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CASES

DETERMINED IS THE

SUPREME COURT OF BRITISH GUIANA.

G. C. ROSS and C. BUCHANAN, trading in partnership,
Plaintiffs,

v.

ROYAL BANK OF CANADA, S. BARCELLOS, and REGISTRAR OF SUPREME COURT, Defendants,

[1937. No. 212.—DECEMBER.]

BEFORE CAMACHO, C.J.

1939. DECEMBER 14, 18; 1940. JANUARY 10.

Mining—Claim licence—Right of holder—Nature of—Profit a prendre—Not goods—Sale of Goods Ordinance, cap. 65, s. 28.

Execution—Lands subject to payment of rent—Interest of judgment debtor in—Levy on—No obligation on execution creditor to pay rent.

Partnership—Partnership assets—Execution on—For debt of partner—Damages recoverable by other partner.

A claim licence under the Mining (Consolidation) Ordinance, chapter 175, must be regarded as a profit a prendre, and cannot be held to be in the category of "goods" within the meaning of section 28 of the Sale of Goods Ordinance, chapter 65.

Where an execution creditor takes claim licences in execution he is not. required by the law to pay the rent due on the licences in order to protect the title of the holder thereof.

A. and B. were partners in mining claims. C. levied execution on one undivided half of the claims in pursuance of a judgment obtained against A. personally. A and B. discontinued work on the claims. The annual rent was not paid, and the claims were sold to a third party.

Held (1) that execution levied on the undivided share of A in the claim licences deprived him of the right to work the claims, as his right to do so had in fact been seized by C;

(2) That the execution did not preclude B. from operating the claims;

(2) that B. was entitled to insist that C. should refrain from execution on partnership assets for the personal debt of A., and that as his legal right to possess the partnership assets free from execution had been infringed by C. he was entitled to some damages for the injuria suffered:

(4) that A. was entitled to general damages for the infringement of his legal right, and to special damages (*a*) for the loss of the nett profits which he suffered during the period from the date of the levy to the date when the claim licences were sold, and (*b*) for his partnership share of that proportionate loss of supplies, other than mining equipment, directly attributable to the execution levied.

Action by George Cecil Ross and Clement Buchanan, trading in partnership, against the Royal Bank of Canada, Soforina Barcellos and the Registrar of the Supreme Court claiming (*a*) an injunction to restrain the defendants from levy and sale at execution of one undivided half of certain partnership mining claims on the

Potaro River; (b) a declaration that the execution levied by the defendants on the claim licences was void; and (c) damages. The necessary facts appear in the judgment.

S. L. van B. Stafford, K.C., for plaintiffs.
H. C. Humphrys, K.C., for first named defendant.

Cur. adv. vult.

CAMACHO, C.J.: The plaintiffs claim an injunction to restrain the defendants from the levy and sale at execution of one undivided half of certain partnership mining claims on the Potaro River. They also invoke a declaration that the execution levied by the defendants on the claim licences is void. They ask for damages.

On the 28th June, 1937, the defendants, the Royal Bank of Canada, obtained judgment against the plaintiff Ross for $205 and costs, on account of a debt due by him to them on a promissory note.

By writ of execution issued on the 29th of June, 1937, the said defendants caused the one undivided half of the claim licences for the mines on the Potaro River, alleged to be owned in partnership by the plaintiffs, to be taken in execution on the 10th July, 1937, in order to satisfy their judgment.

On the 12th of July, 1937, the defendant Soforina Barcellos obtained judgment against the plaintiff Ross for a debt due to her by him on a promissory note. On the following day she issued a writ of execution against the said plaintiff in order to attach the surplus proceeds of the sale at execution of the said undivided half of the claim licences.

These two judgments obtained against Ross were in respect of debts due by Ross personally. The plaintiffs complain of the levy on the ground that the claim licences are partnership property and as such are exempt from execution, except on a judgment against the firm. It is urged that in lieu of execution the statutory procedure should have been adopted and a court order charging Ross' interest in the partnership property with payment of the amount of the judgment debts should have been obtained.

If the claim licences are partnership property, the execution levied by the defendants, the Royal Bank of Canada, must be held to be invalid. This therefore is the first question calling for determination.

It is not necessary for the Court to examine the history of the ownership of the claim licences further than to note that they were at one time owned in partnership by one Wishart, the plaintiff Ross and one Correia, and that as a result of litigation between the partners and as a term of settlement of the litigation Wishart and Correia agreed to transfer to Ross all their interest in the claim licences in consideration of certain monies belonging

to Ross to be retained by Wishart and Correia and payment by Ross to them of $875.

On the 26th of May, 1937, the plaintiff Ross entered into a written agreement with the plaintiff Buchanan whereby Buchanan agreed to provide $600, part of the $875 payable by Ross to Wishart and Correia, and in consideration therefor the plaintiff Ross agreed to transfer the claim licences in the joint names of the plaintiffs. The agreement further provided that the claim licences should become partnership property immediately on payment of the price to Wishart and Correia. The $875 balance of the price was paid in two sums, on the 3rd of June $275, and on the 14th of June $600, to the solicitor representing Wishart. The claim licences therefore became partnership property on the 14th June, 1937.

In view of the partnership established by the agreement in the claim licences, it becomes unnecessary to consider the effect of section 55 of Chapter 175. The Court, however, is of opinion that prior to the 10th of July, 1937, a statutory partnership existed between the plaintiffs in these mining claims.

The learned counsel who represented the defendants, the Royal Bank of Canada, pressed on the Court the view that claim licences are movable property, and referring to section 28 of Chapter 65 submitted that the writ of execution on delivery to the Marshal bound the claim licences and precluded a valid transfer by the plaintiff Ross. The claim licences are in the form of grants to occupy land for the purpose of mining for gold. Those grants are in effect grants of profits of the land. A claim licence must, therefore, in the opinion of the Court, be regarded as a profit a prendre and cannot be held to be in the category of "goods" within the meaning of section 28 of Chapter 65.

In any case having regard to the date (14th of June, 1937) when the claim licences became partnership property and the date of delivery (the 29th of June, 1937) to the Marshal of the writ of execution, the provisions of section 28 of Chapter 65 are inapplicable, inasmuch, as if the claim licences could be regarded as chattels they passed to the partnership prior to the effective date under the section.

This Court accordingly holds that the partnership assets were wrongly taken in execution and that the defendants are liable in damages.

The quantum of damages depend in large measure on the answers the Court returns to the following questions:—

1. Was it the duty of the defendants, the Royal Bank of Canada, to pay the rental on the claim licences and thus preserve the plaintiff's title thereto?
2. Had the plaintiffs, or either of them, notwithstanding execution levied, the right to remain on, and work, the claims?

With regard to the first question—by virtue of regulation 25 of the Mining Regulations, 1931, a claim licence once issued remains in force so long as the yearly rent payable in respect thereof is regularly paid. In default of payment of the rent the Commissioner in the month of March on advertising sale may set up the claim licence at auction and transfer the same to a purchaser. In the instant case the plaintiffs and defendants omitted to pay the rent and the licences were ultimately sold. All parties had knowledge of the proposed sale, none of them attended the sale and in the result the licences were alienated for a trivial sum.

The plaintiffs claim that, after execution levied, it was the duty of the defendants, the Royal Bank of Canada, to protect the title by payment of rent. The claim is based on the liability of a creditor in respect of goods taken in execution under a judgment. It is undeniable that the execution-creditor is responsible for their safe custody and preservation. The reason for the liability, the Court apprehends, resides in the consideration that having deprived the debtor of possession and control, the execution-creditor has thereby placed the care of the goods beyond the power of the debtor. Although the obligation to keep safely and in good condition rests on the execution-creditor the property in the goods does not pass to him. Title remains in the debtor, until the goods are sold. If title remains in the debtor, can it be said that the execution-creditor is obliged to protect or maintain the title? No authority has been cited directly on the point.

An execution-creditor of goods is however responsible only for that care of the goods themselves which the law imposes on him and I know not any decision which would require him to protect the title thereto of the execution-debtor,

It has been held that where a lease is taken in execution the lessee continues liable on his covenant to pay rent although the term has been taken from him under the execution (*Auriol* v. *Mills* (1790) 4 T.R. 98). I am not aware of any authority which would have the effect of establishing a duty in the execution-creditor to pay the rent under the lease in order to preserve the lessee's title.

The lessee's obligations remain by reason of his express covenant. The plaintiffs' rent obligation remained, despite the execution, by virtue of the terms of the licences and the Mining Regulations incorporated therein.

Another consideration presents itself. If the defendants had paid, and the Mines Department had received, the rent, it might have been argued with some force that attornment had taken place. If attornment had taken place, the plaintiffs would have lost all rights under the licences.

However that may be, the Court holds that the agreements contained in the licences, read with the regulations, cast on the plaintiffs, if they desired to retain title, the obligation to pay the

rent and that although the defendants might for their own protection have paid the rent they were not compellable to protect the plaintiffs' title in this manner.

With regard to the second question, the Court is not in doubt that execution levied on the undivided share of the plaintiff Rose in the claim licences deprived him of the right to work the claims. His right to do so had in fact been seized by the defendants. The position of the plaintiff Buchanan is, in the view of the Court, somewhat different. Prior to enactment of Chapter 38, section 25 execution levied on a partner's interest in partnership property *ipso facto* dissolved the partnership. A charging order under the section does no more than confer an option to dissolve. Had the defendants adopted the correct procedure, the plaintiff Buchanan might have opted for dissolution of the partnership whereupon, by virtue of his joint ownership thereof, he might have continued to work the claims, accounting for Ross' share of the nett winnings to the defendants or on the other hand he might have elected to continue the partnership, accounting in that case also, to the defendants for Ross' share of the nett proceeds of the mines.

Although under the old law execution dissolved the partnership, the partner not subject to the execution would not, the Court apprehends, have been precluded from exercising acts of ownership over property of which he was joint owner. The plaintiff Buchanan cannot in the opinion of the Court be put in a worse legal position by reason of the illegal execution of Ross' share than he would have been placed if the execution on Ross' share had been validly levied.

In the opinion of the Court therefore although the defendants levied execution instead of obtaining a charging order, the execution did not preclude the plaintiff Buchanan from operating the claims. On the other hand the plaintiff Buchanan was entitled to insist that the defendants should refrain from execution on partnership assets for the personal debt of the plaintiff Ross, and although the act of the defendants did not, in the view of the Court, inflict substantial damage on the plaintiff Buchanan (any damage he sustained flowing from his election to discontinue operations) his legal right to possess the partnership assets free from execution was infringed by the defendants and for the injuria suffered he is entitled to some damages. The Court assesses those damages at $24.

The plaintiff Ross, on the other, is entitled to such damages as may be regarded as flowing from the illegal levy. The question is how much.

Learned counsel who appeared for the plaintiffs pressed on the Court a claim for damages equivalent to the whole value of the claims. Failure by the defendants in their duty to pay the rent, he urged, resulted in complete loss of the claims.

Having found that there was no such duty on the defendants, the Court does not propose to assess the damages on that basis. The plaintiff Ross is entitled to general damages for the infringement of his legal right and those general damages, the Court assesses at $24. The plaintiff Ross is also entitled to special damages for the loss of the nett profits which he suffered during the period from the date of the levy to the date when the claim licences were sold. The plaintiff Ross is further entitled to special damages for his partnership share of that proportionate loss of supplies, other than mining equipment, directly attributable to the execution levied. The Court directs an enquiry in Chambers into the amount of these special damages.

Both plaintiffs are entitled to their taxed costs, the damages and the costs to be paid by the defendants, the Royal Bank of Canada. The Court does not award damages or costs against the other defendant as the action taken by this defendant did not inflict any damage on the plaintiffs.

Judgment for plaintiffs.

Solicitors: *R. G. Sharples; A. G. King.*

PETER HO *v.* CHARLES JOSEPH.

PETER HO, (Defendant) Appellant,

v.

CHARLES JOSEPH, (Plaintiff) Respondent.

[1939. No. 54.—DEMERARA.]

BEFORE FULL COURT: CAMACHO, C.J.; FRETZ AND LANGLEY. JJ.

1940. MARCH 15, 19, 20; APRIL 29.

Workmen's compensation—Contractor—Principal—When is a person a principal—Workmen's Compensation Ordinance, 1934 (*No. 7*), *s. 18.*

Practice and procedure—Appeal Court—Further or additional evidence—Received in Appeal Court.

A person is a principal within the meaning of section 18 of the Workmen's Compensation Ordinance, 1934 (No. 7) where he gave out, on contract, work for himself of the nature which he usually undertook for others.

Additional evidence received on oath in the Appeal Court instead of returning case to Magistrate to receive such evidence.

Appeal by the defendant Peter Ho from a decision of Mr. J. H. S. McCowan, Magistrate, Georgetown Judicial District, awarding compensation to the plaintiff Charles Joseph under the Workmen's Compensation Ordinance, 1934 (No. 7). The facts and arguments appear from the judgment.

S. L. van B. Stafford, K.C., for appellant.

L. A. Hopkinson, for respondent.

Cur. adv. vult.

The judgment of the Court was read by the Chief Justice as follows:—

This is an appeal from the judgment of the Magistrate for the Georgetown Judicial District awarding compensation under the Workmen's Compensation Ordinance, 1934 to the respondent for injuries sustained by him in the course of his employment.

The appellant is a wood dealer and the holder of a timber grant at Koolieserabo, Demerara River. He owns punts which he lets on hire. The respondent's occupation is that of a punt hand.

In 1936 respondent was employed by William Smith as one of the crew of a punt belonging to the appellant engaged in carriage of wood from the appellant's grant to Georgetown. The respondent made several voyages on the punt to and from the appellant's grant. On the 6th August, on the fourth of these voyages, the respondent was in the bow "checking" the punt at the Fish Koker, Georgetown, by means of a rope attached to the cathead. While engaged on this duty the top coil of the rope slipped from the cathead. The remainder of the rope coiled round the respondent's left foot and he was thrown or dragged overboard. By reason of the injuries he suffered it became neces-

sary to amputate his leg. The appellant admits ownership of the punt hut denies his employment of the respondent and alleges that the respondent was the servant of William Smith, an independent contractor, who contracted with the appellant to bring a cargo of firewood from appellant's grant to Georgetown by a punt provided by the appellant.

The Magistrate held that the appellant in the course and for the purposes of his business had contracted with William Smith for the execution by Smith of the appellant's work and that Smith in turn employed the respondent and that therefore the appellant was liable as principal under section 18 of the Workmen's Compensation Ordinance, 1934.

The question to be determined by this Court is whether the appellant is a principal within the meaning of the section. The section of the Ordinance is as follows:—

> "18 (1) Where any person (in this section referred to as the principal) in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall, provided the notice of the accident required under section 12 is given to him be liable to pay to any workman employed in the execution of the work any compensation under this Ordinance which he would have been liable to pay if that workman had been immediately employed by him . . . . ." etc.

The interpretation of the section which is not free from difficulty has been the subject of much discussion in the English Courts. In *Skates* v. *Jones & Co.* (1910) 2 K.B. 903, 907, 909, Cozens-Hardy, M R., said "I think the application of the section cannot be limited to a case where there are two contracts, namely, a head contract and a sub-contract, although that is the common case to which the section applies." Farwell, L.J. remarked "the section . . . . . extends also to cases in which "the principal" has undertaken certain work on his own account, such work being such as he usually undertakes for others in the course of his own trade or business, and has employed other persons to carry out part or parts of such work for him."

The respondent in order to succeed must therefore show that the appellant gave out, on contract, work for himself of the nature which he usually undertook for others. If the evidence had been left at the point which it reached before the Magistrate this Court would have been in some difficulty to decide that the appellant is a principal within the meaning of the section. It was however within the competence of the Court to return the case to the Magistrate with a direction to receive further evidence or to

receive that evidence itself. The Court adopted the latter alternative.

Isoline Adams adduced before this Court, stated in effect as follows:—she owned a wood-cutting grant and hired punts on several occasions from the appellant to convey wood to Georgetown for which she paid him $23. or $24. according to the size of the vessel. The appellant supplied the punts complete with crew. She did not at any time engage or pay any punthand of any punt supplied to her by the appellant and on arrival at Georgetown she sold the cargo to whomsoever she pleased and paid the appellant the agreed hire. If the wood was sold to the appellant he paid her the price thereof less the agreed charge for the punt. This witness further stated "whenever I hired punts from the appellant we never discussed how much for the hire of the punt and how much the crew would cost, he has never hired me a punt without a crew. Always he provided a crew."

Viola Morris stated that her husband was the holder of a woodcutting grant and she looked after the Georgetown end of the business. That she hired punts from the appellant. "I would tell him I wanted a punt to bring down wood. He would send me a punt. When the wood arrived I would sell the wood to him sometimes and be would take out the cost of the trip. I paid $28—$31 according to the size of the punt. Appellant's crew were on the punts. I paid one lump sum. Appellant never said so much for punt and so much for crew. I sell to the highest bidder". These two witnesses were cross-examined at length without however, shaking the main lines of their evidence. The Court accepts as established that the appellant from time to time contracted with others to provide punts with crews complete and to convey from timber grants, wood belonging to others. He in fact engaged in the business of a lighterman. The court finds that the appellant contracted with William Smith for the performance by the latter of work for the appellant which the appellant usually undertook to do for others. The appellant is therefore a principal within the meaning of section 18 of the Workmen's Compensation Ordinance, 1934, and is liable to pay compensation to the respondent employed by the contractor.

The appeal is accordingly dismissed. The respondent shall have his costs.

Appeal dismissed.

BHAGWANDEI, (Defendant) Appellant,

v.

LAKHAN SINGH, (Plaintiff) Respondent.

[1939. No. 118.—DEMERARA.]

BEFORE FULL COURT: CAMACHO, C.J., FRETZ AND LANGLEY, JJ.

1940. MARCH 19; APRIL 29.

Sale of goods—Warranty—Parol evidence of—Admissibility of—Whether warranty at time of sale—Intention of parties—How determined.

The respondent informed the appellant that he wanted a good milking cow to supply milk. The appellant replied that she had a cow and that she wanted $37 for it. In answer to the respondent she stated that the cow, at each milking, would give 6 pints of milk and more. The respondent offered $33 for the cow, and the appellant accepted it.

A receipt for the purchase price passed from the appellant to the respondent.

The cow did not yield 6 pints of milk at each milking, and it was incapable, by reason of a diseased condition of the udder, of yielding that quantity.

The cow had been in the possession of the appellant for some time, and had calved twice previously.

Held (1) that the receipt was a mere acknowledgment of money, it was never intended to be a memorandum of the terms of the agreement of sale, and that parol evidence was admissible to prove that there was a warranty at the time of sale.

Allen v. *Pink* (1838) 4 M. & W. 140, applied.

(2) that it was intended, at the time of the sale, that the statement of the appellant that the cow would give 6 pints of milk at each milking should amount to a warranty, inasmuch as the appellant assumed to assert a fact of which he had special knowledge and of which the respondent was ignorant, and on which the respondent could not be expected to have an opinion or to exercise his judgment.

Pasley v. *Freeman* (1789) 3 T. R. 51, applied.

Appeal by the defendant from a decision of Mr. F. O. Low, Magistrate, West Demerara Judicial District. The facts and arguments appear from the judgment.

J. A. Luckhoo, K.C., for appellant.

C. A. Burton, for respondent.

Cur. adv. vult.

The judgment of the Court was read by the Chief Justice, as follows:—

This appeal arises out of the judgment by the Magistrate for the West Demerara Judicial District in an action brought by the respondent against the appellant on the sale of a cow sold by the appellant to the respondent. In the Court below the respondent, who was the plaintiff, alleged that at the time of the sale the appellant knew the respondent to be a dealer in milk and that he was purchasing the animal for the purpose of obtaining milk

for sale. The respondent further alleged that the appellant guaranteed that the cow would yield six pints of milk at each milking, morning and evening. The cow did not in fact yield the quantity of milk alleged to be guaranteed and was incapable of yielding the quantity by reason of a diseased condition of the udder. The evidence of the respondent when before the Magistrate was to the effect that he informed the appellant that he wanted a good milking cow to supply milk, that the appellant replied that she had a cow and wanted $37.00 for it. The respondent further deposed as follows:—"I asked her how many pints the cow would give. She said six points and more. I offered $33.00 she accepted it." A receipt which was put in evidence acknowledging the purchase price passed from the appellant to the respondent. The receipt is a mere acknowledgment of money and was never intended in the opinion of this Court to be a memorandum of the terms of the agreement of sale. The Court rejects the objection taken to parol evidence having been admitted of the alleged warranty: *Allan* v. *Pink* (1838) 4 M. & W. 140. Although the conversation as related by the respondent was denied by the appellant, who in fact stated that she did not deal with the respondent and that the sale was made by her husband, the Magistrate found as a fact that the animal belonged to the appellant and that the contract of sale was made by her. The Magistrate also found the appellant warranted the cow after calving would give six pints of milk at each milking morning and afternoon, whereas in fact three of the cow's nipples were blocked and rendered useless by disease. For all these findings of fact the Magistrate had ample evidence and this Court accordingly accepts those findings. The question for determination is whether the statement made by the appellant to the respondent is a warranty.

Chapter 65 of the local laws defines "warranty" to mean "an agreement with reference to goods which are the subject of a contract of sale, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated." There would appear to have been some confusion in the Magistrate's mind as to whether the representation by the appellant to the respondent was an implied condition or warranty. In his reasons for judgment the Magistrate would seem to say that the representation under discussion amounted to an implied condition and at the same time to a warranty. If the representation was a condition, the property did not pass, and the remedy of the respondent would lie in rescinding the contract.

On a sale of goods a condition is implied in the circumstances related in section 16 of Chapter 65. The appellant does not come within the ambit of that section, and the representation made by her at the time of the sale is either a

warranty or a representation of her opinion or judgment for which she could not be made responsible if she were honest.

Was the representation an express warranty? The appellant was informed of the purpose for which the cow was purchased. The animal was bought, to the knowledge of the appellant to supply milk and when asked how many pints the cow would give she specified the quantity. The appellant must have known that the quantity of milk to be yielded by the cow was a material collateral element of the bargain. No special form of words is necessary to create a warranty. As was said by Buller, J., in *Pasley* v. *Freeman* (1789) 3 T.R. 51, "it was rightly held by Holt, C.J., and uniformly adopted ever since that an affirmation at the time of a sale is a warranty, provided that it appears on evidence that it was so intended." The test to apply in determining whether a warranty was intended, is whether the appellant assumed to assert a fact of which the respondent was ignorant, or merely stated an opinion upon a matter of which the appellant had no special knowledge, and on which the respondent could be expected to have an opinion and to exercise his judgment. The appellant in this case had special knowledge of the cow. It was in her possession for some time and had calved twice previously. The respondent could not know of the quality of the cow and relied upon the representation of the appellant that the cow would yield six pints or more of milk at each milking.

The Court finds that the representation made by the appellant at the time of sale was a warranty. The appeal is accordingly dismissed.

The respondent is entitled to his costs.

Appeal dismissed.

Solicitor for appellant: *T. A. Morris.*

T. A. DURANT *v.* I. R. DA SILVA.

T. A. DURANT, Plaintiff,

v.

ISABELLA R. da SILVA, Defendant.

[1939. No. 266—DEMERARA.]

BEFORE CAMACHO, C.J.: 1940. APRIL 23, 24, 26; MAY 6.

Negligence—Public road—Overtaking vehicle—Duty of—Clear roadway—Vehicle in front—On proper side of road—Near edge of road—Right to take more room—Duty of overtaking vehicle—To calculate upon exercise of that right—No knowledge of overtaking vehicle by vehicle in front—Front vehicle swerving to middle of road—Collision—Liability of overtaking vehicle—Whether contributory negligence.

Overtaking vehicles must observe the rule of the road, and should allow for the vehicle which they are about to pass pulling out towards the middle of the road, unless the person in charge of it is seen by the person in charge of the overtaking vehicle to be aware of the latter's intention.

If the driver of the vehicle may adopt either of two courses one of which is safe and the other hazardous, and elects the latter he is responsible for the mischief which results. He cannot in such case insist upon the fact that he kept his own side of the road.

A driver is not to make experiments, he should leave ample room, and if an accident happened from want of that sufficient room, the driver is liable.

The plaintiff was riding his bicycle on his proper side of the road about 3 feet from the eastern parapet of the roadway which was 19¾ feet wide. The defendant's motor car was being driven in the same direction and it was behind the bicycle. The motor car wished to overtake and pass the bicycle. There was no other vehicle on the road where the overtaking and passing were about to take place.

The plaintiff did not know of the close proximity of the defendant's motor car, but the defendant's agent had the plaintiff in full view for some distance before he attempted to pass, and had more than 16 feet of free roadway at his disposal.

When the motor car was in the act of passing the bicycle, there was a collision between the motor car and the bicycle.

It was alleged on behalf of the defendant that the collision was caused by the plaintiff swerving 2 or 3 feet to the right when the motor car was about to pass the bicycle, that the defendant was not guilty of negligence and that the plaintiff was guilty of contributory negligence.

The plaintiff suffered personal injuries as a result of the collision.

Held (1) that there was nothing to prevent the defendant's agent from passing the plaintiff safely, by driving nearer to the western parapet of the road, as the width afforded him ample room so to do;

(2) that the plaintiff was as close to the edge of his proper side of the road as could reasonably be expected;

(3) that the defendant's agent allowed insufficient space to enable safe passage should the plaintiff exercise his right to take more room;

(4) that, assuming that the plaintiff did swerve a matter of 2 or 3 feet, he had a right to do so, and the defendant's agent ought to have calculated upon his exercise of that right; and

(5) that the plaintiff's injury was caused by the negligence of the defendant's agent in not leaving sufficient room when overtaking and passing the plaintiff, and that the plaintiff was not guilty of contributory negligence.

ACTION by the plaintiff Thomas Arthur Durant against the defendant Isabella R. da Silva for damages suffered by the plaintiff through the negligence of the defendant's agent in

driving her motor car, The facts and arguments appear from the judgment.

C. V. Wight, for plaintiff.

H. C. Humphrys, K.C., for defendant.

Cur. adv. vult.

CAMACHO, C.J.: On the evening of the 27th May 1937 the plaintiff was riding a bicycle along the Vlissengen Road, going south, on his proper side three to four feet from the eastern parapet of the road. When between David and Gordon Streets a motor car, identified as a Vauxhall car, was approaching the plaintiff going north. At about that time the defendant's car, driven by her agent, Antonio Da Silva, was proceeding south along the said road. The bicycle ridden by the plaintiff and the car driven by the defendant's agent collided and the plaintiff's right hand was seriously injured. At the moment of collision the defendant's car had overtaken the plaintiff and it is the plaintiff's case that the defendant's car swerved on to him when his bicycle, the defendant's car and the Vauxhall were in a line across the width of the road. The roadway at that point is 19 feet 9 inches wide. It is the defendant's case that on overtaking the plaintiff the defendant's agent allowed a space of two to three feet between the bicycle and the car and that in the act of passing, the plaintiff swerved his bicycle on to the car and thus brought about his own injuries.

The plaintiff and the defendant's agent afford little or no assistance to the Court in determining the cause of the accident.

Mr. Joseph Da Costa saw a car travelling north on the west side of the road and the plaintiff on his bicycle travelling south. According to this witness just as the north bound car arrived opposite the plaintiff the defendant's car, travelling south, passed between the north bound car and the plaintiff and struck the front wheel of the plaintiff's bicycle with his front fender. The bicycle spun round, fell on the car and was pushed away again. This witness admitted in cross-examination that the front wheel of the bicycle may have turned into the road and may have struck the car. In answer to the Court he said "when I saw the defendant's agent pass the plaintiff and the other car there was very little room for him to pass."

Mr. Charles Cecil Kennard, who was being driven in a car behind the defendant's car, stated that the defendant's car was about seven to eight feet from the east parapet of the road and that the plaintiff was about three feet from that parapet. That the car going north had already passed the defendant's car when the latter was passing the plaintiff and that the plaintiff made a sudden swerve on the defendant's car. This witness further said that at the time of the accident there was a space of about three feet between the plaintiff and the defendant's car, and that there

was no impediment on the road which would cause the plaintiff to swerve into the car.

Mr. Kennard was sitting on the back seat of the car in which he was being driven and had immediately in front of him one Francis deFreitas who was seated next to the driver. Mr. Kennard therefore saw the accident through the windscreen over the shoulder of the witness de Freitas and the Court concludes that his view of the road in front and of the accident could not have been perfect.

On these facts the plaintiff and the defendant alleged negligence on the part of each other and, alternatively, the defendant pleads the contributory negligence of the plaintiff.

The evidence in this case is diametrically opposed. The plaintiff accuses the defendant's agent of swerving into his bicycle and calls evidence to establish the allegation. The defendant makes the converse allegation against the plaintiff and supports it by witnesses. In these circumstances it is for the Court to determine on which party primarily lay the duty of taking care.

According to the defendant's agent and her witnesses the defendant's car was driven so close to the plaintiff's bicycle that there was a space left between them of two to three feet only. Accepting the statement it must be observed that there was no other vehicle on the road at that point and that there was nothing to prevent the defendant's agent from passing the plaintiff safely by driving nearer to the west parapet of the road. The width of the road afforded him ample room so to do.

The duty of a driver of an overtaking vehicle is succinctly stated in *Hailsham's* Edition of the Laws of England, Volume 23, at page 639: "Overtaking vehicles must observe the rule of the road, and should allow for the vehicle which they are about to pass pulling out towards the middle of the road, unless the person in charge of it is seen by the person in charge of the overtaking vehicle to be aware of the latter's intention." The evidence does not establish that the plaintiff was seen by the defendant's agent to be aware of the latter's intention to overtake and to pass him.

In *Mayhew* v. *Boyce* (1816) 1 Starkie 423 the rule was laid down that if the driver of a vehicle may adopt either of two courses, one of which is safe and the other hazardous, and elects the latter, he is responsible for the mischief which results. He cannot in such case insist upon the fact that he kept his own side of the road.

Mayhew v. *Boyce* is instructive:—Two public coaches named respectively Phoenix and Dart collided on the London Brighton road. The driver of the Dart attempted to pass the Phoenix just as the Phoenix was about to turn an angle on the road to the left. The case for the defendant was that there was a space of seventeen feet wide to the right of the Phoenix and that no accident

could have happened if the Phoenix had not been driven in an oblique direction from the left to the right of the road. The position of the Phoenix had however, been seen for some time before the Dart came up and it appeared that the driver of the Dart might, by driving nearer the right side than he did, have effectually guarded against the mischief. On these facts Lord Ellenborough said "in point of law, it would make no difference whether the horses of the Phoenix swerved from their course at the instant when the Dart was passing, or they were directed by their driver; he had a right so to direct them, unless he knew that the Dart was following so closely behind. The circumstance of the Phoenix being on the wrong side of the road, on which the Dart had a right to pass, would not authorise the exercise of that right to the extent of destruction. The Phoenix being three feet from the left side, the driver thought it safer to take more room, and he had a right to do so, and the driver of the Dart ought to have calculated upon his exercise of that right."

The case before this Court is a fortiori. The plaintiff was on his proper side of the road and as close to the edge of the road as could reasonably be expected. The defendant's agent allowed insufficient space to enable safe passage should the plaintiff exercise his right to make more room. Assuming the plaintiff did swerve a matter of two or three feet he had a right to do so and the defendant's agent "ought to have calculated upon his exercise of that right." The plaintiff did not know of the close proximity of the defendant's car whereas the defendant's agent had the plaintiff in full view for some distance before he attempted to pass and had more than sixteen feet of free roadway at his disposal.

On the question of sufficient room Rook, J. in *Wordsworth* v. *Willan & Ors.* (1805) 170 E.R. p. 810 had this much to say:—"a driver was not to make experiments, he should leave ample room, and if an accident happened from want of that sufficient room he (the defendant) was no doubt liable." The Court holds that the plaintiff's injury was caused by the negligence of the defendant's agent in not leaving sufficient room when overtaking and passing the plaintiff and that the plaintiff was not guilty of contributory negligence.

The Court awards $147 special damages, being the value of articles damaged or destroyed and loss of earnings for five months at the rate of seventy-two cents per day. As to general damages the Court takes into consideration the permanent disability of the plaintiff's hand assessed at 60% and the pain which he suffered, and in respect thereof awards $480 or $627 total damages. The plaintiff is entitled to his costs.

Judgment for plaintiff (*a*)

Solicitors*: A. G. King; H. C. B. Humphrys.*

(*a*) An appeal to the West Indian Court of Appeal is now pending.

MANGAL, Plaintiff,

v.

SHEIHK REYASAT HUSAIN, Defendant.

[1940. No. 14.—BERBICE.]

BEFORE CAMACHO, C.J., IN CHAMBERS.

1940. MAY 6, 15.

Practice and procedure—Money order—Enforcement of—Leave to issue writ of attachment—Defendant ordered to pay money to plaintiff—Disobedience by defendant—Application to commit for—Procedure—By motion, not by summons.

An application to commit a person to prison for disobedience of a money order whereby he is ordered to pay to the applicant certain moneys, should proceed by way of an application for leave to issue a writ of attachment.

On the Chancery side of the Court, the proper procedure to obtain a writ of attachment is by motion in open Court for leave to issue the writ.

In Chancery applications to commit are invariably made by motion in Court, and not by summons in Chambers.

Summons issued by the plaintiff Mangal, male East Indian, No. 45346, ex Rhone, 1890, against the defendant Sheihk Reyasat Husain, as executor under the last will and testament of Nassiban, female, No. 274, ex Syria, 1876, deceased, for an order committing the defendant to prison for disobedience of an order of a judge in Chambers dated 20th March, 1989, whereby the defendant, as executor of the said Nassiban, was ordered to pay to the plaintiff weekly expenses incurred in the repair of a Mohammedan Mosque.

J. Eleazar, solicitor, for plaintiff.

L. M. F. Cabral, for defendant.

Cur. adv. vult.

CAMACHO, C.J.: The plaintiff issued a summons against the defendant returnable in Chambers to determine:—

(*a*) whether the defendant should not be committed to prison for disobedience of an Order of the Judge in Chambers dated the 20th day of March, 1939, whereby the defendant as the executor of one Nassiban, deceased, was ordered to pay to the plaintiff weekly expenses incurred in the repair of a certain Mohammedan Mosque, not exceeding however, the sum of $1,000;

(*b*) whether the defendant should not be compelled to deposit or pay into Court the sum of $740 balance, it is claimed, remaining unpaid under the said Order of the Court.

Learned counsel for the defendant objected:—

(1) That the defendant being charged with disobedience of a money order the application is wrongly conceived inasmuch as—

(a) the plaintiff should have applied for leave to issue a writ of attachment;

(b) the application for such a writ should have been made by section in open Court.

Alternatively :—

(2) The Judge's Order of the 20th March, 1939, was made within his Chancery Jurisdiction, and that the application to commit should have been by motion in open Court.

With regard to (1) (*a*):—In my opinion the proper procedure was by way of application for leave to issue a writ of attachment.

With regard to (1) (*b*):—The headnote in *Davis* v. *Galmoye* (1888) 39 Ch. D p. 322 reads as follows:—"An application in the Chancery Division for leave to issue a writ of attachment is not properly made by summons in Chambers, but should be made in open Court by motion." The headnote would appear to support the defendant's contention. When, however, recourse is had to the judgment of Cotton, L.J., the proposition is found to be too widely stated. All that the learned Lord Justice decided was that "the Judge was the only proper person to deal with motions of the kind, and it is better to be dealt with in open Court." North, J., from whose Order the appeal was made, subsequently examined (see *Davis* v. *Galmoye* (1889) 40 Ch. D. p. 355) the judgment of Cotton, L.J. and, commenting upon that judgment, remarked, "it is said that the Court of Appeal laid down an absolute rule that applications for attachment must always be made upon notice of motion in open Court . . . . I do not so read that judgment . . . . If the Court of Appeal had considered that there was no jurisdiction in Chambers, my Order would have been reversed. All I find in the report is that Lord Justice Cotton thought it was better for the application to be made in open Court; a view to which I am prepared to give full weight in considering whether a summons for an attachment should be adjourned into Court."

Modern practice and authorities, however, indicate that the application for leave to issue the writ out of Chancery should be by motion in open Court, and that, in any event, an Order for attachment will not be made on a summons in Chambers. In the King's Bench, application to enforce obedience to Orders by a Judge can be made by summons to a Judge in Chambers (*Salm Kyrburg* v. *Posnanski* (1884) 13 Q.B.D., p. 218), but, even in the King's Bench, the better opinion appears to be that applications affecting the liberty of the subject should, if possible, be heard in public.

The proper procedure to obtain a writ of attachment on the Chancery side of the Court is by motion in open Court for leave to issue the writ.

With regard to (2):—The Order was made by the Judge in his

Chancery Jurisdiction, and the summons before me is for committal of the defendant for contempt. In Chancery, however, applications to commit are invariably made by motion in Court and not by summons in Chambers. The wrong procedure has been adopted.

I have been asked to treat the summons as an application to order the defendant to pay into Court the amount claimed. There is, however, an undischarged Order commanding the defendant to pay the money to the plaintiff, and, even if I were justified in law in dealing with the summons in the manner requested by the plaintiff, I do not consider any useful purpose would be served by so doing.

I therefore dismiss the summons.

Summons dismissed.

NATHANIEL PELLEW, *et al*, (Defendants) Appellants,

v.

JOSEPH GRIFFITH, (Complainant) Respondent,

[1940. Nos. 1 and 2.—DEMERARA.]

BEFORE FULL COURT: CAMACHO, C.J., AND FRETZ, J.

1940. MAY 28; JUNE 15.

Criminal law and procedure—Summary conviction offence—Jurisdiction—Question in good faith as to title to immovable property—Location under prospecting licence—Interest in immovable property—Summary Jurisdiction (*Offences*) *Ordinance, cap. 13, s. 11.*

Under the Mining Regulations, the holder of a prospecting licence who complies with all requirements must be regarded as possessed of a profit a prendre, in the land located, that is to say, an interest in immovable property, pending the issue of a claim licence.

Appeal by the defendants from a decision of Mr. J. A. Veerasawmy, Magistrate, Essequebo Judicial District convicting them of assaulting and causing actual bodily harm to Samuel Abrahams and James Crispin Da Silva, and sentencing them to terms of imprisonment.

J. L. Wills, for appellants.

E. M. Duke, acting Crown Counsel, for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by the Chief Justice, as follows:—

This is an appeal brought by Nathaniel Pellew and others from

their conviction by the Magistrate for the Essequebo Judicial District under section 34 (a) of Cap. 13 for unlawfully assaulting and causing actual bodily harm to Samuel Abrahams and James Da Silva. The assault arose over a disputed mining location.

On the 21st July, 1939, there was issued to Reginald David, one of the appellants, on behalf of Adolphus Pompey, another of the appellants, a Prospecting Licence for gold, precious stones and minerals. Acting under his licence Pompey on the 26th July, 1939, located claims Nos 1, 2 and 3 Marawah, another called Ebenezer, on the Cuyuni River and put up notices notifying the locations. Pompey tiled with the Lands and Mines Department notice of the locations and applied for a Claim Licence for No. 2 Marawah. Pompey and his servants started to work the locations. On the 20th October, 1939, Samuel Abrahams and James DaSilva acting on the instructions of one Pires and accompanied by three other persons, went on all four locations occupied by Pompey and claimed to locate them. Abrahams subsequently addressed notices to the appellants Pompey and David and returned to the locations to deliver the notices. The notices informed Pompey that the four claims, which had been located by him on the 26th July, 1939, had been located on the 20th October, 1939, by Abrahams on behalf of Pires. A quarrel and tight thereupon ensued, in the course of which Abrahams and Da Silva were injured.

It is objected in this Court as it was in the Magisterial Court that the assault on Abrahams and Da Silva arose out of a bona fide claim to an interest in land and that therefore the Magistrate's jurisdiction was ousted. The Magistrate overruled the objection and sentenced all the appellants to terms of imprisonment.

The question which this Court is called upon to determine is whether or not the Magistrate had jurisdiction to adjudicate.

Section 11 of Cap. 13 declares that nothing shall authorise the Court to hear and determine any complaint for a summary conviction offence in which any question in good faith arises as to the title to any immovable property or any interest therein or accruing therefrom. The short question therefore is, does filing notice of location and application for a Claim Licence confer on the applicant an interest in land? Regulation 6 (1) of the Mining Regulations provides that the holder of a prospecting licence may with certain reservations prospect for and locate claims on Crown Lands. Regulation 4 (6) confers on the holder of a prospecting licence the right "to work the ground" located thereunder from the date of location until his application for a claim licence can be published and the licence issued or refused, unless indeed the location is disallowed or the holder is ordered to suspend work. Regulation 19 provides that all gold (and these locations were gold locations)

pending the issue of a licence, after locating a claim, shall be subject to the same regulations and shall be recorded and dealt with in all respects as if it had been obtained after the issue of a licence.

The effect of Regulations 4 (6), 6 (1) and 19 is, subject to the explicit qualifications contained in the Regulations, to entitle the holder of a prospecting licence, who locates and notifies locations, to occupy and work the ground located and to win gold therefrom. The Regulations having this effect the holder of a prospecting licence who complies with all requirements must be regarded as possessed of a profit a prendre pending issue of a claim licence, and a profit a prendre, in the opinion of the Court, is an interest in land.

