancelled. *Ex facie*, this decision would render patent 555 invalid for both obviousness and lack of novelty.

I am of opinion, however, that the decision in *Macfarlan's* case, notwithstanding it is reputed to be of doubtful import, cannot be applied locally. This may be seen, I think, from the very reasons on which the decision of it is based. It was the decision of the Superintendent Examiner on an application for a patent, the specification of which related to—"Improvements in and relating to the manufacture of *B-N morpholineoethylmorphine*" (briefly called M.E.M.). The specification acknowledged, in much the same way as

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does patent 555, that the preparation of the same compound by another process is described in a prior French publication which was particularised. It also referred by number to the cited patent summarising the subject-matter of the claims. There were six process and one product claim.

I have already found s. 44 of the Ordinance is applicable to all United Kingdom patents applied for in the United Kingdom and registered in Guyana on or after January 1, 1938, but I am unable to find, in the same way as did the Superintendent Examiner, that "however it may be prepared", No. 6 is an unrestricted claim to the compound *7-chloro-1 methyl-5 phenyl 1-2, 3-dihydro-H-1, 4-benzodiazopinone(2)*, in patent 667. It was possible for the Examiner to reach such a conclusion with respect to the substance M.E.M. in *Macfarlan 's* case because, in England, unlike in Guyana, since the 1st January, 1950, the date when the Patents Act, 1949, commenced, it is permissible to include claims in Specifications for chemical substances without any restriction or without describing with particularity the methods of processes by which those substances are prepared or produced. Before 1950, a claim to a chemical substance in England was tied in just the same way as it is now in Guyana, to its method or process of manufacture. That restriction or limitation upon claims in respect of chemical substances does not now appear in the Patents Act, 1949, as it previously did in s. 38A(1) of the repealed Patents & Designs Act, 1907, as amended. As I have already observed, there is no reference in the Act of 1949 as there used to be ever since s. 38A(1) came to be first introduced in 1919 by the Patents & Designs (Amendment) Act of that year, to substances prepared or produced by *chemical* processes; so there is no longer the need for particularly describing and ascertaining the method or process of those substances or their obvious chemical equivalents as a necessary condition for their inclusion as claims in a specification.

This omission in the 1949 Act has given rise to the doubt, which I have mentioned, whether a claim for an entirely new chemical substance is at all permissible; although the more informed opinion is that such a claim is valid, and that the Patents Act of 1949 has been enacted on that basis. Nevertheless, it was the omission of s. 38A(1) of the Act of 1907 (as amended by s. 8 of the *Patents & Designs Act of 1932*) from the Patents Act, 1949, that the Superintendent Examiner seized upon to make the basis of his interpretation that an invention which leads to the production of a new chemical substance—"resides more in the discovery that the said substance possesses new and useful properties than in the actual process of manufacture", and eventually led him on to conclude that—"an applicant who devises some new process of making the same chemical substance as an earlier patentee is not entitled to claim that substance at all if the prior patentee has obtained a claim for the substance *in the unrestricted form now admissible*, though the later applicant is not debarred, of course, from claiming the new process which he has devised, subject to a proper acknowledgement of the earlier patent" (See p. 431).

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The purport of *Macfarlan's* case is far-reaching indeed. It has certainly affected the time-worn principle enunciated in *Hill v. Thompson* (above), that a valid claim is permissible to an old compound when produced by a new process. But whatever doubts may be said to exist in England with respect to that decision, and there are indeed such doubts [see 29 Halsbury's Laws of England, 3rd Ed., p. 78, footnote (c)], certainly in Guyana, unlike in the United Kingdom, no patentee may obtain a claim for a chemical substance in the "unrestricted form" as stated by the Examiner, simply because it is still the law here in Guyana that there cannot be a claim to a chemical substance apart from particularly describing the process of making it in the specification. The exception or limitation upon claims to chemical substance, *per se*, still remains a part of s. 44 of our Ordinance, unlike the position in the United Kingdom Act since 1st January, 1950.

Now, by the joint effect of ss. 57 and 58 of the Ordinance, one of the "rights" conferred by the certificate of registration is the right of a United Kingdom patentee to initiate legal proceedings for infringement of a registered patent in the same way as s. 59 of the Patent Act, 1949, confers it. But that right like all others, is "subject to all conditions established by the law of Guyana as though the patent had been issued in the United Kingdom with an extension to Guyana". Undoubtedly, this is a useful and necessary subordinating condition, but if we, *ex comitate*, are to give protection to another country's patents, we cannot reasonably be expected to accord them any greater "privileges and rights" than our law permits in respect of our own patents. Whether *Macfarlan's* case has been rightly decided or not, I am of opinion it is not relevant to our situation. I am therefore unable to agree with the submission of counsel for the plaintiffs that s. 44 does not apply to United Kingdom patents.

The plaintiffs, having ascertained and described methods of process of manufacture for their chemical compounds, though, as I have found, they have not specifically claimed for them, are thereby afforded both a substance or product and process protection under s. 44 of the Ordinance. The only point is whether there has been an infringement of their product by the defendants' possession and sale of Tran-Q-Will tablets containing diazepam. I have found that s. 44 applies to United Kingdom patents. Under subsection (2) *ibid*, there is a presumption that new substances of the same chemical composition and constitution are produced by the patented process unless the contrary is proved. However, those new substances must first be shown by the plaintiffs to be of the same chemical composition or constitution, and only when this is done is the onus shifted on to the defendants to show those new substances have not been produced by the patented process of the plaintiffs.

I am of opinion that the onus of proof in s. 44(2) cannot shift to the defendants for, as already shown, the plaintiffs have furnished no proof either in the form of admissions elicited from the defendants or otherwise affirmatively, that diazepam is of the *same chemical composition or*

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constitution as the subject of claim No. 6. For my part, I am inclined to think the learned trial judge was right about the findings he made. As already indicated, unless there was chemical analysis of the Tran-Q-Will tablets (an exercise which Dr. Walcott admitted he had not undertaken), or, alternatively, proof that Delmar's process was substantially the same as, or a colourable imitation of the plaintiffs', it was virtually impossible to prove an infringement by sale of the Tran-Q-Will tablets. In these circumstances, there can be no presumption that diazepam was produced by the patented process.

I would dismiss this appeal and affirm the decision of the learned trial judge with costs.

SOLICITORS:

Appeal dismissed

S.M.A. Nasir for the appellants.

A.G. King for the respondents.

GLADYS TAPPIN v. FRANCIS LUCAS

[Court of Appeal (Luckhoo, C., Bollers, C.J., and Persaud J.A.)
March 15, 16, May 2, 1973]

Criminal Law—Indictable charge laid by private individual—Preliminary inquiry—Right of Director of Public Prosecutions to intervene—Discontinuance of proceedings—Constitution of Guyana, art. 47—Summary Jurisdiction (Appeals) Ordinance, Cap. 17(G) s. 37.

The appellant's son (O.T.) was shot by the respondent, who is a policeman, during an incident in which her son and another person were alleged to have committed robbery with violence. O.T. died as a result of the gun-shot wounds. A coroner's inquest was held, and the jury's verdict was that no one was criminally responsible for O.T.'s death. The appellant then filed an information in which she alleged that the respondent had murdered her son. Upon the matter coming before a magistrate, the latter read a letter in open court purporting to have been signed by the Director of Public Prosecutions in which the latter stated that he had discontinued the proceedings launched by the appellant by virtue of art. 47(1) (c) of the Constitution of Guyana. Thereupon the magistrate made an order for the discontinuance of the criminal proceedings, and discharged the respondent.

The powers of the Director of Public Prosecutions are prescribed by art. 47(2) (3) (4) (5) of the Constitution and are set out in the judgment of the Chief Justice hereunder.

The appellant appealed against the order of the magistrate to the Full court and then to the Court of Appeal.

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HELD: (i) the submission to the magistrate of a letter signed by the Director of Public Prosecutions was sufficient to comply with the Constitution which empowers him to discontinue any criminal proceedings, and that he need not appear in person to do so;

(ii) the D.P.P. has the power to take over and discontinue criminal proceedings instituted by any person in authority, and to discontinue such proceedings at any stage before judgment is delivered.

Decision of the Full Court affirmed

Cases referred to:

- (1) *Goddard v. Smith* (1704) 6 Mod. Rep. 261,87 E.R. 1107.
- (2) *Anisminic v. Foreign Compensation Commr et al*, (1969) 1 All E.R. 208
- (3) *Sharp v. Wakefield* (1888) 22 Q.B.D. 239.
- (4) *Westminster Corpn v. Lond & N. W. Rly Co* (1905) A.C. 426.
- (5) *Br Oxygen Co. v. Board of Trade* (1968) 2 All E.R. 177.
- (6) *Armah v. Govt of Ghana* (1966) 3 All E.R. 177.
- (7) *R. v. Allen* (1861-62) 1 Q.B. 850.

S.E. Brotherson for the appellant.

Dr. M. Shahabuddeen, S.C. amicus curiae for the respondent.-

CHIEF JUSTICE: This is an appeal from a decision of the Full court of the High court in which that court refused an application by Notice of Motion by the appellant, Gladys Tappin, seeking an order *nisi* of *mandamus* under s. 37(1) of the *Summary Jurisdiction (Appeals) Ordinance, Cap. 17*, to be directed to the Senior Magistrate of the Georgetown Magistrate's court, commanding him forthwith to continue to hear and determine a charge of murder instituted against the respondent, P.C. 8255 Francis Lucas.

The application further requested that Mr. E.A. Romao, the Director of Public Prosecutions, should show cause how and why the proceedings in respect of the said charge of murder were discontinued, and that the respondent, P.C. 8255 Lucas, should show cause why he should not stand trial for murder under the said charge.

At the outset we must agree with the Full court that the request for the said orders under s. 37 against the Director of Public Prosecutions and P.C. Lucas were misconceived, as that section as will be seen, is concerned only with "a magistrate or a justice of the peace", It reads as follows:

"37. (1) Wherever a magistrate or a justice of the peace refuses to do any act relating to the duties of his office, the person requiring the act to be done may apply to the court on motion supported by affidavit of the facts for an order calling upon the magistrate or justice, and also upon the person to be affected by the act to show cause why the act should not be done.

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(2) If, after proof of due service of the order, *good cause is not shown* against it, the court may make it absolute and the magistrate or justice upon being served with the order absolute, shall obey, and do the act required, and the costs of the proceedings shall be in the discretion of the court."

In her affidavit in support of the motion for the order of mandamus, the appellant stated that on the 20th day of January, 1972, there was an incident in Bent Street, Georgetown, when her son, Oswald Tappin, accompanied by one Keith Bazillio, both of whom were accused of robbery, was shot in the chest by the respondent, P.C. Lucas, and when he fell to the ground was again shot in his back. There were three eye-witnesses who testified to this shooting and their testimony was supported by the medical evidence which confirmed that the death of the deceased, which occurred ten days later, was caused by the bullet wounds received by him. On the 14th day of March, 1972, a Coroner's inquest was held, as a result of which the jury returned a verdict that no one was criminally responsible for the death of the deceased. After listening to the evidence at the inquest, she was of the opinion that this was a clear case of murder, and as a result she felt that she had not obtained justice at the inquest at the Coroner's court. In the circumstances, she decided to prosecute the respondent privately for the murder of the deceased, for which offence the respondent was not prosecuted by the police or by the Director of Public Prosecutions. On 13th October, 1972, she therefore applied to the magistrate of the Georgetown Judicial District that the respondent be charged for the murder of the deceased, and on the 9th day of December, 1972, the charge was signed by the senior magistrate, Mr. Rudolph Harper. On the 13th day of December, 1972, when the respondent appeared before the senior magistrate on the charge of murder, before the charge was read to him the magistrate read aloud a letter purporting to have come from the Director of Public Prosecutions wherein it was stated that the Director had discontinued the proceedings by virtue of *para. 1(c) of art. 47 of the Constitution of Guyana*.

Counsel for the defence then submitted to the magistrate that the power of the Director of Public Prosecutions to discontinue proceedings under *Art. 47 of the Constitution* had to be exercised by the Director "in person" or through other persons and not by means of a letter. The magistrate at first upheld the submission, read the charge to the respondent, and remanded him in custody until 1 p.m. that day. On the resumption, neither the Director of Public Prosecutions nor any person authorised by him to act on his behalf appeared in Court, and after hearing counsel for the defence further, the learned magistrate reconsidered his ruling and held that as the letter was indeed written by the Director of Public Prosecutions, on a true construction of *Art. 47 of the Constitution* the necessity did not arise for him to appear in person; he thereupon made an order for the discontinuance of the criminal proceedings and discharged the respondent, P.C. Lucas, who was the accused person.

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In this court, learned counsel for the appellant made substantially the same submissions which were overruled by the magistrate and the Full Court, and which consisted of two main questions, viz.:

- (1) Whether the letter of the Director of Public Prosecutions to the magistrate constituted a proper mode of exercising his powers of discontinuance of criminal proceedings under art. 47 of the Constitution of Guyana.
- (2) Whether it was not necessary first for the Director of Public Prosecutions to take over the proceedings himself before purporting to discontinue them.

Art. 47 provides as follows:

"(1) There shall be a Director of Public Prosecutions (referred to in this art., as 'the Director') whose office shall be a public office.

"(2) The Director shall have power in any case in which he considers it desirable so to do —

- (a) to institute and undertake criminal proceedings against any person before any court, other than a court-martial, in respect of any offence against the law of Guyana;
- (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and
- (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by him or any other person or authority.

"(3) The powers of the Director under the preceding paragraph may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions.

"(4) The powers conferred upon the Director by sub-paragraphs (b) and (c) of paragraph (2) of this article shall be vested in him to the exclusion of any other person or authority.

Provided that, where any other person or authority has instituted criminal proceedings, nothing in this paragraph shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court.

"(5) In the exercise of the powers conferred upon him by this art. the Director shall not be subject to the discretion or control of any person or authority.

When the Director exercises his powers under 47(2) (a), (b) or (c), he is required under (3) to do so "in person or through other persons acting under and in accordance with his general or special instructions". This language does not specify that he is required to appear *in person* in court, nor is there any

hint that any such "persons" authorised by him to act on his behalf are to *appear* in person in court. The only prerequisite, from the clear and unambiguous language, is that such "persons" must be authorised to act "in accordance with his general or special instructions". If, therefore, those "persons" are enabled to act without actually appearing in court, *a fortiori* the Director from whom they derive their authority so to do must, in the absence of language to the contrary, be able to exercise his own powers without the necessity for his physical appearance in court. In other words, the Constitution could never have intended that those to whom the Director may-wish to delegate his powers can exercise them without appearance in court but that the Director himself *must* so appear. The mistaken notion which Crept into the argument presented stems from the language—"may be exercised by him in person", but this was necessary to describe the mode of the exercise of his powers, which was to be "in person" or "through other persons", that is, it was not to be confined to a "personal" exercise of those powers, but one which could be delegated. "In person" there had nothing to do with appearance in court. It was to contrast the way in which the Director could act which relieved him (if he wished) from acting "in person" and permitted instead others to act for him on his "special" or general "instructions".

It must be noted that the bona fides of the authority of the letter signed by the Director of Public Prosecutions was not questioned by the appellant in her affidavit, and in this court counsel for the appellant did not dispute the authority of the letter, and in any event the maxim "*omnia praesumuntur rite acta esse*" would apply, in which case the onus would be on the appellant to show that the letter was not duly signed by the Director of Public Prosecutions. Our view, therefore, coincides with that of the Full Court—that under art. 47 of the Constitution the Director of Public Prosecutions acts in person *in the exercise of his powers* under the Constitution not only by a physical appearance in court but by letter.

The history of the subject supports this conclusion. Under *s. 113 of the Criminal (Procedure) Ordinance* which came into force on 1st March, 1894, after a preliminary inquiry was held in the magistrate's court in relation to a charge for an indictable offence against an accused person, and after his committal, on receipt of the documents relating to the inquiry, the Attorney General, if he saw fit to do so, could institute criminal proceedings in the court against the accused person which to him seemed legal and proper. The Attorney General then was the sole authority for instituting criminal proceedings by way of indictment at the assize state, and under 8. 114 of the said Ordinance, at any time after the receipt of the documents and either before or at the trial and at any time before verdict, the Attorney General could enter a *nolle prosequi* either by stating in court or by informing the court in writing that "the Crown" (now the State) "intends that the proceedings shall not continue" and thereupon the accused person was in law bound to be discharged. The Attorney General under this section then had, at

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any time after the receipt of the documents relating to the preliminary inquiry, the power to enter a *nolle prosequi* either in person or by informing the court in writing or through a Crown Prosecutor who, under section 8 of the Ordinance had all the powers and could perform all the duties of the Attorney General subject to any express directions of the Attorney General in that behalf.

Under art; 43 of the 1961 Constitution of British Guiana, there was created the office of the Director of Public Prosecutions, and under art. 45 his powers were conferred upon him similar to those which were subsequently re-enacted under art. 47 of the 1966 Constitution. Then under *s. 20 of the British Guiana (Constitution) Order in Council, 1961*, made by virtue of the *British Guiana Act (1928) 17 & 19 Geo. c5*, all existing laws were to be construed on or after the appointed date of the Constitution coming into force with adaptations and modifications necessary to bring them into conformity with the Order in Council and the Constitution, and (e) of the said section stated:

"(e) references to the Attorney-General shall, in relation to any such period, be construed as references to the Director of Public Prosecutions if the matter in relation to which the references are made concerns the powers conferred on the Director of Public Prosecutions by the Constitution."

The powers of the Attorney General, under *s. 113 or 114 of the Criminal (Procedure) Ordinance* were therefore transferred to the Director of Public Prosecutions who, under both the *1961 and 1966 Constitutions*, was an independent creature of statute not subject to the direction or control of any other person or authority.

Again, under *s. 5 of The Guyana Independence Order, 1966*, made by virtue of *The Guyana Independence Act, 1966*, all existing laws immediately before the appointed day were to continue to have effect as part of the law of Guyana and were to be construed with the necessary modifications, adaptations, and qualifications, etc., and thus the Director of Public Prosecutions continued to have the powers of the Attorney General formerly conferred upon him and exercised by him by virtue of any Ordinance.

Finally, under the *Law Revision Act, 1972*, all the rights, privileges and functions of any criminal cause or matter vested immediately before the 26th May, 1966, in the Attorney General under any written law or the common law or by any custom or practice, shall be deemed as from that date to have become vested in the Director of Public Prosecutions. The position of the Director of Public Prosecutions in Guyana may be contrasted with that of his counterpart in England, where, under the *Prosecution of Offences Act, 1870*, "it shall be the duty of the Director of Public Prosecutions under the superintendence of the Attorney General, to *institute, undertake, or carry on* (such criminal proceedings etc.)". In England then, the Director of Public Prosecutions has no power to discontinue criminal proceedings, that power

being vested in the Attorney General under whose superintendence and direction he must work in the administration of the criminal law. The Attorney General, however, has no power to discontinue proceedings by way of nolle prosequi before a magistrate at petty sessions. He can only stop proceedings on an indictment at the assize level, and this power does not appear to have been recognised before the reign of Charles II in 1704. [See *Goddard v. Smith*, 6 Mod. 261.] He may, however, instruct the Director of Public Prosecutions to withdraw the proceedings in the magistrate's court with leave of the court.

The power to enter a nolle prosequi can be exercised in private as well as public prosecutions, and at any stage of the proceedings after the indictment has been signed or found and before the sentence or judgment has been pronounced, but in summary cases proceedings of this type cannot be stopped by a nolle prosequi. The power is exercised by the Attorney General intimating his unwillingness to prosecute by entering a nolle prosequi and this is done by the filing of the fiat of the Attorney General in the record of the proceedings of the court.

In the light of the historical background adverted to above, the interpretation of the wording of *art. 47 of the 1966 Constitution* reached ought to leave little room for doubt, and that is, that the Director of Public Prosecutions exercises his powers in person under the art. when he writes a letter to the magistrate signifying his decision that criminal proceedings against an accused person be discontinued.

In relation to the second point, we are of the view that subsections (2) (a) and (b) of art. 47, which set out the powers of the Director of Public Prosecutions, are mutually exclusive, and that subsection (2) (c) telescopes the powers of the Director of Public Prosecutions as enacted in (a) and (b). In other words, under (c) the Director has power to discontinue any criminal proceedings instituted and undertaken by him under (a) or taken over and undertaken by him under (b). Under (b) he has the power to take over and continue criminal proceedings instituted by any other person or authority, which means a private prosecution, and therefore under (c) the clear and unambiguous meaning of the language used must be that he has the power to discontinue those proceedings at any stage before judgment is delivered. We cannot agree with the submission that the Director must first take over the proceedings before he seeks to discontinue them, as there is nothing in the language used in the article to suggest that, and there is no procedure laid down in relation to his power to discontinue proceedings. The position of the Director of Public Prosecutions, therefore, in relation to a decision to discontinue criminal proceedings is not now the same as existed under s. 114 of the *Criminal (Procedure) Ordinance, Cap. 11* whereby he could only enter a nolle prosequi on receipt of documents in relation to the preliminary inquiry after a committal. He can now discontinue proceedings at the magistrate's court level, and also enter nolle prosequi on receipt of the documents in relation to a preliminary inquiry under s. 114 of Cap. 11.

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Reference was made by counsel for the appellant to art. 125(8) of the Constitution, with the argument that if the appellant's case were summarily discontinued by virtue of the letter from the Director of Public Prosecutions, the learned magistrate would necessarily be acting *ultra vires* the Constitution, as he would not have heard the appellant's case "according to law". This argument fails to comprehend the effect of sub-section 5 of art. 47 which makes it clear that in the exercise of the powers conferred upon the Director of Public Prosecutions by the Constitution, he shall not be "subject to the direction or control of any other person or authority". The word "authority" there must include the courts in the exercise of their jurisdiction of judicial review.

Art. 125(8), which this court has on previous occasions examined, enacts that: "No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law". We are mindful that privative clauses of the kind referred to cannot oust the jurisdiction of the court to declare an administrative act to be a nullity where it is void *ab initio*. If the decision of the Director of Public Prosecutions to discontinue could be said to be *ultra vires*, and therefore null and void, the existence of an exclusionary or privative provision would not preclude the court from saying so. [See *Anisminic v. Foreign Compensation Commission and Another*, (1969) 1 All E.R. 208.] In the exercise of his powers under art. 47 of discontinuing a prosecution, the Director of Public Prosecutions is in effect performing an administrative act in nature akin to the exercise of a quasi judicial function, which it must be presumed will be exercised fairly and honestly within the ambit of the wide discretion bestowed on him by the Constitution, but he must keep within the legal limits of the exercise of his powers as laid down by the Constitution.

The theory behind the power of the courts in the judicial review of administrative action is in reality the doctrine of *ultra vires*, so that the administrative authority which is derived from statute must operate within the limits and jurisdiction conferred by statute. If the authority or body strays beyond its proper bounds, then its action can be controlled by the supervisory power of the courts. If, however, it acts *intra vires* its statutory limits, it is immune from judicial review. As long as the Director of Public Prosecutions then proceeds within his legal powers and acts *intra vires*, this court will be powerless to interfere. As has been pointed out by Professor Wade in his '*Administrative Law*', p. 70, it is of the essence of discretion that it involves the power to make mistakes. The court has therefore to draw the line between mistakes made *intra vires* and mistakes made *ultra vires*. It was LORD HALSBURY, who said in *Sharp v. Wakefield*, [(1891) A.C. 179:]

" 'Discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be

done according to the rules of reason and justice, not according to private opinion:.....according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular."

This learned lord is also reported as having said in *Westminster Corporation v. London and North-Western Railway Company*, [(1905) A.C. 427 that -

"where the legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any court to contest that discretion."

More recently in *British Oxygen Co. v. Board of Trade*, (1968) 2 All E.R. 177, Buckley, J. stated that an administrative discretion "must be lawfully exercised. It must be exercised impartially; it must not be exercised arbitrarily. It must be exercised in good faith so as to promote the policy and object of the Act."

There is nothing on the record in this case to suggest that the Director of Public Prosecutions in his decision to discontinue the prosecution acted outside the scope of his powers, or that he contravened the law in any way. Indeed, there is no procedure laid down as to the manner in which he should exercise his discretion, and no question could therefore arise as to the breach of any of the principles of natural justice. Under the Constitution he is not required to give any reasons for his decision, nor is he required to hear any representations made to him by a person who has instituted a private prosecution. The rules of natural justice are therefore excluded by necessary implication. It was LORD REID in the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission and Another*, (1969) 1 All E.R. 208 (at p. 209) who, in speaking of the limits of jurisdiction of an administrative tribunal, pointed out that it has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. The word 'jurisdiction' there is used in a wide sense, but it is better not to use that term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. The learned lord then continued: [(1969) 1 All E.R. 209].

"But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it has no right to take into

account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *Armah v. Government of Ghana*, that, if a tribunal has jurisdiction to go right, it has jurisdiction to go wrong. So it has if one uses 'jurisdiction' in the narrow original sense. If it is entitled to enter on the enquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law."

In the circumstances of this case then, there can be no question of a judicial review of the decision by the Director of Public Prosecutions to discontinue the prosecution, and there is nothing to suggest that he did not exercise his discretion bona fide. It must be borne in mind that there is no question here of the Director of Public Prosecutions having to satisfy himself that the private prosecutor had or may have had a good case. There may be questions of policy in relation to the public interest which he is entitled to take into consideration in deciding to continue or discontinue the prosecution though the final decision by him is a completely independent one. In this regard he is in a position similar to that of the Attorney General in England who, in the exercise of his discretion, is in no way bound to prosecute every suspected criminal offence.

It was Sir John Simon in 1925 who stated in the House of Commons:

"There is no greater nonsense talked about the Attorney-General's duty, than the suggestion that in all cases the Attorney-General ought to decide to prosecute merely because he thinks there is what the lawyers call 'a case'. It is not true, and no one who has held that office supposes it is."

In *The Queen v. Allen*, (1861-1862) 1 Q.B. 850, it was decided that the Attorney General had power to enter a nolle prosequi on an indictment without calling upon the prosecutor to show cause why that should not be done and his decision could not be called in question. There Compton, J. expressed the view that private individuals were allowed to prefer indictments in the name of the Crown, thus it was desirable that there should be some tribunal having authority to say whether it is proper to proceed further in a prosecution, and that power was vested in the Attorney General and not the court.

The Director of Public Prosecutions then, while subject to the rule of law like any other public authority or official, under the Constitution enjoys a very wide discretion in instituting, undertaking, carrying on, and discontinuing criminal proceedings. Parliament, in conferring those powers upon him, would expect him to exercise them fairly, reasonably, and in good faith. However, as long as he keeps within the statutory limits of those powers his decisions cannot be the subject of judicial review.

Learned authors have concluded that discretionary power should not mean arbitrary power, but the limits of discretion may be so wide that almost anything may be ordered; this comes close to arbitrariness and the Director of Public Prosecutions under the Constitution appears not to be too distant from that position. However, like the Attorney General in England under the Constitution in the conduct of his responsibility he is accountable to Parliament.

One other aspect of the decision of the Full Court remains to be mentioned, and that is, that it was the view of that court that it was not competent for the magistrate to enquire into a charge of murder against the respondent, P.C. Lucas, on facts which the Coroner's jury had already deliberated and had already given a verdict exonerating the said Francis Lucas. This question was neither raised nor argued in the Full Court. The Full Court *ex propria motu* purported in the complete absence of argument to decide the point. In this court, both counsel for the appellant and the Solicitor General, who appeared *amicus curiae*, considered that the Full Court was in error in its decision on this question. Whilst we would not wish to make any concluded pronouncement on the point in the absence of argument, nevertheless we would wish to say that on the face of it the Full Court's view appears to have little to commend itself.

In the result, we would confirm the Full Court's order of refusal to entertain the application for the order of mandamus, and dismiss this appeal with no order as to costs.

Decision of the Full Court affirmed.

KENNETH NARINE v. LEGUAN DISTRICT COUNCIL

KENNETH NARINE v. LEGUAN DISTRICT COUNCIL
 Plaintiff Defendants

[High Court (George, J.)

April 5, 6, 15, 1972; February 6, 13, 20, 1973]

Local Government—District Council—Prescribed oath of office—Oath administered by officer not appointed Justice of the Peace—Whether elected councillors duly sworn—Municipal District Council Act, 1969, s. 42; Leguan District Council (Oaths) Order, 1970. s.20.

Damages—Wrongful dismissal—Notice of termination unlawful—Three months' notice appropriate, not one month's notice.

The plaintiff sued the defendants, the Leguan District Council for wrongful dismissal and for damages and a declaration. Ever since January 1, 1961, he had been appointed assistant overseer in one of three local authorities that formerly served the island of Leguan, Essequibo until November 1969 when the Municipal District Councils Act of that year was passed dissolving the three local authorities and instituting the present Leguan District Council. This new arrangement necessitated transitional provisions, and legislation was accordingly enacted, respecting *inter alia* the transfer of employees and the property of the old authority to the new.

The defendant district council held its inaugural meeting on 20 May, 1970, and plaintiff was unanimously appointed to the vacant post of Chief Finance Officer. Next day he was duly informed in writing by the chairman that his appointment would take effect from May 1, 1970. Later on June 10, 1970, the minutes of that meeting were confirmed after council's receipt of a letter from the Permanent Secretary to the Ministry of Local Government advising that the post of assistant overseer held by the plaintiff, should be re-designated Chief Finance Officer, and the decision to do so was taken at a statutory meeting of the new council held on July 15, 1970. At a special meeting of August 26, 1970 applications were invited for the posts of Chief Executive Officer and Chief Finance Officer to which the plaintiff had been already appointed as aforesaid. Nevertheless, he was invited to apply for the post and he did so explaining he did so as a formality. Notice was then advertised that he was one of the applicants, and at another meeting on September 9, 1970, both posts were filled—that of Chief Finance Officer by one Mohamed Islam. The plaintiff was afterwards informed by a letter from the Chairman of the Council that his "duties in office" must cease; that he should deliver up all documents, keys and other Council property; that he would be paid one month's salary in lieu of notice and that the post of ranger would be offered him.

In the High Court it was argued on its behalf that the defendant Council had no power to act as they did because the elected councillors did not swear the required oath of office, the oath not having been administered by a Justice of the Peace as is required by law.

HELD: (i) the minutes of the Council's meeting and the chairman's letter advising plaintiff of his appointment were clear and unambiguous and

open to no other construction than that plaintiff was appointed to the post of Chief Finance Officer.

(ii) the fact that on 15th July, 1970 the defendants on instructions from the Ministry of Local Government re-designated plaintiff's post to Chief Finance Officer cannot annul what the Council did by its letter of May 20, 1970.

(iii) the plaintiff was holder of the office of Chief Finance Officer when the elected members of the Council took office on August 20, 1970.

(iv) by appointing Mohamed Islam as Chief Finance Officer, the defendants forthwith terminated plaintiff's services and a reasonable notice of termination would have been three months, or three months salary in lieu thereof.

(v) a declaration that plaintiff is still in the Council's employ is not legally appropriate and must be refused; but he will be entitled to damages and costs for wrongful dismissal, loss of gratuity on abolition of his office of assistant overseer, salary in lieu of vacation and for the task of typing of the Council's estimates for 1970 which he had undertaken.

(vi) the requirement that "no councillor can take part in the proceedings of a District Council or any of its committees unless he has taken the prescribed oath of office before the Chief Executive Officer" is merely directory; so any acts performed by them are not nullified. Re. (v) above, see *B. Munisar v. Bookers Demerara Sugar Estates Ltd. (1979)* 26 W.I.R. 337. *Judgment for the plaintiff*

Ashton Chase, for the plaintiff.

M. Stephenson, for the defendants.

GEORGE, J., In this action the plaintiff claims damages for what he alleges to be the wrongful dismissal of him from his post of Chief Financial Officer by the defendant district council. Prior to the year 1970 the island of Leguan was served by three local authorities and the plaintiff had been in their employ in the capacity of assistant overseer a post which he had held since the 1st January, 1961. On the 4th November, 1969 the *Municipal District Councils Act 1969*, which for convenience I shall call 'the Act', was enacted. It came into force on the 14th November, 1969, by virtue of an order made by the Minister for Local Government pursuant to the provision of section 1 of the Act. Under section 33(1)(b) and (3) the Minister is empowered, by what is called a constitution order, to establish Local Government Districts and to prescribe or provide for:—

- (a) the name of any such district and its boundaries.
- (b) the name of the council for such district and;
- (c) the number of councillors.

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The minimum number of councillors for any district including its chairman and vice chairman is fixed at nine and the maximum eighteen (see sec. 36). Acting under the power conferred under sec. 33 of the Act, the Minister, on the 29th April, 1970, made the *Leguan Local Government District (Constitution) Order, 1970*. Under this order the defendant District Council was created embracing the whole of the island of Leguan and the number of its councillors fixed at fifteen. By virtue of sea 322 of the Act, the effect of this order was to dissolve the three Local Authorities then functioning on the island. As there were no councillors elected under the *Local Authorities (Elections) Act 1969* to serve the new district, as provided for in sec. 38 of the Act, the Minister, acting under the powers conferred on him by sections 325 and 333, made the *Municipal and District Councils (Transitional Provisions) Order 1970 No. 33*, in which twenty-four persons were appointed to exercise the functions of the defendant district council. This order was made on the 30th April, 1970. Section 325 empowers the Minister to appoint persons to carry out the functions of a district council until the commencement of the term of office of its first councillors, and section 333 empowers him to modify any of the provision of the Act if such modification is found necessary for the purpose of removing any difficulties in bringing it into operation. Under this latter provision another order, the *Municipal and District Councils (Exemption from Oaths) Order, 1970*, was made on the 26th May, 1970, exempting the persons appointed under order No. 33 of 1970 from the necessity for taking the oath which is required to be taken by every councillor of a District Council under the provisions of section 42 of the Act. The powers vested in the caretaker Council so constituted were no less ample than those of a Council whose members are elected. These include the power to appoint to offices the emoluments of which do not exceed \$4,800 per annum.

By virtue of section 322(b) of the Act all property which vested or subsisted in any dissolved Local Authority became transferred to and vested in the District Council which is empowered with jurisdiction over the area in which the property is situate; and by section 334 all vacant Local Government Offices in a District Council to which is transferred the property of a villager country Authority, dissolved under section 322 of the Act, should be filled so far as possible from employees of the dissolved Local Authority.

The defendant District Council held its inaugural meeting on Wednesday 20th May, 1970 under the chairmanship of Roopnaraine Jagdeo who had been designated as chairman under the *Municipal and District Councils (Transitional Provisions) Order 1970*. According to the minutes of that meeting the chairman, after welcoming members of the District Council, fourteen of whom were present, intimated to them that as the offices of overseer and assistant overseer provided for under the *Local Government Ordinance, Chap. 150*, had in effect been abolished as a result

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of the creation of the district, the first business of the Council should be to appoint the following officers:—

- (1) Chief Executive Officer.
- (2) Chief Finance Officer.
- (3) Clerk to the Council.
- (4) Such other officers as the Council deemed necessary.

The acting assistant District Commissioner for the Essequibo Islands was offered the post of Chief Executive Officer by a majority of twelve of the members present. The plaintiff, who was present, at the meeting was unanimously appointed Chief Finance Officer and one Peter Montague, Clerk to the Council. The Council also considered the question of filling the vacancy for a shorthand typist and a junior clerk but decided that a notice inviting applicants for these posts should be advertised. On the following day the chairman wrote to the plaintiff informing him that he had been appointed to the office of Chief Finance Officer, with effect from the 1st May.

The minutes of the meeting of the 20th May were confirmed at a meeting held on the 10th June, 1970 which was presided over by the Deputy Chairman. It would appear that on the previous day the defendants had received a letter from the Permanent Secretary to the Minister of Local Government advising *inter alia* that the council should redesignate the posts of overseer and assistant overseer as Chief Executive Officer and Chief Finance Officer. Rather peculiarly the council decided that a decision on the suggestions contained in the letter should be deferred until the elected councillors took office unless the Minister permitted the present caretaker administration to function until the end of that year. Despite this decision however, at their statutory meeting held on the 15th July, the decision was taken that, and I quote,

"Mr. Peter Montague former Village Overseer redesignated Chief Executive Officer of the council and Mr. Kenneth N. Naraine, former assistant overseer, was (sic) redesignated Chief Finance Officer of the Council."

Although the plaintiff was present at this meeting he made no comments about the decision taken. These minutes were never confirmed as the nominated councillors went out of office because of Local Government elections. The next meeting of the defendant Council held on the 19th August, 1970 was a special one of the first elected councillors and understandably no mention was made of the meeting of the 15th July. On the 20th July, 1970 the plaintiff wrote to the Minister conveying the decision of the council on the re-designation of his and Montague's posts. At another special meeting held on the 26th August, among the issues considered, was the status of the plaintiff and Peter Montague. The chairman drew attention to certain letters from the permanent secretary to the Ministry and enquired whether

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the plaintiff and Montague were holding acting appointments or had been appointed permanently to the posts of Chief Finance Officer and Chief Executive Officer. It is recorded in the Minutes that the Chief Executive Officer could give no proper answer but Councillor Seunarine who had been a member of the caretaker council said that they had been appointed to the posts by that council. The minutes of this meeting were confirmed at the meeting of the 9th September, 1970. At that meeting a letter was read informing the council of the Ministry's approval of the appointment of Peter Montague as Chief Executive Officer. Despite this it is recorded that the council also considered the staffing situation and a motion that advertisements inviting applications for the posts of Chief Executive Officer and Chief Finance Officer should be made, was adopted, but that one councillor protested that both officers were "already in office". A notice inviting applications for the two offices was advertised, and the plaintiff was one of the applicants. He states that he only applied because he was told to do so by the chairman who informed him that it was a mere formality. Another meeting was held on the 29th September, 1970 when the defendants proceeded to fill the posts of Chief Executive Officer and Chief Finance Officer. As regards the latter, two applicants were considered viz, the plaintiff and one Mohamed Islam. The latter was elected. The chairman then informed councillors that as a consequence of the vote the plaintiff's "duties in the office" must cease forthwith and he should deliver up all documents, keys and other property belonging to the Council. On that same day the chairman wrote to the plaintiff informing him that his application for the post of Chief Finance Officer had been unsuccessful and requesting him to surrender all property of the Council which he may have in his possession. He was also told in effect that his employment with the council had ceased and that he would be paid his salary for the following month. In addition he offered the plaintiff the post of ranger at a salary to be negotiated. The plaintiff, however, refused to accept this offer and has not since done any work for the defendants.

The first question to be resolved is whether the plaintiff was ever appointed to the post of Chief Finance Officer. The issue of the appointment of Chief Finance Officer was first considered at the meeting held on the 20th May, 1970. The minutes of that meeting are to my mind quite clear and unambiguous and open to no other construction than that he was so appointed. And as if to place matters beyond any doubt the chairman wrote him a letter informing him of his appointment. The fact that subsequently on the 15th July, the defendants acting on the instructions from the Ministry of Local Government purported to redesignate the plaintiff's post as that of Chief Finance Officer cannot in my opinion take away from the unequivocal act of the Council in May 1970.

It may well be argued that what the defendants did on the 20th May, 1970 amounted to a mere offer to the plaintiff which required an acceptance by him. Indeed, there is no direct evidence of an acceptance but in my opinion such an acceptance can be implied by the fact that he continued in

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the defendants' employ after the decision had been conveyed to him by the chairman. Nor do I feel that the plaintiff's letter dated the 20th July, 1970 to the Ministry on behalf of the defendants alters the situation. This was the letter which informed the Ministry that pursuant to the direction contained in it, the defendants had at their statutory meeting on the 15th July, 1970 *inter alia* redesignated the post of assistant village overseer as Chief Finance Officer. Nor does the fact that the plaintiff was an applicant for the office of Chief Finance Officer, after it was advertised, alter the fact that he had already been appointed to the post. And on this aspect of the evidence I believe the plaintiff, that it was at the encouragement of the chairman who told him that his application was a mere formality, that he at all made an application.

In any event, whether it was by virtue of the decision of the 20th May, 1970 or that of the 15th July, the plaintiff was, in my opinion, the holder of the office of Chief Finance Officer when the elected members of the defendant Council took office and held their first meeting on the 20th August 1970. It follows from this conclusion that the acts of advertising the post of Chief Finance Officer as vacant and subsequently filling that post was based on a misconception of the true factual position. Despite this, however, the common law empowers and enables an employer to terminate the services of his employee on giving him proper notice; and there is nothing contained in the Act, or any subsidiary legislation made pursuant to it, which can be said to fetter the powers of the defendant Council in this regard.

As I have already pointed out the defendants on appointing Mohamed Islam as Chief Finance Officer forthwith terminated the plaintiff's services and offered him one month's salary in lieu of notice. However, counsel for the plaintiff, contends that.—

- (a) the defendant Council had no power to act, because the elected councillors did not swear the required oath of office before the proper authority, and
- (b) even if the councillors could properly have acted the dismissal was wrongful because reasonable notice had not been given to the plaintiff.

As regards his first submission it is necessary to draw attention to certain provisions of the Act and certain of the orders made under it. By virtue of sec. 42 of the Act "no councillor can take part in the proceedings of a District Council or any of its committees unless he has taken the prescribed oath of office before the Chief Executive Officer Under sec. 333 the Minister is empowered by order to remove any difficulties which may arise in bringing into operation any of its provisions. It is also provided that any such order may modify the Act itself in respect of any particular matter or occasion so far as appears to the Minister to be necessary or expedient for removing the difficulty. Acting under this power the Minister made

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the *Leguan District Council (Oaths) Order, 1970*, No. 51. Sec. 2 of this order reads as follows:—

"It is hereby prescribed that the oath of office required to be taken before the clerk (Chief Executive Officer) under the provisions of sec. 42 of the Municipal and District Councils Act, 1969, shall be taken by the councillors of the Leguan District Council elected pursuant to the elections held on the 29th June, 1970 before a Justice of Peace".

In this regard, it is common ground between the parties that the oaths of office of the elected councillors was administered by Peter Montague who is not a Justice of the Peace, and from this arises the submission that the defendant Council had no power to act as such, and accordingly could not properly dismiss the plaintiff.

Counsel for the defendants contends, however, that the evidence shows that Peter Montague was either appointed to the office of Chief Executive Officer or, at worst, according to Montague himself, was acting as such at the material time. He, therefore, argues that there was no such difficulty as ought to have caused the Minister to act under sec. 333. In this regard he draws attention to sec. 15(1) of the *Interpretation and General Clauses Act 1970*, the effect of which is invalidate any subsidiary legislation which is inconsistent with the provisions of any statute or in excess of the power under which it is made. The fetters imposed by this provision are however subject to any express provision to the contrary contained in the relevant legislation. And, there can be no doubt having regard to the provisions of sub-sec. 2 of sec. 333 of the Act that there is express provision enabling the Minister to modify the Act itself. As to the question of a difficulty to be removed, even if the court is vested with the power to review the Minister's exercise of his discretion in making the order questioned, it is impossible for me to say that the Minister was confronted with no difficulties. In my opinion unless I had before me from the Ministry all the circumstances which motivated him to make the order it would be a very rash and a judicial conclusion to say that no difficulties had arisen. As I see it, therefore the validity or vires of the Minister's act in making the order cannot be questioned in the manner in which counsel for the defendants seeks to do so.

The conclusion to which I have arrived must mean that the elected councillors were never properly sworn. They were therefore barred by virtue of sec. 42 of the Act from taking part in the proceedings of the Council or any of its committees, unless their acts are saved by sec. 49. This section reads as follows:—

"The acts and proceedings of any person elected to any office specified in sub-sec. 2 of sec. 48 and performing the functions of that office shall, notwithstanding his want of qualification or disqualification, be as valid and effectual as if he had been qualified".

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Among the offices referred in sub-sec. 2 of sec. 48 are those of chairman and councillor. As I understand this provision although a councillor may be disqualified from being elected or did not have the qualification to be elected to the office of councillor, his performance of functions as such after being *de facto* elected would nevertheless be valid and effectual. Further, although properly and validly elected, he is disqualified from performing or did not have the qualification to perform the functions of his office; his performance of those functions would nonetheless be valid and effectual. It follows that sec. 49 modifies the otherwise mandatory sanction contained in sec. 42 and so converts it to a merely directory provision.

I accordingly hold that, despite the failure of the councillors to take the oath before the prescribed functionary, any acts which they may have performed as such do not thereby become a nullity. Among the acts a council is empowered to perform is that of removing from office any officer in receipt of a salary below \$4,800 (four thousand eight hundred dollars) per annum (see sec. 117).

I, therefore, go on to the second limb of the plaintiff's contention, viz., that the period of notice given to him was not reasonable. In the plaintiff's original appointment as assistant overseer the salary to be paid was a yearly one on a scale \$960.00 (nine hundred and sixty dollars) to \$1,440.00 (one thousand four hundred and forty dollars): and in his letter of appointment as Chief Finance Officer his salary scale was also described on a yearly basis viz., \$1,200 (one thousand two hundred dollars) to \$2,040 (two thousand and forty dollars). The fixing of the plaintiff's salary on a yearly basis, as distinct from a monthly one or other shorter period, suggests that it was intended that his office should be one of some duration. Further under sec. 76 of the Act the Chief Finance Officer, is the person primarily charged with the general responsibility of all matters of finance and accounts of a Council. And, by virtue of Part II of Schedule 6 he is the paymaster, accountant, collector, and financial adviser of the Council, and is charged with a myriad of important financial responsibilities. Having regard to all the above circumstances including the salary payable I agree with counsel for the plaintiff that the notice given was not reasonable. In my estimation he should have been given at least three months' notice.

In addition to the period of notice the plaintiff seeks a declaration that he is still in the employ of the defendants as Chief Finance Officer. In this regard it is now well settled that where there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made (see *Francis v. Municipal Councillors of Kuala Lumpur* (1962) 3 All E.R. 633 per Lord MORRIS at p. 637). In that case an employee of the respondent Council appealed to the Privy Council claiming that as the Malayan Court of Appeal had found that his purported dismissal had been *ultra vires*, it should have held that his dismissal was null and void and accordingly that was entitled to a declaration that he was still employed with the council. It was the

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opinion of Lord MORRIS that "special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court". He distinguished the case of *Vine v. National Dock Harbour Board* (1956) 3 All E.R. 939 which was concerned with the wrongful dismissal of the appellant who was a dock labourer registered with the defendants. The effect of the dismissal would have been to deprive the labourer of even obtaining work on any dock. It was this factor which weighed with the court and led it to conclude that the declaration, that the plaintiff was still in the employ of the defendants, had been rightly made.

No special circumstances have been shown in the present case. And, as was pointed out in *Francis v. Kuala Lumpur* (*supra*) at page 638 the fact that the plaintiff's services may be considered statutory is far from conclusive. I accordingly decline to make the declaration sought.

The plaintiff also claims damages for loss of pension. In this regard I was referred to the *District (Pensions and Gratuities) By Law 1957 No. 1*. Under bye Law 4 a pension or gratuity is payable to an employee of a local authority in one of five eventualities, including retirement on or after attaining the age of fifty-five years and on the abolition of his office. As to the former, it was pointed out that but for the plaintiff's dismissal he would have been entitled to continue in the defendant Council's employ until he attained the age of 55 (fifty-five) years after which a pension would become due to him under the Bye Laws. Because his employment was wrongly terminated, so the argument goes, he lost this opportunity. In support of his proposition counsel for the plaintiff relied on the case of *Bold v. Brough Nicholson and Hall Ltd.* (1964) 1 W.L.R. 201. But in that case the plaintiff was employed for a fixed period of time—ten years—with a provision that his employment could continue after the expiration of that period. The agreement was determinable by six months' notice to this effect given by either party and expiring at the end of the ten year period or any date thereafter. During the currency of the agreement the defendants were given the right to terminate the plaintiff's employ if he became incapacitated from illness in any other cause from attending to his duties either permanently or for 183 (one hundred and eighty-three) days or any period of fifty-two weeks. Some considerable time before the ten years had expired he was summarily dismissed. It was in this context that the court held that but for his wrongful dismissal he would have been entitled to a pension under two previous schemes based at worst on his contributions to them at the end of the ten-year period. In the present case the plaintiff's contract was at best a yearly one. He cannot *be* said to have had any vested right to a pension. In the event of a lawful determination of his services, whether after reasonable notice or otherwise, he could not claim to be entitled to any benefits under the Bye Laws. As I see it his eventual entitlement was merely an expectancy and therefore too remote to be taken into account in assessing damages for wrongful dismissal.

Taking into account the principles set out in *Addis v. Gramophone Co. Ltd.* (1909) A.C. 488, I, therefore fix- the damages for the plaintiff's

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wrongful dismissal at \$300.00 (three hundred dollars), having regard to the fact that he has already received one month's pay.

But the plaintiff also claims that his office of assistant village overseer was abolished after the Act came into force. About this there can be little doubt. Sec. 84 of the *Local Government Ordinance* makes provision for the offices of Overseer and Assistant Overseer to serve the village and country or rural areas created under that Ordinance. By sec. 322 of the Act, upon the establishment of a district council any village, country, or rural local authority, within its boundaries, ceases to exist; and, it is also provided that the provisions of the *Local Government Ordinance* should cease to have effect in the area of the former Local Authority. The effect of bye-laws 4(b) and 12 is to grant a gratuity to an employee of a Local Authority who holds an approved appointment whose office has been abolished, after he has served more than seven years but less than twenty years. An approved appointment is defined as one notice of which is published in the Official Gazette (see bye-law 2), and the post of assistant overseer was so published on the 8th February, 1958. The gratuity in respect of an approved appointment is calculated at the rate of one-eighteenth of a month's pay for each month of service up to a maximum of one year's salary. The plaintiff would, therefore be entitled to \$801.70 (eight hundred and one dollars and seventy cents).

The plaintiff also claims that while in his employment with the predecessor Local Authorities he typed the estimates for one of them—the Leguan-Phoenix Village Council, for the year 1970, but did not receive his remuneration of \$40.00 (forty dollars). Further he claims that it was a condition of his employment that he should be granted vacation leave of eighty-four days after a continuous period of three years service calculated at the rate of twenty-eight days for each year. A circular from the Local Government Board dated February 1959 which was adopted by the Village Councils was tendered to substantiate this. However despite the fact that the plaintiff applied for vacation leave on two occasions his applications were not favourably considered. The defendants, who, as I have already pointed out, are by virtue of sec. 322 of the Act, vested with the Liabilities of their predecessor Local Authorities, have not attempted to deny the plaintiff's claim to vacation leave or remuneration for typing of the estimates for the year 1970. I fix his loss of vacation leave for three periods between the 1st January, 1961 and the 30th October, 1970 at \$927.00 (nine hundred and twenty-seven dollars).

Accordingly the plaintiff is entitled to the following reliefs.

Damages for wrongful dismissal	\$ 300.00
Gratuity on the abolition of his office of assistant overseer	801.70
Salary in lieu of vacation	927.00
Typing Estimates for 1970	40.00
	<u>\$2,068.70</u>

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There will, therefore, be judgment for the plaintiff in the sum of \$2,068.70 (two thousand and sixty-eight dollars and seventy cents) with costs to be taxed.

Judgment for the plaintiff.

Solicitors:—

Mr. M. A. A. McDoom for plaintiff.

Miss H. D. Eleazer for Defendant.

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[Court of Appeal (Persaud, Cummings and Crane, J J. A.)
May 4, 29, 1973]

Criminal Procedure—Murder—No evidence of cause of death —Pathologist's certificate not admissible—Committal by magistrate for felonious wounding—Indictment for murder—Whether indictment good—Criminal Law (Procedure) Ordinance, Cap. 11 (G) s. 13(2)—Evidence Ordinance, Cap. 25 (G) s. 43 (4).

The appellant was charged with murder, but as there was no medical evidence before the magistrate at the preliminary enquiry as to the cause of

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death of the deceased person (the pathologist's certificate not being admissible in evidence) the magistrate committed for felonious wounding. The Director of Public Prosecutions indicted for murder, and upon being arraigned for that offence, the appellant pleaded guilty to manslaughter whereupon he was sentenced for the latter offence. He then appealed to the Court of Appeal urging that upon the evidence disclosed on the depositions, the Director of Public Prosecutions could not properly indict for murder, with the result that the indictment, and the ensuing conviction were bad in law.

HELD: (i) in view of the provisions of s. 113 (2) of the Criminal Law (Procedure) Ord., Cap. 11 (G), and having regard to the fact that as the law then stood, the pathologist's certificate was inadmissible, the indictment was bad, and so was the conviction for manslaughter.

Appeal allowed. Conviction and sentence quashed.

Editor's note: The pathologist's certificate as to the cause of death is now admissible in evidence by virtue of the Law Revision Act, 1972 (No. 11), enacted on July 21, 1972.

Cases referred to:

(1) *R. v. Thomas* (1948) 32 Cr. App. Rep. 50.

(2) *R. v. Chairman, London Quarter Sessions, Ex p. Downes*, (1953) a All E.R. 750.

(3) *R. v. Jordan* (1956) 40 Cr. App. Rep. 152.

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

Godfrey Persaud, Senior State Counsel, for the State.

PERSAUD; J.A: The case against the appellant in this matter as disclosed in the depositions taken by the magistrate was that he and the deceased had an altercation in a house on Saturday, April 29, 1972, at about 7 p.m., when the appellant, armed with a knife, stabbed the deceased in the region of the abdomen. The deceased suffered an injury. He was taken to the hospital where the doctor examined him, and he was found to be suffering from the following wounds:

- (1) 2 cm. laceration on both sides of neck.
- (2) 4 cm. laceration on the left arm.
- (3) 2 cm. laceration on left hand; and

there was a stab wound with evisceration in the anterior axillary line of the abdomen.

The doctor expressed the view that the injuries could have been fatal to life, and admitted the deceased as a patient into the hospital, where he died on May 6, some seven days later.

On April 29, 1972, the deceased had been examined by another doctor at the hospital who confirmed the previous findings, except that he found another wound 2 cm. long on the left wrist, and he described the wound to the abdomen as being located over the left eighth intercostal space, anterior axillary line. The doctor expressed the view that the injuries were dangerous to life, and said that an X-ray of the chest showed pneumo thorax on the left side, but there was no further explanation as to what this meant.

On these facts, the appellant was charged with murder. But no evidence as to the cause of death was given before the magistrate who thereupon committed the appellant for the offence of felonious wounding. At the preliminary enquiry, counsel appearing for the State attempted to put in evidence the pathologist's report on the post-mortem examination which sought to indicate the cause of death. The document was then, having regard to the state of the law, clearly inadmissible, as even though *subsection 4 of s. 43 of the Evidence Ordinance, Cap. 25*, was amended by the *Miscellaneous Enactments (Amendment) Ordinance, 1961 (No. 29)* to include the Government Bacteriologist and Pathologist, it was still the case that the pathologist's certificate was not admissible in cases involving homicide. This situation has since been remedied by the *Law Revision Act, 1972 (No. 4)*, enacted on the 21st July, 1972, so that such a document would now be admissible in evidence to prove the cause of death.

Counsel does not impeach the order of committal. He submits, however, that the indictment is bad when regard is had to s. 113(2) of Cap. 11, as amended by the Criminal Law (Procedure) (Amendment) Ordinance, 1961 (No. 22) which reads as follows:

"(2) The indictment against the accused person may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a magistrate in his presence, being counts which may lawfully be joined in the same indictment."

Counsel for the State has conceded that if the indictment was bad, the trial was a nullity; and he accepts that notwithstanding the accused pleaded guilty to manslaughter, the subsequent conviction and sentence would, in the circumstances, be invalid.

In our view, this case is not to be equated with the case of *R. v. Thomas*, (1948) 32 Cr. App. R. 50, where all that was necessary was the formal production of the relevant Statutory Rule and Order in order to complete the case against the appellant, as apart from such Statutory Rule and Order, the offence had been sufficiently disclosed on the face of the depositions.

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The question before us is, as it was in the case of *R. v. Chairman, London Quarter Sessions, Ex parte Downes*, (1953) 2 All E.R. 750, whether the depositions or examination taken before the magistrate in the presence of the accused disclosed the offence of murder. This is to say whether it has been disclosed from the evidence that the deceased died from the wound or wounds inflicted upon him by the appellant. In our view, the evidence on the depositions does not disclose from what cause the deceased died. In all probability he did die from the wounds he received, but in a criminal trial, probability is not, in our view, the same as a *prima facie* case.

Because of the factual aspects of the case we must, with some regret, accede to the submission made by counsel for the appellant, and hold that the indictment was bad, which fact rendered all subsequent proceedings null and void. The appeal is therefore allowed and the conviction and sentence set aside.

CUMMINGS, J.A. I agree.

CRANE, J.A.: It seems to me on the plain wording of s. 113(2) of the *Criminal Law (Procedure) Ordinance, Cap. 11*, there was no power in the Director of Public Prosecutions to substitute in the indictment a count for murder in the place of felonious wounding, the offence for which the examining magistrate committed the accused to stand his trial. S. 113(2) provides as follows:

"(2) The indictment against the accused person may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a magistrate in his presence, being counts which may lawfully be joined in the same indictment."

Accordingly, as it seems to me, the policy behind the subsection is that a substituted count must be founded only on *facts or evidence disclosed in the depositions*. Here, the important point for determination is whether there is any merit in the appellant's contention that the substituted count is a nullity in view of the absence of the post-mortem medical report on the cause of death which the magistrate ruled inadmissible at the preliminary inquiry. There, the medical report was rejected as inadmissible since the doctor was not called to testify in support of it. Can it therefore properly be said that at the time when the Director of Public Prosecutions framed his indictment he had substituted a count for murder that was founded on facts or evidence disclosed in the depositions?

In his memorandum of reasons the learned trial judge concisely catalogued the facts disclosed in the depositions and rule it was quite proper for the Director, on those facts, to substitute a count for murder in the place of

felonious wounding, the offence for which the examining magistrate committed. Senior State Counsel referred us to the main points in the factual evidence, viz., that of the deponent Ramratie, who saw the accused with a knife; that of the deponent Rajdai, who saw him throw the knife away after he had disembowelled the deceased with it; and, above all, to Dr. Cardeno Isidio's examination of the deceased and the multiple stab wounds that doctor considered "dangerous to life". In my view, while all these facts may well support a count for felonious wounding, they are incapable of supporting one for murder in the absence of any evidence of the cause of death of the deceased in the circumstances of this case. Evidence of the cause of death is vital. It cannot be overlooked. It is an essential ingredient in the proof of the offence of murder. In bringing home a case of murder, how the deceased died has got to be proved. It has also to be proved by either direct or circumstantial evidence that it was the accused who brought about his death.

I am in entire agreement with the submission of counsel for the accused that the factual evidence from which the cause of death may be gathered is not sufficiently cogent in this case. It is certainly not the sort of evidence on which the prosecution should endeavour to ground an indictment for murder, particularly when after the passing of *the Law Revision Act, No. 4/1972* on 23rd September, 1972, they were in a position, with the aid of the legal process, properly to structure their indictment on the very same documentary evidence which was rejected by the magistrate.

In the absence of any such evidence, the magistrate could hardly be of opinion the evidence raised a strong or probable presumption of the accused's guilt and a sufficient case to put him up his trial for the crime of murder. [See s. 71 of Cap. 11.] It does not seem to me the cogency of the evidence was such that if it went uncontradicted at the trial, a reasonably minded jury would have convicted solely from the fact that the deceased died on the 6th of May, 1972, from those injuries he received from the accused on the 29th April, 1972. This was the question the magistrate necessarily had to decide before committing the accused to stand trial for murder. However much one may feel inclined to think so, the time gap of eight days between the injuries and the death was too long a period to enable an inference to be drawn that death was caused by the injuries without evidence of the cause of death. It is one thing for Dr. Isidio to say that the wounds he examined on April 29 "were dangerous to life", but the question remains: Did the deceased die from those injuries on May 6? That evidence was lacking when it ought to have been furnished through legal process at the time when the Director framed his indictment.

While it is true the accused was committed on the 4th August, 1972, to stand trial for felonious wounding to the next sessions commencing 3rd October, 1972, in the meanwhile Parliament passed on September 23, 1972, the *Law Revision Act, No. 4/1972*. This Act repealed and re-enacted section 43 of *the Evidence Ordinance, Cap. 25*, permitting any court to receive as evidence "a document purporting to be a post-mortem report of a duly regis-

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tered practitioner a document purporting to be a report made by such medical practitioner within 48 hours of his examination of any injury received by or the condition of a person which is the subject of a prosecution for a criminal offence". [S. 43(4) of Cap. 25.]. The medical practitioner's attendance at court is not an absolute requirement; although the court or any one of the parties may summon him. In these circumstances, in the light of the policy in s. 113(2) above of the depositions disclosing all facts or evidence, I think the proper procedure for the Director of Public Prosecutions to have followed is contained in s. 77(1) of Cap. 11 which says:

"77. (1) At any time after the receipt of any documents mentioned in this Title and before the sitting of the court to which the accused person has been committed for trial, the Director of Public Prosecutions may, if he thinks fit, *remit the cause to the magistrate with directions to re-open the inquiry for the purpose of taking evidence or, further evidence on a certain point or points to be specified, and with any other directions he thinks proper.*"

As I see it, had the Director of Public Prosecutions taken this simple course of remitting the cause to the magistrate with directions to re-open the inquiry and to receive the medical report of the autopsy, he would have had on hand evidence on which he could properly have framed his indictment within the spirit and intendment of s. 113(2) of Cap. 11 above. After the passing of the *Law Revision Act, No. 4/1972*, the Director would have had before the 3rd October, 1972, i.e., before "the sitting of the court to which the accused person has been committed for trial", evidence in the nature of the medical report of the cause of death, and so be in a position to utilise the procedure under s. 77(1) above. I am decidedly of opinion, however, it was not competent for him to present his indictment on an inadequate set of facts or evidence and at the time of trial to seek to prove the case for the State on facts bolstered up by evidence not disclosed in the depositions and on which he obviously did not frame his indictment.

As I have said, the policy of the law is revealed in s. 113(2) of the *Criminal Law (Procedure) Ordinance, Cap. 11.*, where it is abundantly clear that depositions must, as far as possible, contain all facts or evidence on which the accused is going to be indicted; except, of course, when the prosecution is seeking to lead at the court of trial additional evidence which was not obtainable at the preliminary inquiry. To this end has the legislature made provision in s. 77(1) above for the remission of the cause and the reopening of the inquiry in the circumstances therein stated. So it seems to me entirely wrong for the prosecution to by-pass the procedure under s. 77(1), and so be in a position at the trial in the High Court to have admitted, by virtue of *ex post facto* legislation, that which at the preliminary inquiry they could not lawfully have admitted into evidence.

Just how necessary it is for the prosecution to produce evidence of the cause of death may be seen from the case of *R. v. Jordan*, (1956) 40 Cr. App. R. 152, which, to my mind, resembles the present in that the deceased was

stabbed in the stomach by the accused and died after eight days in hospital. The cause of death was found to be due, not to the stab wound, but to supervening pneumonia brought on by an antibiotic the hospital authorities had wrongly administered. It could not, therefore, be said death was due to the stab wound, and the accused was acquitted of the charge of murder. Thus, it may be seen from *Jordan's* case, how essential in a case of murder it is for the prosecution to prove a causal connection between the injury and the death of the deceased, by a post-mortem report, particularly where death does not follow immediately upon the infliction of the injury, and where the deceased has been under treatment. Post-mortem evidence establishes that causal connection; but it is lacking in the instant case. Can it therefore be said in the absence of such evidence that what happened in *Jordan's* case could not have occurred in the present case? In my view, it was for the prosecution to show that it did not

In these circumstances I am compelled to agree the trial was a nullity. There was, in law, no conviction of the accused, even though he had pleaded guilty to the lesser offence of manslaughter. For these reasons, I agree that the appeal must be allowed and the conviction and sentence set aside.

Appeal allowed. Conviction and sentence quashed.

PETER TAYLOR & CO. LTD.
Appellants (Defendants)
and
COMMISSIONER OF INLAND REVENUE
Respondent (Plaintiff)

[Court of Appeal (E.V. Luckhoo C., Bollers C.J. and Persaud J A.)
2, 3, May; 15 June, 1973]

Income Tax—Arbitrary assessment—Action for tax due—Provisional agreement between parties on certain items of tax due—Agreement to withdraw suit conditional on payment of all tax due on remaining items—Whether compromise reached between parties.

Income Tax—Arbitrary assessment—Action for tax due—Whether ultra vires Commissioner of Inland Revenue to compromise suit for lesser amount than sum assessed—Whether Commissioner functions officio after tax assessed—Income Tax Ordinance Cap. 299, s. 48(4).

PETER TAYLOR & CO. LTD. v. C.I.R.

Witness—Taxpayer seeks adjournment for attendance of witness not under subpoena—Application refused by judge—Whether judicial discretion properly exercised.

The respondent, the Commissioner of Inland Revenue, sued the appellant/taxpayer company to recover income tax due, owing and payable in respect of years of assessment 1961 to 1968, together with interest. An amount due for property tax was also claimed.

As per statement of claim, the assessments were made for the years 1961 to 1967, and property tax for years 1962 and 1964 to 1968.

Letters and correspondence passing between the Commissioner and the appellant company revealed that subsequent to the issue of the writ, the appellants made a payment of \$15,000 leaving a balance of \$144,112.62 inclusive of interest. Assessments were arbitrarily made to which the appellants offered no objection, and up to the date of the writ had filed no appeal to the Board of Review. In fact, they submitted no returns whatever to the Commissioner. Evidence oral and documentary before the trial judge revealed that after writ issued, there were two meetings between the taxpayer's representatives and accountants and the Commissioner's officials showing that the parties had endeavoured to arrive at a settlement of the matter with a view to having the writ withdrawn.

On behalf of the taxpayer it was contended that the tendered correspondence showed that the parties had reached a compromise on the amount claimed in the suit. The trial judge considered and dealt with the matter as a "simple tax collection suit," and not as an appeal from the Commissioner's assessment. He refused the appellants' request for an adjournment to procure the attendance of a witness who had agreed to attend but who was not under subpoena. On behalf of the Commissioner, it was contended that all the negotiations between the parties must be disregarded; and that if, indeed, there was a compromise, which was denied, it was incapable of binding the State; it would have been ultra vires the Commissioner it being statutorily impermissible and beyond his competence to do so.

Accordingly, there was judgment for the Commissioner of Inland Revenue.

HELD: 6n appeal; (per Bollers C.J., (Luckhoo C. concurring)).

- (i) no opinion is expressed on the view that the Commissioner had no power to amend his assessments, the majority decision must rest solely on the view that the evidence does not reveal that a compromise was effected. The sum total of the documentary and oral evidence is the respondent in an endeavour to have the writ withdrawn, and a temporary or provisional only; not final, and intended to be effective only if a full agreement had been reached on the remaining items, and payment made as stipulated.
- (ii) (ii) (per Persaud J.A. dissenting), there is enough on the record from which one could arrive at the conclusion that the parties had agreed that the taxpayer should pay a lesser sum as tax than that originally sued for. The view contended for, that any negotiations between the taxpayer and

Commissioner were ultra vires and should be entirely disregarded, cannot be entertained. It must all depend on the circumstances.

Appeal dismissed. Judgment of the High Court affirmed.

Editor's note: It is to be regretted the majority decision did not see fit to decide the important point which arose on the pleadings and which was decided both by the trial judge and in the minority judgment of Persaud J.A., viz., whether it would be *ultra vires* the Commissioner to revise his arbitrary assessment in an action to recover it. more particularly, after the taxpayer had deliberately ignored the appellate process.]

J.O.F. Haynes, S.C., associated with Stanley Persaud, for the appellants.

Dr. M. Shahabuddeen, S.C., Solicitor General, N. Graham, Senior Legal Adviser, for the respondent.

CHIEF JUSTICE: This appeal arises out of a claim on a specially endorsed writ brought by the Commissioner of Inland Revenue against a taxpayer, the appellant company, for the sum of \$140,372.72 for income tax for the several years of assessment from 1961 to 1968, together with interest statutorily chargeable thereon. Subsequent to the issue of the writ, the appellants paid the sum of \$15,000, with the result that the total tax liability of the appellants, inclusive of interest, was alleged to be \$144,112.62.

Although the appellants pleaded that the assessments were arbitrary and excessive and that objections thereto were pending, the main defence pursued, however, was that subsequent to the issue of the writ, the aforesaid assessments were, by agreement between the respondent and the appellants through correspondence, amended to the final sum of \$32,552.94, which would in any event constitute the limit of the appellants' liability and estop the respondent from claiming in excess of this agreed sum, which was further reduced by a payment of \$12,000, leaving a balance of \$20,552.94, the true amount of the appellants' liability, and beyond which the trial judge was not entitled to award any greater sum.

At the trial evidence was led on behalf of the Commissioner of Inland Revenue by the Assistant Commissioner of Inland Revenue, Mr. Wong, and the Deputy Commissioner, Mr. Sandy, after which the appellant company closed its case and led no evidence in rebuttal of the respondent's case. The evidence of the Assistant Commissioner revealed that assessments were raised against the taxpayer in respect of the years 1961 to 1967, and property tax in respect of the years 1962 and 1964 to 1968, as claimed under the statement of claim, and that no objections had ever been made to these assessments, neither were any appeals filed in respect thereof, and what is even more worthy of note, no returns had ever been submitted by the appellant company.

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In respect of the years of assessment 1961 and 1962 in the case of income tax, both tax and interest had been paid. In respect of the year of assessment 1963, a total sum of \$5,552.33 was paid on the 9th October, 1969, after the issue of the writ, and a sum of \$16,947.67 remained unpaid. In respect of the year of assessment 1964, the sum of \$4,145.21 was paid on the 3rd October, 1969, leaving a balance of \$18,354.79 unpaid. In respect of the years of assessment 1956 and 1966, the whole amount assessed had been left unpaid. In relation to the property tax for the years of assessment 1962, 1965, 1966, 1967 and 1968, there were no objections to the assessment raised, and nothing had been paid thereon.

Through this witness, the correspondence between the Commissioner and the appellants in relation to these assessments was put in evidence, and the witness maintained that up to the date of the issue of the writ there were no amendments to any of the assessments referred to by him in his evidence, and there had been no appeals pending before the Board of Review in respect of those assessments and no objections had ever been made to the said assessments.

The Deputy Commissioner stated in evidence that after the writ had been filed, he had had two meetings with representatives of the appellant company. The first meeting, which was at the request of the Company, took place in the presence of a Mr. Rutherford, a trainee-inspector of the department and himself on behalf of the Commissioner, and Mr. Peter Taylor, a director of the Company, Mr. Gangadin, an accountant retained by the Company, and Mr. Laurie Persaud, solicitor to the Company, all of whom appeared on behalf of the Company. Present at the second meeting were Mr. Rutherford and himself on behalf of the Commissioner, and Mr. Gangadin and Mr. L. Persaud on behalf of the Company.

At the first meeting, representatives of the Company stated that there had been no objections to the assessment, and the taxes had not been paid, and there was no right of action by the Company for a refund of excess under s. 73 of the Income Tax Ordinance. There was a discussion of certain aspects of the Company's accounts in respect of the years of assessment claimed in the writ, as the representatives of the Company claimed it might assist the court in the matter because they felt that, having regard to the financial state of the Company, the Commissioner might think it best to pursue a course which would ensure that the tax which would otherwise have been payable by the Company had it submitted its returns on the statutory due date, should, if satisfactorily established, be acceptable.

It was the clear and unequivocal language of the Deputy Commissioner of Inland Revenue that at this first meeting representatives of the Company and himself reached no conclusion because there were certain matters outstanding in relation to accounts which had not been submitted. These matters concerned the most recent financial position of the Company, that is to say,

Trading and Profit and Loss Accounts for the period of one year ending 31st December, 1968, and the Balance-sheet as of 31st December, 1968, which were considered to be of vital import in relation to other assessments.

At the second meeting, representatives of the Company and those of the Commissioner reviewed their respective positions concerning the tax payable on the Company's accounts for the respective years of assessment, had the Company submitted returns, but no conclusion was reached. At no time or subsequent to the two meetings, the Deputy Commissioner declared, was any agreement reached about any of the assessments, the subject-matter of the writ, nor was it at any stage agreed to re-open the assessments of the Company. In his examination-in-chief the witness stated categorically:

"..... However, it was made clear to the Company at the first meeting that all accounts up to, and including the accounts for Year of Assessment 1969, would have had to be submitted before any examination of any set of accounts could be completed."

On the uncontradicted oral and documentary evidence submitted by the respondent in proof of his case, the learned judge in the court below came to the conclusion that there was nothing in the correspondence between the respondent and the appellants which evinced a final concluded agreement *ad idem* with respect to the settlement of the action, and in such circumstances it could not be said that there had been a compromise. He therefore entered judgment for the respondent in the sum of 1144,112.62 with taxed costs.

It is submitted in this court by counsel for the appellants that the learned judge was in error when he so found, and that the relevant correspondence does reveal that a firm agreement had been reached between the appellant and respondent compromising the action for income tax liability of the appellants for the years 1961-1966.

In our view, the first letter relevant to this matter that must be looked at is Ex. 'KK' dated 21st August, 1969, addressed by the firm of accountants retained by the Company to the Commissioner. In para. 1 the writers refer to a letter from the Commissioner dated 1st August, 1961, and to the interview with Mr. Gangadin on Tuesday, 19th August. It then reads:

"We wish to confirm that our clients have now confirmed the several points to which we agreed at the interview on the 19th August, 1969, which we set out hereunder."

The various items of income tax and property tax as claimed in the writ are then set out under the various heads, and under each head the writers state that their clients would settle the amount as claimed or would settle not as claimed but in some other way, as the case might be, and that previous losses were to be carried forward upon receipt of the computation of the Commissioner. In relation to the property tax, they agreed to pay tax and interest from the dates of the respective assessments on the basis of the net property shown in their balance-sheets already submitted. And in respect of those years for which accounts were not submitted, they agreed that the

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Commissioner should use the basis of the last submitted balance-sheet subject to necessary amendments.

The letter concludes with the statement that they had advised their client to make the necessary arrangements to obtain funds to meet their tax liabilities, and they looked forward to the Commissioner's computations with interest calculations, any adjustments thereto to be made at the time thereof. Then comes this important statement:

"By the foregoing arrangements we are left to conclude that you would now withdraw the above-quoted action against our clients. *Year of Assessments 1967 and 1968*. Arrangements would be made to settle these years immediately after settlement of the above-mentioned matter."

In our view this letter indicates nothing more than that the appellants, through their accountants, were seeking to have the action which was filed against them withdrawn, and were alleging that agreement had been reached between the Commissioner and themselves at the meeting held on the 19th August, 1969, in respect of certain of the items of income tax pertaining to certain years of assessment as claimed in the writ up to the year 1966.

To this letter came the reply signed by D.C. Rutherford for the Commissioner, dated 27th August, 1969—Ex. 'B'. In this letter the Commissioner referred to the two meetings held between the parties and submitted details of each year of assessment, 1961-66. The Commissioner made it clear that for the years 1961, 1962, 1963 and 1965 his computations stood. In respect of the years of assessment 1964 and 1966, the computations of the appellants were accepted, save that in respect of the year 1966 in the event that chargeable income returned when the accounts were submitted being in excess of this adjusted chargeable income, the necessary additional assessment would be raised. In para. 3 of the letter it is stated how the interest for the years of assessment had been calculated. In para. 4 the Commissioner stated that he proposed to raise queries on certain items appearing in the balance-sheet for the respective years, and as a result property tax assessment and liability would be agreed on after these queries had been answered. The letter significantly concludes:

"Please let me have your offer to compromise this matter bearing in mind that my final withdrawal will be based on full settlement of the tax liability to year of assessment 1969. Even though I may agree to a withdrawal of the writ now before the court, in any event I will expect all matters to year of assessment 1969 to be settled by 15th September, 1969, by mutual agreement."

In our view, the Commissioner was in this letter making it abundantly clear as to the terms on which he was prepared to treat with the appellants. While in respect of certain items he was insisting that his computations should stand, in respect of other items he was prepared to accept the computation of the appellants, and to open the door to receive further counter-offers of compromise in respect of the remaining items claimed under the writ to

which agreement might be reached, but in any event he was not prepared to withdraw the writ until there had been "a full settlement of the taxpayer's liability up to the year of assessment 1969." Was it not made crystal clear that before there could be any question of the withdrawal of the writ, there was that vital question to be resolved, viz., that "all matters to the year of assessment 1969" were "to be settled by 15th September, 1969, by mutual agreement"? Could it be said then that the Commissioner's letter constituted anything more than a proposal by which he was prepared to abide, and withdraw his writ if the appellant would pay all that was due, after the necessary computations and adjustments in the manner proposed?

Further to this letter, the Commissioner addressed another letter to the appellants dated 9th September, 1969, seeking additional information on the matter of the property tax which had been claimed in the writ in respect of the years of assessment 1962 to 1968, which indicated that the parties were still in the state of negotiations as no final agreement had yet been reached. That was why the Commissioner was at pains to point out that he "will expect all matters to year of assessment 1969 to be settled by 15th September, 1969, by mutual agreement." *If there was not "mutual agreement" on outstanding matters (and there were such matters to be resolved)*, then the proposal could never reach any stage of finality to justify the withdrawal of the writ. In other words, certain matters were partly agreed upon, others had to be resolved, after which payment was to be made by a certain date and then the writ withdrawn.

Then came the letter dated 3rd October, 1969, from the appellants' accountants addressed to the Commissioner, Ex. 'D', in which they referred to the Commissioner's letter dated 27th August—Ex. 'B'—and to Mr. Gangadin's telephone conversation with the Commissioner on the 2nd October, 1969. In this letter the accountants stated that they wished to confirm their clients' financial position was such that they were unable to meet immediately the amounts of tax payable mutually agreed upon in respect of the years 1961 to 1966. They mentioned that the total tax payable which had been agreed to amounted to \$20,875.52, subject to a refund of \$2,747.70, and not taking into account interest on amounts due and payable. Interest would be a certain sum and would have to be re-computed in the light of the agreed method of payment by instalments. They then stated that as mentioned in a telephone conversation, on the 6th October, 1969, they would pay \$12,000 and on the 31st October, 1969, they would pay \$3,000. The letter then seeks to request that the \$12,000 be appropriated to the settlement of certain years of assessment, and that the refund of \$2,747.70 be appropriated towards interest, and the further sum of \$3,000 be applied towards the balance due in respect of the year of assessment 1964. The upshot of all this would be that tax payable for the years of assessment 1965 to 1966 would be discharged by certain quarterly payments. The letter concludes:

"We are endeavouring to obtain the latest audited final accounts, as requested, for submission to you in order that you may be able to ascertain for yourself the Company's financial position."

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Obviously from this letter the appellant was not in a position to meet the clear-cut terms laid down by the Commissioner, nor indeed did he at any stage measure up to the essential requirements of the positive and unequivocal stipulations contained in the letter of 27th August, 1969. Neither the oral evidence nor the correspondence shows that the Commissioner had been persuaded to depart from the prerequisites which underlined the whole process of accommodation which he was willing to make available to the appellants. On the contrary, in a further letter dated 13th February, 1970, he sought information in respect of audited balance-sheets as at 31st December, 1968, and 31st December, 1969, which balance-sheets or their material contents were never made available.

All that the documentary and oral evidence reveal is that the appellants had entered into negotiations with the respondent in an endeavour to have the writ which was filed against them withdrawn, and had reached a temporary or provisional agreement in respect of certain items of income tax, which was only intended to be effective if full agreement had been reached on the remaining items, and payment made as stipulated. In order to secure mutuality on the remaining items, further information and certain balance-sheets were required which were never made available to promote and secure a comprehensive and not a piecemeal solution. Further, if there was to be a withdrawal of the writ, there would have had to have been full compliance with the conditions laid down by the Commissioner in the letter Ex. 'B', i.e., "that all matters up to the year of assessment 1969", this latter condition being a condition precedent to any finally concluded agreement or settlement. Before it could be held that any final conclusion had been reached, all the material terms of what the Commissioner was willing to accept would have had to be met, and this the correspondence clearly reveals what not the case. The main purpose of the negotiations was to endeavour to secure the withdrawal of the writ by meeting his terms, which could not have been met by counter-proposals or the withholding of essential information or by inability to pay in the manner which was demanded. Finality was contingent upon the fulfilment of all the conditions stipulated and not of some, bearing in mind that the appellants had lodged no objections according to law in contest of the assessment made.

We do not think it necessary, for the purposes of this decision, to consider whether the learned judge was right in his view that under the *Income Tax Ordinance, Cap. 299*, the Commissioner had no power to amend an assessment raised by him and effect a compromise with the taxpayer. We rest our decision, therefore, solely on the view that the evidence does not reveal that a compromise was, in fact, effected.

No oral evidence was given by or on behalf of the appellants, and it was argued that an application for an adjournment to lead to witness should have been granted by the trial judge. It was within the discretion of the trial judge to refuse the application in view of what was said by counsel for the

appellants, viz., that "the witness was not subpoenaed. Witness not present because he did not know exactly what date he would be required."

For these reasons, we would dismiss the appeal and affirm the order of the trial judge with costs to the respondent to be taxed.

Appeal dismissed

PERSAUD, J.A. I regret that I must differ from the views expressed by my learned brothers in this matter, and I do so with great respect.

This appeal arises out of a claim made by the respondent upon the appellants for the sum of \$140,372.72 as income tax and property tax, in addition to interest thereon for the years of assessment 1961 to 1968, the interest on the various amounts having been computed up to the 9th April, 1969. It is accepted that the assessments were raised arbitrarily by the Commissioner, as he is in law entitled to do where the taxpayer has not delivered a return. [See s. 48(4) of the *Income Tax Ordinance, Cap. 299.*] In this case the taxpayer failed to file his returns for the relevant years.

On 31st May, 1969, a writ was filed at the instance of the Commissioner to recover the sum aforementioned, and on the 27th October, 1969, a director of the Company swore to an affidavit of defence in which reference was made to certain negotiations between the Commissioner and the taxpayer among other matters, and it was being contended both that there was a noncompliance with the provisions of the Ordinance, and that the Commissioner was estopped from claiming any sum in excess of \$32,552.94 as tax. It would appear that certain negotiations did take place after the writ, but before the affidavit of defence was filed.

The learned judge approached the matter in this way: He held that there was no objection in writing to review and revise the assessments to the Commissioner under the Ordinance [s. 56(2)], and that this matter was a simple tax collection suit, and not an appeal from the Commissioner's assessment. Further, that what had occurred could not be regarded as a compromise between the parties, and even if it were, the Commissioner having made the assessments, was *functus officio*, and could not lawfully effect a compromise with the taxpayer; and that the result of the negotiations was tantamount to a remission of tax, which can only be granted by the President under s. 72 of the Ordinance; any purported remission of tax by the Commissioner would be *ultra vires*. Accordingly, he gave judgment in the entire amount claimed.

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It is evident that correspondence began between the parties as early as 1962, and continued thereafter. It will serve no useful purpose to examine that correspondence in any great detail, except to point out that the taxpayer was seeking to make representations against the 1962 assessment. But the correspondence subsequent to the filing of the writ is, in my opinion, of the utmost importance.

A convenient point from which to take up the narrative relating to the correspondence would be the 21st August, 1969, when the taxpayer's advisers wrote to the Commissioner confirming agreement on various points which had been discussed between the parties and agreed upon at a meeting held on the 19th of August. That letter concluded with these words: "By the foregoing arrangements we are left to conclude that you would now withdraw the above quoted action against our clients.....Arrangements would be made to settle these years (referring to years of assessment 1967 and 1968) immediately after settlement of the above-mentioned matter."

This was followed by a letter dated 27th August, 1969, from the Commissioner in which reference was made to meetings between representatives of both sides. Each year's assessment of income tax was dealt with separately, affirming the Commissioner's own computation in some instances, and accepting the taxpayer's computation in others. The letter concluded thus: "Please let me have your offer to compromise this matter bearing in mind that my final withdrawal will be based on full settlement of the tax liability to year of assessment 1969. Even though I may agree to a withdrawal of the writ now before the court, in any event I will expect all matters to year of assessment 1969 to be settled by 15th September, 1969, by mutual agreement." Attached to the letter was a document described as the 'Schedule of Income Tax Liability' in which was set out the income tax payable in respect of the years 1961 to 1966 together with the interest thereon calculated up to 31st August, 1969, showing the taxpayer's liability in the sum of \$20,875.52 which, if the amount of \$11,677.42 is added as interest increases the liability to \$32,552.94. On that document was also inscribed a note to the effect that 'Year of Assessment 1961 liability of \$2,747.70 to be refunded when paid.' On the 3rd October, 1969, the taxpayer's accountants replied confirming the liability as indicated in the Commissioner's letter, and proposing a method of payment. Between the 9th of October and the 20th of November, the taxpayer made seven payments to the Inland Revenue Department, totalling \$15,000, and it may not be without some significance that five of the seven amounts are the exact amounts due in respect of certain years, and were so accepted by the Commissioner.

Two main points were taken before this court: The first dealt with the question of the refusal of the judge to grant an adjournment to enable the taxpayer to call a witness. The appellants allege a breach of the principles of natural justice. It is an accepted principle that a party to litigation should be heard, and should be afforded a reasonable opportunity to call witnesses on

his behalf if he wishes. It will be recalled that this court held in the case of *Brandt v. A.G.* [(1971) 17.WIR.448] that a person upon whom a deportation order was made should have been given the opportunity to be heard as to why the order should not be executed. But it is not every application for an adjournment that must of necessity be granted. The judge has a discretion in the matter, and in my view, unless it can be shown that the judge exercised that discretion arbitrarily or capriciously, this court should not intervene. In the instant case, the appellant has not, in my judgment, shown that the judge so acted, or that his rights were prejudiced by his inability to call his witness. I would, therefore, rule against the taxpayer on the first point.

The second point was that having regard to the history of the matter as set out in the correspondence, the Commissioner was estopped from giving judgment for more than \$32,552.94. With this submission I agree in part, and I shall attempt to give my reasons therefor hereunder:

It is said that a public servant (which would include the Commissioner) may not bind the State, and the cases referred to in support of that proposition are *Liberty & Co. Ltd. v. Commissioners of Inland Revenue*, (12 Tax Cas. 630) and *Brodie v. Commissioners of Inland Revenue*, (17 Tax Cas. 432). I accept that proposition as sound in law. In the former case, it appears to me that what Rowlatt, J. was stressing was that the Commissioners had no power to bind the Crown by a general declaration of what the law is in particular circumstances beforehand. The courts declare the law, and their view is the one that must prevail over any that the Commissioner may hold in any particular matter. In the latter case is to be found a statement by Finlay J. which seems to accord with the submission made by the learned Solicitor General Finlay J. said (at p. 441 *ibid*):

"I do not think that it is any part of the duty of officials of the Inland Revenue to make contracts or to make declarations and I think it is impossible to hold that the Crown is, under the circumstances, bound by statements made by those officials....."

That learned judge went on to say (*infra*):

"I do not think really with that principle there is any room for the application of estoppel in such a case as this. On that ground, and on the ground, also, that I do not think there was evidence that the trustees had altered their position, I must decide that point also against the appellants" "

Earlier in his judgment, the learned judge had said that he did not see any evidence that they (the trustees) had altered their position on the face of what was said. And therein lies the distinction, in my opinion, between that case and this case now occupying the attention of this court. In the instant case, it is my view that the taxpayer, by reason of the negotiations with the Commissioner, had altered his position in that he was led to believe that his income tax liability for the years 1961 to 1966 had been settled, and this belief must have been strengthened by the Commissioner's appropriation of

the payments made in accordance with the schedule to the letter of the 27th August, 1961, except the last payment of \$3,000 which, it would appear from the correspondence, was intended by the taxpayer to be applied towards the tax due in respect of the year of assessment 1964. In his defence, the taxpayer has raised the equitable defence of *estoppel*, and it would seem that a citizen of the State is entitled to rely on such a defence, if he wishes, in any action brought against him by the State or a representative of the State. [See *A.G. for Trinidad & Tobago v. Bourne*, (1895) A.C. 83.]

As I have already indicated, there is enough on the record from which I have come to the conclusion that the parties had agreed that the taxpayer should *pay a lesser sum* as tax than that originally sued for. In alluding to the facts of the case, it is only fair that I should point out that the evidence of the Deputy Commissioner (Mr. Ulric Sandy) was to the effect that there had not been a concluded agreement. Perhaps it might be useful to quote from his evidence in examination-in-chief. This witness said:

"The defendant Company's representatives and ourselves reached conclusion as to varying or amending the assessments in question. I did not vary any of the assessments."

And:

"The representatives of the Company and I reached no conclusion at that meeting because there were certain matters outstanding in relation to accounts not submitted."

And:

"At no time at, or subsequent to the two meetings with representatives of the defendant Company did I reach any agreement about any of the assessments, the subject-matter of this Writ. I had reached agreement as to the tax payable on the Company's accounts referring to particular years of assessment."

And finally:

"I was able to agree on the tax payable based on the Company's accounts for the year of assessments included in the Writ herein before commencing an examination of the accounts."

In my view, it is clear that Mr. Sandy was maintaining in the two earlier passages that no agreement had been reached. It is equally clear that in the latter statements, he was indicating (to put it at its highest if it is so desired) that there was an agreement to some extent at least. And this is the reason behind the letter of the 27th August, 1969 - Exhibit 'B' - which refers only to income tax, and not property tax.

But the burden of the learned Solicitor General's submission, and this was the judge's view too, that even if there was a compromise, this did not bind the State, as the Commissioner is not authorised by the Ordinance, to effect a compromise with any taxpayer; that all he can do is to assess the taxpayer's liability, and to review and revise any assessment under s. 56(2) of the

Ordinance, but this only when the taxpayer objects in writing within fifteen days of the service upon him of the notice of assessment. [See s. 56(2) & 3]. I think it is right to say, and I believe the learned Solicitor General accepted that this must be the situation, that if his submission is sound, the Commissioner is not empowered to entertain any representation made on behalf of a taxpayer, save when the latter applies under s. 56(2), with the result of representations made, nor can he compromise a suit. The Solicitor General further submitted that in this instance what the Commissioner purported to do was beyond his competence under the Ordinance, and so was *ultra vires*, and has drawn our attention to the dictum of LORD SIMMONDS in *Howell v. Falmouth Boat Construction Co. Ltd.*, (1951) A.C. at p. 845, to the effect that:

"The illegality of an act is the same whether or not the actor has been misled by an assumption of authority on the part of a government officer however high or low in the hierarchy The question is whether the character of an act done in the face of a statutory prohibition is effected by the fact that it has been induced by a misleading assumption of authority. In my opinion the answer is clearly No."

And LORD NORMAND opined at p. 849 (*ibid*):

"..... it is certain that neither a minister nor any subordinate officer of the Crown can by any conduct or representation bar the Crown from enforcing a statutory prohibition or entitle the subject to maintain that there has been no breach of it."

Both law Lords were dealing with and expressing their dissent from a dictum of Denning, L J., in the Court of Appeal, where the latter had said [(1950) 2 K.B. at p. 26]:

"..... whenever government officers, in dealing with a subject, take on themselves to assume authority in a matter with which he is concerned, the subject is entitled to rely on their having the authority which they assume."

It is to be observed that notwithstanding the dicta expressed by the learned law Lords, they came to the same result as did the Court of Appeal. In that case, the plaintiffs who were ship repairers, effected certain alterations and repairs to a ship on the instructions of the defendants. But it was required by law that such alterations and repairs could only be done under the authority of a licence granted by the Admiralty. No such licence was obtained, **but** some of the work was done with the oral authority of the officer authorised to grant licences, who visited the site and inspected the progress of the work, giving directions as to how it should be carried out. Later a licence was granted, subject to the condition that it should 'automatically determine if any unauthorised repairs, alterations or dry-docking are carried out'. Thereafter further work was carried out and completed. Upon the plaintiffs suing for the cost of the repairs, the defendants pleaded that what was done was in

contravention of a statute, and so could not be made the subject-matter of an action. The Court of Appeal held that the defence raised was not a good defence. The House of Lords, in affirming the decision of the Court of Appeal, held that on a true construction of the relevant Order, 'licence' meant 'licence in writing, but that in the circumstances of the case, the licence which was granted covered the work already done under the oral sanction of the proper authority as well as work to be done in the future; that in the case of work done with the oral authority of the officer authorised to grant retrospective licences, but not in fact within the terms of the written licence granted, the defect which he had the power to cure and ought to have cured, should be disregarded. Even though the earlier work was not covered by a licence duly issued, and notwithstanding the view of the House of Lords as regards public officers not binding the Crown, the courts were prepared to hold that the work was properly authorised in the circumstances.

The result of that case would, I believe, support my view that there is merit in the appellants' contention in the instant case in so far as it affects liability for income tax. There was a great deal of correspondence between the taxpayer and the Commissioner, albeit outside the prescribed time for an objection to be made, which clearly indicated that the former was challenging the accuracy of the assessments. It was on this basis that a re-examination of the various assessments was embarked upon; and it was on this basis that the Commissioner entertained representations made by the taxpayer for had he not done so, it is inconceivable that he would have varied his assessments. Having done this, by what principle of justice does he now revert to his original arbitrary assessments? I would be inclined to treat the matter as if the taxpayer objected to the assessments, and I believe that the Commissioner considered the matter in that light also. I am afraid I am not prepared to share the view of counsel for the Commissioner, if I understand it aright, that any negotiations undertaken between taxpayer and Commissioner should be entirely disregarded. It must all depend on the circumstances.

In the result, I would move for allowing this appeal, so far as it relates to the income tax only. The most the Commissioner would have been entitled to would have been judgment in the sum of \$32,552.94 in that regard. But he would have been entitled to the various sums assessed as property tax which total \$4,056.75, not including interest on those amounts to date of payment, for it is clear that the question of the assessment of the property tax, even though raised, had not been settled. Indeed, in his letter of the 27th August, 1969—Exhibit 'B'—the Commissioner indicated that he proposed to raise certain queries, and 'as a result Property Tax Assessment and liability will be agreed on after those queries are answered.' Does this not indicate that the taxpayer's income tax liability had been agreed upon, but not so his property tax liability, and not until the latter had been settled was the Commissioner prepared to withdraw the writ? The taxpayer chose to ignore this part of the Commissioner's letter; but that does not, in my view, resuscitate the original assessment of income tax.

Having regard to the fact that the writ was filed before the negotiations commenced, I would not be inclined to interfere with the Order for costs in the court below for the Commissioner would have been entitled to judgment in any event, but for a lesser amount. The taxpayer having succeeded here in my judgment, would be entitled to some costs, and I would give him half his taxed costs.

SOLICITORS:

L.T. Persaud for appellants.

State *Solicitor* for respondent

JAGRANI DAS v. SURUJPAUL

[Court of Appeal (Luckhoo C, Persaud and Crane, JJ. A.)
May 7, July 13, 1973]

Prescription—Procedure—Application for prescriptive title to land—Originating summons—Whether originating summons is action—Application under Deeds Registry Ordinance, Cap. 32—Title to Land (Prescription & Limitation) Ordinance, Cap. 184 s. 4 (b)—Deeds Registry Ordinance, Cap. 32 ss. 36, 38.

The appellant applied to the court for prescriptive title to certain property under Cap. 184, by way of originating summons, pursuant to ss. 36 and 38 of the Deeds Registry Ordinance, Cap. 32, (Kingdon Edn), alleging that she and her predecessors had been in sole, exclusive, and undisturbed possession of the property for upwards of thirty years; and that since the year 1946 she had been in continuous and undisturbed possession in her own right by herself, her tenants, licensees, servants and agents.

HELD: The appellant has misconceived the procedure; an application by way of originating summons based on the allegation of sole and undisturbed possession, user and enjoyment as of right is not within the contemplation of the provisions of ss. 36 and 38 of the Deeds Registry Ordinance, Cap. 32.

Appeal dismissed. Judgment of the Full Court Affirmed.

JAGRANI DAS v. SURUJPAUL

Cases referred to include:

- (1) *Hollies v. Griffith* (1959) L.R.B.G. 279
- (2) *Hack v. London Provident Building Society* (1883) 23 Ch.D.103.
- (3) *Re. Transport, Reece to Neilson* (1917) L.R.B.G.1 36
- (4) *Kardar Lall Gobind v. H.S. Cameron* (1970) 17 W.I.R. 132.
- (5) *Glen v. Sampson* (1972) 19 W.I.R. 237.

C.M.L. John and Mrs. Pearline Roach for the appellant.

F. Ramprashad, S.C., for the respondent.

CHANCELLOR: I agree with the conclusions reached by my brothers *Crane, J.A.* and *Persaud, J.A.*

PERSAUD, J.A.: The appellant applied to the High Court by way of an *ex parte* originating summons to be awarded title to a certain area of land, described in the schedule which was attached to the application, pursuant to *ss. 36 and 38 of the Deeds Registry Ordinance, Cap. 32, and s. 4 of the Title to Land (Prescription and Limitation) Ordinance, Cap. 184*. She based her application on the allegation that she and her predecessors in possession had been in sole, exclusive, and undisturbed possession of the property for upwards of thirty years, and that since 1946, she has been in continuous and undisturbed possession in her own right by herself, her tenants, licencees, servants and agents. She also maintained that the right to recover the property which might have been vested in any other person had been barred and the title of the true owner extinguished in terms of *ss. 5 and 13 of Cap. 184*. In an affidavit resisting the award, the respondent claimed that he and the appellant were joint owners of the land, they having inherited it from their respective mothers who were the only sisters of the original owner Bhagmonia; and that he and the appellant had been receiving rents from tenants for the land in equal shares.

When the matter came up for hearing, an objection *in limine* was taken to the effect that the application could not properly have been brought under *s. 36 of Cap. 32*. The judge agreed with this submission and so did the Full Court, with the result that the summons was dismissed.

S. 4 of Cap. 184 provides:

"The Court may make a declaration of title in regard to the land or interest in —

- (a) any action brought by or against the owner thereof or any person claiming through him or in which all the parties interested therein are before the Court; or
- (b) any application under section 36 or 38 of the Deeds Registry Ordinance; or

- (c) any application by a judgment creditor; or
- (d) any application under the rules of court;

and may order that the land or interest be passed to and registered in the name of the person who has so acquired such land or interest."

Upon the commencement of this appeal before this court, learned counsel sought to argue that an action would include proceedings by way of summons, thus seeking to invoke the provisions of para. (a) of s. 4 above. And he cited *Hollies v. Griffith*, (1959) L.R.B.G. 279) where Luckhoo, J. held that an action may be launched by originating summons under s. 3 of the Immovable Property (Sale of Interests) Ordinance, Cap. 187, by virtue of s. 2 of the Supreme Court Ordinance, Cap. 7, and Order 41 r. (1) and 43 r. (1) (j) of the Rules of the Supreme Court, 1955. It may very well be that, having regard to the definition of the word 'action' in s. 2 of Cap. 184 to include any proceeding in a court of law, the term 'action' in s. 4(a) would include an originating summons. But the position here is that the appellant has sought to ground her claim specifically on s. 4(b) which in turn restricts applications to the sort that can be brought under either s. 36 or 38 of Cap. 32. What is clear is that the type of 'action' contemplated by subsection (a) of s. 4 of Cap. 184 is not the type of procedure envisaged by an application under subsection (b) I can therefore find no merit in the first point.

The crux of the matter is really whether an application such as this, based on the allegations as they are, is maintainable under s. 35 of Cap. 5:01. To put it in a different way: Can an application, in whatever form brought, in which a prescriptive title is being sought, be launched under s. 36? That section provides as follows:

"Anyone who, by virtue of any contract or transaction or in any other manner has acquired the just and lawful right to the ownership of any immovable property in the Colony, whether registered in the name of or as the property of any other person or not, and who is not able to procure the passing to him and registration in his name of that property by reason of the death, mental incapacity, insolvency, or absence unrepresented from the Colony of the person who last obtained transport of the property or of any person or persons through or from whom that right has been mediately or immediately derived, or owing to any other cause, may apply to the court to order that the property be passed to him and be registered in his name, but that order, unless the court otherwise directs, shall convey only the title held by the previous owner."

Prescriptive title to land as s. 3 of Cap. 184 provides, may be acquired by 'sole and undisturbed possession, user, or enjoyment for thirty years, if such possession, user, or enjoyment is established to the satisfaction of the court and was not taken or enjoyed by fraud or by consent or agreement expressly made or given for that purpose!' And the proviso to the section

reduces the period to twelve years, except in the case of State lands, "if the court is satisfied that the right of every other person to recover the land or interest has expired or been barred and the title of every such person thereto has been extinguished.'

It is my view that ss. 3 and 4 must be read together, for s. 4 refers to 'the land and interest' which must mean 'land or any undivided or other interest therein' mentioned in the former. The unmistakable implication is that there must be sole and undisturbed possession, user, or enjoyment for thirty years (or twelve years as set out in the proviso) before the court can make a declaration of title. Where, however, the court is asked to make a declaration under s. 36 (or 38) of Cap. 32, certain additional conditions must prevail, the first, and most important, being that there must have been an acquisition of a just and lawful right, either by contract or transaction, or in any other manner. It must be borne in mind that for a period of prescription to run, possession must be adverse. But s. 36 does not contemplate such possession; nor does s. 38. The fact that s. 36 does not contemplate adverse possession is amply supported by the setting-down of the reasons, one of which must exist, for the application being made, viz., death, mental incapacity, insolvency, or absence from the country with no representative present, or any other cause. I understand the section to be providing for the situation where a person has acquired a right to property in due course of law, but is unable to obtain title thereto because either the person from whom he has acquired such a right has since died, is suffering from a disability, or is out of the country, in which case, he may make application to the court for an order vesting title in him. This is not the position in the instant case, and it passes my understanding that the appellant should seek her remedy under s. 38.

I agree that the appeal should be dismissed, and that the decision of the Full court should be affirmed.

CRANE, J.A.: This appeal is susceptible of two questions for decision. The first is: Are the pleas of the applicant that she has (i) for upwards of 30 years in the right of herself and predecessors in title; (ii) from the year 1946 by herself, her tenants, servants and agents, been in sole, continuous, exclusive and undisturbed possession, *nec vi, nec clam, nec precario*, of lots 3 and 4, parts of Grant 2051 on the left bank of the Mahaicony River, East Coast, Demerara, available to her in an application under s. 36 or s. 38 of the *Deeds Registry Ordinance, Cap. 32*? In other words: Does the common law doctrine of adverse possession based on positive prescription by "user as of right" lie within s. 36 or s. 38? If the answer is no, then this matter admits of no

further investigation and must forthwith be dismissed. If, however, either the one or the other of the above pleas is available, then the second question will arise, viz: Has the applicant proved her inability to procure the passing of the above-mentioned property to her and its registration in her name because of its previous owner's death or disability as is mentioned in the genus or category in s. 36? (See below].