The evidence leaves no doubt that on the 20th October, 1939, Abrahams and Da Silva went on the locations for the purpose of dispossessing Pompey who was occupying the land with his servants and that the quarrel and assault arose directly out of Pompey's claim to remain on and to work the locations. The Court considers that Pompey in resisting the trespass was asserting his right to an interest in land. The Magistrate should have refrained from adjudication.

The appeal is accordingly allowed, the appellants to have their costs.

Appeal allowed.

BHAGMAN, (Defendant), Appellant,

v.

D. N. STEWART, (Complainant), Respondent.

[1939. No. 208.—DEMERARA.]

BEFORE FULL COURT: CAMACHO, C.J., AND FRETZ, J.

1940. MAY 27; JUNE 15.

Criminal law and procedure—Spirits—Bush rum—Unlawful possession of—Complaint for—Enactment creating offence—Spirits Ordinance, cap. 110, ss. 93 (1), 93 (5); Ordinance No. 22 of 1931, s. 2 (1).

The offence of unlawful possession of spirits (of which the possession of bush rum is an example) is created by section 93 (1) of the Spirits Ordinance, cap. 110 as enacted by section 2 (1) of Ordinance No. 22 of 1931.

Appeal by the defendant Bhagman from a decision of Mr. F. O. Low, Magistrate, Essequebo Judicial District, convicting her of the unlawful possession of bush rum and ordering her to pay a fine of $250, or, in default of payment, to undergo imprisonment for three months with hard labour.

J. A. Luckhoo, K.C., for appellant.

E. M. Duke, acting Crown Counsel, for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by the Chief Justice, as follows:—

The appellant was convicted by the Magistrate for the Essequebo Judicial District for having in her possession a quantity of spirits contrary to section 93 (1) of the Spirits Ordinance, Cap. 110 as re-enacted by section 2 (1) of Ordinance 22 of 1931.

Apart from two submissions of law the appeal is purely one of fact and as the Magistrate had before him ample evidence for deciding in the manner he did and as the conclusions the Magistrate drew from that evidence were eminently reasonable the Court will not disturb the conviction.

The first submission of law is that the Magistrate was wrong in convicting the appellant under the sub-section as the subsection does not create any offence. The short answer to the objection is that the sub-section does create the offence. Moreover the point is precluded by the decision of this Court in *Michael* v. *Ashmead* (1938) L. R. B.G. p. 70.

It is further submitted that the Government Analyst's report was wrongly admitted in evidence inasmuch as the charge was laid under subsection 1 of the section and not under sub-section 5 of the section. The report certified that the liquid submitted

for analysis consisted of spirits at least 19.0% underproof. The Analyst's report was clearly admissible for it established that the spirits possessed by the appellant was bush rum and sub-section 5 of the section explicitly admits the certificate as evidence of that fact.

The appeal is dismissed.

Appeal dismissed.

HENRY BARCLAY, Appellant,

v.

JAMES BLAKE, Respondent.

[1939. No. 322.—DEMERARA.]

BEFORE FULL COURT: CAMACHO, C.J., and FRETZ, J.

1940. MAY 28; JUNE 15.

Criminal law and procedure—Larceny—Ownership—Allegation by defendant—Fictitious pretence of title—Claim of defendant wholly groundless—No bona fide dispute as to ownership.

Appeal—Finding of fact—No bona fide dispute as to ownership of articles alleged to be stolen—Evidence to support finding—Decision will not be disturbed.

The jurisdiction of the magistrate is not to be ousted by mere fictitious pretence of title, and an assertion of right need not be regarded by the magistrate where manifest circumstances satisfy him that the claim is wholly groundless.

Where there is evidence for and against the *bona fides* of the claim, the Appeal Court will be bound by the magistrate's decision.

Appeal by the defendant Henry Barclay from a decision of Mr. F. O. Low, Magistrate, West Demerara Judicial District, convicting him of praedial larceny of four bunches of plantains, the property of Naraine.

J. A. Luckhoo, K.C., for appellant.

E. M. Duke, acting Crown Counsel, for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by the Chief Justice as follows:—

The appellant was convicted by the Magistrate for the West Demerara Judicial District under section 76 (1) Chapter 13 of

praedial larceny of four bunches of plantains the property of one Naraine.

The appellant bases his appeal on the ground that no proof was offered of the statutory offence of praedial larceny and that there was a *bona fide* dispute as to ownership of the plantains ousting the Magisterial Jurisdiction.

The facts are as follows:

The virtual complainant Naraine and the appellant farmed adjoining lands. At about the time the offence is alleged to have been committed plantains were growing on Naraine's land. Naraine had marked his growing fruit by inserting a cocoanut spine at the end of each bunch.

On the 11th May, 1939, Naraine missed from his land four bunches of plantains from his growing trees. He reported the loss to his ranger, Simon Lewis, and the next day, accompanied by Lewis and one Hassanally, Naraine went to the Market place and examined about 100 bunches of plantains which were being offered for sale in the Market by different persons. The appellant was found in possession of five bunches of plantains. On examination four of the five bunches were found to contain a cocoanut spine, inserted at the end of each bunch. Naraine claimed them as his property. The appellant maintained the plantains were his. He indicated on the bunches his mark which was a ring at the upper stem of the bunches made by the hollow end of a cutlass. The respondent, a rural constable, inspected the bunches of fruit and was informed by the appellant that they were his. He pointed out to the respondent his ring mark on the bunches. On further inspection the respondent found Naraine's mark on the fruit. Naraine and the appellant were taken to the Police Station. At the Station the appellant suggested a visit to the farm to ascertain the trees from which the plantains had been removed. The visit was made and the respondent was shown by Naraine the stalks alleged to belong to the four bunches found in the possession of the appellant.

On this evidence the Magistrate convicted.

It is urged that the Magistrate was wrong in convicting the appellant, the evidence not establishing praedial larceny inasmuch as the prosecution was compellable to prove that the appellant had entered on Naraine's land and had cut therefrom the growing fruit.

It is clear from the evidence that the identification marks of Naraine were found on the fruit in the possession of the appellant and from the record it is equally clear that the Magistrate found that the fruit was the property of Naraine. This finding supported by the evidence puts the appellant in possession of property recently stolen. In the absence of an explanation which is either true, or might reasonably be true, a presumption arises against

the appellant that he either stole the fruit or received it knowing it to have been stolen. If the appellant stole the fruit, as the Magistrate found he did, he could only have committed the theft by severing it while growing on Naraine's land, for the evidence is that the fruit was so growing shortly before it was found in the possession of the appellant. After the severance of the fruit from the trees Naraine had no opportunity to mark the fruit with his mark. It is, however, said that some person unknown might have inserted the cocoanut spines after severance of the fruit from the land. There is not a scintilla of evidence, however, to support the suggestion. It is also urged that the fruit bore the appellant's marks. As however the fruit was in possession of the appellant he had ample opportunity of placing his mark thereon after its removal from Naraine's land.

With regard to the alleged *bona fide* claim of ownership, the Magistrate by his decision has found in effect that the claim was not *bona fide*, that the fruit came, in fact, from Naraine's land. The law is not in dispute. The Jurisdiction of the Magistrate is not to be ousted by mere fictitious pretence of title, and an assertion of right need not be regarded by the Magistrate where manifest circumstances satisfy him that the claim is wholly groundless. When there is evidence for and against the *bona fides* of the claim this Court will be bound by the Magistrate's decision.

For these reasons the appeal is dismissed.

Appeal dismissed.

J. P. LACHMANSINGH *v.* RAMBASSIE.

J. P. LACHMANSINGH, Appellant (Plaintiff),
v.
RAMBASSIE, Respondent (Defendant).

[1939. No. 188.—DEMERARA.]

BEFORE FULL COURT: CAMACHO, C.J., FRETZ AND LANGLEY, JJ.

1940. JANUARY 24; FEBRUARY 6.

Bill of sale—Building—By way of security—Seizure of building under bill of sale—Sale by grantee—Surplus proceeds of sale—Accepted by grantor of bill—Acceptance not conditioned on validity of bill—Invalidity of bill of sale for non-compliance with statutory requirements—Parties thereto unaware of—Subsequent knowledge thereof by grantor—No steps taken by him to repudiate transaction—Sale ratified and adopted by grantor—Execution against grantor—Levy on building as property of grantor—Interpleader claim by purchaser—Property in building—In purchaser.

On April 2, 1938, judgment was obtained by R. against E. P.

On May 13, 1938, E. P., by bill of sale, assigned a building to M. H as security for a debt owed by E. P. to M. H. On August 22, 1938, M. H. seized the building under the bill of sale, and on October 3, 1938, he sold it to J. P. L. On the same day M. H. paid over to E. P., from and out of the purchase money, the surplus after deducting the sum due by E. P. to M. H. under the bill of sale.

The bill of sale was void for non-compliance with the statutory requirements, but the transactions which took place on October 3, 1938 proceeded on the footing of its validity. Neither E. P. nor M. H. was aware at that time that the bill of sale was invalid.

After the invalidity of the bill of sale came to the knowledge of E. P. he took no steps to repudiate the transaction or to show in any manner that his acceptance of the money was conditioned on the validity of the instrument.

On October 8, 1938, R. levied upon the building as being the property of E. P. J.P.L. interpleaded, but the magistrate dismissed his claim. He appealed.

Held, (1) that the conduct of E. P., the execution debtor and grantor of the bill of sale, in accepting the purchase money, and retaining it after full knowledge of the invalidity of the instrument, must be regarded as ratification and adoption of the sale; and

(2) that the property in the building therefore passed to J.P.L.

Appeal by a claimant in interpleader from a decision of Mr. A. V. Crane, Senior Magistrate, Georgetown Judicial District, dismissing his claim against the defendant to a building levied upon by the defendant as the property of Edward Paul. The necessary facts and arguments appear from the judgment

A. J. Parkes, for appellant.

S. L. van Batenburg-Stafford, K.C., for respondent.

Cur. adv. vult.

The judgment of the Court was delivered by the Chief Justice, as follows:—

This is an appeal from the judgment of the Magistrate for the

Georgetown Judicial District on an Interpleader Summons issued at the instance of the Appellant.

On the second of April, 1938, judgment was obtained by the Respondent against Edward Paul for the sum of $160 with costs.

On the 8th of October, 1938, execution to satisfy the judgment was levied on a dismantled board building the property, it is claimed, of Edward Paul.

On the 13th of May, 1938, Edward Paul by Bill of Sale assigned the building which was then situated at Alexanderville, East Bank, Demerara, to one Mohamed Haniff, as security for a debt owed by Paul to Haniff.

On the 22nd of August, 1938, Haniff seized the building under the Bill of Sale and on the 3rd October, 1938, sold it to the appellant, acknowledging the purchase money, $190, by a receipt dated 3rd October, in evidence as Exhibit "D." On the same day Haniff paid over to Paul from and out of the purchase money the sum of $120, being the surplus thereof after deducting the amount of $70 due by Paul to Haniff under the Bill of sale. A receipt which is in evidence acknowledged the payment.

On execution levied by the Respondent on the dismantled building the appellant issued the Interpleader Summons, the subject matter of this appeal, claiming the building as his property.

The Magistrate found the Bill of Sale void for non-compliance with statutory requirements and, holding that the building did not pass to the appellant, entered judgment for the respondent.

On the hearing of the Appeal, counsel who appeared for the appellant submitted that, notwithstanding the invalidity of the Bill of Sale, the property in the building did in fact pass to the appellant by virtue of the subsequent adoption or ratification by Paul of the sale as disclosed by his acceptance of the surplus of the purchase money.

The Magistrate found as a fact that the receipts from Haniff to the Appellant and from Paul to Haniff proceeded on the basis of the validity of the Bill of Sale.

Counsel for the Respondent argued that at the time of the sale neither Haniff nor Paul was aware of the invalidity of the Bill of Sale and that the acceptance in those circumstances by Paul of the surplus of proceeds of sale could not be held to be a ratification or adoption of the sale transaction inasmuch as Paul in accepting the money did no more than he would have done, or was bound to do, if the instrument had been valid. In other words, something further was required to be done by Paul to show his adoption or ratification of the transaction.

The Court is prepared to concede that at the time of the sale the grantor and grantee were unaware of the invalidity of the Bill of Sale, and that the sale and receipt by Paul of the

surplus of the purchase money proceeded on the footing of validity of the instrument. The grantor Paul, however, not only received the purchase money. He has never, at any time after the invalidity of the instrument came to his knowledge, taken any steps to repudiate the transaction or to show in any manner that his acceptance of the money was conditioned on the validity of the instrument.

In the view of this Court the conduct of Paul by his acceptance of the purchase money, and retention of it after full knowledge of the invalidity of the instrument, must be regarded as ratification and adoption of the sale.

The Court therefore holds that the property in the building passed to the appellant.

The appeal is accordingly allowed. Costs fixed: Counsel’s fee at $20 and costs in Court below and here costs in this Court $12.46.

Appeal allowed.

A. MANSINGH *v.* R. JONAS.

ARTHUR MANSINGH, (Defendant) Appellant,
v.
RONALD JONAS, (Complainant) Respondent.
[19.40. No. 30.—DEMERARA.]
BEFORE FULL COURT: CAMACHO, C.J., AND FRETZ, J.
1940. MAY 28; JUNE 15.

Criminal law and procedure—Person participating in proceeds of crime—Accomplice—Corroboration—Material particular implicating accused—Participation of accused in crime—Evidence of—Conduct of accused immediately before commission of crime—Presence of appellant at moment of crime—Whether corroboration.

C. was present when A. stole money from the person of B. He accepted from A. part of the money which was stolen from B.

Held, that C. was an accomplice.

N. an Amer Indian was pursuing H. who had stolen from him a dollar note. In the course of the pursuit G. M. and another man, alleged to be the appellant A. M., encountered N. in an alley-way. They stopped him, and informed him that they were constables.

P. H., a witness for the prosecution, deposed that he saw the appellant A. M. with G. M. enter an alley-way behind N., that he saw them stop N., and heard them say "we are policemen."

G. M. and the man alleged to be the appellant A. M. accompanied N. through Leopold Street into St. Philip's churchyard,

P. H. deposed that he saw the appellant A. M., N. and G. M. go to St. Philip's churchyard, that he noticed S. in the vicinity, that he gave S. certain information, and that S. followed the three men into the churchyard.

On arriving at the churchyard the man alleged to be the appellant A. M., and G. M. asked N. whether he knew why he was going to the police station. G. M. told N. that he would be locked up and would receive 6 months' imprisonment. The man alleged to be the appellant A. M., and G. M. then asked N. what he would give them for their trouble. N. replied that he had no money.

At that moment S. arrived on the scene, whereupon G. M. said "look the Sergeant now come," and G. M. added "the Sergeant say to search you." G. M. and the man alleged to be the appellant A. M. held N., and G. M. extracted from N's pocket $6.36, returning however to N. a dollar bill.

S. alleged that he was merely a spectator. He nevertheless accepted from G. M. 36 cents part of the money which was stolen from N.

N. was unable to identify the appellant as being the man who was in company with G. M. S., however, definitely identified him as the person who, together with G. M committed the offence.

After N. left the churchyard, P. H. accompanied him to the police station.

G. M. and A. M. were convicted of larceny from the person of N. A. M. appealed.

Held, (1) that the identification by P. H. of the appellant as the person who was in company with G. M., was complete, and by the evidence of P. H. the appellant was placed in the churchyard with G. M. and N. at the time when the crime was committed;

(2) that the appellant's conduct, deposed to by P. H., immediately prior to the commission of the offence, proved that he was acting in concert with G. M.;

(3) that evidence to be corroborative must tend to show that the person accused participated in the crime

(4) that P. H. corroborated the evidence of the accomplice S. (which was to the effect that the appellant A. M. participated in the robbery) in a material particular, namely, the presence of the appellant at the moment of the crime; and

(5) that the appellant A. M. was properly convicted.

A. MANSINGH *v.* R. JONAS.

Appeal by the defendant from a decision of Mr. A. V. Crane, Senior Magistrate, Georgetown Judicial District, convicting him of larceny from the person and sentencing him to six weeks' imprisonment.

J. A. Luckhoo, K.C., for appellant.

E. M Duke, acting Crown Counsel, for respondent.

Cur. adv. vult.

The judgment of the Court was read by the Chief Justice, as follows:—

The appellant was convicted by the Magistrate for the Georgetown Judicial District of larceny from the person under section 91 of Cap. 13.

The facts are briefly as follows:—

On 1st December, 1939, Benjamin Norton an Amer Indian was pursuing one Holder who had stolen from him a dollar note. In the course of the pursuit one Malcolm and another man, alleged to be the appellant, encountered Norton. They stopped him and informed him that they were constables. They accompanied Norton through Leopold Street into St. Philip's churchyard. On arriving there they asked Norton whether he knew why he was going to the Police Station and Malcolm informed him that he would be locked up and would receive six months' imprisonment. They then asked Norton what he would give them for their trouble. Norton replied he had no money. At that moment George Simon arrived on the scene whereupon Malcolm said "look the Sergeant now come" and Malcolm added "the Sergeant say to search you." Malcolm and the other man, alleged to be the appellant, held Norton. Malcolm extracted from Norton's pocket $6.36 returning however to Norton a one dollar bill. George Simon alleges that he was merely a spectator. He nevertheless accepted from Malcolm the 36 cents which had been stolen from Norton. On this evidence it is contended, the Court thinks rightly, that Simon is an accomplice and that his testimony requires corroboration.

Norton was unable to identify the appellant. George Simon, however, definitely identified him as the person, who together with Malcolm, committed the offence.

It is urged on this Court that there was no corroboration before the Magistrate of Simon's testimony. Percy Hubbard a witness for the prosecution however stated that he saw Mansingh with Malcolm enter an alleyway behind Norton, that he saw them stop Norton and heard them say "we are policemen." He further alleged that he saw the three men go to St. Philip's churchyard and that noticing George Simon in the vicinity he gave Simon certain information and that George Simon followed them into the churchyard. Hubbard subsequently accompanied Norton to the police station.

It is submitted that the evidence of Hubbard, although it might be sufficient to establish commission of the offence, does not corroborate the testimony of Simon in that Hubbard does not give evidence which connects the appellant with the offence. In *Rex* v. *Baskerville* 25 Cox p. 531 Lord Reading re-affirmed the rule "that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it." More shortly put, evidence to be corroborative must tend to show that the person accused participated in the crime. The following example serves to illustrate the rule—if two accused charged with burglary are seen by a third person standing before the door of the house which within a few minutes thereafter is burglariously entered and one of the accused alleges that he and the other accused committed the burglary, the evidence of the third person who saw both accused standing before the door would tend to show that the accused against whom his accomplice alleges the crime, participated in the crime and would be in the opinion of the Court corroborative of the accomplice's testimony. In this case Simon deposes to the presence of the appellant and of his participation in the robbery. Hubbard corroborates Simon by stating that the appellant went into the churchyard with Malcolm and Norton, and Hubbard further deposes that prior to their entering into the churchyard he heard the appellant and Malcolm inform Norton that they would take him to the station. The identification of the appellant by Hubbard is complete and by Hubbard's evidence the appellant is placed in the churchyard with Malcolm and Norton at the time when the crime was committed. Hubbard corroborates Simon in a material particular, that is to say, the presence of the appellant at the moment of the crime. The appellant's conduct immediately prior to the commission of the offence, deposed to by Hubbard, proves that he was acting in concert with Malcolm. The evidence of Hubbard implicates the appellant in the crime. If this evidence is not to be regarded as corroborative no evidence short of an eye-witness's testimony would be corroboration.

In the opinion of this Court the Magistrate properly convicted the appellant and his appeal is therefore dismissed.

Appeal dismissed.

PONAPARREDDY MADRAY AND ATTORNEY-GENERAL,
Plaintiffs,
v.
E. SEALEY AND OTHERS, Defendants.

[1937. No. 199.—DEMERARA.]

BEFORE CAMACHO, C.J.

1939. DECEMBER 5, 7, 8, 11, 20, 21;
1940. FEBRUARY 27, 28, 29; MARCH 1; MAY 17, 20, 21, 22;
SEPTEMBER 14.

Plantations—Size of—First depth—100 roods facade by 750 roods in depth—Regulations of 1792.

Plantations—Second depth—Freely alienable by Crown between 1792 and 1835—Regulation of 1835—Reserved for owners of first depth—Rule in force until repealed by Ordinance No. 39 of 1900—Second depth freely alienable by Crown since 1900.

Construction—Plantation—No grant by Crown of second depth—Yorkshire Hall—Meaning of—First depth only.

Execution sale—Immovable property—Interest of execution debtor in—No more transferred to purchaser.

Transport—Immovable property—No opposition—By person in actual possession—Due or actual notice of intention to transport lands of which he is in possession not given to him—Rights of person in actual possession not prejudiced by transport.

Bastardy—Mother makes no bastard—Bastard has no lawful father—No succession ex parte paterna.

Husband and wife—Marriage—Proof of—Cohabitation and repute—Evidence of—Prevalence of concubinage.

Immovable property—Prescriptive title—Acquired under Roman Dutch law prior to January 1, 1917—No declaration by Court required to complete or evidence title—Civil Law of British Guiana Ordinance, cap. 7, ss. 2 (3), 4 (1).

Husband and wife—Marriage in community—Prescriptive title—Wife dies before husband acquires—No interest passes to heirs of wife.

Evidence—Immovable property—Prescriptive title to—Set up against legal owner—Onus of proof—On person setting up prescriptive title.

Practice—Order by consent—Cannot be attacked by party thereto.

From 1835 onwards the Court, of Policy clogged in favour of the owners of first depths of plantations the right of the Crown to alienate second depths. The clog on alienation remained in operation until the enactment of Ordinance No. 39 of 1900 which repealed all prior regulations relating to the second depths of all plantations. It was therefore not until 1900 that the Crown resumed its right to alienate freely lands reserved as second depths of plantations.

Between the year 1792 (when regulations were made as to the lotting out of plantations) and the year 1835 there was no grant by the Crown of the second depth of Plantation Yorkshire Hall to any person whomsoever, and between the years 1835 and 1900 no grant of the second depth of Plantation Yorkshire Hall was made by the Crown to any owner of the first depth of the plantation.

Held, that any transport therefore of "Yorkshire Hall" between the years 1835 and 1900 could only refer to the first depth thereof.

A purchaser at execution sale does not acquire more than the execution debtor possessed. *Belmonte's petition* (1893) L.R.B.G. 42, *dos Santos* v. *Johnson,* L.J. 17.5.1901, and *Gillis* v. *Seequar* (1920) L.R.B.G. 35 followed.

Where at the time of an execution sale there was no second depth to a plantation, no grant thereof having been made by the Crown, the purchaser

of the "east half Yorkshire Hall" only acquired title to the first depth of the east half of the plantation, and not to the second depth of the east half of the plantation.

Where a person is in actual possession of immovable property which is advertised to be transported, the omission on his part to oppose the passing of the transport does not prejudice his rights thereto, unless he has had due or actual notice of the intention to transport the immovable properly of which he is in actual possession.

Lalbahadursingh v. *McPherson and others* (1939) L.R.B.G. 80 applied

A. advertised transports of the east half of plantation Yorkshire Hall in accordance with a plan deposited in the Registrar's Office. At that time, no grant had been made by the Grown of the second depth of the east half of plantation Yorkshire Hall. A. was the owner of the first depth of the east half of the plantation, and the Crown was the owner, and in possession, of the second depth. Reference by the Grown to the plan would have disclosed that A, was proposing to dispose of the second depth.

Held, that as the east half of plantation Yorkshire Hall meant the first depth, and did not include the second depth, of the east half of the plantation, the advertisements were not due or actual notice to the Crown, which was in actual possession of the land.

Although in Roman Dutch law. "a mother makes no bastard," a bastard has no lawful father, and therefore no right of succession *ex parte paterna.*

Although cohabitation with the required repute as husband and wife is proof that the parties between themselves have mutually contracted the matrimonial relation, some definite evidence must be offered, especially in a colony where concubinage is common, of that repute.

Chow v. *Fung and others* (1920) L R.B.G. 84, followed.

Prescriptive rights acquired in immovable property under Roman Dutch Law prior to January 1, 1917, are preserved by section 2 (3) of the Civil Law of British Guiana Ordinance, chapter 7, notwithstanding section 4 (1) of the Ordinance.

Where prior to January 1, 1917, a person was in adverse possession of land for thirty-three and a third years, he has acquired, by virtue of that fact, prescriptive title to the land, and a declaration by the Court to that effect is not required to complete or to evidence his title.

A. was married to his wife in community of goods. A. was in adverse possession of a parcel of land. B. died before A. had acquired title by prescription.

Held, that as at the time of B's death, A. had not acquired prescriptive title, no possessory interest interest in the land passed to the heirs of B.

Where a person sets up, as against the legal owner of the land, prescriptive title, the onus is upon him to establish continuous and adverse possession for the prescriptive period so as to destroy the rights of the person having the legal title.

An order of Court made by consent of the parties cannot be attacked by a party thereto.

A. brought an action against B. By consent of the parties, an order was made by the Court joining C. as a plaintiff. At the trial, B., objected that C., was wrongly joined as plaintiff.

Held, that as the order was made by consent of the parties, the objection must fail.

ACTION by Ponaparreddy Madray against Emmanuel Sealey, Martin Luther Cox, James Yetteau, James Mitchell, Jane Johnny, John Groobie and John Johnny claiming damages and an injunction for trespass on the second depth of the East half of plantation Yorkshire Hall, Mahaicony, East Coast, Demerara. Madray was the holder of a conditional purchase grant from the Crown in respect of the land comprised within the second depth of the east half of plantation Yorkshire Hall. In that grant the right to minerals was reserved to the Crown, and the full purchase price of the second depth had not yet been paid to the Crown. Subsequent to the filing of the writ, the Attorney-General, by order of the Court made with the consent of the plaintiff Madray and of the defendants, was joined as a plaintiff. The Attorney-General, in his statement of claim asked for a declaration that subject to the conditional purchase grant issued to the plaintiff Madray, the Crown was the owner of the second depth. All of the defendants filed a defence to the claims of the two plaintiffs, but, at the

trial, the defendant Mitchell withdrew his defence. The facts and arguments appear in the judgment.

J. A. Luckhoo, K.C., for the plaintiff Madray.

E. M. Duke, acting Crown Counsel, for the plaintiff, the Attorney-General.

S. L. van Batenburg-Stafford, K.C., for all defendants except James Mitchell and John Groobie.

The defendant *John Groobie,* in person.

Cur. adv. vult.

CAMACHO, C.J.: In this action the plaintiff Madray claims—

(1) Damages for trespass in respect of that portion of land shortly described as the second depth East half Yorkshire Hall,

(2) a declaration that he is the beneficial owner of and is entitled to the free and undisturbed possession of the said land, and

(3) a perpetual injunction to restrain the defendants and their agents from entering and trespassing upon the said land.

The case for the plaintiff Madray is that—

(*a*) In the year 1902 the Crown were the legal owners of the second depth of the East hah Yorkshire Hall and in that year one Tronchin, a Government Surveyor, made a survey and diagram of the said second depth defining the boundaries thereof.

(*b*) In 1903 the Crown set up at auction the right to a Licence of Occupancy of the said second depth which was purchased by the plaintiff's father.

(*c*) Licence of Occupancy, issued in 1903, to the plaintiffs father, defined the second depth as "the tract of Crown land situate in the rear of the Eastern half of Plantation Yorkshire Hall situate on the East sea coast of the county of Demerara and colony of British Guiana, etc. as shown by the diagram hereunto annexed."

(*d*) The father of the plaintiff entered into possession and remained in undisturbed possession, of the said second depth until his death in 1929 whereupon the plaintiff took possession thereof, paying the yearly rental and exercising acts of ownership.

(*e*) In 1934 the plaintiff applied to the Crown for a Conditional Purchase Grant of the said second depth and received the grant in 1936.

(*f*) On the 22nd and 23rd March 1937, the defendants broke into the said second depth, carried away growing produce and have from that time continually trespassed on the said land, claiming ownership thereof.

The plaintiff, the Attorney-General, claims on behalf of the Crown, subject to the Conditional Purchase Grant issued to the plaintiff Madray, ownership of the said second depth. This plaintiff refers to the advertisement of sale of the Licence of Occupancy for the said second depth, the sale thereof to the plaintiff's father, and alleges that at the time of such advertisement and sale none of the defendants claimed any interest in the said second depth, as was incumbent on them to do by virtue of section 16 of the Crown Lands Ordinance, 1887.

The defendants deny that the said second depth was surveyed by Tronchin and dispute the accuracy of the description of the land contained in the statement of claim. They deny that the plaintiff's father took possession of the second depth under the Licence of Occupancy, or that he was in undisturbed possession of the land. They challenge the legality of the Conditional Purchase Grant issued to the plaintiff. Alternatively, they deny that the land described in the Conditional Purchase Grant is the second depth of the East half Yorkshire Hall. They admit the picking and carrying away of growing produce from the land in dispute but claim the right, as owners, to do so. One of the defendants Jane Johnny, although not claiming ownership, justifies her entry on the land as the servant of the other defendants. The defendants further allege that Letters of Decree for East half Yorkshire Hall were granted in the year 1845 to one James Chichester and that in the year 1849, after a survey thereof by one William Downer, James Chichester transported to the predecessors of the defendants *inter alia* lots 11 to 16 and 18 and 19 situate thereon as shown on the diagram of the East half Yorkshire Hall prepared and deposited in the Registry by William Downer. The plaintiffs allege that lots 11 to 19 shown on the diagram comprise the second depth East half Yorkshire Hall, and assert that William Downer's diagram is erroneous inasmuch as in the year 1849 the second depth was owned by the Crown, Chichester being then entitled to—the first depth only of the estate and could not therefore pass a valid transport for any portion of the second depth thereof. The defendants reply that Chichester in the year 1848 advertised the intended transports in the *Official Gazette,* and that the plaintiffs are estopped, the Crown not having intervened, from disputing the title of the transportees which became absolute a year and a day after the transports were passed. The defendants, save Jane Johnny, claim to be beneficial owners of the disputed land and to derive their title from the transportees of Chichester. The defendants further allege occupation by the transportees of Chichester and their successors for 61 years prior to 1903 and assert that they are the successors in ownership and possession.

The first question calling for determination is what was the extent of Yorkshire Hall as originally granted?

By Order and Regulations made by Their High Mightinesses the States of Holland in the year 1792, each plantation in the Colony was limited in area to 500 acres. The regulations decreed that the first grant of the land should not exceed 250 acres, that is to say, a facade of 100 Rhynland roods and 750 Rhynland roods in depth. It was further declared that when two thirds of the area of the original grant was put in cultivation a second depth of 250 acres or 750 Rhynland roods in depth at the back of the original grant might be added. On a plan based upon surveys made in 1798 and 1802 by Bouchenroeder, Yorkshire Hall is shown to be 750 roods in depth. The sea is shown as the northern boundary of the plantation and the East and West boundaries to be constituted by other plantations. The South boundary according to this plan would appear to have been formed by vacant or Crown lands. In 1801, John Hopkinson transported Yorkshire Hall to Ralph Shelton. The transport, although disclosing the East and West boundaries of the estate, is silent as to its North and South boundaries. We know from Von Bouchenroeder's plan that the sea formed the northern boundary, the omission in the Hopkinson transport to indicate the southern boundary is persuasive that the lands to the South of the estate remained vacant or Crown lands. Yorkshire Hall as transported to. Shelton contained 750 Rhynland roods in depth with 100 Rhynland roods facade or in all 250 acres. In 1801 therefore, no lands had been added to the original Grant of Yorkshire Hall In 1835 the Court of Policy by Regulation declared that "so long as an estate is in cultivation and there is the most distant chance of the second depth being required by the proprietors of the first depth such second depth will never be granted to another person."

From 1835 onwards the Court of Policy thereby clogged in favour of the owners of first depths the right of the Crown to alienate second depths. The clog on alienation remained in operation until the enactment of Ordinance No. 39 of 1900 which repealed all prior regulations relating to the second depths of all estates. It was therefore not until 1900 that the Crown resumed its right to alienate freely lands reserved as second depths. There is no record before the Court of any grant by the Crown between the years 1792 and 1835 of the second depth of Yorkshire Hall to any person whomsoever, nor is there any evidence of any grant of the second depth by the Crown between the years 1835 and 1900 to any owner of the first depth of the estate. Any transport therefore of "Yorkshire Hall" between the years 1792 and 1900 could only refer to the first depth thereof. Moreover, by Ordinance 6 of 1838 all persons were prohibited from occupying Crown land except by virtue of a Licence of Occupancy. There is no evidence before the Court of any Licence of Occupancy or Conditional Purchase Grant of the second depth of the East half of

Yorkshire Hall until the year 1903 when in that year a Licence of Occupancy was issued to the plaintiff's father for that portion of the estate.

The Court therefore concludes that until the year 1903 Yorkshire Hall comprised 750 Rhynland roods in depth and 100 Rhynland roods facade: and further, any occupation of the lands reserved as the second depth of Yorkshire Hall was without the consent of the Crown.

The second question which calls for decision is whether or not there was land available at the back of the first depth to constitute a second depth to Yorkshire Hall.

The 1792 Order and Regulations of the States of Holland raise a presumption, rebuttable nevertheless by the defendants, in favour of the existence of a second depth to the estate. The plan of Deseaves 1790 (Exhibit X1) and the map of Van Cooten dated 1792 (Exhibit Dl) disclose land at the back of first depth Yorkshire Hall available for second depth to the estate. The 1802 Bouchenroeder's survey and plan (Exhibit B) of all lands granted by the Batavian Government in the three counties of the Colony show Yorkshire Hall comprised of 250 acres with land immediately at the back thereof available for the second depth of the estate. A survey and plan made in 1899 by Frank Fowler, Assistant Crown Surveyor, defines the second depth of Yorkshire Hall. The extract from the plan attached to the application in 1901 by one Patoir for the second depth of Yorkshire Hall (Exhibit X) and the advertisements of the application (Exhibit W) indicate a second depth to the estate. The applications in 1901 of Enoch Johnny and J. A. Semple owners of portions or first depth East half Yorkshire Hall recognise the existence of a second depth to the estate (Exhibit 'Y'). The plan attached to Exhibit C discloses a second depth to Yorkshire Hall, Exhibit C being the grant in 1902 by the Crown of a portion of the second depth of Yorkshire Hall to the Demerara Railway Company for a permanent way and a reserve for railway purposes.

The survey and diagram made in 1902 by Tronchin, Government Surveyor, attached to Exhibits D and E (Licence of Occupancy for the second depth East half Yorkshire Hall granted to the plaintiff's father and Conditional Purchase Grant of the said second depth to the plaintiff) disclose the existence of a second depth to the estate. So also does the advertisement, of sale of right to the Licence of Occupancy of second depth East half Yorkshire Hall. (Exhibit A1). Exhibits L and M are Licence of Occupancy and Conditional Purchase Grant by the Crown to the plaintiff's father of the second depth West half Yorkshire Hall. Exhibits F, G, H, J, K, L, N and O are Licences of Occupancy and Conditional Purchase Grants by the Crown for the second depths of Bushy Park, Now or Never, Sarah, Drill, Ormsary and

Raisonable, all lands in the immediate vicinity of Yorkshire Hall, and laid out at about the same time as Yorkshire Hall. These Licences of Occupancy and Conditional Purchase Grants, excepting always the Licence of Occupancy and Grant for the second depth East half Yorkshire Hall, establish undisputed dealings by the Crown with the second depths of these plantations. Moreover, there is no evidence of any dispute at the time of the right of the Crown to grant, as the Crown did by Exhibit M, the second depth of the West half of Yorkshire Hall.

It would be against the weight of evidence to reject the Crown's contention in favour of the existence of a second depth to East half Yorkshire Hall. Apart from the defendants' denial of a second depth to the East half of Yorkshire Hall and the evidence afforded by Downer's plan, all the documents and historical facts of the case support the claim for a second depth.

The Court concludes that a second depth was reserved in respect of the whole of Yorkshire Hall, East half as well as West half of the estate.

The third question to be answered is, on what part of East half Yorkshire Hall is the portion of land in dispute situate?

In 1842 James Chichester did in fact purchase, at execution sale, the East half Yorkshire Hall, and in 1845 did in fact obtain Letters of Decree therefor. The Letters of Decree describe the land as "East half of the abandoned plantation Yorkshire Hall." The instrument omits mention of the boundaries of the plantation or of its extent. As already stated, however, there is no evidence of any grant by the Crown of any portion of the second depth of East half Yorkshire Hall between the years 1792 and 1903 and the Letters of Decree granted in 1845 to Chichester must be assumed to have vested in Chichester the East half only of the original 750 Rhynland roods in depth and of the 100 Rhynland roods facade.

In 1848 Chichester caused the said survey and diagram to be made and prepared by William Downer, Sworn Land Surveyor, for the purpose of sub-division and sale of the land to a number of different purchasers. Downer's diagram sub-divides the land into 19 lots. Our concern is with lots 11 to 19 inclusive.

In the year 1848, Chichester advertised transport of lots 11 and 15 in favour of Success Jonathan, lot 12 in favour of King Campbell, lot 13 in favour of Paul Johnny, lot 14 in favour of Yetteau Brandis, lot 16 in favour of Cockroy Yetteau, lot 18 in favour of Thomas Joseph, Frankie Joseph, and Joseph Joseph, and lot 19 in favour of Toby Jacob.

In the year 1850 Success Jonathan by Letters of Decree acquired some of these lots (Exhibits A2 and A3). Lot 17 was apparently sold to one Brave Warren but no transport was passed to him. The plaintiffs say that lots 11 to 19 are shown on the Downer diagram as occupying the second depth of East

half Yorkshire Hall. The defendants on the other hand assert that the lots are not on the second depth, that there never was a second depth to Yorkshire Hall and that the lots are situate on the original 250 acres of the estate. They contend that the north boundary is not the sea as shown on the Von Bouchenroeder's plan, but the old Mahaicony Canal as shown in William Downer's plan (see Exhibit C1).

In the Downer plan a considerable portion of land north of the Mahaicony Canal is indicated as land thrown up by the sea. Eliminating the lands claimed as thrown up by the sea the Downer plan would place lots 11 to 19 on the first depth of the estate and, the southern boundary being Farm as shown on that plan, there would be no second depth to Yorkshire Hall. The ancient plans and maps of the Mahaicony estates do not disclose Farm to be the South boundary of Yorkshire Hall, on the contrary they show vacant or Crown lands forming that boundary and on those plans and maps the sea is shown to be the north boundary of the estate and not the Mahaicony Canal.

Mr. Moses, a surveyor, called by the defendants and shown the Fowler plan (Exhibit Q) stated that measured from the South boundary of the first depth as shown on the plan (point Y on the plan) Yorkshire Hall comprises 750 roods in depth and that the second depth of Yorkshire Hall as shown on that plan (from point Z to point X on the plan) contains 350 roods or 1,050 roods for both second and first depths.

Mr. Spence, another surveyor, stated that the first and second depths of Yorkshire Hall to mean high water mark contain 950 roods and an additional 160 rods going out to sea, *i.e.* an aggregate depth of 1,100 roods, Exhibits D and E disclose that the depth of the second depth is 350 roods and deducting this depth from the entire depth, 750 roods are left as the first depth. The extent of the first depth so found coincides with the area of Yorkshire Hall as originally laid out.

The defendants endeavoured to overcome this difficulty by the contention that most, if not all, of the lands north of the Mahaicony Canal on the Downer plan did not originally form part of the East half of Yorkshire Hall and that the greater portion, if not all, of those lands subsequently accreted by action of the sea.

Mr. Moses who examined the land stated that he found a dam north of the Mahaicony Canal which ran in the direction of the sea and that that dam had been encroached upon by the sea to the extent of 1,000 feet and that the flow of the tide now covers land which was cultivable at one time.

From his evidence and that of Mr. Spence the Court finds that land north of the Mahaicony Canal was originally part of Yorkshire Hall and that Yorkshire Hall as originally laid out was bounded by the sea at a point north of the Mahaicony Canal.

The Downer plan asserts accretion but it must not be overlooked

that having fixed "Farm" as the South boundary of the estate Mr. Downer had to account for the area in excess of 750 roods. In no other plan or map is land shown as accreted to Yorkshire Hall and there is no other satisfactory evidence on the point. The Court is however invited to say that Downer's plan should be accepted in preference to all others, and to the evidence as a whole, corroborated as it is by the general statement that accretion is of common occurrence in this colony. It should, however, be added that erosion is of equal common occurrence and accepting the evidence of Mr. Spence and Mr. Moses it would seem that, on the contrary, the sea has encroached to the extent of 1,000 feet, according to Mr. Moses, and 160 rods, according to Mr. Spence, on the first depth of the estate.

On the evidence the Court declines to rely on the Downer plan because, first, it is satisfied that Farm was not the South boundary of Yorkshire Hall as that estate was originally laid out, secondly, because the North boundary is not accurately set out, and thirdly, because if the North boundary of the estate, as originally laid out, is the sea, as the Court is satisfied it is, the "East half Yorkshire Hall" as defined by the plan would contain an area in excess of that grantable as the first depth of a plantation. The Court finds that lots 11 to 19 are shown in error in Downer's plan to be on the second depth of the estate.

Assuming the original extent of the estate, a second depth in reserve thereto, and the situation of lots 11-19, as found by the Court:—

(*a*) What is the legal effect of the purchase of East half of Yorkshire Hall at execution by, and the Letters of Decree granted to, James Chichester? It is argued that as the decree vested in him East half Yorkshire Hall he thereby secured the whole of the East half of the estate, the first depth as well as the second depth, if the latter existed. The contention does not meet with the approval of the Court. Although Chichester bought at execution sale he did not thereby acquire more than the execution debtor possessed. As stated by Chalmers, C.J. in *Belmonte's petition* (1893 L.R.B.G. 42), "Levy and sale do not constitute a process of legerdemain which in some mysterious way make a bad or defective title into a good title; they simply take out of the execution debtor such and no better right and title as were vested in him." In *Dos Santos* versus *Johnson* (L.J.17.5.1901) the principle is affirmed that "Letters of Decree can only be granted for the property that was in the debtor but the Court assumes, where there has been an unopposed levy and sale under execution, that the property as sold was that of the judgment debtor and grants Letters of Decree without further inquiry."

> Major, C. J. in *Gillis* v. *Seequar* (1920) L.R.B.G. 35 in commenting on this passage said: "As to the assumption stated to be made by the Court, it is only so made for the purposes of the Letters of Decree, certainly not in order to take out of the judgment debtor that which in fact is not in him and so give the purchaser at execution a good title instead of a bad one," and "Letters of Decree are no more than a purchaser's conveyance of the subject matter of the contract between the Marshal and the purchaser at execution sale."

What was in fact sold and conveyed to Chichester?

At the time of the sale and Decree the second depth did not form part of Yorkshire Hall, it had not been added to the estate, it was not vested in the execution debtor. "East half Yorkshire Hall" in the Decree is descriptive of the East moiety of the estate as it was then constituted—namely—of a first depth only and the East moiety of that depth was all that was sold and conveyed to Chichester. The Court finds that Chichester did not obtain legal title to any portion of the second depth.

Moreover, assuming at this stage for the purposes of the argument Chichester took possession of lots 11-19 at the time of the purchase, he transported them in 1849 and did not therefore acquire a possessory title to them or any of them.

(b) What is the legal effect of the transports by Chichester to the persons under whom the defendants claim?

In l849 Chichester advertised the transports. The relevant passage of the advertisement reads as follows:—"By James Chichester transport of lots,—part of the East half of Plantation Yorkshire Hall, situate in the district of Mahaicony as laid down and defined on a diagram thereof by the Sworn Land Surveyor William Downer dated 3rd November 1848 and deposited in the Registrar's Office." Pursuant to the advertisement the lots were transported as related previously in this judgment.

Learned Counsel for defendants contended that the transports were in accordance with Downer's plan and passed full property in the land described although including that claimed by the Crown to be the second depth. He submitted that notwithstanding the second depth may have been wrongly included in the transports the Crown not having opposed are precluded from alleging ownership of the second depth. He puts it higher than a mere question of estoppel, a deprivation, in law, of ownership.

The Crown, it is submitted, were at liberty to attack the transports within a year and a day on the ground of fraud and as they did not exercise their right of interposition their ownership was destroyed.

In Roman Dutch Law "Real rights, or jura in re, can only be validly transferred to another by the owner of the property.

None but the real owner can give and transfer full ownership. A delivery by a transferor can never give the transferee any greater right than was vested in such transferor at the time of delivery." (Grotius, DeBruyn's edition 1894 p. 483). "It is claimed that once passed; a transport carries with it an indefeasible title to the subject matter purporting to be conveyed. If this theory, which has unaccountably gained some currency, were true, the tenure of property in the colony would be very insecure in the case of any owner who is not a diligent reader of the advertisement of transports in the *Official Gazette* and local papers.": *per* Nunan, J., acting, in *Rahimbaksh and others* v. *Vieira and Anor.* L. J. 22. 6. 1906.

The defendants, however, rely on the non-interposition by the Crown at the time, or within a year and a day, of the passing of the transports.

In *Lalbahadursingh* v. *McPherson and Others* (1939) L. R. B. G. 80 this Court examined the effect of advertising transport. "The question of the effect in this Colony of advertising a transport has been considered in a number of cases. In the *Petition of Van Kinschot,* Chalmers, C.J., quoted with approval the following passage from *Burge's* Commentaries on Colonial and Foreign Law, Volume 2, page 581:—

> There are some cases in which the right is preserved notwithstanding there has been no opposition in the sale interposed. Thus it need not be interposed where the right of the third person is manifest. Neither can the omission to make his opposition prejudice the person who is in actual possession of the property on his own behalf.

In *Fauset* v. *Baveghems,* L J., 5th March, 1912, Berkeley, J., decided that the person in possession who after advertisement of an intended transport does not oppose is estopped from setting up title by prescription if even his prescriptive right could be established. In *Abdool Rohoman Khan* v. *Boodhan Maraj* (1930) L. R. B. G. 9, Savary, J, decided that the advertisement of an intended transport *is not equivalent to actual notice* as regards the person in possession for the statutory period. In *Ferreira* v *Ho-A-Hing* (1896) L. R. B. G. p. 78 the plaintiff had *actual notice* of the execution sale and did not oppose. Sheriff, J. observed 'silentium is to be regarded as contumax . . . . . he could have stopped the sale in its inception but by standing by he is to be regarded as waiving or abandoning any right that was in him'. In *South African Association* v. *Van Staden* 9 S. C., p. 95, it was held that inasmuch as no objection was made by the defendant to the sale, after *due notice* thereof had been given, he was not entitled to set up his right by prescription against the purchasers at a sale in execution without notice of the defendants' claims."

The consequences which flow from the advertisements, depend on whether the Crown were, at the time of the transports, in actual possession of the second depth and whether if in such possession, they had due or actual notice of Chichester's intention to pass transports. The defendants say the Crown were out of possession and alternatively that the Crown had adequate notice.

What are the facts?

As shown, Chichester did not by the 1842 Decree acquire ownership of the second depth and no proof has been offered of possession thereof by him at any time prior to the transports.

In the year 1849 the Crown owned the land, and, in the absence of any evidence to the contrary, must be presumed to have been in possession.

In this connection the provisions of section 10 of Ordinance 6 of 1838, which were not repealed until 1861, are worthy of notice. It is not suggested that the Crown ever had occasion to implement the section in relation to the second depth East half Yorkshire Hall.

The Court finds that Downer's plan and Chichester's transports were made and passed at the time the Crown were in actual possession of the land purported to be conveyed.

What notice did the Crown have?

It is true the advertisements referred to Downer's "diagram deposited in the Registrar's Office," but that diagram, the advertisements stated, was of the "East half of plantation Yorkshire Hall," not of the second depth thereto. "Yorkshire Hall" at that time consisted of a first depth only, the advertisements were not, in the opinion of the Court, actual notice to the Crown in possession. The Court holds that the Crown was not deprived of ownership by virtue of the transports and that the plaintiff Madray is not estopped from setting up title derived from the Crown. The findings by the Court on the Chichester Letters of Decree and Transports apply with equal force to the 1850 Letters of Decree issued to Success Jonathan in respect of some of the lots.

Assuming, however, that Chichester passed a good title to his transportees, have the defendants or any of them established a right of inheritance derived from the transportees or any of them?

The defendants Jane Johnny and James Mitchell may be eliminated from consideration. The first named makes no claim to ownership by inheritance or prescription. James Mitchell abandoned his defence.

The defendant Groobie had prepared and put in evidence a genealogical tree (Exhibit A4) purporting to show his descent and that of other defendants from the transportees of Chichester. The document is based entirely on hearsay and the Court does not accept it as satisfactory evidence of the facts therein recorded.

Assuming it, however, to be an accurate record it does not help the defendants' case.

Emmanuel Sealey claims by inheritance through Cecilia Weatherspoon who derived from Success Jonathan. In his evidence he stated that his father was Edward Sealey, his mother Maria Simon and that they were not married. It was Edward Sealey who was related to or descended from Cecilia Weatherspoon and, in order to inherit, this defendant must establish his descent from her. Although in Roman Dutch Law "a mother makes no bastard" a bastard has no lawful father and therefore no right of succession *ex parte paterna*" (*Lee's* Introduction to Roman Dutch Law, page 34) Emanuel Sealey has no claim by inheritance.

Martin Luther Cox claims inheritance through King Campbell. This defendant stated that his mother was the daughter of Sabina George, and that Sabina George was the daughter of King Campbell. He did not know whether lot 12 transported to King Campbell was sold at execution. The lot was in fact sold at execution to Success Jonathan in 1850 (Exhibit Z1). This defendant has no claim by inheritance.

James Yetteau or James Yetteau Brandis stated that he claims inheritance through Yetteau Brandis and Cockroy Yetteau. He further states that he claimed "under Joseph as heir of Toby Jacob." On these claims the defendant offers no evidence apart from the bare statements. In A4 the parents of this defendant are shown to be November Yetteau and Alice Wood. November Yetteau was previously married to or lived with Mary Adams. (There is no evidence of any marriage). Mary Adams was descended from Cecilia Weatherspoon but there is no relationship of this defendant to Cecilia Weatherspoon. Moreover, lot 16 transported to Cockroy Yetteau was sold to one Ferreira in 1873.

James Yetteau or James Yetteau Brandis has no claim by inheritance.

Paul Johnnie. There is no evidence of any claim by inheritance by this defendant. Moreover, the defendant Groobie stated that the lot transported to Paul Johnnie, presumably an ancestor of this defendant, was sold to Success Jonathan.

John Groobie stated that Success Jonathan married Frances Weatherspoon. He claims that through Cecilia Weatherspoon who, it is alleged, succeeded to the property of Success Jonathan through Frances Jonathan, her sister, he is entitled of inheritance to a portion of the second depth. He, however, stated that Frances Weatherspoon predeceased Success Jonathan and he gives no evidence of any marriage between Frances Jonathan nee Weatherspoon and Success Jonathan. The only evidence of the marriage of Frances Weatherspoon and Success Jonathan is the statement by this defendant that his grandfather so informed him.

In *Chow* v. *Fung and Others* (1920) L.R.B.G. page 84, Dalton, J., dealt with the evidence which should be required to establish the fact of marriage, and although "cohabitation with the required repute as husband and wife is proof that the parties between themselves have mutually contracted the matrimonial relation," some definite evidence must be offered, especially in a colony where concubinage is common, of that repute.

The evidence of this defendant is not sufficient for the Court to find marriage of Success Jonathan with Frances Weatherspoon or to find the fact of marriage of the defendant's parents. Moreover, Frances Jonathan had no interest in the property other than the interest she may have acquired through marriage in community with Success Jonathan. Assuming such was her status, on her death prior to that of Success Jonathan and prior to acquisition of Success Jonathan of any prescriptive interest she left no interest in the property which could devolve on her heirs.

The Court finds that this defendant has no claim by inheritance. For the same reason this Court finds that none of the defendants has any claim by inheritance to any of the lots for which Success Jonathan obtained Letters of Decree in 1850.

The penultimate question for solution is, have the defendants established title to the land in dispute, arising out of the possession by those under whom they claim, or by their own possession, or by a combination of their predecessors' and their own possession.

In Lalbahadursing v. *Mc Pherson and Others,* this Court stated:— "Prior to the enactment of the Ordinance (Civil Law of British Guiana, chapter 7) Roman Dutch Common Law fixed the prescriptive period at a third of a century. By section 3 of the Ordinance and from and after the 1st January, 1917, the law governing immovable property in this colony ceased to be Roman Dutch Law, the English Common Law of real property being at the same time declared inapplicable. Section 4 (1) of the Ordinance provides that title of immovable property may be acquired by sole and undisturbed possession for 30 years if that possession is established to the satisfaction of the Supreme Court which may issue a declaration of title in regard to the property in the manner prescribed by any Ordinance or Rules of Court. It would appear that after the 1st January, 1917, a prescriptive title cannot be acquired except in manner laid down by the section. What however is the position with regard to prescriptive rights accrued under Roman Dutch Common Law prior to 1st January, 1917?

These rights would appear to be preserved by subsection 3 of section 2 of the Ordinance and it follows that if the defendants were able to establish adverse possession for 33⅓ years prior to the commencement of the Ordinance effect would have to be given to their possession notwithstanding section 4 (1) of the Ordinance."

In order, however, to establish the acquisition of a possessory title by their predecessors the defendants must show—

(*a*) that their predecessors were in hostile and exclusive possession of the land in question continuously for a period of 33⅓ years and that such possession was held under a claim of right;

(*b*) that the defendants succeeded to that possessory title.

The only predecessor through whom any defendant could possibly put forward any claim is Cecilia Weatherspoon. Assuming that Success Jonathan could have acquired a prescriptive title, that title would not have been acquired until 1883. Frances Jonathan, however, died in 1866, prior to the acquisition of any possessory title by Success Jonathan. At the time of her death therefore Frances Jonathan owned no possessory interest in the land, assuming her marriage in community, and at her death no possessory interest passed to her heirs. Cecilia Weatherspoon had, therefore, no claim and those who claim under her by virtue of a possessory right in Frances Jonathan accordingly have no claim. The other defendants who claim through King Campbell, Yetteau Brandis, Cockroy Yetteau or Paul Johnnie have not established any legal or possessory title in any of these transportees

These defendants must therefore rely on their own possession for the prescriptive period.

What is the evidence of the defendants' possession? Summarised it is as follows—

Joseph Thorpe Whitehead stated: "I never heard of second depth Yorkshire Hall, Raisonable or Taymouth Manor, never knew of a second depth. In 1878 there were people on Yorkshire Hall, they had watch houses on Yorkshire Hall and lived on Blenheim by my father's permission". The witness, it should be observed, does not identify any of the defendants as being on Yorkshire Hall in 1878. Further, "in 1901 there were people cultivating East half Yorkshire Hall, there was cultivation on south portion of East half Yorkshire Hall, the cultivation was continued until 1926, the black people's cultivation. These cultivations were among coconut trees. I knew these coconut trees belonged to the black people, Enoch Johnnie, Andrew Johnnie, Mrs. Semple and James Yetteau. "When Madray went in to plant coconut trees there was strong opposition to Madray." It is to be noted that this witness, apart from identifying James Yetteau, does not identify any of the defendants as owners of the coconut trees to which he refers. The value of his evidence may be gauged by the following statements he made in answer to the Court, "Have never been on Yorkshire Hall, never walked on East side line of Yorkshire Hall, never walked on Middle Walk of Yorkshire Hall, never been on Yorkshire Hall from the sea. I knew that people were cultivating East half Yorkshire

Hall because I saw them from the railway. I do not know if the cultivations were on the railway reserve". This witness does not establish occupation by any of the defendants of any portion of the second depth East half Yorkshire Hall for any period of time Moreover, the litigation appears to have been in some measure induced by this witness informing the defendants that "East half Yorkshire Hall belonged to them."

William Limerick stated that he worked with a surveyor named Massiah in 1896 while a line was being cut from Mahaica Railway bridge to Mahaicony. Provisions were planted on Yorkshire Hall, black people were cultivating, the land belonged to black people. The railway line went through the provisions. This witness does not identify any of the defendants as cultivators on Yorkshire Hall, and although according to him the railway line went through the cultivated ground there is no evidence of any compensation having been paid to any of the cultivators for loss of ground, except a statement by Groobie that one Adams received compensation. Limerick claimed that his wife, whose name was Joseph, inherited land at Yorkshire Hall and licensed the defendants Mitchell, Sealey, Yetteau and Cox to work the land. He added that he knew nothing about a second depth at Yorkshire Hall. It is impossible from the evidence of this witness for the Court to find occupation by the defendants or any of them for the prescriptive period.

Thomas Donaldson stated that he bought a house at Yorkshire Hall and lived there. That one Semple gave him permission to remain on the land, that he went on the land about two years before the railway was built, that the house was on East half Yorkshire Hall, about 450 rods from the North boundary of Blenheim. He further stated that when the plaintiff's father Madray bought the place he obtained permission from Madray to remain on the land. He lived there for about twelve years. He further stated that black people were still on the land and cultivating it—Enoch Johnnie, Paul Bishop, Isaac Barnwell, Isaac Hughes, Frederick Hughes, etc, none of whom is a defendant.

This evidence does not show occupation by the, defendants of any portion of the second depth Yorkshire Hall which would enable them to claim possessory title.

Albert Robert Gonsalves gave evidence to the effect that in 1916 he possessed a coconut factory and operated this until 1930, and that he bought nuts from all the neighbouring estates as well as from the black people. The nuts he bought from the black people he entered in his books as having been bought from Mahaicony or from Groobie the defendant. This witness' evidence does not assist the Court on the question as to whether or not the defendants or any of them had possession of the second depth Yorkshire Hall for the prescriptive period.

James Yetteau Brandis stated that he "grew up" on Yorkshire

Hall and that his father's cottage was on the South of the railway line which did not, however, exist at that time. That one Johnnie, one Sealey, one Cox and one Paul Johnnie lived there. That Toby Jacob's heirs lived on both sides of the Canal and that people were cultivating, amongst others King Campbell, Johnnie and one Cox. He stated that he left Yorkshire Hall and went to live at Zes Kinderen after the railway was built and that he cultivated his land until the plaintiff obtained an injunction in this case. It is not clear from this witness' evidence whether the land he cultivated was on the first or second depth of the estate and he appears to have left the land wherever it was, on several occasions for the gold fields or diamond fields. This witness is somewhat more precise than the other witnesses but not sufficiently so as to enable this Court to find occupation by him for the prescriptive period.

Emmanuel Sealey stated that he has known Yorkshire Hall for thirty years. That his grandmother, Polly Romeo, lived at Yorkshire Hall and that he lived there with her since the age of nine, and that in 1906 she gave him a piece of land to cultivate: It is not clear whether this piece of land was situate on the second depth of Yorkshire Hall. Assuming, however, that it was so situate and that he was in possession from that date until action brought, this defendant has not been in possession for the required period.

Martin Luther Cox stated that he first went to Yorkshire Hall before the railway was built and lived with his grandmother Sabina Campbell. That his grandmother farmed on Yorkshire Hall until 1919 and that he also had a farm there. When or bow he acquired the farm he did not state, except that he claimed through King Campbell. This witness does not assist the Court as to the precise length of his occupation, if any, of any portion of the second depth of the estate.

John Groobie. This defendant stated that he was born in 1878. From 1893 until 1898 he worked in the goldfields. Between 1888 and 1905 he was in the Mahaicony district but was not living at Yorkshire Hall. During those years although he went from time to time to Yorkshire Hall he was not cultivating land there although his grandfather and brothers were. This witness does not make out any occupation of the land for any period.

As is apparent from this short survey of the evidence all the witnesses were extremely vague as to time and could not indicate any particular and uninterrupted period of 33⅓ years occupation by the defendants which would enable the Court to find acquisition by them of a possessory title. If the second depth Yorkshire Hall was ever occupied by the defendants or any of them, or by those they claim as their predecessors, it is impossible for the Court, on the evidence, to say for how long that occupation

endured. The plaintiff has traced his title from the Crown and the Court is satisfied that the Crown were and are the legal owners of the second depth Yorkshire Hall. The onus is upon the defendants to establish continuous and adverse possession for the prescriptive period and thus destroy the rights of the plaintiffs. They have failed to do so.

The final question is as to the position of the Crown in the litigation. The point was taken that the Attorney General is wrongly joined as plaintiff. Whatever the opinion of the Court may be on the submission, the Attorney General was joined by order of the Court and on reference to the note of the Judge who made the order it is clear that it was made by consent of the parties. The submission therefore falls to the ground.

There must be judgment for the plaintiffs on their respective claims and on the counterclaim. The declarations and injunction invoked by the plaintiffs are granted in terras of the statements of claim. The sum of $200 against the first five named defendants jointly and severally is awarded to the plaintiff Madray as damages for their acts of trespass. The plaintiffs to have their costs on the claim and counter claim.

Judgment for plaintiffs.

Solicitors: *J. Edward de Freitas,* for plaintiff Madray;

Percy W. King, Crown Solicitor, for plaintiff the Attorney General;

R. G. Sharples, for all defendants except Mitchell and Groobie.

E. MARS & ANR. *v.* L. BAPTISTE & ANR.

ELVIRA MARS and MARY BRANKER,
Appellants (Defendants),
v.
LAWRENCE BAPTISTE and PHILLIPPINA BAPTISTE,
Respondents (Plaintiffs).

[1939. No. 337.—DEMERARA.]

BEFORE FULL COURT: CAMACHO, C.J. and FRETZ, J.

1940. MAY 28, 29, 30. AUGUST 26.

Magistrate's Court—Jurisdiction of—Ouster of—Where bona fide question of title involved—Not by mere fictitious pretence of title.

Appeal—Whether bona fide question of title involved—Evidence for and against, before magistrate—Appeal Court will not interfere with his decision.

Immovable property—Sale of—Purchase money paid—No legal title in vendor—Purchaser satisfied—Rents and Profits received by vendor—Held in trust for purchaser.

The jurisdiction of the magistrate is not ousted by mere fictitious pretence of title, and an assertion of right need not be regarded where the party's own showing or other manifest circumstances satisfy the magistrate that the claim is groundless.

It is the magistrate's duty to determine, on the evidence adduced, whether a *bona fide* question of title is involved, and, if there is evidence both for and against the contention this Court will not reverse the magistrate's decision. A vendor of land did not have a good legal title therefor. He sold the land to, and received the purchase money from a, purchaser who was satisfied with not being able to acquire a good title.

Held, (1) that the vendor cannot keep the purchase money, and receive the fruits of the land;

(2) that the vendor must be deemed to hold the rents and profits of the land as trustee for the purchaser.

Appeal by the defendants Elvira Mars and Mary Branker from a judgment of the Magistrate, Georgetown Judicial district, in favour of the plaintiffs Lawrence Baptiste and Phillippina Baptiste. The necessary facts and arguments appear from the judgment.

A. J. Parkes, for appellant Mars.

J. A. Luckhoo, K.C., for appellant Branker.

C. Shankland, for respondents.

Cur. adv. vult.

The judgment of the Court was delivered by the Chief Justice, as follows:—

The appeal is against the judgment of the Magistrate for the Georgetown Judicial District entered in favour of the respondents in the action brought by them against the appellants for rents, rates and taxes alleged to be due by the appellants to the respondents. The respondents are husband and wife and the dispute arose in connection with their ownership of North half of lot number 56 or 80 Breda Street, Georgetown. Lawrence

Baptiste claimed ownership of one undivided half of the half lot under the will of Maria Basch who died in the year 1867 and also by virtue of his possession of the undivided half of the half lot from the year 1882 until the year 1934, when, it is alleged, Lawrence Baptiste sold his undivided half share to his wife Phillippina Baptiste. The remaining undivided half of the half lot was acquired by the appellant Elvira Mars nee Reid under the will of Louisa Davison who died in the year 1889.

By agreement of sale dated the 20th June, 1934 and made between the appellant Mars and Phillippina Baptiste it is witnessed that Mars sold to Phillippina Baptiste, for the sum of $125, "all of her right, title and interest in and to the said north half of lot No. 56 or 80 Breda Street." By the same instrument Mars agreed to relinquish all claim to any interest in the said half lot and undertook to execute all documents necessary to confer oh Phillippina Baptiste a legal title although by the instrument it is acknowledged that Mars is unable to confer a legal title.

Prior to the acquisition of any interest by Phillippina Baptiste in the half lot Lawrence Baptiste and Mars, as owners of the half lot, entered into an agreement of lease with one Ruby Lindo whereby a house lot on the half lot was leased to Ruby Lindo for a term of four years commencing on the 4th March 1932. Lindo, it is alleged, paid, on at least one occasion, the rent to Lawrence Baptiste and Mars. Before the lease terminated Branker entered into occupation of the building and was permitted by Lawrence Baptiste and Mars to occupy the land on which the house stood on a yearly tenancy, it is alleged, but otherwise on the terms of the lease to Lindo. Lawrence Baptiste deposed that Branker in, the year 1934 attorned tenant to him by the payment of rent to him as landlord and in respect of the year 1935. On the 4th March, 1934 Mars entered into an agreement of lease with Branker whereby she leased to Branker the one half of the half lot sold by her to Phillippina Baptiste on the 20th June, 1934 for the term of ten years at a rental of $15 per annum, rates and taxes. Branker has refused to pay the rents, rates and taxes to Phillippina Baptiste and has paid the rent and outgoings to Mars who, notwithstanding the instrument of sale of the 20th June, 1934 has retained these moneys refusing to deliver them over to Phillippina Baptiste. The question the Magistrate had to decide, as this Court has to determine, is whether Mars is entitled to retain these moneys or is compellable to account therefor and to pay over to Phillippina Baptiste.

It is objected that the Magistrate had no jurisdiction inasmuch as the decision of the question involved determination of the question of ownership of immovable property and that a *bona fide* dispute as to title had arisen. The law on the subject is not in doubt. The Magisterial jurisdiction is not ousted by mere fictitious pretence of title and an assertion of right need not be regarded

where the party's own showing or other manifest circumstances satisfy the Magistrate that the claim is groundless. It is the Magistrate's duty to determine on the evidence adduced whether a *bona fide* question of title is involved and if there is evidence both for and against the contention this Court will not reverse the Magistrate's decision. In this case the Magistrate had before him a lease made by Lawrence Baptiste and Mars, as owners, to Ruby Lindo. By joining with Baptiste in this document Mars acknowledged or acquiesced in the claim by Lawrence Baptiste to ownership in one undivided half in the half lot. The Magistrate also had before him the sale by Mars to Phillippina Baptiste whereby Mars sold the other undivided half share in the half lot to Phillippina Baptiste and wherein it is recited that Phillippina Baptiste is the owner of the other undivided half share of the half lot. The Magistrate, in the view of this Court, rightly decided that he had jurisdiction, for if the instrument of sale is a genuine document it is clear that while acknowledging the ownership of Phillippina Baptiste to one undivided half share in the half lot she sold to Phillippina Baptiste the other undivided half. It is objected that notwithstanding the sale and notwithstanding the present ownership of Phillippina Baptiste of the whole of the half lot, the respondents are precluded from recovering the rent received from Branker by Mars on the ground that they are not transportees of the property in question. In short, that being equitable owners, and not legal owners, they cannot maintain the action. The Court rejects this contention. By the agreement of sale from Mars to Phillippina Baptiste it is expressly acknowledged that neither party to the agreement possessed any title deeds and that Mars was unable to pass a valid transport or legal title. Does the lack of a legal title exclude Phillippina Baptiste from the benefit of the fruits of the land sold to her by Mars and occupied by Branker? In the opinion of the Court it does not. It is undeniable that a purchaser of land does not become entitled to the profits thereof until the completion of the purchase or until the date fixed for completion. From the completion of the purchase or from the date fixed therefor it is the duty of the vendor in possession who receives the rents to hold them for the purchaser (*Plews* v. *Samuel* (1904) 1 Ch. 468, 469). Although in this case the legal title has not passed by reason of the inability of Mars to confer such a title Phillippina Baptiste has paid the purchase price to Mars and Mars, as previously stated in this judgment, has agreed to relinquish every claim to any interest in the land sold. Although Mars is incapable of giving transport the instrument of sale and the payment of the purchase money by Phillippina Baptiste show acceptance by her of Mars' title, such as it is, Phillippina Baptiste is therefore entitled to possession. Within the contemplation of both parties the purchase so far as it could

be completed was completed on 24th June, 1934. Mars cannot keep the purchase money and receive the fruits of the land. In the language of Knight Bruce, V.C. the vendor "cannot have both money and mud." If Mars keeps the purchase money, as she has done, she must be deemed to hold the rents and profits as trustee for Phillippina Baptiste. In *Bennett* v. *Stone* (1903) 1, Ch., p. 524, the following relevant observations fell from Cozens-Hardy, L.J., "the position of vendor and purchaser under a contract which is silent as to possession and as to interest does not now admit of doubt. From the time when the purchaser could prudently take possession—that is to say, from the time when a good title is first shown (and this Court would add, from the time when title is accepted by the purchaser)—the parties, in the view of the Court in Equity, change characters. The purchaser becomes the owner of the land, and entitled to the rents and profits and bound to discharge outgoings, and the vendor becomes entitled to the purchase money, with interest until actual payment, and in respect of this right the vendor has a lien upon the land for the unpaid purchase money which the Court will enforce."

In the opinion of this Court the Magistrate rightly decided that the respondents are entitled to recover the rents and profits received by Mars from Branker.

With regard to Branker the Court is not satisfied of attornment by Branker to the respondents, or either of them. Branker holds under a lease from Mars dated prior to the sale by Mars to Phillippina Baptiste. Under the lease Branker's covenants require her to pay the rents, rates and taxes to Mars and the Court holds that Branker was not wrong in law in making payments to her. The lease under which Branker holds should be assigned to Phillippina Baptiste by Mars. (*Tasker* v. *Small* 3 M. & C. pp. 69 & 70). The Court dismisses the appeal of the appellant Mars with costs to be paid by her to the respondents. The Court allows the appeal of the appellant Mary Branker with costs to be paid by the respondents.

THE WEST INDIAN COURT OF APPEAL

REPORTS OF DECISIONS

OF

THE COURT

SITTING IN

TRINIDAD.

[1940.]

JUDGES OF THE COURT:

G. C GERAHTY, President (Chief Justice of Trinidad and Tobago).
E. A. COLLYMORE, Chief Justice of Barbados.
M. V. CAMACHO, Chief Justice of British Guiana.
J. H. JARRETT, Chief Justice of the Leeward and Windward Islands.

C. HOPKINSON AND P.C. DANIEL& ANR.

IN THE WEST INDIAN COURT OF APPEAL.

CAMILLA HOPKINSON, Plaintiff-Appellant,

AND

P.C. DANIEL AND ANOR., Defendants-Respondents.

(1940—No. 1., TRINIDAD AND TOBAGO).

Before GERAHTY, C.J., Trinidad and Tobago, (President); COLLYMORE, C.J., Barbados; and CAMACHO, C.J., British Guiana.

26TH JULY, 1940.

Right of Appeal—West Indian Court of Appeal (*Amendment*) *Rules, 1930—Documents to be left with Registrar on Appeal—Affidavit of service of Notice of Appeal—Rule 11* (*1*)*—Omission to file—*"*Documents & Papers*"*—Rule 12* (*4*).

The appellant brought his appeal on the 1st February, 1940. The documents and papers enumerated in paragraphs (*a*) to (*g*) of Rule 11 (1) of the West Indian Court of Appeal (Amendment) Rules, 1930, were left with the Registrar within the time prescribed by the said Rule; but the affidavit of service, together with the copy of the said notice of appeal, required by the said Rule, was not filed until long after the time limited by the said Rule, and without leave.

On the hearing of the Appeal, Counsel for the Respondents took the preliminary objection that the affidavit of service of the notice of Appeal was a "necessary affidavit" within the meaning of paragraph (*d*) of Rule 11 (1), and submitted that the appeal stood dismissed by reason of the operation of Rule 12 (4) of the said Rules, default having been made in leaving the said affidavit within the prescribed time.

Counsel for appellant contended that the affidavit of service was not one of the "documents & papers" enumerated in paragraphs (*a*) to (*g*), and that Rule 12 (4) had no application. He submitted that there was no penalty attached to the omission, and that the Court should waive the non-compliance with the rule.

Held, (i). The affidavit of service of the Notice of Appeal, required to be left with the Registrar under rule 11 (1) of the West Indian Court of Appeal (Amendment) Rules, 1930, is not one of the "documents or papers" enumerated in paragraphs (*a*) to (*g*) of the said Rule, to which the sanction under Rule 12 (4) applies.

(ii). The affidavit of service of the Notice of Appeal is an essential requisite and a condition precedent to the setting down and prosecution of the Appeal.

E. P. Bruyning, for Appellant.

Solicitor-General, for Respondents.

The Judgment of the Court was delivered by the President as follows:—

On this appeal coming on for hearing, a preliminary objection was taken by the learned Solicitor-General on behalf of the Respondents that default has been made by the Appellant in leaving with the Registrar an affidavit of service of the notice of Appeal upon all parties directly affected by the appeal within 28 days from the date when the appeal was brought as required

by Rule 11 (1) of the West Indian Court of Appeal (Amendment) Rules, 1930.

The learned Solicitor-General in support of his contention pressed on the Court the view that the omission to leave the affidavit of service with the Registrar brings into operation Sub-Rule (4) of Rule 12 and that on the expiration of the period prescribed for leaving the document with the Registrar the appeal stood dismissed with costs.

It was his contention that the affidavit of service is one of the documents and papers referred to in paragraph (*d*) of Sub-Rule (1) of Rule 11.

In the alternative, assuming that this contention is not sound, he submits that the affidavit of service of the notice of appeal is an essential requisite and a condition precedent to the setting down of the appeal for hearing, the foundation in fact for the continuation of the appeal.

We find ourselves in agreement with the submission for the appellant that the affidavit of service is not one of the documents or papers enumerated in paragraphs (*a*) to (*g*) of Sub-Rule (1) of Rule 11 and therefore the sanction under Sub-Rule (4) of Rule 12 has no application.

On the other hand this Court views the leaving of the affidavit of service with the Registrar as a condition precedent to the prosecution of the appeal.

Failure to take this necessary step in the proceedings constitutes non-compliance with a statutory requirement inasmuch as the rule directing the step to be taken has statutory force.

South Staffordshire Waterworks Co. v. *Stone* (1887) 19 Q.B.D. 168.

Duke of Atholl v. *Read* (l934) 50 T.L.R. 264.

The right of appeal is created by statute subject to certain conditions. The right can only exist subject to compliance with those conditions, which prescribes the mode in which that right shall be exercised.

This Court is as much bound by these conditions as are litigants and the Court is not seized of any matter in which the statutory requirements subject to which the jurisdiction of the Court is to be exercised, have been omitted or neglected.

We conclude therefore that this appeal should be struck out for want of jurisdiction and it is struck out accordingly.

(Note:—On the application of the Appellant, Respondents not objecting, no costs were awarded).

E. DREPAUL *v.* MOHABEER.

EDMUND DREPAUL *et al,* Appellants (Defendant),

v.

MOHABEER, Respondent (Complainant).

[1939. No. 339.—DEMERARA]

BEFORE FULL COURT: CAMACHO, C.J., FRETZ AND LANGLEY, JJ.

1940. JANUARY 23, 26; FEBRUARY 9.

Criminal law and procedure—Illegal impounding—Nature of offence—Against owner or occupier of land—Object of offence—Interest of public order—To prevent breaches of the peace.

Criminal law and procedure—Illegal impounding—Owner or occupier of land from which animal driven by unauthorised person—Proper complainant—Pounds Ordinance, cap. 93, s. *10.*

Criminal law and procedure—Illegal impounding—Authorisation to take animal from private premises or land—To be in writing—Pounds Ordinance cap. 93, s. 10 (*c*).

Criminal law and procedure—Convictions—Must be certain.

The owner or occupier of land from which animals are driven by an unauthorised person is the proper complainant under section 10 of the Pounds Ordinance, chapter 93.

Exemption under section 10 (*c*) of the Pounds Ordinance, chapter 93, can only be claimed if the authorisation is in writing.

The appellants were convicted for taking on the 17th May, 1939, 78 head of cattle from private land at Plantation Phillippi, Corentyne, Berbice, they not being the owners or occupiers of the land or persons authorised in writing by the owners or occupiers, contrary to section 10 (*c*) of the Pounds Ordinance, Chapter 93. In the convictions the animals were enumerated, the sex of each of the animals were specified, and the animals were described as the property of the complainant and others. On appeal, it was urged that there were uncertainty of ownership, and uncertainty of identification, of the animals, and that the convictions were therefore bad for want of certainty.

Held, (1) That the section was framed in the interest of public order, and to prevent those breaches of the peace which would be likely to result from illegally impounding under this section, which is a form of aggravated trespass to land;

(2) that an offence under the section is committed not against the owner of the animal as such, but against the owner or occupier of land as such;

(3) that the convictions were sufficiently certain inasmuch as the date of the offence and the locality where the offence was committed were stated, and the number and sex of the animals were specified.

Appeal by the defendants from an order of Mr. A. C. Brazao, Magistrate, Berbice Judicial District, convicting the defendants Edmund Drepaul, George Drepaul, Moses Drepaul, Peter Drepaul and Chalmers Kyte for taking 78 head of cattle from private land, they not being the owners or occupiers of the land or persons authorised in writing by the owners or occupiers, contrary to section 10 of the Pounds Ordinance, chapter 93.

J. A. Luckhoo, K.C., for appellants.

H. C. Humphrys, K.C., for respondent.

Cur. adv. vult.

The judgment of the Court was read by the Chief Justice, as follows:—

The appellants were convicted by the Magistrate for the Berbice Judicial District for taking 78 head of cattle from private land, they not being the owners or occupiers of the land or persons authorised in writing by the owners or occupiers, contrary to section 10 of Chapter 93.

The Magistrate found the following facts:—

The respondent and his brother Shivnarain are, and were at the material time, the occupiers of the second depth of Plantation Phillippi, Corentyne Coast, Berbice. Phillippi is adjacent to Plantation Kilmarnock which is occupied by the father of the first four appellants. None of the appellants owns or occupies any part of Phillippi. No authorisation in writing was given to the appellants, or any of them, by the occupiers of Phillippi to remove cattle therefrom. On the night of the 17th of May, 1939, two of the appellants armed with guns, and accompanied by the other appellants broke the wire fences separating Phillippi from Kilmarnock and drove a large number of cattle from Phillippi into a pen at Kilmarnock. On the following day the cattle so removed were impounded at Tarlogie as animals found straying at Kilmarnock. On the same day the respondent visited the pound and ascertained that 78 head of cattle had been impounded of which 36 belonged to him, the remainder being animals belonging to persons who were permitted by the respondent to depasture them at Phillippi.

The evidence further discloses that some time in 1939, the respondent verbally authorised Edmund Drepaul to capture strays on Phillippi.

The defence put forward by the appellants in the Court below was in each case an *alibi*. Four of the appellants, apart from their own testimony, offered no other evidence in support of this defence and the witness called by the fifth defendant, Chalmers Kyte, to establish his *alibi* was not believed by the Magistrate.

On the facts proved before the Magistrate the Court is of opinion that the appellants were rightly convicted. The convictions are however attacked on the following grounds:—

1. It was not competent for the respondent to bring the charge in respect of cattle which did not belong to him.
2. No proof was offered of the number of cattle taken from Phillippi.
3. No proof having been offered of the ownership or description of each animal, the convictions are bad for want of certainty.
4. The appellant Edmund Drepaul was authorised by the respondent to take stray cattle from Phillippi and the other appellants were his agents or servants.

With regard to the first objection, section 10 (*c*) of the Ordinance provides that every one who with the view of making any animal a stray takes that animal from private land of which he is not the owner or occupier or person authorised in writing by the owner or occupier shall be liable on conviction to the penalty thereby imposed.

Learned counsel who appeared for the appellants pressed on the Court the argument that the only person, other than the police, competent to prefer a charge under the section is the owner of the animal unlawfully removed. When, however, regard is had to the language of the section it is clear that an offence under the section is committed not against the owner of the animal but against the owner or occupier of the land, unless indeed the occupier or owner of the land is also the owner of the animal. It would appear that this section was framed in the interest of public order and to prevent those breaches of the peace which would be likely to result from this form of aggravated trespass to land.

This court is of opinion that the owner or occupier of land from which animals are driven by an unauthorised person is the proper complainant under the section.

As to the second objection it is sufficient to say that the appellants were seen driving a considerable number of cattle from Plantation Phillippi, that it was proved that cattle driven from Phillippi were impounded and that at the pound the respondent recognised 36 of the animals as his property and 42 of them as the property of his licencees who had depastured the animals at Phillippi. The evidence offered to the Magistrate on the number of animals removed from Phillippi is, in the view of the Court, adequate.

The third objection raises the question of the validity of the conviction as drawn up by the Magistrate. The conviction, it is said, is bad for want of certainty. The conviction does no more than enumerate and specify the sex of the animals describing them as “the property of the complainant and others.” Uncertainty of ownership and uncertainty of identification are therefore the basic grounds of objection. This uncertainty it is then urged would deprive the appellants of their plea of *autrefois convict* on any subsequent charge in relation to the same offence.

The Court holds the conviction sufficiently certain inasmuch as the date of the offence and the locality, where the offence was committed, are stated and the number and sex of the animals specified. The appellants would not, regard being had to the particularity of the conviction, be subject to a second conviction for the same offence. The test that would be applied is “have the accused been convicted of an offence which is the same or practically the same offence as that with which they are charged.” On any subsequent prosecution evidence which showed that the animals were of the animals taken on the 7th of

May, 1939, from Phillippi would enable the appellants successfully to plead *autrefois convict.*

To the conviction as drawn may well be applied, although its application is not necessary, the maxim "*id certum est quod certum reddi protest.*"

The last objection cannot be sustained and for the reasons, first, the authorisation was an authorisation to impound cattle straying on Phillippi. The animals impounded by the appellants were not straying on Phillippi. Secondly, exemption under the section can only be claimed if the authorisation is in writing. In this case there was no written authorisation.

The appeal is dismissed and costs are awarded to the respondent. Costs fixed: disbursements $10:—Counsel's fee $20.

Appeal dismissed.