A perusal of *s. 35 the Deeds Registry Ordinance Cap. 5:01*, shows there are two prerequisites for preferring an application by originating summons thereunder. Firstly, the applicant must show he has acquired "the just and lawful right to the ownership of any immovable property by virtue of any *contract or transaction or in any other manner*". Secondly, he is unable to obtain the passing of the property to him and its registration in his name because either the person who last obtained transport for it, or any person or persons through or from whom he has mediately or immediately acquired his right of ownership is, or are dead, mentally incapacitated, insolvent, or has left the State of Guyana without leaving behind a representative to transact his business, *or owing to any other cause*, which general words I interpret *ejusdem generis* with the precedent genus of category.

Thus is built into s. 36, the notion that the acquisition of the just and lawful right to the ownership of immovable property may be mediately or immediately derived through or from any person or persons now deceased, or, as stated in the section, from such person or persons as are living but under a disability that is the equivalent of death. So a purchaser or transferee may have derived the right to ownership by having directly purchased or transacted it with a deceased person, or had the benefit of the contract or *transaction wherein he derived the right to ownership handed down to him through a person or succession of persons, now deceased, or under disability as aforesaid*. Thus, anyone may be able to show in an application under s. 36 that he has inherited the right to ownership of the immovable property from his ancestors by *will or inheritance*.

In contrast with the above, ss. 13 and 14 of the Deeds Registry Ordinance, Cap. 32, require as a condition precedent to title vesting in a purchaser, all transports, mortgages and leases to be executed and passed before the High Court, and to be registered and filed as of record in the Deeds Registry. However, so long as both requirements in s. 36 are fulfilled, application may be made to the High Court for an order on the Registrar that the title of the person from whom the right to ownership in the property was obtained be passed to and be registered in the applicant's name.

S. 36 is worded thus:

"Anyone who, by virtue of any contract or transaction or in any other manner has acquired the just and lawful right to the ownership of any immovable property in the Colony, *whether registered in the name of or as the property of any other person or not*, and who is not able to procure the passing to him and registration in his name of that property

by reason of the death, mental incapacity, insolvency, or absence unrepresented from the Colony of the person who last obtained transport of the property or of any person or persons through or from whom that right has been mediately or immediately derived, or owing to any other cause, may apply to the court to order that the property be passed to him and be registered in his name, but that order, unless the court otherwise directs, shall convey only the title held by the previous owner."

Ex facie, it would appear that so long as the second condition is also satisfied, the scope or ambit of the above section is wide enough to enable any application to be made in respect of any right to ownership or interest whatsoever in immovable property that can be bought or sold or transacted for including possessory or prescriptive rights in land. But it will be necessary for me to determine in particular whether prescriptive rights fall within the acquired right to ownership of which s. 36 speaks, and, in case they do, to discover their nature and extent, inasmuch as s. 4(b) of the *Title to Land (Prescription & Limitation) Ord., Cap. 184*, makes this investigation compelling by conferring on the High Court a discretionary power to issue a declaration of title to "the land or interest in any application under s. 36 or s.38 of the *Deeds Registry Ordinance*.....and may order the land or interest be passed to and registered in the name of the person who has so acquired such land or interest." With the thought that a declaration of title under s. 4 of Cap. 184 may issue only in relation to undivided, possessory or prescriptive rights in land, I think the above power is a clear indication which one may regard as a clue to the legislative intent—that prescriptive rights have always been within the acquired right to ownership of immovable property in s. 36.

The question which arises for determination in this case, however, is whether, on their true construction, the words "or in any other manner" in s. 36 are wide enough to countenance an application for a declaration for common law prescriptive title to land based on sole and undisturbed possession, *nec vi, nec clam, ne precario*, i.e., in respect of the applicant's adverse possession in *sua propria* for either the longer or shorter period in the enacting part or in the proviso to s. 3 of the *Title to Land (Prescription & Limitation) Ordinance Cap. 184*. In other words: Is an application of prescriptive title at common law (under s. 3 of Cap. 184) also cognisable under s. 36 of Cap. 32? In seeking a solution to the problem, I shall adopt two lines of approach—(a) the historical setting and context in earlier and later ordinances, and (b) the *ejusdem generis* rule of interpretation.

HISTORICAL SETTING AND CONTEXT APPROACH. It has been shown that s. 36 was in all probability modelled on s. 2 of the *South African Cape Derelict Lands Act, No. 28/1881*, and that it differs therefrom in two respects, namely, (i) the phrase "by prescription", while being included in s. 2 of the South African Act, is excluded from s. 36; (ii) the phrase "or as the property", while being included in the expression in s. 36—"whether registered in the name of *or as the property* of any other person or not"—is

not included in s. 2 of the South African legislation. S. 2 of the *South African Cape Derelict Lands Act, 1881*, reads as follows:

"Any person who shall, *by prescription*, or by virtue of any *contract or transaction, or in any other manner*, have acquired the just and lawful right to the ownership of any immovable property in this (Province), registered in the name of any other person, and cannot procure the enregisterment of such property in his name in the Land Register in the manner and according to the forms of that purpose by-law provided, by reason of the death, mental incapacity, insolvency, or absence from the (Province), of the person in whose name such property stands enregistered as aforesaid, or of any person or persons through or from whom such right shall have been mediately or immediately derived, or owing to any other cause, may apply by petition to the Supreme court to order registration of title to such property in his name in the Land Register."

I think there is every reason for believing from its wording that s. 36 was indeed patterned on the South African Act. If this be so, it is very likely, and, I would think, reasonable to conclude from the context which will be presently examined, that the local Legislature considered it expedient to enact that section with modifications to suit local conditions such as existed at the time of its enactment. I will endeavour to show through historical antecedents, which are unavoidable, that what was foremost in the minds of the Legislature in the year 1919 was probably the fact that the Civil Law, having only been abolished three years previously as the common law of Guyana, there arose the necessity to preserve with respect to immovable property, every "right of ownership or other right, title or interest" acquired or vested under the old Civil Law and to bring it into conformity with legislation passed after the abolition of that law.

But what did the Legislature intend by not incorporating the word "prescription" within the section as did the South African Act? Was it considered superfluous to do so, inasmuch as that concept may have already been included within the general words—"or in any other manner"? This question can only be resolved on the true construction of s. 36 in the light of the power conferred by section 4(b) of Cap. 184.

In construing s. 36 it would be unavailing, in my view, to try to discover what are the reasons for such differences as there are in the phraseology of the local and the South African sections. To adopt such an approach would only lead to confused thinking and to erroneous impressions and conclusions gained from making unprofitable comparisons between them. I have always found it a good working rule, when construing the language of a later statute *in pari materia* which is differently worded from an earlier, to bear in mind the counsel of *Jessel, M.R.* in *Hack v. London Provident Building Society*, (1883) 23 Ch.D. 103 (at p. 108):

"It is the duty of the court first of all to find out what the Act of Parliament under consideration means and not to embarrass itself with

previous decisions on former Acts when considering the construction of a plain statute framed in different words from the former Acts. *We have first to see what this Act of Parliament says.*"

"Any other course," said the same judge in *Ex parte Blaiberg*, (1883) 23 Ch. D. 254 (at p. 258), "would be apt to lead us astray. If the later Act can clearly have only one meaning we ought to give effect to it accordingly. But if, instead of doing this, we compare it with the former Act, and say that it differs from it to such and such an extent.....and then consider the decisions upon the former Act, we might in that way go back to half-a-dozen older Acts, and, after considering the decisions on them, we might at last arrive at a conclusion exactly contrary to the later Act.'"

I shall therefore construe the general words "or in any other manner" in s. 36 in their context with special reference to what was said by Viscount Simonds in *Attorney General v. H.R.H. Prince Augustus*, when, in a similar exercise, he had occasion to construe with respect to the conferring of British nationality on the respondent, the general words "or hereafter to be born" which followed the phrase "all persons lineally descending from Princess Sophia, Electress of Hanover" in the preamble to a statute of Queen Anne. Viscount Simonds said: [(1957) 1 All E.R. at p. 53]

"For words, *and particularly 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 that the statute was intended to remedy."

Obviously, some provision in the form of s. 36 was necessary in view of ss. 2(3), 3(1), 3(4)(c) and 4(1) of the *Civil Law of Guyana Ordinance, 1916*, which abrogated Roman Dutch law in Guyana. While s. 2(3), on its coming into force, preserved any existing "right of ownership, or other right, title or interest in immovable property", s. 3(1) abrogated Roman Dutch law; s. 4(1) provided that title by prescription to immovable property may be declared by the Supreme Court and empowered that court, on the fulfilment of specified conditions, to issue a declaration of title therefor; and s. 3(4) (c) (not referred to in any of the judgments of the courts below) made registration of transfers and declarations of prescriptive title to land by vendors a condition precedent to the vesting of title *in purchasers, claimants or other transferees*. [See below] In my view, it is impossible to *explain properly and resolve the present difficulty in s. 36 without reference to s. 3(4) (c) of the Civil Law Ordinance, No. 15/1916, particularly as both sections are concerned with conditions necessary for the purchase, transfer, the vesting of title in immovable property and its registration, the phrase in sections 36 - "whether registered in the*

name of or as the property of any other person or not"—obviously providing the connecting link between them.

In *Re Transport, Reece to Neilson*, (1917) L.R.B.G. 136, Reece made application to pass a transport to Neilson of an undivided interest in Plantation Lucky Spot, on the left bank of the Demerara River. Reece's claim to pass the transport was based on prescriptive rights, which he supported by affidavit as was formerly the practice. The Registrar reported to the court that the transport was not in order, because no declaration of title was made by the court or a judge as required by s. 4(1) of the *Civil Law of British Guiana Ordinance, No. 15/1916*. Hill, J. held that after the coming into force of Ordinance No. 15/1916 on January 1, 1917, any person who was desirous of passing a transport or conveyance of immovable property under prescriptive rights, whether those rights accrued *before* or *after* the coming into force of the Ordinance, must first obtain a declaration of title from the court under the provisions of section 4(1) of the ordinance.

From the foregoing, it would appear that what the Legislature means to convey in s. 36 by the use of the phrase, "whether registered in the name of or as the property of any other person or not," is the idea that a vendor's neglect to register a transfer or declaration of title to immovable property is to be no obstacle to an application of a purchaser to have title passed to him and registered in his name. If this view be correct, then it seems to me possessory rights in land, a declaration of prescriptive title to which s. 3(4)(c) of ordinance No.15/1916 made it necessary to have *registered* as condition precedent to title vesting in a purchaser, transferee or claimant, are clearly within the ambit of s. 36. The right to make an application "is thus given to anyone who has by either contract or transaction directly acquired the just and lawful right of ownership in the possessory rights of another or *indirectly or mediately* derived them through some other or *others, and to have title thereto passed to him and registered in his name*. Subject to the provisions of s. 36, anyone may apply for title to the possessory rights of another, whether or not that other has obtained, as the law requires, a declaration of title which is registered in his name. The law requires registration of a declaration of title before title vests in a purchaser, but a failure to have it registered is to be no impediment to an application under s. 36 for the passing of the possessory title acquired directly from or indirectly through another and to have the same registered in the acquirer's name.

In my judgment, the rules of construction are in favour of this view, because, notwithstanding the repeal of s. 3(4) (c) by s. 41 of the *Deeds Registry Ordinance, No. 17/1919*, on the very same day when s. 36 became law, s. 3(4)(c) specifically referred both to present and future Ordinances, and rules dealing with a subject *in pari materia*, viz., registration. To illustrate my thinking: Let us suppose that in *Re Transport, Reece to Neilson* (above), Neilson had purchased and gone into possession of Reece's prescriptive undivided interest, that Reece had died before obtaining a declaration of title to

it, and so could not have the same registered in his name in accordance with law. I think it is clear in such case, Neilson could have applied for and obtained the relief and remedy which s. 36 affords, for he would thereby have acquired the just and lawful right to the ownership of Reece's possessory interest irrespective of whether the latter had obtained a declaration of title and had the same registered in his name. Neilson would have acquired that right because the law in no way prohibited him acquiring a *jus ad rem*, i.e., the right under an agreement of sale to call for a legal transfer of Reece's possessory interest. The law only prohibited Reece's title from vesting in Neilson "*unless and until*" Reece's declaration of title was registered. It was in this way s. 3(4)(c) (now repealed) expressly dealt with the matter of the acquiring of another person's possessory rights in land. S. 3(4)(c) is therefore inseparably linked with, and must be read as one with both the present conveyancing system in the Deeds Registry Ord, Cap. 32, and with s. 4(b) of the *Title to Land (Prescription and Limitation) Ordinance, 1952, though much later in time.*

When one considers that s. 4(b) is a conveyancing and registration section like s. 36, and that ever since the year 1917 the Legislature had, as we shall presently see, expressed its intention that registration should be conducted in accordance with any present and future Ordinance and rules dealing with that subject, I do not think it is at all difficult to discover its intention when it conferred on the High Court the power in s. 4(b) above-mentioned. It seems to me it was the Legislature's will that wheresoever expressed, all present and future rules and Ordinances dealing with conveyancing and registration are to be read and construed together as part and parcel of one general system. Later on, I shall consider s. 4(b) more fully in relation to ss. 36 and 38 of Cap. 32, but it is interesting for purposes of comparison to note this approach in construction is identical with that I once took when construing s. 65 of the *Criminal Procedure Ordinance, Cap. 11. [See R. v. Hussein, ex p. Director of Public Prosecutions, (1965) L.R.B.G. at pp. 153-456, or 8 W.I.R. at p. 85].*

The rule as to the exposition of one or more Acts [i.e., s. 36 of Cap. 32 and s. 4(b) of Cap. 184] by the language of another Act *in pari materia* [i.e., s. 3(4) (c) of Ord. No. 15/1916] is well known. It was LORD MANSFIELD who comprehensively explained it in *R. v. Loxdale, (1758) 1 Burr*, in this way (at p. 448):

"Where there are different statutes *in pari materia*, though made at different times, or even expired and not referring to each other, they shall be taken and construed together, as one system and as explanatory of each other."

What is important to observe here, I think, is the fact that LORD MANSFIELD spoke of statutes "not referring to each other" in the instant case, however, the situation is an *a fortiori* one, since s. 3(4) (c) has referred to Ordinances and rules "now or hereafter dealing with such registration".

This seems to me indicative of the Legislature's intention that all conveyancing and registration rules and Ordinances, should be so connected as to form one system or code of legislation which must be read together.

Acquired rights in immovable property would undoubtedly have been seriously impaired and rendered meaningless in the hands of owners had the death or other like incapacity of vendors or other transferors been allowed to stand in the way of a conveyance of those rights. That was why provision was made for their preservation, and their conveyance and registration in the new structure built into *s. 36 of the Deeds Registry Ordinance, No. 17/1919*, the long title of which reads:

"An Ordinance to regulate the office of the Registrar of Deeds of British Guiana and to amend the law relating to the *execution and registration of Transports, Mortgages and other Deeds.*"

The conveyancing system was accordingly *amended* in 1919 with respect to the method and manner of passing title to immovable property and its registration in the Deeds Registry.

I have shown registration as a prerequisite to the vesting of title first began on the 1st January, 1917, when *s. 3(4) (c)* came into force. But the latter was merely tentative, as it anticipated the *Deeds Registry Ordinance* of 1920 above-mentioned, and the Rules of Supreme Court (Declaration of Title), 1923, in the following terms:

"Title to immovable property other than title by will or inheritance and the title to any easement, profit a prendre, or servitude connected therewith shall not vest in any purchaser or other transferee or claimant unless and until the transfer or declaration of title has been registered in accordance with any Ordinance or Rules *now or hereafter dealing with such registration.*"

I have already observed that the above section was repealed. Nevertheless, it was substantially re-enacted in *r. 7 of the Rules of the Supreme Court* the following manner:

"13. (1) 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.

(2) Movable property may be mortgaged in the same way as immovable property.

(3) All transports and mortgages passed after the commencement of this Ordinance shall be *registered* by the Registrar and filed as of record in the Registry.'

Under the former common law, title by prescription *vested* automatically after 331/3 years of exclusive possession *nec vi, nec clam, nec precario*. No

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formal act of conveyance was necessary to vest title in an adverse possessor. If or when it became necessary to pass title by prescription, that was done simply by affidavit. [See *Adams & Christmas v. Raghbir*, (1951) L.R.B.G. 90 at p. 94].

The word 'vests' in s. 13(1) above, it appears to me, is wide enough to include a person in whom there is title by prescription under our former common law, but who has not availed himself of the opportunity of obtaining a declaration of title and of having the same registered in his name. However, title being already *vested* in him, it is plain he is not a person who can make an application under s. 36, though it is conceivable that a purchaser or transferee from him may acquire the just and lawful right of ownership to his possessory rights, and apply for transfer and registration in his own name.

I think the important thing to observe about s. 36 is that it is intended solely for the benefit of a purchaser, transferee, claimant or other donee. It is a purchaser's and claimant's section in the sense that he has acquired either immediately or mediately the right to ownership to which he desires title.

It is evident from s. 13 of Cap. 32 that applicants having merely the right to ownership, with their vendors, transferors or persons from, or through whom that right has been directly or mediately derived, either dead or similarly incapacitated, would have been hard put to have transports passed to them for immovable property of which they may be in possession. It is this category of people s. 36 is intended to help; and if I am right, then there is yet another important point to observe. It is, that whilst our Legislature (unlike South Africa's) has deliberately excluded positive prescription as a mode of acquiring title in s. 36, it did not prohibit prescriptive rights from being bought and sold, or being acquired mediately by agreement. As I have shown, an agreement of sale of registered" or unregistered possessory right, title or interest to a purchaser was not, and is not, in any way invalidated by either s.(4) (c) of Ordinance No. 15/1916 or s. 13 of Cap. 32. Such a sale was and still is perfectly lawful. I would emphasise, all that those sections prevented was the *vesting* of the vendor's title to the interest in the purchaser, "*unless and until*" the vendor or transferor registered his declaration of prescriptive title to it. It is only in the sense of their acquisition by purchase or transaction that I think prescriptive rights may be said to fall within s. 36. But this is a very far way from saying the section provides for Jagrani Das preferring an application for title to prescriptive rights in respect of her own personal occupation, her predecessors in title, and/or her tenants, agents and servants.

The plight of those persons having just and lawful rights to ownership of immovable property who were unable to comply with the provisions of the *Civil Law Ordinance, No. 15/1916*, dealing with registration, must have been in the minds of the framers of s. 36. It must have been evident to them it was a tremendous handicap to purchasers and transferees that the new legislation required the presence *coram lege loci* of the vendor to execute transports,

mortgages and leases. Either a vendor's or his attorney's presence is essential in order to have title to rights of ownership under post-1919 legislation vested and registered in his purchaser's name. Further, it must have been obvious, in the circumstances, that a purchaser in possession under a verbal contract for the sale of land made before 1917 (permitted under Roman Dutch law) was greatly inconvenienced by not having a good selling title so much so that his only resort was to a collusive suit (which the Supreme Court deplored) in order to obtain one. [See on this point, '*A Treatise on the Law of Immovable Property*' by E. Mortimer Duke, at p. 65].

The conclusion therefore seems inescapable that it was with a view to "speedily and inexpensively" assisting just and lawful owners of rights of outstanding titles in immovable property to get them in and register them, coupled with the desire to achieve, as far as possible, the free alienation of lands in the country that the Legislature's adaptation of the South African section in question to local conditions was motivated. Such being the state of the law at the time of the passing of the *Deeds Registry Ordinance 1919*, there can be no doubt that at that time a purchaser's position could not have been described otherwise than but perilous had it not been for the enactment of *Section 29 of Ordinance No. 17/1919*, now. s. 36 of Cap. 32. His vendor or transferor may have died or become incapacitated in a manner similar to death, before he could effect registration and. transfer his title to the purchaser according to law.

This view must exclude an application like the present which is based on an applicant's own positive or acquisitive prescription. Nevertheless, there is equity in the section. It is designed to ensure, firstly, the lawgiver's determination not to allow a purchaser's, transferee's or claimant's just and lawful right to ownership, acquired either before or at any time after the 1st January, 1917, to be rendered merely barren or otherwise nugatory only because of the death or similar incapacity of his vendor, etc. and, secondly, the maintenance of the principle which is applicable in all progressive communities, viz., that land should be freely alienable, a principle which cannot be assured if a landowner does not have a marketable *title* to his land.

EJUSDEM GENERIS RULE OF INTERPRETATION

As I see it, according to my second line of approach, the applicant's claim to prescriptive title as aforesaid will depend on whether or not prescription in an applicant's own right can properly be held to fall within the ambit of the general words—"or any other manner"—which follow the special words immediately preceding them, viz., "contract or transaction", in s. 36. In other words, the question resolves itself into this: Do the precedent words—"contract or transaction"—creates a genus or category? If they do, then in legal contemplation, the accompanying general words must likewise be restricted to the same genus or category. This is the *ejusdem generis* rule of interpretation which, if held to apply, furnishes an additional reason for excluding the applicant's claim in her own right to title by prescription under the section. [See *Lopes v. Santos*, (1897) L.R.B.G. 39. 40.]

The purport of s. 36 is that the just and lawful right to ownership must arise by virtue of a "contract of transaction", that is to say, by some unilateral or bilateral act involving the expressed intention of one or more parties directed to the creation, transfer, or extinction of a right, and effective in law for that purpose. A right acquired by simple contract or agreement between two parties is bilateral since it is the creature of the declared wills of both parties. *If the right is acquired by testament*, or by inter vivos donation without the concurrence of the donee, that is a unilateral act of a donor. [See *Halley v. Halley*, (1960) L.R.B.G. 66, where there was an application under s. 36 to have certain property passed to the applicant and registered in his name by virtue of an alleged gift of it to him by his mother prior to 1905.] Either unilateral or bilateral form of expression is an act of party which fulfils the first requirement of s. 36.

In the light of the above analysis, a disposition under a will is a transaction of the unilateral kind. *This is why a testamentary disposition of a right or interest in immovable property sometimes forms the subject-matter of an application under s. 36, and why an executor or administrator who finds himself handicapped in being able to pass title to that interest to a devisee, invokes the assistance of that section. For example, a testator may have by will devised all his "possessory right, title and interest" in his farm 'Blackacre', and a right of way over his neighbours 'Whiteacre' which he had exercised in favour of 'Blackacre' for upwards of 30 years. Ordinarily, the devisee would be entitled to receive transport along with a declaration of title to the testator's respective possessory interest and right of way in these two properties. If, however, for reasons stated in the section, or "owing to any , other cause", the personal representative is unable to procure the passing and registration of title to them in the devisee's name, application may be made to the court by the personal representative with that end in view for "speedily and inexpensively" determining the matter.*

In the context, a transaction may include any legal means whereby one acquires or disposes of any right or interest in immovable property. It is also classified as an "act of the party" and may be inclusive of contract. Transactions are varied and complex. Among them are included transporting of immovable property, mortgaging, leasing, contracting with respect to the same and the transferring or assigning of rights and interests and cancelments concerning the same. One transaction may involve two or more of these classes of acts simultaneously. For example, the same transaction may be both a contract and a grant of an interest in land, e.g., a lease is such a transaction. A lease creates mutual rights and obligations between the parties, and at the same time grants a term for which the lease is to enure, which is an interest in the land.

I am pointing out all this not merely out of academic interest, but so that I might show a direct and distinct affinity between the two concepts of contract and transaction and to demonstrate their Connection in the same genus or category. I consider them both special words constitutive of more or

less a comprehensive and interrelated category or class of acts of the party, the unmistakable feature about them being that the right to ownership which they confer on the party who acquires it, undoubtedly stems from positive unilateral or bilateral action or agreement.

If my analysis of the concepts of the precedent special words in the expression under consideration is correct, then by the *ejusdem generis* rule their effect will be to restrict and control the scope and ambit of the general words so as to make the latter fall within the genus or category of the precedent words, and thus render it obligatory that the just and lawful right to ownership of which s. 36 speaks, be acquired, unlike by prescription, solely through the intention of the party from whom the right to ownership has been acquired. This interpretation will necessarily restrict the making of an application to acquiring the possessory rights by purchase or transaction, and not extend it to include the case where those rights are acquired by virtue of the applicant's positive prescription.

DECLARATION OF TITLE UNDER s. 36.

There remains for consideration the inter-relationship between s. 36 and s. 4(b) of the *Title to Land (Prescription & Limitation) Ord., Cap. 184*, a declaration of prescriptive title under which the applicant, Jagrani Das, has also sought. This section, in so far as it is relevant, says:

"4. The court may make a declaration of title in regard to *the land or interest* in —

(b) any application under s. 36 or s. 38 of the Deeds Registry Ord.;

and may order that *the land or interest* be passed to and registered in the name of *the person who has so acquired such land or interest.* "

The purport of s. 4(b) is clear. It seems to me by empowering the court to make a declaration of prescriptive title in an application under s. 36 or s. 38 of Cap. 32, when that power did not exist before, the Legislature has obliquely acknowledged thereby what I have already tried to show existed from the moment those sections became law, viz., that under s. 36 it was, and is, always open to an applicant to have passed to him and registered in his name, title to the just and lawful right to ownership of the possessory rights of another.

Whatever doubts may have hitherto existed with regard to the nature of s. 36 in so far as prescriptive rights are concerned, I think its construction has been undoubtedly aided by the survey of contemporary legislation. This, to my mind, has facilitated the task in discerning with some measure of precision the circumstances attendant on the exercise of the court's discretionary power to make a declaration of title. However, I think it is an over-simplification

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of the matter merely to say, as did the trial judge that s. 4(b) "applies to cases where the applicant can properly come under s. 36", a view adopted by the Full Court. Just exactly what cases "properly come" under s. 36 has not been, in my respectful view, in any way explained.

It is chiefly for the above reasons I do not think it is true to say, as has been said in the leading judgment of the Full court, that—"s. 4(b) of Cap. 184 introduced for the first time into s. 36 the concept of prescriptive user *nec vi, nec clam, nec precario*", and is "an incorporation by reference of the provisions of s. 36 of Cap. 32 into Cap. 184".

I am opposed to the above view that in the year 1952 common law prescription was introduced for the first time in s. 36, and say without fear of contradiction, s. 4(b) did nothing of the sort. The power given thereunder is only enabling. The High Court is merely given a discretionary power in an application under s. 36 to make a declaration of title in circumstances in which it could not have done so before 1952.

A reading of ss. 3 and 4 of Cap. 184, s. 36 and s. 38 of Cap. 32, conjointly, instantly shows what s. 4(b) does: This subsection confers jurisdiction on the High Court to make a declaration of title with respect to "the land or interest", an expression which is not unintentionally couched in identical language as that in the proviso of the precedent s. 3. It is plainly identified with "land or any undivided or other interest therein" in the enacting part of the same section, where, on the fulfilment of specified conditions, the court is empowered to grant title by prescription. From this, I think it must follow on the making of an application for a declaration of title in respect to any of the four paragraphs of s. 4 of Cap. 184, that prescription is obviously relevant. On the plain wording of s. 36, however, the application must be based on facts supporting a claim to the just and lawful right to ownership to a prescriptive right or interest in immovable property that has been acquired by purchase or by means of some transaction from someone who has already prescribed for it, either by the old common law method of user as of right, or under limitation of actions to recover land on the wording of s. 38.

We have seen that between 1917 and 1919 as the High Court was unable to make a declaration of title in favour of a purchaser or transferee where the latter had acquired merely the right to the ownership of a prescriptive interest in immovable property for which his vendor or transferor did not have a registered declaration of title. [See *Re Transport, Reece to Neilson*, (1917), above.] However, after 1919, a limited jurisdiction was conferred by s. 36 on the court to make an order—"unless the court otherwise directs"—to "convey only the title held by the previous owner". Thus, in a case where a purchaser acquired a possessory interest, say, of only 25 years, there was no power in the court to issue a declaration in his favour. This was because his vendor did not have a possessory interest of at least 30 years as the law required. [See *s. 4(1), Civil Law of Guyana Ord., 1916* (repealed).] The court's discretion to issue a declaration had to be exercised in accordance

with law. Where, however, a vendor or transferor with or without a registered declaration of title sold or transferred his possessory interest in immovable property of which he had been in adverse possession for upwards of 30 years, all things being equal, there was nothing to prevent the court from making a declaration in his purchaser's or transferee's favour. However, in an application under s. 36 after 1952, s. 4 of Cap. 184 vested an extended jurisdiction in the court. Thereafter, a discretionary power was conferred to make a declaration of title in respect of any land or interest title to which has been acquired by sole and undisturbed possession, user and enjoyment for not less than 12 years. But before making the declaration under s. 36, it behoves the court to satisfy itself that the applicant's claim is not being supported by evidence of his own positive or acquisitive prescription. The applicant must either be a purchaser or transferee of a possessory interest. He must have acquired the right to ownership of that possessory interest by purchase, gift, inheritance or otherwise from someone who has already prescribed for it by sole and undisturbed possession, user and enjoyment for not less than 12 years, or acquired it by limitation of actions to recover land under s. 38.

The references to "the land or interest" in ss. 3 and 4(b) of Cap. 184 are no indication, in my view, that the concept of prescription was thereby introduced in s. 36 for the first time. Those references admittedly relate to land for which title by prescription may be acquired, but I am quite clear that is a circumstance which cannot override the plain requirements of s. 36. I think the position is readily understood if only it is borne in mind that the application is essentially made under s. 36 of Cap. 32 and not under s. 4(b) of Cap. 184, the discretion in which is only ancillary. It seems to me all that was introduced by s. 4(b) into *ss. 36 and 38 of the Deeds Registry Ordinance*, was an extension of the court's jurisdiction to make a declaration of prescriptive title, in the one case, in favour of a purchaser or transferee, and in the other, in favour of a disseisor for a period less than the traditional 30 years; all that is essayed by s. 4(b) is the bringing of the provisions of ss. 36 and 38 of Cap. 32 in conformity with the spirit and intendment of the new and shorter period of 12 years' prescription that was introduced by the proviso to s. 3 and ss. 5 and 13 of Cap. 184, respectively. The effect of ss. 5 and 13 is to extinguish title to land or any interest therein after the expiration of the shorter period of 12 years during which any person may bring an action in respect of it. Accordingly, where before 1952 nothing short of adverse possession for a period of 30 years sufficed to enable the court to issue a declaration under either s. 36 or s. 38, after 1952 adverse possession for 12 years suffices.

But even where the land or interest does concern prescriptive rights, the High court will not be justified in making an automatic order nisi under s. 36 merely on an allegation on affidavit that such rights are involved, which was the point where, in my humble opinion, the trial judge fell into error in this case. I have shown in making a declaration, the court has a judicial discretion to exercise as indicated by the words "may make", and that for a declaration to issue the facts must *not suggest the applicant's is applying for prescriptive*

title at common law *in sua propria*. That would be fatal to the application. It is the duty of the judge to investigate in each paragraph under s. 4 of Cap. 184, the nature of the prescriptive right. He must determine whether the alleged prescriptive right is positive or negative, how it came to be acquired, through whom it has been acquired, and decide whether the person of inherence is he in whose favour the Legislature intends a declaration of title should be made and in whose name it should be registered. It is essentially a question of interpretation of the particular paragraph of s. 4.

RIGHT BY EXPROPRIATION UNDER s. 38.

When the right to immovable property has been acquired by expropriation, i.e., by dispossessing another from rightful ownership of it for the statutory period of limitation, the applicant becomes entitled to make application to have the property passed to him and registered in his name if he is unable from any cause to obtain transport in the ordinary manner and according to the usual forms. Here, it is important to understand his entitlement is not under common law prescription, but by virtue of the law of limitation of actions—the result of the joint operation of ss. 5,6,10 and 13 of the *Title to Land (Prescription and Limitation) Ord.*, No. 62/1952, Cap. 184, the gum-total of which is, that after the expiration of twelve years from the date of dispossession when the right to bring an action for the recovery of his land accrued, not only is the true owner's *title* extinguished, but also his *remedy*, i.e., his right to bring an action for the recovery of his land is barred. Today, s. 38 affords an example of perfect prescription under which the true owner, who has been out of possession for 12 years, loses not merely his right of action for its recovery, but also his right of title itself. This—, however, has not always been the law with us. In Guyana, prior to 1952, negative or extinctive prescription was of an imperfect nature. Only the true owner's remedy was barred, but his title was left intact. [See *Frank v. Ali Buksh*, (1943) L.R.B.G. 78, and *D'Aguiar v. Obermuller*, (1948) L.R.B.G. 68]

I mention the above to correct the error in *Duke's "Treatise of the Law of Immovable Property in British Guiana"*, at p. 63. There, the impression is given that title to land was always extinguished, as it is today, on proof of dispossession for a period of 12 years. The fact of the matter, however, is, that before the 27th December, 1952, the right to immovable property by expropriation was incapable of being acquired until 30 years had elapsed from dispossession, i.e., when the true owner's right of action had accrued. *Duke* arrived at the conclusion that 12 years sufficed to extinguish "all rights in connection with the land" by comparing, as he himself said, s. 4(1) and s. 4(2) of the *Civil Law Ordinance, No. 15/1916*, but surprisingly opined:

"Reading them together we find that *the owner loses all rights in connection with the land after dispossession for twelve years*, but disseisors, even if they were in possession from the very instant that the owner went out of possession and remained in possession or

continuously, do not acquire ownership by prescription until they continue in possession for eighteen years longer. So that for eighteen years the ownership of the land is in a state of suspense, although of course, the disseisors' possession will be good against all the world after the lapse of 12 years. We are not aware whether this absurdity was appreciated by the legislature *So that it appears that after the lapse of twelve years the dispossessor can apply to the court for the passing of transport* although he would not be able to apply for a declaration of title until after the lapse of thirty years."

When *Duke* wrote his treatise in the year 1923, it was not true to say an owner "lost all rights in connection with the land after dispossession for twelve years", or that the dispossessor could have applied to have transport passed to him after a lapse of 12 years from dispossession, i.e., on a mere negative or defensive title, because s. 4(2) which was structured on s. 14 of the *Limitation Ordinance 1856*, barred only his remedy to recover his land. It was only the owner's right to "make an entry" that s. 4(2) barred, not his right to re-enter possession under title at any time within 30 years from dispossession or accrual of his cause of action. The statement above is alarming because, if Duke is right, then it would have been permissible to have two "full and absolute" titles in respect of one property at one and the same time. Before 1952, on the doctrine of remitter, the true owner's *status quo ante* was always capable of revivor, notwithstanding the statutory lapse of 12 years after accrual to him of a right of action for his dispossession. The doctrine of remitter is explained in *Blackstone's Commentaries* 19, 189 in the following manner:

"Where he who has the right of entry in lands, but is out of possession, obtains afterwards the possession of the lands by some subsequent, and, of course defective title, he is remitted or sent, by operation of law, to his ancient and more certain title.

"The possession which he has gained by a bad title is *ipso facto* annexed to his own inherent good one; and his defeasible estate is utterly defeated and annulled by the instantaneous act of law, without his participation or consent. As if A disseises B, i.e., turns him out of possession, and afterwards demises the land to B (without a deed) for a term of years, by which B enters, this entry is a remitter to B, who is in of his former and surer estate. But if A had demised to him for years by deed or by matter of record, there B would not have been remitted. For if a man by deed takes a lease of his own lands, it binds him, because a man never can be allowed to affirm that his own deed is ineffectual; the same law holds if it had been by matter of record." (*Dictionary of English Law* by Earl Jowitt, at p. 1519.)

There is, however, no doubt at all our legislation relating to the limitation of actions prior to 1952 was based on the older English statutes. [Cf. 21 Jac. I c. 16; also see s. 14 of the *Limitation Ord.*, *Cap. 184 Major Ed.*] However, Gap. 184 is modelled on the modern English Limitation Act, 1939, which bars the remedy and extinguishes the title at one and the same time.

Distinguishing between the right to make an entry and entering into possession under title is of extreme importance. It is respectfully suggested it was a failure to do so that led the distinguished jurist into the error of thinking that since the true owner had lost "all rights in connection with the land", there was no point in the Legislature's permitting title to remain in a "state of suspense" for 18 years longer than the initial period of 12 years' dispossession. In *Kadar Lall Gobind v. H.S. Cameron et al*, (1970) 17 W.I.R. at p. 154, I endeavoured to explain the distinction between those two rights, viz., that the one was concerned with the making of continual claims by nominal or formal entries on land, but only with the intention of preventing the statute of limitation from running against the true owner; whereas the other was concerned with re-entering with the intention of remaining on the land after the true owner had regained possession of it from one who is not lawfully there. Only the former right was barred by s. 4(2) of Ord. No. 15/1916, and now by s. 11 of Cap. 184. In *Glen v. Sampson*, (1972) 19 W.I.R. 237 the right to enter possession under title was considered a substantive right that was vested in the true owner, and one which Parliament did not intend to be automatically defeated by s. 13 of Cap. 184. It is respectfully suggested the mistake made by the learned author of "*The Law of Immovable Property in British Guiana*" was probably caused by his applying to s. 4(1) (2) of Ord. No. 15/1916 the English *Real Property Limitation Act of 1833* (s.34), and the *Real Property Limitation Act, 1874* (s.1) when there was no warrant for so doing. Without setting out those two English sections, the joint effect of them is both to bar remedy and extinguish title at one and the same time. In Guyana we had not yet reached that stage of development in our land law in 1923. Prescription based on limitation of actions was then merely imperfect. What is now in substance s. 13 of Cap. 184 was not on our statute books when *Duke* wrote his learned treatise.

Perhaps the point I seek to make is merely of academic significance since the effect of ss. 5, 6, 10 and 13 of Cap. 184 is now simultaneously to bar the right of action and extinguish title after 12 years from the time when the right to bring an action for dispossession accrued. Nevertheless, from the reader's standpoint, I think the record ought to be set right. But for myself, I regret I cannot share the view that the Legislature was unappreciative of the "absurdity" of what it did when it barred only the remedy in s. 4(2) of Ordinance No. 15/1916, since it was the feature of the older English Statutes of Limitation to be purely negative in nature. They barred only the remedial right of the true owner, but did not extinguish his substantive right of title. The possessor acquired a title indirectly only, which might be defeated if the true owner in any way lawfully came to the possession again. My own opinion is the Legislature in 1916 was fully cognisant of the effect of what it did, but acted unduly cautious in giving the true owner too long a time peaceably to recapture his *status quo ante*, by exercising his right of entry under title during the additional period of 18 years. However, now that the demands of commerce have become more pressing in our modern and rapidly expanding

community in which the importance of land values play a vital role, the only possible answer today is to be found in s. 13 of Cap. 184. The true owner's title is extinguished today after only 12 years from the accrual to him of a right of action to recover his land.

CONCLUSION

The thing to bear in mind is that the application of which s. 4(b) speaks is one to be made in respect of possessory rights which have been purchased from someone who had already prescribed at law for them (s. 36), or in respect of limitation of actions to recover land (s. 38); but I am quite clear an application cannot be made in respect of facts such as would support the ingredients of s. 3 of Cap. 184, which is meant to deal with prescription at common law on the old concept of adverse possession.

So it seems to me, the reference made in the concluding part of s. 4(b) to "the person who has so acquired such land or interest", can apply to no other than the person and the type of interest capable of being acquired under s. 36 of Cap. 32, i.e., he who has acquired either mediately or immediately by virtue of a contract or transaction the just and lawful right to immovable property of another, and who is labouring under an incapacity which prevents him for the reasons stated in that section from acquiring title from that other person.

In my judgment, it was essential for Jagrani Das to comply strictly with the requirements of s. 36. The facts of her application do not accord with the purpose and intent of either s. 36 or s. 38, but rather with s. 3 of Cap. 184; her application is therefore misconceived. This is why I am in agreement with the decision of *Vieira J.* that the order nisi should be discharged. I would dismiss this appeal with costs.

Appeal dismissed.

Judgement of the Full Court affirmed.

Solicitors

M.A.A. Mc Doom for the appellant.

N.O. Poonai for the respondent.

CYRIL DURBEEJ
Appellant (Defendant)
and
BHAGWAN PERSAUD,
Police Constable No. 7137
Respondent (Complainant)
[Court of Appeal (Persaud, Cummings and Crane JJ. A)
May 29; July 24, 1973]

Magistrate—Jurisdiction—Discretion to hear and determine two or more complaints at one and the same time—Consents of all parties a pre-requisite—Consents of all not obtained—Whether magistrate commits a specific illegality or acted in excess of jurisdiction—Whether magistrate heard and determined the complaints in due form of law.

The appellant failed to affix retail selling prices to four price-controlled articles exposed for sale. He pleaded guilty to each of the four charges and was fined on each of them in the magistrate's court.

On appeal, the Full court held there was non-compliance with s. 28 of Cap. 15, the law requiring the consent of all parties before the magistrate could properly have dealt with two or more complaints at one and the same time and the result was a specific illegality as contended for.

The Full court however, held there was a procedural error not affecting the merits of the case, and dismissed the appeal.

On appeal to the Guyana Court of Appeal, it was contended for the appellant on an additional ground that the magistrate exceeded his jurisdiction by entertaining the four complaints together without the consent of all the parties.

On behalf of the respondent, it was argued there was in fact no illegality because the magistrate did not 'hear and determine the complaints', the appellant having pleaded guilty to the charges.

HELD: (i) the real question is whether the magistrate exceeded his jurisdiction. The magistrate had jurisdiction to try any one of the four complaints, and also jurisdiction to hear and determine all four of them together at one and the same time, but only with the consent of the parties. He did not have that consent and so he acted in excess of his jurisdiction.

(ii) (per Persaud J.A) to 'hear and determine the complaints' would include a plea of guilty, a narration of the facts by the prosecution, circumstances of a plea of mitigation and the pronouncement of sentence.

Appeal allowed. Judgment of the Full Court and magistrate reversed.

Cases referred to:

- (1) *Brangwyne v. Evans* (1962) 1 All E.R., 446.
- (2) *R. v. Salisbury & Amesbury, JJ Ex parte Greatbatch* (1954) 3 W.L.R. 29.
- (3) *R. v. Ashbourne Justices Ex parte Naden* (1950) W.N. 51.
- (4) *Aldus and another v. Watson*, (1973) 2 All E.R. 1018.

C.L. Luckhoo, S.C., for the appellant.

G.H.R. Jackman, Senior State Counsel, for the respondent.

PERSAUD, J.A.: The appellant was charged summarily before a magistrate with four contraventions of *Art. 4(1) of the Trade Control of Prices Order, 1963*, as amended, and made under *s. 5(4) of the Trade Ordinance, 1958*, the contraventions being that he failed to have the retail selling price affixed to four price-controlled articles which were exposed for sale in his shop at Dundee, Mahaicony, on the East Coast of Demerara. He pleaded guilty to all the charges and counsel urged certain circumstances in mitigation, whereupon the magistrate fined him \$500:00 (five hundred dollars) on each offence. The matters engaged the attention of the Full Court as one appeal where it was argued on behalf of the appellant that a specific illegality had been committed by the magistrate in the simultaneous hearing of the four complaints. That court held that there had been a non-compliance with *s. 28 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15*, (which requires the consent of all parties before a magistrate may hear and determine two or more complaints at one and the same time), resulting in a specific illegality having been committed, and the fact that the defendant was pleading guilty to the charges did not create a waiver of the necessity for the magistrate to hear and determine the complaints; but that for such specific illegality to have availed the appellant, it must properly have fallen within one of the grounds of appeal created by *s. 9 of the Summary Jurisdiction (appeals) Ordinance, Cap. 11*, *s. 9(k)* prescribes as a ground of appeal the following:—

" (k) some specific illegality, other than hereinbefore mentioned, substantially affecting the merits of the case was committed in the course of the proceedings therein or in the decision;"

But the Full Court held that the error in procedure did not affect the merits of the case, and sought to deal with the submission in these words:

" The appellant before the magistrate intended to plead guilty to the four complaints for which he had been summoned and which most certainly had been read out to him by the magistrate before he pleaded guilty to each one of them. The

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appellant had the benefit of representation by counsel, and it is perfectly ridiculous to think that he could have a shred of merit."

And they dismissed the appeal.

Before us, that submission was repeated, but counsel relied upon an additional ground which he obtained leave to argue, to wit:

"The magistrate's court exceeded its jurisdiction in the matter by taking the four complaints together without the consent of the parties",

thereby clearly relying on *s. 28 of Cap. 15, and seeking* to bring himself within the ambit of *s. 9(b) of Cap. 17*.

Counsel for the respondent's submission in answer is that the magistrate did not exceed his jurisdiction in that he had jurisdiction to hear each complaint, and that not every illegality—assuming there was an illegality—ousted jurisdiction, or led to an excess of jurisdiction. He further submitted that in fact there was no illegality in that *s. 28* by the use of the words 'hear and determine the complaints' contemplated the taking of evidence and an adjudication thereon which situation does not arise when a defendant pleads guilty.

We are of the opinion that hearing and determining a complaint would include a plea of guilty, a narration of the facts by the prosecution, a narration of the facts by the defence, a narration of the facts by the prosecution, a narration of the circumstances of mitigation by the defence (if any), and the pronouncement of the order or sentence by the court. *S. 27 of Cap. 15* seems to make this quite clear.

We feel that the real question here is whether the magistrate exceeded his jurisdiction. There can be no doubt but that he had jurisdiction to hear each complaint separately, and had he done so, there could have been no valid criticisms. But *s. 28 of Cap. 15* provides as follows:

"Where two or more complaints appear to arise out of the same circumstances the court may, if it thinks fit, and if all the parties consent, hear and determine the complaints at one and the same time."

If the magistrate had jurisdiction to hear each complaint by itself and could only have heard two or more together, if *he had the consent of all the parties*, and he proceeded to hear four complaints without having obtained the consent of the appellant, he will have exceeded his jurisdiction. So this is not a case, in our view, of whether the magistrate had jurisdiction to hear the matters, but whether he exceeded his jurisdiction by taking the course he did. It is perhaps superfluous to state that a magistrate, being a creature of statute, may not depart from the path defined for him by that statute.

In *Brangwyne v. Evans*, it was held that unless a defendant consents, either expressly or impliedly, it is wrong for two informations to be heard at the same time, and that 'the principle is of general application and, accord-

ingly, justices should never proceed to hear two or more informations at the same time without expressly asking the defendant whether he consents to that course.' The judgment concluded with these words: [(1962) 1 All E.R. 446, at 448].

It seems ... that the convictions on these three informations were reached contrary to law in the sense that the procedure which the justices adopted ought never to have been adopted and, as it was contrary to law, the only course which this court can take is to quash those convictions."

The point we would wish to make is that the court must ensure that the defendant is made aware of his rights, and must not take it for granted that he must know of those rights merely because he is represented by counsel or solicitor.

In *R. v. Salisbury & Amesbury, JJ. Ex parte Greatbatch* [(1954) 3 W.L.R. 29], LORD GODDARD, while agreeing that the enquiry as to whether an accused person wished to be tried by a jury must be addressed to the accused, saw no reason why, if the question was asked, solicitor or counsel, in the presence of his client, could not answer the question. The court, however, quashed the order made by the justices on the ground that the accused was not informed of his right to be tried by a jury. Similarly, in the case in hand, the appellant was not informed of his rights under s. 28 of Cap. 17. We feel, therefore, that on that ground the convictions ought to be quashed, the magistrate having exceeded his jurisdiction in that he failed to comply with the requirements of s. 28.

It may be said that this was a case of a mere irregularity, and if we were to follow the decision of LORD GODDARD, L.C.J., in the earlier case of *R. v. Ashbourne Justices Ex parte Naden* [(1950) W.N. 51], we should dismiss this appeal and affirm the decision of the Full Court. In that case, there was an application for an order of certiorari to quash a conviction for careless driving where the defendant was charged both for dangerous driving and careless driving. The two complaints were heard together, and the Court of Appeal thought that the justices were justified in assuming from the circumstances that the defendant's solicitor did consent to both charges being heard together. It was held that even if there was an irregularity in the proceedings, it did not follow that the court should grant an order of certiorari; that certiorari was granted where an inferior court acted without jurisdiction; that consent could not give a court jurisdiction which it did not possess, and a conviction made in such circumstances would be quashed. It was further held that in the case of a mere irregularity the court had a discretion in the

granting of the order, and would require if any injustice had been done. The court was of the view that no injustice had been done, and refused the order.

We are of the view that what was done here was more than a mere irregularity; the course adopted by the magistrate was contrary to law, to use

the language used in *Brangwyne v. Evans* (supra). He exceeded his jurisdiction, and even though the point may be regarded as a technical one, we feel justified, having regard to the authorities, in holding that the convictions cannot stand.

In the circumstances perforce, we must allow the appeal and reverse the judgment of the Full Court as well as that of the magistrate, and quash the convictions.

CUMMINGS, J.A.: The paramount question for determination in this case boils down to this: Did the learned magistrate have jurisdiction to hear and determine the offences for the commission of which the appellant was charged? Examination of the relevant statute law compels an affirmative answer. Any point taken with respect to want of jurisdiction had the offences been taken *seriatim* would therefore have been untenable, but although the magistrate had this jurisdiction he could not hear and determine the charges concerning "two or more" of these offences together unless the statutory conditions for so doing were first fulfilled, that is, he had first to obtain the consent of both appellant and respondent. Although, therefore, he had jurisdiction to hear and determine each offence, to hear them together as he did without the required consent was to act in excess of the jurisdiction which, I repeat, he undoubtedly had in his judicial district.

In my view, therefore, the answer to the question I posed at the beginning of this brief judgment is—he did have jurisdiction, but he acted in excess of it. It is quite clear that whether or not a magistrate acts in excess of his jurisdiction is a question which this court is competent to determine on appeal.

The grounds of appeal having been amended accordingly, I am of the view that the learned magistrate, although having jurisdiction to hear and determine the offences for which the appellant was charged, acted in excess of it when he conducted the trial in the way that he did. The position would, of course, have been different as far as this court is concerned, had there been a lack as distinct from an excess of jurisdiction, as the former could only have been considered here had it been raised before the learned magistrate. It will be observed that I have not stated the facts of the case in this judgment, as they have already been adequately dealt with in the judgment which preceded mine. I find it therefore unnecessary to repeat them here.

I would accordingly allow this appeal, set aside the judgment and order of the Full Court and quash the conviction and sentence of the learned magistrate.

CRANE, J.A.: There can be no doubt these complaints did arise out of the same facts and circumstances. All four of them arose out of the failure

and/or neglect of the defendant to affix price-control tags on four commodities he exposed for sale in his shop at Mahaicony.

Under s. 28 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, a magistrate has jurisdiction to hear two or more complaints at one and the same time "if all the parties consent". *Ex facie*, in view of the express requirement that *all parties* should consent, it would appear that section is intended to apply only to a situation where two or more complaint are made against different defendants, and not a case like the present of several complaints against one defendant.

In the case of *Brangwynne v. Evans*, (1962) 1 All E.R. 446, the head-note reads, "It has always been a principle of law that a defendant in a magistrate's court can only be called on to answer one charge at a time unless he consents, either expressly or impliedly, to informations being heard together; accordingly, a magistrate's court should never proceed to hear two or more informations at the same time without expressly asking the defendant whether he consents to that course."