W. ST. C. THWAITES AND S. KHAN.

IN THE WEST INDIAN COURT OF APPEAL,

WILLIAM ST. CLAIR THWAITES, Defendant-Appellant,

AND

SAFIRAN KHAN, Plaintiff-Respondent.

[1940—No. 3—TRINIDAD AND TOBAGO.]

Before COLLYMORE, C.J., Barbados (President); CAMACHO, C.J., British Guiana; JARRETT, C.J., Leeward and Windward Islands.

31ST JULY; 1ST AUGUST, 1940.

Record of Appeal—"*Copy of Judgment or decision of Trial Judge*"—*West Indian Court of Appeal* (*Amendment*) *Rules, 1930, Rule, 11* (*f*)—*No written reasons for judgment at time of delivery—Oral Judgment—Reasons for Judgment subsequently given for purposes of record—Counsel's notes on trial.*

Preliminary point taken on hearing of Appeal.

By rule 11 (f) of the West Indian Court of Appeal (Amendment) Rules, 1930 one of the documents necessary for inclusion in the record for use on Appeal, is a copy of the judgment or decision of the trial judge. In this case, the learned trial judge whose decision was appealed from did not at the time he delivered judgment give his reasons in writing, but delivered an oral judgment.

After this appeal had been brought, the Registrar, in pursuance of directions to him given by the Court some years previously and observed in practice, requested the trial Judge to furnish him in writing with his reasons for judgment for incorporation in the record.

Appellant did not include in the record of the Appeal the written reasons so furnished by the trial Judge, but in place thereof substituted a copy of Counsel's notes of the oral judgment.

On the Appeal, Counsel for Respondent took the objection that the copy of the notes of the judgment taken by Counsel was improperly included in the record, and asked that the written reasons as subsequently furnished by the trial Judge should be used on the Appeal. He also cited *Huddleston* v. *Furness* (1899) 15 T.L.R 238.

Counsel for Appellant objected to the inclusion in the record and to the use by the Court of the written reasons. It was the duty of Counsel to take notes of the judgment for the purpose of the Appeal—*ex-parte Skerrat 28 Solicitors Journal 376.* He also cited *The King* v. *Local Government Board, ex-parte Arlidge* (1914) 1 K.B. 160; In *re McConnell* (1885) 29 Ch. D 76; *Lowery* v *Walker* (1910) 1 K.B. 173, at pp. 180—1, and (1911) A.C. 10 at p. 13.

Counsel also submitted that there was no Statute or Rule directing the Judge to put his reasons in writing subsequent to delivery of oral Judgment. He cited instances of Statutory directions to that effect, *e.g.*, O. 58 Rule 20 (b) of the R.S.C., England, (Appeal from County Court); Cap. 64, S.35, Laws of Trinidad; Privy Council Rules, dated 21st December, 1908; Ordinance No. 31 of 1931, S. 28, Laws of Trinidad, &c.

Held: That Counsel's notes of the judgment were improperly included in the record, and, following the practice of this Court, that the written reasons of the trial Judge should be used on the Appeal.

New trial ordered where trial judge omitted to decide certain vital issues raised on the pleadings and in the evidence.

Hannays, K.C., Wooding with him, for Appellants,

Wharton, for Respondent.

The Judgment of the Court was delivered by the Chief Justice of British Guiana as follows:—

The practice of this Court is to receive and consider the judge's reasons for his judgment whether those reasons were delivered in open court at the time or not. It is of advantage to this Court to have the judge's reasons for his conclusions before us. The practice however lacks confirmation by the rules and although the Court in the absence of any provision has moulded its own procedure we think that a rule should be made affirming the practice subject to such safeguards as to the rule making authority may seem proper.

With regard to Counsel's notes, these are, in our opinion, improperly included in the record. They are not of the documents required or needed nor has it ever been the practice to allow their inclusion and we consider the proper course is to order their removal therefrom. We will, however, in accordance with established practice permit Counsel to refer to and make use of his notes in the course of and for the purposes of his argument.

The Court proceeded to hear the Appeal and delivered the following judgment:—

The Court has come to the conclusion that the learned trial Judge has omitted to decide certain vital issues raised on the pleadings and in the evidence.

Having rejected the versions of the accident as related for the Respondent and for the Appellant, the learned trial Judge failed to decide:—

(1) how the accident occurred.

(2) the position of the deceased at the moment of impact and how he came to be in that position, and failed to deal satisfactorily with the question of contributory negligence.

This Court does not propose to determine the case finally and is of opinion, having regard to all the circumstances, that its proper course is to order a new trial.

So that the trial shall not be prejudiced the Court refrains from any expression of opinion on the merits of the case.

New trial ordered accordingly; the costs of the first trial and of this appeal to abide the result of the new trial.

G. JUGMOHANSINGH AND BHOLA.

IN THE WEST INDIAN COURT OF APPEAL.

GEORGE JUGMOHANSINGH, Defendant-Appellant,

AND

BHOLA (an infant by his guardian and next friend), Plaintiff-Respondent.

[1940—No. 2., TRINIDAD AND TOBAGO.]

Before COLLYMORE, C.J., Barbados (President); CAMACHO, C.J., British Guiana; JARRETT, C.J., Leeward and Windward Islands.

30TH AND 31ST JULY; 3RD AUGUST, 1940.

Time—Meaning of "day"—"Within 28days"—Extension of time—Application for—Procedure—"Court or Judge"—W.I.C.A. Rules, 1920, Rule 25—W.I.C.A. (*Amended*) *Rules, 1930, rr. 11* (*1*), *12* (*4*) *and 18* (*d*).

Preliminary point taken by the Respondent on the hearing of the Appeal. The facts are as follows:—

The last day of the period of 28 days, within which an appellant is required by R. 11 (1) of the W.I.C.A. (amended) Rules, 1930, to leave with the Registrar the affidavit and documents referred to by the said rule, expired in this case on the 3rd April, 1940. As was decided by the W.I.C.A. on 23rd August 1939, in the appeal of *Dhajoo* v. *Thom* (1939) L.R.B.G. 262, (on appeal from the Supreme Court of British Guiana) this day was also the last available day for applying for an order for extension of time to file the said affidavit and documents.

By the Rules of the Supreme Court, the office of the Registry closed at 4 p.m. At 4 p.m. on such last day the said affidavits and documents had not been left with the Registrar, but after the hour of 4 p.m. on that day Counsel and Solicitor for the appellant attended at the residence of a Judge of the Supreme Court and made an application *ex parte*, under Rule 18 (1) of the W.I.C.A. (amended) 1930 Rules, for an extension of time within which to file the necessary documents referred to in the said rule 11 (1). The Order was duly made by the Judge at his residence some time after 4 p.m. on that day, extending the time for filing the documents and papers within 7 days from the date of the Order.

At the trial it was contended by the Respondent:—

(*a*) That inasmuch as by Statutory Regulations the Office of the Registry of the Supreme Court closed at 4 p.m., and the documents and papers required by Rule 11 (1) had not been left with the Registrar before 4 p.m. on the last day for doing so, the appeal stood dismissed by reason of Rule 12 (4) of the Amended Rules, 1930; and, further, that the Order extending the time for filing the record having been made after 4 p.m. on that day was ineffective, because the appeal already so stood dismissed.

(*b*) That the terms of the order did not extend the time for filing the affidavit of service of the notice of motion, and the appeal should therefore be struck out, having regard to the decision of the Court in *Hopkinson* v. *Daniel & anor*, (Trinidad & Tobago) on the 26th July, 1940.

(*c*) That the *ex parte* application for extension of time to file the record was wrongly made to a Judge in Chambers since, no procedure having been provided by the W.I.C.A. Rules for making the application, the practice and procedure relating to appeals in the Supreme Court of this Colony applied, and the application should have been by motion in Court as provided by Order 60, Rule 19 of the Rules of the Supreme Court of Trinidad and Tobago, 1917.

Held,

(i) That the right of an appellant to leave with the Registrar the documents required by Rule 11 (1) expired at midnight of the 28th day

after the appeal was brought. If, before midnight on the last day for leaving the documents, an order is made extending the time for filing the said documents, the right of the appellant to prosecute his appeal is preserved.

(ii) By the Order made on the 3rd April, 1940, it was intended to give leave to extend the time for filing all the necessary papers referred to in rule 11 (1), including the affidavit of service. The restricted construction of the expression "document and papers" given by the Court in *Daniel* v. *Hopkinson*, had no application to the interpretation of the Order of the 3rd April.

(iii) That the right conferred on an appellant by Rule 18 (1) of the W.I.C.A. (amended) Rules, 1930, to apply to a Judge of the Supreme Court for extension of time was, in the absence of any *ad hoc* procedure in the said rules, properly exercised by a Judge of the Supreme Court on application made to him in Chambers, such being the usual method of procedure in similar applications to that Court.

M. J. Butt, for Appellant.

E. P. Bruyning, for Respondent.

The Judgment of the Court was delivered by the Chief Justice, British Guiana, as follows:—

A threefold objection is taken to the adjudication by this Court of the questions raised by this Appeal. It is submitted that:—

(1) The appeal stands dismissed by virtue of Rule 12, sub-rule (4) of the Rules of this Court forasmuch as the appellant has not complied with the requirements of Rule 11, sub-rule (1).

(2) Although the learned Chief Justice of this Colony on the appellant's application by order enlarged the time for lodgment of all papers and documents demanded by Rule 11 (1), this Court has held that the expression "Documents and Papers" does not include the affidavit of service referred to in the sub-rule and the order not being expressly inclusive of the affidavit cannot be deemed to grant enlargement of time for lodgment of that document.

(3) The application for enlargement of time cannot be made otherwise than by motion in open Court after service on all parties, and that in the instant case it was made *ex parte* and in Chambers and therefore failed to comply with the governing rules, apart from the objection that any step to be taken must be taken before 4 o'clock at latest on the last available day.

The facts on which these objections are founded are as follows:—

Rule 11 (1) requires an appellant within 28 days from the date of bringing his appeal to leave with the Registrar an affidavit of service of the notice of motion together with a copy of the notice of appeal and also the "documents and papers" set out in paras: (*a*)—(*g*) of Rule 11 (1). On the last day available and at about 4.30 o'clock in the afternoon, not having previously implemented the sub-rule, the appellant applied to the learned Chief Justice for an order for extension of time. The order was granted in terms following:—

"That the time limited by the West Indian Court of Appeal (Amendment) Rules 1930 within which the appellant shall leave with the Registrar the documents and papers set out in sub-clause (1), Rule 3 of the West Indian Court of Appeal (Amendment) Rules 1930 be and the same is hereby extended for 7 days from the date hereof."

In pursuance of, and within the time limited by the order, the appellant left with the Registrar all the necessary documents including the affidavit of service.

The Court now deals with the objections in inverse order. As to the third objection:—

The Court is referred to Rule 18 of the Rules of this Court which declares that applications for extension of time may be made to the Supreme Court, or a Judge thereof, in the Colony where the appeal arises unless the local Legislature of any Colony have otherwise provided.

Where a rule directs application to a Court or Judge, the application if made to a Judge is made in Chambers. Counsel for the Respondent however points to Rule 25 of the Rules of this Court and contends that the Rules of this Court omit to establish any procedure for application to a Judge. He invokes in aid Order 60, Rule 19 of the Supreme Court Rules which directs that every application to a Judge in respect of an appeal shall be made by motion, necessarily in open Court. If his premise is conceded it would follow that the learned Chief Justice had no jurisdiction to entertain the application except by way of motion in Court after service of the motion, on all necessary parties.

Is the premise right? As was pointed out "application to a Judge," *simpliciter* means application to a Judge in Chambers, and there exists no need for *ad hoc* procedure by Rule of this Court inasmuch as the application is to a Judge of the Supreme Court and the usual practice of that Court on such applications would be followed. We agree and hold that applications for enlargement of time are not required to be made by motion. To decide otherwise would be to deprive an appellant of a statutory right.

With regard to the second objection:—

It is undeniable that this Court has recently held that the expression "documents and papers" which occurs in Rule 12 (4), for the purpose of bringing that rule into operation, refers to the documents and papers set forth in paras: (*a*)—(*g*) only of Rule 11 (1), and not to the affidavit of service referred to in the last mentioned sub-rule. This Court in adopting the construction on which the present argument is based did not intend to, and did not in fact, give a comprehensive or exclusive interpretation of the expression. In its primary sense the expression "documents and papers" includes the affidavit of service, and

when the learned Chief Justice granted enlargement of time for leaving "documents and papers set forth in sub-clause (1). Rule 3" he intended to include the affidavit of service, and as there does not exist any valid ground to justify restricted interpretation of the expression (the operation of sub-rule (4) of Rule 12 not being in question) we hold that the order embraced not only the documents and papers referred to in paras: (*a*)—(*g*) of Rule 11 (1) but all documents and papers mentioned in that sub-rule.

It was the first objection taken by the Respondent which induced more anxious consideration, although on careful examination of the objection we entertain no difficulty in rejecting the submission. We are asked to say that by reason of a local statutory rule, directing closing of the Supreme Court Registry at 4 p.m. each day, the papers and documents relating to an appeal to this Court may not be left on the Registrar after that hour on any given day, and that if an appellant neglects to leave the necessary papers before 4 p.m. on the last available day the right to prosecute his appeal is extinguished by operation of Rule 12 (4), notwithstanding that, according to the proper meaning of "day", Rule 11 (1) allows an appellant up to midnight of the 28th day for leaving all necessary papers.

This Court cannot subscribe to this view. "Day" means a day of 24 hours and unless this period is cut down by express provision or necessary implication an appellant has until midnight of the last available day within which to exercise his right under Rule 11 (1).

It is to be observed that although the Registrar of this Court is also the Registrar of the Supreme Court he is not, *qua* Registrar of this Court, governed by rules which were made to apply and apply only to him as Registrar of the Supreme Court. It is true that he performs his duties in both capacities at the same office, but as Registrar of the West Indian Court of Appeal he is not bound by the office hours fixed for the performance of his duties in relation to the local Court. Our rule provides that documents of appeal may be left with him within 28 days after appeal brought, and we interpret this rule to mean that the documents and papers may be left at any time before midnight of the 28th day. If therefore an order for enlargement of time is obtained before that hour the right to prosecute his appeal is preserved to the appellant although the necessary papers were not left with the Registrar before the closing hour of the Supreme Court Registry, or before midnight, of the last available day. Provided the papers are left within the enlarged time, time having been granted before midnight of the last available day by the Supreme Court or a Judge thereof, the appeal continues.

We therefore overrule all three objections and proceed to hear the appeal.

W. R. GUEVARA *v.* R. WOODBURN.

IN THE WEST INDIAN COURT OF APPEAL.

WILLIAM RALPH GUEVARA, Plaintiff-Respondent.

v.

ROBERT WOODBURN, Defendant-Appellant.

[1940—No. 4—TRINIDAD AND TOBAGO.]

Before COLLYMORE, C.J., Barbados (President); CAMACHO, C.J., British Guiana; JARRETT, C.J., Leeward and Windward Islands.

29TH, 30TH JULY; 10TH AUGUST, 1940.

Negligence—Collison—Motor car and cyclist—Continuing negligence—Last opportunity—Doctrine of—Not applicable in simultaneous negligence.

Plaintiff, the respondent in the Appeal, while cycling at night and about to approach the junction of two roads, on one of which he was travelling, saw the glare of the lights of a motor vehicle, which was approaching the junction on the other road. Plaintiff was riding on his correct side at a rate of 8-10 miles per hour, but the motor vehicle, at the time when it came into Plaintiff's view, was approaching the junction on its incorrect side at a speed of 30-35 miles an hour. Plaintiff, though aware of the on-coming motor car, continued on his course thinking he could cross the road in sufficient time. The motor vehicle continued on its incorrect side of the road without reducing its speed and struck the Plaintiff when the latter had almost crossed the road to safety.

The defendant did not give evidence at the trial, but submitted that, while he was negligent, the negligence of the Plaintiff was contemporaneous and continuous with that of the defendant and disentitled Plaintiff to damages. The trial Judge found that Plaintiff was negligent in pursuing his course although aware of the oncoming vehicle; but, also holding that despite the Plaintiff's negligence the defendant could have avoided the accident by the exercise of reasonable care, awarded the Plaintiff damages.

On Appeal, *held,* (reversing the learned trial Judge):— that, on the evidence, the negligence of Appellant and Respondent was simultaneous and the doctrine of last opportunity had no application; that though the appellant was also himself guilty of negligence, yet the respondent was the one who brought the loss on himself and was not entitled to throw the loss on appellant.

Child, K.C., (*Butt* with him) for Appellant.

Wharton, for Respondent.

The judgment of the Court was read by the President, as follows:—

In this appeal from the judgment of the learned Chief Justice of Trinidad the facts are simple and fall within a narrow compass.

The action was one of negligence and was concerned with a collision between the Appellant's (Defendant's) motor jitney and the Respondent (Plaintiff) riding on his bicycle. The accident happened on the 12th October, 1938, about 10.30 p.m. at the junction of French and Roberts Streets, Port-of-Spain.

The Streets as they approach the junction are straight and meet almost at right angles. The width of the South Eastern section of Roberts Street is 20ft. 2in. whereas that of the North

Western section is 28ft. 3in. A plan of the *locus in quo* is in evidence.

As a result of the regrettable occurrence the Respondent suffered personal injuries and consequential financial loss and was awarded damages in the sum of $1,773.38. No question of the sufficiency or excess of these damages is raised in this appeal.

Although complaint is made on behalf of the Appellant of the failure by the learned trial Judge to draw certain inferences, the main facts are not in dispute and, indeed, at the trial no evidence was adduced on behalf of the Appellant.

As found by the learned Judge these main facts are as follows:—

"The plaintiff, an experienced cyclist, 61 years of age, was riding his cycle along French Street from North to South and approaching the junction of that street and Roberts Street. On arriving at a point marked by him as red X on the plan he saw a glare of the lights of a vehicle coming from Roberts Street West to East.

"The plaintiff's cycle was carrying an electric torch lamp which was functioning at the time. Plaintiff was riding at a speed of 8-10 m.p.h. He proceeded to enter the crossing at the same pace to a point marked by him as red O on the plan.

"Between red X and red O (a distance of some 23 feet) the plaintiff admits that he paid no heed to the approaching lights. On reaching red O the plaintiff saw the defendant's jitney at a point marked by him as blue O on the plan. The jitney he says was travelling very fast. Blue O shows the defendant's jitney to be approaching the crossing on its wrong side of the road. The Plaintiff, keeping his eye on the oncoming vehicle, proceeds to take the crossing at the same speed and when he gets within 4 feet of the opposite side, the south eastern corner, at a point marked by him on the plan as X in pencil, he is struck on the right side and he and his cycle are hurled some 25 feet up Roberts Street East. He received a comminuted fracture of the right knee and other injuries resulting in some permanent disability.

"The plaintiff's explanation is that he thought there was sufficient time to cross and that it was safe to do so. John Emmanuel corroborated the plaintiff's version in that he says that the jitney took the crossing straight without turning one way or the other and he estimated its speed at 30-35 m.p.h."

The negligence of the Appellant's driver is admitted and at the trial was admitted to be high (*sic*) and the burden of this appeal rests on the basis that at the time of the accident the Respondent was riding his bicycle negligently, that his negligence was contemporaneous with that of the Appellant's driver, that it continued up to the time of collision and that in consequence in the circumstances of this case the Respondent is not entitled to recover damages against the Appellant.

The negligence of the Appellant's driver being admitted the Court turns its attention to the negligence alleged and established against the Respondent.

In the defence at pp. 18 and 19 of the record it is alleged that the Respondent was guilty of negligence in that he *inter alia*, (1) failed to keep a proper look out, (2) failed to apply his brakes or to stop in sufficient time to avoid colliding with the Appellant's motor car, and (3) failed to exercise due care and skill in the management of his said bicycle.

The learned Judge in dealing with this aspect of the case makes the following findings in these words which are to be found at pp. 55 and 56 of the Record:—

"I find also on the evidence that in taking the crossing in the circumstances indicated by the plaintiff, he (the plaintiff), although riding on his correct side at a reasonable speed, was negligent in the sense of being careless of his own safety and in not appreciating the situation created by the rapid approach of the defendant's jitney. To that extent the plaintiff may be said to have contributed to the accident." For this statement there is ample evidence in support and it cannot be contended that these findings are ill-founded.

Moreover, the finding of negligence in the "taking of the crossing" is not only significant but of the utmost materiality on the question as to responsibility for the accident.

The learned trial Judge emphasises the negligence of the Appellant's driver, pointing out that he had or should have had a view of the Respondent from a distance of well over 70 feet and criticises the defence for failure to offer any explanation of the driver's omission to take any of the courses open to him.

In the judgment the question is asked "whether, despite the plaintiff's negligence, the defendant's driver could nevertheless by the exercise of reasonable care and skill have avoided running down the plaintiff?" and is resolved in favour of the Respondent on the ground that the evidence points strongly to the conclusion that by the exercise of reasonable care and skill the Appellant's driver could have avoided the accident and that it was his negligence which was the decisive cause.

In the view of this Court the learned trial Judge should also have decided the further question, whether, admitting the Appellant's driver's negligence as already described, the Respondent was guilty of such negligence as would disentitle him from recovering damages. Did the Respondent in the circumstances of the case act as a reasonable and prudent man in the face of the situation created by the negligence of the Appellant's driver so as to exonerate him from being the author of his own mishap?

The answer to this question seems largely to be supplied by the finding that the Respondent, in taking the crossing, was careless of his own safety and did not appreciate the situation created

by the rapid approach of the Appellant's jitney, although, according to the evidence, he saw lights as he approached the corner, saw the vehicle, realised that it was on its wrong side travelling fast at 30 m.p.h. or more, and did not know what course it would take.

Confronted with this situation the Respondent continued on his course across the junction of the streets thinking that he would get across, and as has been pointed out, getting nearly across until he was knocked down within a few feet of the corner.

It has been said that the Respondent's negligence had ceased at the time of the collision but in our view there can be no doubt that whilst the Respondent continued on his course in the manner described his negligence continued and continued up to the moment of impact.

This case is distinguishable from those of *British Columbia Electric Railway Co., Ltd.,* v. *Loach* (1916) 1 A.C. 719, and *McLean* v. *Bell* (1932) 48 T.L.R. 467.

Without reference to the many other authorities cited it is sufficient to observe that on the evidence in this case and the findings of the trial Judge the negligence of the Respondent and of the Appellant's driver was simultaneous and that therefore the doctrine of last opportunity is inapplicable.

It is difficult to find words sufficiently strong in which to condemn the negligent driving of the Appellant's driver who on the evidence is unfit to be in charge of any motor vehicle.

But it must be borne in mind that "it is not simply a question of weighing the acts of negligence on the part of the plaintiff and the defendant respectively and deciding against the party whose negligence is the greater, or of deciding whose negligence materially contributed to the damage, or was the real or efficient cause of the accident, because there might be two, or even three, causes of an accident. But the doctrine of contributory negligence is based on the principle that in deciding which of two parties shall bear the loss resulting from a casualty, justice requires that a party who by his carelessness has brought the loss upon himself shall not be entitled to throw that loss upon another."

We are of opinion that in this case the Respondent is the party who brought the loss on himself, although the Appellant was himself guilty of negligence. In view of the conduct of the Appellant's servant it is with great regret that the Court is forced to this conclusion. The appeal is allowed, with costs of appeal and of the Court below.

T. ROBERTS AND BATTOO BROS.

IN THE WEST INDIAN COURT OF APPEAL.

THEOPHILUS ROBERTS, Plaintiff-Appellant,

AND

BATTOO BROS., Defendants-Respondents.

[1939—No. 4. TRINIDAD AND TOBAGO.]

Before GERAHTY, C.J., Trinidad (President); COLLYMORE, C.J., Barbados; CAMACHO, C.J., British Guiana.

25TH, 26TH JULY; 10TH AUGUST, 1940.

Appeal on questions of fact—Credibility of witnesses—Inferences drawn by trial Judge—Reversal by Court of Appeal—Principles on which Court of Appeal will proceed in dealing with questions of fact.

Parties to a Cause are entitled as well on questions of fact as on questions of law to demand the decision of the Court of Appeal. It is the duty of the Appellate tribunal to rehear the case, paying great deference and giving due weight to the opinion of the Judge, especially as to reliance to be placed on the testimony of the witnesses. But the Court must make up its mind, not disregarding the judgment appealed from but carefully weighing it and not shrinking from overruling it, if on full consideration it comes to the conclusion that it is wrong.

Plaintiff-Appellant got his arm severed in a collision between two omnibuses travelling in opposite directions, both owned by Respondent, in one of which Appellant was a passenger. Appellant's case was that the driver of the omnibus in which he was travelling swerved the omnibus so suddenly to the left that the Appellant's equilibrium was disturbed and that in attempting to recover his balance his arm was thrust out of the omnibus and was struck and severed by an approaching omnibus.

The Respondents' explanation of the cause of the injury to the Appellant was that the Appellant was riding with his arm projecting over the side of the vehicle when the collision occurred. The Respondents called no direct evidence to support this proposition, hut largely relied on inferences sought to be drawn from the finding of the severed limb on the roadway after the accident.

The trial judge did not believe the evidence of the Appellant, nor of his witnesses, as to how the Appellant's arm was in the position it was when the arm was severed, but accepted the theory advanced by the Respondents that the Appellant was sitting with his arm projecting outside of the omnibus for greater case and comfort, thereby contributing to his injury.

Held: (Gerahty, C.J.; Trinidad, dissenting):—

(1) that since the reasons of the trial Judge for disbelieving the evidence of the Appellant were not due to the demeanour of the witnesses, but to the conclusion of fabrication of evidence and the inconsistencies which he found in the evidence of Appellant's witnesses, and these inconsistencies and the grounds which the Judge found for fabrication being before the Court of Appeal, the Court is in as good a position to evaluate these factors as was the trial Judge.

(2) that the findings of fact and inferences drawn by the trial Judge were against weight of the evidence and should be set aside.

A. H. McShine, for Appellant.

H. O. B. Wooding, for Respondents.

The Judgment of the Majority of the Court was delivered by CAMACHO, C.J., as follows:—

This is an appeal from the judgment of the learned trial Judge

delivered in favour of the Respondents (Defendants) in the action brought by the Appellant (Plaintiff) to recover damages for injuries suffered by the Appellant,—allegedly arising out of the negligent driving of the Respondents' motor omnibuses.

The Respondents are owners of motor omnibuses numbered H2864 and H3637. On the 6th December, 1938, these two vehicles were plying for hire along the public highway leading from Port-of-Spain to Teteron Bay. Both vehicles were conveying passengers. The Appellant was a passenger for reward in H2864 and was seated therein on the right or offside rear seat thereof, having on his left another passenger, one Victor Appang, immediately beside him. Travelling in the same omnibus were among others John Quashie, Leo Woodruffe and Evans Puckering. At or near the junction of the old and new Western Main Roads and as H2864 was proceeding in the direction of Port-of-Spain, H3637 approached from the opposite direction. The road at this point, and for a considerable distance, is a straight road. As the vehicles drew nearer to each other, each being in full view of their respective occupants, the driver of H2864, pulled out from his left, or proper side, to the right and over the crown of the road, in order to overtake and pass two cyclists riding abreast on his left, as alleged by witnesses for the Plaintiff, or to avoid a pool of water lying on the left of the road, as alleged by a witness called by the Respondents. While this was happening H3637 continued on its course on its left, or proper side, and at the moment of the accident its near wheels were on the grass verge of the road. The width of the road hereabouts is 25 ft. 6in. The evidence discloses that had H 2864 continued on its altered course a head on collision of the two vehicles would have been inevitable, that in order to avoid the threatened collision the driver of H 2864 swung or swerved his vehicle to the left, and that at the time when the driver so conducted his vehicle it was travelling at a speed of between 20 to 25 m.p.h. H 3637, it appears, was being driven at about the same rate of speed. As the two omnibuses passed each other the Appellant suffered the injuries for which he seeks compensation. The Respondents deny liability and *inter alia* plead that the Appellant was the sole author of his own misfortune or, in the alternative, that he was guilty of such contributory negligence as to disentitle him from recovering.

The trial Judge was called upon to determine three main questions:—

(1) Had the Appellant established a case of actionable negligence in the Respondents?

(2) Had the Respondents shown that the injury was caused solely by the Appellant's own negligence? and if not

(3) Had the Respondents established that the Appellant was guilty of that degree of contributory negligence which would disentitle him from recovering?

The answers to these questions involve examination of the evidence and consideration of the influence of that evidence on the determination of the following issues:—

(1) Did H2864 pull to the right and over the centre of the road?
(2) Did this manoeuvre, if it occurred, take place at a moment when the approach of H3637 rendered it hazardous?
(3) Did H2864, in order to avoid H3637, swerve suddenly or sharply to the left of the road?
(4) Did this swerve (if any) produce lurching of H2864 resulting in the unbalancing of some of its passengers, including the Appellant?
(5) Was the injury suffered by the Appellant caused in the manner alleged by him or in the manner alleged by the Respondents?

Before discussing the evidence it is serviceable to refer to the principles on which a court of appeal proceeds in dealing with questions of fact decided by a trial court. Undeniably the presumption in a non-jury case is that the decision appealed against is right on the facts; a presumption which must be displaced by the appellant. If the correctness of the learned trial Judge's decision is left in doubt that decision should not be disturbed. It is, however, the duty of the Appellate tribunal to rehear the case, paying great deference and giving due weight to the opinion of the Judge, especially as to the reliance to be placed on the testimony of the witnesses. Nevertheless it must reconsider the materials which were before the Judge and must make up its mind, not disregarding the judgment appealed from but carefully weighing and considering it and not shrinking from overruling it, if on full consideration it comes to the conclusion that it is wrong. The parties to the cause are entitled as well on questions of fact as on questions of law to demand the decision of the court of appeal and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own conclusions though it should always bear in mind that it has not seen nor heard the witnesses and should make due allowance in this respect.

Savage v. *Adam* (1895) W. N. 109.
Coghlan v. *Cumberland* (1898) 1 Ch. 704.
The Glannibanta (1876) 1 P.D. 283.
Flower v. *Ebbw Vale Steel, Iron and Coal Coy.* (1936) AC. 206.

This Court is not unmindful of Lord Robson's observations in *Khoo Sit Hoh &* ors. v. *Lim Thean Tong* (1912) A.C. 323, on the importance of the demeanour of witnesses not seen by the Appellate Tribunal, their credibility, the probable brevity of the Judge's notes and the other elements which Lord Robson considers should act as signals of caution to an appellate tribunal.

Although it has been repeatedly said that an appeal court can never recapture the advantage possessed by the court of trial by reason of the personal appearance of the witnesses whose evidence is under consideration, nevertheless the court must be satisfied that there appear upon the record due and sufficient grounds which support the conclusions of the trial Judge.

In the judgment under review the learned trial Judge was not influenced by the demeanour of the witnesses, otherwise he would have so stated. His judgment proceeds on his conclusion of fabrication of evidence, the inconsistencies which he finds in the evidence of Appellant's witnesses *inter se* and on the reliance he places on the testimony of Evans Puckering. These inconsistencies indicated by the learned trial Judge, the grounds on which he finds fabrication of evidence and the testimony of Puckering are before us and this Court is, in our view, in as good a position to evaluate these factors as was the learned trial Judge.

It is noteworthy that Regulation 27 (5) (*a*) and (*b*) of the Motor Vehicles Road Traffic Regulations, 1939, directs the driver of a motor vehicle to keep on the left of the road, unless pre-vented by some sufficient cause, and on meeting other vehicles to keep as close as possible to that side of the road. On the evidence this Court is not in any doubt that the driver of H2864 disobeyed the injunction and that he departed from his proper side and drove his vehicle to the right and over the centre of the road, thus encroaching on the right of way of the traffic proceeding in the opposite direction. Moreover, the Court is satisfied that the moment of breach of the regulation was a moment of danger, regard being had to the close proximity of H3637. Assuming at this stage the credibility of the witnesses Quashie, Appang, and Woodruffe, their testimony, and, to a less extent that of Puckering, establishes the justice of these conclusions. In acting as he did the driver of H2864 was guilty of negligence. His motive in thus driving his vehicle is immaterial. The desire to overtake or to pass cyclists, or to avoid water, on the left of the road may be explanation of his conduct, it does not excuse it. Improperly and knowingly he involved both vehicles in a dangerous situation and must therefore be regarded as having acted, if not recklessly, at least without that reasonable care and skill which the law enjoins, having placed H2864 and H3637 in extreme jeopardy, he is forced by his self-imposed peril to act swiftly, and to swing his vehicle sharply away from the other to the left of the road. The sudden swerve of the vehicle is asserted by the Plaintiff and his witnesses. Puckering denies there was a jolt and is silent as to whether the vehicle swerved or not. The learned trial Judge is mistaken as to the effect of the evidence of Puckering on this point. If the driver of H 2864 was driving at the speed, or even approximately at the speed alleged, the sudden,

as it must have been, swing or swerve to the left would necessarily have caused lurching of the vehicle. This lurching is spoken of by all the witnesses with the exception of Puckering. The evidence on this point is, in the view of this Court, overwhelming. All the witnesses are definite that the two vehicles passed in the closest proximity. Some indeed say that the omnibuses collided, others that they did not come into contact with each other. However that may be, it is undeniable that the Appellant's arm was caught between the two vehicles and was severed at the shoulder. How was the injury caused? The Appellant states that up to the moment of the accident he was sitting with his hands on his lap. He is supported by the witness, Victor Appang, who places him with both hands in that position, holding a paint brush. The Appellant alleges that when the omnibus lurched his equilibrium was disturbed and that, to recover his balance, he made an attempt to seize the shoulder of the vehicle, that he failed to take hold of any part of the structure, that his arm was thrust into space and out of the omnibus, was caught between the two vehicles and was severed.

The allegation in the particulars of negligence, that the Appellant's arm was crushed and had to be amputated, and the evidence that the arm was severed, have been made the subject of invidious contrast and it is sought thereby to discredit the case for the Appellant. It is difficult to appreciate the importance of the comparison. It cannot be doubted that the Appellant's arm was severed and lay in the road, nor can it be denied that what remained of his arm was subsequently amputated. Having regard to the manner in which the injury was caused this Court would not doubt that the arm was to some extent crushed as well as severed.

In explanation of the causation of the injury the Respondents asserted that the Appellant was riding in H2864 with his right arm projecting over and beyond the right side of the vehicle and that he maintained that position despite his knowledge of the close approach of H3637, or that he failed to keep a proper look out.

At the trial not a scintilla of direct evidence supported the proposition and the driver of H3637, the Respondents' servant, who was in the best position to affirm or deny it, was not called as a witness. Presumably he was unable to afford the Respondents' case any assistance.

The respondents largely relied on inferences sought to be drawn from the finding of the severed limb on the roadway after the accident. The learned trial Judge concluded that the injury "could only have resulted from him (the appellant) having it (*i.e.* the arm) at the time projected beyond the rail or shoulder of the omnibus—an attitude of sitting he might well have adopted

for the purpose of enjoying greater ease and comfort on account of the tightness of the accommodation."

Indeed this conclusion was essential if the Respondents were to succeed, for unless this vital question of the position of Appellant's arm was resolved in favour of the Respondents their whole case fell to the ground inasmuch as no other act or omission was charged against the Appellant as contributory to his injury. Is, however, the conclusion founded on evidence or on warranted inference therefrom? Assuming the limited nature of the accommodation, what justification is there for the inference that the Appellant, for greater ease and comfort, projected his arm beyond the structure of the vehicle? The uncontradicted direct evidence absolutely denies it and the suggestion, for it is only a suggestion, of Appellant's attitude while seated in the vehicle does not commend itself to this Court as a justifiable finding on the evidence. The fact that the severed limb fell on the roadway and not within H 3637 is relied on by Respondents to buttress the finding, for, say the Respondents, the admitted contiguity of the two vehicles at the critical moment precluded the possibility of the arm falling on the roadway unless the Appellant's arm occupied that position.

It is, however, recorded in the evidence that the front of the vehicles passed clear of each other before the Appellant was struck and that it was the rear portions of both vehicles which caused the damage. If credence may be attached to the witnesses who depose to this fact the severed arm would have fallen in the place where it was found. Scrutiny of the learned trial Judge's reasons leads to the conclusion that he preferred the theory advanced by the Respondents to the evidence adduced by the Appellant, rejecting that evidence as untruthful. On what foundation is the rejection based? If his disbelief of the evidence was properly rooted in the unsatisfactory or suspicious demeanour of the witnesses, or in the unconvincing nature of their testimony whether resulting from improbability or falsehood, this Court would, on the principle on which it acts, refrain from substituting its own judgment for that of the learned trial Judge. Such is not however the case here.

Credence is not attached to the assertion by the Appellant's witnesses of the presence of cyclists on the road. Why? Because in effect, says the learned Judge, the Appellant and Puckering did not see them and they were not seen after the accident. The evidence on this point is that of Quashie, who occupied the second outer seat on the left of H 2864, Victor Appang and Woodruffe, These witnesses declared that two cyclists were on the road on the left of H 2864 and that it was in order to overtake and pass them that the driver pulled to his right. Against their affirmative evidence the following indeterminate evidence of Puckering and Appellant is offset.

Puckering:—

"No cyclist about. I saw none while in bus and none when I came out."

Appellant:—

"I did not observe anything on road besides bus."

Appellant was sitting on right side of the omnibus and Puckering occupied an inner seat on the left side of the vehicle. The cyclist might well have been on the left of H.2864 and not been observed by either of these two witnesses. The Court could not reasonably on this contrast of evidence have concluded that Appellant's witnesses were untruthful.

The learned Judge however comments: "This is indeed a small matter but it shows what witnesses will say to support their case and find a reason for an incident." This Court is unable to endorse the inference; indeed, in its opinion, the observation discloses an erroneous approach by the learned trial Judge to examination of the evidence. If the witnesses fabricated their testimony on this point it would have been simple for the Appellant to have accorded his evidence with theirs.

The learned trial Judge rejected the evidence of the sudden swing or swerve of H.2864. Was the rejection reasonable having regard to the testimony? Again indeterminate evidence by Puckering is preferred. Puckering deposed that he did not experience any jolt of H.2864 at the time of the accident. Every witness for the Appellant affirmed the swing and alleged a lurch of the vehicle. The two statements are not incompatible and as indicated earlier in this judgment Puckering neither denied nor affirmed the swing or swerve of the vehicle.

The Appellant alleged collision of the two vehicles. The learned trial Judge finds no collision and consequentially discredits the Appellant's case. What is the evidence? It is indisputable that the Appellant's injury was caused as a result of the arm being caught between the two vehicles. Can it be reasonably doubted that the impact, although slight, would have been felt in both vehicles? And might not that impact have been honestly mistaken for collision of the two vehicles? If we turn to the evidence of the Appellant's witnesses we find them saying: "I felt a jolt" "I heard a crash," "I heard a grating behind caused by the two buses," "Buses grazed," "Buses rubbed against each other" These are mental impressions related by the witnesses. Puckering's impression was similar: "At the time I thought buses had touched at the right rear portion of my bus." He also heard a crash. On subsequent examination of H.2864 and not finding recent marks of collision he changed his view. It is however clear that at the moment of the accident the passengers of H. 2864 thought the two vehicles had collided. Relying on the evidence of Captain May the learned trial Judge finds that the buses did not touch each other. The conclusion

may or may not be right. It is however difficult to conceive, conceded the accident occurred in the manner suggested by the Respondents, how contact between the two vehicles was avoided. If the Appellant's arm was projected over the side of H. 2864 and was severed between the two vehicles when in that position the finding that the two vehicles never came into contact with each other is tantamount to a finding that on severance of the tissues of that part of the arm resting against the structure of H. 2864 the two vehicles in some inexplicable manner failed to touch each other. It is more than probable there was contact, though sufficiently slight as not to produce any injury to the structure of either vehicle.

Proof of collision of the two vehicles is not however essential to fix the Respondents with liability if the injury suffered by the Appellant was caused by the negligent driving of the Respondent's servant and no contributory negligence is shown in the Appellant.

As to the evidence of broken glass, all that can be said is that the evidence is conflicting, and evenly balanced. One set of witnesses saw broken glass; the other set did not. A finding on this question in favour of the Respondents would not however be conclusive of the main issue. In this state of the evidence this Court does not consider that it can reasonably be found that on the question of collision or no collision the Appellant's witnesses were guilty of falsehood.

Nevertheless, the learned trial Judge stresses his opinion that Appellant and his witnesses fabricated the evidence. In his own words; "It is my view that Plaintiffs witnesses, none of whom waited on the spot to be present at the Police investigation but all of whom were visiting him at the hospital and busying themselves days after making measurements, have here again fabricated evidence to support the case and Plaintiff himself refused to give the Police a statement, to use his own words, "until he saw somebody first."

There is, in the view of this Court, no justification for this sweeping condemnatory conclusion. Dishonesty should not be imputed to the witnesses because they were absent from the Police investigation. There is no foundation whatever for the observations applied to all the witnesses relative to the hospital visits and the taking of measurements. One witness only for the Appellant saw him at the hospital, quite fortuitously, when visiting another victim of the accident, and one only of the Appellant's witnesses took measurements of one of the vehicles. The refusal of the Appellant to give a statement is explained by reference to the advice given to him by his medical attendant. The learned trial Judge's conclusion as to the falsity of the evidence is not a properly considered conclusion based on reasonable grounds.