Quite recently, the above-mentioned principle in *Brangwynne v. Evans* was applied to a case involving separate informations against two or more defendants, the question being whether the court had power to hear the informations together without consent of the defendants. In the Queen's Bench Division, the Lord Chief Justice in *Aldus and another v. Watson*, (1973) 2 All E.R. 1018, held that where separate informations are preferred against two or more defendants, a magistrate's court has no power to try the informations together without the defendants' consent even though each defendant is charged with an identical offence arising out of the same set of facts. So it appears there is no appreciable difference between a case where there are separate informations against two or more defendants, and a case involving two or more complaints against only one defendant. The principle is the same. The court must obtain the consent of the party or parties before it can have jurisdiction to hear and determine the complaints or informations.

This being the case, counsel for the appellant urges that the imposition of a fine of \$500 in respect of each of the complaints was "erroneous in point of law"; alternatively, that the magistrate had no jurisdiction in the matter. For myself, I am unable to see how it could be appropriately argued the decision is erroneous in point of law in a case where a magistrate fails and/or neglects to obtain a statutory consent. I am inclined to think the expression "erroneous in point of law" has relevance to misconstruction or misapplication of some specific provision of the law; but this is not the case here. Nor can I see that the alternative ground of a want of jurisdiction in the matter is at all relevant; although, even if it were, it would have been incumbent on counsel to have taken formal objection to the want of jurisdiction at some time during the progress of the case before the magistrate pronounced his decision. [See s. 9(a) Cap. 17.] On this being brought to his attention, learned counsel for the appellant sought and was granted leave to

amend his grounds of appeal to read—"The Magistrate's Court exceeded its jurisdiction in the matter."

I have no doubt the amended ground is the appropriate one in the circumstances for this reason: If he so wished, the learned magistrate had the undoubted jurisdiction to hear and determine each of the four complaints one by one. However, s. 28 of Cap. 15 also gives him a discretionary jurisdiction to hear and determine two or more of them at one and the same time, provided only, as a condition precedent *all the parties give consent*, i.e., provided both the prosecution and the defendant consent to the complaints being heard and determined at one and the same time. The learned magistrate, however, heard the four complaints at one and the same time, but determined them by convicting the defendant without having obtained his consent.

At most times it is rather difficult to discern with precision the distinction between acting in want of jurisdiction and acting in excess of it, but I think the position in this case is clear: The magistrate had jurisdiction to try any one of the four complaints, and also jurisdiction to hear and determine all four of them together at one and the same time, but only with the consent of the parties. He did not have that consent; so when he entertained the four complaints together he had at that time authority in law to deal with only one of them. It was in this manner I think he exceeded his jurisdiction. It seems to me as soon as counsel decided to seek an amendment to his grounds of appeal to include the ground that the magistrate acted in an excess of jurisdiction, it was a foregone conclusion that this appeal would be decided in favour of the defendant.

These are my reasons for allowing the appeal and setting aside the convictions and fines.

Appeal allowed

JAGROO v. GEORGE WIMPEY & CO. LTD.

[Court of Appeal (Luckhoo, C, Bollers, C.J. and Persaud J.A.)
January 29, February 2, July 30, 1973]

Building Operation—Construction work on sea wall—Whether building operation—Factories Ordinance, Cap. 115(G) s. 3(1). Factory—Demolition and reconstruction of sea wal—Site of operations a progressive one—Whether a factory—Meaning of "premises"—Factories Ordinance, Cap. 115(G) s.2.

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The respondents, a firm of building, electrical and mechanical contractors, were engaged in the demolition and re-building of certain sea-defence works. To execute this work, they employed carpenters, mechanical operators, mechanics, labourers and watchmen; the appellant was employed to watch the works. The nature of the work required the constant movement of equipment and materials as the work progressed. The equipment included mechanically and electrically propelled machinery, as well as lighting-plants, all of which required repairs and maintenance which were done on the site. The appellant claimed to be entitled to wages for overtime in respect of work done as a watchman on a number of Sundays.

HELD: (Luckhoo C., & Bollers C.J. concurring)

(i) on a fair construction of the provisions of the Factories Ordinance, Cap. 115(G) the sea-defence could not be described as a building, and the works were not building operations.;

(ii) the appellant did not establish that what he was employed to watch were "premises" within the meaning of the Ordinance.

Appeal dismissed. Judgment of the High Court affirmed.

Cases referred to include:

- (1) *Long Eaton Recreation Grounds v. Midland Rly Co.* (1901) 71 L.J.K.B 74.
- (2) *Waite's Exors v. Commrs of Inland Revenue*, (1914) 3 K.B. 196.
- (3) *Elms v. Foster Wheeler Ltd* (1954) 2 All E.R.714.
- (4) *Knight v. Demolition & Construction Co. Ltd.* (1953) 2 All E.R. 508.
- (5) *Aylward v. Matthews* (1905) 1 K.B. 343.

Ashton Chase with Miss S. Doobay for the appellant.

C.L. Luckhoo S.C. for the respondents.

PERSAUD, J.A.: This is an appeal against an order of dismissal made by a judge of first instance of a claim brought by the appellant against the respondents. The claim is for overtime wages in respect of work done by the appellant as a watchman. The respondents are a firm of building, electrical and mechanical contractors, who were at the relevant time engaged in the demolition and rebuilding of the sea-defence works between Kitty and Liliendaal, on the East Coast of Demerara,,for a distance of one and a half miles. To execute this work, the respondents employed carpenters, mechanical operators, mechanics, labourers and watchmen. Various types of machinery, all mechanically or electrically propelled were used; work was done during the night for which the operation of lighting-plants was necessary, and from time to time repairs of various pieces of equipment were carried out on the site. As is to be expected where work of this nature is carried on, it was

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necessary to move the equipment and materials being used in the project almost every day to keep pace with the progress of the work. In this case the work commenced at the Kitty end and progressed eastwards. Upon completion, the wall with all the components measured seventy-five feet in width. This has been described by the trial judge as the wall complex. The machines and other equipment used were left overnight at whatever point work ceased for the day. The appellant was employed as a watchman and his duties included watching the works and the equipment and machinery which were being used. He claims double the normal wages payable to a watchman in respect of 40 Sundays during the period October 1969 to September 1970. He would succeed if his employment was in a factory within the contemplation of the *Factories Ordinance, Cap. 115(C)*.

A factory is defined by s. 2 of the Ordinance to mean:

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

- (i) the making of any article or of part of any article; or
- (ii) the altering, repairing, ornamenting, finishing, cleaning or washing, or the breaking up or demolition of any art; or
- (iii) the adapting for sale of any art.; or
- (iv) the generating, transforming or converting, or switching, controlling, or otherwise regulating electrical energy —

and the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control;

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

And s. 3(1) extends the provisions of the Ordinance to building operations and works of engineering construction. Learned "counsel for the appellant does not seek to bring his case within the definition of an engineering construction, but formulates his submissions in this wise. He urges —

- (a) that the arts., such as concrete, sandcrete frames and slates were made on the premises;
- (b) that arts., such as cranes and draglines were repaired on the premises, and the finishing of certain metal baskets which were used on the northern toe of the wall fell within (ii) above;
- (c) that there was the generating of electrical energy on the premises;

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- (d) that the entire work was a building operation as defined by the Ordinance, and therefore s. 3(1) applies;
- (e) that the demolition and excavation which took place brought the premises within the Ordinance by virtue of the Building (Safety) Regulations, 1955 (No. 4).

It might be preferable to dispose of (d) and (e) above immediately, as it is not difficult to see that neither applies. If the works carried out can fall within the definition of 'building operations', then the appellant would be entitled to succeed even though what is done is not done in a factory, in view of s. 3(1) (*supra*). A 'building operation' is defined by the Ordinance to be —

".....the construction, structural alteration, repair, or maintenance of a building (including re-painting, re-decoration and external cleaning of the structure), the demolition of a building, and the preparation for, and laying the foundation of, an intended building, but does not include any operation which is a work of engineering construction within the meaning of this Ordinance:"

It is clear that by reason of this definition the 'operation' must revolve around a building, and although the imperfection of language poses a definitional difficulty of determining with precision what 'a building' was intended to connote, the concept is normally associated with a structure of some size, which is intended to have some degree of permanence or at least to endure for some appreciable time. The verb 'to build' is often used in a wider sense than a substantive 'building'. Thus, a ship-builder is said to build a ship; a coach-builder to build a carriage; birds are said to build nests; but none of these when constructed can be called a 'building'. But it is a fact that different meanings have been attributed to the term, depending so much on the context, and in some instances on the interpretation of statutes. For example: A railway embankment was held to be a building [see *Long Eaton Recreation Grounds C. v. Midland Railway Co.*, (1902) 2 K.B. 574] but in ordinary language, and in normal circumstances, such an embankment would hardly be so described. But in *Waite's Exors. v. Commrs. of Inland Revenue*, (1914) 3 K.B. 196, it was held that embankments or sea-walls constructed against flooding at spring-tide were not 'buildings' within the meaning of the *Finance (1909-10) Act, 1910 (U.K.)*. The question then really is whether, on a fair construction of the particular definition in the context of the Ordinance, a seawall can be described as a 'building'. We do not think so, especially having regard to the objects and scheme of the Ordinance and the provisions of the *Building (Safety) Regulations, 1955 (G)* which regulations, intended as they were to apply to 'building operations' defined by s. 2 of the Ordinance, would become irrelevant to the question on hand if it were otherwise.

Counsel for the appellant contended that the expression 'building' in our legislation should be extended to include a wall, and that 'building' used in the definition of 'building operation' should be given its widest possible meaning.

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In *Elms v. Foster Wheeler Ltd.*, (1954) 2 All E.R. 714, the defendants were under a contract to manufacture, deliver, and erect four steam-generating plants at a power station which was in the process of construction. In order to do so, it was necessary not only to put in boilers, but to erect a substantial amount of steel stanchions, steel girders, and joists for the purpose of supporting the various items of plant which had to be put in, and also for the purpose of providing galleries, stairs and floors to make the various portions of the plant accessible when in due course the plant had to be worked. The question was whether work undertaken by the defendants involved part of the operation of a construction within the meaning of the *Building (Safety, Health and Welfare) Regulations, 1948 (U.K.)*. It was held that it was Romer, L J. felt that the answer to the question depended upon the construction of the regulation and the application of the regulation when construed to the facts of the case, and that in that case the defendants contributed to the structural work of the building as opposed to the installation of a plant simpliciter.

In *Knight v. Demolition & Construction Co. Ltd.*, (1953) 2 All E.R. 508, another case cited on behalf of the appellant, the question was whether brick arches enclosing blocks of retorts in a retort house which was being demolished, were buildings within the meaning of a regulation which applied 'to the demolition of any building or substantial part of a building'. It was held that they were. Here again, it was stressed that each case must depend on its own facts, bearing in mind the object of the Act. Parker J. held that one would in ordinary language describe the retort blocks as buildings, and that part of a plant may be a building, notwithstanding that it can also be described as a plant.

And again, in *Aylward v. Matthews*, (1904-05) 21 T.L.R. 196, a workmen's compensation case, it was held that a wooden platform, measuring 41/2 feet on each side, and over 30 feet in height, and intended to carry a steam crane for the purpose of raising materials for use in the permanent building which was being constructed, was a building within the meaning of the *Workmen's Compensation Act, 1897 (U.K.)*. The *ratio decidendi* of that case can be gleaned from the dictum of the Master of the Rolls which is reproduced hereunder. Again, there is ground for saying that the decision in that case turned on its own facts and on the Act concerned. The Master of the Rolls said [(1904-05) 21 T.L.R. at p. 197].

"It required some reflection before one could accept the proposition that a temporary wooden platform such as the present one, to be erected for raising materials for the erection of a permanent building, was itself a 'building'. But they were dealing with an Act in which they could not find any principle upon which its provisions should be interpreted, and they had to ascertain the interpretation of the Act as best they could from the language used and from the objects aimed at by the Act. The Act dealt (*inter alia*) with accidents to workmen when they were employed on or in or about a building which

exceeded 30 feet in height, and which was being constructed by means of a scaffolding. The elements of an accident which existed in such a case were the dropping of tools or other materials upon the head of a workman below, or a workman falling off the scaffolding. Those elements existed as much in the case of a wooden structure like the present one as in the case of a permanent brick structure of the same height. So far as any incident could be contemplated as likely to arise from the use of a scaffolding, that incident could be contemplated as likely to arise in the present case. It was a question of fact whether the structure was a 'building'

The case of *Lavy v. London County Council*, (1895) 2 Q.B. 577, is not on the same footing as the case in hand. There it was held that a wall eleven feet high which replaced a much lower wall was a 'building, structure, or erection' within the meaning of s. 75 of the *Metropolis Management Act, 1862 (U.K.)* which made it unlawful to erect a *structure* beyond the general line of buildings along a certain road.

In yet another case of *Stevens v. Gourley* (141 E.R. 752), it was held that a structure of wood, of considerable size (16 feet by 13 feet) and intended to be permanently used as a shop is a 'building' within the *Metropolitan Building Act, 1855 (U.K.)*, although not let into the ground, but merely laid upon timbers upon the surface. This was another instance of a case turning on its own circumstances, regard having been had to the legislation, its objects, and the mischief it was intended to cure. Indeed, in that case, Erle, C.J. recognised the difficulty of defining the term 'building' within the meaning of the statute, and did not attempt to do so, but he had no difficulty in holding that the structure in question was a building. *Elms v. Foster Wheeler Ltd.* (supra) was referred to with approval by Salmon J. in *McGuire v. Power Gas Corp. Ltd.* [(1961) 2 All E.R. at p. 544] when His Lordship said:

"It seems to me that whether any given structure is a building within the meaning of those regulations [i.e., the Building (Safety, Health and Welfare) Regulations, 1948] must turn very largely upon the facts of the particular case. The courts have from time to time considered what structures are or are not buildings. In each case, however, the court has pointed out that it is in effect deciding no more than a question of fact and at the end of the day one has to bear in mind the evidence about the structure and look at the pictures and models, if there are any, and say, in effect, is that in fact a building? In this case, not without some hesitation, I have come to the conclusion that the structure with which I am concerned is a building, and that the defendants were engaged in the operation of constructing it when the accident occurred."

Counsel for the appellant has submitted that if the *Factories (Safety) Regulations, 1953 (G.)* do not apply, then there are no other appropriate

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regulations devoted to the protection of the workman on a factory site in which case the legislation would not have achieved its avowed objective. This view was echoed by Salmon, J. in the *McGuire* case (supra) when he said (ibid): "I can see no reason why Parliament should have intended that workmen engaged on the construction of such a structure as this should alone be denied any statutory protection. It is common ground that if the regulations do not apply, then there are no statutory provisions applicable; that is to say, no statutory safeguards for the workers engaged upon the construction of structures of this kind." It is clear to our minds that the learned judge was there referring to workers actually engaged in work of construction, for he went on in his judgment to describe the nature of the work done, and concluded that it was a factory. We do not wish to be understood to be saying that watchmen should not be regarded as workmen to qualify for benefits under the Factories Legislation, but we hope to show that where a watchman is employed in a place other than a factory, he is not unprotected. Apart from prescribing wages, and hours of work, the Factories Legislation's principal aim is to afford protection from injuries to workmen engaged in factories.

But counsel for the respondents had directed his attack at the very foundation of the appellant's arguments. He says that for the appellant to succeed, he must establish one of three things, viz.: (a) that he was employed in a factory; or (b) that the operations in which he worked were building operations; or (c) that they were works of engineering construction. We have already dealt with the last two situations.

It is argued that the appellant must establish (or it must at least appear from the evidence) that he worked on 'premises in which, or within the close or curtilage or precincts of which' persons are employed in manual labour in any process for, or incidental to any of the purposes set out in the definition. The submission is that the wall upon which the works of demolition and reconstruction were carried on were not 'premises', but the concession has been made that if the wall can be so regarded, then the appellant should succeed. Therefore, it behoves us to examine this question in some detail.

Rather than looking to the law dictionaries for the various meanings which have been attributed from time to time to the term 'premises', we would refer to the dictum of LORD GODDARD in *Gardiner v. Sevenoaks R.D.C.*, (1950) 2 All E.R. 84 which, in our opinion, deals with the matter succinctly and quite adequately. In dealing with the question whether a cave could be regarded as premises within the *Celluloid and Cinematograph Film Act, 1922 (U.K.)*, LORD GODDARD said: [(1950) 2 All E.R. at p. 85].

" 'Premises' is, no doubt, a word which is capable of many meanings. How it originally became applied to property is, I think, generally known. It was from the habit of conveyancers when they were drawing deeds of conveyance referring to property and speaking of 'parcels'. They set out the parcels in the early part of the deed, and

later they would refer to 'the said premises', meaning strictly that which had gone before, and gradually by common acceptance 'premises' became applied, as it generally is now, to houses, land, shops, or whatever it may be, so that the word has come to mean generally real property of one sort or another. There is no doubt that from time to time the word 'premises' has been given different meanings, either extended or more restricted."

Counsel for the appellant has relied upon the case last cited for the proposition that because the *Factories Ordinance* is a 'safety Ordinance, 'premises' should be read in its widest possible sense. We accept that proposition as sound, but would point out that such reading must not be extended outside the scope of the Ordinance. Witness the further dictum of LORD GODDARD on the same page of the report cited: [(1950) 2 All E.R. at p. 85].

"I do not say that every cave would come within the term 'premises' in this Act, if, for instance, it was an open cave which be open to the outside air the whole time. This, however, was not that class of place. It was a place with a door, and, in fact, the excavations had been turned into a closed warehouse."

In the earlier case of *West Mersea Urban D.C. v. Fraser*, (1950) 1 All E.R. 990, the Court of Appeal had to determine whether a house-boat was 'premises' within the *Water Act, 1945 (U.K.)* to qualify for a supply of water for domestic purposes. It was held that 'premises' within the meaning of the Act meant property which had a sufficient degree of permanency in the site it occupied, and accordingly the house-boat did qualify.

It seems to us, therefore, that 'premises' though not a term of art, must have some appearance of permanence, and must be delineated by boundaries, even though such boundaries may not be visible, such as a wall, or fence, or ditch. A factory must occupy a fixed site, but a place is not excluded from the definition of a factory only by reason of the fact that it is in the open air. Perhaps we can best illustrate what we have in mind by referring to *Pease v. W.J. Simms, Sons & Cooke, Ltd.*, (1932) 1 K.B. 723, where the question was whether a house, one of many on building sites, could, when completed be regarded as a factory, where, when the operations on the building sites began, and the machines were being used for purposes of the construction of the houses, it might well be contended that the whole of the building site was a factory. That case concerned workmen's compensation for injuries suffered on houses which were held not to be within the precincts of the machinery used in the construction business, and therefore were not factories. Were one to apply the *ratio* in the *Pease* case to the case in hand, it would appear that there could have been factories on the various sites from time to time, but their exact location is indefinite from the evidence which has been led, and it would be idle to speculate. To our way of thinking, there is no question but that there must be geographical limits of some sort, and we would say that the use of the words 'in which' following the word 'premises' in the definition of the word 'factory' followed by the expression 'within the close or cartilage

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or precincts of which lends strength to that point of view. The original meaning of 'curtilage' is a court; 'close' is a derivative from the Latin *clausum*, which means something marked by boundaries so that it can be broken; and 'precinct' derived from the latin word *praecingere* meaning to gird.

We will digress somewhat to consider the case of *Beck v. Dick, Kerr & Co.*, (1906) 75 L.J.N.S. 569. While not urging that the work that was being done by the respondents was in the nature of engineering construction, counsel for the appellant before us has placed heavy reliance on that case, and to the dictum of LORD ATKINSON at p. 574 (*ibid*). In that case, a workman was injured in unloading rails for contractors, who were converting a horse tramway into an electric tramway, at a distance of seven hundred yards from the site of actual operations and fifty yards from part of the tramway so to be converted. He was at work in a railway yard in which, by arrangement with the railway company, the rails were stacked. The workman applied for workmen's compensation, claiming that he was injured 'on or in or about an engineering work' within the meaning of the Workmen's Compensation Act. No doubt counsel had hoped to give to the words by which 'factory' is defined in the *Factories Ordinance (G)*, a meaning akin to that given by LORD ATKINSON to the word 'about' in the U.K. legislation, that is to say, 'in close proximity to'. But that was not an end to the matter, for LORD ATKINSON was clearly of the view that the question was really one of user, for he said: [(1906) 75 L.J.N.S. at p. 574].

"I assume, therefore, for the purposes of this case that the 'engineering work' in which the appellant must have been engaged, if he is to recover, must be work confined to some physical area, and that he must, when injured, have been working 'on or in or about' that area. It is obvious, however, that difficulties arise in ascertaining what is the extent and what are the limits of the area of an engineering work which do not arise in the case of factories, docks, etc. In these latter cases the walls or fences built around the factory or dock, as the case may be, fix the boundaries and determine the area. In the cases such as the first mentioned there is no structural boundary. The area cannot, I think, be confined to the soil on which the rails are actually laid, nor in all cases to the street through which the tramway runs, nor even to the premises immediately abutting upon the street. The area must, I think, in the case of a railroad or tramway and other undertakings of that sort, be fixed by user—that is to say, by the carrying on of some portion of the general operation of construction, alteration, or repair which the employer is engaged in carrying out."

Thus it will be seen that that case does not support the appellant's contention in this matter. In the result, it is our judgment that the appellant has failed to prove that the place he was required to watch was premises as understood in law to bring it within the definition of a factory.

As we have indicated earlier, counsel had urged that unless the Factories Regulations applied to a workman, the latter is without protection.

Presumably, he was referring to the *Factories (Safety) Regulations, 1953 (G.)*, and the Building (Safety) Regulations, 1955 (G.) both of which have been made under the *Factories Ordinance*. The latter apply only to building operations, the definition of which has already been given, while the former seem to apply to those persons who are engaged in work incidental to the operation of a factory, such as operating or repairing machinery. Indeed, we very much doubt whether it can be said that a watchman performs manual labour, having regard to what we have said earlier in this judgment. We are, however, not called upon to determine that question.

A watchman is not debarred from receiving overtime wages, for these are prescribed by the *Minimum Wages Orders*. So it is not the case that he is entirely without protection, or that he is outside the pale of the labour legislation.

For the reasons we have given, we would dismiss this appeal with costs, and affirm the judgment of the learned judge in the court below.

Luckhoo, C., & Bollers C.J. concurred Appeal dismissed.

VISHNU NARINE SARJU v. FELIX WALKER (NO. 1)

[Court of Appeal (Persaud, Cummings and Crane. J.J.A.)
July 5, 25; October 26, 1973]

Damages—Personal injuries—Computation of damages—Principles to be observed—Heads of award.

Damages—Review of award by Court of Appeal—Approach by Court of Appeal

Costs—Fixed by trial judge—Discretion of trial judge—Review by Court of Appeal—Rules of the Supreme Court (1955) [G] O. 49, r. 20.

The appellant, while riding a bicycle, was involved in an accident with a motor car driven by the respondent, as a result of which he suffered severe head injuries, with laceration of the right side of the brain producing an intracerebral haematoma, paralysis of the left side of the body, and a compound fracture of the right forearm. He remained unconscious for three weeks, and an operation on the brain was carried out for the purpose of removing the haematoma. At the time of the accident, he led a normally active life for a young man of his age, and attended the Guyana Industrial Training Centre where he was pursuing a course in plumbing, with the hope of qualifying as a plumber. During this period he received a stipend of \$40 per week, and was paid his daily expense of travelling from home to the Centre.

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The medical evidence was that the appellant had lost his capacity to continue his studies; that he was likely to develop epilepsy in later life; that he had lost control of his bowel and bladder movements; that he was unable to speak properly; that it was necessary to have someone to dress him, and to look after the personal hygiene; and he could not pursue any gainful occupation, nor could he engage in any of the activities he was accustomed to prior to the accident.

The trial judge awarded the appellant a total sum of \$25,000 damages—\$15,000 for loss of pecuniary prospects, and \$10,000 in respect of the nature and extent of the injuries sustained, the nature and gravity of the resulting disability, pain and suffering, and loss of amenities. He also awarded \$680 as costs on the ground that the case was a simple one and devoid of complexities.

On appeal:

HELD: (i) in awarding damages for injuries, a court must look at

the overall figure at the end, and to arrive at this figure, awards must be made under the well recognised heads; although a court cannot award a plaintiff precise compensation, he will be awarded fair compensation in all the circumstances;

(ii) an award in respect of prospective earnings is intended to compensate an injured person for money he would have earned during his normal working life, but for the accident;

(iii) (Cummings J.A. dissenting) the court has a discretion to award, or not to award costs, and where the trial judge has shown that he has properly exercised that discretion, the Court of Appeal will not interfere.

Appeal allowed. Award of damages increased; Order for costs in court below affirmed.

Cases referred to include:

- (1) *West & Son, Ltd. v. Shephard* (1963) 2 All E.R. 625
- (2) *Davies v. Powell Duffryn Associated Collieries, Ltd* (1942) A.C. 601.
- (3) *Fletcher v. Autocar & Transporters Ltd.* (1968) 1 All E.R. 72.
- (4) *Watson v. Powles* (1967) 3 All E.R. 721.
- (5) *Ward v. James*, (1965) 1 All E.R. 568.

D. Jagan for the appellant.

C.A.F. Hughes for the respondent.

PERSAUD, J. A.: In this appeal, the appellant, even though the successful party in the court below, has attacked every award (including that pertaining to costs) of the learned trial judge. This is not said by way of criticism of the

appellant, for he is legally entitled to pursue this course if he wishes, but rather to indicate that it will be necessary by reason of the arguments adduced to examine and pronounce upon every aspect of the award made. In so doing, it will become necessary, of course, to examine the learned judge's reasons for coming to the conclusions which he reached.

The action arose out of an accident involving the appellant, who was riding a bicycle, and the respondent, who was driving a car, as a result of which the former suffered rather severe injuries. The appellant claimed damages alleging negligence in the respondent who counter-claimed. He succeeded on his claim, while the counter-claim was dismissed. He now contends on appeal that the award made by the judge was totally inadequate, having regard to the severity of the injuries suffered by him, and his resulting incapacity.

At the time of the accident, the plaintiff was just two months short of his twenty-second birthday, and when the action was heard he was twenty-three plus. The learned trial judge found that the respondent was entirely to blame for the accident, and the finding is not under attack. So that this appeal is concerned solely with the award of damages. The appellant was taking a course in plumbing at the Guyana Industrial Training Centre, for which he was paid a stipend of \$40 per week. He lived in the rural area, and his travelling expenses were met by the Centre. I think it will be not unreasonable to assume that he would have continued attending the course but for the injuries suffered as a result of the accident, and that he would eventually have qualified as a plumber, when, no doubt, he would have been able to earn more than \$40 per week. It would appear from the evidence that, prior to the accident, he led a normally active life for a young man of his age, in that he engaged in athletic exercises such as high-jumping, judo, karate and boxing. Now, he says, since the accident, and as a result of the injuries he received, he cannot take part in any of those sports; exposure to the sun causes him headaches; he cannot control his bowel and bladder movements; he has lost the power to hold things with his left hand; he now walks with a limp; he must have assistance to dress; he suffers from black-outs; and he cannot sleep properly due to headaches.

Now what are the injuries responsible for this abyss of helplessness into which the appellant says he has been plunged? According to the medical evidence, the appellant was admitted into hospital on the 9th April, 1971, suffering from 'severe head injuries with laceration of the right side of the brain producing an intra-cerebral haematoma, paralysis of the left side of the body—including left upper limb and left lower limb: and 'compound fracture of right forearm'. The appellant remained unconscious for three weeks. An operation on the brain was carried out for the purpose of releasing the intra-cerebral haematoma, and the appellant was finally discharged from the hospital on the 19th August, 1971. He was last seen by the same surgeon on the 18th July, 1972, nine days before he gave his evidence in this matter. Following upon that examination, the surgeon has painted a not too reassuring picture of the appellant's future; indeed he has fixed his disability as

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permanent and complete. Examination of the skull revealed a large bony defect about three inches in diameter over the right parietal bone—no doubt a post-operative condition—and the right forearm displayed a healed scar over the right upper postero-lateral aspect. I will quote extracts from the surgeon's evidence. These are as follows:

"Flexion of the right elbow was limited and movement of pronation (palm facing downwards) and supination (palm facing upwards) were also decreased.

"The grip of the right hand was weak. Examination on the left upper and left lower limbs revealed that plaintiff had a complete left spastic *hemiplegia* (this means that the whole of the left side was paralysed in stiffness) and there were no active movements in any of joints of the left upper and left lower limbs. This means that those joints can only be moved passively—that is by someone else or by use of the other arm.

"Passive movements revealed rigidity of all the joints of the left upper and left lower limbs and the reflexes were abnormal in these limbs.

"His gait was abnormal and he walks with a pronounced limp and drags the whole of the left lower limb as he walks. There is also muscle wasting of all the muscles of the left upper and left lower limbs.

"In my opinion the injuries suffered by the plaintiff—he suffered severe head injuries and a compound fracture of the right forearm. There is now definite evidence that plaintiff has severe irreparable damage to the brain. Although he is still attending physiotherapy I expect no further improvement on his condition. Wasting of muscle on the left side of the body would become more increased.

"Plaintiff is unable to speak properly and has to have someone dress him and look after his personal hygiene.

"Due to the weakness of the left side of his body he would be unable to sit up for long periods, nor to walk properly, climb stairs and take part in outdoor or social activities. He would not be able to partake in any form of studies and will not be able to pursue any gainful occupation. He is very likely to develop epilepsy in later life and in later years there might be psychological deterioration.

"The brain damage suffered by the plaintiff would lead to loss of control of bowels and urine. Blackouts are consistent with plaintiff's head injuries.

"I think plaintiff is almost sure to develop epilepsy in later life.

"Plaintiff's articulation of words was difficult.

"In my opinion the plaintiff may be able to sit and make strokes, e.g., a tally clerk does."

In the course of his judgment, the judge came to the conclusion that despite the severe injuries, the appellant had not been reduced to what, in common parlance, is called a *vegetable*; and even though much of the sunshine had gone out of his life, and physically he had undergone a metamorphosis to his decided disadvantage, the learned judge had formed the impression from a close observation of the appellant that there was still a spark of optimism arising, perhaps, from his youth. While lamenting the lack of evidence as to the appellant's prospects of advancement, and job security, the learned judge gave the fullest effect to the ordinary contingencies of life and the uncertainty of the appellant's earning capacity for the rest of his life. The judge, using a multiplier of 15, and having arrived at a mean income of \$1,080 per annum, after making allowances for income tax and imponderables, awarded \$15,000 for loss of pecuniary prospects, to which was added the sum of \$10,000 under the heads (i) nature and extent of the injuries sustained; (ii) nature and gravity of the resulting physical disability; (iii) pain and suffering; and (iv) loss of amenities. The judge tested his global award of \$25,000 thus:

"I had prominently in mind the fact that the immediate investment of a present lump sum of \$25,000 at, let us say, 7% interest per annum would produce an annual income approximately that which has been lost. I regarded this result as one rough guide to the fairness of the compensation to be awarded."

And again:

"I acted on the basis that one has to give and take a little each way and put life's contingencies in the balance. The result must be depressed damages."

And, dealing with the question of costs, the learned judge concluded his judgment with these words:

"Even taking into account the arguments by counsel for the plaintiff on the question of damages and the citation by him of the authorities appearing on the record, the case was a simple one devoid of complexities and I considered that \$650 was a proper sum in which to fix the plaintiff's costs."

As I have already indicated, every phase of the award made by the judge has been brought under attack. Learned counsel for the appellant divided his arguments under several heads: (1) Under pain and suffering, which he used to cover the judge's items (i), (ii) and (iii) above, he submitted that amount of \$10,000 was totally inadequate in that sufficient weight was not given to the nature of the injuries and the resulting physical disability; that the judge did not take into account the fact that the appellant was suffering from black-outs and would suffer epilepsy in later life; and that in assessing damages for pain and suffering, it must not be overlooked that a young person would in all probability undergo a longer period of pain and suffering than an older person simply because he has a longer life span before

him yet. Counsel has also urged that the judge should have awarded a sum of money to cover expenses that may be incurred in care and attention necessary because of the appellant's inability to look after himself. (2) So far as the loss of prospective earnings is concerned, counsel has submitted that this was really a mathematical process by which one's prospective earnings can be precisely calculated, and he expounded two methods of calculation, and has submitted that the judge ought to have used one of these, and demonstrated that whichever one the judge used, the amount would have been far in excess of \$15,000. (3) Though a small item, the judge should not have rejected the claim for the cost of the medical certificate, as the certificate was necessary for the preparation of his case. (4) The judge erred in fixing the costs without the consent of the parties.

There are certain principles by which an appellate court must be guided in matters of this nature. According to LORD MORRIS in *West & Son, Ltd. v. Shephard*, (1963) 2 All E.R. at p. 635, the damages awarded must be attacked on the basis that to someone apprised of the facts, the figure must seem startling and would suggest that it cannot be right. "The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present, it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment." And this is how the matter was put by LORD WRIGHT in *Davies v. Powell Duffryn Associated Collieries, Ltd.*, (1942) 1 All E.R. at p. 664:

"It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere whether on the ground of excess or insufficiency."

Now to ascertain whether the damages awarded are excessive or insufficient, it is inevitable that one should examine the method employed in assessing those damages. Counsel for the appellant planks for a mathematical formula at least for the damages relating to the loss of prospective earnings while counsel for the respondent rejects this method, and submits instead that the damages should be fair and reasonable; that the court should look at the global figure awarded, and if that is not unreasonable, the court should not interfere.

There can be little dispute but that compensation for injuries should be fair. Perfect compensation is hardly possible, and can be unjust in certain circumstances. In *Fletcher v. Autogar & Transporters, Ltd.*, (1968) 2 W.L.R.

743, *Diplock, L.J.*, expressed his opinion on the object of compensation thus: [(1968)2 W.L.R.at p.752].

"It is a platitude that purpose of compensatory damages in an action for personal injuries is to put the victim in the same position as he would have been if he had not sustained those injuries, *so far as money can do this*. But money never can do this. The effect of any physical injury is to make the life of the person who sustains it different from what it would otherwise have been. The change may be temporary or permanent; it may be slight or fundamental; but his position can never be the same as it would have been but for the injuries."

And later (*ibid* at p. 763):

"The award of damages should serve some social purpose, but I am uncertain as to the social purpose which the award of an additional sum is intended to serve. It cannot be intended as the modern substitute for blood-money, for that in case of death is fixed at a figure of the order of £500 (See the latest case in the House of Lords). .. I suspect that its social purpose is to relieve the horror and anguish which ordinary human beings who constitute society cannot but feel when contemplating the state to which the victim has been reduced. Death comes to all men; but to reduce a living man to the condition of a crippled animal shocks the imagination. Perhaps it is because there are infinite gradations of physical injuries that the courts have instinctively felt that the conventional sum, unlike that awarded where injuries cause death, should bear some relation to the sums awarded for severe though lesser injuries where the money can be used to ameliorate the victim's lot. Or it may be, and this I find a more satisfactory rationalisation, that in a case where the victim is not dead but still exists, one ought to provide a large margin to ensure that whatever contingency may occur for which allowance was not made in assessing the provision needed for the victim and his dependants, there will be funds to meet it."

LORD DIPLOCK agreed with *DENNING, M.R.*, that in cases of personal injuries to adopt the common method of assessing damages under three separate heads "may lead to error and tends to result in awarding to the earner of a larger income greater compensation for his actual physical and mental deprivations than would be awarded to a victim who earned a smaller income." In his judgment, *DENNING, M.R.*, arrived at a *global figure*, and then said [(1968) 2 W. L. R. at p. 751].

"Having reached that figure, I think it proper to look at it again as an overall figure to see whether it is a fair compensation, and reduce or increase it accordingly."

But it is noteworthy to observe that *LORD DENNING* himself had arrived at his final figure after considering several heads, having referred to his own

dictum in *Watson v. Powles* much of which I would like to quote [(1967) 3 W.L.R. at p. 1368]:

"In modern times, when damages are assessed by judges sitting alone, this court has discouraged judges from going too much into detail. When I was a judge of first instance, this court told me it was a mistake to subdivide the amount. On the whole I think this is right. *There is only one cause of action for personal injuries, not several causes of action for the several items. The award of damages is, therefore, an award of one figure only, a composite figure, made up of several parts.* Some of the parts may be capable of being estimated in money at all but must proceed on a conventional basis, such as compensation for pain and suffering and loss of amenities: see *Ward v. James*. At the end all the parts must be brought together to give fair compensation for the injuries. If a man is awarded a very large sum for loss of future earnings, it may help to compensate him for his future pain and suffering. If he has no loss of earnings, he may be more generously compensated for pain and suffering. And so forth."

And the matter was dealt with by *Orr, L.J.* in *George v. Pinnock* when he said [(1973) 1 W.L.R. at p. 126].

"It is thus as well to say that, whatever may have been the differing judicial views up to a few years ago and, indeed, up to 1970, as to whether a judge should simply award a global sum, or whether he should state in his judgment what are the main components of that figure, the modern practice, since *Jefford v. Gee*, (1970) 2 Q.B. 130 (decided on March 4, 1970), is to adopt the second course. It is true that that adoption has to a considerable extent come into being because of the differing rates of interest applicable to differing heads of damage under the *Jefford v. Gee* decision. On the other hand, it is also in part due to the general adoption of that considerable body of judicial opinion which held that plaintiff and defendant alike are entitled to know what is the sum assessed for each relevant head of damage and thus to be able on appeal to challenge any error in the assessments. In my judgment, this court should be slow to emasculate that right of litigants."

Even in times not so modern, the principles were much the same, for in *Phillips v. S.W. Rly. Co.*, (1879) 4 Q.B.D. 406, *Cockburn, C.J.* expressed them thus [(1879) 4 Q.B.D. at p. 407].

" the compensation should be commensurate to the injury sustained. But there are personal injuries for which no amount of pecuniary damages would afford adequate compensation, while, on the other hand, the attempt to award full compensation in damages might be attended with ruinous consequences to

defendants who cannot always, even by the utmost care, protect themselves against carelessness of persons in their employ. Generally speaking, we agree with the rule as laid down by Brett, J., in *Rowley v. London and North Western Ry. Co.* an action brought on the 9 & 10 Vict. c. 93, that a jury in these cases 'must not attempt to give what they consider under all the circumstances a fair compensation'. And this is in effect what was said by Mr. Justice Field to the jury in the present case. But we think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life. If a jury have taken all these elements of damage into consideration, and have awarded what they deemed to be fair and reasonable compensation under all the circumstances of the case, a Court ought not, unless under very exceptional circumstances, to disturb their verdict."

For my part, I agree with respect with the views expressed by *LORD DENNING* in *Watson v. Powles* (supra) which I understand to be that while one must look at the overall figure at the end, to arrive at that figure, awards must be made under the well recognised heads (and I will interject to observe that under some heads, mathematical calculation must, of a necessity, be involved), and the reason for adopting this course is as stated by *Orr, L.J.*, in *George v. Pinnock* (supra).

So, bearing the relevant principles in mind, I now proceed to examine the awards made by the learned trial judge. *Pain and suffering and loss of amenities*: I have not sought to subdivide under the same headings as the judge has done, and has been done in other cases decided both in this country and in other jurisdictions in this area, as I am of the view that both pain and suffering and loss of amenities must depend on the severity of the injuries received, and the resulting disabilities, if any, so that in effect these latter categories are absorbed into the main heading. The judge, as I have already indicated, awarded \$10,000. Remembering that awards for personal injuries in this region should bear some uniformity, and that we ought to establish and follow trends of our own, I have examined as many Caribbean cases as I could. I would like to refer to three of them as being relevant on this point:

In *Cornilliac v. St Louis*, (1964) 7 W.I.R. 491, the injured person, age 48 years, sustained a compound, comminuted, complicated fracture of the

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right humerus in the middle shaft, and a fracture of the upper end of the radius and ulna at the right elbow joint. He suffered intense pain for some time. Prior to the accident, he had been an active, physically fit, outgoing man, who enjoyed playing music on the saxophone and piano. He was full of zest. As a result of the accident, he could no longer play the musical instruments, and his outdoor activities were severely limited. Arthritis had set in, and was likely to get worse. He was awarded \$7,500 as general damages. This was increased on appeal to \$21,000 of which \$6,000 was for pain and suffering.

In *Aziz Ahamad, Ltd. v. Raghubar*, (1967) 12 W.I.R. 352, the respondent, who was 40 years of age, was involved in a motor accident in which he sustained a fractured dislocation of the eleventh and twelfth dorsal vertebrae resulting in complete paralysis of the lower limbs from the waist downwards (paraplegia); he was unable to walk except with the aid of crutches and double calipers; he was incapable of controlling the action of his bladder and bowels, and he suffered total sexual impotence. He was awarded \$48,000 as general damages, \$16,000 for loss of future earnings, and \$32,000 for the other matters which go to general damages. The Court of Appeal of Trinidad and Tobago held that even though the award was high, it was not inordinately high, and they refused to disturb it.

In the Guyana case of *Khan v. Bhairo & de Castro*, (1970) 17 W.I.R. 192, the appellant lost his right arm following a motor accident involving two vehicles, one of which he was the driver. In the Court of Appeal, *Bollers, C. (ag.)*, having arrived at a figure for loss of pecuniary prospects, added \$2,500 for pain and suffering. *Cummings, J.A.* agreed with the global figure arrived at by the learned Chancellor (ag.), and *Crane, J.A.*, while pointing out that the judge had not indicated what sum he had awarded under this head, approached the matter by using the second method of computation, and arrived at a figure more or less in the vicinity of that reached by the Chancellor (ag.), without indicating what sum should be awarded under this head.

Learned counsel has submitted that it must be taken that a younger person's span of life would be longer than that of an older person, and, therefore, the younger person who suffers from a permanent injury would have pain and suffering (and he could have added would have to endure the resulting incapacity) for a longer period. No doubt this would be so if he lived out his normal span of life, but as death is certain, the time of death is uncertain, and this is why allowance must be made for what has been described as imponderables and contingencies, and, I would add, the certain uncertainties of life.

Under this head, counsel has also argued that the judge should have taken into account additional expenses which the appellant was bound to incur in securing help to attend to him. It will be recalled that the appellant had said that he needed assistance to dress and to attend to his personal hygiene. It was also argued that no account was taken of the medical opinion that the appellant would suffer from epilepsy later in life.

There is no dispute that sums have been awarded in relation to expenses incurred for care and attention. See *Fletcher v. Autocar & Transporters, Ltd.*, (1968) 2 W.L.R. 743, *Hagger v. de Placido*, (1972) 1 W.L.R. 716, and *George v. Pinnock*, (1973) 1 W.L.R. 118. In the instant case, apart from the fact that this aspect would not appear to have been raised in the court below, the appellant is asking for 'expenses which he himself would have to meet, and not for losses suffered by his father, brother, or sister, by reason of their attending to his needs, in which event *Hagger v. de Placido* would not apply, as that case was concerned with the latter situation. And really, there is no evidence of the nature that was available to the plaintiffs in the other two cases cited immediately above to warrant an award being made in this regard. To do so would be sheer guess-work based on unsatisfactory evidence.

The medical evidence is that the appellant is almost sure to develop epilepsy in later life, and he himself has said that since the accident, he has suffered from black-outs. In assessing the general damages, the learned judge did take into consideration 'the nature and gravity of the resulting physical disability'. The question is whether the damages ought to be increased because of this very real possibility. How can a court quantify, in terms of money, the possibility that the appellant might suffer epilepsy in the future? It is again a question of guess-work. Damages can be quite substantial, or nominal, depending on the effects of the injuries received and the permanency or otherwise of those effects; and unless the appellant can show that the court below was patently wrong in its assessment, the Court of Appeal will not interfere. In the case before us, the judge seemed to have placed some weight on his observation of the appellant, an opportunity the benefit of which this court has not had. I do not feel that it has been demonstrated that the assessment of \$10,000 for pain and suffering and loss of amenities was inordinately low, and I am not prepared to accede to the appellant's submission by increasing it.

Loss of prospective earnings. Now I turn to loss of prospective earnings. An award of prospective earnings is intended to compensate an injured person for money he would have earned during his normal working life but for the accident. This involves the ascertainment of his earnings at the time of the accident, which is calculable, and this is related to an estimate of the remaining years during which he would have been able to earn, subject always to the ever-present imponderables. Other factors to be taken into account are income tax liability, and the fact that the payment is being made in a lumpsum as opposed to its being spread over a period of years which would have been the case were he to have earned it from his vocation. The matter has been stated thus in *Munkman's Damages* (3rd Ed. at p. 49):

"Before the loss of earning capacity can be converted into a capital sum, the judge has to consider the evidence and probabilities in the case, and arrive at firm conclusions upon three things. First, what would the plaintiff probably have been able to earn in the future, if he

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had not been injured; secondly, how long his incapacity continue; and thirdly, how much (if anything) is he still able to earn?"

The first method of computing loss of prospective earnings, as described by learned counsel is as follows: Estimate the working years remaining of this plaintiff's working life. This he fixes at 37, the plaintiff having been 23 at the date of award, and his working life being estimated to go up to 60 years. Then multiply his yearly income by 37, reduce the amount arrived at by ten per cent for income tax, and reduce the result further by one-third for imponderables, and the sum arrived at would be a proper award under this head. He cites *Jamaica Omnibus Services, Ltd. v. Caldarola*, (1966) 10 W.I.R. 117, the judgment of *Bollers, C. (ag.) in Khan v. Bhairo*, (1970) 17 W.I.R. 192, as examples where this method was used. The second method is to estimate the number of years the plaintiff would be expected to engage in his trade as a mason. This, counsel fixed at 20 years, and is described as so many years' purchase. The plaintiff's net income is multiplied by the number of years' purchase and the amount arrived at is the sum that should be awarded under this head. This method was employed by *Crane, J.A.*, in *Khan v. Bhairo* (supra) who used a multiplier of 10. But it is only right to point out that there need not be a fixed method of calculation. The proper thing to do is to have regard to the matters set out by *Munkman* (supra), and to arrive at a figure that is not unreasonable in the circumstances.

In the instant case, the judge estimated that the plaintiff would have learned in the future what he had been earning at the time of the accident, no less no more, found that he would have been incapacitated for the rest of his life, and that his incapacity rendered him unable to earn for the remainder of his life.

In those circumstances, the learned judge selected 15 as the multiplier. Fifteen years' purchase was described by *Denning, M.R.* as substantial in the case of a 20-year-old boy in *Senior v. Barker & Allen*, (1965) 1 All E.R. 818, where the plaintiff, a right-handed person, suffered the complete loss of three fingers, and part of his index finger, with the result that he lost the main part of the use of his right hand. Generally speaking, the multiplier should be in an inverse ratio to the age of the injured plaintiff, but it is easy to see that this can be extended to make an award out of all proportion to such a sum as would be justified in the circumstances. If regard were to be had to more recent cases, as, for example, *Khan v. Bhairo* (supra), where 10 was used as the multiplier in the case of a 43-year-old plaintiff, I would have been inclined to think that the proper multiplier should be 20. But the fact that one judge (not the trial judge) would be inclined to use a different multiplier is not an end to the matter. Was the multiplier 15 and unreasonable one in the circumstances?

The judge paid due regard to the doctor's evidence, and while not questioning the latter's ability at diagnosis, seemed to have had the appellant under very close observation as he gave his evidence. The judge went so far as to cause the appellant to perform the exercise of walking up the stairs of the

court; and this he did satisfactorily. The judge came to the conclusion that, in spite of the *doctor's prognosis, dark and dismal though it was, the appellant had not been reduced to the stage of being described as a mere vegetable*. When the judge of first instance has given due weight to all the evidence and circumstances before him, and then proceeds to *fix a multiplier* which cannot be regarded as unreasonable, a court of review should hesitate to substitute its own intelligent guess for that of the judge, for that is what it is really: an intelligent guess.

I would, therefore, use the same multiplier as the judge did, but my method of computation would be as follows: From the gross annual earnings of \$2,080 I would deduct \$196 to represent income tax that would be payable under the Income Tax Ordinance, as if it were net income. I multiply the difference of \$1,884 by 15; this amounts to \$28,260. Then I deduct one-third so as to arrive at a fair and reasonable amount of compensation for the injuries suffered and the resulting incapacity, leaving a balance of \$18,840, to which I add the general damages of \$10,000 and the special damages of \$3,260 bringing it all up to \$32,100. To this I would add \$15 under special damages to cover the cost of the medical certificate—for I accept the submission that this was a necessary expenditure incurred in the preparation of the case. So the final total figure would be \$32,115: As counselled by LORD DENNING, M.R. in *Fletcher v. Autocar & Transporters, Ltd.* (supra), I would look at the overall figure again, and ponder whether it is fair compensation in all the circumstances, and reduce or increase it accordingly. I think it is fair. As has been said, it cannot be that a plaintiff will be awarded precise compensation; he will be awarded fair compensation in all the circumstances.

Before going on to the question of costs, I would like to say a word on insurance premiums. Counsel for the respondent has referred us to *Heaps v. Perrite Ltd.*, (1937) 2 All E.R. 60, and *Khan v. Bhairo* (supra), and has submitted that a court is entitled to take into account in assessing damages in cases of this sort, the fact that large damages will cause insurance premiums to become so heavy as to bring business to a standstill. This was the view expressed by Greer, L.J. in the former case, and by *Boilers, C. (ag.)* in the latter. It is only right to say that *Greer, L.J.* refused to interfere with the judge's award on that ground. The matter again received judicial attention from *Diplock, L.J.* in his dissenting judgment in *Wise v. Kaye*, (1962) 1 All E.R. 257.1 would mention, *en passant*, that contrary to counsel's observation, the other members of the court of Appeal did not, as far as I could see, dwell upon this aspect of the matter. *Diplock, L.J.* was remarking upon the uselessness of making awards of damages greater than a defendant could pay, and that 'the maximum should be fixed at a figure at which there was a reasonable prospect that defendants responsible for causing injuries coming within the higher part of the scale based on that maximum will be able to pay'. And comparing the situation as it exists today, *Diplock, J.J.* continued (ibid at p. 274) thus: "Insurance removes the immediate burden of paying damages from the individual defendants and spreads it over the general body of

premium-paying policy-holders. Here it increases in most cases the general cost of goods and services, in some cases merely the cost of private motoring, with consequent hardship to the public as a whole. To avoid fixing the scale at a level which would materially affect the cost of living or disturb the current social pattern is a factor, Benthamite no doubt in origin, in the empirical process by which the maximum/datum is determined.

And in *Fletcher v. Autocar & Transporters, Ltd.*, (1968) 2 W.L.R. 743, LORD DENNING, M.R., referred to the impact which awards, 'daunting' in their immensity, would spread through the body politic. There can be no gainsaying that huge awards may have the effect of causing an upsurge in insurance premiums, for, if faced with heavy financial burdens by way of the award against them of inordinately heavy damages, insurance companies will inevitably spread the load among the policyholders. But I find it difficult to appreciate, and I believe an injured plaintiff would also suffer from the same disability, why the fact that premiums may be affected should be a main consideration in assessing damages. I am more inclined to the minority opinion expressed by *Salmon, L.J.* in the *Fletcher* case, not forgetting that, being a minority view, it must not be regarded as carrying the day. *Salmon, L.J.* said: [(1968) 2 W.L.R. at p. 771].

"Certainly, in my view, the assessment of damages should have nothing to do with the financial position or conduct of the defendant still less with its possible impact upon insurance premiums. It has recently been stressed that damages for tort are, with certain irrelevant exceptions, purely compensatory, *Rookes v. Barnard*. The sole duty of the court is to award a plaintiff that to which he is entitled, namely, fair and reasonable compensation for the loss he has suffered, irrespective of the repercussions of such an award. A plaintiff's loss cannot depend in any way upon whether the defendants or their insurers have assets worth many millions or are on the verge of insolvency, nor upon whether the defendant's negligence was grossly culpable or amounted merely to inadvertence."

Now to the question of costs: The learned judge awarded the plaintiff the sum of \$650 on the ground that the case was a simple one devoid of complexities. It is trite law that the award of costs is a matter within the discretion of the trial judge, and such discretion is a wide one; but wide though it is, it is a judicial discretion and must be exercised on fixed principles, that is, principles of reason and justice. In the absence of special circumstances, a successful litigant should receive his costs. To exercise a discretion to refuse him his costs, it is necessary, to show some ground, for a discretion exercised on no ground is not a judicial exercise of that discretion. If, however, there are grounds, the question whether they are sufficient is entirely for the trial judge, and a Court of Appeal should not interfere with that discretion. [See *Donald Campbell & Co. Ltd. v. Pollak*, (1927) A.C. at p. 809.] A successful party may, for example, be deprived of his costs where he misconducts himself. But it has been said that a successful litigant is entitled *prima facie* to his costs as of right. [See *Civil Service Co-operative Society v. General Steam*

Navigation Co., (1903) 2 K.B. 756.]: To put the matter in its proper perspective, it is meet to attract attention to LORD HALSBURY'S observations in that case: [(1903) 2 K.B. at p. 756].

"No doubt, where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied.

And in the *Donald Campbell* case in which it was conceded that the real question for determination was whether in those particular circumstances it was competent for the question of costs alone to have been raised on appeal, *Viscount Cave, L.C.* (in fact all the Law Lords did), examined the question of the discretion of the trial judge to award costs. *Viscount Cave* said [(1927) All E.R. Rep. at p. 41]:

"A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he had no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must, of course, be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case.

"But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which has been proved before him or which he has himself observed during the progress of the case, then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it."

LORD ATKINSON put the matter thus (at p. 42 supra):

"I think it is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts."

And to illustrate the restraint which a Court of Appeal imposes upon itself in reviewing an order made by a judge of first instance, I would like to quote from *Wilmar, L.J.*'s judgment in *Jones v. Mc Kenzie & Mersey Docks & Harbour Bd.*, with which comments I am in entire agreement as they are apposite to the case in hand: [(1964) 2 All E.R. at p. 846

"I am far from saying, as I hope I have made clear, that if I had been trying this case I should necessarily have exercised my discretion in the same way as the judge did. It may be that it was not a good

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exercise of discretion; but, if I may say so with all respect to the argument which has been addressed to us, that is not the point. I find myself unable to say that the judge, in relying on the circumstances on which he did rely, proceeded on grounds which are wholly unconnected with the cause of action so that it could properly be said that he never exercised a judicial discretion at all. In my judgment he did exercise his discretion, however wrongly he may have exercised it, and in those circumstances I do not think that it is open to this court to interfere."

Our rules of court (o. 49 r. 20) clearly leaves the matter of costs to the discretion of the judge, though not encroaching upon, or detracting from, the principles laid down in the cases. That rule provides:

"In any case where the court or a judge shall think fit to award costs to any party, the court or a judge may by the o. direct taxation of the costs of such party and payment of a proportion thereof or direct payment of a sum in lieu of taxed costs and direct by whom and to whom such proportion or sum shall be paid."

I am anxious that the discretion of a judge to fix costs is not whittled down, as this discretion is as a rule used to the benefit of litigants. Where costs are fixed, the expenses of taxation are avoided, and the party against whom the order is made usually finds that he is not required to pay as much as if a bill had been taxed. This is not to say that there should never be an o. for taxed costs. Where the circumstances warrant it, a successful party would have his costs taxed; and in other suitable cases he would have his costs fixed.

In the result, I would allow this appeal, and substitute the following for the o. of the learned judge: I would award the plaintiff damages in the total sum of \$32,115. The judge's award of the costs below is affirmed. The plaintiff must have his costs in this court.

CUMMINGS, J.A.: In this case the grounds of appeal set out were as follows:

- (a) "The general and special damages were awarded on wrong principles and were a wholly erroneous and unrealistic estimate of the damage suffered by the appellant. The said award was totally inadequate and was not made in accordance with the principles of the English Common Law introduced into Guyana by the Civil Law Ordinance Cap. 2.
- (b) "The learned trial judge did not exercise his discretion judicially in fixing the appellant's costs at \$650.00 (six hundred and fifty dollars).

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I have had the benefit of reading and hearing the judgment of my learned brother Persaud, and agree with the conclusions reached therein. Although our reasons therefor are not identical, I consider it sufficient for me to say, without repetition of the facts which are fully set out in his judgment, that the learned trial judge erred in law by *applying a wrong principle of law* in his assessment of the damages claimed; and it is trite law that in such circumstances this court will entertain an appeal for the purposes of correcting that error. I differ, however, from the rest of the court on their confirmation of the method employed by the learned trial judge in arriving at the successful plaintiff 's (appellant) costs in the court below.

It is convenient at the outset to set out the local legislation dealing with the question of costs. *The Supreme Court Ordinance, Cap. 7* (subject to the necessary modifications and adaptations) provides as follows:

"The Supreme Court of 3. (2) The court shall have and may exercise all the authorities, powers, and functions belonging or incident to a court of that character according to the law of England

Fees and costs generally 62. (1) The fees and costs payable and allowable in the court shall be regulated by rules of court and, where provision is not made by those rules, the existing tariffs and regulations as to fees and costs shall remain in force.

(2) Subject to the provisions of the next succeeding s. and to rules of court, the costs of and incident to any proceeding in the court shall be in the discretion of the court or judge."

The Rules of the Supreme Court, 1955, Order 49 provide as follows:

Costs to be in the discretion of the court. 1. Subject to the provisions of the Supreme Court of Judicature Ordinance and these rules, the costs of and incidental to all proceedings in the court, including the administration of estates and trusts, shall be in the discretion of the court or judge

.. .. .

Scales on which costs allowed 7. (1) Except as hereinafter provided, in causes and matters commenced after these rules come into operation solicitors shall be entitled to charge and be allowed, unless a judge shall in any case otherwise direct —

(a) The fees set forth in Scale I of Appendix V to these rules, in all causes and matters Except those under paragraphs (b) and (c) of this rule;

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- (b) the fees set forth in Scale II of the said Appendix in all causes and matters where the sum of money claimed or the value of the land or thing in dispute, in the opinion of the judge, does not exceed five hundred dollars, save as provided in paragraph (c) hereof;
- (c) the commuted sums set forth in Scale III of the said Appendix, in all causes and matters where judgment is obtained under Order 12 or in default of appearance or pleading or by confession before trial where the claim is for a debt or liquidated demand;

and no higher fees shall be allowed in any case, except such as are by this Order otherwise provided for, and in causes and matters commenced before the coming into operation of these rules to which the scale of costs previously in force is applicable, the same scale shall continue to be applied.

"20. In any case where the court or a judge shall think fit to award costs to any party, the court or judge may by the Order direct taxation of the costs of such party and payment of a proportion thereof or direct payment of a sum in lieu of taxed costs and direct by whom and to whom such proportion or sum shall be paid."

Although the trial judge has a discretion on the question of the award of costs, it must be exercised within the ambit of the rules; within that ambit the discretion is unfettered but must be exercised judicially. It is clear that a judge, acting within that ambit has power to deprive a successful litigant* of his costs or to award him only a part of his costs or even to make him pay the costs of the unsuccessful party. He is expressly forbidden to order costs above what is allowed by Scale I, but in accordance with the rules cited above may order costs either in accordance with Scale I or Scale II. His discretion, as I have outlined it above, ought to be based upon one or a combination of circumstances, such as, upon a reflection of the cause of the litigation, that is to say, whether or not it could have been avoided by one or other of the parties; steps taken before the filing of the writ; the conduct of the parties, and/or their legal advisers; payment into court; or other matters *ejusdem generis*. I am not here attempting to set out an exhaustive list. *I have not, however, been able to find any case in which a judge exercised the discretion on the basis that the case was "simple and devoid of complexity"*. In my view, with great respect, that seems to be an irrelevant consideration, resulting in a non-judicial exercise of the discretion.

This court, after hearing three days of argument and taking some time to consider its judgment, has unanimously found in favour of the appellant

with respect to the merits of the appeal as set out in the grounds above, and in effect increased the global figure of the damages awarded by the learned trial judge from \$28,260 to \$32,115—a difference of approximately \$4,000—on the grounds that he misconceived a principle of law to be applied in the assessment of damages in such a case. This misconception seems to have formed the basis for the judge's conclusion that the matter was a "simple one, devoid of any complexity". Such a basis is obviously the perpetuation of what this court has deemed to be an error of law, and since the proceedings in the Court of Appeal are a rehearing of the entire matter based upon the grounds of appeal, which include the question of costs, this court is obliged to review and correct, if necessary, any part of the order, including the order as to costs.

The Federal Supreme Court Ordinance No. 19 of 1958 (subject to the necessary modifications and adaptations) provides as follows:

"General powers of the Federal Supreme Court. 5; Subject to the provisions of the British Guiana (Appeals) Order in Council, 1957, and of any Ordinance the Federal Supreme Court shall in the exercise of any jurisdiction vested in it by this Ordinance, have all the powers and authorities vested in or exercisable by the Supreme Court of Judicature in England on the first day of January 1958.

Appeals in civil matters. 9. (s) Subject as otherwise provided in this s., an appeal shall lie to the Federal Supreme Court in any cause or matter from any order of the Full Court or of a judge of the Supreme Court (whether made before or after the date on which this Ord., comes into force) where such an order is —

(a) final and is not —

.. ..

(iii) an order as to costs."

At this point, consideration of the relevant English legislation *in pari materia* is attracted. It is almost identical with the local legislation set out above, the *locus classicus* on the interpretation of which, in my view, is the case of *Donald Campbell & Co. v. Pollak*, (1927). It seems clear to me that in these circumstances the judgment of *Viscount Cave, Lord Chancellor*, on the preliminary objection raised in that case is expressly in point, where he said: [(1927) App. Cas. at p. 739].

". . . . The respondent raises the preliminary objection that the appeal is incompetent as being an appeal as to costs only, and your LORDSHIPS have now to deal with this preliminary objection."

And at p. 741 he said:

"My LORDS, if the authorities are carefully examined, I think it will appear that there is no rule of the House which prevents a party

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from asking to have a decision reviewed on the ground that it is wrong in law even though the only result of a reversal of the decision would be to alter the incidence of costs. *In my opinion, the true rule is that, while this House will not review an exercise of discretion as to costs, it will not refuse to entertain an argument that an order as to costs is founded on an error of law.*

"... is *Duwall v. Terry*, (Show. P.C. 15,16) where the appeal failed on merits, and the report concludes: 'And as to costs, held no cause for an appeal in this case, nor in truth was it ever known to be a cause, if the merits were against the party appellat. And so the decree was affirmed in the whole.' "

At p. 743 he commented:

"..... In *Fitzgibbon v. Scanlan* (1 Dow, 261, 270) LORD ELDON said that, 'although an appeal would not be received merely on the subject of costs, yet it did not follow but the art. of costs might be taken into consideration when there was an appeal respecting other matters.'

"In *Inglis v. Mansfield* (3 Cl. & F. 362, 371), LORD BROUGHAM SAID: 'The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is, that you cannot appeal for costs alone, but you can bring an appeal on the merits, and if that is not a colourable ground of appeal for the purpose of introducing the question of costs to the court called upon to review the case, the court of Review will treat that not as an appeal for costs, but will, in affirming the judgment given in the court below, consider the question of costs as if it is fairly raised.....!'"

And at p. 745:

"..... In *Metropolitan Asylum District Managers v. Hill* (5 App. Cas. 582, 584) it was held that an o. of the court of Appeal which imposed as a condition for a new trial, the payment of the costs of the first trial was not an appeal in respect of costs only and ought, therefore, to be entertained; and LORD SELBORNE stated the rule as follows: '*The rule, subject to certain exceptions, is established, that an appeal is not to be allowed in respect of costs only; which means that when the merits of a question have been determined, and when a court has thought fit to give or refuse costs in the exercise of its discretion, and in the absence of any settled principle upon the subject, the Courts of Appeal must give so much credit to the exercise of that discretion as not to allow the merits, when they are no longer in controversy, to be again gone over with great expenditure, not only of money but also of judicial time, for the mere purpose of reviewing that discretion.*' No doubt the appeal in that case was not in respect of costs only, but was an appeal against a refusal to make an unconditional order for a new trial;

but the language of LORD SELBORNE is interesting as showing the origin and meaning of the rule under discussion

At p. 747 he said:

"My LORDS, I have gone through this long succession of cases only for the purpose of ascertaining what is the precise rule which has been laid down by this House, for I agree that, *if a rule of practice exists*, it ought not now to be disturbed, and that the rule (whatever it may be) was not abrogated by s. 3 of the Judicature Act, 1876. *The result of my examination appears to be (1) that there is no universal rule that an appeal as to costs only will not be entertained by this House*, but the true rule is as stated by LORD NORTHINGTON in *Cowper v. Scott* (1 Eden. 18), by LORD ELDON in *Tod v. Tod* (2 W. & S. 542) and by LORD SELBORNE in *Metropolitan Asylum District Managers v. Hill*, as well as by Sir Joseph Napier in the Judicial Committee and by LORD ST. LEONARDS and LORD CRANWORTH in the Appeal Committee, and accordingly (2) that in this House, as in the Court of Appeal, an appeal from a discretionary order as to costs will not be received, except, perhaps, in cases where there is also a bona fide appeal on merits; but (3) that when it is alleged that the court of Appeal in dealing with costs has fallen into error on a point of law which governs or affects costs, an appeal on that question will be heard. There are (as will have been) many cases in which an appeal under those conditions has been entertained, and there is no case in which such an appeal has been held to be incompetent.

"If this be the true view, then it is plain that the appeal in the present case, in which the exercise by the trial judge of his statutory discretion as to costs has been set aside by the Court of Appeal on legal grounds, ought to be allowed to proceed. I therefore move your Lordships that the preliminary objection to this appeal be disallowed, and that the costs of and consequent upon that objection be paid by the respondent in any event."

It might be helpful also to refer to the speeches of *LORD BLACKBURN*: and *LORD WATSON* who concurred with *LORD SELBORNE* in *Metropolitan Asylum District Managers v. Hill*, one of the cases referred to by *Viscount Cave* (supra), in which they said, inter alia:

LORD BLACKBURN:

".....I think it quite right and reasonable that the costs of this particular application should not be disposed of until we know what are the merits of the whole case."

LORD WATSON:

".....I quite concede the propriety of the rule that the Court of last resort ought not to entertain an appeal which involves nothing except the payment of costs, but it appears to me that that rule

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is limited to the case where the whole merits of the action or cause have been determined, and where the judges who have decided the cause have applied their minds to the right of the parties to receive an award of costs, looking to the whole circumstances and the conduct of the case, because it must be kept in view that the right to costs does not, in most cases, merely depend upon the merits of the cause as finally decided, but may, to a very great extent, depend upon the mode in which it has been conducted throughout by the parties. Accordingly, I think it would be out of the question to require that the Court of Appeal should investigate not only the merits of the cause but the whole of the proceedings in the cause *ab initio*, for the purpose of ascertaining whether the discretion of the court below had been rightly or wrongly exercised.

"But, my LORDS, the question here, although in one sense it may be called a question of costs, has not been determined by the Court of Appeal at all upon any consideration of the merits of the action, for it has not yet been determined whether the appellants are in the right or in the wrong."

It is obvious from the speeches that the law LORDS, in some of the judgments cited above, used the term "discretionary costs" as a term of art in contradistinction to costs generally raised as a result of an error of law.

Although the preliminary objections as to the competency of the House to hear the appeal in *Campbell v. Pollak* (*loc. cit.*) was overruled, the appeal was eventually dismissed. It must not be overlooked, however, that that was an appeal against costs only, found to have been based upon a proper judicial exercise of the discretion, and is therefore easily distinguishable from the present appeal. Consequently, applying, as I consider myself bound to do, the principles which emerge from the judgments of their Lordships in the House of Lords and the Privy Council referred to above, to the instant case, I am of the view that the appellant should also succeed in his appeal on the question of costs and propose that either counsel agree upon the costs in the court below, or that this Court orders that those costs be taxed on the higher scale certified fit for counsel.

CRANE, J.A.: The awards of general and special damages in this case are attacked on two grounds: Firstly, that they are based on wrong principles; secondly, that they are so wholly erroneous and unrealistic an estimate of the injuries suffered as to render them out of accord with the principles of English common law as applied in Guyana.

A perusal of the authorities beginning with *Flint v. Lovell*, (1935) 1 K.B. 354, 360; *Davis v. Powell Duffryn Associated Collieries Ltd.*, (1942) A.C. 601; and *Nance v. Br. Columbia Electric Rly.*, (1951) A.C. 601, reveals

the principles which warrant interference by appellate courts with awards for personal injuries. These cases illustrate the above two grounds of complaint as the reasons for such interference when a trial judge sits either alone or with a jury. *Flint v. Lovell* was a decision of the Court of Appeal which later received the approval of the House of Lords in respect of the following guiding principle that was laid down by *Greer, J.*:

"In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong *principle of law*, or that the amount awarded was so extremely high or very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

Perhaps I will be excused for setting our principles which are so well known and tried, but I should explain that I do so only with a view to emphasising the ground on which I propose to support the appellant's plea that the damages were awarded on a principle that was wrong.

In assessing the plaintiff's net annual earnings under the head "prospective future loss", the trial judge arrived at the figure of \$1,080 which he derived from the gross income of \$2,080. The judge catalogued the many difficulties encountered in reaching his final assessment and expressed the opinion that they were mainly due to scantily led evidence of plaintiff's prospects of advancement. He was left, he said, "to grope in the dark" over the lack of evidence on many relevant matters such as whether plaintiff was an employee or an independent plumber; whether he enjoyed job security at the time of the mishap, and the time when he expected to retire as a plumber. The length of time for which he worked as a plumber was also not given, nor was evidence of his aptitude as a plumber/trainee at the Guyana Industrial Training Centre where he attended a course at the time of the accident. I must agree with the judge and say that I think that if he had the required evidence before him, it is quite possible the quantum of his award might have been higher. Lamenting the absence 'of evidence of the nature above described, the judge said:

"With the evidence on this aspect of the matter so lacking in the kind of details that a court would throw into the scales, I thought it right to give the fullest effect to the ordinary contingencies of life and the uncertainty I felt that the plaintiff's earning capacity would be nil for the rest of his life. The multiplier that seemed suggested in all the circumstances including his age, was one in the vicinity of 15 years. To reach the present capital value of lost future earnings I discounted for tax and the usual imponderables and reach a mean income in the vicinity of some \$1,080 per annum. See *Aziz Ahamad Ltd. v. Raghubar* (infra).

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"Avoiding mathematical precision the sum I assessed under the head of loss of pecuniary prospects was \$15,000.

"That figure was increased to \$25,000, the total amount assessed as general damages, to accommodate the other four heads of award aforementioned, assessed altogether at \$10,000. I had prominently in mind the fact that the immediate investment of a present lump sum of \$25,000 at, let us say, 7% interest per annum would produce an annual income approximately that which has been lost. I regarded this result as ore rough guide to the fairness of the compensation to be awarded."

Arriving at his assessment of plaintiff's net annual income, it is important to note that the judge "discounted for tax and the usual imponderables and reached a mean income in the vicinity of some \$1,080 per annum. See *Aziz Ahamad Ltd. v. Raghubar*, (1967) 12 W.I.R. 352". Here, I think it is fair to say that by quoting the *Aziz Ahamad* case the judge must have relied on the principles of assessment that were illustrated in that case, which was also concerned with a claim for damages for personal injuries. I am, however, of opinion he misapplied an important principle in the assessment. The method employed in *Aziz Ahamad's* case is set out under quotation in the judgment of the Court of Appeal delivered by *Wooding, C.J.* [See pp. 354-355 of the report of the case.] The report is easily accessible, and when one looks at it, the method employed is the replica of that referred to in *Mayne & McGregor on Damages*, 12th Ed., para. 766, page 657. So I will confine myself to relating what that textbook says on the matter.

"Method evolved by the courts—The courts have evolved a particular method for calculating this head of damage. The basis is the amount that the plaintiff would have earned in the future and has been prevented from earning by the injury. This amount is calculated by taking the figure of the plaintiff's annual earnings at the time of the injury less the amount, if any, which he can now earn annually, and multiplying this by the number of years during which the loss of earning power will last, which, if the injury is for the plaintiff's life, will require a calculation of the period of his expectation of working life. The resulting amount must then be scaled down by reason of two considerations, first that a lump sum is being given instead of the various sums over the years, and second that contingencies might have arisen to cut off the earnings before the period of disability would otherwise come to its end. The method adopted by the courts to scale down the basic figure is to *take the figure intact of present annual earnings and reduce only the multiplier*. And if the present annual earnings are liable to increase or decrease in the future, then the practice of the courts is still to allow for this not by changing the figure of present annual earnings but by altering up or down, the multiplier."

It will be observed, contrary to what is stated above, in computing plaintiff's net annual earnings, the trial judge "discounted for. tax *and* the usual imponderables" prior to applying his multiplier of 15 years in purchase of the injured man's net annual earnings, that is to say, he made two separate and distinct deductions before multiplying—one for income tax (\$196), and the other for imponderables (\$804). I readily agree a judge's discretion to discount income tax from gross annual income, rather than from the "resulting amount" obtained by the application of the multiplier to the net annual income cannot be questioned nor interfered with in any way, for it appears from the decision of *British Transport Corporation v. Gourley*, (1955) 3 All E.R. 796, it is immaterial whether tax is deducted before or after receipt of income. It was decided in that case that when assessing damages in actions for personal injuries or wrongful dismissal, for the loss of actual or prospective earnings, allowance must be made for any incidence of income tax on the earnings, where the damages themselves are not taxable in the hands of the recipient. On this point LORD GODDARD, C.J. expressed this opinion [(1955) 3 All E.R. at 805].

"The taxpayer must pay and, in my opinion, it cannot make any difference whether he receives the gross income and pays his tax later, as he does if assessed under Sch. D, or whether it is deducted before he receives it, as is the case with tax under Sch. E or P.A.Y.E. In either case, to say that a taxpayer has the benefit of his full income is, in my opinion, to be out of touch with reality, to use the words of LORD SORN in *M'Daid v. Clyde Navigation Trustees*, (1946) S.C. 462; 2nd Digest Supp."

It seems to me the above passage furnishes the reason why, in personal injuries cases, some trial judges deduct income tax directly from gross annual earnings [as did *Wooding, C.J.* (at p. 355) in the *Aziz Ahamad* Case], and why others prefer to do so only after quantification of the total damages. What LORD GODDARD clearly means above is, that in either case tax has got to be deducted. This is why it cannot make any difference whether one judge discounts tax from gross annual earnings, whereas another does so by altering up or down his multiplier so as to allow for and regulate the uncertainty of the incidence of income tax. [See per LORD GUEST in *Taylor v. O'Connor*, (1970) 1 All E.R. at p. 373 (g).] One can well see how right this is in principle, when one bears in mind that income tax is a tax on earnings. So there can really be no breach of principle if it be deducted from the gross income in order to arrive at the net annual earnings. But what I find cannot be supported by any principle is the scaling down of the injured man's annual earnings for imponderables to \$1,080, before applying a multiplier to that figure. I have shown that the judge purported to follow the principles in the *Aziz Ahamad* case by quoting it, *but nowhere in the judgment of that case (under quotation at pp. 354-355 of the report) is it to be seen that gross annual earnings were reduced by the Trinidad trial judge by deducting either income tax, or any amount in respect of imponderables or uncertainties*

before applying the multiplier to the net annual income. As already indicated, while in the instant case the judge's discretion to deduct income tax from gross annual income cannot be faulted, it is my respectful opinion there is no warrant for any deduction at that stage with regard to imponderables; and, for this reason, I think he erred on an important principle in the assessment of fair and adequate compensation as damages. The error is not difficult to see. In the passage in *Mayne & Mc Gregor on Damages* (above), it will be seen the exercise of scaling down is resorted to principally for *two* reasons: (i) the injured man gets once and for all a lump sum instead of various sums of money, over the years. This is an important advantage, for he is free to invest it immediately in part or whole if he so desires; and (ii) contingencies might have arisen to cut off the earnings before the period of disability would otherwise have ended. It is my opinion, however, that having discounted the sum of \$804 for imponderables from gross annual income before quantifying damages, the judge committed a breach of the principles in both of the above reasons for which damages may be scaled down. There is no need for authority to show that net annual income cannot be treated as damages, for it is the application of the multiplier to net annual income which converts the latter into the sum to be awarded as damages. Until there is such a conversion it cannot be said there is a scaling down of damages. *The principle of "scaling down" or "discounting for imponderables", as the judge puts it, applies only to damages, not to income.* Nor, as it seems to me, can the position be rectified by the multiplier being afterwards applied to purchase a specific number of years of net income that has already been wrongly scaled down. *The result would only be to take so many years' purchase of income that has been wrongly calculated.* The application of the multiplier at that stage cannot effectively rectify the error by converting erroneously computed net income into a legitimate award of damages.

It remains to determine how far this error of scaling down gross annual earnings has affected the quantum of the judge's award. According to my calculations, it has done so to the extent of nearly \$4,000 in this way: The injured man's gross earnings were \$2,080 per annum (\$40 x 52 weeks). From this a deduction of \$196 must be made for income tax leaving \$1,884 which, when I multiply by the figure 15 (chosen by the trial judge) in order to obtain that number of years' purchase of the net annual income, I arrive at the amount of \$28,260 as prospective future loss of earnings. In choosing his multiplier this was the only time when the judge could have properly scaled up or down the award for such imponderables and uncertainties as he may have found to exist by increasing or reducing his multiplier. We have seen how this exercise is achieved by that method, which is exactly the same employed by the learned trial judge when selecting his multiplier. He gave consideration to the fact that plaintiff was 23 years old, also "the fullest effect to the ordinary contingencies of life" and the uncertainty he felt about the medical evidence, viz., that the plaintiff would be unable to earn anything for the rest of his life. His thinking on that matter is reflected in his comment on the evidence of plaintiff's physical condition, which clearly was not

altogether acceptable to him. Indeed, the judge considered "there was merit" in defence counsel's (Mr. Bishop) submission that plaintiff's evidence "whittled down the doctor's evidence of disability".

While plaintiff was giving evidence, the judge kept him continuously under observation. It was observed he gave evidence intelligently, that he sat on a chair while doing so, and though at times there were lapses of concentration when questioned, he did not appear to be altogether, in the view of the judge, "labouring under the most substantial present mental disorientation". While testifying he was observed to ease off his right shoe with his right hand, the grip of which the doctor said was weak. At counsel's request he walked up the stairs to courts VI and VII in 55 seconds: then down again without assistance. Further, he admitted he could read and write with his right hand since the accident; could comb his own hair and that it was possible for him to rejoin the Guyana Industrial Training Centre, if only he was able to use his left hand. Here, it is important to observe medical testimony had deemed him incapable of performing these acts, all of which the judge saw for himself he was capable of performing. So it appears most of what the trial judge himself saw of and heard from and about the plaintiff in the witness-box was, at least from an objective physical standpoint, contrary to the medical testimony. The judge was thus able to compare evidence which he saw for himself with what he was told about the plaintiff. From all this evidence he drew his own conclusions of the plaintiff's physical and mental condition which enabled him to fix a multiplier of 15.

Very briefly, medical evidence was led to the effect that plaintiff, at the time of his admission to hospital on the 9th April, suffered severe head injuries with laceration of the right side of the brain producing an intra-cerebral haematoma, paralysis on the left side of the body including left upper limb and left lower limb, and a compound fracture of his right forearm. Some 14 months later, that is, at the time of the trial, Dr. Punraj Singh, who had examined and admitted him to hospital, testified in court. It is most important to note at this time, Dr. Singh still had the plaintiff under treatment and observation. He now thought there was severe irreparable damage to the brain, so much so that he told the court he expected no further improvement in his patient's condition since there was wasting muscle on the left side of the body and that such condition would increase as time went on. He further told the court plaintiff was unable to speak properly, was in need of nursing care, was unable to sit up for long periods, could not walk properly, climb stairs, and would not be able to partake in any form of studies nor pursue any gainful occupation. It was evidence of this kind that raised doubts in the judge's mind, particularly after what he saw and heard from plaintiff and which led to the following remarks in his reasons for decision:

"Mr. Bishop's submission that the plaintiff's own evidence had somewhat whittled down the doctor's evidence of disability did have merit. The injuries sustained by the plaintiff were serious but he was not by any means reduced to what in common parlance is called a

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vegetable. As against the pessimistic medical prognosis I formed the impression from close observation of the plaintiff and his demeanour while giving evidence that he had not thrown in the sponge, that there was still present beneath the external signs of affliction at least a small spark of optimism arising perhaps from youth. Bearing in mind the doctor's concession under cross-examination that in his opinion the plaintiff might be able to sit and make strokes as a tally clerk does and my own assessment of the plaintiff's condition in the light of the medical and his own evidence, I should not be greatly surprised if future events prove that the doctor's expectations could have been more sanguine. For all that I felt that much of the sunshine had gone out of his life and physically he had undergone a metamorphosis to his decided disadvantage."

In the face of observations of so pertinent a nature as the above, am I justified in interfering with the judge's multiplier of 15 by substituting the figure of 20 for it as we have been asked to do by counsel for the appellant? Ought I seriously to consider interfering when it is so clear that he has considered and given "the fullest effect to the ordinary contingencies of life" and the uncertainty between the conflict of the medical evidence and the plaintiff's own testimony as demonstrated from the witness-box on the subject of whether the latter would be able to earn anything for the rest of his life; Clearly, this is a matter which he has obviously made provision for and scaled his multiplier to suit. I do not think I can rightly interfere. As I have said, the only fault I find with the assessment is the subtracting of \$804 from annual earnings for imponderables, although it is contended the judge erred by having "prominently in mind" the investment of the lump sum general damages of \$25,000 at 7% which would produce the income lost by the accident. I shall speak about this presently.

In order to arrive at a fair compensation, I look at the overall figure and accordingly scale down the \$28,260 by one-third on the authority of *Fletcher v. Autocar & Transporters Ltd.*, (1968) 1 All. E.R., per LORD DENNING, M.R., at p. 735, and so arrive at \$18,840 under the head "prospective loss of earnings", to which, when I add the global sum of \$10,000 awarded as compensation under the other four non-pecuniary heads, I arrive at \$28,840.

But the global award of \$10,000 on these four non-pecuniary heads is challenged as being wholly inadequate having regard to the gravity of the injuries received and to the fact that the judge has not allocated the components of that award to each head, specifically. Adequate weight, it is said, was not placed on the severe injuries and the resulting physical disability, the injuries in the *Aziz Ahamad* case being comparable with those in the instant case. For this reason, counsel for the appellant contended for the same measure of general damages that was awarded in that case, namely, \$48,000.

While I readily accept the principle that, as far as possible, awards should be predictable in that they should bear a comparable complexion within the jurisdiction, I do not think quantum should be influenced merely by comparing respective types of injuries, but also by a consideration of all the circumstances of the particular case including present and probable future effects on the victim. To my mind, this is a factor that must not be overlooked in estimating the quantum of an award. For example, merely to say there is a broken clavicle or a broken right hand below the elbow, and, for that reason \$X is the appropriate measure of damages because that was the award in a previous case, is, in my way of thinking, an inaccurate and unsatisfactory guide to fair and adequate compensation. On comparison everything which would increase or decrease the quantum of an award must be looked at. In sustaining a broken clavicle or hand, one plaintiff may have suffered much more pain than another had suffered in a previous case, and for a longer time too, a factor which may have adversely affected and caused his general health to suffer to a greater degree. Assuredly, this should affect quantum under the four non-pecuniary heads of general damages in two cases to such an appreciable extent as to show how unsatisfactory is the method of merely comparing injuries. Evidently, it was this principle the trial judge recognised when, on comparing, not merely injuries, but the nature and extent as suffered in both *Aziz Ahamad's* case and the case of *Manraj v. Morgan*, (1964) L.R.B.G. 96 with the present, he proceeded beyond mere comparison to reach the conclusion, which I think was right, that "the disabilities suffered by the appellant there (in the *Aziz Ahamad* case) were worse than those suffered by the plaintiff", and so could not merit an award of \$48,000.

I would, therefore, support the judge's global figure of \$10,000 on the four non-pecuniary heads of general damages, notwithstanding the complaint there is no itemisation under each head. There is evidently a division of opinion amongst English judges of eminence as to the necessity for itemisation of damages in actions for personal injuries. LORD PEARSON'S in *Baker v. Willoughby*, (1969) 3 All E.R. at p. 1535 is, that "itemisation of the damages by dividing them into heads and subheads is often convenient, but not essential". See also LORD MORRIS' in *West (H) & Son, Ltd. v. Shephard*, (1963) 2 All E.R. at p. 625, and LORD GODDARD'S in *Davit v. Smith*, (1958) C.A. (No. 34a, 30.1.58) reported in *Kemp & Kemp*, Vol 1, 2nd Ed., at p. 354, which are to be same effect. However, in spite of these eminent pronouncements, there appears at the present day, as *Sachs, L.F.* tells us in *George v. Pinnock*, (1973) 1 All E.R. at p. 934:

"a considerable body of judicial opinion.....that plaintiff and defendant alike are entitled to know what is the sum assessed for each relevant head of damage and thus to be able on appeal to challenge any error in the assessments. In my judgment, this court should be slow to emasculate that right of litigants."

The opinion of *Sachs, L.J.* seems to indicate that despite the conflict of judicial opinion which exists on the subject, litigants have a "right" to know

what are the main components of a global award. But, as I see it, this "right" of which the learned LORD JUSTICE speaks, can only be properly said to arise when the trial court is seised with the question of what rates of interest are applicable to the various heads of damage as is illustrated by the decision of the Full Court of Appeal in *Jefford v. Gee*, (1970) 1 All E.R. 1202. There is, however, no question of interest or other compelling circumstance which arises in this case; and for this reason I am of opinion the trial judge's failure to itemise damages has occasioned no injustice to the appellant.

I said I would return to this question: whether it was right for the trial judge when making his assessment to have "prominently in mind the fact that the immediate investment of a present lump-sum of \$25,000 at, let us say, 7% interest per annum would procure an annual income approximately that which has been lost." *Ex facie*, this direction would appear to be in breach of both professional and judicial opinion. In his textbook on Damages, McCormick, the American author, writes as follows on the topic (at pp. 303 304):

"Equally erroneous would be the award of a sum the annual interest upon which would equal the wages lost annually. This would give the plaintiff his lost wages during the period of disability, which is full compensation, and at the end of his life he would still have intact the principal sum."

In *Rowley v. London & North-Western Rly. Co.*, (1873) L.R. 8 Ex. 221, the rule was laid down that a jury (or judge when sitting alone) may not properly assess as damages a sum of money equal to the present price or value of an annuity equal to that income which would probably have been earned by the plaintiff but for the accident. Also, in the recent case of *Taylor v. O'Connor*, (1970) 1 All E.R. at p. 373, LORD GUEST in the House of Lords in like manner disapproved of the method of awarding damages for future loss by the purchase of an annuity of the extent of the loss except as a "very rough guide" to the payment of compensation. LORD GUEST considered that if such a method were adopted it would have to depend on current rates of interest, and would not allow for inflation; the award would have to be discounted because it provides for certainty and does not allow for contingencies. Further, he thought, it would require actuarial evidence, has the disadvantage of increasing the length and expense of trials, and unduly complicating matters.

As I see it, the annuity method is not entirely to be condemned. It certainly has merit as a rough guide to the amount of compensation to be paid. There can be nothing wrong in a direction to consider quantum on the basis of the purchase of an annuity in replacement of lost income and to use it as a "rough guide", provided the jury are told (or the judge directs himself as he has clearly done in the present appeal) that on finally assessing compensation they (or he) must of necessity take into account all contingencies such as the possibility of illness, retirement or death and other imponderables. This was what *James, L.J.* thought to be a proper direction in the leading case

of *Phillips v. London & S.W. Rly.*, (1879) 5 Q.B.D. at p. 84, and the approach the Court of Appeal took in *Johnston v. Great Western Rly., Cp.*, (1904) 2.K.B. at p. 259, when, on the same point now taken, it was suggested there was a misdirection when the jury were charged in the following manner:

"There is a loss of £500 a year on what he" (the plaintiff) "is earning already—the difference between what he is able to earn now and what he would have earned but for this accident. Give him such compensation as you think will put him in the position in which he would have been."

On this aspect of the summing-up, *Vaughn-Williams, L.J.* remarked:

"If the summing-up had stood there, I should have said there was a clear misdirection, because the plaintiff ought not to be put in the position in which he would have been by making such a calculation as that which the learned judge has referred to, for the jury are bound to take into consideration the chances and accidents of life, and a number of other matters. But the learned judge, in the very next passage, gave the jury a sufficiently plain instruction based on the judgment in *Rowley v. London & North-Western Rly. Co.* for he said: 'There are the accidents of life and other elements which have to be taken into consideration which ought to prevent you giving him such a sum as would be simply an investment for him, and enable him to do nothing. Still he is entitled to a fair sum, considering the position for which he was fitted, and the position in which he is not'. Continuing *Vaughn-Williams, L.J.* said, 'I think that direction is accurate and cannot be complained of.' "

As I have already indicated, the excerpt from the judgment under appeal shows the learned judge did exactly as was done by the trial judge in *Johnston's* case, above, when he gave "the fullest effect to the ordinary contingencies of life and to the uncertainty (he felt) that the plaintiff's earning capacity would be nil for the rest of his life," as he considered the method of purchasing an annuity in replacement of lost income.

Special damages of \$3,260 are in the main undisputed, save for the fact that the trial judge denied the sum of \$15 in respect of a medical certificate for which the injured man paid his doctor. I think the claim for it is quite legitimate, and, on principle, would allow it as reasonable expenses incurred. In this manner, I arrive at a grand total of \$32,115 as general and special damages.

These errors in the judge's assessment have occasioned a loss of damages to the plaintiff, and I would allow the appeal for the reason stated in the first ground of complaint.

Before leaving this appeal, I believe I should say a few words in support of the course taken by the judge of fixing the appellant's costs of appeal at \$650 instead of directing taxation of them.

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After a trial lasting two consecutive days, the trial judge delivered an oral judgment on the very next day as follows:

"29th July, 1972.

Messrs. Jagan and Bishop present.

Judgment for plaintiff—Counterclaim dismissed.

Special damages — \$ 3,260.00

General damages - \$25,000.00

Total damages - \$28,260.00

Counterclaim dismissed.

Costs to plaintiff \$650.00."

The complaint here is not that the judge lacked the jurisdiction to fix a gross figure as the costs of the action, but that he failed to exercise his discretion judicially both in the respect that counsel were not consulted and for the reasons he gave in his judgment for so doing.

It is to be observed that nowhere in the above excerpt of the oral judgment is it recorded that counsel had objected to either the award of the gross figure of \$650, or on the ground that the judge did not give him a hearing before fixing costs in that sum. Can it be proper at this stage for counsel who stood by and said nothing at the trial to attack either the award or the reasons for the award as they appear in the judgment? Speaking for myself, I should have thought the proper time and place for counsel to have asked to be heard on the question of costs was at the trial, unless the judge was unwilling to listen to that request. But evidently that was not the case. The record does not so reveal. I am afraid I am bound by the record unless it is contradicted by affidavit after the trial judge had been notified that the matter was going to be questioned on appeal; but this is not the case.

In the concluding paragraph of his reasons for judgment, the judge said on this point:

"Even taking into account the arguments by counsel for the plaintiff on the question of damages and the citation by him of the authorities appearing on the record, *the case was a simple one devoid of complexities* and I considered that \$650 was a proper sum in which to fix the plaintiff's costs."

The general rule is that the costs of and incidental to all proceedings in the High Court shall be at the discretion of the court or judge (*see O. 49 r. 1, Rules of the Supreme Court, 1955*); and the power to award them for a fractional or gross sum is to be found in r. 20 *ibid.*:

"In any case where the court or a judge *shall think fit* to award costs to any party, the court or a judge may by the O. direct taxation of the costs of such party and payment of a proportion thereof *or*

direct payment of a sum in lieu of taxed costs and direct by whom and to whom such proportion or sum shall be paid."

Thus, it is clear a trial judge has the power to award costs in any one of two ways. The discretionary element in the power is, of course, signified by the words "where the court or judge *shall think fit*". But the exercise of his discretion to choose one or other of the two modes above-mentioned, must be based on reason and the justice of the case, that is to say, the judge must act in a judicial manner in exercising his discretion to choose one or the other of them.

It will be observed from the above the judge was influenced chiefly in the course he took by the fact that he considered the case "a simple one devoid of any complexities". However that may be, and however much his opinion may differ from mine or from anyone else's on the matter, the authorities all show there can be no justification for disturbing his decision to *fix* costs in the action once there is some material on which he can exercise his discretion. [See *Jones v. McKie & Mersey Docks*, (1964) 2 A.E.R. 842.] The conclusion that the case was a simple one cannot, in my view, be said to be unconnected or unrelated to the case. Speaking both from my own experience in these matters at first instance and from my observations of the remarks made by English judges in the law reports of the difficulties which underlie the assessment of damages in personal injuries cases, I should have thought the matter is generally a difficult one, particularly on account of the many imponderables and uncertainties that arise and test judicial acumen. Assigning reasons for fixing costs, the trial judge remarked that even though he appreciated counsel's arguments and his citation of cases which appear on the record, yet he did not think the case merited an award of more than \$650 because it was a simple one. It seems to me whether that opinion be right or wrong is beside the point for that was a conclusion at which the judge could have arrived on the facts of the case. The conclusion that the case was simple is just as relevant and connected with the case and capable of depressing the amount of an award of costs, on the one hand, as the opposite conclusion that it was difficult, would, on the other hand, have operated to increase the award.

Suppose, for example, the judge had awarded fixed costs of \$1,300 instead, having concluded that he thought the case difficult and complicated. Can it be said he had failed to exercise a judicial discretion because he did not direct costs to be taxed? Put in another way: Should the fact that a case be considered difficult automatically entitle a successful litigant to say costs should be taxed rather than be fixed in a gross sum? *E converso*, if a case be thought simple, should that fact entitle a litigant to only a gross sum rather than taxed costs? I am afraid no positive answer one way or the other is possible to these questions. The answer to them must be left to the good sense and discretion of a trial judge adjudicating on the materials available before him in the particular case. For myself, I would adhere to the view I have always held—a successful litigant is entitled only to such costs as, on a

proper exercise of judicial discretion, he may be allowed on the materials available before the trial judge, or, as *Viscount Cave, L.C.*, has concisely put it, he has no right to costs unless and until the judge awards them to him. He has only a reasonable expectation of costs. In such circumstances, I think all that can be said is that it may be quite justifiable to award taxed costs, notwithstanding a case be considered simple, in just the same way as it may be justifiable to award a gross sum even though the case is considered difficult. No hard and fast rule can be laid down, one way or the other. It all depends on the facts and circumstances of the particular case.

In any case where a trial judge concludes that a case is simple or difficult, he must necessarily address his mind to, and exercise his discretion to the award of costs solely on materials available before him. But so long as he does so, however wrong his reasons may be for his conclusion, all the authorities show he will thereby have exercised his discretion judicially and his determination will not be disturbed on appeal. Without exception, the cases are clear on this point—that a judge's discretion to fix the costs of any action will not be disturbed so long as he acts judicially in the exercise of it *on a matter connected with facts before him*. In the Annual Practice, 1961 (at p. 1999/219), there is the following statement:

"In many classes of cases the courts award costs on settled principles, but it is always in the discretion of the court to depart from the rule where the circumstances of the particular case require it. The distinction between costs awarded according to a general rule and costs awarded in the exercise of a discretion on particular facts is important, because an appeal lies from an order awarding costs on a wrong principle; but no appeal lies from the erroneous exercise of a discretion on particular facts."

Without doubt, the most classical statement of a trial judge's discretionary power to award costs of an action is given in the celebrated case of *Donald Campbell & Co. v. Pollak*. There, the *LORD CHANCELLOR* said:

"It appears to me that the true view is substantially that taken by *LORD STERNDALÉ, M.R.*, in the passage in his judgment in *Ritter v. Godfrey* which I have quoted. A successful defendant in a non-jury case has no doubt, in the absence of special circumstances, a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff; but he has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion, like any other discretion, must, of course, be exercised judicially, and the judge ought not to exercise it against the successful party except for some reason connected with the case. Thus, if—to put a hypothesis which in our courts would never in fact be realised—a judge were to refuse to give a party his costs on the ground of some misconduct—wholly unconnected with the cause of action or of some prejudice due to his race or religion or

(to quote a familiar illustration) to the colour of his hair, then a Court of Appeal might well feel itself compelled to intervene. *But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it.*"

Further, the case of *Willmott v. Barber*, (1881) 17 Ch. D. 772, 774, shows how powerless is a Court of Appeal to interfere with the judicially exercised discretion of a trial judge to fix the costs of an action. When *Fry J.* was of opinion that plaintiff's claim failed and also that the charges made by the defendant in the counterclaim were frivolous, he dismissed both claim and counterclaim and made the following order:

"The court doth order that the action be dismissed without costs: that the costs of the plaintiff of this action and counter-claim be taxed, and that the counter-claim be dismissed with costs, to be taxed and paid by the defendant to the plaintiff.

"And in case such last-mentioned costs shall not amount to one-half of the plaintiff's costs of the action and counter-claim, then it is ordered that the defendant pay to the plaintiff such a sum as will, with such costs, amount to such one-half of the entire costs of the action and counter-claim."

On appeal from the last paragraph of the order, it was held it was wrong only as to form, though not in substance, and that it was quite within the judge's discretion to order the defendant to pay one-half the costs of the whole litigation which was what in substance the order meant. *Jessel, M.R.* said [(1881) 17 Ch. D.at p. 774]

"The judge has a large discretion as to costs. He may make the defendant pay the costs of some of the issues in which he failed, although he may have succeeded on the whole action. Or he may say that both parties are wrong, but that he could not apportion the blame in a definite proportion, and therefore would dismiss the claim without costs. Or he might say that the plaintiff should have half the costs of the action, or some other aliquot part. Or he may follow the course which I sometimes adopt, and I generally find that the parties are grateful to me for doing so, namely, fix a definite sum for one party to pay to the other, so as to avoid the expense of taxation, taking care in doing so to fix a smaller sum than the party would have to pay if the costs were taxed. All these cases are fairly within the meaning of s. 49 of the Judicature Act, 1873, and there is no appeal from the discretion of the judge."

With the above principles on the award of costs so well recognised and applied by the Court of Appeal, it seems to me the only question for determination can be whether there were any materials before the trial judge on which he could have concluded that the case was a simple one, because, if he adjudicated when there were no materials, or proceeded on grounds wholly unconnected with the case, he has not really exercised his discretion judicially. In my opinion there were indeed such materials in this case even though my own findings on them may well have been different from his, which is really beside the point. The trial judge, it seems to me, must have been influenced by the drift and conduct of the case of which he alone had the view and control; also by the fact that only six witnesses in all were called on to testify and, most likely, by the manner in which they did so. Reading their evidence myself, though I could not have observed their demeanour, the text of it seems straightforward enough. The fact that the judge had to "grope in the dark" for details of relevant evidence that was not led, but which, it appears to me, could and ought to have been led, must have left an unfavourable impression on his mind. But what is important, I think, is that the case lasted only two days (27th and 28th July, 1972), and that judgment was delivered the very next day, i.e., 29th July. In my way of thinking, these were all facts connected with the litigation which could have given the judge the impression, albeit erroneously, that the case was "simple and devoid of complexities". To him the case was simple in spite of counsel's arguments and citation of authorities; although, as I said, I do not entirely agree with him. Such materials cannot be said to be unconnected with the case, and, as we have already noticed in the extract from Viscount Cave's speech above, even if the judge can be faulted in his assessment of those materials, a Court of Appeal has no right to disturb a conclusion that is based on them, however wrong it may be. This is a deep-rooted principle that runs through the law.

I close with this pertinent observation. It was argued before us that the learned judge ought at least to have consulted counsel before fixing the costs of the action; that if it was not counsel's right that he should do so, then at least the judge ought to have done so as a matter of courtesy. While I readily agree in a civil action there is much to commend any course that is satisfactory to both sides, I know of no rule that makes it obligatory on a judge to consult and obtain the consent of counsel before fixing costs; although, if counsel asks to be heard on costs, I think he ought to be heard. Fixed costs are not "agreed costs". The latter are what the parties themselves inform the court they have agreed on and desire to become a record of court. When at first instance, I myself have always found consultation helpful when fixing the costs of a successful party. That course, apart from being courteous, has the advantage of securing to a judge much useful information. In fixing costs, the parties are informed of the court's intention to fix the costs of the action. An enquiry is made of the successful party what are his costs, excluding those normally incurred in initiating the action. Then costs, inclusive of counsel's

brief fee, are awarded in a gross sum, as *Jessel, M.R.* said above, that is less than what would be obtained if a taxation is directed; preferably, though not necessarily, with consent of both parties. But in the absence of counsel's agreement, I have always considered there is nothing in the way of the exercise of my discretion to fix costs, so long as I have heard both parties.

For the above reasons, I would support the trial judge's order as to fixed costs of the action and allow the appeal to the extent already stated by substituting a total award of \$32,1150.00 as general and special damages with costs.

Appeal allowed. Damages increased. Order for costs in court below affirmed.

Solicitors:

Sase Naraine for the appellant

Dabi Dial for the respondent

B.S.E. WILLIAMS v. S.A. STOREY Appellant/Respondent

In the Full Court on Appeal from the Magistrate's Court for the Georgetown Magisterial District, (Boilers C.J. and M.A. Churaman J.,) January 19, February 16, 1973.

Magistrate's Court—Landlord & Tenant—Landlord's application for possession—for own use—Need to show reasonable requirement not anticipating need—No bona fide present need shown—Application refused—Kent Restriction Act Cap. 36:23. S.16 (l) (e).

The appellant, an aging and ailing landlord, applied for possession of his three flat premises in Georgetown on the pretended ground of physical hardship. The tenant did not testify, but rested his case on the submission of his counsel that a reasonable requirement of the premises on the ground of own use had not been shown. The learned magistrate having accepted the landlord's evidence in its entirety nevertheless refused to make an order for possession. The landlord then appealed to the Full Court.

HELD: (*dismissing the appeal from the magistrate's refusal*)

- (i) The application was not bona fide.
- (ii) The evidence fell short of showing a genuine present need for the landlord's possession, but only an anticipated need for the premises.