Whatever the opinion entertained by this Court as to the accuracy in law of the decision in *White* v. *Latchmansingh* this Court would be bound by its allowance by the West Indian Court of Appeal. The two cases are, however, clearly distinguishable. In *White* v. *Lutchmansingh* the injured man admitted his arm was resting on and over the rail of the vehicle in which he was being conveyed. In the instant case there is no such admission or proof. This Court holds that the findings of fact and the inferences drawn in this case and which would attract it within the ambit of *White* v. *Lutchmansingh* are unwarranted on the evidence, indeed that those findings and inferences are so much against the weight of evidence that they should be set aside. The decision is accordingly reversed. The Court directs judgment to be entered for the Appellant and refers the case to the trial Judge to assess the damages. The Appellant is entitled to his costs of the Court below. No costs of appeal are awarded, the Appellant having arrived at this Court *in forma pauperis*, except such casts of appeal as were incurred up to the time the Appellant obtained leave to appeal *in forma pauperis.* Stay of Execution granted for 3 weeks.

GERAHTY, C.J., Trinidad, delivered the following dissenting Judgment:—

I regret that I am unable, for reasons which I will state, to concur in the conclusion arrived at by my learned Brothers that the judgment of the learned trial Judge should be reversed.

The difference between us lies in the method of approach to our common task.

The facts giving rise to this appeal have been fully stated in the judgment just delivered.

It is, I think, beyond dispute that the issues before the learned trial Judge, and his findings thereon, involve questions of fact alone, and that the Judge, having found against the Appellant as he has done, was bound by the judgment of this court in the case of *White* v. *Ramsay & ors.*

I therefore approach my consideration of this appeal on the basis that I am being invited on behalf of the Appellant to disturb a series of findings of fact made by the learned Judge on oral evidence led at the trial and that before I can do so I must be convinced that his decision is wrong.

The learned Judge, in his reasons for judgment, after exonerating the driver of the approaching bus of any act responsible for the accident, concludes by finding that: “The negligence according to the evidence, is that the driver of the Plaintiff’s bus pulled away from his left and then pulled sharply back to his left on becoming conscious of the proximity of the approaching bus, and that this act of his caused the Plaintiffs arm to shoot out of a window when he made an effort to steady himself by taking hold

of the sill or shoulder of the window. I do not accept this account of the accident which, in my view, is due to the Plaintiff's own negligence."

After considering the judgment as a whole, I have come to the conclusion that when the learned Judge says that he cannot accept the Appellant's account of the accident, he is not only finding that the Appellant has not discharged the onus upon him but he is impliedly stating a disbelief in the testimony of the Appellant and his witnesses.

This at once introduces, to my mind, the question of credibility in which I find myself, sitting as an Appellate Judge, in a position of great disadvantage in assessing the proper value to be attached to the testimony of the witnesses as compared to the trial Judge who heard and saw them give their evidence. Moreover, there was, in my view, a conflict of evidence on facts governing the Appellant's case. I have before me merely the bare record in narrative form of what was said by the witnesses and nothing to indicate how and in what manner their evidence was given so as to enable me to exercise my own judgment on the question of their credibility or otherwise. The principale is stated by Lord Wright in *Powell & wife v. Streatham Manor Nursing Home,* (1935) A.C. at p. 266 that: "The Court of Appeal has no right to ignore what facts the Judge has found on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing." In my opinion this principle applies to the present appeal. I can merely have recourse to the record to discover whether there was material before the learned Judge on which he could reasonably arrive at the conclusion which he did.

In my view there was such material.

In the first instance there are important variations between the case set up by the Appellant in the Statement of Claim and that put forward by his witnesses at the trial.

In the Statement of Claim it is contended that the two buses collided, whereupon the Appellant sustained injury, and in the Particulars of Negligence that Bus H2864 was driven into or against Bus H3637.

At the trial the presence of cyclists on the road is introduced for the first time. The witnesses speak of Bus H2864, in which the Appellant was travelling, going out to the right of the road to pass these cyclists at a time when Bus H3637 was approaching from the opposite direction, and assert that, after passing the cyclists, Bus H2864 swerved sharply to the left, causing the passengers, including the Appellant, to lurch to the right side. According to the Appellant he felt a jolt which threw him to the right, whereupon he made an attempt to grip the shoulder of the window with his right hand, which at the time was on his lap, failed to do so with the result that his arm shot through the

window and was severed by contact with Bus H3637. He states that he heard a crash which was caused by Bus H3637 rubbing on the bus in which he was travelling.

I do not disagree with the contention that in practice pleadings in running down cases tend to follow common form, but to say the least of it, I find it curious that such important factors in relation to the accident as the presence of the cyclists and the alleged sharp swerve to the left were not mentioned in the Statement of Claim. I do not think that this omission should be unduly stressed against the Appellant and it does not appear to have weighed at all with the trial Judge. Nevertheless I feel that it should not be altogether overlooked in considering the relevant findings of the learned Judge.

I now turn to the consideration of the various findings of the learned Judge culminating in the finding quoted earlier herein.

My conclusion, that the learned Judge's ultimate finding implies his disbelief in the credibility of the testimony of the Appellant and his witnesses on essential issues, is fortified by the earlier findings recorded in his reasons for judgment.

These findings may be summarized thus:—

(1) That there were no cyclists on the road as alleged by witnesses for the Appellant,

(2) That there was no sudden turn or swerve to the left,

(3) That there was no displacing or swaying of the occupants in Bus H2864 from or in their seats,

(4) That there was no colliding or grazing of the buses and that though they did pass very close to each other, that of itself is no evidence of negligent driving,

(5) That the loss of the Appellant's arm did not occur through his missing his hold, as he says,

(6) That it could only have resulted from his having his arm projecting beyond the rail or shoulder of the bus.

It will be necessary to examine each of these findings separately to ascertain whether or not there is a sufficiency of evidence to support findings (1)—(4) as above, and whether the inferences drawn in support of the findings last mentioned can reasonably be drawn on the facts found.

In regard to the question of the presence of the cyclists, the suggestion of the learned Judge is that this is fabricated evidence to account for the change of course of the bus. This is the first manifestation of the disbelief in the mind of the Judge in the veracity of the Appellant's case.

Now it cannot, in my view, be gainsaid that there is a conflict of evidence on this point.

The Appellant did not observe anything on the road except the other bus; this, however, may be accounted for by the position he was occupying in the bus.

Quashie says he saw two cyclists riding abreast and side by

side with the bus for some time before the bus got ahead; he did not however see them after the accident. Appang and Woodruffe also say they noticed cyclists. On the other hand Lance Cpl. Puckering, who may, I think, be deemed an independent witness states he saw no cyclists about while in the bus or when he came out, yet he was sitting on the left of the bus and could have seen. He says he was not reading his book on mathematics immediately before the accident. P.C. McDonald Ward, who was a passenger in Bus H3637, saw a bus approaching but no other vehicles on the road.

In my view, therefore, there was evidence upon which the learned Judge could find as he did on this point and upon which he might reasonably discredit that part of the Appellant's case which sought to assign a reason for the alleged change of course of Bus H2864. The learned Judge appears to have accepted Puckering's explanation that there was a pool of water on the left of the road and that the driver "came off his line" to pass it as the other bus was approaching, but when "both vehicles seemed to be well away from each other."

In cross-examination, Puckering said the "driver swerved right to pass the pool of water but was still on the left of the road," thereby indicating that there was not in fact any substantial change of course.

The next finding relates to the alleged sudden turn or swerve to the left. Here again there is, in my view, a conflict of evidence between Quashie, Appang and Woodruffe on the one hand and Puckering and McDonald Ward on the other.

The former witnesses asserts that there was a sudden swerve to the left, while Ward says he did not see the oncoming bus change its course and Puckering makes no mention of any swerve, but states that there was no jolt at all, which the learned Judge seems to have interpreted in his judgment as meaning that there was no sudden swing to the left, although this witness did not according to the record say so, as the Judge has implied.

In any event, there was undoubtedly an issue of fact which the Judge had to resolve on this evidence and he did so by giving credence to the versions given by Puckering and Ward.

Again there was, in my view, a conflict of evidence as to whether there was any displacement of passengers from or in their seats as the result of any swerve or jolt. On this issue also the learned Judge found against the Appellant and his witnesses in favour of Puckering's definite statement that there was no jolt, an expression which was used by the Appellant in his evidence.

If there was in fact a jolt, which I think could only have been caused either by a sudden swerve or actual collision between the buses, it is, in my opinion, surprising that Puckering, who was sitting on the left of the bus on the inner side of the seat, was not affected by it and even dislodged from the seat. There is,

however, no mention of such a fact in his evidence. The evidence of Ward that he did not see the bus change its course also tends to eliminate any cause for displacement.

There is therefore, in my opinion, sufficient evidence on which the learned Judge could find as he did on this issue of fact.

As to the fourth finding referred to earlier, there is, in my view, ample evidence to negative the suggestion that there was any actual collision or rubbing between the two buses. Captain May, another independent witness, who examined the buses in the afternoon of the day of the accident found no traces of damage to indicate either collision or rubbing. His evidence is corroborated by Puckering who also examined Bus H2864 and by Ward who says the buses did not touch.

Here again the learned Judge makes reference to fabrication of evidence on the part of the Appellant's witnesses, and, not having had the advantage of hearing those witnesses give their evidence, I am not prepared to hold that the impression formed by the learned Judge was unjustified or wrong.

The evidence is, however, conclusive, in my opinion, that the buses did in fact pass very close to each other.

The learned Judge has found that this fact in itself is no evidence of negligent driving.

I find myself in some doubt whether or not there should have been a finding of negligence in the driver of bus H2864 in view of the fact that, according to Quashie's evidence, this bus would have been travelling to the right of the centre of the road at the material time. It is to be observed, however, that no impressions were found on the road by Lance Cpl. Alexander to confirm his evidence in this respect. On the other hand there is a conflict of evidence as to how and why it got there, if it did, and the Judge has found against the Appellant's version.

I am not prepared in the circumstances, to go so far as to hold, on the facts as found by the learned Judge, that the Appellant satisfied the onus upon him of establishing negligence in the driving of Bus H2864 and that the learned Judge was wrong in his finding.

That being so, it follows that the onus never shifted to the Respondents to prove their allegation of negligence or contributory negligence in the Appellant.

As however Counsel for the Respondents at the hearing of this appeal, was prepared to concede the point that there may have been some degree of carelessness in the driving of Bus H2864, and assuming that the learned Judge was wrong in holding that there was no negligence, there remain for consideration the fifth and sixth findings of the learned Judge, referred to earlier herein, and the question whether the Appellant's injury resulted from such negligence.

The Appellant's version that before the accident he was sitting

with his right hand inside the bus on his lap is corroborated by Appang who was sitting next to him. Appang says, in effect, that as he lurched against the Appellant his hands were still on his lap and that he did not have his hand over the window at any time. Woodruffe also says he could see if Appellant's hand was outside but he did not see it outside.

It is to be observed also that no evidence was given by the defence either to contradict this evidence or to establish their plea of negligence or contributory negligence in the Appellant.

But the fact remains that Appellant's arm was outside at the moment of accident. So far, however, as direct evidence is concerned the Appellant's version as to how his arm got there stands alone and uncorroborated Against his version there stand the findings of fact of the learned Judge refuting the cause assigned by the Appellant for the sudden projection of his arm through the window of the bus.

The learned Judge on the facts found by him has drawn the inference that the loss of the Appellant's arm could only have resulted from his having kept his arm projecting beyond the rail or shoulder of the bus.

It remains therefore to be considered whether that inference can reasonably be drawn on the facts found.

It seems to me that if there was no colliding of the buses and no sudden swing to the left with resultant jolt, as found by the Judge, then the only reasonable inference is that the Appellant's right arm must have been resting on the window sill and projecting outwards; for if immediately before the accident his arm was lying on his lap the Appellant, having failed to substantiate the cause he assigned for the sudden projection of his arm, has further failed to show any reason whatsoever why his arm should suddenly have been thrown upwards from his lap and outwards.

Having come to the conclusion that there are no grounds for disturbing the findings of fact of the learned Judge, it seems to me that it would be entering into the realms of mere conjecture if I were to attempt to draw inferences on the question of what might have happened on the basis that the learned Judge's findings of fact were incorrect.

For the reasons stated, I am of the opinion that this appeal should be dismissed.

G. P. JUGMOHUNSINGH *v.* BHOLA.

IN THE WEST INDIAN COURT OF APPEAL.

GEORGE P. JUGMOHUNSINGH, Appellant-Defendant,
v.
BHOLA (by his Guardian and next friend Badaloo), Respondent-Plaintiff.

[1940—No. 2—TRINIDAD AND TOBAGO.]

Before COLLYMORE, C.J., Barbados (President); CAMACHO, C.J., British Guiana; JARRETT, C.J., Leeward and Windward Islands.

3RD, 6TH, AND 10TH AUGUST, 1940.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Negligence—Motor Vehicle—Excessive speed at Junction—Contributory Negligence—Last opportunity of avoiding accident—No application of doctrine in cases of simultaneous negligence.

The Appellant's driver, whilst driving a motor truck at a speed not less and probably considerably more than 20 miles an hour along a main road, approached a point in the road where it was joined by a side road. Respondent, a child, who was standing under a shop on the southern side of the main road, suddenly ran across the road diagonally in a north-westerly direction at a distance of not less than 12 feet in front of the oncoming Appellant's truck. Appellant's driver swerved to the right to avoid him but did not apply his brakes. The respondent received severe injuries. The trial Judge found that the Appellant's driver was negligent in that he approached the junction at an excessive speed and without having control of his vehicle; and that the respondent was also guilty of contributory negligence in suddenly darting across the road in front of the vehicle. But, he also found that the Appellant's driver had the last opportunity of avoiding the accident by the application of his brakes, and that his failure to do so was the substantial cause of the accident. He gave judgment for the respondent.

Held, (reversing the decision of the trial Judge):—

i. That the junction was not approached and crossed at an excessive speed.

ii. That the question of the last opportunity did not arise upon the facts which the learned trial Judge found, the doctrine of last opportunity having no application at all where the negligence of both parties is simultaneous.

iii. That the real and only issue in the matter was not whether the Appellant's driver took that course which would certainly have averted the accident, but whether the one he did was, having regard to the sudden emergency, a reasonable course to take.

United States of America v. *The Laird Line* (1924) Appeal Cases 286 followed.

iv. That in the circumstances the driver did all a reasonable man could be expected to do.

M. J. Butt for Appellant.
E. P. Bruyning for Respondent.

The judgment of the Court was read by the President, as follows:—
This is an appeal from a decision of the learned Chief Justice

of Trinidad by which the Respondent-Plaintiff was awarded damages of $2,020 for injuries received on the 31st day of, December, 1988, arising out of an accident on the Eastern Main Road with the Appellant-Defendant's motor truck.

The Respondent, who sues by his father as guardian and next friend, was at the time of the accident between five and six years of age and received severe facial and other injuries from which permanent disfigurement is likely to result.

The negligence alleged in the statement of claim was that the Respondent was standing near the junction of the Caura Road and the Eastern Main Road when the Appellant's driver so negligently drove and managed the Appellant's motor truck that it came into collision with the Respondent. The particulars of negligence material to the case include: driving at an excessive speed, failure to pull up or avoid the Respondent and failure to keep to the proper side of the road.

The Appellant by his defence denied that he was guilty of any negligence and alternatively alleged that the Respondent contributed to the accident by his own negligence by suddenly and without warning running across the road in front of the Appellant's motor truck without looking for or observing the approach of the vehicle and in so doing ran against the Appellant's motor truck.

At the trial evidence was given by the Respondent's witnesses that the Respondent was standing on the edge of the northern side of the Eastern Main Road at the time of impact, watching cricket being played on the savannah, and that for some reason for which no explanation was given by any of the Respondent's witnesses the Appellant's truck, which was being driven along the Eastern Main Road in a westerly direction, swerved over to its wrong side of the road and knocked down the Respondent. The Respondent was dragged by the vehicle for some 30 feet before it was brought to a standstill on the northern side of the road at a point some four feet west of the crossroads.

At the conclusion of the case for the Appellant, which was a strenuous denial of the facts as deposed to by the Respondent's witnesses, learned Counsel for the Respondent, so it would appear, jettisoned the evidence of his witnesses in so far as it had reference to, firstly, the position of the child at the time of the accident and, secondly, as to the allegation of the excessive speed at which the Appellant's truck was being driven. In place thereof Counsel accepted, for the purpose of his submissions to the Court, the evidence given by the Appellant's witnesses on these two points.

The learned trial Judge, who accepted the account of the accident as given on behalf of the Appellant, found the following facts:—

(1) That the accident occurred on a straight portion of the

Eastern Main Road a few feet from its junction with the Caura Road at a point where the width of the road is some 19 ft. 4 ins.

(2) That at the time of the accident the road was clear of traffic and there were people under the gallery of a shop on the southern grass edge of the road and at the northwestern corner, and that a game of cricket was in progress on the savannah on the northern side.

(3) That the Respondent, who was standing under the shop on the southern side of the Eastern Main Road, ran across the read diagonally in a north-westerly direction at a distance of not less than 12 feet in front of the on-coming Appellant's truck.

(4) That on seeing the Respondent the driver swerved to the right to avoid him, but did not apply the brakes of the vehicle

(5) That the Appellant took the junction at a speed of not less and probably considerably more than 20 m.p.h.

(6) that the point of impact was approximately 5 feet in the road from the northern edge and some 4 feet west of the junction and that the Respondent ran a distance of some 30 feet in front of or partially in front of the truck before he was knocked down.

Upon these facts as found the learned Chief Justice held that:—

(1) The Appellant's driver was negligent in approaching and crossing the junction at an excessive speed and without having that control over his vehicle which it was his duty to have in the circumstances.

(2) That the Respondent was guilty of contributory negligence in suddenly darting across the road in front of the Appellant's truck without looking for or observing its approach.

(3) That the Appellant's driver's failure to apply his brakes when he saw that the Respondent was running diagonally away from him was the substantial cause of the accident which he, with the exercise of ordinary care and skill could have avoided.

On behalf of the Appellant it was contended on the facts proved:—

Firstly: That the inference of excessive speed by the learned trial Judge was not justified and that the Appellant's speed was not in fact excessive.

Secondly: That the Appellant's swerve to the right was in the circumstances reasonable and understandable.

Thirdly: That the Appellant's failure to apply his brakes was excusable and cannot be ascribed to negligence.

Fourthly: That it was the negligent act of the Respon-

dent in running across the road which was the sole cause of the accident or, alternatively, if not the sole cause of the accident it was contributory in the legal sense of the term to the injury suffered by the Respondent.

We propose first to examine the evidence on which the learned trial Judge found that the speed at which the vehicle was being driven at the time of the accident in the attendant circumstances of the case was excessive.

The only evidence adduced on behalf of the Respondent suggesting that the vehicle was being driven at a fast speed comes from the witness Parosa, but the testimony of this witness was rejected in toto by the learned Judge. One of the witnesses for the Appellant estimated the speed at 20-25 m.p.h., while other witnesses, including the Appellant himself, would have it as being between 15 and 20 m.p.h. There is no suggestion of excessive speed or fast driving in the evidence of any witness for either party whose testimony was accepted by the learned Judge, and it is to be observed that Counsel for the Respondent in his final address to the Court placed the speed of the vehicle, using his own words at "round about 20 m.p.h." It is agreed that the statutory speed limit for a vehicle of the type driven by the Appellant's driver is 25 m.p.h., and even assuming that such a speed was in fact being maintained at the time of the accident although the evidence would not appear to support such a finding—can negligence be inferred from such a speed having regard to the nature and condition of the road in question and the amount of traffic on the road at the time or which might reasonably have been expected to be on it?

The accident occurred in the early afternoon on a straight portion of a main road which at the time was free of vehicles or pedestrian traffic, and it is in such circumstances that the Appellant's driver, on the correct side of the road, approached the crossroads at a speed within that prescribed by the law.

We are of the opinion that the finding of the learned trial Judge, and we quote the actual words used, "that the driver took the junction at a speed of not less and probably considerably more than 20 m.p.h.", is not consistent with the evidence and we therefore disagree with the finding that the junction was approached and crossed at an excessive speed. In the submissions of Counsel for the Respondent before the Court, the speed of the vehicle was placed at round about 20 m.p.h. and was regarded as an undisputed fact in the case and we therefore see no justification on the evidence for arriving at a different conclusion.

But this is only the first step. The real issue in the case resides in the question whether the learned trial Judge was, on the evidence, entitled to take the next step and to find that the negligent omission of the Appellant's driver to apply the brakes was the substantial cause of the accident.

The learned Judge having found the Appellant guilty of negligence and the Respondent guilty of contributory negligence then proceeded to ask himself the question whose negligence substantially caused the accident and who had the last chance of avoiding it.

The doctrine of last opportunity has no application at all when the negligence of both parties is simultaneous. This doctrine presupposes that there is an interval of time between the two acts of negligence and that they are severable and not contemporaneous or nearly so.

It is the opinion of this Court that the doctrine of the last opportunity is not applicable and the real and only issue in this case is whether the Appellant by the exercise of reasonable care and skill (which does not mean anything superhuman or exceptional, with all allowance for what is called the agony of the moment) could have avoided the accident and whether the learned trial Judge has drawn those inferences from the evidence which should have been properly drawn from it. Was the learned trial Judge right in concluding that if the Appellant had acted reasonably, that is to say applied his brakes and lessened his speed, he could have averted the casualty? Having regard to the time factor in this case the driver had to make up his mind instantaneously to meet the situation created by the action of the Respondent whilst the execution of his decision occupied not more than one second.

It may be argued and was argued that had he acted otherwise and applied his brakes and/or swerved to the left the accident might have been averted.

This is a reasonable rough conjecture but in the present instance it is not an inference supported by any specific facts proved in the case.

The Appellant was placed in a position of peril by the Respondent—and we quote the actual words of the learned Judge—"suddenly darting across the road in front of the Appellant's truck," and even assuming that the decision he made resulted in misfortune to the Respondent this Court must have regard to the circumstances in which a driver is suddenly called to act and should not demand from him superhuman prescience and skill. The question the learned Judge was called upon to decide was not whether he took that course which would certainly have averted the accident, but whether he took that course which, having regard to the sudden emergency, was a reasonable course to take.

Lord Dunedin in *United States of America* v. *The Laird Line* (1924) Appeal Cases, in the course of his judgment remarked:—

> "that it is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in danger."

It is to be conceded that other alternative courses of action were open to the Appellant's driver at the moment the Respondent darted in front of the oncoming vehicle, which had they been adopted might or might not have averted the accident, but the issue, as we see it, is merely whether in acting as he did in the dilemma in which he found himself the driver can be said to have acted reasonably or unreasonably.

We find in the circumstances that he did all a reasonable man could be expected to do.

While the Court has the greatest sympathy for the victim of this deplorable accident it must apply the law to the facts regardless of its sympathy and while the injury suffered by the Respondent invokes our commiseration we have for the reasons stated no alternative but to reverse the decision of the learned Judge. We therefore direct judgment to be entered for the Appellant with costs in this Court and the Court below.

REX

v.

RAMJEET SINGH.

[1940. No. 40.—DEMERARA.]

BEFORE CAMACHO, C.J.

1940. FEBRUARY 12, 14.

Criminal law and procedure—Fair and impartial trial—Trial resulting in a true verdict whether of guilt or of innocence—Duty of Court to secure—If trial took place in county where accused committed for trial—Would take place in an atmosphere of prejudice—Fair and impartial trial can be had in another county—Trial removed—Criminal Law (*Procedure*) *Ordinance, cap. 18, s. 114.*

It is the duty of the Court to secure a fair and impartial trial, meaning thereby a trial resulting in a true verdict whether of guilt or of innocence.

Where the Court was satisfied that, if the trial of an accused person occurred in the county of Berbice, it would take place in, at least, an atmosphere of prejudice, but that a fair and impartial trial could be had in the county of Demerara, the Court ordered that the trial should be removed from the county of Berbice to the county of Demerara.

Motion by the Attorney-General that the trial of Ramjeet Singh, indicted for murder, be removed from the County of Berbice to the county of Demerara.

E. M. Duke, acting Crown Counsel, for the Attorney-General.

J. A. Luckhoo, K.C., for the accused Ramjeet Singh.

Cur. adv. vult.

CAMACHO, C.J.: On behalf of the Attorney-General this Court is moved under section 114 of Cap. 18, to remove the trial of Ramjeet Singh, charged with murder, from the county of Berbice to the county of Demerara. The section enables the Court, or a

Judge, on the motion of the Attorney-General, or the accused person, and on sufficient grounds shown by affidavit to change the venue. Learned counsel who appeared for the Attorney-General based his argument for the order on two grounds, first, as of right in the Attorney-General, secondly on sufficient cause shown by the affidavit of Percy W. King.

It is serviceable to state immediately that, in the view of the Court the application on behalf of the Attorney-General is not made in that form which would enable the Court to grant the order as of course and the Attorney-General must stand or fall on the question as to whether or not he has disclosed sufficient grounds to the satisfaction of the Court as required by the section.

The issue of the Order is in the discretion of the Court, a discretion to be exercised judicially. As was stated by Fitzgerald, J., in *The Queen* v. *Phelan,* (1881) 14 Cox 581 the duty of the Court is to see that the case shall be tried in a place where a "fair and impartial trial" may be had: and "fair and impartial" he defined to mean "a trial resulting in a true verdict whether of guilt or innocence." In a Canadian case (*R.* v. *O'Gorman*) the principle on which a change of venue in a criminal case will be ordered is stated to be that there is fair and reasonable probability of partiality or prejudice in the place in which the indictment would otherwise be tried; a general prejudice throughout the colony would not be sufficient ground for the granting of the order: *R* v. *Hayward,* (1840) 4 J.P. p. 428. What then are the facts and suggestions on which the Attorney-General invokes the aid of the Court?

On the 23rd December last, Mr. Wilfred Swingler, who was the Resident Engineer at Port Mourant, Berbice, died as the result of a gunshot wound allegedly feloniously inflicted on the preceding night. On the 27th December, the Berbice Chamber of Commerce and Development Association held a meeting of the Chamber at Berbice which was attended by persons holding positions of influence in that county. Some of those persons were members of the Legislative Council: others were, a Bank Manager, a Clergyman and persons holding positions of importance in the sugar industry and in commercial undertakings carried on in Berbice. A resolution passed at that meeting recited that outrages on property and persons were frequent in the county, that they were of terroristic character designed to pervert the administration of justice, that responsible citizens were concerned for adequate steps to be taken to bring the culprit to justice, that the prosecution of those responsible lacked vigour and that unless the situation was remedied citizens would be at the mercy of mob violence and rascality. In the speeches which supported the resolution the authorities were stated to accord preferential treatment to certain sections of the

population. An allusion obviously to a particular race or class. One speaker stated that he had prepared and would cause the widest circulation throughout Berbice of a petition to Government which he was confident would be widely signed by responsible and law abiding citizens. His promise was implemented for on the 24th of January this year he and others presented to the Governor a petition signed by 2,017 persons in the county of Berbice. The petition so signed repeated in the main the allegations in the resolution and required that the laws of the Colony be firmly administered without fear or favour. From the statement made to the effect that the petition would be presented for approval to responsible citizens it is fair to infer that resort was had to extensive canvassing in the county and it is equally fair to infer that a considerable proportion of the signatories to the petition are persons liable to jury service in the county of Berbice. The jurors book for the current judicial year for that county contains 579 names. It is not known to the Court how many jurors for the county of Berbice in fact signed the petition. Clearly if jurors are as well petitioners it would be inadvisable for them to sit in judgment on the accused. Although the transactions which led up to the petition and the petition itself preceded the arrest and indictment of the accused an atmosphere has been created in the county inimical to a fair and impartial trial. It is however urged that the resolution and the speeches made in support thereof may be regarded as generalities having no application to the accused inasmuch as at that time the accused was unknown and was not in jeopardy. Although the accused had not been apprehended when these matters transpired the whole trend of the agitation in Berbice represents that the perpetrator must be found, vigorously prosecuted and punished. The Crown alleges that the accused is the perpetrator of the crime and I consider that if his trial occurs in Berbice it would take place in, at least, an atmosphere of prejudice. Moreover, the allegations that contributions are being solicited and collected at various points in Berbice in aid of the defence from a wide circle of people are not denied and although this fact is susceptible of stricter proof the uncontradicted information has been conveyed to the Court. From the affidavit in support of the motion two factions—one for and one against the accused—would appear to be already in being in the county where the facts arose. It is urged by learned counsel on behalf of the accused that the accused would be satisfied to stand his trial in the county in which the alleged crime took place. It is the duty of this court however, to secure a fair and impartial trial, meaning thereby a trial resulting in a true verdict whether of guilt or innocence. Mere preference for any particular place of trial by the Crown or the accused cannot effectively weigh with the Court. It is suggested that the county of Demerara is as much prejudiced as

the County of Berbice inasmuch as at a meeting of the Georgetown Chamber of Commerce on the 3rd of January, 1940, a resolution of similar trend as that passed by the Berbice Chamber and speeches similar in tone and terms were passed and made by the members of the Georgetown Chamber. Both meetings and their transactions were widely circulated by the newspapers throughout the Colony. It is to be noted however that after the meeting of the Georgetown Chamber of Commerce no further steps were taken whereas in Berbice a campaign of canvassing to obtain signatures to the Berbice petition was inaugurated and successfully conducted. The population of Demerara is much greater than that of Berbice and the jury list for the county of Demerara numbers 2,378 names. In my opinion while a fair and impartial trial is not likely to be had in Berbice such a trial may be had in the county of Demerara. I accordingly order that the trial of Ramjeet Singh on a charge of murder be removed from the county of Berbice to the county of Demerara and I further order that all costs occasioned by the removal shall be borne by the Crown including costs of any view of the *locus in quo* which the judge may think fit to order in the course of the trial.

This motion and the order which issues thereon emphasise the restraint which members of the public ought to exercise in commenting on matters which relate to the administration of justice.

Solicitor for applicant: *P. W. King*, Crown Solicitor.

CORENTYNE S. CO., LTD. *v.* COM., IN. TAX.

THE CORENTYNE SUGAR COMPANY, LIMITED,
Appellants,

v.

THE COMMISSIONERS OF INCOME TAX, Respondents.

[1939. No. 105.—DEMERARA.]

BEFORE LANGLEY, J., IN CHAMBERS.

1939. JUNE 19, 26; 1940. FEBRUARY 16.

Income tax—Deductions—Capital employed in improvements—Deductions in respect of outgoings and expenses wholly and exclusively incurred in production of income—Cannot be included in—Deductions in respect of exhaustion of property—Not excluded from—Income Tax Ordinance, cap. 38, ss. 10, 11, 12 (*d*).

Construction—Ordinance—Contradictory provisions—To be read together—Income Tax Ordinance, cap. 38, ss. 11, 12 (*d*).

Income tax—Capital or revenue expenditure—Question of fact for Commissioners—Appeal—Onus on appellant to prove Commissioners wrong—Income Tax Ordinance, cap. 38, s. 45 (*5*)

Income tax—Capital or revenue expenditure—Lands leased by taxpayer for cane cultivation—Lands empoldered, drained and improved—Necessary—To carry out purposes for which lands leased—Expenditure incurred—In nature of capital expenditure—Question of degree—Apparently capital expenditure.

Income tax—Exhaustion of property—Property—Includes interest in lease—Income Tax Ordinance, cap. 38, s. 11.

Income tax—"During the year immediately preceding the year of assessment"—Construction of—Income Tax Ordinance, cap. 38, ss. 10, 11, 55.

Income tax—Deductions for exhaustion—May be spread over a period of years—Income Tax Ordinance, cap. 38, s. 11.

Income tax—Exhaustion of property—Construction—Ordinance—Not clear and unambiguous—Meaning of "property" in relation to capital assets—Uncertain—Court cannot therefore say that Commissioners are wrong—Income Tax Ordinance, cap. 38, s. 45 (*5*).

Section 12 (*d*) of the Income Tax Ordinance, Chapter 38, (which provides that no deduction shall be allowed in respect of any capital employed in improvements), does not apply to a deduction claimed under section 11 in respect of exhaustion or wear and tear of property arising out of its use or employment in the business of the taxpayer, but it applies to a deduction claimed under section 10, (which relates to deductions claimed in respect of outgoings and expenses wholly and exclusively incurred in the production of income) in respect of capital expenditure of a non-recurring nature, being expenditure on the improvement of a capital asset, that is to say, such expenditure is excluded from the deductions allowable under section 10 of the Ordinance.

The provisions of section 12 of the Income Tax Ordinance apply, except as otherwise, (for instance in section 11), provided in the Ordinance.

A company leased certain lands, adjoining their own lands, for the purposes of cane cultivation for a period of years. To carry out the purposes for which the lands were leased, it was necessary to incur considerable expenditure on empoldering, draining and improving the said lands. During the year ending December 31st, 1937, the sum of $3,632.28 was expended by the company for this purpose.

The terms of the leases made it quite clear that the contracting parties recognised that the tenant would have to spend considerable sums at once to get the leased land into condition for cane cultivation. Without such expenditure the lands were useless for the purposes for which they were leased. The rent agreed upon was correspondingly less than it would have been, had the tenant not been involved in preliminary expenditure.

In ascertaining the chargeable income of the company the Commissioners of Income Tax disallowed, as a deduction from the gains or profits of the company, the said sum of $3,632.28. The company appealed.

Held, (1) that the expenditure was in the nature of capital expenditure, and, from the description of the items thereof, it appeared to be capital expenditure.

Clayton v. *Newcastle-under-Lyme Coporation* (1888) 2 Tax Cases 416, and *Vallambrosa Rubber Co.* v. *Farmer* (1910) 5 Tax cases 529 applied.

(2) that the question whether expenditure is capital or revenue expenditure is purely one of fact for the Commissioners to decide, and such question may be one entirely of degree.

(3) that by section 45 (5) of the Income Tax Ordinance, chapter 38, the onus of proving that an assessment is excessive is on an appellant, and as the company had not proved that the Commissioners were wrong on the facts, the finding of the Commissioners that the expenditure was capital expenditure could not be disturbed.

Whatever may be the interpretation of the word "property" in section 11 of the Income Tax Ordinance, Chapter 38, the word there includes interest of the taxpayer in leases.

The words "during the year immediately preceding the year of assessment" in section 11 of the Income Tax Ordinance, Chapter 38, must be construed with reference to section 55 (which relates to the refund of income tax overpaid in a previous year).

On the analogy of section 13 of the Income Tax Ordinance, chapter 38, (which relates to allowances for trade losses), it is within the scheme of the Ordinance, (which aims at avoiding fluctuations of the burden cast on the taxpayer), that the Commissioners of Income Tax should be empowered, under the discretion conferred on them by section 11, to allow a deduction at a reasonable amount; to say that a fraction of any item may be allowed in respect of any financial period, and the remainder be spread over the succeeding financial periods in such proportions as they may deem reasonable.

The discretion vested in the Commissioners of Income Tax by section 11 of the Income Tax Ordinance chapter 38, governs the deductions permitted thereby, and not the decision as to what property shall be the subject of the deductions.

The expression "exhaustion, wear and tear of property" occurring in section 11 of the Income Tax Ordinance, chapter 38, in so far as the word "exhaustion" is concerned, is not clear and is ambiguous; and no effect can be given to the word "exhaustion."

For an interpretation to be placed upon section 11 of the Income Tax Ordinance, chapter 38, which gives the Commissioners a discretion to allow deductions for exhaustion on any type or form of capital asset would be accepting a principle contrary to the whole scheme of the Ordinance. Fluctuations, either up or down, in the value of capital assets have always been held to be something outside the scope of income taxation.

The scheme of the Income Tax Ordinance provides that deductions in respect of capital depreciation cannot be allowed except within very clearly defined limits expressed in the Ordinance itself. The use of the word "exhaustion" in section 11 (which relates to deductions in respect of capital depreciation of "property") does not indicate clearly and without ambiguity upon what "property'' the relief was intended to be created for the benefit of the taxpayer. It is impossible for the Court to arrive at a definition of what capital assets may be made the subject of the Commissioners' discretion in allowing deductions. It is impossible to ascribe a meaning to the word "property" in section 11, unless an interpretation is put on the section which would be repugnant to the scheme of the Ordinance as a whole.

A deduction, if not expressly authorised by the Income Tax Ordinance, cannot be allowed. It is not possible to ascertain precisely what "property" is by the Ordinance intended to be subject to the deduction: consequently the appellant has not satisfied the Court that the Commissioners were wrong in refusing to allow the deduction.

Appeal by the Corentyne Sugar Company, Limited, against the decision of the Commissioners of Income Tax given on the 24th March, 1938, confirming an assessment made upon the company

for the year of assessment 1938, upon the income derived by the appellants during 1937.

The grounds of appeal were as follows:—

1. The appellants are holding the following lands, namely:—

(*a*) Plantations lots numbers 28, 30, 32, 34, 36, 38 and 40, situate on the east sea coast canal, in the county of Berbice under lease from Edgar Evans Hicken for a period of 15 years from the 1st January, 1935, with a right of renewal for a similar period: and

(*b*) the triangular piece of land being the back part of Fyrish on the Corentyne Coast in the county of Berbice under lease from the Local Authority of the Fyrish Country District of the county of Berbice for a period 17 years from the 1st January, 1933.

2. It is provided by the lease with the said Edgar Evans Hicken, *inter alia*, as follows:—

"3. The lessee shall be at liberty at any time or times during the said term to construct and maintain a drainage canal in the east side line of Plantation Borlam with all such dams, sluices, stop-offs and kokers as they may consider expedient from time to time and to use and operate such drainage canal as they may deem beneficial and shall have all such rights of way and otherwise for themselves, their servants and agents as may be convenient for constructing, maintaining and operating such canal with such dams, sluices, stop-offs and kokers. If the lessor so requires it the lessee shall put down at such point as the lessor may reasonably require a box koker not larger than 6 feet by 6 feet to connect the drainage of Plantation Borlam with the said canal but the lessee shall not be liable to repair such koker.

4. The lessee shall be at liberty at all times during the said term to use the east side line dam of Plantation Maryburg and the east side line dam of Plantation Hammersmith as ways for themselves, their servants, agents and tenants to pass and re-pass between the public road and the said premises, with or without vehicles and with or without draught animals and beasts of burden or mechanical tractor or implements. The lessee shall during such term keep up and maintain such side line dam aforesaid.

5. The lessee shall make up all dams of the said premises to such a height as may be reasonably necessary to keep off the water of adjacent lots from flowing on the premises and will maintain such dams during the continuance of the said term.

6. The lessee shall be at liberty from time to time to place maintain and remove all such stop-offs and kokers in and aqueducts under such part of the east sea coast canal aforesaid as lies to the north of the said premises and to put, maintain and remove such bridges across the same as they may deem reasonably necessary or convenient to connect the said premises with

the side line dams of Plantation Maryburg and Hammersmith aforesaid.

7. The lessee shall be at liberty to alter and improve the premises from time to time but at the expiration of this lease the lessee shall have no claim against the lessor for compensation or otherwise for any alterations or improvements made to the premises or for any expenses incurred in connection therewith or in respect of the same.

8. The lessee shall not have the right to assign this lease without the consent of the lessor in writing first had and obtained.

9. Should the lessor at any time during the existence of this agreement be desirous of selling the premises or any part thereof he shall be bound in the first instance to offer the same to the lessee for such similar consideration as he may have been *bona fide* offered by and be willing to accept from a third party and in the event of the acceptance by the lessee of such offer the lessor shall transport the premises to the lessee, the cost of such transport to be borne between the lessor and the lessee in equal shares."

3. It is provided by the lease with the said Local Authority, *inter alia*, as follows: —

"2. The lessees shall be at liberty at any time or times during the said term of 17 years to construct and maintain drainage canals, with all such dams, sluices, stops-off and kokers as they may consider expedient from time to time and to use and operate such drainage canals as they may deem beneficial and shall have all such rights of way and otherwise for themselves, their servants and agents as may be convenient for constructing, maintaining and operating such canals with such dams, sluices, stops-off and kokers.

4. The lessees shall be at liberty to improve the said land from time to time, but at the expiration or determination of this lease the lessees shall have no claim against the lessors for compensation or otherwise for any improvements on or to the said land or for any expenses incurred in connection therewith.

5. The lessees shall not have the right to assign this lease without the consent of the lessors first had and obtained but such consent shall not be arbitrarily or unreasonably withheld.

11. The lessors shall not in any way be liable for any loss or damage which the lessees and/or their tenants may suffer through drought or flood or any imperfect drainage of the said land.

12. All buildings and erections and engines, machinery, plant and other appurtenances which the lessees may place and erect on the said land shall be and remain the property of the lessees and may be removed at any time."

4. The appellants during the year ending 31st December, 1937, expended the sum of $3,632.28 in empoldering, draining and improving the said lands.

5. The said assessment is erroneous because the said sum of $3,632.28 is an outgoing and expense incurred by the appellants in the production of their income and should have been allowed by the Commissioners as a deduction under section 10 of the said Ordinance.

6. The appellants during the years 1935, 1936 and 1937 expended in the aggregate including the said sum of $3,632.28 the sum of $36,842.29 as set out in the Schedule hereto in empoldering, draining and improving the said lands.