Mc Doom v. Fung, (1946) L.R.B. G. 289; C.R. Jacob & Sons Ltd. v. Oudkerk, (1947) L.R.B.G. 81, and A. Gaffoor & Sons Ltd. v. Bhanal Boodhan No. 2626 of 1968; followed.

Appeal dismissed.

O.M. Valz, for the appellant

Miles Fitzpatrick, for the respondent.

JUDGMENT OF THE COURT: The appellant/landlord, now some 62 years old, is the owner of a number of properties, altogether at least five, situate at various places within the city of Georgetown. At an early age, he became afflicted with paralysis from which he appeared to have partially recovered; about three or four years ago, the effects again manifested themselves, But he has since been able to walk. In addition he suffers from general ill-health, and the gravamen of his complaint is the undue physical strain in mounting stairways due to his physical condition.

He at present resides in a three flat building which consists of the upper flat housing four bedrooms inclusive of bath, middle flat containing dining and sitting room with an additional bedroom occupied by his brother and brother's wife but which is expected to be shortly available to him, if it is not so by now, and a lower flat housing servants' quarters and garage accommodation. It is evident that this somewhat commodious building adequately accommodates the appellant, his wife and six children who reside with him.

It is to be noted that the appellant's complaint is not the lack of accommodation but solely the difficulty in ascending and descending staircases, notably when necessary to visit his bath which necessitates one flight of stairs, and when going to his car which means descending one or two flights of stairway.

He admits in evidence that the premises at present occupied by respondent as a statutory tenant is one for which he has an attachment having lived in those particular premises previously. Additionally he claims that these premises are self-contained with all conveniences on one floor which would ideally meet his requirements, notwithstanding that he would have to ascend and descend one flight of stairs as the premises are elevated.

Having offered the respondent alternative accommodation which was refused by the latter, the appellant moved the magistrate of the Georgetown

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Judicial District for an order for possession of the premises now occupied by respondent/tenant on the ground that the premises are reasonably required for his own use. The appellant alone testified. Counsel for respondent—Tenant being content to rest his case on certain submissions which the learned magistrate upheld. The appellant now appeals to this Court.

Before the learned magistrate, it is of moment to observe that the appellant admitted that on account of his physical handicap, the ideal situation would be for him to live at ground-level but he said he did not care to do so as he believes it will be too damp. He further admitted that his present residence with a bedroom in the middle flat may adequately satisfy his needs with the insertion of a bath, and so avoid a necessity to climb an additional stairway, *thus equating the conditions with those of the premises in question*. His answer to that is that he does not like the bedroom in the middle flat of his present residence.

Additionally, the appellant has a two-storeyed building immediately behind this existing residence, which accommodates the lower flat at ground-level. The lower flat appears to be self-contained and was vacant about a year previous to the instant application for possession. The appellant's answer to not availing himself of those premises is to the effect that, apart from not wanting to live at ground level despite his admission that it is the best solution to his problems of mobility, *he does not like the surroundings*, despite the fact that it is behind his existing residence.

Added to all of this, it appears quite clear that the appellant nurtures an idea of disposing of his present residence inasmuch as, his children being all grown, he can foresee in the near future that his present residence would be too large for him. It requires but little imagination to see that the primary consideration of the appellant is his anticipation that his children, now all grown, may shortly go their several ways when this somewhat commodious property may be wholly superfluous for the needs of himself and his wife.

Counsel for appellant submits before us that the magistrate, having accepted the appellant's testimony in its entirety, a clear case for an order had been made out on the evidence led.

As has been firmly established in the several authorities, notably *McDoom v. Fung* (1946) B.G.L.R. 2891 ; *C.R. Jacob & Sons Ltd. v. Oudkerk* (1947) L.R.B.G. 81 and *A. Gaffoor & Sons Ltd. v. Bhanal Boodhan* No. 2626 of 1968 (Guyana), the two questions to be decided in matters of this nature are:—

- (a) Are the premises reasonably required, and
- (b) Is it reasonable to make the order.

In the circumstances of the instant appeal, only the first question falls to be decided, as the second question only arises after the first has been affirmatively answered

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The respondent's contention is that the appellant has not shown a genuine present need as contemplated in the first of these considerations.

The authorities are clear that before an order of possession can be made, it is the duty of the landlord to establish that the premises are reasonably required for his own use. In other words, there is an *onus* cast upon him to show a *genuine present need* and not a mere desire or claim (*See Quinlan v. Phillip, (1965) 9 W.I.R.*).

The evidence clearly establishes that the appellant's motivation for an order is not so much that he is in need of these premises on the pretended ground of a physical handicap as he alleges, as much as he apprehends that at some date in the near future his present residence would become superfluous for just himself and wife, and he wishes to prepare for such eventuality; because of his *attachment* for the premises in question, rather than a *need* therefor, he seeks to obtain an order for possession in anticipation thereof. Clearly the application is not bona fide, and the evidence falls far short of showing a genuine present need. While we appreciate that as a proprietor of more than two premises the appellant may satisfy his personal choice in respect of which of the premises he shall live, nevertheless his decision must be based on a genuine present need and not an anticipating need.

The appeal is accordingly dismissed, the order of the magistrate affirmed, with costs to the respondent fixed at \$24.56.

Appeal dismissed.

MOHAMED YASSIN v. HARPAUL

[In the Full Court, on appeal from the Magistrate's Court
for the East Demerara Magisterial District (Boilers C.J. and
M.A. Churaman J.) January 19, 1973; February 1973]

Magistrate—Claim for trespass and/or conversion of animal—Animal wilfully and unlawfully taken—Dies at police pound—Trespass -judgment for full value of animal—Facts prove conversion of animal—Magistrates order amended to read conversion—Summary Jurisdiction (Appeals) Act, Cap. 3:04, S.28(a).

The appellant forcefully took and carried away the respondent plaintiff's horse to police pound where it died. The respondent claimed the horse as his property. Magistrate found the appellant/defendant mistakenly took the horse to be his; that he had committed trespass, and awarded the respondent \$240 representing the value of the horse.

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On appeal, it was contended that as only the tort of trespass, (as the court found) was committed, only nominal damages were permissible and not the value of the horse as ordered.

HELD: by the Full Court of the High Court:

(i) the taking of the respondent's horse being both wilful and wrongful the appellant was liable for its full value in an action in trover.

(ii) there was a conversion of the respondent's horse rather than a trespass to it. Accordingly the finding of trespass will be amended to read conversion in the order of the learned magistrate.

Appeal dismissed—order varied

Keeler v. Braithwaite (1949) L.R.B.G. 105 applied.

B. E. Commissiong, for the appellant.

S. I. Marcus, for the respondent.

BOLLERS, C. J.: The respondent-plaintiff is the owner of horses which are normally attended by his son. On 9th April, 1972, the respondent's son was attending the horses while depastured when the appellant came and forcefully took One of the horses away claiming that it was the appellants. The respondent's son protested. The appellant took the animal to the police pound where it subsequently transpired that the horse died, as a result of which the respondent-plaintiff claimed damages for trespass and/or conversion of the said animal. *The appellant in his defence pleaded that the horse in question was his property, and the issue was so contested before the magistrate.*

The learned magistrate found that the appellant, who was illiterate, *mistakenly thought the animal to be his and took the horse out of the possession of the respondent*, and had accordingly committed the tort of trespass. Implicit therein is the finding that the horse in question was the property of the respondent and that the appellant had wrongfully and unlawfully taken the animal out of the possession and control of the respondent. The magistrate entered judgment in favour of the respondent in the sum of \$240.00 *representing the value of the horse.*

The appellant now appeals to this court. The main ground of appeal is that only the tort of trespass was committed for which only nominal damages should be awarded, and not the value of the animal which ought only to be awarded in conversion. The submission in other words is that the evidence only disclosed trespass and not conversion.

It should be noted that after the appellant wrongly took the animal out of the possession and control of the respondent, he appears to have taken it to the Police Pound where the animal died some four days later; the circumstances surrounding the death are unknown.

It is clear from the learned magistrate's findings of fact that he entered judgment in favour of the respondent on the basis of a conversion and not mere trespass, and even though the learned magistrate in his reasons said he found the tort of trespass, we are satisfied that if the circumstances support the tort of conversion rather than trespass, this Court has the power to substitute a finding of conversion rather than trespass. *Kieler v. Braithwaite (1949) L.R.B.G. 105.*

We must therefore examine the circumstances to see whether the evidence disclosed the tort of conversion or that of mere trespass de bonis asportatis.

The tort of conversion consists of an act of wilfully interfering with any chattel without lawful justification whereby any person entitled thereto is deprived of the possession of it (Salmond on Torts, 8th Ed., P. 314). The two elements necessary to constitute conversion are:—

- (1) A dealing with chattel inconsistent with the right of the person entitled to it.
- (2) An intention in so dealing to deny that person's right.

It is clear on the findings of the learned magistrate that the original taking by the appellant was both wilful and wrongful. The authorities show that anyone who interferes with a chattel or animal does so at his own risk, and if the loss of same (whether intended or not) in fact results from such wrongful act, he is liable for the value of the chattel or animal in an action of trover.

It is to be noted that a mistake of law or fact is no defence to anyone who intentionally interferes with a chattel. He does so *suo periculo* and takes the risk of the existence of a sufficient lawful justification for the act; and if it turns out that there is no justification, he is just as responsible in an action of trover as if he had fraudulently misappropriated the property. In this context it is to be observed that in the contest before the magistrate the appellant relied on his ownership as the basis of the appellant's justification for removal of the animal, but that basis was expressly rejected by the magistrate. We recognise the principle that where there is a genuine doubt in the defendant's mind as to the ownership of chattels, a temporary and provisional refusal to deliver them to a claimant pending enquiries is justifiable and is not a conversion. *Vaughn v. Watt (1840) 6M & W 497*, but this case was not contested on that basis.

We must finally observe that it is no defence that restoration of the chattel or animal had become impossible, even though the impossibility resulted from no act or default of the appellant; so that whether the animal died from an act or omission of the appellant while the animal was at the police pound, or even by inevitable accident, or even by the wrongful act of a third person, the appellant is none the less liable in conversion.

In the circumstances, we hold that the appellant did in fact commit the tort of conversion and is liable for the value of the animal in question; save

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that we substitute a finding of conversion in place of the finding of trespass and amend the order of the magistrate accordingly, the appeal is dismissed with costs to respondent fixed at \$22.16.

Appeal dismissed.

THE STATE
v.
BOBB BAKER MELVIN HENDRICKS

[High Court (Berbice Assizes, Indictment No. 4233
(Vieira J.), May 9, 11, 1973.)]

Criminal Law—Murder—Preliminary enquiry—Neither evidence of registered medical practitioner nor post mortem report tendered—Committal of accused—Post mortem report tendered at Assizes—Voir dire—Admissibility of post mortem report—Evidence Act Cap. 5:03 S. 43 as amended; Law Revision Act, No. 4 of 1972, s. 16(1).

The accused Bobb Baker and Melvin Hendricks were indicted on two counts in an indictment charging them with the murder of and intentionally causing grievous bodily harm to one Lakeram Bhola. At the preliminary inquiry neither did the registered medical practitioner give evidence, nor was his post mortem report tendered in evidence.

At the assizes it was sought to put in a post mortem report allegedly performed on Bhola's body signed by Dr. Balwant Singh, Government Bacteriologist and Pathologist, and dated September 23, 1970 at the Georgetown Hospital in the presence of P.C. 6866 Harnansingh.

The trial judge at a *voir dire* in the absence of the jury, identified two questions for decision after hearing both counsel—(i) whether the post mortem report, (tendered as Ex. C) was one and the same sealed document as that given by Dr. Balwant Singh to P.C. Harnansingh on September 23, 1970, and (ii) whether the post mortem report was admissible in evidence.

HELD: (i) the first submission is factual. The post mortem report was properly tenderable, and so admissible.

(ii) the Law Reform Act, 1972 being procedural, is retrospective and so will apply to the post mortem report even though it is dated September 23, 1970, i.e., two years before 1972 when the Law Reform Act was passed.

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(iii) there was no necessity to call Dr. Balwant Singh as a witness to tender his post mortem report either at the preliminary enquiry or at the assizes.

See *Chester v. Hardatt called Ghandie*, (1976) 24 W.I.R., also *Mohamed Zaman v. The State* (1973) 20 W.I.R. 238, and p. 394 below.

Post Mortem report admissible.

N. Kissoon, State Counsel, for the State.

Doodnauth Singh, associated with R. Kharran for the defendants.

VIEIRA, J., in this matter the two accused are indicted on two counts as follows:—

FIRST COUNT STATEMENT OF OFFENCE

Manslaughter, contrary to sec. 94 of the Criminal Law (Offences) Ordinance, Chapter 10.

PARTICULARS OF OFFENCE

Bobb Baker and Melvin Hendricks, on the twenty-second day of September, in the year of our Lord one thousand nine hundred and seventy, in the County of Berbice, unlawfully killed Lakeram Bhola.

SECOND COUNT STATEMENT OF OFFENCE

Causing grievous bodily harm with intent, contrary to sec. 57(a) of the Criminal Law (Offences) Ordinance, Chapter 10.

PARTICULARS OF OFFENCE

Bobb Baker and Melvin Hendricks, on the twenty-first day of September in the year of our Lord one thousand nine hundred and seventy, in the County aforesaid, caused grievous bodily harm to Lakeram Bhola with intent to cause him grievous bodily harm, or to maim, disfigure or disable him.

At the preliminary inquiry before the magistrate of the Berbice Magisterial District the charge was one of manslaughter only and the two accused were committed for that offence on 2nd October, 1972. No registered medical practitioner gave evidence before the magistrate neither was any post mortem report tendered.

Now, before me, the State seeks to put in a medical report of a post mortem allegedly performed on the body of the deceased, Lakeram Bhola,

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by Dr. Balwant Singh, then Senior Government Bacteriologist and Pathologist, on Wednesday 23rd September, 1970, at the mortuary of the Georgetown Hospital in the presence of P.C. 6866 Harnansingh. Evidence on a *voir dire* in the absence of the jury was taken by me to decide (1) whether the post mortem report tendered as exhibit "C" for identification only is one and the same document as that allegedly given by Dr. Balwant Singh to P.C. Harnansingh in a sealed envelope on the said 23rd September, 1970, and (2) whether the said post mortem report is admissible or not under the provisions of sec. 43(1) of the *Evidence Ordinance*, Chapter 25, as amended by sec. 16(1) of the *Law Revision Act*, No. 4 of 1972, as set out in the second schedule thereto.

I will deal with the second submission first.

Before its amendment sec. 43 of Chapter 25 read as follows:—

"43(1)—Any document purporting to be a report, under the hand of the Government Analyst, upon any matter or thing duly submitted to him for examination or analysis and report, for the purposes of any preliminary enquiry before a magistrate in respect of any indictable offence, or in any proceeding in a magistrate's court, or before a coroner, shall be receivable on that inquiry or proceeding as *prima facie* evidence of any matter or thing therein contained relating to the examination or analysis.

(2) If, on any inquiry or proceeding aforesaid, the Government Analyst is called as an expert, the party calling him shall, unless the magistrate, or the magistrate's court, or the coroner, otherwise expressly orders, pay all costs occasioned by his having been so called.

(3) The provisions of this section, other than with regard to a preliminary inquiry shall with the necessary modifications, apply in the case of a document purporting to be a report by a duly registered medical practitioner of any injuries received by a person which are the subject of a prosecution by the person or his parent or guardian or by the police in any case involving a charge or injury to the person: provided that the report purports to have been written on the same day as; or on the day following that on which the examination was made by the medical practitioner.

(4) In this section the expression "Government Analyst" shall be construed to include an assistant analyst, and the Government Bacteriologist".

The amendment under the *Law Revision Act of 1972* is as follows:—

"43(1)—Any document purporting to be a report made under the hand of an Analyst, on any matter or thing duly submitted to him for examination or analysis and report, shall be receivable in any court as evidence of any matter or thing contained therein relating to the examination or analysis.

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(2) Notwithstanding subsec. (1) the court may of its own motion or on the application of any party to the proceedings, require the Analyst to attend before the court and give evidence.

(3) If an Analyst is called on an application under subsec. (2) of any party to the proceedings the court may order that party to pay the costs occasioned by his having been so called.

(4) The provisions of this section shall, with the necessary modifications, apply to a document purporting to be a post mortem

report of a duly registered medical practitioner, and to a document purporting to be a report made by such medical practitioner within 48 hours of his examination of any injury received by or the condition of a person which is the subject of a prosecution for a criminal offence.

(5) In this section the expression "Analyst" means a government analyst, an assistant government Analyst, a radiologist, a government bacteriologist and a pathologist, a scientific officer of the Analyst Department of the Government or any other person of like qualifications prescribed for the purposes of this section by order made by the body authorised to make rules of Court under the High Court Ordinance".

The Law Revision Act of 1972 is intitled—

"An Act to provide for the Revision of the Laws of Guyana, and for matters connected therewith, including Miscellaneous Amendments, Repeals and Validations".

Apart from the very important aspect of providing for all future revisions of our Laws by a permanent Law Revision Committee, which has the great advantage of militating against the necessity of passing future Law Revision Acts, the Act of 1972 has repealed, amended, extended and substituted large and important areas of both substantive and adjective law in our Acts and their respective subsidiary legislation.

It is, I think, quite clear, that the amendment to sec. 43 of Chapter 25 has not only extended the category of professional persons under the definition of "Analyst (formerly "Government Analyst") but has greatly eased the work of the courts and, in particular, in relation to preliminary inquiries by a magistrate of indictable matters committed within the confines of his judicial district.

Both the State and private individuals have been saved from unnecessary and undesired financial strain as a result.

Post mortem and other medical reports as well as reports from the Government Analyst Department are now tender-able and admissible in preliminary inquiries without the inconvenience, delay and cost of having to call the maker of such reports which had undoubtedly speeded up the committal of accused persons and thus brought about the quicker despatch of indictable matters in the High Court.

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But the amended sec. 43 has gone even further by providing for the admissibility of analyst, post mortem or other medical certificates in the High Court itself without the makers thereof having to come and give evidence in court. There is a proviso, however, under sub-sec. (2), a wise precaution on the part of the Legislature I feel, that the makers of such documents may be called to attend in court and give evidence where any party to the proceedings so require or the court, on its own motion, so directs.

To my mind, the real purpose of the amended sec. 43 is to effect speedier trials in both the Magistrates' Courts and the High Court including persons accused of indictable offences without any unreasonable expense, delay and frustration.

It is submitted before me that the Act of 1972 *is not retrospective* and, as it came into force on the 23rd September, 1972, the date of its publication in the Official Gazette, then it is not applicable to the post mortem report (exhibit "C") since this was signed by Dr. Singh on 23rd September, 1970, exactly 2 years previously.

In *Attorney-General for Canada v. Halett & Carey Ltd.* (1952) A.C. 427, Lord Radcliffe succinctly stated the paramount rule of construction of a statute as follows at p. 449—

"There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes but the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention".

Another way of expressing the phrase "intention of the legislature" is by saying that a statute should be construed in accordance with its policy and object. As Lord Goddard, C.J., pointed out in *Barnes v. Jarvis* (1953) 1 W.L.R. 649 at p. 652.

"A certain amount of commonsense must be applied in construing a statute. The object of the Act has to be considered"

As I see it, s. 43 of Cap. 25 is entirely a *procedural section* and does not in any way affect constitutional or substantive rights such as proprietary or contractual rights neither has it amended, varied and repealed the existing substantive criminal law of this country, neither has it created any new crime or crimes.

The general canon of construction is that there is a presumption against the retrospective effect of statutes. As Scrutton, L.J., said in Word v. British Oak Insurance Co. Ltd., (1932) 1 K.B. 392 at p. 397 -

"*Prima facie* an Act deals with future and not with past events. If this were not so, the act might annul rights already acquired, while the presumption is. against the intention".

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In the same case *Greer, L.J.*, said at p. 398—

"There are numerous cases which clearly show that the courts lean against so interpreting an Act as to deprive a party of an accrued right"

In *Re Athlumney (1892) 2 Q.B. 547 at p. 551, Wright, J.*, had this to say—

"Perhaps no rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, *otherwise than as regards a matter of procedure*, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language that is fairly capable of either interpretation, *it ought to be construed as prospective only*".

In *Dunlop Rubber Co., Ltd. v. Longlife Battery Depot (1958) L.R. 1 R.P. 65, Lloyd-Jacob, J.*, said at p. 74—

"The rule of construction is that, *save as concerns procedural matters . . .* retrospective operation is not to be given to a statute so as to impair an existing right unless that effect cannot be avoided without doing violence to the language of the enactment....."

In *Lauri v. Renad (1892) 3 Ch. 402* that eminent jurist, *Lindley, L.J.*, said at p. 421—

"It is a fundamental rule of English Law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective effect than its language renders necessary"

As I see it, therefore, the *Law Revision Act* of 1972 merely amended sec. 43 of the *Evidence Ordinance, Cap. 25*, by *altering or changing the procedure* from a rather cumbersome, inadequate and frustrating one to a simple, speedy and sensible one.

In my considered opinion, therefore, *sec. 43 of Chapter 25 as amended, being merely procedural, is both prospective and retrospective* and clearly covers the post mortem report (exhibit "C") in this matter and I rule, accordingly, that it is admissible despite the fact that it was made 2 years prior to the coming into force of the Act of 1972.

The first submission is really a factual one in the sense that I have to decide whether there is a sufficient nexus between the report tendered for identification as exhibit "C" and the one given to P.C. Harnansingh by Dr. Balwant Singh on 23rd September, 1970. To my mind this is a simple matter. All the new sec. 43(1) speaks of is—

"Any document *purporting*....."

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This, I think, clearly means *prima facie proof only* and not proof beyond a reasonable doubt. P.C. Harnansingh stated that Dr. Singh gave him the certificate in a sealed envelope after he saw the doctor sign it on his desk and he observed the name "Lakeram Bhola" on it and this was done after the constable had witnessed a post mortem examination performed on the body of the deceased after it was identified by his brother-in-law, Ravindranauth Seebarran.

The first submission is accordingly also overruled and this court rules that exhibit "C" is not only admissible *but properly tenderable also* as the *post mortem* report relating to the deceased signed by Dr. Balwant Singh in the presence of P.C. Harnansingh and given to him on 23rd September, 1970.

ADDENDUM:

After my ruling was given, Mr. Doodnauth Singh submitted that the effect of sub-sec. (2) of sec. 43 of Chapter 25, as amended, is that, although a medical report may be admissible, nevertheless, in proper cases, such a report is not tenderable unless and until the maker thereof attends court and gives evidence thereof. He urges that to allow the certificate to be tendered through P.C. Harnansingh, as the State is attempting to do here,

would breach a fundamental rule of evidence in that evidence should be given *viva voce* and that documents are merely used to refresh the witness memory. He contends that the failure of the State to call Dr. Balwant Singh at the preliminary enquiry or to tender the post mortem report in those proceedings or even to call Dr. Singh at this trial in the High Court would result in a denial of the right of the accused to cross-examine a State Witness.

Mr. Kissoon, in reply, submits that sec. 43(2) allows a post mortem report to be tendered without the necessity of having to call the maker thereof to court for the purpose of giving evidence in relation thereto. He argues that to say that before the report can be tendered it is necessary to call the maker thereof to give evidence thereon would, in effect, defeat the very purpose of the section and the manifest intention of the Legislature.

I have no doubt, whatsoever, that Mr. Kissoon's contention is correct. If Mr. Singh's submission is right then there would be delay, expense and frustration in having to postpone this trial and await Dr. Balwant Singh's presence, whenever that may be, depending on a number of factors such as availability, etc., and I am fortified, in my opinion, by the use of the permissive 'may' in the subsection and not the mandatory 'shall'.

The particular circumstances of this case must be rare, indeed, and I cannot possibly see any injustice in tendering the document through P.C. Harnansingh since there is always the safeguard that the proviso gives to call Dr. Singh either by the court, on its own motion or at the request of Mr. Singh himself. Indeed, to hold otherwise would, in my opinion, work a grave injustice on the State and, after all, it was really to the benefit and interest of the State mainly that this very reasonable and sensible amendment was passed.

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This submission is accordingly overruled and *the court rules that exhibit "C" is properly tender-able through P.C. Harnansingh.*

The jury will now be directed to return and the trial will continue with the evidence of P.C. Harnansingh.

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and
HAZRAT ALI known as ABDOOL

[High Court (Mitchell, J.) 14, 18 May, 1973].

Magistrate—Jurisdiction—Landlord & Tenant—Action for possession of land in the High Court—Statute creates right and appoints specific tribunal for enforcement—Party seeking right must resort to tribunal specified and not to others. Landlord and Tenant Ord. Cap. 185, ss.3, 46 (1)(a).

Landlord & Tenant—Notice to quit—Claim for possession of land—Magistrate's court sole entitlement to entertain claim.

The plaintiffs, who are transported owners, brought an action for possession against their tenant, the defendant, in the High Court. Notice to quit and deliver up the premises was served on June 7, 1971, but the defendant failed to do so.

In limine, the defendant contended firstly, that being building land, the plaintiffs are not entitled to possession, because there is no jurisdiction in the High Court to hear and determine the claim; alternatively, that the land being agricultural land, legal proceedings for the recovery of possession are maintainable only in the Magistrate's Court under the Landlord & Tenant Ord. Cap. 185, s. 46(1)(a).

HELD: — (i) the procedure laid down in s. 46 of Cap. 185 is one to be followed if the landlord wishes to recover possession after the determination of the tenancy;

(ii) the Summary Jurisdiction (Petty Debt) Ord. Cap. 16, gives the magistrate jurisdiction to adjudicate upon the matter. It is not intended to confer a jurisdiction on the High Court; and does not do so.

(iii) whether the land is agricultural or building land the jurisdiction to hear and determine the action was in the magistrate s and not in the High Court.

*Submission in limine upheld .
Jurisdiction of High Court ousted.*

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Cases referred to include:—

- (1) *Doe d. Bishop of Rochester v. Bridges* (1831) 1 B & Ad. 847.
- (2) *Pasmore v. Oswaldwistle U.D.C* (1898) AC. 387.
- (3) *Barraclough v. Brown* (1897) AC. 615.
- (4) *Wilkinson v. Barking Corp.* (1948) 1 K.B. 721.
- (5) *Horner v. Franklin* (1905) 1 K.B. 749.

See also, *Sowailall v. Kalika Persaud et al.*, (1971) 18 W.I.R. 186 and, *Adjodhia Persaud Singh v. Chuni Lall*, (1977) 25 W.I.R. 226.

J. A. King for the plaintiffs. *D. C. Jagan* for the defendant.

MITCHELL J.: In this action the plaintiffs claimed that they are the owners by transport No. 737 of 1922 of *inter alia*, a piece of agricultural land at Good Hope Dam, East Coast, Demerara, and are entitled to possession thereof, and that they let the said piece of land to the defendant upon a yearly tenancy of forty-eight (48) cents per annum. They further stated that they duly determined the tenancy of the defendant on 31st December, 1971 by serving him with a notice in writing dated 7th June, 1971, on the said 7th June, 1971, but despite the determination of the tenancy the defendant has remained in occupation of the said premises.

Accordingly, the plaintiffs claimed possession of the said premises and an order compelling the defendant to remove his house and any other structure which he may have on the said land, and, on his failure to do so within such time as the court may fix, that the plaintiffs be at liberty to enter the said land and to remove the said house and other structures. The plaintiffs, also, claimed mesne profits.

The defendant in his statement of defence denied that the plaintiffs are entitled to possession of the said land. The defendant also, stated *inter alia* that the land is building land and having regard to the nature of the plaintiffs action, the court had no jurisdiction to hear and determine that claim. Alternatively, the land is agricultural land and legal proceedings for the recovery of possession of such lands are maintainable only in the magistrate's court under the provisions of the *Landlord and Tenant Ordinance, Chapter 185*.

When the matter came up for hearing before this court, counsel for the defendant submitted in limine for the consideration of the court that the court had *no jurisdiction* to hear and determine the matter on the basis that the land in question was agricultural land. He said that if the land was building land, which is what the defendant contends in his statement of defence,

the *Rent Restriction Ordinance Chapter 186*, now cited as the *Rent Control Ordinance* would apply.

Counsel for the defendant said further that S. 46, sub-s. (1) and (2) of the *Landlord and Tenant Ordinance, Chapter 185*, would also apply. He said that S. 46, sub-s. (2) is bound up with sub-s. (1) and confers a jurisdiction on the magistrate not on the High Court and under S. 46 sub-s. (2) the action should be brought in the Magistrate's Court.

Counsel for the plaintiffs in reply said that the question as to whether it was building land would require evidence and that before that argument could be advanced the tenancy must be determined. He contended that the word "may" in s. 46(IXa) gave the landlord the right to bring the action either in the Magistrate's Court or in the High Court.

The provisions of S. 46(1) of the *Landlord and Tenant Ordinance, Chapter 185* remain unimpaired by the *Rent Restriction (Amendment Act, 1969 (Act No. 31 of 1969))*.

S. 46(1) of the *Landlord and Tenant Ordinance, Chapter 185* provides:

"Whenever the term or interest of any tenant of a tenement held by him at will or for a term, either without being liable to the payment of rent, or at a rent not exceeding the rate of twelve hundred dollars a year, has ended or has been determined by a legal notice to quit, or otherwise, if the tenant (or, when he does not himself occupy the premises or occupies only a part thereof, if the person by whom they or any part thereof are or is occupied) refuses or neglects to deliver up possession of them the following provisions shall apply —

- (a) the former landlord or his agent *may file* against the former tenant or occupier an action under the Summary Jurisdiction (Petty Debt) Ordinance *for the recovery of possession of the land* or buildings formerly held under the tenancy,
- (b)

In terms of the pleadings the plaintiffs assert that they are the owners by transport of the lands in question and that they let those lands to the defendant upon a yearly tenancy. In the defence the defendant does not admit or specifically deny that he is a tenant, and the burden is on the plaintiffs to prove that he is a tenant. The plaintiffs have launched this action on the basis that he is a tenant and their claim in terms of the pleadings would succeed or fail on their proof or lack of proof of that assertion.

For the purposes of the consideration of this submission in limine it is, therefore, appropriate that *prima facie* I accept the assertion of the plaintiffs that the defendant is a tenant of the plaintiffs. The plaintiff is not approbating and reprobating that fact and is not seeking an alternative remedy based on a status other than that of landlord and tenant.

In terms of the plaintiff's statement of claim the tenancy is a yearly tenancy of agricultural land.

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S. 3 sub-s. (2) of the *Landlord and Tenant Ordinance*, Chapter 185 provides:—

"A tenancy from year to year is a holding of land or buildings under a contract, express or implied, for the exclusive possession thereof for a term which may be determined at the end of the first year or any subsequent year of the tenancy either by the landlord or the tenant by a regular notice to quit".

By virtue of the provisions of ss. 3 and 4 of the *Landlord and Tenant Ordinance*, Chapter 185, s. 46 of that Ordinance would be applicable to the tenancy relationship as asserted by the plaintiffs as existing between the plaintiffs and the defendant.

In the *Landlord and Tenant Ordinance*, Chapter 185, under the heading "Provisions relating to Tenancies generally" at s. 14 which is concerned with things privileged from distress there is reference at s. 14(b) "In the case of a tenancy relating to land used for agricultural or grazing purposes".

The plaintiffs asserted, also, that the defendant's tenancy was duly determined on 31st December, 1971, by a notice to quit and having regard to the application of s. 46 of the *Landlord and Tenant Ordinance*, Chapter 185, to the relationship I would hold the view that the procedure laid down in the said s. 46 of Chapter 185 was the one to be followed if the landlord wished to recover possession after the determination of the tenancy.

It is clear that the procedure laid down in s. 46(1)(a) previously mentioned specifically provides for the filing of the action under the *Summary Jurisdiction (Petty Debt) Ordinance*, Chapter 16.

The *Summary Jurisdiction (Petty Debt) Ordinance*, Chapter 16, of the Laws of Guyana gives the magistrate jurisdiction to adjudicate upon the matter. It was not intended to confer a jurisdiction on the High Court and does not do so.

The *Landlord and Tenant Ordinance*, Chapter 185, is an Ordinance to regulate the relationship between Landlord and Tenant and to amend the existing law with respect thereto. The object of the Ordinance seems to be to provide the tenant with security of tenure and to prevent the landlord from evicting or dispossessing the tenant without an order of the competent court.

The question may be asked as to what is the competent court in the circumstances and that is the question with which this judgment is concerned. The answer is found in the various sections of the said *Landlord and Tenant Ordinance*, Chapter 185.

S. 22 of Chapter 185 under the title "Recovery of Rent by Distress" confers jurisdiction on the magistrate and so does s. 33 and, also, s. 46. "Tenement" in s. 46 means any land or buildings in possession of a tenant under a tenancy. S. 48 provides protection for the officers concerned in the adjudication upon the matter under the Ordinance and in the execution of

any warrant issued by virtue of powers conferred by that Ordinance. The officers protected under s. 48 are the magistrate, the constable and the bailiff.

Sections 52, 53 and 54 also concern the magistrate.

In this regard the legal maxim of construction "expressio unius. exclusio alterius" may be applicable so as not to extend the jurisdiction of the court under Chapter 185 unless specifically indicated by the Ordinance. It is my opinion that that is really so, and the Legislature in its wisdom thought it fit in s. 11(1) of the said Chapter 185 to specifically and singularly extend the jurisdiction which was otherwise conferred on the magistrate in terms of that Ordinance to the Supreme Court or a judge thereof in those particular circumstances.

S. 11(1) provides:—

"In the case of any action for a forfeiture brought for non-payment or rent, *the Supreme Court or a Judge thereof shall have power to give relief in a summary manner etc....*"

There is emphasis on the *summary manner* in which relief should be given. There is no such provision specifically or by implication arising under the Ordinance which confers jurisdiction on the Supreme Court or a judge thereof with respect to the recovery of possession of tenements in ss. 45 and 46 of Chapter 185.

Accordingly, I am of the view that no such jurisdiction of the Supreme Court was intended or contemplated or conferred under s. 45 or s. 46 of Chapter 185 and the landlord, if he has recourse to the court to obtain possession of any land or buildings in possession of a tenant under a tenancy must comply with the procedures laid down in s. 46, and, if the tenement concerns land used for agriculture, the procedures laid down in s. 46(2) in relation to the functions of the adjudicating magistrate would apply and the court concerned would be the court of the Summary Jurisdiction of the magistrate.

Moreover, at s. 46(1)(f) it is stated.—

"*The law, practice and procedure* under the Summary Jurisdiction (Petty Debt) Ordinance and the Summary Jurisdiction (Civil Procedure) Rules, or any amendment thereof, shall apply to the plaint, the issue of the summons and *the hearing and determination* of the action for the recovery of possession under this section";

but there is no reference or implication that the jurisdiction of the court to embark on the hearing was limited by a reference to s 3(1) of that Ordinance, the Summary Jurisdiction (Petty Debt) Ordinance, Chapter 16.

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According to *Maxwell on Interpretation of Statutes*, 10th edition at page 131:—

"The saying has been attributed to Lord Mansfield that nothing but express words can take away the jurisdiction of the superior courts but *it seems that it may in certain circumstances be taken away by implication* '.

The court said in the case of *Doc d. Bishop of Rochester v. Bridges (1831) 1 B & Ad. 847, 859:-*

"Where an Act creates an obligation and enforces the performance in a specific manner, we take it to be a general rule that performance cannot be enforced in any other manner".

This saying was adapted by LORD HALSBURY L.C. in *Pasmore v. Oswaldtwistle U.D.C. (1898) A.C. 387,394.*

In the case of *R. v. County Court Judge of Essex*, LORD ESHER M.R. with reference to the question as to whether a county court judgment debt carried interest under s. 17 of the *Judgments Act, 1838* said—[(1887) 18 Q.B.D.at p. 707].

"The ordinary rule of construction applies to this case, that where the legislature has passed a new statute giving a new remedy, that remedy is the only one which can be pursued".

According to the learned author of "*Craies on Statute Law*" the result of the application of the rule "*that no remedy can be taken but the particular remedy prescribed by the statute* as enunciated in *Stevens v. Evans (1761) .2 Burr. 1152, 1157* and also *Wake v. Mayor of Sheffield (1884) 12 Q.B.D. 145* may even oust jurisdiction as in *Barraclough v. Brown (1897) A.C. 615*, where the question raised was whether an action for a declaration would lie on a statute which gave a new right to recover expenses in a court of summary jurisdiction from persons not otherwise liable. LORD WATSON said: - [(1897) A.C. at p. 622].

"The right and the remedy are given uno flatu and the one cannot be dissociated from the other. By these words the legislature *has, in my opinion, committed to the summary court exclusive jurisdiction* not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable and has *therefore by plain implication enacted that no other court has any authority to entertain or decide these matters*".

The whole tenour and the words of the *Landlord and Tenant Ordinance*, Chapter 185, postulate for a summary trial by a court of summary jurisdiction.

In *Wilkinson v. Barking Corporation* in the Court of Appeal of England, ASQUITH L J. said: [(1948) 1 K.B. at p. 724].

"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 that right must resort to this remedy or this tribunal and not to others'.

According to the learned author of "Craies on Statutes Law" sixth edition at p. 248.—

"The true rule for ascertaining whether the special remedy does or does not include a right of action is laid down in *Vallance v. Falle (1884) 13 Q.B.D. 109,110*, where STEPHEN J. said:

"The general rule . . . seems in substance to be that the provisions and object of the particular enactment must be looked at in order to discover whether it was intended to confer a general right which might be the subject of an action or to create a duty sanctioned only by a particular penalty in which case the only remedy for breach of the duty would be by proceedings for the penalty".

I am of the view that by virtue of the provisions of s. 3 of the *Landlord and Tenant Ordinance*, Chapter 185 to which reference has already been made, the tenancy with respect to agricultural land which the plaintiffs claim would be included in the scope and purview of the said *Landlord and Tenant Ordinance*, Chapter 185, and therefore, recourse must be had to the Magistrate's Court and the jurisdiction of the High Court is ousted. If I may borrow and adopt the words of LORD JUSTICE VAUGHAN WILLIAMS in the English Court of Appeal in the matter of *Horner v. Franklin* which was a landlord and tenant case: [(1905) 1 K.B. 479].

'If the jurisdiction of the High Court was not ousted in such a case as this there would arise two different jurisdictions in the same matter between the same parties on a different basis'.

In my humble opinion it was not the intention of the legislature when the *Landlord and Tenant Ordinance*, Chapter 185, was enacted in 1947, that there should arise two different jurisdictions in respect of the same matter of possession of a tenancy between the same parties and it is, also, my humble opinion that the legislature from the wording of the Ordinance intended that the matter of possession with regard to the tenancies mentioned in s. 3 of that Ordinance should be dealt with summarily, expeditiously and inexpensively and, therefore, provided the summary procedures laid down in that Ordinance whereby that intention could be achieved before a court of summary jurisdiction.

The defendant had contended that the land in question was "building land". In so far as the plaintiffs had claimed that the land was "agricultural land" it was an issue to be determined by the court as to whether the land was "building land", or 'agricultural land". I have, however, as this submission was made in limine proceeded to determine this submission on the basis of the pleadings and on what the plaintiffs on whom the burden of proof lies, have asserted in their statement of claim to the effect, that the land was "agricultural land".

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If after due consideration it had been determined by the court that the land in question was building land, then the Rent Restriction Ordinance, now cited as the *Rent Control Ordinance*, Chapter 186, would have applied and there are abundant and well established judicial authorities both Guyanese and otherwise to support the conclusion of law that the Magistrate's Court would have jurisdiction in such a case, and that the jurisdiction of the High Court would, also, be ousted.

Thus, in my view, whether it is "agricultural land" as the plaintiffs assert, or, "building land" as the defendant claims the jurisdiction of the High Court is ousted in the matter of a claim for possession of the tenements or premises.

Accordingly, I am of the view that the plaintiff's claim for possession in this case should have been instituted in the Magistrate's Court and could not properly have been brought in the High Court of the Supreme Court of Guyana, as the jurisdiction of the High Court has been ousted by the provisions of the *Landlord and Tenant Ordinance*, Chapter 185.

The plaintiffs claim must therefore be struck out.

There will be costs to the defendant fixed by the court in the sum of \$275.00 (Two Hundred and Seventy-five dollars).

Plaintiffs' claim struck out.

BHAGMATIE & SEEPERSAUD v. MAMAS

(Appellants/Plaintiffs)

[In the Full Court on appeal from the
East Demerara Magisterial District.

(K. S..Massiah and M. A. Churaman JJ.) June 8, 29, 1973]

Magistrate's Court—ex parte judgment—Matter heard and determined in Magistrate's Court—Jurisdiction to order a re-hearing—Discretion—Appeal brought under wrong section of Ordinance—Jurisdiction of Full Court—Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, ss. 20, 32—Summary Jurisdiction (Civil Procedure) Rules, Cap. 12(G) (Sub. Leg.), rr. 4,5.

In the Magistrate's Court both the respondent and her legal adviser were in default of appearance on the day fixed for hearing, and judgment was recorded ex parte in favour of the appellants (landlords).

The respondent then applied, supported by affidavit for a re-hearing under s. 32 instead of s. 20 of the Summary Jurisdiction (Petty Debt) Ordinance Cap. 16. S. 32 was not, being unsupportable, the appropriate section under which to appeal. Nevertheless, the magistrate granted the respondent's application for the re-hearing.

On the landlords' appeal to the Full Court against the order for rehearing.

HELD: (affirming the order of the magistrate)

- (i) the magistrate had a discretion to grant a re-hearing, and it was proper to make the order in the circumstances;
- (ii) the circumstances being such that the application could be accommodated under s. 20 of Cap. 16, notwithstanding it was unwittingly identified under s. 32 of Cap. 16, the Full Court had jurisdiction to determine the application under the appropriate section and so to make any order the magistrate ought to have made.

Harry Badge v. Brijlall, (1962) L.R.B.G. 9 applied.

Appeal dismissed.

Re (ii) above, See *Arthur & Hermanstynne* (1972) 19 W.I.R. at p. 61, B-C.

E. A. Gunraj for the appellants.

B. Dos Santos for the respondent.

JUDGMENT OF THE COURT: This appeal raises the interesting point as to whether and in what circumstances an application for the re-hearing of a cause or matter in the magistrate's court can or ought to be granted.

The appeal under review arose out of the grant of an application for a re-hearing of a claim for possession of building land. After innumerable adjournments at each of which it would appear the respondent was in attendance, the possession claim was finally determined in favour of the appellants on the 7th January, 1972, the respondent on that day being in default of appearance. Both the respondent and her legal adviser were genuinely under the impression that the cause had been set down for hearing on 10th January, 1972, and on attending the magistrate's court on that date, the respondent discovered to her surprise that the cause had been determined in her absence three days earlier on 7th January, 1972; she forthwith informed her legal adviser, and on the 25th January, 1972, the respondent filed an application in the prescribed form for a re-hearing, supported by an affidavit.

It is of primary significance that the learned magistrate found on the hearing of the application for re-hearing that the respondent and her legal adviser genuinely believed that the cause had been set down for hearing on the 10th January, 1972 and not 7th January, 1972. Of equal significance is the fact that the respondent asserted a defence which, if accepted, would have afforded a formidable resistance to the appellants' claim for possession; and of yet further importance is the fact that the appellants (landlords)

have in no way whatsoever altered their position in consequence of the determination of the possession claim, nor would they suffer any prejudice which cannot be reduced by costs.

It was against this background of circumstances that the learned magistrate granted a re-hearing of the cause from which order the appellants now appeal to this court.

Counsel for respondent raised before us a preliminary point as to the jurisdiction of the Full Court on the basis of the appellants' non-compliance with ss. 4 and 5 of the *Summary Jurisdiction (Appeals) Ordinance* Chap. 17. We decided to defer ruling on this preliminary point and to hear arguments on the merits. In view of the decision we have reached, it is unnecessary to deal with the preliminary objection, and we express no view on it.

The main contention advanced before us, as indeed also before the learned magistrate, is the question of the jurisdiction of the learned magistrate to hear and determine the application for re-hearing. The submission in other words questions the jurisdiction of the learned magistrate to hear and determine the application for re-hearing inasmuch as the application though filed and served on the 2nd named appellant within twenty-eight days was not served on the 1st named appellant until 28th May, 1972 i.e. some four months after the date of filing. It is here convenient to observe that the evidence suggests that this delay was due not to any tardiness on the part of the respondent in posting same, but to the facility or rather the lack of it, in effecting delivery. This much debated point of 'service within twenty-eight days' arises from the wording of 4 and 5 of Part 20, of the *Summary Jurisdiction (Civil Procedure) Rules*, Cap. 12 (Subsidiary Legislation) which read thus:—

"4. An application under s. 32 of the Summary Jurisdiction (Petty Debt) Ordinance for a new hearing may be made at the same sitting of the court at which the action was heard, if both parties be present, or not more than twenty-eight clear days after the date of the termination of the action of which a new hearing is desired.

5. When it is intended to make an application contemplated in 1, 3 and 4 of this Part of these rules at a subsequent sitting of the court, the applicant shall deliver to the clerk a notice of application in accordance with Form 52 in the Appendix and serve on the opposite party a copy of such notice containing the date of hearing of the application".

The words "not more than twenty-eight clear days" formed the focal point of counsel for the appellants' submission, urging as he does that the application must not only be filed but also served within twenty-eight days of the termination of the cause sought to be re-heard.

It becomes readily apparent that we must look to s. 32 of the *Summary Jurisdiction (Petty Debt) Ordinance*, Cap. 16 to determine the applicability of that section to the matter under review.

S. 32 (ibid) reads thus:—

"32. If in any case the court is satisfied by an unsuccessful party to an action that he was prevented by causes beyond his control from placing his case fully before the court at the first hearing of the action or that the judgment was obtained by fraud or other improper conduct on the part of the successful party, the court may, if it thinks proper, order a new hearing of the action to be had upon the terms it thinks reasonable, and in the meantime stay the proceedings in the action:

Provided that nothing in this section shall be construed to take away or in any manner affect any right of appeal under the Summary Jurisdiction (Appeals) Ordinance".

It is fair to observe at this juncture that the parties herein litigated this matter in the court below as one properly arising under s. 32 (supra), and it is equally evident that the learned magistrate determined the contest on the footing that s. 32 was the applicable and appropriate section. But was it the appropriate section covering the circumstances of the matter under review? We are of the clear view that it was not, as this section embraces a number of situations which may give rise to a party seeking a re-hearing. among those situations are fraud, improper conduct on the part of the successful party, or if the unsuccessful party was prevented by "*causes beyond his control from placing his case fully before the court*". This last situation appears to have lured the respondent as a relevant and pertinent ground upon which the application ought to be predicated. We take the view that a mistaken belief as to the date of the hearing of the cause does not fall within the scope of "prevented by causes beyond his control" as these words seemingly relate to the will of the party having neither the ability nor the competence of any control over the causes envisaged in the section; additionally this section envisages a party putting forward his case at least up to a certain point, but not "fully" in the sense that 'much more could have been put forward.

We may at once observe that the number of days elapsing between the date of judgment in the substantive claim i.e. 7th January 1972 and the date of the filing of the application for re-hearing i.e. on 25th January. 1972, some 18 days thereafter, appears to have unwittingly influenced the respondent in contesting the issue under s. 32 of Cap. 16. The relevance of the number of days becomes readily apparent when we compare the provisions of s. 20 of the Summary *Jurisdiction (Petty Debt) Ordinance* Cap. 16 which read thus:—

"20. If, on the day of hearing or at any adjournment of the court or cause, the plaintiff appears, but the defendant does not appear or sufficiently excuse his absence, or neglects to answer when called in court, the magistrate may, on due proof of service of the summons, proceed to the hearing and determination of the cause on the part

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of the plaintiff only, and the judgment thereupon shall be as valid as if both parties had appeared:

Provided that in any of those cases the magistrate may, at the same or any subsequent sitting of the court, set aside any judgment so given in the absence of the defendant, and the execution thereupon, and may grant a new hearing upon the terms, if any, as to payment of costs, giving security, or otherwise, he thinks just, on sufficient cause being shown to him for that purpose".

and the provisions of r. 1(1) Part 20, of the *Summary Jurisdiction (Civil Procedure) Rules* Cap 12 which read thus:—

"An application under s. 20 of the Summary Jurisdiction (Petty Debt) Ordinance or under r. 5 of Part VII of these rules to set aside any judgment given or the execution thereupon and for a new hearing shall be made to the court or a magistrate within fourteen days after the hearing of the action or *such further time as the court or a magistrate may allow*. The application shall be dealt with, if possible, by the magistrate who entered judgment against the defendant" (underscoring ours).

It is to be appreciated that an application under r. 1 requires service upon the opposite party in terms of r. 5 (supra) without circumscribing the time limited for such service.

The question is could this court properly deal with the matter as one under s. 20 of Cap. 16, when the parties in the court below litigated the matter as one under s. 32 of Cap 16? We are of the view that we can. Suffice it is to say that if the circumstances are such that the claim can be accommodated under s. 20 of Cap. 16 but unwittingly identified under s. 32 of Cap. 16, the court ought to determine the matter under the appropriate section and to apply the relevant principles and considerations applicable thereto.

Fully appreciating that the learned magistrate exercised his discretion on considerations which he thought relevant to s. 32 of Cap. 16, we must now determine whether those considerations are not only relevant to s. 20 of Cap. 16 but whether there are other relevant considerations to be properly considered under s. 20 which the learned magistrate omitted to consider.

We are of the view that the considerations applied by the learned magistrate are the very considerations to be properly applied under s. 20 and there is no further consideration which the learned magistrate ought to have but omitted to consider save and except the question of the time within which the application ought to be commenced i.e. 14 days under r. I of Part 20, about which we shall shortly deal.

The principles generally applicable to the discretionary jurisdiction to grant a re-hearing of a cause were fully set out in *the case of Grimshaw v. Dunbar, (1953) 1 All E.R., at p. 350*. Those principles may briefly be enumerated thus: (a) the reason for the applicant's failure to appear when

the cause was heard; (b) whether there had been undue delay in making the application, (c) whether the other side would be prejudiced by an order for a new trial so as to render it inequitable to permit the case to be re-opened; and (d) whether the applicant's case was manifestly insupportable.

These principles were considered with approval by PERSAUD J. (as he then was) in the local case of *Harry Badge v. Brijlall*. 1962 L.R.B.G. at p. 9.

We have looked at all these matters and are of the view that the learned magistrate's appreciation of, and approach to the issues raised, demonstrably accorded with the principles enunciated. They are of the view that these considerations should all be answered in favour of the respondent.

We have not over-looked or ignored the time limit of fourteen days in r. 1 Part 20, but as the section evidently bestows a judicial discretion to enlarge this time, we are of the view that having regard to all the circumstances touching this issue had the learned magistrate considered the application under the relevant section and rule he would have or at least ought to have, exercised his discretion in favour of an enlargement of time having regard to his anxiety, in his own words, to meet "the interests of justice". In any event, we are empowered to make any order which the learned magistrate in a fit case ought properly to make, as we take the view that if it is possible to say on looking at the facts, although no reason be given for exercising or refusing to exercise a discretionary jurisdiction, that had the magistrate taken all the relevant circumstances into consideration and had excluded all irrelevant circumstances, he could not possibly have arrived at a conclusion other than to grant an enlargement of time within the purview of r. 1 (Supra); for any refusal to exercise the discretion against an enlargement of time in the face of the facts of this case would involve a palpable miscarriage of justice.