7. The said assessment is erroneous because inasmuch as the said leases will run out within 15 years from the date on which empoldering was first started and give no option to purchase the said lands, a proportion (based on the unexpired period of the said leases) of the said sum of $36,842.29 or of any increase thereof, should have been allowed as a deduction for the exhaustion in the year ending 31st December, 1937, of the property represented by the said sum of $36,842.29 under section 11 of the said Ordinance.

8. The said assessment is also erroneous because the gains or profits from the appellants' business for the year ending 31st December, 1937, cannot be truly ascertained without allowing the said deductions, which are not deductions disallowed by section 12 of the said Ordinance.

The Schedule referred to in paragraph 6 of the grounds of appeal was as follows:—

Particulars of cost of empoldering, draining, etc.

	1935.	1936.	1937.
(1) Digging Cross canals	...2,016.08	3,640.68	747.20
(2) do. Middle walks	... 828.28		
(3) do. Side-lines	...2,357.16		
(4) do. Drains, fourfoots and Trackers	…4,805.62	5,760.88	1,853.00
(5) Backing Earth	…2,809.08	3,241.72	1,032.08
(6) Stop-offs	... 26.64		
(7) Bridges and Aqueducts	... 3,309.81	3,894.45	
(8) Fencing	... 479.81		
(9) Making up Dams	... 39.80		
	$16,672.28	$16,537.73	$3,632.28

Cost in 1935—$16,672.28
Cost in 1936—$16,537.73
Cost in 1937—$ 3,632.28
$36,842.29

The statement by the Commissioners of Income Tax of the

material facts upon every point specified in the summons as a ground of appeal together with the reasons in support of the assessment was as follows:—

1. The appellants have been assessed to income tax for the year of assessment 1938 upon the income derived by the Appellants during the year 1937 from gains or profits arising mainly from the business of cultivating sugar cane and manufacturing and selling sugar carried on by the Appellants.

2. In ascertaining the chargeable income the Commissioners have disallowed as a deduction from the gains or profits the sum of $3,632.28 expended during the year 1937 by the Appellants on empoldering, draining and improving certain lands leased and used by the Appellants for the purposes of the Appellants' business.

3. The Appellants expended during the year 1935 and 1936 further sums as set out below on empoldering, draining, and improving the aforesaid lands:

1935	...	.. $16,672.28
1936	...	... 16,537.73

the total sum so expended including the said sum of $3,632.28 expended in the year 1937 being $36,842.29, (In ascertaining the chargeable income for the years of assessment 1936 and 1937 the aforesaid sums expended in 1935 and 1936, respectively, were disallowed as deductions from the gains or profits).

4. The lease with Edgar Evans Hicken provides *inter alia*:—

"11. If the Lessee not less than six calendar months before the expiration of the said term shall give to the Lessor or leave at his usual or last known place of abode in this Colony a notice in writing requesting a renewal of the said term for a further term of fifteen years from the 31st day of December, 1949, then and in such case the said term shall be renewed accordingly upon the same terms and subject to the same covenants, provisoes and conditions as herein contained and the Lessor shall, if the Lessee so requires, execute and do at the expense and cost of the Lessee all such acts, deeds and things as may be reasonably necessary to assure to the Lessee such renewal as aforesaid."

5. The other terms and conditions of the leases under which the lands are held by the Appellants are as stated in paragraphs 1, 2 and 3 of the grounds of appeal set out in the summons, the facts thereof being admitted by the Commissioners and not in dispute.

6. The Appellants contend—

(*a*) that the said sum of $3,632.28 is an outgoing or expense incurred by the appellants in the production of their income and should be allowed as a deduction in ascertaining the chargeable income under section 10 of the Ordinance.

(*b*) that the said sum of $3,632.28 is not a deduction disallowed by section 12 of the Ordinance.

Alternatively, (c) that the aforesaid aggregate amount of $36,842.29 has been expended by the Appellants in acquiring property in respect of which there should under section 11 of the Ordinance be allowed as a deduction in ascertaining the chargeable income a reasonable amount for the exhaustion of the said property during the year 1937 on the ground that the said property will become exhausted on the termination of the period of the leases.

7. The Commissioners say,—

(*a*) that the said sum of $3,632.28 is not an expense wholly and exclusively incurred in the production of the income and is therefore not an allowable deduction under section 10 of the Ordinance.

(*b*) that the said sum of $3,632.28 is capital expended on improvements and no deduction in respect thereof can therefore be allowed in accordance with section 12 (d) of the Ordinance.

(*c*) that the sum of $3,632.28 is not a proper debit item to be charged against incomings of the appellants' business when computing the balance of profits of it.

(*d*) that no deduction for exhaustion of property under section 11 of the Ordinance can be allowed with respect to the property leased to the Appellants by reason of the aforesaid aggregate expenditure of $36,842.29 on empoldering, draining and improving the said lands because—

(1) there has in fact been no exhaustion of the property: the lands have been improved by the incurring of the expenditure;

(2) the lands are kept continually in being by annual expenditure on maintenance which is properly allowable as a deduction under section 10 of the Ordinance;

(3) the lands would not be exhausted by reason of the termination of the leases. With respect to paragraph 7 of the grounds of appeal, the facts are that the appellants have no right of renewal and no option to purchase with respect to the land leased from the Local Authority of the Fyrish Country District but that, with respect to the lands leased from Edgar Evans Hicken, the appellants have a right to renew the lease, and further a right to purchase, should the lessor at any time during the existence of the lease be desirous of selling;

(4) the lands alleged to be exhausted are not owned by the appellants.

(5) the alleged exhaustion is not exhaustion arising out of the use or employment of the property in the business of the appellants;

(6) The alleged exhaustion did not occur during the year immediately preceding the year of assessment.

H. C. Humphrys, K.C., for the appellant.

(1) The amount claimed as a deduction is allowable under section 11 of the Income Tax Ordinance, Chapter 38, as a reason-

able amount for exhaustion. There is no similar provision in the English income tax law, and that is why *Gillatt and Watts* v. *Colquhoun* (1884) 33 W.R. 258, 2 Tax Cases 76, 83, 84 and *Alianza* v. *Bell* (1905), 1 K.B. 184, 5 Tax Cases 69, 70 were decided otherwise. There is in this case exhaustion. The money spent on the premises leased will be exhausted in 15 years as the leases will be terminated in 15 years. The Commissioners of Income Tax, wherever there is exhaustion, allow the total amount to be spread over a period of years. The amount allowable should therefore be one-fifteenth of the total amount. (2) If the amount claimed is not allowable under section 11, then it is allowable under section 10. Rent is an outgoing which is allowed. If the obligation to place the lands in order was to be performed by the lessor, then the rent would have been greater than it is at present, and that enhanced rent would have been allowed as a deduction under section 10. He also referred to *Jones* v. *Skinner* (1835) 5 L.J. Ch. 87, *Casey* v. *Laylor,* 5 Irish Common Law Reports 507, *Vallambrosa Rubber Co.* v. *Farmer* (1910) 5 Tax Cases 536, and *Snelling's* Dictionary of Income Tax, 8th edn, pp. 358 to 363. (3) Whether the deduction should be allowable under section 10 or section 11 is immaterial as it is the practice of the Commissioners where the total amount is large, as in the present case, to allow the amount to be spread over a long period of years. *E. M. Duke*, acting Assistant Attorney-General, for the respondents. For Income Tax purposes the law does not permit all the deductions which a prudent trader would make in ascertaining his own profits: *Alianza Co., Ltd.* v. *Bell* (1904) 5 Tax Cases 71, 72, (1905) 1 K.B. 184, C.A., *per* Stirling, L. J. The rights of the Crown and the liabilities of the taxpayer cannot be made to depend upon the latter's system of accounts: *Gresham Trustees* (*City's Moiety*) *v. Commissioners of Inland Revenue* (1897) 4 Tax Cases 341, 13 T.L.R. 362; *Attorney-General* v. *London County Council* (1900) 4 Tax Cases 301, 302, (1901) A. C. 26; *Edinburgh Life Assurance Co.* v. *Lord Advocate* (1909) 5 Tax Cases 491, (1910) A.C. 143; *Liverpool & London and Globe Insurance Co.* v. *Bennett* (1911) 6 Tax Cases 359, (1911) 2 K.B. 577; *J.&M. Craig* (*Kilmarnock*) *Ltd.* v. *Cowperthwaite* (1914) 13 Tax Cases 668, 669; *Thaw* v. *South West Africa Co., Ltd.* (1924) 9 Tax Cases 159, 131 L.T. 248; *Collins* v. *Firth-Brearley Stainless Steel Syndicate, Ltd.* (1925) 9 Tax Cases 569; *Whelan* v. *Dover Harbour Board* (1934) 18 Tax Cases 564, 151 L.T. 288; *Seaham Harbour Dock Co.,* v. *Crook* (1930) 16 Tax Cases 345, 347, 46 T.L.R. 396, 47 T.L.R. 23, 48 T.L.R. 91; *Sterling Trust Ltd.* v. *Commissioners of Inland Revenue* (1925) 12 Tax Cases 888. The mere method of accounting does not alter the character of the sums paid out. The Court has to look at the substance of the matter, and not at the manner in which the account is stated: *J. & R. O'Kane & Co.,* v.

Commissioners of Inland Revenue (1920) 12 Tax Cases 338, 126 L.T. 707; *Sterling Trust, Ltd* v. *Commissioners of Inland Revenue* (1925), 12 Tax Cases 888; *Bernhard* v. *Gahan* (1927) 13 Tax Cases 735; *Commissioners of Inland Revenue* v. *Scottish Automobile and General Insurance Co., Ltd.* (1931) 16 Tax Cases 390, 391; *Commissioners of Inland Revenue* v. *Veitch & Co.* (1933) 18 Tax Cases 316, (1934) 1 K.B. 535.

In *Mac Taggart* v. *B. & E. Strump* (1925) 10 Tax Cases 24, Lord Sands referred to the harsh bookkeeping principles as regards capital and income which are applied in construing the Income Tax Acts, and in *Roebank Printing Co. Ltd* v. *Commissioners of Inland Revenue* (1928) 13 Tax Cases 874 Lord President Clyde discussed how far commercial practice and the express provisions of the Income Tax Acts respectively govern the computation of profits for income tax purposes. Generally speaking, the question whether a deduction is to be allowed must be determined by the rules regulating what may be allowed in the preparation of the balance sheet or the profit and loss account: *Commissioners of Inland Revenue* v. *Warner & Co., Ltd.* (1920) 12 Tax Cases 239, (1920) 2 K.B. 553.

Though the Court may arrive at the conclusion that the deduction is not prohibited by section 12 of the Income Tax Ordinance, chapter 38, yet still it cannot be allowed under section 10 unless it is, on the facts of the case, a proper debit item to be charged against the incomings of the trade when computing the balance of profits of it: *Usher's Wiltshire Brewery, Limited, v. Bruce* (1915) 6 Tax Cases 399, 436, (1915) A.C. 433, 468; *Atherton* v. *British Insulated and Helsby Cables, Ltd.* (1925) 10 Tax Cases 182, 183, (1925) 1 K.B. 421; (1926) 10 Tax Cases 191, 192, 199, (1926) A.C. 205; *Mallett* v. *Staveley Coal & Iron Co., Ltd.*, (1928) 13 Tax Cases 787, (1928) 2 K.B. 405.

The Commissioners of Income Tax have found that the expenditure in question is capital expenditure. Whether or not an item of extraordinary expenditure—and the expenditure in question was extraordinary expenditure—falls to be treated as capital expenditure is a question of fact: *Hyam v. Commissioners of Inland Revenue* (1929) 14 Tax Cases 488, *per* Lord Sands. Although it is true that a finding of fact that a particular expenditure is capital expenditure does not necessarily foreclose consideration by the Court: *Lothian Chemical Co* v. *Rogers* 1926) 11 Tax Cases 522, *per* Lord President Clyde, still it remains a question of fact: *Morant* v. *Wheat Grenville Mining Co.* (1894) 3 Tax Cases 302, 71 L.T. 358, *per* Wright, J.

In a rough way it was not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is

going to recur every year: *Vallambrosa Rubber Co.* v. *Farmer* (1910) 5 Tax Cases 536, *per* Lord Dunedin. This criterion has been approved and accepted in several subsequent cases: *Small* v. *Easson* (1920) 12 Tax Cases 355, *per* Lord Justice Clerk Scott Dickson. In *Ounsworth* v. *Vickers. Ltd.,* (1915) 6 Tax Cases 671, 675, (1915) 3 K.B. 267, Rowlatt, J., said that no stress should be laid upon the words "every year" and that the real test is between expenditure which is made to meet a continuous demand, as opposed to an expenditure which is made once for all. In *Atherton* v. *British Insulated and Helsby Cables, Ltd.,* (1925) 10 Tax Cases 192, 196, (1926) A.C. 205 the criterion set forth in the *Vallambrosa* case was referred to, and it was stated that the criterion suggested is not a decisive one in every case.

In *United Colleries, Ltd.* v. *Commissioners of Inland Revenue* (1929) 12 Tax Cases 1254 it was held that whether an outlay is to be treated as capital or income must depend not entirely upon the consideration whether exactly the same sort of operation has to be repeated every year, but also upon the consideration whether an operation is trivial in relation to the magnitude of the works, and that the question into which category any particular expense must fall is always one of degree. In *Boyce* v. *Whitwick Colliery Co., Ltd.* (1934) 18 Tax Cases 680 Lord Hanworth, M.E. stated that it has often been tried to lay down some sort of principle which shall be a guide (as to whether annual sums are capital or income) but one has to look at the facts of each case.

The leases formed part of the fixed capital assets of the Corentyne Sugar Company Limited. *Mallett* v. *Staveley Coal* and *Iron Co., Ltd.,* (1928), 13 Tax Cases 787, (1928), 2 K.B. 405. Expenditure made for the acquisition of an asset is a capital expense: *Robert Addie & Son's Collieries, Ltd.* v. *Commissioners of Inland Revenue* (1924) 8 Tax Cases 677, *per* Lord President Clyde. When expenditure is made with a view to bringing into existence an asset, there is good reason, in the absence of special circumstances, for treating such expenditure as capital: *Athertons' case* (1925) 10 Tax Cases 192, 193.

Preliminary expense incurred in bringing property to a stage when it can produce income is capital expenditure: *United Collieries, Ltd.,* v. *Commissioners of Inland Revenue* (1929) 12 Tax Cases 1248, 1253. Expenditure upon the provision or supply of "implements utensils or articles" wherewith to commence a business is capital expenditure: *Hyam* v. *Commissioners of Inland Revenue* (1929) 14 Tax Cases 485, *per* Lord President Clyde.

The cost of improvement is a charge against capital: *Highland Railway Co.* v. *Balderston* (1889) 2 Tax Cases 488, *per* Lord President.

A taxpayer can make capital expenditure upon the land of a third party, it is none the less capital expenditure even if it is upon the land of a third party and not upon his own land: *Boyce* v. *Whitwick Colliery Co., Ltd.*, (1934) 18 Tax Cases 685, *per* Slesser, L.J. In *Ounsworth* v. *Vickers Ltd.*, (1915) 6 Tax Cases 671, (1915) 3 K. B. 267, it was held by Rowlatt, J. that expenditure incurred by a shipbuilding firm in deepening a channel and creating a deep water berth (not on their own property) to enable vessels constructed by them to put out to sea is capital expenditure. This was approved by Viscount Cave, L. C. in *Atherton* v. *British Insulated and Helsby, Cables Ltd.,* (1925) 10 Tax Cases 193.

The sum in question was part of a sum of $36,842.29 which was expended by the appellants on empoldering, draining and improving the lands leased by the appellants and used by them for the purposes of their business. It was a preliminary expense incurred in bringing the property to a stage when it could produce income, and the business of cane cultivation on the lands leased could not be begun unless the lands were empoldered, drained and improved. The expenditure was made for the acquisition of an asset, or with the view of bringing into existence an asset, capable of producing income. The expenditure was not trivial. It was an expenditure which was made once for all, as opposed to an expenditure which is made to meet a continuous demand.

The expenditure in question was therefore capital expenditure, and not a proper debit item to be charged under section 10 of the Income Tax Ordinance, chapter 38, against the incomings of the trade when computing the balance of profits of it.

Anomalies must always exist in the incidence of a tax such as the income tax. The existence of anomalies may be a reason for legislating, but is not one for putting a strained and impossible construction on the language of the Acts: *Bowers* v. *Harding* 1891) 3 Tax Cases 25, (1891) I Q.B. 560, *per Pollock, B.*, and *National Provident Institution* v. *Brown* (1920) 8 Tax Cases 79.

No deduction can be allowed for exhaustion under section 11 of the Income Tax Ordinance, Chapter 38, unless (*a*) there was exhaustion; (*b*) the exhaustion was of property owned by the taxpayer including plant and machinery; (*c*) the exhaustion was exhaustion arising out of the use or employment of the property (including plant and machinery) in the trade, business, profession or vocation of the taxpayer; and (*d*) the exhaustion arose during the year immediately preceding the year of assessment. In other words, (*a*) the exhaustion must be proved, (*b*) the property exhausted must be identified, (*c*) the use or employment of the property which, it is alleged, caused the exhaustion, must be identified, (*d*) it must be shown that the exhaustion arose out of the use or employment, and (*e*) it must be shown that the

exhaustion, claimed by the taxpayer as a deduction, arose during the year immediately preceding the year of assessment. If any one of these elements is not satisfactorily proved or established, then the taxpayer has not made out his case for a deduction in respect of exhaustion under section 11 of the Income Tax Ordinance, Cap. 38.

No deduction can be allowed under section 11 of the Income Tax Ordinance, chapter 38, for the reasons specified in paragraph 7 (d) of the statement of the Commissioners. There was no exhaustion of the property: the lands have been improved by the incurring of the expenditure. The alleged exhaustion is not exhaustion arising out of the use or employment of the property in the business of the appellants. What the appellants call exhaustion would not arise until the expiration of the leases and did not occur during the year immediately preceding the year of assessment. The lands alleged to be exhausted are not owned by the appellants, and the lands would not be exhausted by reason of the termination of the lease.

The property owned and exhausted must be physical property like a gold mine, a coal mine, a timber forest, an oil well or a bauxite mine. "Property" is not notional like capital. It must be represented by physical assets. A company does not own the capital of the company.

In Canada provision is made by section 5 of the Income War Tax Act, for allowing a deduction from the chargeable income in respect of exhaustion of mines, wells and timber limits. It is obvious that in such cases the exhaustion does in fact arise out of the use of the mines, wells and timber limits in the business of the taxpayer: see *Plaxton*, Canadian Income Tax Law, pp. 77, 78, 82.

In the present case the land is agricultural land, and there is no exhaustion within the meaning of section 11 of the Income Tax Ordinance. The alleged exhaustion did not arise out of the use of the property, but *ex contractu*, by reason of the circumstance that the lands empoldered drained and improved did not belong to the appellants, but are held by them under leases. The alleged exhaustion arose by virtue of the very documents creating the leases: and started the very moment they were executed and would arise whether or not the lands were used for cane cultivation or were allowed to become abandoned. He also referred to *Llewellyn* v. Davis (1873) L.R. 16 Eq. 294.

By section 12 (*d*) of the Income Tax Ordinance, chapter 38, for the purpose of ascertaining the chargeable income of any person no deduction shall be allowed in respect of any capital employed in improvements. The money in question was capital expenditure employed in improvements, and therefore no deduction can be allowed under section 11 of the Ordinance. It may be considered to be a hardship on the appellants if the deduction

claimed by them is disallowed, but that is no reason for putting a strained and impossible construction on the language of sections 11 and 12 (d) of the Income Tax Ordinance, chapter 38.

Cur. adv. vult.

LANGLEY, J.: This appeal, among other issues, raises the question of the interpretation to be placed upon section 11 of the Income Tax Ordinance, Chapter 38, (hereinafter called "the Ordinance").

The issue has been clouded by the introduction of Canadian Legislation, which, in my opinion, provides very little, if any, guide in the matter. I purpose dealing with that aspect first. I will compare the two instruments. Section 6 of the Income War Tax Act of the Dominion of Canada (hereinafter called "the Act") in part reads as follows:—*Deductions not allowed.*

"In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of . . . (*b*) Any outlay, loss or replacement of capital or any payment on account of capital, or any depreciation or obsolescence, except as otherwise provided in this Act." Section 12 (d) of the Ordinance reads:—"For the purposes of ascertaining the chargeable income of anyone, no deduction shall be allowed in respect of any capital employed in improvements." It should be noted that the Act makes express reference to deductions authorised elsewhere therein. In my opinion, that limitation restricts any deductions allowable to those mentioned elsewhere in the Act. Those deductions so authorised appear to be set out in section 5 (*a*) of the Act. They read "*Exemptions and deductions.* Income as hereinafter defined shall for the purposes of this Act be subject to the following exemptions and deductions. (*a*) Depreciation and Exhaustion . . . Such reasonable amount as the Minister, in his discretion, may allow for depreciation and, the Minister in determining the income derived from mining and from oil and gas wells and timber limits shall make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair."

Section 11 of the Ordinance reads "In ascertaining the chargeable income of anyone engaged in a trade, business, profession, or vocation, there shall be allowed as a deduction a reasonable amount for exhaustion, wear and tear of property owned by him including plant and machinery, arising out of the use or employment of the property in the trade, business, profession, or vocation during the year immediately preceding the year of assessment."

At first glance the Canadian section appears to limit the deductions to operations in mining of minerals and lumber undertakings, but a closer examination leaves me with the impression that many

other commercial undertakings might be made the subject of these deductions at the discretion of the Minister.

From the information before me, however, the deductions allowed by Canadian authorities have been limited to the undertakings mentioned in that section. That fact has significance, in my opinion. It should be noted that the provisions of these two instruments differ in two material respects. *Firstly,* the limitation created by the words "except as otherwise provided in this Act" contained in section 6 (*b*) of the Act are not ordained in section 12 (*d*) of the Ordinance. *Secondly,* there is no indication of any use or limitations contained in section 11 of the Ordinance respecting the word "exhaustion," such as are enacted in section 5 (*a*) of the Act.

It appears to me that the cases based on the Act, heard before the Canadian Courts, can provide no guidance to this Court, because the Ordinance does not contain those indications in the context of the relevant section of the Act which provided the basis of the restrictions on deductions to mining or forestry properties.

There is agreement that the provisions in respect of exhaustion of capital assets created by section 11 of the Ordinance do not exist in the United Kingdom: therefore such English authorities as touch upon that subject are negative in nature.

In my opinion the terms of the several leases do not affect the issue before me at the present time, beyond the material fact that the lands were so leased for a period of years. My consideration of the issues before me is not affected by the contingent possibilities arising from the exercise of options to purchase the leased land or renew the lease.

The expenditure in issue arose on two leases entered into by the Company presumably prior to the 1st January, 1935, but the monies were not actually expended until some date or dates in 1935, 1936 and 1937, so that the Company had not lost the right to claim adjustments of previous assessments under the provisions of section 55 of the Ordinance, quite apart from the right to appeal which has been exercised under the provisions of section 45 of the Ordinance.

I have dealt with that aspect fully in my judgment in the case of the Demerara Electric Company, Limited versus Income Tax Commissioners of even date.

In construing the Ordinance, this Court must be satisfied that the meaning of the provisions is clear and unambiguous: *Tennant* v. *Smith* (1892) Appeal Cases p. 154. I must construe the words according to their ordinary and natural meaning: *Commissioners of Inland Revenue* v. *Herbert* (1913) Appeal Cases 332. No considerations of equity, nor hardships, should affect the construction of the Ordinance; *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1921) 1 K.B. 71. The substance, rather than

the form of transaction under review, should be examined: *Inland Revenue Commissioners* v. *Fisher's Executors* (1926 A.C. 411.

Where contradictory provisions appear in the same instrument, it is usual for the Courts to give weight to the latter provision in which the contradiction appears, unless there is a strong indication to the contrary.

It was submitted that section 12 (*d*) of the Ordinance would limit the provisions of the previous section, 11.

In am satisfied that although capital assets, which qualify for deductions under section 11, may well be the subject of expenditure on improvements from capital funds, such as plant and machinery, nevertheless the Legislature intended that the provisions of section 11 should be given effect by the Commissioners.

That is to say, I consider that words "except as otherwise provided in the Act" which are expressed in the Act, should in effect be implied in the Ordinance. It appears to me that the clearly expressed scheme of the Ordinance requires that this section 12 (d) should be read in a sense which cannot be said to be the natural one if it were taken by itself. I would invite the attention of the Commissioners to this point. I am of opinion that it would be well to consider its amendment on the lines of the Act.

Returning to the main issue of section 11 of the Ordinance, an issue surrounded by grave difficulties.

Perhaps the easier way of approach, would be to clear, first of all, so much of the wording of the section as would appear to be clear and unambiguous.

It would seem safe to say that the Legislature by using the phrase "including plant and machinery" intended that the preceding word "property" should extend the provisions to property other than plant and machinery.

Then arises the question, what value should be placed upon the word "property"? It is expressly stated that it includes plant and machinery—incidentally usually both capital assets—and by inference that it goes beyond those assets.

Mr. Humphrys has cited the judgment in *Casey* vs. *Laylor and Others,* reported in the Irish Common Law Reports which I have not before me neither have I the precise reference. There can be no question that the descriptive word said to have been held appropriate to the word "property" in that case, is correct; that "comprehensive" describes rightly what categories of rights or things may constitute property.

I hold that the rights of the Company created by the several leases held are interests in land which may constitute property within the meaning of section 11 of the Ordinance.

Mr. Duke submitted that the Company could not be called "owners" of those interests as the freehold of the land in ques-

tion is vested in others. I do not accept that submission. Although ownership is the most extensive right allowed by law to a person of dealing with a thing to the exclusion of all other persons, true ownership may be divided amongst several persons and may he vested to a limited extent in some person for definite periods only. Therefore I hold that the Company are the owners of those interests in the land which I have already held is property within the section.

Having eliminated these minor issues I will now deal with the difficult question of the interpretation to be placed upon the phrase "exhaustion, wear and tear of property." To quote the first Lord Halsbury in the action *Tennant* v. *Smith* (1892) Appeal Cases, p. 154:—

> "You have no right to assume that there is any governing object which a taxing Act is intended to attain, other than that which it has expressed by making such and such objects the intended subject for taxation; you must see whether a tax is expressly imposed."

That refers to what might be income but the principle is the same in arriving at what might be an allowable deduction.

The section expressly applies to machinery which is usually a capital asset, and frequently the subject of capital expenditure on improvements and replacements. Such machinery may have a definite period of usefulness, but such periods, certainly vary very extensively. Income tax practice and rules give the Commissioners a discretion in fixing a percentage, which may or may not coincide with the life of such machinery.

To express this position in principle, section 11 recognises that a taxpayer owning a capital asset which as time passes becomes actually lessened in value may at the discretion of the Commissioners be allowed what they consider a reasonable deduction which may or may not correspond with that decrement: *Caledonian Railway Co.* v. *Banks* (1880) 1 Tax Cases 487.

The Commissioners are given a discretion as to what is reasonable as a deduction on property, but, in my opinion, the legislation should indicate clearly what property of the taxpayer should be subject to such discretion.

I will cite the well known remark of Lord Macnaghten in the case of the *London County Council* v. *The Attorney-General* (1901) A.C. 35. He said: "Income Tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else," that is capital. Therefore, I consider that in ascertaining the chargeable income deductions are allowable, but there is every indication that, with certain specific exceptions expressed, clearly capital was not intended to be the subject of such deductions.

I am satisfied, however, that the Legislature did not intend

that principle to be so broad as to make all capital assets subject to this discretionary deduction.

It must be remembered that we are dealing not with the actual value of the asset at the date of account, but the item of account which appears in the appropriate account of the taxpayer in respect of that asset.

An asset owned by a taxpayer may have different values, and even no value in his accounts.

To cite examples: (*a*) the true commercial and intrinsic value; (*b*) the value appearing in the accounts, to which it has been reduced in previous financial periods in accordance with commercial standards of prudence; (*c*) the value to which it has been reduced by deductions in previous financial periods with the approval of the Income Tax Commissioners; and (*d*) the case of an asset still existing which has been completely written off in value.

Taking the examples of machinery in coal mines or forests, percentages are, or have been, allowed as deduction.

In fact, in the case of machinery, the wear and tear at first would be negligible, but would increase as years passed: whereas in the case of mines and forests, no coal or timber might be obtained until transport facilities were created and thereafter the exhaustion would probably rest on the question of demand for the product and fluctuate irregularly accordingly.

After very careful consideration I am forced to the conclusion that the phrase "exhaustion, wear and tear of property" in so far as the word "exhaustion" is concerned is not clear and is ambiguous.

In my opinion, until the wording of this section has been clarified by amendment, no force can be given to the words "exhaustion . . . . of property." I do not consider that the Commissioners should have any discretion as to what "property" the section should apply unless it is clearly expressed. It is so expressed in the case of plant and machinery.

For an interpretation to be placed upon the section giving the Commissioners a discretion to allow deductions for exhaustion on any type or form of capital asset would be accepting a principle contrary to the whole scheme of the Ordinance. Fluctuations, either up or down, in the value of capital assets have always been held to be something outside the scope of income taxation.

I will now pass to the facts as I understand them. The Company leased certain lands, adjoining their own lands, for the purposes of cane cultivation, for a period of years. To carry out the purpose for which the land was leased, it was necessary to incur considerable expenditure on empoldering and improving the said lands. During the year ending 31st December, 1937,

$3,632.28 is alleged to have been expended by the Company for this purpose.

In paragraph 5 of their grounds, the Company contends that that expenditure was an outgoing incurred from revenue for the production of their income, and should have been allowed by the Commissioners as a deduction under section 10 of the Ordinance. The relevant subsection was not cited. The question arises therefore, was this capital or revenue expenditure?

The Lord President said in his judgment in *Vallambrosa Rubber Company, Limited,* v. *Farmer* (1910) 5 Tax Cases p. 529: "In a rough way, I think it is not a bad criterion of what is capital expenditure, as against what is income expenditure, to say that capital expenditure is a thing which is going to be spent once and for all, and income expenditure is a thing that is going to recur every year."

In this instance, the terms of the leases made it quite clear that the contracting parties recognized that the tenant would have to spend considerable sums at once to get the leased land into condition for cane cultivation. The position was higher than that, as without such expenditure the land was useless for the purposes for which it was leased.

Common sense dictates that the financial terms of the lease were based on that position, and the rent agreed upon was correspondingly less than it would have been had the tenant not been involved in preliminary expenditure.

This situation, however, does not affect the question of whether that essential expenditure of the tenant in conditioning the land was capital, or revenue, expenditure

The reversionary value of the lands may be equally enhanced by the expenditure of the capital as of the revenue of a tenant or both combined. The reversionary aspect is quite irrelevant to the issue before me.

It is purely a question of fact upon which the Commissioners have to decide, on evidence supplied by the taxpayer, as to whether any expenditure is revenue or capital expenditure. Even if these lands had been empoldered before, and the expenditure now in issue was merely restoring them to their proper state of working, that would not clarify the position as to whether it is capital or revenue expenditure. It seems to me, without the full facts before me, that if this expenditure was essential, but not recurring in its nature, it should be treated as capital.

From the scanty material before me, I am of opinion that probably some of it is the one and some the other. But to decide which is which, would be a question of fact for the Commissioners.

To cite an example which occurs to me. Assuming that an estate has been out of cultivation for a number of years, its irrigation system would deteriorate, canals would become shallow,

dams would crumble, and the kokers would become useless through disrepair. To re-instate that irrigation system it would he necessary to clean the canals, and possibly rebuild the dams and kokers. That would involve very heavy expenditure, not likely to recur; in other words, in the nature of capital expenditure. Yet the annual cleaning of canals and running repairs to dams and kokers are items of normal revenue expenditure. It is a question of degree.

If this question was the same here, as in England, then the position would appear to be covered by inference: *Clayton* v. *Newcastle—under—Lyme Corporation* (1888) 2 Tax Cases 416. A gas works was in a defective condition when purchased, amounts were set aside for its restoration, but were not permitted as deduction. Presumably, the present expenditure necessary for the reconditioning of the land leased would not have been allowed as a deduction in England. As I have said this is only negative reasoning.

An examination of the schedule to the case discloses no item describing the repair or reconstruction of existing works, excepting the last item. "Making up dams $39.80," incurred in 1935. That item is ambiguous and having regard to the amount, may be ignored.

All the other items, would appear from their description, to be capital expenditure, but, in the absence of further and better particulars I am not prepared to say whether the yare capital or revenue expenditure. Neither is it within my province to do so, in my opinion. It is a question of fact primarily for the decision of the Commissioners, and the Company has provided me with no grounds for reviewing the facts. Section 45 (5) of the Ordinance by inference places the onus of proof on the Company.

Mr. Humphrys has submitted that if this expenditure is not revenue, then it must be capital expenditure and as such, being subject to exhaustion, deductions should be allowed under section 11 of the Ordinance.

Paragraphs 6, 7 and 8 set out the grounds of appeal on this aspect of the case. I will deal with them, together with the relevant reasons given in reply by the Commissioners.

The Commissioners first allege that the item of $3,632.28 is not an expense wholly and exclusively incurred in the production of the income and is therefore not allowable as a deduction within section 10 of the Ordinance: sub-paragraph 7 (*a*). The answer to this submission appears to me to rest on the plain issue of whether this expenditure is capital or revenue expenditure. I have dealt already with that matter. If it is, or any part of it is, revenue, then, in my opinion, it certainly is an expense wholly and exclusively incurred in the production of the Company's income. It may still be so described if it is capital expenditure, but if it is capital expenditure and of a non-recurring nature,

then the total sum is expenditure on the improvement of a capital asset and is excluded from section 10 by the provisions of section 12 (*d*).

As a point of account, it should be treated as an accretion to the item in capital account representing the value of the leaseholds.

I have dealt with that issue already and am of opinion that capital expenditure, which may not be deducted in full when it is incurred because it falls within the provisions of section 12 (*d*) of the Ordinance may still be the subject of the deductions allowed for exhaustion, wear and tear under section 11 of the Ordinance: otherwise the latter section would have no purpose. This alternative submission is a mixed question of fact and law. Lord Atkinson in his judgment in the *Great Western Railway Company* v. *Bater* (1922) 8 Tax Cases 230 lays stress on the fact that mixed questions of law and fact are not restricted in the same way as questions of pure fact, from review by Courts of Appeal, although attempts have been made to adopt that course.

It would perhaps be as well to point out that the issue before me is one of account. There would be items appearing in the accounts of the Company created in consequence of their ownership of their leasehold properties. They should, quite rightly, from the accounting point of view, be given a monetary value as an asset in the capital account.

The Commissioners agree that the expenditure now in question represents an improvement of that asset, and presumably the cost of that improvement should be entered in the capital account as an addition to the original item appearing therein in respect of those leaseholds.

The Commissioners in paragraph 7 (*b*) of their statement make the bald statement that no deduction can be allowed in accordance with section 12 (*d*) of the Ordinance. I have already ruled that that may not be so, as expenditure incurred in the case of capital assets and improvements thereto may be the subject to the provisions of section 11.

The Commissioners in paragraph 7 (*c*) of their statement again make the bald statement that this item cannot be charged against income. I do not agree. In my opinion, if this item had been held to be, firstly, revenue expenditure, or, secondly, capital expenditure, and deductions were properly allowable and allowed under section 11 of the Ordinance; then the item or deductions respectively would be items of account and might properly be entered in their appropriate places in arriving at the income of the Company's business.

I now pass to the various subheads of paragraph 7 (*d*) in which the Commissioners set out their principal grounds of opposition.

Paragraph 7 (*d*) (1) of their statement is as follows: "there has in fact been no exhaustion of the property: the lands have

been improved by the incurring of the expenditure". This alleges that the lands were improved by the expenditure. There appears to be some confusion of thought arising here, *firstly,* between the value of the asset itself and the value placed upon it in" the accounts of the Company; *secondly,* the amount of the expenditure now in issue, which the Company wishes to be treated in its entirety as a deduction within the provisions of section 11 of the Ordinance.

On the first point, it is not the original cost of the asset, but the amount shewn in the accounts to represent the value of that asset. In other words, the value of the rights created by the lease for the benefit of the Company in holding the land for a term of years, augmented by the capital expenditure on improvements.

On the second point, the deduction is not governed by the amount actually spent, but by the decision of the Commissioners as to what may be reasonable as a deduction arrived at on the basis of the depreciation of the physical state of the asset during the period in question: *Burnley Steamship Company* v. *Atkin* (1884) 3 Tax Cases, 275.

It is obvious that, from a commercial standpoint, in the case of an asset, which may disappear completely by the flowing of the term of the lease, some reduction of value should be made in the accounts of the Company as the term of the lease passes. That does not mean that for the purposes of the Ordinance, the same basis will be accepted by the Commissioners.

Therefore, when the Commissioners say that the lands have been improved by the expenditure now in issue, they are correct, but the provisions of section 11 must be applied to the total value of the asset when any expenditure arising in the period under review has been added to the value of the asset brought forward from the previous accounting period.

I will cite an example:

Value of X 1st January, 1939	... $5,000
Plus capital expenditure on improvements	… 3,000
Value of X 31st December, 1939	…$8,000
Less deduction allowed by Commissioners as reasonable exhaustion of property at 10%	... $ 800
Nett value of X 31st December, 1939	... $7,200

Paragraph 7 (*d*) (2) of the statement of the Commissioners is as follows: "the lands are kept continually in being by annual expenditure on maintenance which is properly allowable as a deduction under section 10 of the Ordinance." The purpose of this sub-paragraph is not clear to me. It seems irrelevant.

I agree with the description of normal maintenance charges,

but the Commissioners have already submitted that the expenditure now in issue is preliminary capital expenditure which has been spent once and for all.

Paragraph 7 (*d*) (3) of the statement of the Commissioners is as follows: "the lands would not be exhausted by reason of the termination of the leases. With respect to paragraph 7 of the grounds of appeal, the facts are that the appellants have no right of renewal, and no option to purchase, with respect to the land leased from the Local Authority of the Fyrish Country District, but that, with respect to the land leased from Edgar Evans Hicken, the appellants have a right to renew the lease, and further a right to purchase, should the lessor at any time during the existence of the lease be desirous of selling". The same confusion of thought is shewn here. *Firstly,* the asset upon which exhaustion is claimed is the value of the item appearing in the books of the Company, representing the value of the lease. The hypothetical value of the rights of the Company arising from their use of the leased land. Not the actual total cost nor the value of the land itself. That does not belong to the Company. They own exclusive rights over it for a term of years. Those rights will become exhausted by the flow of time, It is for that exhaustion of value that the Company seeks relief. *Further,* the question of what action the Company may be in a position to take at the expiration of the present leases or before, or may be bound to take because the owners desire to dispose of the freehold property leased, is quite irrevelant to the issue now before me.

The Commissioners have to consider the position as it was in the period under review. It is for their unfettered decision. There is no indication, in my opinion, that it would be unreasonable to ask them to decide the matter on the financial implications arising from the present state of affairs between the Company and the owners of the land. Changes which may take place in the future are matters which may be dealt with in the period during which they may arise.

Paragraph 7 (*d*) (4) of the statement of the Commissioners is as follows: "the lands alleged to be exhausted are not owned by the appellants." I have already dealt with this submission. The Company own rights clearly defined over the land for definitely prescribed periods. The item of expenditure in respect of which they claim relief, under the provisions of section 11 of the Ordinance, is the augmented value of those rights as shewn in their accounts.

Paragraph 7 (*d*) (5) of the statement of the Commissioners is as follows: "the alleged exhaustion is not exhaustion arising out of the use or employment of the property in the business of the appellants." There appear to be two aspects here. *Firstly* the annual rents paid for these leased lands are charges which

may be said to arise from their use and employment and, as such, doubtless have been accepted as revenue expenses. The ownership of such leases, in my opinion, justifies an item being included in respect of them as a capital asset. Obviously, that asset decreases in value as the unexpired periods of the leases lessen. That lessening in value which should be reflected in the taxpayer's accounts. *Secondly,* if the Company improved these lands by expenditure of a non-recurring nature, classified as capital expenditure, it is a question of fact for the Commissioners to decide whether such expenditure is for the use and employment of the property or not.

To cite an example with these aspects. If they have to make a new canal, or if they dig out 10,000 cubic yards of earth from an old canal, which has accumulated over a period of years, before they can commence to cultivate the newly leased lands. If they dig out 2,000 cubic yards of earth from a canal, previously kept in working order up to the period of account in question.

The first aspect is clearly capital expenditure of making the estate and not working the estate. The second aspect is a border line case, which might justify an allowance in part.

All these are factors which might have been taken into consideration in arriving at what deduction would be reasonable; if any deductions had been allowable as waste under the provisions of section 11 of the Ordinance.

It is well established that the Commissioners in arriving at what are income and expenditure for the purposes of the Income Tax Legislation do not necessarily accept the taxpayer's accounts. Commercial prudence may well cause reserves to be built up and assets written down to an extent which would not be accepted by the Commissioners in arriving at the taxpayer's income.

On the other hand the Commissioners may be satisfied that expenditure of a non-recurring nature is an improvement of a capital asset, yet they may not allow deductions under section 11 even though the value of the asset in which such expenditure is included in the accounts is subject to exhaustion.