Having regard to the fact that the respondent became aware of the determination of the matter on the 10th and commenced his application on the 25th, some 15 days later, we do not think there was undue delay, and the discretion ought to be exercised ex debito justitiae; as *Lord Atkins expresses the view in Evans v. Bartlam* (2). (1937) 2 ALL E.R. 650: —

"Appellate jurisdiction is always statutory: there is in the statute no restriction upon the Jurisdiction of the Court of Appeal and, while the appellate court, in the exercise of its appellate power, is no doubt entirely justified in saying that normally it will not interfere with the exercise of a Judge's discretion (or Magistrate's) except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done, it has both the power and the duty to remedy it".

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We adopt LORD ATKINS' view so admirably expressed.

The appeal is accordingly dismissed, the order of the magistrate affirmed, with costs to the respondent fixed at \$21.25.

Appeal dismissed.

THE PUBLIC TRUSTEE OF GUYANA as Administrator
of the Estate of ABDUL KARIM, deceased, Plaintiff
AND
THE VILLAGE COUNCIL OF BLANKENBURG-HAGUE,
Defendants
[High Court (GEORGE J.) 1, 2 February, 1973; 12 June 1973]

Local Authority—Levy for rates—Appointment of Village Overseer as appraiser by Supreme Court Registrar—Overseer's affidavit of valuation—Overseer present at and bid at execution sale on local authority's behalf—Whether Overseer's interest conflicts with duty—Whether real likelihood of bias. 0.36 rr. 4-6 Rules of the High Court Cap. 3:02.

An amount of \$136.00 became due to the Den Amstel Village Authority (the defendants' predecessor) as rates for two lots of land owned by one Abdul Karim. The lots were levied on, advertised for sale and transported to the local authority whose overseer had sworn the valuation of the lots at \$500. The overseer was present at the sale, bidden and had bought in the lots at a mere \$3.09 on the authority's behalf.

Since obtaining transport, the defendants have contracted to sell the lots to one Fanfair.

Abdul Karim subsequently died, and the plaintiff has sued the present defendants, the Village Council of Blankenburg-Hague, in the capacity as administrator of the Estate of Abdul Karim, deceased, in an action for fraud to set aside the transport to the defendant authority, and for an injunction restraining the sale to Fanfair in accordance with 0.36. rr. 4-6 of the Rules of the High Court, Cap. 3:02.

In his particulars of fraud the Public Trustee complains that (i) the appointment by the Registrar of the Supreme Court of the defendants' village officer as an appraiser of the lots, was irregular; (ii) the village officer's valuation of \$500 was far too low; (iii) the defendants' subsequent purchase of the two lots at \$3.09 was too low a figure.

HELD: (i) insofar as it is based on fraud, the plaintiff's case must fail for there is no evidence that the Registrar acted otherwise than *bona fide* when he appointed the village overseer as valuer; there is also no evidence of on between the defendants and their overseer valuer.

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(ii) the plaintiff has not discharged the onus of establishing that the lots were undervalued.

(iii) there was however, a real likelihood of bias with respect to the overseer's valuation as he may well find his interest in a speedy collection of the rates conflicts with the delay which may result if the reserve price provided by the rules is not reached at the First sale under 0.36 rr.4-6 of the Rules of the High Court.

(iv) the sale must be declared unlawful because there was an irregularity committed by the Registrar's appointment of the village overseer as appraiser of the two lots.

c.f. Tieschmaker v. Tieschmaker (1982) Civil Appeal No. 12 of 1981, d/d 18 June, 1982. C.A.

Judgment for the plaintiff. Costs fixed at \$500.00.

Case Referred to *Roche v. Hill*, (1887) 3 T.L.R. 298.

Miss *L. Ferdinand* for the plaintiff.

C. M. L. John for the defendants.

GEORGE, J.: The defendants are the successor local authority to the Den Amstel Fellowship Village Council and as such are by operation of law-vested with all the property and liabilities of its predecessor. (See sec. 322 of the *Municipal & District Council Act 1969*). Among the property of the Den Amstel-Fellowship Village Council was the immovable property the subject-matter of this action which that council owned by virtue of transport No. 174 of the 30th January, 1970. The property is described as follows: —

"North half of lot number 45 Section A. south of the public road one undivided two hundred and fiftieth part or share of and in section B, east half of lot number 72 in section C, west half of lot number 72 section D, east half of lot 72 section E Den Amstel in the Den Amstel and Fellowship Village District, situate on the west sea coast in the county of Demerara, Guyana.....no building thereon".

These lots had been appraised in the name of Abdul Karim the predecessor in title of the defendants and whose estate the plaintiff now represents as its administrator. He seeks to have the transport held by the defendants set aside for fraud and a non-compliance with rule 4 of Order 36 of the *Rules of the High Court*.

The evidence is short and uncontested. Abdul Karim had owed the *Den Amstel Fellowship Local Authority* the sum of \$135.00 (one hundred and thirty-five dollars) which represented the rates levied on the lots in question for the year 1967. The Local Authority caused the necessary notice of demand to be issued and on the non-receipt of the sum due applied to the High Court, under the rules relating to parate execution for a writ of execution. The order for execution was made by *Vieira, J.* on the 19th March, 1968 and on 18th October that year a levy was made pursuant to the learned

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judge's order. The lots were advertised to be sold on the 1st April, 1969, and pursuant to the provisions of order 36 rule 4, the Registrar obtained an affidavit of valuation of the lots on the 29th March, 1969. This affidavit was sworn by Hubert Lewis who was at all material times the village overseer of the Den Amstel-Fellowship-Local Authority. In his affidavit Lewis valued the lots \$500.00 (five hundred dollars). On the 1st April, 1969 the marshal who conducted the sale at public auction withdrew it because of the absence of the local authority's village overseer. The lots were again advertised to be sold on the 10th June, 1969, but on the day of the sale no one came forward to bid. The lots again came up for sale on the 26th August, after being duly advertised, and on this occasion the village overseer, bidding on behalf of the *Den Amstel Fellowship Local Authority*, purchased them for \$3.09 (three dollars and nine cents). Since obtaining transport the defendants have entered into a contract of purchase and sale of the lots with one Fanfair.

In their defence the defendants claim that they were forced to purchase the lots in order "to protect their interests in the arrears (sic) rates due to them pursuant to their statutory powers".

In his reply the plaintiff seeks to rely on this admission to find an additional cause of action. He contends that the defendants' averment in their statement of defence that they were compelled to purchase the lots in order to protect their interest in the arrears of rates would make their act of purchase "*ultra vires* and in error". In this regard, the only provision contained in the applicable statute, the *Local Government Ordinance*, Cap 150, which deals with the purchase by a local authority, of lots which are sold at execution for the recovery of rates is section 138(1). This section reads as follows:

"The local authority of a village or country district may purchase for the benefit of the village or country district any lot with or without the buildings, if any, thereon, or any buildings, sold for the recovery of rates".

The reason given by the defendants for the purchase of the lots cannot be said to be for their benefit. And in this regard it would be apposite to note that under sec. 23 of the *Deeds Registry Ordinance* Cap. 32 the conveyance by way of transport of any immovable property is always subject to all 'statutory claims' which are defined to include unpaid rates (See sec. 2 of the Ordinance). It, therefore, follows that any private individual who may have bought the lots would become liable to pay all the outstanding rates. However, there are two fatal objections to the plaintiff raising this issue as he does. The first is based on Ord. 17 rule 18. The relevant portion of this rule provides that "no pleading shall, except by way of amendment, raise any new ground of claim....." The plaintiff's reply seeks to do just that which is prohibited by the rule. Secondly, even if the plaintiff had successfully applied for an amendment to his statement of claim to plead that the purchase was *ultra vires* the provisions of sec. 138(1) he would undoubtedly have been

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met with the defence of his failure to comply with the provisions of sec. 206 of the Ordinance. This section so far as it is relevant reads as follows:

"1) No proceedings shall be issued against or served on any local authority, . . . 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 the notice in writing had been served on the local authority.....clearly stating the cause of action, and the name and place of abode of the intended plaintiff.....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".

A further point concerning section 206 was raised by counsel for the defendants during his address and it would be convenient to dispose of it at this stage. He pressed upon me that the action should be dismissed because there is no evidence of a compliance with its requirements. However, this submission in my opinion shows a lack of appreciation of the true definition of the section. Its limitations, to my mind, are to be found in the words "anything done or intended to be done or omitted to be done *under the provisions of the (Local Government) Ordinance*". What the plaintiff complains of are acts purported to be done in compliance with the Rules of Court, and not by the defendants or on their behalf, but by their village overseer and by the Registrar of the Supreme Court, who appointed him to value the lots. Such acts clearly do not fall within "the contemplation of section 206.

I shall now proceed to consider the plaintiff's main contentions as set out in his statement of claim. In paragraph 7 he complains that no order was obtained from the High Court as required by section 37 of the *Deceased Persons Estates Administration Ordinance* Cap. 46.

This section reads as follows:—

"No one who has obtained the judgment of a court against a deceased person in his lifetime or against his executor or estate shall sue out or obtain any process in execution therefor before the expiration of the period notified in the Gazette in the manner provided in the last preceding section and no person shall thereafter within six months after the grant of probate or letter of administration obtain any process in execution without first obtaining an order of the court".

In my view the short answer to the plaintiff's contention in this regard is that the section places a limitation only on persons who obtain judgments against the deceased on his estate. A judgment in this context can only mean one obtained in a court of law but parate execution is not granted in pursuant of any such judgment and therefore his arguments in this regard must fail.

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The plaintiffs also found his action on fraud. As I understand the particulars pleaded in support of this aspect of his case, the fraud consists in:

- (a) the swearing by the defendants' overseer of the affidavit of valuation as required by order 36 r.r.4 to 6 of the Rules of the High Court.
- (b) the low valuation given and;
- (c) the subsequent purchase by the defendants.

Rules 4 to 6 of Order 36 read as follows:—

"4. Before the day fixed for the sale of any property at parate execution . . . the Registrar shall unless the proprietor shall otherwise request in writing, obtain from a competent valuer a sworn valuation of such property..."

5. Where the sworn value of the property exceeds five hundred dollars the property shall not be sold at execution in the first instance at less than three fourths of such value.

6. If a property be not sold at execution in the first instance, the Registrar shall not less than twenty-one days thereafter again advertise the same in the usual manner for sale and shall thereafter sell the same without reserve to the highest bidder".

In support of his contention that the true market value of the lots was far in excess of that given by the defendants' village overseer, viz. \$500.00 (five hundred dollars) the plaintiff called as a witness the valuer who on the 22nd July, 1968, had valued the lots for the purposes of his application for letters of administration. This valuer had fixed the valuation of the lots at \$700.00 (seven hundred dollars) which he claims was ten per centum below their fair market value. He explains that for the purposes of estate duty it was his custom so to value property. This witness, however, had no personal knowledge of the lots and admits that they had been pointed out to him by someone who had accompanied him to them, for this purpose, on the instructions of the defendants' village overseer. Unfortunately this person was not called as a witness. Therefore, the vital nexus for a proper identification of the lots is missing. It must follow that the plaintiff has not discharged the burden of proof which he undertook viz. that of establishing that the lots had been undervalued.

Aside from this, however, there is no evidence of any collusion between the ultimate purchasers, the defendants, and their village overseer. Indeed all the evidence points to the contrary. Further it is the Registrar of the Court who is charged with the responsibility of appointing a valuer and there is not a scintilla of evidence that he acted other than *bona fide* when he appointed the defendants' overseer as such.

In the result therefore the plaintiff's case in so far as it is based on fraud, must fail.

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But in my opinion the failure of the plaintiff to make out a case of fraud based on the particulars given does not necessarily mean that the action must fail. Under section 84 of the Local Government Ordinance it is clear that a village overseer is the employee of the local government authority which appoints him and by virtue of section 85 he is the collector of rates on behalf of his local authority. Rates constitute a substantial, if not a major, source of the revenue of a local authority, and the speedy collection of outstanding sums must be of paramount concern, if the authority is to carry out its administrative and other functions efficiently. It is no doubt in order to encourage the prompt collection of rates that it is provided by subsection 2 of section 85 that the remuneration of a village overseer "may consist either in whole or in part of a percentage of the moneys collected by him".

From the foregoing it must follow that a village overseer has a vital indeed almost a vested, interest in the speedy collection of rates for two reasons viz. to prove his efficiency as a collector and/or to ensure that his remunerations are maximised. On the other hand, however, the effect of rules 4 to 6 of Ord. 36 is to delay the collection process in respect of property whose value is over \$500.00 (five hundred dollars). A village overseer called upon to value property taken into execution for non-payment of rates may well find that his interest in speedy collection conflicts with the delay which may result if the reserve price provided by the rules is not reached at the first sale. He may therefore be tempted to value the property in question below \$500.00 (five hundred dollars) in order to expedite the sale.

The plaintiff does not challenge the competency of the village overseer as a valuer of the property in his local authority area. What is being contended, however, is that there is a real possibility of bias on his part. The English case of *Rocke v. Hill* (1887) 3 TLR 298 is of some significance. The English Distress Act 1689 permitted the sale of goods seized under a distress. However it was provided that before the sale of the goods so seized they should be appraised by two appraisers. In that case the landlord's agent in respect of the distress was one of the two appraisers. It was held that this was sufficient to make the sale bad and thus entitle the tenant to the full value of the goods in accordance with section 19 of the *Distress for Rent Act, 1737* (England). It should be noted that prior to the enactment of the 1737 statute such an irregularity made the sale unlawful.

I can see no real difference between the facts of the present case and that in *Rocke v. Hill* (supra.) The appraiser as village overseer was the servant or agent of the local authority at whose instance the execution was levied. Further he, it was, who signed the copy of the notice required under section 125 (1) as well as the certificate to the effect that the original had been served on the proprietor. If to these facts is added the possibility of a direct monetary reward in the event of collection of the rate there can be little room for any other conclusion than that there was a real likelihood of bias on the part of the overseer in valuing the lots in question. In the circumstances I am left with no alternative than to declare the sale unlawful because

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of the irregularity committed when the Registrar in his appointment of the village overseer as the appraiser of the lots in question. I also grant an injunction restraining the defendants from in any way disposing of the lots and fix costs against them in the sum of \$500.00 (five hundred dollars).

Judgment for the plaintiff

Stay of execution for six weeks.

SOLICITORS: —*State Solicitor* for Plaintiff.

Dabi Dial for defendants.

THE STATE
v.
WINSTON CAMPBELL AND COLIN HYLES
[High Court (Vieira, J.) June 12, 13, 1973]

Criminal Law and procedure—Evidence adduced by prosecution—Unsworn statements by both accused—Defence counsel declines to address jury—Right of reply by prosecution in all cases—Whether judge right to rule prosecuting counsel has no right to reply—Criminal Law (Procedure) Act Cap. 10:01, s.149.

After the close of the cases for both accused defence counsel sought an adjournment to 1.00 p.m. of the same day. Later that day, he informed the court he would not be addressing the jury, as he had a right to do by s. 149 of the Criminal Law (Procedure) Act Cap. 10.01. Whereupon prosecuting counsel intimated he wished to address the jury. On objection being taken by defence counsel, the trial judge heard arguments in the jury's absence and ruled as follows:

(i) Counsel for the prosecution has no absolute right of reply regardless of whether the accused, or counsel on his behalf, addresses the jury at the dose of the case for the defence or not.

(ii) the phrase "in all cases" in s. 149 of the Act means, and can only mean "in all cases where the right of reply properly exists", it does not, and cannot mean "the right to always have the last word; i.e. the right to address the jury regardless of whether the accused or his counsel has first addressed the jury.

(iii) prosecuting counsel has no right of reply under s. 149 in view of the fact that no address to the jury was made by defence counsel on behalf of the first accused.

Submission upheld.

EDITOR'S NOTE

What is the true construction and operation of s. 149 of the Criminal Law (Procedure) Act has long been a thorny problem with the legal profession. It has however, now been finally settled by the Guyana Court of Appeal. See *Director of Public Prosecution's Reference No. 1 of 1980* (1980) 29 W.I.R. 94. There, it was held that the words "in all cases" in s. 149, do not mean to say prosecuting counsel necessarily has the right to reply "in every case". He is not compelled to do so: those words are not mandatory, but merely discretionary. The right to reply to unsworn statement is not dependent (as the trial judge considered) on whether defence counsel has declined to sum up the evidence in the case. Counsel's declining to sum up cannot deprive prosecuting counsel of his statutory discretionary right to reply, because, quite apart from any unsworn statement, that right has from very ancient times been dependent only on whether witnesses have been adduced in support of the defence (see Fourth Report, Recommendation 3 of the Criminal Law Revision Committee, Cmnd 2146). So, in the present case, the fact that the first accused did indeed call sworn evidence in support of his unsworn statement, would have given an undoubted right to the prosecution to reply to that unsworn statement. As it is now considered, in the light of the Privy Council's decision in *D.P.P. v. Daley*, (1979) 2 W.L.R. 245, procedurally desirable to let an accused have the last word to the jury, legislation (as it was in England) is necessary to affect that end.]

L. Ganpatsingh, State counsel, for the State

Claude A. Massiah, for the first accused

Second accused in person

VIEIRA J.: In this matter the two accused are jointly charged for the felony of robbery with aggravation, contrary to s. 222(b) of the *Criminal Law (Offences) Ordinance, Cap. 10*.

At the close of the case for the State, counsel for the No. 1 accused; Mr. Claude Massiah, informed the court that he wished to exercise his right to open the case for his client to the jury in accordance with the provisions of s. 148 of the *Criminal Law (Procedure) Ordinance, Cap. 11* (hereinafter referred to as the Ordinance). This was done and the two accused elected to make unsworn statements from the dock and, in addition, No. 1 accused called one witness on his behalf.

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At about 11.00 a.m., after the case for both accused had been closed Mr. Massiah requested an adjournment until 1.00 p.m., on the ground that he was suffering from a sore throat. When the court resumed in the afternoon, Mr. Massiah intimated that his throat was still sore and he informed the court that he would not be addressing the jury. Mr. Ganpatsingh then stated that he wished to address the jury and, on Mr. Massiah objecting to this course of action, arguments were heard by me in the absence of the jury and I gave my ruling the next morning which is as follows:—

There are three sections of the Ordinance which are important for the purpose of this ruling and these are —

- "147. After the accused person has been given in charge to the jury, or when the jury have been sworn, counsel for the State may open the case against the accused person, and adduce evidence in support of the charge.
148. The accused person or his counsel shall be allowed, if he thinks fit, to open his case, and, after the conclusion of the opening, the accused person or his counsel shall be entitled to adduce evidence in support of the defence, and, when all the evidence is concluded, to sum up the evidence.
149. Counsel for the State shall *in all cases* have the right of reply. '

The marginal notes to these three sections are "Case for the prosecution", "Cases for the defence", and "Right of reply " respectively. It is trite knowledge that marginal notes are not considered by Parliament at any stage of the proceedings on a bill—*Attorney General v. Great Eastern Rail Co. (1879) 11 Ch. D. 449 C.A. at p. 461*. It is on this ground that the weight of authority is against their use as an aid to construction *R. v. Fulham Guardians (1909) 2 K.B. 504. D.C.*, at p. 509.

We must therefore look elsewhere and what better place than the Ordinance itself. It is a fundamental rule of construction of statutes and of deeds and other documents that the words used therein must be given their ordinary and natural meaning as they are generally understood in the English language at the time of the passing of the statute or execution of the deed or other instrument unless such a construction leads to absurdity or unless the context requires some special or particular meaning. In this respect it is permissible to refer to dictionaries and the works of standard authors.

As I see it, s. 148 is clearly divided into three parts, viz: — (a) an opening address to the jury by the accused or counsel on his behalf, if thought fit; (b) the adducement of evidence in support of the defence and (c) a summing-up or address to the jury by the accused or by counsel on his behalf, at the close of the case for the defence. An accused person or his counsel has the right to use all or any of these three circumstances. The use of (a) is very rare indeed in this country whereas (b) and (c) are commonplace.

What I think has caused confusion and some difficulty here is the use of the phrase "*in all cases*" in section of 149 of the Ordinance. I cannot agree, with all due respect, that it has the extremely wide meaning attributed to it by Mr. Ganpatsingh, i.e. that the State has the "right of reply" in all indictable cases in the High Court. To concede this, would, I think, amount to disregarding the history relating to the order of speeches evolved over the centuries in England in criminal trials with which I have not the time nor the inclination to recount in any detail. Suffice it to say that it was not until the passing of the *Criminal Evidence Act* of 1898 that an accused person was permitted, for the very first time, to give sworn testimony on his own behalf. Much of the procedure relating to the order of speeches in criminal trials become rather involved and arguments as to which side had the "right of reply" depended largely upon whether the accused himself gave sworn testimony and called witnesses or did not himself give evidence but called witnesses or gave evidence but did not call witnesses. After the passing of the *Criminal Procedure Act of 1865* it was held in *R -v- Dowse (1865) 4F&F 492* that witnesses to character only were not within the provisions of that Act and, consequently, if the defence called any such witnesses, then the prosecution had no "right of reply." All these subtleties and fine distinctions were swept away by the *Criminal Procedure (Right of Reply) Act, 1964*, s. 1 of which is set out at para. 558 of the 36th Edition of *Archbold*. The table of the order of speeches under that Act are set out at paras. 559 & 560 of *Archbold (ibid)* and clearly shows that in England to-day it is the defence that always has the final "right of reply" whatever the circumstances may be.

As I understand the position in Guyana today, counsel for the State has the final "right of reply" in the sense that he always addresses the jury after defence counsel does so whether the accused himself gives evidence or not and whether the accused calls any witnesses on his behalf or not. But I cannot agree that he has an absolute "right of reply" regardless of whether the accused, or counsel on his behalf, addresses the jury after the close of the case for the defence or not. To my mind, this would make nonsense of the ordinary, natural, simple and popular meaning of the word "reply" which, according to the *Concise Oxford Dictionary, 4th Edition (1951) at p. 1035* is defined as —

"Reply, v.i. & t, & n. 1 Make answer, respond, in word or action".

In my considered opinion, the phrase "in all cases" in s. 149 of the Ordinance means and can only mean "in all cases where the right of reply properly exists." It does not and cannot mean "the right to always have the last word." As I see it, the words "right of reply" in the said section 149 does not and cannot mean "right to address the jury regardless of whether the accused or his counsel has first addressed the jury or not." One can only "reply" to something that has been previously said, e.g., and answer to a question or a query, or a statement in contradiction or contradistinction to another, etc., To say, as Mr Ganpatsingh is saying that the "right of reply"

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would apply where counsel for an accused person opens the case for the defence under first limb of section 148 of the Ordinance without utilising the third limb of the said section 148 is, to my mind an untenable proposition. When counsel for an accused person or an accused person himself, makes an opening of his case, he cannot be said to be "reply" to the opening address of counsel for the State. The procedure under the first limb of section 148 of the Ordinance merely allows the defence to be explained to the jury in simple terms and no court, I think, would allow anything really more than that to be said at that stage.

As Mr. Massiah correctly states the words 'right of reply' is a term of art and has a special meaning in English Law from which ours is derived. An excellent account of the order of speeches in criminal trials is contained in *Roscoe's Criminal Evidence. 16th Edition (1952)* at pp. 273—274 in relation to the prosecution's case and at pp. 279—281 in relation to the defence. At p. 279 the following passage appears under the heading "Reply"—

"Right to reply. Whenever any witness other than the defendant is called on behalf of the defendant, at any time in the course of the trials, the prosecution will have a right, at the conclusion of the defence, to address the jury in reply. Until the passing of the Criminal Justice Act, 1948, the prosecution became entitled to reply if any document was put in by the defence. Now by sec. 42 (1) of that Act: "Notwithstanding anything in sec. 2 of the Criminal Procedure Act, 1865, as amended by sec. 3 of the Criminal Evidence Act, 1898, the prosecution shall not be entitled to the right of reply upon the trial of any person on indictment on the ground only that documents have been put in evidence by the defence."

It is with some degree of satisfaction that I place on record my experience that State counsel never exercise their undoubted "right of reply" where an accused person, who is unrepresented by counsel, addresses the jury on his own behalf. This is one of the great traditions of the Bar which I hope will be preserved for all time.

For these reasons, therefore, the submission of Mr. Massiah is upheld and this court rules that Mr. Ganpatsingh cannot address the jury and has no "right of reply" under section 149 of the Ordinance in view of the fact that no address to the jury was made by Mr. Massiah on behalf of No. 1 accused.

Submissions upheld.

DATED THIS 13th DAY OF JUNE. 1973.

ADDENDUM:

This ruling was given in the morning in the presence of eleven jurors only and not the full panel of twelve and this occurred as the result of the foreman having to rush his wife and children to hospital for suspected gastro-enteritis and it was not certain when he would be returning. I then intimated to both lawyers that I proposed to ask both accused whether they had any objection to my giving in the absence of the foreman and I pointed out to them that I did not consider that by doing so, it being a question of law solely, that this would, in any way, prejudice the fair trial of the two accused. Both accused then consented to the ruling being given in the absence of the foreman and I then went on to rule as I have indicated above.

This matter may well be of more academic interest now since the foreman returned in the afternoon and the court proceeded to sum up after No. 2 accused declined to address the jury. Later, the jury unanimously brought in a verdict of not guilty and the two accused were accordingly discharged. It may well be, however, that had the two accused been convicted and had appealed then the Court of Appeal may have decided that the trial was a nullity in view of the ruling having been given in the absence of the full panel of twelve jurors but this might well be mere conjecture. I concede that it is a good arguable point but I do not concede that had an appeal been brought it would necessarily have been successful. Only the future can tell whether these particular circumstances will ever arise again and thus what I did was legally proper or not.

SEECOMAR SINGH AND ANOTHER v. R. C. BUTLER
Plaintiffs/Defendant
[High Court (Bollers, Chief Justice)
June 26, 29, 30; July 2, 3, August 17, 1973]

Elections—Injunction to restrain Returning Officer from accepting oversea votes—Jurisdiction of court to grant injunction—Commencement of elections—Constitution of Guyana, 1970, arts. 71, 92.

Elections—Appointed day—Injunction to restrain Returning—Effect of granting injunction—Constitution of Guyana, art. 67.

Returning Officer—Officer of the State—Injunction against officer of the State in his official capacity.

Interlocutory proceedings—Interim injunction.

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The President of Guyana issued a proclamation dissolving Parliament, and fixed a day for the election of members of the National Assembly. The defendant is the Chief Elections Officer.

The plaintiffs brought an action against the defendant in his capacity as Chief Elections Officer in which they sought declarations that certain Election Laws made under the Constitution of Guyana were unconstitutional, illegal, ultra vires, void and of no effect, and an injunction to restrain the defendant from performing certain acts as Elections Officer. They also filed a summons in which they sought certain interlocutory orders to restrain the defendant from performing certain acts in relation to the pending elections. This decision deals with the summons, and matters in connection therewith, as the question of the jurisdiction of the High Court to grant the remedies sought, was raised in limine.

HELD: (I) the elections commenced with the issue of the proclamation by the President, and that, by virtue of the provisions of art. 71 of the Constitution of Guyana (which is set out in the judgment), the High Court of Guyana has no Jurisdiction to grant an injunction, but only to deal with those matters specifically delegated to it by Parliament;

(ii) to grant the equitable remedy of an injunction would be a negation of art. 67 of the Constitution (also set out in the judgment) which is the supreme law of Guyana;

(iii) the defendant being a public officer in the service of the Government of Guyana is the same as a servant of the Crown Proceedings Act, and therefore cannot be restrained by injunction from carrying out his statutory duty;

(iv) to grant an injunction would mean that the court would be making an interim declaration that the legislation dealing with the elections is invalid, and this the court will not do, for the main issue will not have been determined;

(v) while the court can grant an interlocutory injunction which will have the practical effect of granting the sole relief claimed, the court will not do so in these proceedings.

Application dismissed.

Cases referred to include:—

- (1) *Gladys Petrie v. Attorney General* (1971) 14 W.I.R. 292
- (2) *Re Addington Election* (1927) 1 D.L.R. 188.
- (3) *Temple v. Bulmer*, (1943) 3 D.L.R. 649.
- (4) *N. P. Ponnuswami v. Returning Officer, Namakkal Constituency* (1952) 3 S.C.R. 218.
- (5) *Bainbridge v. P.M.G.* (1906) 1 K.B. 178.
- (6) *Jaundoo v. A.G. of Guyana* (1972) 16 W.I.R. 141.

B.O. Adams, S.C., D. Jagan, M. McDoom and C. M. L. John for the plaintiffs. Dr. S. Shahabuddeen, S.C., Solicitor General (R. G. Marques with him) for the defendant.

BOLLERS, C.J., On the 23rd day of June, 1973, the plaintiffs who describe themselves as citizens of Guyana and qualified as electors for election of members of the National Assembly of Guyana and desire to be represented therein, filed a writ of summons against the defendant, R. C. Butler, in which it was made dear that the defendant was being sued in his capacity as Chief Election Officer, and in which they claim in the endorsement of the writ, inter alia, the following declarations:

- (a) That the Election (Amendment) Regulations, 1973, No. 6 of 1973, made or purporting to be made by the President of Guyana are unconstitutional, illegal, ultra vires, void and of no effect.
- (b) That the said regulations may not be properly used or relied upon to permit postal voting in pursuance of its provisions at the General Elections to be held in Guyana on the 16th July, 1973, or at all.
- (c) That the Representation of the People (Adaptation and Modification of Laws) (No. 3) Regulations, 1968, No. 30 of 1968, are unconstitutional, illegal, ultra vires, void and of no effect, and that votes may not properly be counted in the General Elections to be held on the 16th July, 1973, in pursuance of the said Regulations No. 30 of 1968, or at all.
- (d) That the Elections Regulations, 1964, should apply without amendment to the counting of votes at the General Election on the 16th July, 1973.
- (e) That the Representation of the People (Adaptation and Modification of Laws) (No. 2) Regulations, 1968, No. 25 of 1968, are unconstitutional, illegal, ultra vires, void and of no effect and should not be used or relied upon to permit voting by electors resident outside of Guyana at the General Elections on the 16th July, 1973.
- (f) That a General Election conducted in accordance with the provisions of the aforesaid Regulations No. 6 of 1973, No. 30 of 1968, and No. 25 of 1968 would be unconstitutional, illegal, ultra vires and void.
- (g) That the Representation of the People (Adaptation and Modification of Laws) Act, No. 16 of 1968, as amended by the Act No. 7 of 1973, is unconstitutional, illegal, ultra vires, void and of no effect.

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- (h) That the Representation of the People (Adaptation and Modification of Laws) Regulations, 1968, No. 21 of 1968, are unconstitutional, illegal, ultra vires, void and of no effect.
- (i) That No. 32 of 1968 of the said Regulations are unconstitutional, illegal, ultra vires, void and of no effect.
- (j) That the Elections Regulations (Amendment) (No. 2) Regulations No. 9 of 1973, are unconstitutional, illegal, ultra vires, void and of no effect.
- (k) That any notice published in the Official Gazette by the defendant under the provision of Regulation 61 of the Elections Regulations, 1964, as amended by the aforesaid Regulations, No. 30 of 1968, would be unconstitutional, illegal, ultra vires, void and of no effect.

They further seek an injunction restraining the defendant from inviting, accepting, or recording in any manner or using or taking into account postal votes by electors resident in Guyana, cast, thrown, delivered or received by or from postal voters resident in Guyana in the conduct of the said General Elections and from counting votes cast at the said General Elections other than in accordance with the provisions of the Elections Regulations, 1964, as made on the 25th September, 1964, and an injunction restraining the defendant from inviting, accepting, recording or in any manner whatsoever using or taking into account votes by electors, resident outside of Guyana cast, thrown, delivered, or received by or from voters resident outside of Guyana in the conduct of the said General Elections.

I pause here to state that Regulations No. 6 of 1973 deal with postal voting by electors resident in Guyana, whereas the 1968 Regulations deal with postal voting for electors resident outside of Guyana.

In an extraordinary publication of the Official Gazette dated 5th June, 1973, there was a proclamation by the President of the Republic of Guyana, acting in accordance with the advice of the Prime Minister and in pursuance of Art. 67 of the Constitution of Guyana, in which it was stated that by proclamation of the President dated the 5th June, 1973, Parliament shall be dissolved on the 7th June, 1973, and that the President, in pursuance of the said Art. 67, did proceed to appoint the 16th July, 1973, as the day on which an election of members of the National Assembly shall be held.

It will be seen that the aim and purpose of the plaintiffs' action is to obtain declarations that the Acts of Parliament and certain regulations made thereunder by virtue of and in pursuance of which the elections to the National Assembly are to be held on the appointed day should be declared unconstitutional, illegal, null and void and so result in the said election being declared null and void, and indeed, to obtain an injunction restraining the Chief Election Officer from holding any election to the National Assembly on the appointed day on the basis of postal voting by electors resident in Guyana and resident outside of Guyana, pursuant to the legislation enacted

by Parliament by virtue of which the elections to the National Assembly are conducted, administered and held; and that such postal voting by voters both resident in Guyana and outside of Guyana should not be accepted, recorded or counted in the conduct of the said General Elections, and indeed, that the votes cast at the said General Elections should not be received and counted otherwise than in accordance with the provisions of the Elections Regulations, 1964, as made on the 25th September, 1964.

On the 23rd June, 1973, the plaintiffs filed a summons returnable for the 26th day of June, 1973, in which an application was made for the following interlocutory orders:

- (a) An interlocutory injunction restraining the defendant from inviting, accepting, recording or in any manner whatsoever using or taking into account postal votes, by electors resident in Guyana, cast, thrown, delivered or received by or from postal voters resident in Guyana in the conduct of the General Elections to be held in Guyana on the 16th July, 1973, or at all and from counting votes cast at the said General Elections other than in accordance with the provisions of the Elections Regulations, 1964, as made on the 25th September, 1964.
- (b) An interlocutory injunction restraining the defendant from inviting, accepting, recording or in any manner whatsoever using or taking into account votes by electors, resident outside of Guyana cast, thrown, delivered or received by or from voters resident outside of Guyana in the conduct of the said General Elections.
- (c) Such further or other reliefs as the nature of the case may require; all pending further order of the court or until the hearing of the action.

In their affidavit in support of the summons, the plaintiffs state that on the 14th day of June, 1973, the defendant, who was appointed the Chief Election Officer, received nominations of candidates and lists of candidates for the General Elections to be held for the election of members to the National Assembly of Guyana on the 16th July, 1973, and they allege that Regulations Nos. 21, 25, 30 and 32 of 1968 were never laid in the National Assembly although the National Assembly met on numerous occasions since these said Regulations were made. They further allege that Regulations No. 6 of 1973 were laid in the National Assembly on the 1st June, 1973 and that on the 6th June, 1973, a member of the National Assembly gave notice of a motion to annul the said Regulations, but that the said motion was never debated by the National Assembly before its dissolution on the 7th June, 1973. They were therefore advised by counsel that both the 1968 Regulations and the 1973 Regulations were ultra vires, illegal and unconstitutional, void and of no effect as the National Assembly was deprived of an opportunity of annulling them. That unless, therefore, the defendant was

restrained by order of the court, he intended to conduct the General Elections on the 16th day of July, 1973, on the basis of inviting, accepting, recording and counting postal votes cast, thrown or delivered by electors both inside and outside of Guyana, and to take into account these votes in calculating the number of seats to be awarded to each or any list of candidates at the said elections for the National Assembly, and the return by him as elected members of the National Assembly on the 16th of July, 1973, or as soon as practicable thereafter persons who have been selected from the list of candidates. That the taking into account of these votes will be in violation of Art. 66 of the Constitution of Guyana for the reason or reasons that the casting of votes overseas in favour of lists of candidates as well as voting by postal voting in Guyana are ultra vires, unconstitutional, illegal, void and of no effect. They were advised, therefore, that the issues raised in the action are vital to the proper constitution of a National Assembly, as provided for under the Constitution of Guyana, and that the determination of the questions whether postal voting in Guyana is legal, and whether votes may properly be cast outside of Guyana for the purpose of elections to the National Assembly will substantially affect the outcome of the said elections. They were further advised that the unconstitutionality of the 1968 and 1973 Regulations, with the casting of votes outside of Guyana, the counting of votes and postal voting in Guyana are patent, and permitting the use of the casting of votes overseas and postal voting in Guyana will defeat the democratic process. Finally, the plaintiffs aver that they were advised that the Representation of the People (Adaptation and Modification of Laws) Act, 1968, and the Act of 1973 were passed by less than two-thirds of all the elected members of the National Assembly.

I digress here for a moment to state that although the plaintiffs in their affidavit appeared to be alleging that voting by overseas voters not resident in Guyana was illegal, unconstitutional, ultra vires and of no effect, the position taken by their counsel at the hearing of the summons was, that under the Constitution overseas voters could properly vote; but the true objection was directed to the mode in which their votes were cast, and that what the plaintiffs were alleging was that postal voting by residents in Guyana and non-residents outside of Guyana was not permitted by the Constitution and was therefore illegal, ultra vires and of no effect. In other words, an overseas voter, if his name appeared on the register, could travel to Guyana and quite properly cast his vote in Guyana.

The defendant in his affidavit in reply stated that, save as to the allegation that Regulations No. 9 of 1973 were never laid in the National Assembly, he admitted that the President had made those Regulations on the 7th of June, 1973, and they were published in the Official Gazette on the 11th June, 1973. Parliament was, however, dissolved with effect from the date on which the Regulations were made, viz., 7th June, 1973, and still stands dissolved. Notwithstanding during the dissolution the laying requirement is legally inoperable, but, nevertheless, the regulations are valid. Even if Regulations Nos. 21, 25, 30 and 32 of 1968 were never laid in the National

Assembly, and even if the Regulations of 1973 were laid and the motion moved thereupon was never debated, and the Representation of People (Adaptation and Modification of Laws) Act, 1968, and Representation of the People (Adaptation and Modification of Laws) Act, 1973, were passed by less than two-thirds of all the elected members of the National Assembly, the legislation is, nevertheless, valid. In respect of the allegation that Regulations No. 6 of 1973 were laid but the motion never debated, he was advised that the laying requirement stands suspended during the dissolution of Parliament but will be resumed when the National Assembly next meets, and that any motion for the annulment of Regulations No. 6 of 1973 can then be moved, but that the Regulations are meanwhile valid. He intended, therefore, to conduct the election on a basis which would take into account postal votes and votes of electors resident outside of Guyana, which he believed he is empowered and required by law so to do. He was advised that all votes including those of overseas electors would be cast in Guyana.

At the hearing of the summons, the Solicitor General, who appeared on behalf of the defendant, took a preliminary objection which he considered to be of a fundamental nature affecting the jurisdiction of the court to entertain the proceedings, in which points arising therefrom had been set out in the defendant's affidavit in reply. In his preliminary objection, the Solicitor General raised four points which are set out hereunder and which will be dealt with separately, and some of which were already raised by the Honourable Attorney General five years ago in the case of *Gladys Petrie & Others v. The Attorney General & Others*, (1971) 14 W.I.R. (Pt. 2) 292, a decision of the High Court of Guyana upon which the Solicitor General heavily relied. The submissions are, that the court has no jurisdiction in this matter because —

- (i) The questions raised by the action and by the summons are exclusively assigned to the special jurisdiction conferred on the High Court by Art. 71 of the Constitution.
- (ii) The grant of the interlocutory injunctions prayed for will result in substantial disobedience to the constitutional command given by Art. 67 for a national election to be held on 16th July, 1973, this being the date duly appointed for the purpose by His Excellency the President's Proclamation of 5th June, 1973.
- (iii) An injunction cannot issue to restrain the defendant from discharging the functions vested by law in him in his capacity as Chief Election Officer.
- (iv) The grant of the interlocutory injunctions prayed for will amount to the impermissible grant of an interlocutory declaration that the legislation under challenge is indeed invalid.

In support of the first point, the Solicitor General repeated and relied on the submissions made by the Honourable Attorney General in the *Petrie* case in which an appeal from the decision had been abandoned, and sub-

mitted that Art. 71 of the Constitution created a special tribunal, having a special exclusive restrictive jurisdiction in the determination of questions as to elections. It was an exclusionary and limited jurisdiction, and a jurisdiction which must be exercised within the observance and confines of the limitation. The submission continued that under Art. 71 the Constitution creates the High Court as a special tribunal, and gives it an exclusive jurisdiction to determine questions as to elections, and in that same article power is given by the Constitution to make provision with respect to the circumstances and manner in which the conditions upon which the proceedings for the determination of those questions under the Article may be instituted in the High Court, and on appeal; and Parliament under s. 4 of the Representation of the People (*Adaptation and Modification of Laws*) Act, 1968 (G.), had brought into effect, as if enacted under para. 5 of Art. 71 of the Constitution, the House of Assembly (Validity of Elections) Regulations, 1964 (No. 40), which, by Reg. 3, made provision for a reference for the determination of any questions whether any person has been validly elected as a member of the House of Assembly, to be by way of an election petition presented to the court. It was pointed out that Parliament had also under s. 3(1) of the 1968 Act enacted that the *Elections Regulations, 1964(C)* shall have effect as if enacted under para. 4 of Art. 66 of the Constitution under which Parliament may make provision for (a) the registration of electors; (b) the manner in which lists of candidates shall be prepared and entered for an election etc., and (c) generally for the conduct of elections, and this had been done by the Elections Regulations, No. 24 of 1964. In other words, there had been an adaptation and modification of the House of Assembly (Validity of Elections) Regulations 1964 (No. 40) and the Elections Regulations, No. 24 of 1964.

The submission of the Solicitor General is, therefore, that the proper procedure to be adopted for the determination of any question which arises under (a), (b), (c) and (d) of Art. 71—and we are here concerned with (b) (1)—should be by way of election petition under and by virtue of Reg. 3 of the House of Assembly (*Validity of Elections*) Regulations, 1964, as enacted under the 1968 Act, in this special jurisdiction of the High Court as conferred upon it by Art. 71 of the Constitution, and by virtue of the language used in Art. 71 this procedure should be adopted after the holding of the elections. In view, therefore, of the historical development of the determination of controverted elections and the special nature of the jurisdiction which Parliament had by statute entrusted to the courts, the courts will always construe legislation of this kind vesting jurisdiction to deal with disputes as to elections with special circumspection, and in particular will only exercise its jurisdiction in accordance with the law which creates it. In particular, it will not seek to eke out a jurisdiction on which the Constitution dealing with the matter may be silent. The contention is that the matters raised in the summons raise the question which is entrusted to the court under Art. 71 whether an election has been lawfully conducted, i.e., whether there is some general illegality either affecting the whole election

or the election held in some particular place, or, in the absence of a general illegality, whether there has been some specific illegality, either an act or omission which has affected the result of the elections. The observation is that in both cases the provision looks to a conclusion of an election and the enquiry is made at the end of the day. The enquiry therefore resolves itself into two questions:

- (a) Has the election been lawfully conducted?
- (b) Has there been an unlawful act or omission which has affected the result?

On these questions as to elections, it is submitted that the jurisdiction conferred by Art. 71 on the High Court is the only jurisdiction, and no other jurisdiction can be provided by statute since this would be inconsistent with the Constitution and, in fact, no other jurisdiction arises under the Constitution itself as the only other jurisdiction conferred on the High Court by the Constitution is the jurisdiction to enforce fundamental rights. [See Art. 19].

Counsel for the plaintiffs in reply to these submissions stated quite erroneously, in my view, (which will be shown later in this judgment) that in the present summons unlike the *Petrie* case the plaintiffs were not seeking for the elections not to be held nor were they asking the court to restrain the defendant from holding or conducting the General Elections on the appointed day, nor were they asking the court to disenfranchise any category of voters. The plaintiffs were merely asking the court to prevent a mode of voting by persons qualified to vote which had been specified by regulations which were made without jurisdiction, and which were ultra vires the Constitution, and were made without the jurisdiction of the Constitution which stands above the legislature and executive of Guyana. They were impugning the constitutionality of the provisions of certain regulations and they conceived it as the court's duty to interpret the Constitution and not to permit laws passed without jurisdiction to be carried out so as to create a fraud upon the Constitution. He did not subscribe to the view that in Guyana it was the State which was sovereign, but that it was the Constitution that was sovereign and the supremacy lay in the Constitution. His strong point was that if a citizen who was an elector was of the view that any legislation dealing with elections to the House of Assembly or at all was ultra vires the Constitution, illegal, void and of no effect, he had every right to approach the court to have the legislation so declared, and it was the court's duty to interpret the Constitution at any stage, which it had jurisdiction to do under the general law or under *Art. 92 of the Constitution*. He made it clear that the plaintiffs were not proceeding under Art. 71 of the Constitution but were asking for an interpretation of the Constitution, and if the court were to decide on the question of the interpretation in favour of the plaintiffs, it would be a waste of time and money for an election to be held which would result in being declared null and void by the court.

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In order to answer these submissions, I consider it necessary to reproduce in full *Art. 71 of the Constitution of Guyana* and to refer to its historical background. Art. 71 reads as follows:

"71.(1) Subject to the provisions of this Article, the High Court shall have exclusive jurisdiction to determine any question —

- (a) regarding the qualification of any person to be elected as a member of the National Assembly;
- (b) whether —
 - (i) either generally or in any particular place, an election has been lawfully conducted or the result thereof has been, or may have been, affected by any unlawful act or omission;
 - (ii) the seats in the Assembly have been lawfully allocated;
 - (iii) a seat in the Assembly has become vacant; or
 - (iv) any member of the Assembly is required under the provisions of Art. 61(3) of this Constitution, to cease to exercise any of his functions as a member thereof;
- (c) regarding the filling of a vacant seat in the Assembly; or
- (d) whether any person has been validly elected as Speaker of the Assembly from among persons who are not members thereof or, having been so elected, has vacated the office of Speaker.

(2) Proceedings for the determination of any question referred to in the preceding paragraph may be instituted by any person (including the Attorney General) and, where such proceedings are instituted by a person other than the Attorney General, the Attorney General if he is not a party thereto may intervene and (if he intervenes) may appear or be represented therein.

(3) An appeal shall lie to the Court of Appeal —

- (a) from the decision of a Judge of the High Court granting or refusing leave to institute proceedings for the determination of any questions referred to in para. (1) of this article;
- (b) from the determination by the High Court of any such question, or against any order of the High Court made in consequence of such determination.

(4) No appeal shall lie from any decision of the Court of Appeal given in an appeal brought in accordance with the preceding paragraph.

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- (5) Parliament may make provision with respect to —
- (a) the circumstances and manner in which and the conditions upon which proceedings for the determination of any question under this article may be instituted in the High Court and an appeal may be brought to the Court of Appeal under this section;
 - (b) the consequences of the determination of any question under this article and the powers of the High Court in relation to the determination of any such question, including (without prejudice to the generality of the foregoing power) provision empowering the High Court to order the holding of a fresh election throughout Guyana or a fresh ballot in any part thereof or the re-allocation of seats in whole or in part; and
 - (c) the practice and procedure of the High Court in relation to the jurisdiction and powers conferred upon it by or under this article and of that court and the Court of Appeal in relation to appeals to the Court of Appeal under this article;

and, subject to any provision so made, provision may be made with respect to the matters aforesaid by rules of court".

As was stated in the judgment in the *Petrie* case, an analysis of the article in relation to the matters which concern us here, reveals that Parliament is here conferring an exclusive jurisdiction on the High Court to determine certain questions. These questions centre around the qualification of any person to be elected as a member of the National Assembly, whether generally or in any particular place, an election has been lawfully conducted or the result of an election affected, whether the seats in the Assembly have been lawfully allocated or a seat has become vacant or any member of the Assembly is required to cease to exercise any of his functions as a member, regarding the filling of a vacancy or whether any person has been validly elected as Speaker.

In para. 3, provision is made for an appeal to the Court of Appeal from the decision of a judge of the High Court granting or refusing leave to institute proceedings for the determination of any of those questions as referred to, and also from the actual determination by the High Court of any such question or against any order of the High Court made in consequence of such determination. Para 4 ensures that there is no further appeal from the decision of the Court of Appeal on any question relating to the determination of those matters already referred to.

Under para. 5(a), the article gives power to Parliament to make provision with respect to the circumstances and manner in which and the conditions upon which proceedings for the determination of any of those

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questions referred to may be instituted in the High Court and an appeal may be brought to the Court of Appeal under this section.

At this stage it may be pointed out that Parliament, by virtue of the Representation of the People (*Adaptation and Modification of Laws*) Act, 1968, (G.), which enacted and incorporated by reference the House of Assembly (*Validity of Election*) Regulations, 1964 (G), by Reg. 3, prescribed that the manner in which proceedings for the determination of these questions under Art. 71 should be referred by petition (hereinafter referred to as an Election Petition), and under Reg. 4(1) an election petition may be presented by an elector or a candidate.

Under para. 5(b) of the article, Parliament is empowered to make, firstly, provisions as to the powers of the High Court in relation to the determination of the class of questions referred to in Art. 71(1) and sought to be determined in the proceedings instituted under para. 5(a), in other words, what orders the court could make including an order to hold fresh elections throughout Guyana, or a fresh ballot in any part thereof, or the re-allocation of seats, secondly, provisions as to the consequences of such determination or order of the court.

Under Art. 83, there shall be for Guyana a Supreme Court of Judicature consisting of a Court of Appeal and a High Court with such jurisdiction and powers as are conferred upon those courts, respectively, by this Constitution or any other law. It follows, therefore, that jurisdiction in relation to matters involving elections or more specifically the conduct of elections, can only be exercised by the court under a conferment by the Constitution itself or by any other law, and it is clear to me that from the history of the matter the court had no jurisdiction at common law to hear any matter relating thereto. In *Erskine May's Parliamentary Practice*, (17th Ed.) p. 184, the learned author points out that before the year 1770, controverted elections were tried and determined by the whole House of Commons as mere Party questions upon which the strength by contending factions might be tested. In order to prevent, however, a perversion of justice, the House consented to submit the exercise of its privilege to a tribunal constituted by law which, though composed of its own members, should be appointed to secure impartiality and the administration of justice according to the laws of the land and under the sanction of oath. Subsequently, there was a system of selection by lot, of committees for the trial of election petitions. Partiality and incompetence, however, continued in the constitution of these committees, and in 1839 an Act was passed establishing a new system whereby the responsibility of individual members was increased. Eventually, in 1866 the jurisdiction of the House in the trial of controverted elections was transferred by statute to the courts of law. Blackstone in his commentaries speaking of the unwritten or common law, distinguished that law into three kinds; the third category of which was "certain particular laws which by custom are adopted and used by some particular courts of petty general and extensive jurisdiction". The history

of the laws relating to controverted elections, however, reveals that they were administered by the House of Commons in the exercise of its privilege and were not considered by the courts, far less adopted, until this jurisdiction was transferred by statute to them. It will thus be seen that from ancient times the courts exercised no common law jurisdiction in relation to election petitions, these being dealt with by committees selected from the members of the House of Commons, and when the courts did commence to exercise jurisdiction in these matters, it was conferred on the courts by statute passed in the legislature. *Rogers on Elections*, 20th Ed., (1928), Vol. 1, p. 161, states authoritatively that the House of Commons from the earliest times claimed and exercised the exclusive right of deciding upon the validity of all elections to its own body.