The *Coltness Iron Company* v. *Black* (1881) 6A.C. 315, has been cited. It went to the House of Lords. Lord Penzance said that the Act permitted the deduction of the cost of working the mine, but not the cost of making it. That is irrelevant to the issue before me because, *firstly,* the judgment was based on the English Law which makes no provision for the exhaustion of capital assets being allowed; *secondly,* the expenditure which the Coltness Company wished to treat as a deduction was based on the ground of its being a revenue charge and not a capital charge.

Paragraph 7 (*d*) (6) of the statement of the Commissioners is as follows: "the alleged exhaustion did not occur during the year immediately preceding the year of assessment." This exhaustion

refers to the aggregate amount of $36,842.29 of which only $3,632.28 was incurred in 1937. The expenditure in that year is the basis of taxation for the year upon which the Company has been assessed.

This sub-paragraph would appear to raise several issues. *Firstly,* can a taxpayer claim to have a deduction to which he was entitled, but did not claim, brought into account after he has been finally assessed for a previous period? *Secondly,* if so, for how long does that right continue to exist in his favour? *Thirdly,* have the Commissioners the right to allow a deduction in respect of expenditure incurred in one financial period to be spread over the next or succeeding periods? *Fourthly,* where a deduction was allowable in a previous period, out of date, can the Commissioners still decide that they will spread the original amount deductable over a period of years and allow the taxpayer such deductions as may fall within a period in which he was entitled to adjustments or future periods.

Section 11 of the Ordinance expressly states "exhaustion wear or tear . . . . . arising . . . . during the year immediately preceding the year of assessment."

Section 41 empowers the Commissioners to issue an additional assessment on persons not assessed or under-assessed at any time during the year of assessment or within two years after the expiration thereof.

Further, the Commissioners must assess that person at such amount as according to their judgment the taxpayer ought to have been charged.

This latter provision means that the taxpayer would be entitled to such relief as section 11 affords up to the expiration of the time when the Commissioners may legally assess him.

Therefore, in my opinion, the words in section 11 "arising. . . during the year preceding the year of assessment" are not necessarily words of limitation. That is to say, normally they would limit the deductions to the specified period, but, if the Commissioners decide to spread a charge over a period which includes the accounting period specified in this section, such a transaction would not be illegal.

Returning to the three questions I have set out above.

Section 55 (1) of the Ordinance clearly gives a taxpayer a right to have an assessment reviewed and over taxation repaid, which answers the first question in the affirmative.

Section 55 (2) limits the period during which such a claim may be commenced to within two years from the end of the year of assessment to which the claim relates.

It may be useful to point out that that may mean approximately three years from the date of the transaction involved.

To cite an example. Assuming the financial year commences on the first January in each year. On the 21st January,

1935 a transaction takes place which constitutes a legal deduction for the purposes of income tax. That transaction forms part of the accounts of the year 1935; which are the basis for assessment for the year 1936. Under the provisions of section 55 (2) of the Ordinance, the taxpayer is entitled to make his claim at any time up to midnight on the 31st December, 1938.

The actual date upon which the Company first addressed their claim to the Commissioners does not appear on the appeal record, so that I shall not comment on this aspect of the case, but the rule to be applied, if necessary, I have made clear by that example.

This answers the second question.

With reference to the third question, section 11 of the Ordinance gives the Commissioners a discretion to allow any deduction for exhaustion at a reasonable amount. I see no reason why that power should not empower them to say that a fraction of any item may be allowed in respect of any financial period and the remainder be spread over the succeeding financial periods in such proportions as they may deem reasonable.

This principle is set out in section 13 of the Ordinance governing allowances for trade losses, and it is therefore within the scheme of the Ordinance which obviously aims at avoiding fluctuations of the burden cast upon the taxpayer.

On the subject of the fourth question, it seems to me that section 55 (2) clearly indicates that all claims must arise within the period exemplified above.

In my opinion it would be placing an unnatural meaning on the words of the section to enlarge their strict limitation to cover claims which arose before the period allowed; but which might be brought within the period if the Commissioners spread the deduction in question over several financial years.

Perhaps it will clarify my finding if I apply it to the last example shewn above.

Assuming the out of date transaction took place on the 30th June, 1934, but was one which the Commissioners would have spread over 5 years. That is, they would have allowed as a deduction one-fifth of the amount of the item for the years of assessment 1935, 1936, 1937, 1938 and 1939. In my opinion, such a claim would be irretrievably out of date after the 31st December, 1937.

Section 55 of the Ordinance covers the case where the excess taxation has been paid and creates a right for the taxpayer in addition to his right of objection and right of appeal (see sections 44 and 45). I do not know what the facts of this case are in connection with that issue. It has not been raised.

I have dealt with all the issues raised in this appeal at considerable length because the issues are too important to pass over on the grounds of my findings.

In my opinion, it is clear that the Legislature intended to introduce some relief, probably on the same lines as those now in force in Canada in respect of mineral and forestry undertakings, for depreciation in capital assets.

Unfortunately, the draftsman has failed to indicate clearly what relief was intended to be granted.

To sum up the result of my research I find *firstly,* that the appellants have failed to prove that any part of the expenditure in issue was revenue expenditure within the provisions of section 10 of the Ordinance. The Commissioners, rightly or wrongly, have held that it was not revenue expenditure. The onus of proving otherwise rests on the appellants, a duty they have failed to discharge. *Secondly,* that in section 11 of the Ordinance, the use of the word "exhaustion" does not indicate clearly and without ambiguity upon what property the relief was intended to be created for the benefit of the taxpayer. It is impossible for the Court to arrive at a definition of what capital assets may be made subject to the Commissioners' discretion in allowing deductions. I wish to stress the distinction. The discretion of the Commissioners is clearly limited by what is a reasonable allowance which may be, allowed as a deduction.

By the use of the word "property" which has been held to be "exhaustive", the subject matter of that discretion might be held to cover any capital asset.

In other words, the discretion vested in the Commissioners by the provisions of section 11 of the Ordinance governs the deductions permitted thereby, and not the decision as to what shall be the subject of the deductions.

I am quite satisfied that the scheme of the Ordinance and that of analogous Legislation elsewhere in the British Empire, which I have studied has never accepted the principle of allowing deductions in respect of capital depreciation, except within very clearly defined limits expressed in the legislation itself.

It has been said that a Court must place an interpretation on the language of a legislative instrument whenever possible. In this case I find it impossible to discharge that duty unless I placed an interpretation on the section which would be repugnant to the scheme of the Ordinance as a whole: *Grey* v. *Pearson* (1857) 6 H.L.C. 106.

I was led to this conclusion by the judgment of Lord Russell in *Attorney General* v. *Carlton Bank* (1899) 2 Q.B. 164. He said: "I see no reason why any special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation, or to any other subject, namely, to give effect to the intention of the Legislature, as that intention

is to be gathered from the language employed, having regard to the context in connection with which it is employed. The Court must no doubt ascertain the subject matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like."

In this case I have not found it possible to ascertain precisely what property "is by the Statute intended to be applied" for the purpose of allowing the deduction. The Ordinance does not reach that high standard of certainty which, in my opinion, is necessary in the case of taxing or any other legislation. The fact that the failure may cause hardship to the taxpayer should not influence the construction of the section in question.

Having regard to all the circumstances of the case I make no order for costs.

I very much regret the delay in delivering this judgment but my duties on Circuits, both in this and other counties, have prevented the very extensive study those issues have necessitated taking place before my return to Georgetown recently.

Appeal dismissed.

Solicitors: *J. E. de Freitas; Percy W. King*

Crown Solicitor.

THE DEMERARA ELECTRIC COMPANY, LIMITED,
Appellants,
v.
THE COMMISSIONERS OF INCOME TAX, Respondents.

[1939. No. 106.—DEMERARA.]

BEFORE LANGLEY, J., IN CHAMBERS.

1939. JUNE 26; 1940. FEBRUARY 16.

Income tax—Expenditure—During year immediately preceding year of assessment—No other expenditure deductible—Income Tax Ordinance, cap. 38, ss. 10, 11, 55.

Income tax—Capital or revenue expenditure—Supply of electric energy—Corporation erecting generating plant—Liabilities incurred by corporation therewith—Contract by company to supply corporation with electric energy—How obtained—Agreement by company to re-imburse and indemnify corporation in respect of liabilities—Sum paid to corporation—Integral part of contract transaction—Outgoings wholly incurred in production of income of company—Revenue expenditure.

Income tax—Exhaustion and wear and tear of property—Meaning of "property"—Tangible asset—Does not include intangible asset.

Speaking generally, it is the dates upon which items of income or expenditure are received or incurred, which are the relevant dates for the purpose of income tax accounting, not the dates upon which the taxpayer may choose to enter such items in his accounting long afterwards.

Any expenditure incurred in financial periods prior to the period which constitutes the basis of the year of assessment should not be included in the accounts of that year, but such items should be made the subject of a separate claim, adjusting the assessments previously passed by the Commissioners. Moreover, that expenditure to be properly the subject of a reclaim, must have arisen during the prescribed periods in which reclaims are permissible under the express limitations set out in section 55 (2) of the Income Tax Ordinance, Chapter 38.

A company incurred certain expenditure in the years 1927 and 1930. In the year 1934 the amount of this expenditure was transferred to the debit of an account "Deferred Charges" in the books of the company. Portions of this sum were written off against the operating profits of the company for the years of assessment 1935, 1936 and 1937, but the Commissioners were not aware of this fact until the accounts of the Company for the year of assessment 1938 were being examined. In those accounts the company claimed as a deduction a part of the expenditure incurred in 1927 and 1930.

The deduction in respect of the year of assessment 1938 was disallowed by the Commissioners of Income Tax on the grounds, among others, that, if it is in respect of revenue expenditure under section 10 of the Income Tax Ordinance, cap. 38, it was not incurred, and that if it is in respect of exhaustion under section 11, it did not arise, during the year immediately preceding the year of assessment 1938, that is to say, during the year ended December 31, 1937. The company appealed.

Held, (1) that under section 10 and under section 11, of the Ordinance, the claim for the deduction was out of time; and

(2) that even assuming that the total expenditure could have been properly entered in 1934 in respect of the year of assessment 1935, it was too late in 1938, under section 55 (2) of the Ordinance, to claim an adjustment in respect of that year of assessment, as more than 2 years had elapsed since the end of the year of assessment 1935.

Where a lawful deduction was not claimed in the proper year of assessment, nor subsequently under section 55 (2) of the Income Tax Ordinance,

cap. 38, within the time prescribed by that subsection, it is not competent to the Commissioners to allow the deduction and spread over a period of years the amount which, if the claim were not out of date, would have been lawfully deductible

A company in order to obtain a contract with a corporation for the supply of electric energy for a period of 15 years paid to the corporation and other parties, the sum of $61,404.96, by way of re-imbursement and indemnity to the corporation for and in respect of liabilities incurred by the corporation in connection with a plant which the corporation had proposed to erect for generating electricity instead of obtaining such electricity from the company.

The sum expended was not entered punctually in the accounts of the company as trade expenses when they were incurred.

Held, (1) that if the items of expenditure had been so entered, they would have been proper charges under section 10 of the Income Tax Ordinance, cap. 38. They formed an integral part of the contract transaction, and as such, they were outgoings wholly incurred in the production of the company's income;

(2) Any benefit accruing under the contract is not a tangible asset, such as the unexpired term of a lease of land, but merely an intangible benefit which may have arisen or be arising through an increase of the trade of the company. Any such benefit could never be precisely ascertained because of the many other extraneous factors which might cause the income of the company to fluctuate from time to time during the period of the contract;

(3) Any such benefits which may have accrued under the contract would not form a capital asset of the company which could be regarded as being subject to a deduction in respect of exhaustion; and

(4) No deduction can be allowed under section 11 of the Income Tax Ordinance, cap. 38, for the exhaustion of the sum of $61,404.96 during the period of the contract.

Appeal by the Demerara Electric Company Limited against the decision of the Commissioners of Income Tax given on the 24th March, 1939, confirming an assessment made upon the company for the year of assessment 1938 upon the income derived by the appellants during 1937.

The grounds of appeal were as follows:—

1. The appellants for the purpose of obtaining a contract with the Mayor and Town Council of Georgetown for the supply of electric energy for a period of 15 years from the 28th day of September, 1927, paid out in the months of November and December, 1927, and in the month of November, 1930, the sum of $61,404.96 in the aggregate to the Crown Agents, the said Council and other parties by way of re-imbursement and indemnity to the said Council for and in respect of liabilities incurred by the said Council in connection with a plant which the said Council proposed to erect for generating electricity instead of obtaining such electricity from the appellants.

2. The appellants have amortized the said sum of $61,404.96 over a period of 15 years being the period of the said contract, and have charged the sum of $4,093.66, being one-fifteenth of the said sum of $61,404.96 as an expense of their business for the year ending 31st December, 1937.

3. The said assessment is erroneous because the said sum of $4,093.66 is an outgoing wholly and exclusively incurred during the year 1937 within the meaning of section 10 of the Income Tax Ordinance, chapter 38, and within the principle of spreading

expenditure recognised and adopted by the Commissioners, and should have been allowed by the Commissioners as a deduction under the said section.

4. In the alternative, the said assessment is erroneous because if the said sum of $61,404.96 is capital which is not admitted, then the said capital is exhausted within 15 years and the sum of $4,093.66 is a reasonable amount to be deducted each year for the exhaustion of such property for the year and should have been allowed by the Commissioners as a deduction under section 11 of the said Ordinance.

5. The said assessment is also erroneous because the gains or profits from the appellants' business for the year 1937 cannot be truly ascertained without allowing the said deduction of $4,093.66 which is not a deduction disallowed by section 12 of the Ordinance.

The statement by the Commissioners of Income Tax of the material facts upon every point specified in the summons as a ground of appeal together with the reasons in support of the assessment was as follows:—

1. The appellants have been assessed to income tax for the year of assessment 1938 upon the income derived by the appellants during the year 1987 from the gains or profits arising from the business of generating and supplying electricity.

2. In ascertaining the chargeable income the Commissioners have disallowed as a deduction from the gains or profits the sum of $4,093.66 being one-fifteenth part of a net sum of $61,404.96 expended by the appellants partly in the year 1927 and partly in the year 1930 in the circumstances hereinafter set out.

3. Under an indenture made on the 28th day of September, 1927, between the Mayor and Town Council of Georgetown on the one hand and the appellants on the other hand, the Town Council agreed—

(*a*) to cancel its original plan to instal an electric power generating plant and oil engines for the purpose of operating the pumps of the Water and Sewerage system of the City of Georgetown,

(*b*) to arrange instead for the supply of electric power by the appellants for the aforesaid purposes for a period of 15 years subject to the right of the Town Council to renew the contract for another period of 15 years or for any shorter period upon such terms as may be agreed upon between the parties.

4. In accordance with clause 2 of the said indenture the appellants partly in the year 1927 and partly in the year 1930 paid for the machinery referred to in sub-clause (A) and made payments under sub-clauses (B) to (D) in discharge of various liabilities which had been incurred by the Town Council in connection with its original plan.

5. The machinery paid for by the appellants in accordance with

sub-clause (A.) of clause 2 of the said Indenture was sold by the appellants and was never used by them in their business.

6. The net sum expended by the appellants under sub-clauses (A) to (D) of clause 2 of the said indenture (after deducting the sum realised by the sale of the machinery) was $61,404.96. This sum of $61,404.96 was originally charged by the appellants against the surplus account in the books of the appellants' head office in Canada, but in the year 1934 this sum was transferred to the debit of the account "Deferred Charges" in the books of the appellants in British Guiana. Of this sum the appellants wrote off against the operating profits of the year 1934:—

(1) 5/15 of $61,404.96 applicable to years ended 31st December, 1933, viz.	... $20,468 34
(2) 1/15 of $61,404.96 charged to operating expenses 1934, viz.	... 4,093 66
	$24,562 00
leaving a balance at debit of "Deferred Charges" of	... 38,842 96
	$61,404 96

7. Of this balance of $38,842.96 the appellants wrote off against the operating profits of each of the years 1935, 1936 and 1937 the sum of $4,093.66, that is to say, $12,280.98 altogether.

8. The Commissioners first became aware of these charges made by the appellants against operating profits when the accounts of the appellants for the year 1937 were being examined for the year of assessment 1938. Thereupon the Commissioners disallowed the sum of $4,093.66 as a deduction in ascertaining the income of the appellants for the year of assessment 1938, and acting under the provisions of section 41 of the Income Tax Ordinance, made additional assessments upon the appellants for the years of assessment 1936 and 1937 in respect of similar sums written off by the appellants against profits in their accounts for the years 1935 and 1936, respectively, but on account of the time limit imposed by section 41 of the Income Tax Ordinance the Commissioners were unable to make additional assessments upon the appellants for the year of assessment 1935 in respect of the sum of $24,562 written off by the appellants against operating profits in the year 1934 as explained in paragraph 6 hereof.

9. The appellants contend—

(*a*) that the said sum of $4,093.66 is an outgoing wholly and exclusively incurred during the year 1937 and should be allowed as a deduction in ascertaining the chargeable income under section 10 of the Ordinance.

(*b*) alternatively, that the said sum of $4,093.66 is a reason-

able amount to be allowed as a deduction under section 11 of the Ordinance for the exhaustion of the property acquired by the appellants by reason of the aforesaid expenditure of $61,404.96 incurred by the appellants in the years 1927 and 1980 in terms of the indenture of the 28th September, 1927.

10. The Commissioners say—

(a) that the said sum of $4,093.66 is not an expense wholly and exclusively incurred during the year of assessment in the production of the income assessable to tax within the meaning of section 10 (1) of the Ordinance.

(b) that the said sum of $4,093.66 (or any other sum) cannot be allowed as a deduction for exhaustion of property with respect to the aforesaid expenditure of $61,404.96, because—

(i) there has not been in fact any exhaustion of any property owned by the appellants;

(ii) there has not been in fact any exhaustion of property acquired and owned by the appellants by reason of the said expenditure;

(iii) the alleged exhaustion did not arise—

(A) out of the use or employment of the property in the appellants' business: or

(B) during the year immediately preceding the year of assessment.

11. There is annexed hereto (not reproduced) as part of this statement a copy of the indenture made on the 28th September, 1927, between the appellants and the Mayor and Town Council of Georgetown.

H. C. Humphrys, K.C., for the appellants: The Company held a franchise for electric lighting and electric power. The money was paid to the Council for the sole purpose of earning income. In the alternative, the company paid a premium of $61,404.96. No part of the machinery purchased was used by the company in its plant. After 15 years the contract with the Council expires, and the sum of $61,404.96 is exhausted. The principle of spreading expenditure over a number of years has been recognised by the Commissioners. He referred to the Electric Lighting Ordinance, chapter 79, section 5 (1), and to the following cases: *Knowles* v. *McAdam* (1877) L.R. 3 Ex. D. 23: *Coltness Iron Co.* v. *Black* (1881) 6 A.C. 315; *Watney & Co.* v. *Musgrave* (1880) L. R. 5 Ex. D. 241; *Gillatt & Watts* v. *Colquhoun* (1884) 33 W.R. 258, 2 Tax Cases 76, 83, 84; and *Earl of Derby* v. *Aylmer* (1915) 3 K.B. 374, 6 Tax Cases 665.

E. M. Duke, acting Assistant Attorney-General for the respond-dents: Where money has been expended for the purpose of securing contracts or supplies or raw material, such money is capital expenditure: *Scott* v. *Hoddinott* (1916) 7 Tax Cases 85; *James Waddie & Sons, Ltd.* v. *Commissioners of Inland Revenue* (1919) 12 Tax Cases 113; *Charles Marsden & Sons*

Ltd. v. *Commissioners of Inland Revenue* (1919) 12 Tax Cases 217; *Morley* v. *Lawford & Co.,* (1928) 14 Tax Cases 240, 242; *Commissioners of Inland Revenue* v. *Huntley & Palmers Ltd.* (1928) 12 Tax Cases 1222; *Commissioners of Inland Revenue* v. *Hagart and Burn Murdoch* (1929) 14 Tax Cases 442, 443; (1929) A.C. 386, *per* Lord Buckmaster. Broadly speaking, outlay is deemed to be capital when it is made for the initiation of a business, for extension of a business, or for a substantial replacement of equipment: *Commissioners of Inland Revenue* v. *Granite S. S. Co., Ltd.,* (1927) 13 Tax Cases 14, *per* Lord Sands. A premium paid for premises or permanent rights without which you cannot begin the business is capital expenditure: *Green* v. *Favourite Cinemas Ltd.* (1930) 15 Tax Cases 394, *per* Rowlatt, J. Compensation paid for the sterilisation of a capital asset is capital expenditure: *Glen Borg Union Fireclay Co., Ltd.,* v. *Commissioners of Inland Revenue,* (1920-22) 12 Tax Cases 427, *United Steel Co., Ltd.,* v. *Cullington* (1939) Taxation Magazine, 13th May, 1939. No portion therefore of the sum of $61,404.96 was deductible by the appellants as revenue expenditure under section 10 of the Income Tax Ordinance, chapter 38. And in any event, this expenditure was incurred in the years 1927 and 1930, and not in the year 1937 in respect of the year of assessment 1938. There was no exhaustion within the meaning of section 11 of the Income Tax Ordinance. No property was exhausted by reason of its use in the appellants' business, and further, the alleged exhaustion did not arise during the year 1937.

H. C. Humphrys, K.C., in reply.

Cur. adv. vult.

LANGLEY, J.: This claim made by the Demerara Electric Company, Limited, (hereinafter called "the Company"), is based on a contract entered into on the 28th September, 1927, between the Company and the Mayor and Town Council of Georgetown, British Guiana, (hereinafter called "the Council"), a statutory corporation.

Clause 2 of that contract required the Company to purchase from the Council certain unwanted machinery. The net financial result of that transaction was a loss to the Company of $61,404.96. All payments were made partly in November and December, 1927, and partly in 1930. The Company accepted that loss, presumably because they calculated that the price they would receive for power supplied in the future, and reduction of costs by increased load, or some other aspect of their trading undertaking, would benefit them ultimately.

The Council also had a right of extending the period of the contract. These aspects are irrelevant to the matter before me.

The Company originally charged this expenditure against a

Surplus Account in the Head Office in Canada. In 1934, purely as an accounting entry, the Company created a Deferred Charges Account in their books in British Guiana, and charged $20,468.34 in respect of the 5 years ending 31st December, 1933, and a further item of $4,093.66, operating expenses for the year ending 31st December, 1934.

These items I will treat separately because they refer to different financial periods.

Fortunately, for the sake of brevity, I can take the first five years together. Section 55 (1) of the Income Tax Ordinance, cap, 38, (hereinafter called "the Ordinance"), vests a right in the taxpayer to have an assessment reviewed and over-taxation repaid, but section 55 (2) of the Ordinance limits the exercise of that right to a period terminating two years from the end of the year of assessment to which the claim relates. The expenditure forming the basis of these first transactions, entered in the accounts of the Company in 1934, actually arose in 1927 and 1930. In my opinion these items could not be entered properly—for the purposes of income tax—in the accounts for that year, 1934.

I have no doubt, speaking generally, that it is the dates upon which items of income or expenditure are received or incurred, which are the relevant dates for the purposes of income tax accounting—not the dates upon which the taxpayer may choose to enter such items in his accounts long afterwards: subject, of course, to entries made in respect of deductions or allowances spread over periods approved by the Commissioners, bad debts, outstanding creditors, etc.

Any expenditure incurred in financial periods prior to the period which constitutes the basis of the year of assessment should not be included in the accounts of that year, (covered up and lost sight of as in this case), but such items should be made the subject of a separate claim, adjusting the assessments previously passed by the Commissioners. Moreover, that expenditure to be properly the subject matter of a reclaim, must have arisen during the prescribed periods in winch reclaims are permissible under the express limitations set out in section 55 (2) of the Ordinance,

Even assuming that the adjustments made in 1934 could be properly made in the accounts of that year then (A), the transaction in this case would have affected the year of assessment, 1934. That is, the expenditure would have arisen and should have appeared in the accounts for 1933 or preceding years. The right to claim for an adjustment therefore ceased on the 31st December, 1936.

(B) The single adjustment for the 1934 period would relate to the 1935 assessment and would cease on the 31st December. 1937.

It would seem that any claim by the Company in connection

with adjustments in respect of any years of assessment prior to the 31st December, 1936 would be out of date unless made prior to 1st January, 1938. That means, of course, that the transactions in issue must have arisen in the preceding financial annual period which provides the basis for taxation for the year 1936.

There only remains the question as to whether in the case of a deduction, which was allowable in a previous financial period out of date, the Commissioners may lawfully decide to allow the deduction and spread the original amount deductible over a period of years; permitting the taxpayer such deductions as may fall within a financial period, or future periods, in which he might he entitled to deductions in respect of the items in issue.

The principle of spreading expenditure over several financial periods, with a view to avoiding fluctuations of the burden cast upon the taxpayer, has been recognised by the Revenue Authorities of most British Countries. An example is created by section 13 of the Ordinance governing allowances for trade losses in most of such territories.

It would, however, in my opinion be putting a strained and unnatural meaning on the words of section 55 (2) of the Ordinance to adopt this course. It would enlarge what is a strict limitation of the period during which such claims may lawfully be made by a taxpayer, if the original transaction in itself is out of date.

The position is not altered by the fact that fresh entries were made in the local accounts of the Company in 1934, and subsequently thereto.

That completes the rights of the Company to claim adjustments either in respect of the past or in the future.

I now turn to the question of whether the Commissioners can make any additional assessments, and, if so, for what periods.

It appears that the adjustments made by the Company in 1934, and annual items of a similar nature entered in respect of the years of assessment 1935, 1936 and 1937 passed unnoticed by the Commissioners until the year of assessment which was based on the 1937 financial period.

The Ordinance by section 41 vests the Commissioners with power to make an additional assessment at any time within the year of assessment or within two years of the expiration of the year of assessment. As I understand that section, that means that at any time in 1933 the Commissioners could make additional assessments in respect of the financial transactions of a taxpayer arising after the 1st January, 1935. I say 1935, because the taxation which ought to have been charged in 1936, would be taxed upon the financial transactions of the taxpayer during 1936 I have already held that the claim of the Company in respect of the financial implications arising from the contract executed on the 28th September, 1927, which covered the period 1927—1930

is out of date. Therefore the Commissioners were entitled to assess the Company on an income not made subject to the annual debit item of $4,093.66 in respect of the years of assessment 1936, 1937, 1938.

In my opinion, had these items of expenditure been entered punctually in the accounts of the company as trade expenses when they were incurred, they would have been proper charges under the Ordinance. They formed an integral part of the contract transaction and, as such, outgoings wholly incurred in the production of the Company's income.

Mr. Humphrys has made an alternative submission on behalf of the Company that if these items cannot be properly allowed as deductions under section 10, such deductions as the Commissioners may deem reasonable in respect of waste should be allowed under the provisions of section 11 of the Ordinance. I do not understand this alternative submission. There is no need for me to deal with this aspect, having regard to my findings already recorded. I feel, however, that it is always useful to record an opinion on matters which have been fully argued before the Court. It may help when such aspects do arise in other cases in the future.

In this case certain property was purchased by the Company from the Council, at an agreed price, as one of the terms of the contract into which they had entered. The item with which the Court is dealing, is one purely of accountancy. It is reflected only in the accounts of the Company.

I assume that against the gross debit created by the amount paid by the Company to the Council, there would appear in the accounts of the Company, several credits representing the value of some of the property so purchased which was taken into the use of the Company. Such items would appear as debits in the Plant and Machinery a/c. Other credit items would appear in respect of sales by the Company of part of the said property so purchased, when the purchasers paid for them. Possibly, other items were received of which I have no knowledge. I assume that the sum of $61,404.96 which is the total sum now in issue, was arrived at by striking a balance on that account. I say that I assume this to be so, because I accept the Commissioners' figure. 1 would point out, however, that paragraph 2 of the Company's grounds of appeal allege that that sum was the "aggregate" sum paid by them to the Crown Agents. It may have been the net result of all the transactions when complete, and not a gross figure, without reductions arising on sales of the property.

Mr. Humphrys suggest that this expenditure should be spread over the period of the contract, but that would be a division of what was an expense incurred in only three financial periods which are set out. It is true that this expenditure might be

regarded as a preliminary expense of a non-recurring nature, essential to obtaining the contract.

The Court is asked, alternatively, to treat this as capital expenditure which should be wiped out by proportionate debits, called deferred charges, over a period of years. The Commissioners are invited to accept that basis as a reasonable deduction for "waste of property" under the provisions of section 11 of the Ordinance.

I can find no grounds for saying that any benefits which may have accrued under the contract would form a capital asset of the Company which could be regarded as subject to waste or exhaustion.

Any such benefit accruing under the contract is not a tangible asset, such as the unexpired term of a lease of land, but merely an intangible benefit which may have arisen or be arising through an increase of their trade.

It may be true that this preliminary expenditure may have fallen heavily during the years in which it was incurred. That is irrelevant. It is certain that any such benefit could never be precisely ascertained because so many other extraneous factors might cause the income of the Company to fluctuate from time to time during the period of the contract.

In the circumstances, quite apart from the question of this expenditure being out of time, I should not have found that it could have been made the subject of deductions under section 11 of the Ordinance.

I have dealt very fully with the provisions of section 11 of the Ordinance in my judgment in the appeal of the *Corentyne Sugar Company, Limited* v. *The Commissioners of Income Tax* (No. 105 of 1939, Demerara, of even date). I do not propose to say more now than that the use of the word "exhaustion" in that section does not indicate clearly and without ambiguity upon what property the relief was intended to be created for the benefit of the taxpayer.

It is impossible for the Court to arrive at a definition of what capital assets may be made subject to the Commissioners' discretion in allowing deductions.

The discretion of the Commissioners in fixing the amount of deductions is clearly limited by what is a reasonable allowance.

The word "property" has been interpreted as "exhaustive". I can find no indication in the wording in this section to give the Commissioners another discretionary power to decide as to what property shall, and what property shall not, come within the scope of the section. The discretion governs the deduction, not the decision as to what shall be the subject of the deduction.

The scheme of the Ordinance, and analogous legislation elsewhere in the British Empire which I have studied, has never accepted the principle of allowing deductions in respect of capital

depreciation except within very clearly defined limits expressed in the legislation itself.

I find that to interpret section 11 in such a way as to create an implied discretion in the Commissioners to decide that any capital asset, other than plant and machinery, expressly mentioned and for which there is ample and authoritative definition, might be regarded as or subject to "waste", would be repugnant to the general scheme of the Ordinance.

I have dealt with my reasons for arriving at this aspect of this appeal very fully in the last mentioned judgment, and I desire the judgment in that case to be read when this judgment is considered, although, of course, it does not form part of this judgment. The facts in the two cases differ very considerably.

Quite apart from this question of the interpretation of the word "waste" in section 11, I am of opinion that the claim is out of date as a claim arising under the provisions of section 11.

I have dealt with the aspect of time earlier in this judgment in reviewing these transactions as items within section 10 of the Ordinance.

In my opinion, claims in respect of deductions allowable under section 11 would be subject to the same limitations of the periods in which claims could be made by either the Commissioners or the taxpayers.

Sections 41, 45 and 55 do not distinguish between the sections under which relief may be claimed, but deal with all or any additional claims, appeals or reclaims of taxation overpaid.

Finally, dealing with the aspect of the Commissioners' discretion to spread items of account over periods in order that the burden of taxation may fall evenly upon the taxpayer. I have dealt with this aspect already in this judgment in respect of the several items. In my opinion, if it could be found that these items for which claim is made, or any part of them, were property subject to waste within the provisions of section 11, the position as regards limitation of the aspect of time during which claims could be made would be precisely the same for all classes of adjustments. I have nothing to add to my earlier comment on that aspect.

I find that the Company has failed to provide any grounds for the Court to interfere with the decision of the Commissioners.

In my review of such facts as appear on the file there may be grounds upon which adjustments in the assessments might have been made, but the time for making such adjustments is long past. It would be wrong to allow either the Commissioners or the taxpayer to enter items of accounts in respect of transactions occurring during financial periods not within the expressly limited periods during which additional assessments or claims may be permitted by the Ordinance. There must be finality

in these things, and the Ordinance unambiguously makes the position clear.

This judgment might have been limited and decided upon on the issue of the claims being out of date. I have dealt with the other aspects arising from the grounds of appeal in the hope that it may assist the Commissioners and, in fairness to the taxpayers of this Colony, cause consideration to be given to clarifying the law.

Had this appeal failed on account of the defect in the Ordinance I should have made no order for costs, but as it has failed through the claim being out of date the appellants will pay costs.

I very much regret the delay in delivering this judgment, but my duties on Circuits both in this and other counties, have prevented the very extensive study those issues have necessitated taking place before my return to Georgetown recently.

Liberty to apply on question of costs.

Appeal Dismissed.

Solicitors: *J. E. de Freitas*; *Percy W. King* (Crown Solicitor).

GEORGE D. ARTHUR, Appellant,

v.

JUDITH COX, Respondent.

[1940. No. 10.—DEMERARA.]

BEFORE LANGLEY, J.

1940. JANUARY 29; FEBRUARY 10; MARCH 4.

Mining—Mining dispute—Whether a location is valid—Decision by Commissioner—Appeal—Order made to cease work—Mining (*Consolidation*) *Ordinance, Cap. 175, s. 94.*

Practice—Mining claim—Whether a location is valid—Injunction—Application for—Against person in possession of claim—Previous proceeding by another person to oust person in possession unsuccessful—Not a material fact to be disclosed in application.

Where an appeal in a mining dispute involved the question whether a location of a mining claim by one or other of the parties was valid or not the Court made an order under section 94 of the Mining (Consolidation) Ordinance, Cap. 175, that all work shall cease on the claim, pending the decision on the appeal.

On an application under section 94 of the Mining (Consolidation) Ordinance, Cap. 175, it is not a material fact to be brought to the notice of the Court that, in a prior proceeding, some person, not being the appellant, had made a similar claim against the respondent and had failed to oust him.

Motion by the respondent Judith Cox to discharge an order made by the Court under section 94 of the Mining (Consolidation) Ordinance, Chapter 175, on the application of the appellant George D. Arthur, that all work on two mining claims, the subject matter of a mining dispute between the appellant and the respondent heard before the Commissioner of Lands and Mines, should cease pending the hearing and determination of the appeal. Section 94 provides that "the Court at any time after proceedings in appeal have been commenced, on motion by either party, may order that all work shall cease on a claim, either generally or by any particular person or persons, pending the decision of the matter". The grounds of the respondent's application were: (*a*) that the appellant obtained the order on an *ex parte* application, and not on an application made by way of motion; and (*b*) that the appellant, in his application, had failed to disclose to the Court that one Benjamin Chan had unsuccessfully tried to oust the respondent from the claims.

L. A. Hopkinson, for respondent.

J. A. Luckhoo, K.C., for appellant.

Cur. adv. vult.

LANGLEY, J.: On the 15th January, 1940, the appellant applied *ex parte* to the Court in Chambers for an injunction to restrain

the respondent from continuing operations on two mining claims, the ownership of which was in issue between the parties. A decision was given against the appellant by the Commissioner of Lands and Mines on the 19th December, 1939.

From that decision the appellant has filed notice of appeal Mr. Gonsalves, on behalf of the appellant, applied *ex parte* under section 94 of the Mining (Consolidation) Ordinance, Chapter 175, which requires such an application to be made by way of motion. That irregularity escaped the notice of the Court. The Court however, quite independently of the Mining Ordinance has inherent jurisdiction to grant such an application where it deems meet to do so, and did so in this case. The appellant gave the usual undertaking in damages. Subsequently, Mr. Hopkinson, representing the respondent, tiled notice of motion drawing the attention of the Court to this irregularity and applying for the said injunction to be set aside.

On the 29th January, 1910, after hearing counsel for both parties, and with their consent, the Court adjourned the hearing until 12th February, 1940, to allow the respondent to set out the grounds of her opposition to the granting of an order by the Court that work should cease on the mining claims in question pending the decision of the appeal.

On 12th February, 1940, the Court heard arguments for both parties. The appeal record, owing to administrative difficulties in production, was not before the Court but by consent both counsel quoted, from their own records of the proceedings, such matters as they wished to bring to the knowledge of the Court.

Mr. Hopkinson submitted that the appellant had asked the Commissioner to declare the location of the respondent illegal, and either to grant him exclusive rights to locate these claims or to declare them open to prospectors generally for location.

Mr. Luckhoo traversed that submission by saying that the appellant had submitted, at the hearing before the Commissioner, that after the appeal to the Commissioner was lodged, but before the hearing of the issues by the Commissioner, the appellant had legally located the two claims.

Mr. Hopkinson at the hearing on the 12th February, 1940, submitted that before the appellant could lawfully apply to the Court for an injunction he must establish that he had some vested interest or some colour of right in the property to be made subject to that order of the Court.

Mr. Hopkinson has cited *Maxwell* v. *Hogg* (1867) L.R. 2 Chan. App. p. 311. Sir G.T. Turner, L.J. commenced his judgment by saying that "the plaintiff must show some property, right or interest in the subject matter of his complaint." I do not consider it necessary to do more than apply that principle to the facts of this case.

From the information supplied me, on the o and, by

Counsel for the respondent, the appellant asked for exclusive right to locate that claim; on the other hand, Mr. Luckhoo has informed the Court that his client has legally located the claim and alleges that the respondent's location of the claim was not legal.

It is not for the Court to judge the merits of those claims at this stage of the proceeding, but in my opinion, these facts provide some evidence of a *prima facie* interest in the property vested in the appellant.

That being so, he was entitled to apply to the Court for either an injunction or an order under section 94 of the Mining (Consolidation) Ordinance.

I would add that a mining claim is in more need of protection, where persons dispute ownership, than any other property I can think of, because the minerals of great value may be disclosed in the first work undertaken, and thereafter it may be void of any value. Therefore, it is essential that the claim should remain intact until such a time as the ownership is definitely decided.

I do not consider that the judgments in the *Sports and General Press Agency, Limited* v. "*Our Dog*" *Publishing Co. Ltd.* (1917) 2 K.B. p. 125 carried the matter any further than *Maxwell* v. *Hogg.*

Mr. Hopkinson made a further submission that the appellant should not have been granted an injunction because he had suppressed material facts when making his *ex parte* application. He cited as his authority *The King* v. *Income Tax Commissioners of Kensington* (1917) 1 K.B. p. 487.

The material fact was that one Benjamin Chan had made a similar claim and failed to oust the present respondent.

In my opinion, the answer to that hypothetical case—the full facts are not before the Court—is that the burden of proof should have been on Benjamin Chan and because he failed to establish his claim, this Court must not assume that the respondent's title to the claims in issue was established. That decision is evidence only of Benjamin Chan's failure to establish title. That issue is irrelevant to the issue now before the Court, and there was no need for the appellant to disclose it.

The Court orders that the injunction granted by the Court on the 15th January, 1940, be dissolved and that there be substituted therefor an order of the Court under section 94 of the Mining (Consolidation) Ordinance, Chapter 175, that all work shall cease upon the lands the subject matter of this dispute comprised within the boundaries of the claims known as New Law No. 1 and New Law No. 2 Creek hill and flat, by the parties hereto and their servants, agents and persons whomsoever connected with them respectively; and generally shall cease until the hearing and final determination of the complainant's (appellant's)

appeal. The applicant continues his undertaking to abide by any damages which the opposite party may sustain by reason of this Order. That all costs connected with the *ex parte* application be paid by the appellant, and, that the costs of this application in so far it proceeded by motion, be costs in the cause.

Solicitors: *Carlos Gomes,* for respondent.
J. Gonsalves, O.B.E., for appellant.

ABDOOL RAHAMAN, FAZLAH RAHAMAN and MOORAL, Appellants,

v.

C. A. L. METTELHOLZER, Respondent.

[1939. No. 313.—DEMERARA.]

BEFORE FULL COURT: CAMACHO, C.J., FRETZ AND LANGLEY, JJ.

1940. JANUARY 30, 31; FEBRUARY 1; MARCH 8.

Customs—Master's report—Before Comptroller or other proper officer of customs—To be made and subscribed—Otherwise a nullity—Customs Ordinance, cap. 33, s. 38.

Customs—Duty—Liability to—When ascertainable and payable—On making of perfect entry—Customs Ordinance, cap. 33, ss. 47, 48.

Criminal law and procedure—Fraudulent attempt at evasion of customs duties—Preparation and attempt—Distinction between—Customs Ordinance, cap. 33, 168 (*i*).

Where a master's report which is required to be made by section 38 of the Customs Ordinance, cap. 33, is made and subscribed otherwise than in the presence of the Comptroller or other proper officer of customs, it is a nullity.

Although liability to customs duty may attach at some time antecedent to the making of perfect entry under section 47 of the Customs Ordinance, cap 33, the duty becomes ascertainable and payable at the moment only when perfect entry is made.