This position was recognised by the Privy Council in their judgment in *Theberge v. Laundry*, (1876) 2 App. Cas. 102, where the Lord Chancellor, LORD CAIRNS, in delivering the judgment of the court referred to two Acts of Parliament passed by the Quebec Legislature, that is to say, the Quebec Controverted Elections Acts of 1872 and 1875, and stated that these Acts were peculiar in their character, and were not Acts constituting or providing for the decision of mere ordinary civil rights; these were Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular court of the colony for the purpose of taking out with its own consent of the Legislative Assembly and vesting in that court that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly, of deciding election petition and determining the status of those who claimed to be members of the Legislative Assembly. The learned Lord Chancellor continued [(1876) 2 App. Cas. at p. 106]:

"A jurisdiction of that kind is extremely special and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the Constitution of the Legislative Assembly to be distinctly and speedily known".

In *Re Addington Election*, (1927) 1 D.L.R. p. 188, where a returning officer had declared a candidate elected by acclamation, and it was alleged that another proper nomination was received, it was held that the court had no jurisdiction to order the returning officer to grant a poll as that would be in effect declaring the election void and an election can only be declared void upon proper proceedings by petition to avoid the election. In that case, the jurisdiction of the court was questioned upon two grounds, firstly, that there was no power in the court to order election officers to perform their duties or to perform them in a particular manner—and I pause here to say that the plaintiffs in this summons are asking that the Chief Election Officer be restrained from performing his duties in a particular manner by not accepting and counting postal votes. ROSE J., in *Addington's case* did not even consider the first point raised but rested his judgment on the second

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point, and that was, that the matter was taken out of the jurisdiction of the court by the Controverted Elections Act, 1914, which by s. 7 enacted that the proper procedure for matters of this kind was an election petition.

In *Temple v. Bulmer*, (1943) 3 D.L.R. 649, where it was held that the issue of a writ is part of the privileges of a provincial legislative assembly upon which the courts will not intrude by way of mandamus, DUFF, C. J. C. in the judgment of the Supreme Court of Canada, stated that the court was satisfied in its view that the issue of a mandamus would constitute an intrusion upon the privileges of the Legislative Assembly. This was also the view taken by the Ontario High Court in *Re Toronto Beaches Election, Ferguson v. Murphy*, (1944) 1 D.L.R. p. 204, where it was held that mandamus will not lie to compel a County Court Judge to proceed with a recount of votes cast at a provincial election when there has been non-compliance with the *Election Act, 1937*, and it will not lie because the matter concerns the privileges of the Legislature and is not within the jurisdiction of the court. Again, in *Redman v. Buchanan*, (1913) 1 D.L.R. p. 389 it was held by the Alberta Supreme Court that the Court has no jurisdiction to enjoin the Returning Officer from holding a nomination and election on the dates appointed in an election writ issued by the Lieutenant-Governor-in-Council, under s. 105 of the *Alberta Election Act; Alberta Statutes, (1909) Ch. 3* notwithstanding that the provisions of that section had not been complied with since the court has no jurisdiction over matters pertaining to elections unless specially authorised by statute. These Canadian cases where there exists a written Constitution cited by the Solicitor General, demonstrate that in matters pertaining to elections and the conduct thereof, the court has no jurisdiction at common law, that jurisdiction being vested in the Legislature and the courts could only entertain these matters within their jurisdiction if so authorised by Parliament or, as in the case of Guyana, by the Constitution itself. *R. v. Hutchins Ex p. Chapman*, (1959) S. AS.R. 189, an Australian case, is an illustration of this principle, where the allegation was that women were not qualified to be elected to the Legislative Council, and it was urged that the Constitution imposed that disqualification (just as the Solicitor General has so graphically put it, it is said here that a class of voters is disqualified from voting either because of lack of inherent constitutional right or because they are not entitled to vote by a particular procedure), and it was held that under the election code there was a strict schedule of events which had to be strictly followed if an election were to be held at all and which would stand in danger of being imperilled if the courts were to interfere with the electoral process beforehand. For the result would be to interfere with the strict schedule which must be adhered to. When, therefore, application was made to the Supreme Court for an order in the nature of a mandamus directing the returning officer to reject the nomination paper of a woman as a candidate for election, the Supreme Court held that it had no jurisdiction to make the orders sought and the law was, that once the writ for an election has been issued to the returning officer for the State, the question whether or not the election has been properly conducted

and the return of the writ has resulted in a person properly qualified being duly elected to fill the vacancy for which the election is being held, is a matter to be determined by the court of Disputed Returns on a reference by the House in pursuance of a petition properly instituted under the Electoral Acts and by that court alone. A scrutiny of this case discloses that a mandamus was sought on the ground that under the Constitution Act, 1934—55, and by law, female persons could not be elected as members of the Legislative Council, and it was submitted that the court had jurisdiction to determine the question and that under s. 46 of the Act the court would have to decide for itself whether or not the disqualification existed, independent of any resolution of the House. The argument ran, as in the present case, that the right of the House to determine its Constitution had nothing to do with anything that might arise in the *inter regnum* between the dissolution of a Parliament and the election of a new one, and that the validity of proceedings before the Returning Officer was not exclusively the concern of Parliament. PIPER J., who dealt exclusively with the question whether the court had power to make the order asked for by the applicant, stated that it had to be remembered that the jurisdiction to determine the validity of an election to a legislative body was a matter not originally pertaining to the Judiciary, but the Legislature always asserted the right to determine of whom its members should consist, and whenever they had thought fit to delegate a part of that duty to another tribunal, as they had done from time to time, they had, nevertheless, retained control to a certain extent. By the Constitution Act, each House had delegated to another tribunal, the Court of Disputed Returns, the power to determine whether or not the Returning Officer's return was correct, including the question whether the vacancy had been filled by the election of a person duly qualified. S. 46(2) of the Constitution Act gave to the Supreme court jurisdiction to decide in an action to recover the penalties therein provided for, that a person who sat or voted in the House when he was elected and returned 'by this Act disabled from or declared to be incapable of voting or sitting in Parliament' without the Court of Disputed Returns first ruling on the question; but this did not result in Parliament having abandoned to or conferred upon this court the right to interfere by mandamus with the course of an election. Whatever jurisdiction was conferred by s. 46(2) is a jurisdiction to be exercised after an election is completed, not a jurisdiction to decide a matter during the election. In the view of the learned judge then, the reservation by Parliament to determine of whom its members should consist involved the reservation of the right to determine the validity so far as it concerned the result of the election, of every step taken by the Returning Officer between the time of the issue of the writ and the return of the writ by him endorsed with the names of the candidates elected, including therein the correctness of that return. The learned judge concluded on this note: (1959) S.A.S.R. 189.

"To grant a mandamus in the case would, it seems to me, result in this court determining in advance a question which it is peculiarly the province of Parliament to determine, viz., who is and who is not to

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sit and vote therein. Parliament may, by s. 46, have committed to this court or in a proper case the Local court, jurisdiction to hear and determine a claim for penalties for sitting or voting contrary to the Act but it has not committed to this court jurisdiction to pronounce in advance upon the qualifications of a nominated person to sit."

Thus it will be seen that a mandamus was being sought under the ordinary jurisdiction of the court on the ground that on an interpretation of the Constitution Act, 1934, which had been by the Legislative Council under and by virtue of the *Imperial Act of Parliament, 1848*, women were not eligible to sit in the Legislative Council of the Parliament of the State of South Australia, and the court declined jurisdiction on the ground that such matters were to be determined by the Court of Disputed Returns on reference by the House in pursuance of the petition properly instituted under the Electoral Act and by that court alone, as the legislative branch had always retained the right to determine of whom its members should consist and had delegated that power to the aforesaid court.

I agree then with the submission that the question which the court has to consider under para. 1(b) of Art. 71 is whether there is some general illegality either affecting the whole election or the election held in some particular place, or in the absence of a general illegality whether there has been some specific illegality being either an act or omission which affects the result of the election. The word "election" in the paragraph must be used in its wider sense to include the whole process of an election. See Vol. 12, *Halsbury's Laws of England* (2nd Ed.) p. 237—238, wherein it is stated that although the first formal step in every election is the issue of the writ, the election is considered for some purposes to begin at an earlier date. It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is "reasonably imminent", either the issue of the writ nor the publication of the notice of election can be looked to as fixing the date when an election begins from this point of view. The election will usually begin earlier than the issue of the writ. It is clear then, that for our purposes the election will at least commence, and indeed in this case has commenced, with the issue of the proclamation by the President under Art. 67 on the 5th June, 1973, and if any irregularities or illegalities are committed from this period of time in relation to various matters involved in the election, then these illegalities may form the basis of an election petition after the result of the election has been made known. I therefore turn my attention to Art. 66 para. 4 of the Constitution under the heading "Election". Part II of Cap. 6, para. 4, speaks of "subject to the provisions of this Constitution", Parliament may make provision for (a), (b), (c), (d), (e) and (f) generally for the conduct of elections and for giving effect to the provisions of this Article. It is clear, therefore that Parliament, in making provision for the conduct of elections under this Article, must do so subject to

the provisions of the Constitution, and if any law passed by Parliament pertaining to the elections collides with other provisions of the Constitution. then this law must be *ultra vires* the Constitution, illegal and of no effect. Here, however, there is no allegation of a collision with the other provisions of the Constitution; the allegation is that the regulations which are the impugned legislation were not properly laid before the Legislature, that is to say, the National Assembly—and I pause here to state that this can come as no surprise as the Constitution under art. 65 makes provision for the qualification of an elector who is a non-resident citizen of Guyana but who is domiciled in Guyana and for whom it must be reasonably presumed that it was the intention of the framers of the Constitution that provision should be made by Parliament for those persons to exercise the franchise. The matter, however, does not end there. Under para. 5 of art. 71 of the Constitution, it is enacted that Parliament may make provision with respect to the circumstances and manner in which and the conditions under which proceedings for the determination of any question under this article may be instituted in the High Court, and an appeal may be brought to the Court of Appeal under this section. The words "subject to the provisions of the Constitution" are conspicuous by their absence. It is clear, therefore, that Parliament has been given *carte blanche* in relation to passing laws in respect of the circumstances and manner in which and the conditions upon which proceedings for the determination of any question arising under art. 71 (1) (a), (b), (c) and (d) may be instituted in the High Court from which an appeal lies to the Court of Appeal. Provided, therefore, Parliament in passing its laws in relation to elections keeps within the perimeter or circumference of those matters mentioned in the article, there can be no question of any collision with any other provision of the Constitution, nor can it be said that the doctrine of *ultra vires* can be raised to render any law illegal, null and void and *ultra vires* the Constitution. Under the Constitution, therefore, Parliament has been granted the wide power by the Constitution to speak in relation to election laws and Parliament has so spoken by the legislation which is sought to be impugned, and, more particularly, the House of Assembly (Validity of Election) Regulations 1964. No. 40, which by reg. 3 made provision for a reference for the determination of any question whether any person has been validly elected as a member of the House of Assembly to be by way of an election petition presented to the court.

The Indian case of *N. P. Ponnuswami v. Returning Officer, Namahbal Constituency*. (1952) S.C.R. (India) strongly supports this view. In that case,

the appellant, whose nomination papers had been rejected by the Returning Officer, applied under Art. 266 for a writ of certiorari to quash the order of the Returning Officer and to direct him to include the appellant's name in the list of valid nomination. The Supreme court considered the whole of Part XV of the Constitution of India, which is similar to that of Part II of Cap. 6 of the Constitution of Guyana, and held that —

(a) in Part XV the word "election" is used in the wide sense of the entire process culminating in the candidate being elected, and it was used in that sense in Art. 329 (b); (b) the scheme of Part XV was that whatever matter was a ground for calling an election, in question, and the rejection of a nomination paper furnished such ground, should not be urged at an intermediate stage before the court, but should be urged in the manner in which and at the stage at which Art. 329(b) prescribed. This was the necessary implication of Art. 329 (b), for if the grounds for questioning an election could be urged at an earlier stage, Art. 329 (b) would be deprived of its meaning and content. Any other construction would lead to a conflict of jurisdictions for the High court may express one view at an interlocutory stage and the election tribunal may express an opposite view after hearing of the election petition. The court in its judgment stated that Art. 329 (b) of the Indian Constitution provided that "notwithstanding anything in this Constitution no election to either House of Parliament or to the House or either House of the Legislature or of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate legislature, and Art. 327 empowered Parliament [as Art. 66 (4)(f) of the Guyana Constitution] to pass laws making provision with respect to all matters relating to or in connection with election to the Legislature "subject to the provisions of the Constitution", and this was contrasted with the words used in the case of Art. 329 "notwithstanding anything in the Constitution", and it was conceded at the Bar that the effect of the difference in language was that whereas any law made by Parliament under Art. 327 could not exclude the jurisdiction of the *High court under Art. 266 of the Constitution* [Art. 19 (2)(b) of the Constitution of Guyana] which deals with the enforcement of fundamental rights under the Constitution, and the power of the High court to issue to any person or authority the appropriate writs or orders and directions for the purpose of enforcing or securing the enforcement of fundamental rights, that jurisdiction was excluded in regard to matters provided for in Art. 329.

The decision in the Ponnuswami's case was followed by the Supreme court of India in *Dr. N.B. Khare v. Election Commission of India* in 57 A.S.C. 694, 697 where the wider meaning of the word "election" was adopted as being applicable to the expression "relating to or in connection with the election to a President or Vice President," accordingly it was held that S. 18 of the Presidential and Vice Presidential Election Act 1952, enacted under Art. 71 (3) must be construed to mean that the time for the exercise

of jurisdiction by the Supreme court to inquire into and decide doubts and disputes arising out of or in connection with the Presidential election was after the entire election process was completed.

In the present summons, there is no question here, as indeed in the *Ponuswami* case, of excluding the jurisdiction of the High court under the article of the Constitution dealing with the enforcement of protected provisions in relation to fundamental rights, but whereas under Art. 329(b) of the Indian Constitution it is provided that "notwithstanding anything in the Constitution no election shall be called in question except by an election petition, under the Guyana Constitution, the Constitution itself has conferred upon Parliament the power to pass legislation in relation to the question whether generally or in any particular place an election has been lawfully conducted or the result thereof has been or may have been affected by any unlawful act or omission. It is therefore the Constitution itself speaking through Parliament and making provision with respect to the circumstances and manner in which and the conditions upon which proceedings for the determination of those matters may be instituted, all of which would be grounds for calling an election in question. As I see it then, there is no difference in essence in relation to this matter between the Constitution of India and the Constitution of Guyana, and the distinction, if any, is one without a difference.

I wish to make it clear that though I have premised my decision on the point—that the election in its wide sense has already commenced, I would say by way of obiter that even if the plaintiffs had brought proceedings for a declaration immediately after the legislation which they seek to impugn was passed, and the date of the election had not been proclaimed, they would have had no *locus standi* as the issue under review would have been merely academic and hypothetical as they would have had no special interest in having the question decided. [See *Burnham v. Attorney General of Canada*, (1971) 15 D.L.R. (3d) Pt. 1/6]. The interest, as I see it, would only have arisen after the publication of the proclamation of an election. The courts have always refused to adjudicate upon theoretical issues and to make declarations thereon.

Junior counsel maintained his submission as made by him in the *Petrie* case, which was overruled then, and from which ruling I can see no reason to depart. The submission is, that Art. 71(1)(b) did not contemplate a situation where a party was urging that an Act of Parliament or a regulation made thereunder was illegal, null and void and ultra vires the Constitution, but was intended to cover cases where as a result of an unlawful act or an omission done in pursuance of an Act of Parliament or regulations presumed to be valid, it made an election not lawfully conducted or affected the result thereof. The contention is that the intention of the framers of the Constitution was to exclude any legislation that might be invalid, as ultra vires the Constitution or the Act of Parliament by virtue of which it was made, and to presume that the legislation was valid and that any unlawful act or

omission done in pursuance of the valid legislation would cause an election not to be lawfully conducted, or affect, or may have affected the results of the election. His argument was that the words "whether an election has been lawfully conducted" must be interpreted to mean only unlawful acts or omissions which spring from valid legislation *intra vires* the Constitution or an Act of Parliament, as the case may be. The question, he urged, of the conduct of the election can only be considered in respect of valid laws. If the law is unconstitutional, a citizen must have the right to approach the court before the election in order to determine whether the law is unconstitutional or not. In support of his submission, counsel cited *Re Kensington North Parliamentary Election*. (1960) 1 W.L.R. p. 762. I cannot accept this submission as there is nothing in the language used to suggest that the words "lawfully conducted" must be confined to unlawful acts or omissions done in pursuance of a valid Act of Parliament or Regulations *intra vires* the Constitution. Surely if an Act of Parliament or regulations on which and by virtue of which an election is conducted is *ultra vires* the Constitution, or such regulations made under a valid Act of Parliament are *ultra vires* the Act, then it cannot be said that the election has been lawfully conducted, for anything done under the invalid legislation must be unlawful, null and void. As I see it, an unlawful act is an act done under valid or lawful authority, but done in an improper or unlawful manner or is an act done without lawful authority. If, therefore, the defendant in this case receives and accepts postal votes by virtue of legislation which is *ultra vires* the Constitution, illegal, null and void, it must result in the election not being lawfully conducted, and/or in an unlawful act or omission affecting the result of the election. Once, therefore, it is conceded that the matter of postal voting comes within the ambit of the conduct of the elections or is an act unauthorised by legislation or authorised by invalid legislation in relation to elections, the procedure prescribed by the 1964 Regulations must be adhered to. The case of *In Re Kensington North Parliamentary Election*. (1960) 1 W. L.R. 762, cited by counsel, is of no assistance in the determination of this matter as that decision was based on the application of the interpretation of an Act of Parliament in England, where there is no written Constitution and Parliament is omnipotent and supreme and no question of the doctrine of *ultra vires* can arise, in relation to an Act of Parliament. It might however be of assistance in cases where irregularities in pursuance of valid legislation are committed.

The argument was advanced by counsel for the plaintiffs that Art. 92 of the Constitution had conferred jurisdiction on the High Court to entertain this application which required an interpretation of the Constitution, but after hearing the reply by the Solicitor General on this point, the argument was shifted to one that the Constitution, by para. 1(a) of that Art., recognised that the High Court had jurisdiction in any matter which involved an interpretation of the Constitution, so it followed that a citizen could contest the validity of any law passed by Parliament at any stage which concerned an interpretation of the Constitution. To answer the submission, the relevant portion of Art. 92 is set out hereunder:

PART 3.

Appeals

"92. (1) An appeal to the Court of Appeal shall lie as of right from decisions of the High Court in the following cases, that is to say-

- (a) final decisions in any civil or criminal proceedings on questions as to the interpretation of this Constitution;
- (b) final decisions given in exercise of the jurisdiction conferred on the High Court by Art. 19 of this Constitution (which relates to the enforcement of fundamental rights and freedom);
- (c) final decisions in the determination of any of the questions for the determination of which a right of access to the High Court is guaranteed by article 8 of this Constitution (which relates to the rights of persons whose property is compulsorily acquired); and an appeal shall lie as of right to the Judicial Committee from any decision of the Court of Appeal in any such case.

(2) Parliament may provide for an appeal to lie from decisions of the Court of Appeal to the Judicial Committee, either as of right or with the leave of the Court of Appeal, in such other cases as may be prescribed by Parliament.

(3) Nothing in the two preceding paragraphs shall apply to the matters for which provision is made by article 71 of this Constitution.

(4) Save as otherwise provided by Parliament, an appeal shall lie to the Judicial Committee with the special leave of the Judicial Committee from decisions of the Court of Appeal in any civil or criminal matter in any case in which, immediately before the date on which Guyana became a republic, an appeal could have been brought with the special leave of Her Majesty to Her Majesty in Council from such decisions."

A perusal of this article reveals that it deals with the question of appeals, and jurisdiction is conferred by the article not on the High Court but on the Court of Appeal in relation to certain matters, paragraph 1(a) being the one in which we are here concerned. It is made plainly clear in the article that whereas there is a right of appeal from a decision of the High Court to the Court of Appeal in respect of certain matters, and a further right of appeal to Her Majesty in Council from any decision of the Court of Appeal in any such case, at para. (3) nothing in the two preceding paragraphs shall apply to the matters for which provision is made by Art. 71 of the Constitution; therefore, in relation to the question raised under Art. 71 of the Constitution, the right of appeal stops at the Court of Appeal. If, therefore, constitutional issues in relation to the interpretation of the Constitution were raised in the High Court under para. (1) (a) of Art. 92, which could also be

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raised under Art. 71, then it would follow that in relation to the matters under Art. 71 an appeal would stop at the Court of Appeal, and in the case of Art. 92 an appeal could reach the Judicial Committee of the Privy Council, which would operate in absolute negation of Art. 71. In my view, all that Art. 92 (1)(a) does is to recognise that the High Court has jurisdiction in any civil or criminal proceedings on final decisions (and an application by way of summons does not give rise to a final decision) as to the interpretation of the Constitution, and that is precisely why para. 3 was enacted - because it recognised that constitutional issues could arise in relation to matters included in Art. 71. and therefore it excluded matters for which provision was already made under that article.

I concur in the exposition of Art. 71 by the learned Solicitor General, where he declares that under the article all election issues are determinable only by the High Court, and Parliament is forbidden to entrust that jurisdiction to itself or to any other body. The High Court must exercise the Jurisdiction at the stage and in the manner prescribed by Parliament under Art. 71(5). Election disputes can involve issues relating to the constitutionality of the election laws. The issues must then be decided by the High Court in a manner prescribed by Parliament under para. 5 of Art. 71, and election appeals, even when involving constitutional issues, stop at the Court of Appeal and do not go on the Privy Council. It is for the High Court itself in its ordinary jurisdiction which is to determine the area of exclusiveness of the jurisdiction conferred by Art. 71 on the High Court. The area of jurisdiction must of necessity embrace questions of constitutionality of election legislation. The moment such an issue is raised, the High Court must in the exercise of the special jurisdiction conferred upon it by Art. 71, determine that question at the stage and in the manner prescribed by Parliament under Art. 71 (5), which is by way of an election petition. As Gledhill on *Fundamental Rights in India* explains it, when a tribunal is created by statute, the statute may say that a tribunal may take cognisance of a matter if certain facts exist or certain prescribed conditions are satisfied. Alternatively, as in the present case, it may give the tribunal jurisdiction to determine whether the necessary facts exist or conditions are satisfied, and thus even if the tribunal has given itself jurisdiction by a wrong decision, that is not, in itself, sufficient to call for remedy by certiorari. *Ebrahim v. Custodian General*, (1952) A.I.R. S.C. 319. I understand this to mean that the Constitution, in conferring this special jurisdiction on the High Court under Art. 71, gives the High Court, in the exercise of its ordinary jurisdiction, the necessary power to examine the question whether it has jurisdiction under the said article to inquire into the matters complained of in the proceedings; if it so decides then it proceeds to hear and determine the matter in the exercise of its special jurisdiction.

Counsel for the plaintiffs recited statements made by *Jain on India Constitutional Law*, to the effect that the Constitution contains provisions to safeguard the independence of the Judiciary in the discharge of their functions and constitutes the fundamental law of the land and no legislature

could enact a law contrary to the Constitution, and that Parliament was the creature of the Constitution and its powers, rights privileges and obligations have to be spelt out from its provision. Therefore, he urged, a parliamentary law to be valid must conform in all respect with the Constitution, and it is for the courts to decide whether an enactment is constitutional or not. With these statements no one can disagree, but the question here is one of procedure and not of substantive law, and there is no doubt that these principles can and should all be adhered to in an election petition.

I conclude my ruling on this point with the approval of the Solicitor General's observation, though it may appear to impinge on the principle of balance of convenience in relation to the merits of the application, that it must be that the High Court in its ordinary jurisdiction has no jurisdiction to entertain the matters raised in the summons because of the dreadful results that would flow from them. If an injunction were granted but discharged shortly before the election, the practical effect would be to preclude voters from exercising a valid right to vote by post, since voting by post is a process of time. That situation in itself would ground an election petition after an election has been held. No one knows how many electors resident in Guyana and out of Guyana would vote by post, so that only the skeleton of an election might be held which would not be the same thing as an election being held, the obvious consequence of which may be a postponement of the election. If in these circumstances, an injunction were granted and an appeal therefrom lodged, the hearing might take a long time when Parliament at the moment has been dissolved, in which case the state would be left without a Parliament to manage its affairs. It is true that under Art. 82(5) there is power to re-call Parliament after dissolution, but the power is exercisable only for limited purposes, and under Art. 69 (2) there is power in the Elections Commission to postpone the holding of an election in certain circumstances but this is not such a circumstance. All of this must lead to the conclusion that the framers of the Constitution did not intend that the court in the exercise of its ordinary jurisdiction, shall have jurisdiction in these matters.

On the second point, I can only repeat what was said in *Petrie's* case (at p. 307 of the Report), and that is that under Art 67 of the Constitution there is a distinct unequivocal command by the Constitution itself, that an election be held, and on a particular date which by proclamation of the President has been duly appointed, and if an injunction were granted, it would be in negation of this article of the Constitution, the function of the President exercised under this article not having been challenged. The submission by counsel for the plaintiffs that the summons does not seek to stop the election but merely seeks to stop postal voting by electors, I find to be specious, as no one knows the percentage of electors who would vote by post. If it is a large percentage, and the court would have to be so satisfied otherwise there would be no effect on the conduct of the elections nor would it affect its result, it may very well result as I have already said in only a shell

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of an election being held, in which case it could not be said that an election in the true sense of the word has been held. There is no difference in this case, then, from the *Petrie* case in which the plaintiffs were seeking an injunction to restrain the Chief Election Officer from holding an election on the basis of registers of electors compiled pursuant to the legislation by Parliament which they sought to impugn. The equitable remedy of an injunction which must always follow the law cannot override Art. 67 of the Constitution which, by Art. 2, is the supreme law of Guyana. See also *Redman v. Buchanan*, (1913) 11 D.L.R. p. 389, already referred to in this judgment.

I pass now to a consideration of the third point, and I am of the view that the proceedings were erroneously brought against the defendant in his official capacity and cannot be sustained. It is admitted that the defendant was appointed Chief Election Officer, which office was created by virtue of Reg. 6, Part 1 of the 1964 Regulations made under the *British Guiana Constitution Orders, 1961* and 1964, which, under s. 3(1) of the *Representation of the People (Adaptation and Modification of Laws) Act, 1968*, had been brought into effect as if enacted under para. 4 of Art. 66 of the Constitution, and he is therefore a public officer. 'Public Officer', under Art. 125 of the Constitution, means the holder of any public office and includes any person appointed to act in any such office. 'Public office' means an office of emolument in the Public Service. The 'Public Service' means the service of the Crown (now the State) in a civil capacity in respect of the Government of Guyana. The defendant is therefore in the service of the Government of Guyana and an Officer of the State. An injunction is claimed against him in his official capacity and legislation similar to the *Crown Proceedings Act, 1947* (U.K.) being unknown in this country, the authorities are clear that an injunction cannot be obtained against an officer of the Crown in his official capacity if the effect of granting the injunction would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown, as the Queen cannot be coerced in her own Courts—see 11 *Halsbury's Laws of England* (3rd Ed.) p. 16 para. 25 and 21 *ibid*, p. 351 para. 737. The *Republic Act, No. 9 of 1970*, which declared Guyana to be a Republic, creates no difficulty as the Crown is now replaced by the State, and that is why LORD DIPLOCK was able to say in *Jaundoo v. The Attorney General of Guyana*, 1972 16 W.I.R. 141 at p. 148 in the judgment of the Privy Council, that an objection to an injunction sought against the Government of Guyana was not removed by the subsequent amendment of the Constitution under which the executive authority of the Crown and the executive functions of the Governor General were merged and transferred to the President, and the Public Officers of Guyana are now no longer referred to as being in the service of the Crown, but as being in the service of the Government of Guyana itself. The position now of a public officer in the service of the Government of Guyana is then the same as a servant of the Crown in England at common law before the introduction of the *Crown Proceedings Act, 1947* (U.K.). That position is well settled

that the Crown servant is not sueable in his official capacity and no action in that capacity would lie against him. He could, however, be sued in his individual or personal capacity and not as a servant or agent of the Crown. See *Raleigh v. Goschen*, (1898) 1 Ch. 73, *Bainbridge v. Postmaster General*, (1906) 1 K.B. 178, where in the former case which was a case of trespass. ROMER J., laid down the principle that has stood the test of time, that if any person commits a trespass he cannot prevent himself being sued merely because he acted in obedience to the order of the executive government or any officer of State, but he could merely be sued in his individual capacity as a wrongdoer. So that in *Abrams v. The Anglican School*. (1960) L.R.B.G. at p. 78, where a claim was brought against the Director of Education in his official capacity for a declaration that the dismissal of the plaintiff, who was a teacher at a Government School, by the Governing Body of the school with the approval of the Director, was unlawful, null and void. LUCKHOO, C.J. accepted the submission based on the case of *Raleigh v. Goschen* that actions will not lie against Crown servants in their official capacity. Reference was made to *Hosier Bros. v. Derby* (Earl), (1918) 2 K.B. 671, in which the Court of Appeal laid down the principle that an action can no more be brought against the servant of the Crown for a declaration as to what a contract means than it can be brought for a substantive remedy under the contract itself. In *Merricks v. Heathcote Amory and the Minister of Agriculture, Fisheries and Food*, (1955) 1 Ch. 567, where the plaintiff moved for a mandatory injunction against the Minister that he should withdraw the draft of a scheme under the *Agricultural Marketing Acts, 1931 to 1949*, regulating the marketing of potatoes, it was held that the Minister in carrying out or proposing to carry out his functions under s. 1 of the Act of 1931 and in dealing with the scheme was acting as a representative or officer of the Crown, so that an injunction would not lie. UPJOHN J., in the course of his judgment said, "In the case where the relevant or appropriate Minister is directed to carry out some function or policy of some Act, he is either acting in his capacity as a Minister of the Crown representing the Crown, or is acting in his personal capacity, usually the former. I find it very difficult to conceive of a middle classification". In *Harper v. Secretary of State for the Home Department* (1955) 1 Ch. 238, EVERSLED. M.R. who in delivering the judgment of the Court of Appeal in the particular case and refusing to uphold an interim injunction against the Minister, stated: "I am not satisfied, though I express no final view, that in any event an injunction could be obtained against the Secretary of State for the Home Department, having regard to the terms of the *Crown Proceedings Act, 1947*". S. 21 of the *Crown Proceedings Act, 1947*, subsec. (2), under which these two cases were decided, enacted that "the Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown", but, as the learned Solicitor General has pointed out, they cannot be distinguished for that they turn on the *Crown Proceedings Act, 1947*, for the reason that the immunity of Crown servants from injunction was part of the pre-existing immunity, and what

the Act did was not to confer any fresh or additional immunity but to retain a part of the former immunity while for the first time exposing the Gown Servant to general liability to suit. *De Smith at page 462* gives as his opinion that the effect of s. 21(2) of the Act of 1947 appears to be to preclude the award of an injunction against any government department or other body that is a Crown servant or against a Minister or any other officer of the Crown for any act done in his official capacity. The case upon which counsel for the plaintiffs depends for his submission that an interlocutory injunction can be properly granted against the defendant in his official capacity is *Attorney General for the State of New South Wales & Others v. Trethowan & Others*, (1930—31) 44 C.L.R. 394, an Australian case where de Smith in his *Judicial Review of Administrative Action*, 2nd Ed., p. 463, footnote 99 expresses the opinion that in that country and in Canada, the Courts are more liberal than the English Courts in entertaining applications for injunctions against Crown servants. In the *Trethowan* case, the question arose whether there could be a repeal of s. 7(a) of the *Constitution Act, 1902-29 (N.S.W.)* by an enactment of a Bill which, under s. 2 of the Act, could not be enacted unless it was submitted to and approved by a majority of the electors. The High Court of Australia held that it could not be done because it required a manner and form in which a law shall be passed respecting powers of the legislature within the meaning of the *Colonial Laws Validity Act, 1865*, which was an Imperial Act from which the Legislative Council of New South Wales received its powers to pass laws. In other words, as DICKSON J. (as he then was) put it, the case depended upon the question whether the Bill for the repeal of s. 7(a) could be presented for the Royal assent and become a valid law without compliance with the condition which that section itself prescribed, and the answer to that question depended upon the true meaning and effect of the written instruments from which the Parliament of New South Wales derived its power. The Court, then, after going fully into the question of the validity of s. 7(a), held that it was valid and effective and concluded that the Full Court was correct in its view that it was a fit case for an interlocutory injunction. That case, however, differs from the circumstances of the present case in that the question of the validity of the law that was being contested was fully ventilated and found to be sound, and the decision on that point reached finality, whereas the position in the present case is otherwise.

In *Hughes and Vale Proprietary Limited v. Gair & Others*, (1953-54) 90 C.L.R. 203, the same High Court of Australia qualified the ruling in the *Trethowan* case when it held that it was only by reason of exceptional statutory provisions, if ever, that a Court will grant an injunction to restrain the presentation of a Bill for the Royal assent; and *Dickson, C.J.*, who was a member of the Court of the *Trethowan* case pointed out that in that case the question before the Court was restricted to the validity of s. 7(a) of the Act, and in his view the case was of doubtful authority. It is true that Lord Diplock in *Jaundoo v. Attorney General of Guyana* appeared to give approval to the Canadian case of *Carlic v. The Queen and Minister of Manpower and*

Immigration, 65 D.L.R. 633, for the proposition that an interim injunction could be properly obtained against the Minister to the exclusion of the Queen, but as the learned Solicitor General has pointed out, that case turned on the interpretation of a particular statute wherein the necessary implication was that the Court had jurisdiction to issue an injunction to restrain the Minister. *Lord Diplock* did say in the *Jaundoo* case that "if the matter were urgent, it would have been open to the landowner (plaintiff) to add as an additional party to the motion, the Director of Works or the Minister in whom the powers of the Director of Works under the Roads Ordinance are now vested and to claim an injunction against him". If Lord Diplock meant to say that the equitable remedy of an injunction could properly be claimed against the Director of Works or the Minister in their official capacity, then, in my view, he would be cutting across a long line of authority which at common law the authorities are clear could not be done. It must be that this learned judge was saying that an injunction could be obtained against those persons individually or in their personal capacity because the act of taking possession of the land in question under the *Roads Ordinance, Cap. 277* (which did not require payment of compensation) involved a trespass. It should be observed however, that the Order of the Court could be stultified by the appointment of another person to those posts. It may very well be that *Lord Diplock* was assuming that the Crown *Proceedings Act 1947* obtained in Guyana, as his statement at page 150 of the report appears to confirm i.e. following the precedent of the Act the High Court could make an order for payment of compensation or damages against the Government of Guyana, accompanied by a further order that execution shall not be issued for enforcing the payment thereon. I distinctly refrain from raising a constitutional issue by saying, as was said in *Cassell & Co. Ltd. v. Broome*, (1972) AC. 1027, that the statement of the law was made *per incuriam*. I agree, therefore, with the observation of the learned Solicitor General that if the Crown servant (now under the amendment of the Guyana Constitution a servant of the Government) is trespassing, the Courts can restrain him in his individual capacity, but not when he is acting under a statute, as in the present case, and carrying out statutory functions.

The case of *Ghani et al v. Jones*, (1969) 3 All E.R. 1700, cited by counsel for the plaintiff, does not assist him in any way as Jones was not sued in his capacity as Superintendent of Police, but he was merely described as such, and his act in depriving the plaintiff of his passport amounted to a trespass, and there was no question there of restraining a servant of the Crown from exercising statutory powers. I hold then that the defendant, a high representative of the State and Government of Guyana, cannot be restrained by injunction from carrying out his statutory duties.

In answering point four, what springs to my mind at once is the strong implication that if an injunction were granted in this case it would mean that the Court would be making an interim declaration that the legislation dealing with elections is indeed invalid, and as one judge puts it, there is no such animal. *Lord Diplock* in the *Jaundoo* case stated that a declaration of rights

is not a suitable form of interim relief pending final determination of the landowner's (plaintiff's) application, and *de Smith's Judicial Review of Administrative Action* cites *Underhill v. Ministry of Food*, (1950) 66 T.L.R. (Pt. 1) 730, as authority for the proposition that it has been held that the Courts have no general jurisdiction to award an interim declaration of rights. Inability to issue an interim declaration in lieu of interlocutory injunction against the Crown is a significant gap in the law of judicial remedies. In the *Underhill case*, where s. 21 of the *Crown Proceedings Act, 1947*, which had made inroads into the immunity of the Crown servant, was considered, *Romer J.*, laid down the law which was followed by the Court of Appeal in *International General Electric Company of New York Ltd., and another v. Commissioner of Customs and Excise*, (1962) 1 Ch. 784, when he stated (at p. 593 of the report):

"At the outset, counsel for the Ministry of Food says that this court has no jurisdiction to do what it is invited to do, i.e., to make a kind of interim declaration in substitution for the interlocutory injunction which clearly it has no power to grant. He says that when the Crown Proceedings Act, 1947, s. 21, refers to the court making a declaration, it refers to a final declaration, and it is an unheard of suggestion that an interlocutory declaration should be made which might be in precisely the opposite sense of the final declaration made at the trial. He says, and I think rightly says, that what is usually done on the hearing of an interlocutory application is to grant some form of temporary remedy which will keep matters in status quo until the rights of the parties are ultimately found and declared, and that, accordingly, the reference to making a declaration of rights means a declaration at the trial as distinct from a declaration on some interlocutory application. Accordingly, he says that, just as I cannot grant an interlocutory injunction against the defendants, even if in all respects a prima facie case has been made out, I cannot as an alternative make an interim declaration either. In my judgment, that submission is right. I do not think that this court has jurisdiction under s. 21 of the Act to make something in the nature of an interim declaration of right which would have no legal effect, and which, as I say, might be the very opposite of the final declaration of right made at the trial after hearing all the evidence and after all the matters in issue had been gone into at length. Therefore, just as I am of opinion—and this, of course, was conceded—that I cannot grant by way of injunction the relief which is asked for in the first part of the notice of motion, equally I cannot grant the declaration 'until trial or further order', as the notice of motion says, in accordance with the second part of that notice."

In the latter case, it was held that an order declaring the rights of parties must in its nature be a final order and (subject to appeal) be *res judicata* between the parties; and that in proceedings against the Crown it was not possible to obtain an order which corresponded to an interim injunction or an interim declaration which did not determine the rights of the parties

but which was only intended to preserve the status quo. The authorities then lead me to the conclusion that a final declaratory order can be made on interlocutory proceedings, but an interim declaration cannot be made on interlocutory proceedings as there is no such order.

Finally, I move to the last point made by the Solicitor General on the authority of *Dodd v. Amalgamated Marine Workers' Union* (1924) 93 Ch. 65, that it is not the practice of the Court (except by consent) to grant on an interlocutory application an injunction which will have the practical effect of granting the sole relief claimed. Counsel for the plaintiffs has been able to show from the case of *Woodford v. Smith*, (1970) 1 W.L.R. 806, a decision by *Megarry, J.* that this is not the law and in a proper case the remedy can be granted which will have the effect of granting the sole relief claimed in the substantive proceedings. In this case, *Megarry J.* said. "I do not think that there is anything to prevent the Court in a proper case from granting on motion substantially all the relief claimed in the action," and then later. "In my judgment looking at the case as a whole there are no grounds upon which the Court should refuse to grant an injunction." It is clear from this case and the authorities of *Manchester Corporation v. Connolly and Others*. (1971) All E.R. 961, and *Heywood v. B.B.C. Properties Ltd.*, (1963) 1 W.L.R. 975, that a proper case is one in which there is no possible defence; this cannot be said of the present case as, on the one hand, the complaint is that the Elections Regulations were not properly laid in the House of Assembly and a motion in relation thereto not debated, whereas in *Springer v. Doorly*, 1950 L.R.B.G. 10, it is established that non-compliance with a laying requirement does not invalidate subordinate legislation, and the Courts will treat the subordinate legislation as in force before it is laid in Parliament, and will regard the laying requirement as being only directory, and the further complaint being that Parliament cannot delegate its power to make regulations to the President, *Hodge v. The Queen* (1883) L.R. 9 A.C. 117 is authority for the proposition that a Legislature committing important regulations to agents or delegates does not efface itself as it retains its power intact and can whenever it pleases destroy the agency it has created, and set up another or take the matter directly in its own hands. And, on the other hand, it being plainly admitted that non-resident citizens under the Constitution have the right to vote, it must be expected that Parliament, by virtue of the powers conferred upon it by the Constitution, would make provision for the registration and voting process of such electors. There can be no question, therefore, of the present case being one where there is no defence.

I would conclude this judgment, therefore, by a reference to the judgment of the *Ponnuswami* case, and endorse the view therein expressed that, having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule, and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

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Where a right is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. The plaintiffs have their remedy in an election petition. I hold that the preliminary objection taken by the Solicitor General is sound, and I would decline jurisdiction.

The application is therefore refused, costs, in any event, to be certified fit for counsel.

Application refused.

BUTLER (MAGDALEN)

and

BUTLER (MAURICE)

[High Court (Morris J.,)

September 29; October 19; December 7,22,1972,

January 12, 17, 24, 1973]

Permanent Maintenance—Wife mainly responsible for break-up of the matrimonial home—Principles to be applied in quantifying amount due for her permanent maintenance.

The wife/petitioner filed this petition for permanent maintenance against the husband/respondent. In previous divorce proceedings in his answer to her petition, the husband cross-prayed for a dissolution on the same ground, viz., malicious desertion. Later, he abandoned his answer and cross-prayer, and so the wife obtained an uncontested *decree nisi* on the husband's alleged malicious desertion.

In this petition for permanent maintenance, notwithstanding the withdrawal of the husband's cross-prayer, the trial judge found it difficult to accept the wife's contention that it was her husband who was responsible for the break-up of the matrimonial home. On the contrary, it was the wife, he considered, who did so, chiefly through her desire to proceed to the United Kingdom and set up home there. Whereupon she walked out of the home after unsuccessfully persuading the husband to emigrate. His Honour found as a fact that it was on "these rocks that the ship of marriage foundered after sailing the matrimonial seas for 19 years", and that it was the wife who was mainly responsible for the breakdown of the marriage.

HELD: (i) an intolerable state of affairs would arise if a wife breaks up a marriage by insisting the matrimonial home should be set up where she desires and then move out and expect to be awarded such permanent maintenance as would maintain her past status; it is for the husband to provide the matrimonial home;

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(ii) while the size of the discount that should be made for the wife's conduct when quantifying the amount due for her having left the matrimonial home, permanent maintenance must not be punitive. On the evidence, it should not be unsubstantial. There will therefore be an award of \$80.00 per month as permanent maintenance with costs fixed at \$200.00 in the wife's favour.

Application granted.

Porter v. Porter (1969) 1 W.L.R. 1159, and *Rose v. Rose* (1951) P.D.A. 31. applied.

Cases referred to:

- (1) *Wood v. Wood* (1891) P. 272.
- (2) *Porter v. Porter* (1969) 1 W.L.R. 1159.
- (3) *Trestain v. Trestain* (1950) 1 All E.R. 198.
- (4) *Rose v. Rose* (1951) P.D.A. 31.

B. E. Commissiong for the petitioner.

B. E. Gibson for the respondent.

MORRIS, J. In her petition dated 15th May, 1972, the petitioner prayed the court to make an order against the respondent for permanent maintenance and other relief.

Briefly the material facts showing the sequence of events leading to this petition are as follows:

2. On 14th August, 1971 the petitioner filed a petition for a divorce from her husband the respondent on the ground of his malicious desertion. The respondent filed an answer on the 9th September, 1971 and therein cross-prayed for a dissolution of the marriage also on the ground of the petitioner's malicious desertion.

The respondent withdrew his answer and cross-prayer and the petitioner obtained a decree nisi on the ground of the respondent's malicious desertion in accordance with her petition which was thus uncontested.

Since 1891 in *Wood v. Wood*, LINDLEY J. stated the principles to be taken into consideration in determining the question of maintenance as follows:—

- (1) The conduct of the parties;
- (2) their position in life and their ages and their respective means;
- (3) the amount of the provision actually made;
- (4) the existence or non-existence of children and who is to have the care and custody of them;

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- (5) any other circumstances which may be important in any particular case".

In *Porter v. Porter SACHS L.J.*, said: (1969) 1 W.L.R. at p. 1159]

"The application of those principles and the practice of the Divorce Division has varied from decade to decade. The court takes into account the human outlook of the period in which they make their decisions both as regards that important factor 'the conduct of the parties', and also the 'other circumstances' of the particular case. The practice as to discretion has thus materially varied on this matter as on many others such as the discretion exercised when granting a decree, where the ambit of the discretion has fundamentally altered in the past 25 years. In the exercise of any such discretion the law is a living thing moving with the times and not a creature of dead or moribund ways of thought".

In the course of the hearing counsel for the petitioner underscoring the respondent's conduct as that of the blameworthy spouse stressed the importance of the fact that it was the petitioner who (even though hearing of the petition was ultimately uncontested) had obtained the decree dissolving the marriage.

In regard to this, the learned Lord Justice in the same case made the following observations: [(1969) 1 W.L.R. at pp. 1159-1160].

"It is now commonly accepted that a decree based on a matrimonial offence, whilst of course establishing the factum of that offence, is often of little and sometimes of no importance in reaching conclusions as to whose conduct actually broke up the marriage".

and referred to *Trestain v. Trestain* (1950) 1 All E.R. 198, C.A. in which *DENNING L.J.*, said at p. 202:

"I desire to say emphatically that the fact that the husband has obtained this decree does not give a true picture of the conduct of the parties. I agree that the marriage has irretrievably broken down and that it is better dissolved. So let it be dissolved. But when it comes to maintenance or any of the other ancillary questions which follow on divorce, then let the truth be seen".

I desire finally to refer to the observation of *SACHS L.J.* on the propriety of the practice of counsel advising a spouse not to pursue a prayer and whether or not accepting such advice would prejudice his or her chances of success on ancillary matters.

In *Porter v. Porter* the learned LORD JUSTICE said: [(1969) 1 W.L.R. at p. 1160].

"It is important for it to be clear that counsel can properly advise, as they often do and as has been endorsed by this court, that *by taking a course of not pursuing a prayer, the spouse who takes it does not*

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prejudice his or her chances of success on ancillary matters such as custody and maintenance, which will probably have to be investigated later. These ancillary (a euphemistic word) matters are often these which are at the very heart of the real issues with which the parties are concerned".

I have considered, in some detail, the evidence placed before me in regard to the conduct of the parties.

Counsel for the petitioner has invited this court to say, that it was the respondent who was responsible for the breakdown of the marriage. In this regard, the petitioner alleged, among other things, that the respondent had so developed a relationship with his secretary that he told her (the petitioner) that he was no longer in love with her and asked her to leave the matrimonial home telling her that he was in love with his secretary and that he wanted to marry her.

The respondent on the other hand in effect alleged that the petitioner:—

- (a) continuously told him while they were living together that she was "fed up" with this country;
- (b) tried unsuccessfully to persuade him to agree with her to set up their home in the United Kingdom;
- (c) actually went to the United Kingdom alone but on returning to Guyana still kept on trying to persuade him to this end;
- (d) made arrangements to ship her things to the United Kingdom; and
- (e) finally left the matrimonial home.

After closely examining all the evidence placed before me, I found that I could not accept the petitioner's contention that it was the respondent's conduct that was responsible for the break up of the marriage.

It is however often very difficult to specify, with any degree of certainty, the particular spouse whose conduct is to be blamed. The evidence reveals the picture on the one hand of the petitioner tenaciously clinging to the pursuit of her goal of setting up her home in the United Kingdom regardless of the respondent's contrary wishes while on the other hand the respondent remained intractable and unyielding to the petitioner's persuasions. I am not in any way suggesting that he should have so yielded but it seems clear that their relationship had, to use a perhaps indelicate but rather apt expression, "turned sour". It was in my view that on these rocks the ship of marriage (after sailing the matrimonial seas for 19 years) foundered and, eventually, irretrievably broke down. Turning then to the question of quantum for maintenance, I seek to be guided by those principles so clearly outlined in *Wood v. Wood (supra)*.

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In *Rose v. Rose*, a 45-year-old wife after 20 years of marriage obtained a divorce on the ground of her husband's misconduct and petitioned for permanent maintenance. In considering the question of maintenance DENNING L.J. said: - [(1951) P.D.A. at p. 31].

"... no general rule can be laid down on the matter but this wife is certainly under no legal duty to go out to work in order to reduce the maintenance that the husband should pay".

Now there were however three significant factors which made the above case rather different from the instant case. These factors were:—

- (1) The wife had obtained the divorce on the ground of her husband's misconduct (the matrimonial offence was Adultery).
- (2) She had no training in any trade or calling, had never worked during the marriage except for some period when she gave assistance to a friend in running a kitchen at the friend's kindergarten school.
- (3) There were two children of the marriage of whom the wife had custody—one being four and half years old.

In the above mentioned case of *Porter v. Porter* in considering the conduct of the parties in general, and that of the wife in particular SACHS L.J. said:- [(1969) 1 W.L.R. at p. 1161].

"When it comes to permanent maintenance it will be for the court to decide what discount, if any, in the upshot should be made for the wife's conduct....If no discount is made, *prima facie*, the standard applicable is that the wife shall, so far as practicable continue in a comparable standard of living to that obtaining before the divorce (see *KERSHAW v. KERSHAW*) (1966) page 13 and *Roberts v. Roberts* (1968) 3 W.L.R 1181)".

Thus in considering "what discount, if any should be made" for the petitioner's conduct, it seems, on a review of all the evidence that while I have already found that the respondent was not the spouse mainly to be blamed for the break up of the marriage, the petitioner, in my view, by her conduct, in no small way contributed to its collapse. I can find no authority to guide me in determining the size of the discount. And though no mathematical formula can be created for quantifying its size, I am of the opinion that, on the evidence, it should be quite substantial.

It is accepted generally that the husband should provide the matrimonial home. Insistence by a wife (not merely persuasion to the point of breaking up a marriage) that the matrimonial home should be elsewhere is a matter that should not be regarded lightly. As I see it, an intolerable state of affairs would arise, if a wife breaks up a marriage by such insistence (as in this case) and then, because of her husband's refusal to yield to her insistence she should have the right to move out of the matrimonial home and expect to be awarded such permanent maintenance, as would enable her to

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continue in a standard of living comparable to that obtaining before the divorce. While it is clear that the size of discount should not be punitive, on the evidence I am satisfied that it should not be unsubstantial.

There are no children of the marriage in the custody of, or dependent on, the petitioner—there is only one child—a daughter, married and living with her husband. The parties though not young cannot in any way be regarded as old. The respondent is 48 years old and the petitioner is 51 years old. Each has suffered disruption of a marriage that has lasted for about 19 years and would have to start rebuilding a home almost from scratch.

Both agree that the respondent receives a salary of \$630.00 per month as an employee at the Rice Marketing Board. The respondent however disputed the allegation that he also works at and receives a salary of \$110.00 and \$100.00 per month from the Guyana Traders Survey Company and Overland Tourist Company respectively. I was not altogether satisfied with the evidence for the petitioner in this regard. Taking all those principles outlined in *Rose v. Rose (supra)* into consideration and in reviewing the entirety of the evidence I award the sum of \$80.00 per month as permanent maintenance to the petitioner. Costs fixed in the sum of \$200.00 in favour of the petitioner.

Order accordingly.

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