M. brought to Springlands from Dutch Guiana a number of rafts consisting of 166 crabwood logs which were destined for a saw mill at No. 78 Village, Corentyne. F.R., the manager of the saw mill, orally informed an assistant forest ranger that 166 logs had arrived,—100 from the Dutch shore and 66 from Canacaburi in the Colony. He produced to the ranger a permit for 100 logs of Dutch origin, and a pass for the 66 logs which he alleged had come from Canacaburi, and on which customs duty would not be payable. The ranger delivered the pass to the chief officer of customs at Springlands. F.R. verbally reported to the chief officer of customs the arrival of 100 logs from Dutch Guiana, and 66 logs from Canacaburi. Subsequently, M. made his master's report but it was made in the presence of the revenue runner and not in the presence of the proper officer of customs. Perfect entry was not made of the logs which had been imported from Dutch Guiana.

M. and F.R. were convicted for a fraudulent attempt at evasion of duties of customs payable on 66 crabwood logs imported from Dutch Guiana into the Colony. They appealed.

Held, by Camacho, C.J. and Fretz J., (Langley J., *dissentiente*)

(1) that the oral false representation made to the chief officer of customs by F.R. is insufficient by itself to constitute an attempt;

(2) that the representation by M., contained in the report and declaration was not made to the proper officer of customs, by whom only exemption from duty on 66 logs could be granted or passed;

(3) that had the report and declaration been made to the chief officer of customs, a further step, namely, the making of perfect entry, was necessary to enable an attempt at evasion of duty; and

(4) that an attempt was not established, and the convictions must be set aside.

Appeal by the defendants Abdool Rahaman, Fazlah Rahaman and Mooral from an order of Mr. A. C. Brazao, Magistrate, Berbice Judicial District, convicting them for a fraudulent attempt at evasion of duties of customs payable on 66 crabwood logs imported from Dutch Guiana into this Colony. The facts and arguments appear from the judgments.

L. M. F. Cabral, for appellant Abdool Rahaman.
S. I. Cyrus, for appellant, Fazlah Rahaman.
H. C. Humphrys, K. C., for appellant Mooral.
Percy W. King, Crown Solicitor, for respondent.

Cur. adv. vult.

CAMACHO, C.J.: Abdool Rahaman, Fazlah Rahaman and Mooral appeal against their conviction by the Magistrate for the Berbice Judicial District for an offence against section 168 (i) Cap. 33, to wit, for a fraudulent attempt at evasion of duties of customs payable on 66 crabwood logs imported from Dutch Guiana into this colony.

The question for determination by this Court is, assuming the accuracy of this Magistrate's factual findings, are the appellants, in law, guilty of any offence?

Abdool Rahaman is the owner of a saw mill at Springlands which he supplies with timber brought from Dutch Guiana and from his concession at Canacaburi. Fazlah Rahaman is actively engaged in the management of the mill. On the second of March 1939, Mooral brought to Springlands from Dutch Guiana a number of rafts consisting of 166 logs which were destined for Abdool Rahaman's mill. On the same day Archibald Joseph, an assistant Forest Ranger, was informed by Fazlah Rahaman that 166 logs had arrived, 100 from the Dutch shore and 66 from Canacaburi, producing to Joseph at the same time a permit for 100 crabwood logs of Dutch origin. He also handed to Joseph a pass for 66 logs which he alleged had come from Canacaburi, and on which duty would not be payable. Joseph delivered the pass to Mr. Mittleholzer, the Sub-Comptroller of Customs and officer in charge of the District Administration office at Springlands. Later that day Fazlah Rahaman reported to this officer the arrival of 100 logs from Dutch Guiana and 66 logs from Canacaburi. Mr. Mittelholzer requested the presence of Mooral the master of the rafts, in order that he might make his master's report as required by the Customs Ordinance and regulations

thereunder. Mooral made his report to Mohamed Alli, a Revenue runner attached to the Springlands office. The report, which was made in statutory form and written by Mohamed Alli at the dictation of Mooral, is in evidence as exhibit "C". It is signed by Mooral as having been declared before Mr. Mittelholzer. It was not in fact made or declared before that officer. It represented that 100 logs only were imported from Dutch Guiana whereas in fact, as found by the Magistrate, 166 logs were brought from that country. The prosecution alleged, and the Magistrate agreed, that the conduct of the appellants and the false report and declaration by Mooral together constituted an attempt by them to evade payment of Customs duty on 66 logs. In this Court it is submitted on behalf of the appellants that, granted the facts found by the Magistrate, no offence, in law, is disclosed.

It becomes necessary, therefore, to examine what acts or series of acts would be regarded in law as an attempt to commit an offence.

An offence may pass through three stages before its completion, first, the intention is formed, secondly, the preparation made for its commission and finally, the attempt to commit. The mere intention and preparation are not punishable under our law. There is a wide difference between the preparation for the attempt and the attempt itself. Preparation goes no further than devising the means or measures necessary for the commission of the offence whereas the attempt is the direct movement towards its commission. The principle is readily stated, difficulty occurs when it is sought to determine where a given act emerges from the stage of preparation and becomes an attempt. Stephens in his *Digest of Criminal Law* defines an attempt to commit a crime as "an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined, but depends upon the circumstances of each case".

In English law, as in our law, an attempt is treated as a definite fact, subject to examination as to whether that fact is in its nature criminal, and not, as in the Jurisprudence of some other countries, as a continuous proceeding, subject to determination as to when that proceeding assumes a criminal character. The principle of English law governing attempts is established by a current of authorities of which *Reg.* v. *Duckworth* (1892) 2 Q.B. 83, *Reg.* v. *Bain* (1862) L. & C. 129, *Reg.* v. *Brown* (1890) 24 Q.R.D. 357, *Reg.* v. *Ransford* (1870) 13 Cox 9, *Reg.* v. *Williams.* (1893) 1 Q.B. 320, *Reg.* v. *Roeuck* (1856) D. & B. 25 and *Reg.* v. *Hensler* (1870) 11 Cox 570 are familiar illustrations.

In *Reg.* v. *Cheeseman* (1862) L. & C. 145 Blackburn, J. said "there is no doubt a difference between the preparation antecedent to an offence, and the actual attempt. But if the actual

transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime".

The question at issue in this appeal is, precisely, whether or not the actual transaction had commenced which would have ended in the crime had the appellants not been interrupted. Was the final act, short of actual commission, performed by the appellants or any of them, or, to put the proposition differently, would the false report and declaration have led to evasion of customs duty, if such had been accepted by the Customs authorities. Section 38 of cap. 33 requires the master of every ship within 24 hours after arrival in any port of the colony to make due report of the ship to the Comptroller, or other chief officer of Customs of that port, in Form 1 of the second schedule. The Form calls for particulars of all goods intended to be imported and provides for a declaration to be made before the Comptroller, or chief officer, of the truth of the particulars contained in the Form. Regulations made by the Comptroller under the Customs Ordinance 1884 (as amended by an Ordinance of 1908) and approved on the 28th June, 1908, require a like, if fuller, report and declaration, to the Sub-Comptroller of Customs at Springlands, of timber brought down the Corentyne river to Springlands from Dutch Guiana. The regulations are however silent as to the need for "perfect entry". Section 47 of the Customs Ordinance, however, compels an importer to make "perfect entry" of all goods intended to be consumed in the colony and thereupon, by section 48, the duty becomes payable to the proper officer. In the absence of statutory exemption an importer of timber landed at Springlands, and intended for consumption in the colony, must make "perfect entry" thereof notwithstanding that the master of the importing vessel or raft may have reported and declared as the law and regulations demand. It thus follows that customs duty becomes ascertainable and payable at the moment only when "perfect entry" is made, although liability, to duty may attach at some antecedent time.

In the instant case the master of the rafts made his report and declaration to the Revenue runner. The revenue Runner is not the proper officer under the law and regulations to accept or witness either act. The report and declaration were false. Subject to subsequent observations on the conviction recorded against Abdool Rahaman, the conduct of the appellants display fraudulent intent and the report and declaration undoubtedly disclose preparation, nevertheless the Magistrate's finding of an attempt to commit the offence is, in my view, ill-founded. The report and declaration to the Revenue runner, who had no authority for the purpose, is of no greater import, as an attempt to evade customs duty, than if made to or before a person totally unconnected with the customs, The report and declaration cannot, in

my opinion, be considered a direct movement towards the commission of the offence. In the *King* v. *Robinson* (1915) 2 K.B. 342, it was held that a person cannot be convicted of an attempt to obtain money by false pretences, unless he made the false pretence to the person from whom the money was intended to be obtained, or to his agent, and a false pretence made to a third person, although intended to be ultimately reported to the person from whom the money was to be obtained, will not suffice. Although in the appeal before the Court the report and declaration made to the Revenue runner were false, and, presumably, were intended to be ultimately communicated to the proper officer of customs, the Revenue runner was not the agent of the Sub-Comptroller and a representation made to the former could not be regarded as representation made to the Sub-Comptroller. I regard the report and declaration as a nullity. Putting however the case for the prosecution at its highest by assuming the validity of the document I still do not consider that a criminal attempt would be established. Duties of Customs, as stated, do not become demandable or payable until "perfect entry", and no such step was taken by the appellants. Until "perfect entry"—that is to say—until that act is done which would constitute the actual commission of the crime, if not interrupted, an attempt is not committed. In *Eagleton's case* (1855) Dears. 538, Parke, B. states the law in unequivocal language "acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are; and if, in this case, after the credit with the relieving officer for the fraudulent overcharge, any further step on the part of defendant had been necessary to obtain payment, as the making out a further account or producing the vouchers to the Board, we should have thought that the obtaining credit in account with the relieving officer would not have been sufficiently proximate to the obtaining the money. But on the statement in this case, no other act on the part of the defendant would have been required. It was the last act, depending on himself, towards the payment of the money, and therefore ought to be considered as an attempt". In this case the last act necessary, that is to say, "perfect entry", to enable evasion of duty was never done, or attempted, by the appellants.

In an Indian case (*Reg.* v. *Dhundi* (1888)1 L.R. 8 All. 304) a practice existed in a town, that Octroi duty imposed on goods passing out of the town should be refunded by the following process. The goods about to be exported were taken to the central office where a representation of their contents as being non-dutiable was made. If the office accepted the representation a refund certificate was granted which was endorsed by the outpost clerk when passing the goods, and on taking the certificate so endorsed to the central office the duty paid to the outpost clerk

would be returned. The defendant took three skin vessels to the central office and made a statement as to one which would have entitled him to a certificate. The clerk examined the contents and found the statement was untrue and thereupon handed over the defendant to the police. He was convicted of an attempt to cheat. On appeal the conviction was reversed on the ground that the certificate alone would not have entitled him to the money and that further acts necessary to entitle him to the refund were not performed or attempted. The facts in *Reg.* v. *Dhundi* are not dissimilar from the facts in this case. In the Indian case a false representation was made to obtain a certificate. Had the certificate been granted further steps would have been required before the defendant would have obtained the refund. Here a false report and declaration were made with intent to evade customs duty. Had the report and declaration been made before the proper officer a further step, that of making "perfect entry", would have been necessary before the appellants could have obtained exemption from duty. The combined report and declaration was not the final act which would have enabled a fraud on the customs. It is true to say that *Reg.* v. *Dhundi* has not been followed by later cases in India. The reason however resides in the wide language of section 511 of the Indian Penal Code which punishes "any act done towards the commission of an offence" as an attempt. The expression "any act" clearly excludes the notion that the final act, short of actual commission, is alone punishable. Although under section 168 (i) anyone is punishable who is "in any way concerned" in any fraudulent "attempt" at evasion of duties of customs the prosecution must establish that it is an "attempt", in the legal meaning of the word, in which the accused person is concerned. Considered in the light of our law *Reg.* v. *Dhundi* was rightly decided, in my opinion, for it followed the well established principle, to which we in this colony adhere, that only that act which would constitute the actual commission of a crime if it were not interrupted, is an attempt to commit that crime.

Apart from the question of law the evidence adduced against Abdool Rahaman does not support his conviction and his appeal must in any event be allowed, with costs.

On the following grounds:—

(1) That the oral false representation made to the Sub-Comptroller by Fazlah Rahaman is insufficient by itself to constitute an attempt and for the reason stated in ground 3 hereunder,

(2) That the representation by Mooral, contained in the report and declaration was not made to the Sub-Comptroller or his agent, by whom only the exemption from duty on the 66 logs could be granted or passed,

(3) That, had the report and declaration been made to the

Sub-Comptroller; a further step was necessary to enable an attempt at evasion of duty,—I hold that, in law, these two appellants did not commit the offence of which they stand convicted.

Their appeal should be allowed. Having regard to their conduct they should be deprived of costs.

FRETZ, J.: I concur.

LANGLEY, J.: The appellants are appealing against their conviction on a charge of attempting to evade duties of customs on 66 crabwood logs, contrary to section 168 (i) of the Customs Ordinance, Chap. 33, hereafter called the Ordinance.

The record shows that Abdool Rahaman is the father of Fazlah Rahaman. He is the owner of the sawmill at No. 78 Village, Corentyne. The record provides grave grounds for suspicion that he knew of what was taking place, but, not that he took any action sufficient to constitute the offence charged. Therefore, I am of opinion that his appeal should succeed.

Fazlah managed this sawmill for his father. There was an earlier transaction in which Fazlah purchased from a Dutch timber merchant, named either Singard or Klafoyda, certain Dutch logs. They arrived at No. 78 on 26th February, 1939. They were passed through the customs on the 27th February, and duty was paid on the 28th February, 1939. A captain named Hamid brought the logs and passed them through the customs. The Dutch permit to export in that case was produced to the customs officers, and returned to Fazlah who filed it in the sawmill office. I take these facts from the evidence of Abdool. It is corroborated by the customs officer's evidence.

Several points emerges from this evidence. *Firstly,* the procedure adopted in such cases. *Secondly,* that the transaction was wholly within the knowledge of Fazlah. *Thirdly,* that it was complete with no more action to be taken by either side. *Fourthly,* that there could be no confusion in the matter in the mind of Fazlah.

Three days after it was complete, the transaction now in issue took place. Fazlah said he went out in midstream and saw Mooral, the captain who brought these logs down from Dutch territory, about 8 a.m. on the 2nd March, 1939. Their conversation is of great importance. Mooral had his Dutch permit with him there. He knew they were Dutch logs. He was reporting to his employer, on first arrival, and told him he had 166 logs. Fazlah admits he told him that he had 166 logs. Mooral said he brought no British Guiana logs. His conversation with his employer was based on his knowledge at that time. If Fazlah took the trouble to go out into mid-stream to see his employee, is it likely that he would be left in doubt as to the

true position? The distinction was important, because duty depended on the source from whence the logs were taken. Fazlah went to the Customs Office, Mr. Mittelholzer, hereinafter called the "C.O.C.", and Mohamed Ali, a revenue runner, were present. The versions of what, took place at that interview differ, but the learned Magistrate has accepted that of the Customs officials. He had the all important advantage of seeing these witnesses. This interview was after Fazlah had seen Mooral. In the absence of any positive evidence to the contrary, in my opinion it must be presumed that Fazlah was then in possession of the true facts, that is, that Mooral had brought 166 Dutch logs, which were subject to duty. Both the C.O.C. and Ali said Fazlah told them that the shipment was 100 Dutch logs and 66 British Guiana logs. Fazlah said that, owing to a misunderstanding, he thought that some of the logs were Dutch and others British Guiana logs. His evidence on that point was not accepted. Quite apart from the valuable aid of seeing the witness, in my opinion, his story is incredible, having regard to his previous interview with Mooral in midstream.

What is more significant still, is the evidence of the assistant forest ranger Josephs. In passing, I would point out that Ali and Josephs, as officers performing duties in connection with the service of customs, would come within the definition of "officer of customs" in section 2 of the Ordinance. The documentary evidence ("A" & "B") supports Josephs. Josephs said he saw 5 rafts coming down the Corentyne. River at Skeldon in the morning. That was before 8 a.m. when Fazlah went out to them at No. 78, about a mile away. Later, Josephs approached Fazlah enquiring for them. That was after the Fazlah-Mooral interview, but before Fazlah went to the Customs Office. At their interview Fazlah gave Josephs what purported to be a Dutch Permit for 100 logs, now missing, and the permit to cut British Guiana timber "A". He must have told Josephs there were 66 B.G. logs, as Josephs entered 66 B.G. logs in the Customs Office Day Book, (Ex. "E") before the arrival of Fazlah at the Customs Office at about 11 a.m. that morning.

This last mentioned Dutch permit has mysteriously disappeared from the Customs file, after it had been in the official keeping some time. It had been sent to the Law Officers and returned to the Customs Department for the purposes of this prosecution. Sufficient secondary evidence, properly admitted, shows that this missing document would have corroborated the evidence of the three Customs officials. The entries in the Day Book (Ex. "E.") also properly admitted as entries made by the witness Josephs at the time and in the course of his duties in the Customs Department. In my opinion official books and forms of a Government Department are not restricted to those ordained by statute. Therefore the day book, an accounting necessity, was an official book. They

were official entries in an official book. The learned Magistrate has found as a fact that that document must have been a forgery. In my opinion, the circumstantial and documentary evidence produced gives ample ground for that finding. The C.O.C. said he did not think it was a genuine permit, and his actions later confirm this statement. Fazlah accounts for the missing document by saying that the permit he gave to Josephs was the Dutch permit he had received back from the Customs officials in respect of the shipment received on the 26th February which I mentioned earlier. If that was true, it would have shewn the exporter as some other Dutch timber merchant (? Klafoyda), yet, the Customs officials said it gave the name of "Maxie" and they entered that name in the Day Book, with the document in front of them. Before Fazlah arrived, the C.O.C. had seen Josephs make the entries in the Day Book. He had the missing document and the B.G. Permit (Ex. "A.") in his possession. He told Fazlah to send Mooral to him, Mooral attended about 11 a.m. I will deal with this interview when I deal with the evidence against him.

The result of this interview was that Mooral had complied with the request made by the C.O.C. and the statutory report had been completed, so far as it could be, prior to agreement between the Customs Official and the importer, Fazlah, as to the actual measurements of the logs. It is true that Mooral and the Customs officials had gone further and signed and certified an irregular declaration. This action, in my opinion, was surplusage and is covered in this case, by the legal maxim that "Surplusage does no harm." Of course were we trying an offence based on a legal declaration, the position would be totally different. After the manifest (Ex. "C") had been seen by the C.O.C. the latter went to the defendant's sawmill at No. 78. He met Josephs and Ali there. Fazlah was sent for and asked by the C.O.C. to point out the B.G. logs. Fazlah counted out the logs. They were in one raft of 30 odd logs and other loose logs making in all 66 logs. He did this by stepping on them. In addition, Fazlah pointed out three other rafts to the C.O.C. and said they were the Dutch logs. The C.O.C. then said he wanted to see the Captain, Mooral.

I will summarize the facts at this point, Fazlah had handed a forged document and a genuine British permit to Josephs, who was acting as officer of customs in this matter, reporting 100 Dutch logs and 66 B.G. logs, and subsequently reported to the C.O.C. in the same quantities. He had complied with the C.O.C's request and sent Mooral to lodge the statutory report at the Customs Office. Mooral had attended and seen the manifest (Ex. "C") legally prepared, as far as it could be prepared, until the precise measurements were available. The Customs officials attended where the logs imported were. Fazlah pointed out the

logs and distinguished between the Dutch and B.G. logs in accordance with the report made by him and confirmed by Mooral. Fazlah thereby had taken all the action possible up to that point. It was obvious that he intended to deceive the C.O.C. and cause him to call for duty on 100 logs instead of 166 logs. Then the series of acts were interrupted because the C.O.C. called for Mooral. There was no need for Mooral to attend, but he did so. The three defendants undoubtedly realised that their plot had been discovered by the C.O.C.

There was no reason why the C.O.C. should not have ordered his assistant to measure the logs pointed out by Fazlah and accepted duty on them on the basis of those measurements.

What followed merely confirmed this attempt to evade duty. When Mooral arrived, the three defendants conferred privately; they then approached the C.O.C. and completety contradicted all their previous statements and actions and said the 166 logs were Dutch. Fazlah sent Mooral to search in his canister for the real Dutch permit (Ex. "D".). When Mooral returned saying he could not find it, Fazlah replied "I have got some papers I had better go and look for it there." I compare that statement with his evidence that he discovered the real Dutch permit between 4.30 and 5 p.m., and considered it too late to send it to the Customs Office at Skeldon. He forgot all this when the C.O.C. sent for him within about half an hour of this discovery, and went out and pointed out the logs as being Dutch and B.C. logs. Fazlah denies that he pointed out these logs, but the learned Magistrate has accepted the version of the Customs officials, I think quite rightly. The evidence connecting Mooral with this offence commences when Josephs saw him at Skeldon. He admits telling Fazlah that he had 166 logs when he saw him in midstream about 8 a.m. On instructions of Fazlah he attended the Customs office between 10 and 11 a.m. Ali said he made out (Ex. "B") the manifest from particulars supplied by Mooral. Mooral said he signed this document but did not give particulars or read it. The number of rafts was not shewn on the documents handed to Josephs by Fazlah, so presumably Mooral supplied that information. Josephs may have seen the rafts, but would not know which were Dutch logs and which were not. The learned magistrate would not accept Mooral's evidence that ho did not know that only 100 Dutch logs were entered on the manifest. The evidence shews that there were approximately 30 logs on each raft, this would agree with the numbers entered, and also with the logs pointed out to the C.O.C. by Fazlah later that day.

Mooral signed this manifest before it had been completed (or could be completed as the logs were still in midstream when it was signed) by the insertion of the cubic measurements of the logs. Later that afternoon Mooral handed in the genuine Dutch permit at the Saw Mill office. Unfortunately, he was not cross-

examined as to whether he saw any permit at the Customs office. He was sent for at the request of the C.O.C between 5 and 6 p.m. that afternoon. Although he had lodged the genuine Dutch permit at the Sawmill office between 2 and 4 p.m. he went off to search his canister at the request of Fazlah. When asked to account for the Dutch permit of 100 logs both he and Fazlah remained silent.

In my opinion, these actions of Fazlah and Mooral constituted overt acts immediately connected with an attempt to evade customs duty. They formed part of a series which, had they not been interrupted by the C.O.C. would have resulted in the logs being measured and the cubic content entered in the manifest (Ex. "C".) There can be no question that they were committed with a guilty intention. They were directly connected with the customs officers acting in the performance of their duties. They had reached the final point where the initiative had passed from the defendants to the Customs officials. Counsel for the defendants have displayed considerable ingenuity in drawing red herrings across the true trail, if I may be allowed to say so, by importing the totally irrelevant question of the validity of the actions of Mooral and the C.O.C. in respect of the completion of the manifest. Mooral's act in signing that document, before it was completed, in fact before it had any meaning at all, as without the cubic measurement of the logs it was worthless, and the C.O.C. in certifying that a declaration had been signed and made before him, do not affect the evidence of a series of acts constituting an attempt to commit crime.

Had this charge required proof of a declaration there can be no question that it must have failed. Those irregularities do not interfere with the continuity of the series of acts of the accused which were taking place for the purpose of misleading the customs officials into accepting duty on only 100 logs.

Because a person does not fulfil all statutory requirements of customs Jaw at each step, that would not nullify those acts, if in themselves they constitute evidence of actions which, if uninterrupted by the proper authority, would have resulted in the evasion of duty.

Because this manifest was void as a declaration that does not nullify it as a definite step taken by the accused towards the evasion of duty.

Because Ali could not lawfully take a declaration from an importer, that would not nullify his duty as an officer of customs in assisting those, properly entering a Customs Office, in preparing documents they are required to fill up under the Ordinance.

Because Mooral and the C.O.C were guilty of irregularities in purporting to complete a form before it could be completed lawfully their actions would not nullify Mooral's action in so far as it was lawful. Mooral took lawful action, though the information

was false, in setting the Customs machine running. He was the proper person to do it. The C.O.C. asked that he should attend to do it. It could have continued by the identification and measurement of the timber.

The Court has to consider the actions of the defendants and place them in their true position as a series of actions alleged to be leading up to the commission of a crime. Lawful or unlawful actions may have a proper place in that position.

Rex v. *Linneker* (1906) 2 K.B. 102 provides perhaps the strongest authority defining what constitutes an attempt to commit crime. A very strong Court accepted the definition given in Art. 49 in *Stephen's* "Digest of the Criminal Law" (1st edn.): "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted."

There is nothing in that definition to say that the criminal must have been interrupted after he had done everything he could do to complete the crime except some act which did not depend on the initiative being in his power to take action. There is nothing to say that every step he takes must be lawful. *Regina* v. *Button* (1900) 2 Q.B. p. 597 has been cited. There counsel submitted that the accused, who had obtained a generous handicap in a running race by giving a false name and suppressing a very successful record, should not have been convicted because, although he ran in and won the race, he had not applied for the prize before he was found out. It was not suggested that his fraudulent action in shortening the course he had to run, would nullify that step, in the series of his actions, in racing. Mr. Justice Mathew pointed out that the appellant did not get the opportunity to apply for the prize, he was found out too soon. The conviction was upheld because the pretences were not too remote. These defendants were found out before they were able to evade duty. Can it be said that their actions were too remote when it is remembered that the last act of pointing out the timber left the initiative with the Customs officials? The defendants between them had taken all steps necessary up to that point, to say nothing of the surplusage. *Rex* v. *Robinson* (1915) 2 K.B. 342 also was cited. I need not quote the facts, but the appeal was expressly allowed on the broad principle that no communication of any kind of the false pretence was made to the Insurers, Lloyds. In that crime it is essential that the person upon whom the pretence is practised should be deceived. In this case the Customs machinery was not only put in motion by the defendants, but the officials were given false documentary evidence and had Dutch logs pointed out to the C.O.C. as B.G. logs. Can it be said that there was no act done by the defendants in the nature of an attempt to evade customs duty which

reached the mind of the proper customs official? *R.* v. *Eagleton* (1855) 6 Cox. C.C. p. 559. and the range of cases cited with it in Archbold's *Criminal Pleadings* (30th Ed. p. 1443.) make it quite clear that mere intentions and preparations to commit a crime are not sufficient to constitute an attempt to commit a crime. The crux of the matter now before this Court may be summed up in the words of Blackburn J. in *R.* v. *Cheeseman* (1862) 9 Cox C.C. p. 103. "But in the present instance the actual crime has commenced, and the attempt would have ended in the completion of the crime, had not the prisoner been interrupted." In *R.* v. *White* (1910) 2 K.B. p.124. the question of what constituted an attempt was a secondary issue, but that judgment does throw light on one aspect of this case. The evidence indicated that a poisoner had put poison in a wine glass, but the quantity was insufficient to kill a human being, if taken alone. Bray, J. in delivering the judgment of the Court said "the completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder, even although this completed act would not, unless followed by other acts, result in killing. It might be the beginning of the attempt, but would none the less be an attempt."

In my opinion, the beginning of the crime was when Fazlah delivered the forged Dutch permit to Josephs. Even supposing Josephs was not a customs official—I consider he was—it was his duty to receive these documents, enter them in the Day Book and hand them to the C.O.C., about whose status there can be no question. That was a completed act of Fazlah; the first of a series of completed acts which Fazlah and Mooral carried out. The partial completion of the manifest, the request for the attendance of Customs officials to measure the logs, the identification of the 100 logs subject to duty and of those falsely represented as B.G. logs before the officials. All these were separate and complete acts in themselves. They wont a long way to completing the attempt up to the point when the interruption came from the C.O.C. They have been described as only preparations for the completion of a perfect entry. For the purposes of this crime, it is not necessary that a perfect entry should be made. One can envisage many circumstances in which customs duty may be evaded, without any contact having been made between the criminal and the Customs Staff. I think it can safely be inferred that had the C.O.C. caused the 100 logs to be measured and calculated the duty on them, Fazlah would have paid the duty on them.

Another aspect upon which considerable stress was laid by counsel for the defendants, was the question as to whether the logs had become dutiable. Mr. Humphrys cited the case of *Canada Sugar Refining Co.* v. *The Queen* (1898) Ap. Cases p. 735. There a ship called at a Canadian port without unloading

certain cargo, in question, consigned to another Canadian port. She subsequently discharged this cargo at the port of consignment. It was held that the cargo did not become dutiable by the mere fact that the ship in which it was borne entered the limits of a Canadian port, prior to the port of consignment. Customs law, in effect, makes a ship a bonded warehouse, during the period she is in port, in so far as any cargo she may be carrying to some other part is concerned. Duty does not attach to any cargo except, to use the wording of the statutory Form 1 of the Second Schedule to the Ordinance, "goods intended to be imported at this port." The port of clearance and entry of the goods are treated as relevant by the Customs officials, and the Customs laws govern that position. I fail to see how that case helps this case, There is no complication of an intervening port. There was a direct importation from Dutch Guiana, not from beyond the seas, as was suggested, as the logs were never out of the Corentyne River but by way of inland navigation; section 19 (1). There has never been any question that the logs were not consigned to No. 78, B.G. They were goods of a special nature which involved a special procedure. One does not lift 166 logs out of the river on to a wharf and then into a warehouse, as one would a packing case of foodstuffs, from ship or lighter. In fact they were, with the knowledge of the Customs staff, water borne into the pen at No. 78. The defendants pointed out the B.G. logs as one raft intact and loose logs from another raft, which had been broken up already. The latter were actually on the beach at the saw mill. Because of their special nature they had passed into the private custody of the importer, Abdul. The time of importation of goods is laid down in section 25 (1) of the Ordinance. There is a distinction between the time goods become dutiable and when duty becomes payable. To evade duty, it is not necessary that the time for payment should have arrived, if the interruption of the series of unlawful acts tending to evasion, takes place before that time has arrived. Where the series of acts has commenced, and it is clearly shewn that some goods were not going to be disclosed at all to the proper authority an offence may be complete.

The Comptroller is given a wide discretion in altering the procedure for the issue of a bill of entry (section 47) by the provisions of sections 57 and 64. How far he had exercised that power in the present instance is not very clear. That however, in my opinion, is irrelevant as the Court is not here to test the efficiency of the Customs service; nor is it called on to say whether certain regulations have or have not been sufficiently complied with to cause a civil liability to rest one way or another. The issue is to consider a series of actions, a course of conduct, which have been proved to the satisfaction of the learned Magis-

trate and to decide whether they constitute the beginning, or something more, of an attempt to evade customs duty.

In my opinion, the logs had been imported when they reached the saw mill premises and duty accrued on them from the time they reached the limits of the saw mill, if not before. Can it be rightly submitted that if they had been taken to a more remote spot on the coast and landed ready for removal into the local trading centre, without there being any lawful excuse for that action, that when found, they would not be dutiable because the absconding captain had not made a report, or that the importer had not made a perfect entry? I think not. A great deal of argument was directed by Counsel to the question of the legality of the report (Ex. "C"). I consider that issue largely irrelevant. The wording of sect. 38 of the Ordinance which governs this procedure is clear. The preparation of the report (Ex. "C") need not have been in the presence of the Comptroller, or other proper officer of customs. The form could not be completed, prior to the measurement of the logs: the action of Mooral became illegal, only when he caused, or allowed to be made the entry of 100 Dutch logs, instead of 166 Dutch logs. Whether Ali copied that figure from the missing document, or was told by Mooral that that was the correct figure, is of no importance. It is a fair inference that Mooral told Ali to enter three rafts, as there was no mention of that on the documents previously handed to Josephs. The learned Magistrate has found that Mooral knew that only 100 logs were entered on the form, instead of 166 Dutch logs. No declaration could have been taken lawfully until the measurements of the logs had been settled. The principal purpose of this report is to describe the quantity of the dutiable goods imported. 100 Dutch logs might describe any size of log. It is on board measurement that duty is payable, that is 12 board feet to the cubic foot. No such data being available, no declaration should have been taken. In actual fact no declaration was taken. That does not alter the fact that if there was one more Dutch log in that shipment than the hundred reported by Mooral and entered in the preparation of the report (Ex. "C") even though that report was incomplete, the information supplied was false and one act of Mooral, in his attempt to evade payment of duty was in itself complete.

In my opinion, the evidence adduced in this case of completed acts of Fazlah Rahaman and Mooral, respectively, provides abundant material for the decision of the learned Magistrate. That evidence shows a long series of completed acts which could have no other purpose than attempting to evade customs duty, right up to the point when the C.O.C. interrupted them. The real issues in this appeal are very simple and clear. I have no

hesitation in saying that, in my opinion, the appeals of Fazlah Rahaman and Mooral should be dismissed with costs.

Appeals allowed.

Solicitor for appellant Mooral: *J. E. De Freitas.*

SUSAN CHAN *v.* RAMSUNDAR.

SARAH CHAN, Plaintiff,

v.

RAMSUNDAR, Defendant.

[1939. No. 303.—DEMERARA.]

BEFORE LANGLEY, J., IN CHAMBERS.

1940. JANUARY 29.

Practice—Interrogatories—Action on a mortgage—Defence—Plaintiff an unregistered money-lender—Money-lending transactions by plaintiff—Prior to execution of mortgage—Discovery of—Limited to reasonable period—Meaning of reasonable period—Dates of loans and period between last loan and date of mortgage—Regard to be paid to.

Practice—Interrogatories—Defence—Plaintiff an unregistered moneylender—Money-lending transactions by plaintiff—Discovery of—Names and addresses of persons to whom loans made—Not required to be stated by plaintiff—Dates places, terms and other circumstances to be stated.

Money-lenders—Mortgage to secure loan—Statutory defence—When available—Money-lenders Ordinance, cap.68, ss. 2, 3, 4.

Where a defendant to an action on a mortgage alleges that the plaintiff is a money-lender and that he is unregistered, interrogatories ordered at the instance of the defendant with the view of showing that the plaintiff was carrying on business as a money-lender must be limited to a reasonable period prior to, and up to and including, the date of the mortgage. In determining what is a reasonable period, regard will be had to the dates upon which the moneys secured by the mortgage passed from the plaintiff to the defendant, and to the intervening period between the date when the last sum of money so passed, and the date of the mortgage.

In such interrogatories the plaintiff will be required to state the places, dates, terms and other circumstances of money-lending transactions, if any made by the plaintiff during the period ordered, but not the names and addresses of any persons to whom loans were made during the said period.

Semble, that the statutory defence that the plaintiff is an unregistered moneylender would prevail,—

(*a*) if the plaintiff was not registered as a money-lender when the loans actually made to the defendant, but was registered prior to the date upon which a mortgage was executed to secure the repayment of the loan and interest, provided that during the whole period between the date of the loan and the date of the mortgage he was carrying on business as a money-lender; or

(*b*) if the plaintiff was registered as a money-lender when the loan was actually made to the defendant, but was not registered as such on the date upon which a mortgage was executed to secure the repayment of the loan and interest, provided that during the whole period between the date of the loan and the date of the mortgage he was carrying on business as a money-lender.

Application by the plaintiff Sarah Chan to vary certain interrogatories which on the application of the defendant Ramsundar she had been ordered to answer. The facts and arguments appear from the judgment.

C. Shankland, for plaintiff.

J. A. Luckhoo, K.C., for defendant.

Cur. adv. vult.

LANGLEY, J.: in the course of his judgment said: Mr. Shankland, on behalf of his client, the plaintiff Sarah

Chan, asked the Court to vary certain interrogatories, dated the 18th January, 1940, which the defendant is seeking to have answered by the Order of the Court.

The matter is really one issue, but it has several aspects. The first aspect is the period during which the actions of the plaintiff may be made subject to the interrogatories. The defendant has asked for a three years' review, prior to the date of the mortgage in issue, hereinafter called "the charge." while the plaintiff wishes to limit the period of review to one year.

Mr. Shankland cited the action *Nash* v. *Layton* (1911) 2 Ch. 71, as authority for limiting the period to one year. I do not accept that judgment as doing more than holding that the period should be a reasonable period, having regard to the particular case to which it is to be applied. In that action the charge sought to be set aside under the provisions of the Imperial Money Lenders Act, 1900, was dated the 23rd October, 1906, and, in so far as I can understand the record, the consideration for that charge passed upon that date. This aspect of the action was not fully argued, as, at the suggestion of the Court, the period of review was reduced from 3 years to 1 year prior to the date of the charge, by consent of parties.

The circumstances of this case are rather more complicated because a considerable period elapsed between the dates upon which the loans were advanced to the defendant and the date upon which the charge was executed as security for the several loans and the interest which had accrued thereon during the intervening period, from July—September 1936, to 20th October, 1938.

My difficulty in this case has arisen on the "spread" of the transaction and to decide, not the length of the period of review but the date upon which it should terminate. In other words, whether to fix the period considered reasonable prior to the transaction should be added the period during which the transactions took place.

The provisions of section 3 of the Money Lenders' Ordinance, Chapter 68, hereinafter called "the Ordinance", include the words "or the enforcement of any agreement or security made or taken after the commencement of this Ordinance in respect of money lent before or after the commencement of this Ordinance". In my opinion, they show clearly that it was contemplated that the passing of the money might precede the execution of a charge securing that loan. I quite realise that this provision deals with special circumstances arising on the commencement of the Ordinance. I do not consider that position affects the principle accepted. That is, that the loan may take place at a different date to that of an instrument connected with it, subject to the provisions of the Ordinance.

I should have thought there would have been authority for the proposition, but I can trace none in the library at my disposal.

Further, the provisions of the last mentioned section give the Court power to re-open the whole transaction, so that in this case the circumstances and documents, if any, connected with the original loans may be made the subject of the review of the Court.

It seems to me that the passing of the cash involved is an integral part of the transaction which terminated in the execution of the charge. As I understand the Ordinance, the purpose is that the borrowers should be made fully aware that they are dealing with a money lender. To provide that warning to the borrower, the Legislative has, by the Ordinance, required persons in that trade to carry on their business in registered offices visibly marked with their registered names and calling, and that all documents must be executed in their registered names.

This statutory defence is not a personal defence. To cite the judgment of the Master of the Rolls in *Nash* v. *Layton* "it does not merely give a remedy to the borrower against the lender, it strikes at the charge itself, if it comes within it, and renders it one in which no one can get relief."

The position is, that if he is a money lender, the instrument reviewed should be in his registered name and the transaction carried through at his registered address as such. If the lender is not registered, then the instrument is void if it is proved that he is carrying on a money-lender's business defined by the provisions of section 2 of the Ordinance.

Accepting that position, to support this statutory defence, the party raising it must prove that the other party is carrying on the business of money lender as defined.

It is not the promissory notes for the loans which are in issue now, but, the charge executed two years later which amalgamated the capital and accrued interest arising therefrom.

In my opinion, to assist him to succeed in this defence, the defendant is entitled to information from the plaintiff as to the circumstances occurring during the period of this transaction as a whole. That is, that he should be entitled to interrogate for a reasonable period, having regard to the dates upon which the money passed, up to the date the charge was executed, but not after that last mentioned date.

Let me assume for the purposes of argument, that the plaintiff was not registered as a money-lender in 1936 when the loans were made, but did register as such, prior to the date of execution of this charge, and further, that during the whole of that period she was carrying on the business of money lender. Can there be any doubt that she would have contravened section 4 of the Ordinance?

Having committed an offence against the Ordinance in providing what was substantially the consideration for the charge, could she defend the charge itself successfully against this statu-

tory defence, if those assumed facts were proved to the satisfaction of the Court? In my opinion, the defence would prevail.

Reversing that assumed position. Assume that the lender was duly registered and properly made a loan to the defendant but allowed her registration as money lender to lapse before the execution of the charge. This instrument would then be executed during a period when the lender was not registered. The consideration would be partly the original loan and partly new consideration of the accrued interest thereon.

Unquestionably the Court could re-open the whole transaction. One aspect of the purpose of this legislation would have been fulfilled inasmuch as the borrower would have been placed upon his guard.

But the Ordinance strikes at the charge itself and it is the action of the lender in executing an instrument which is a loan transaction which is illegal. In my opinion the statutory defence, if proved, would prevail. It is for this reason that I consider that any alleged transactions of the plaintiff as a money lender would be relevant issues in the action which took place for a reasonable period before the first loan and the whole period between the borrowing of the money and the execution of the charge.

This is dealing with the facts as pleaded. It might have been submitted that the issues before the Court must be limited to the date upon which the loan is evidenced in the charge, 20th October, 1938, and that the money in law passed on that date. I have not seen the document in question. The plaintiff does not claim, however, to have paid any specific sum on that date. She claims that the amount was "due and owing" on that date.

The defendant has applied for information from the 21st October, 1935 to the 20th October, 1938. The loans were made in July and September, 1936, which makes a three year period, approximately 9 months before the first loan in July, 1936. I am of opinion that that would constitute a reasonable period before the first loan and should precede and include the period during which the transactions between the parties took place. The Court orders the original period of three years prior to the 20th October, 1938, shall stand.

The defendant, however, extended the period covered by some of the interrogatories to the "present time". That is after the date of the execution of the mortgage, 20th October, 1938. In my opinion, what happened after that last mentioned date is irrelevant to the defence raised. To prove a course of conduct of the plaintiff after the date of the transaction in issue without evidence that that course of conduct had preceded the terminations of the transactions in issue would provide no support to the statutory defence. If evidence of conduct proximately prior to the transaction were proved, there would be no necessity to

prove similar conduct after the relevant date. This subsequent period was not included in the interrogatory finally approved in *Nash* v. *Layton.*

I have considered the Order made by Verity, Judge, on the 7th September, 1936 in the action *Francis de Abreu* v. *Edward D. Clarke* (No. 123—1936, Demerara, Volume July-December 1937, p. 322) but do not feel myself bound thereby.

I now turn to Mr. Shankland's second submission that the plaintiff should not be ordered to give names and addresses of persons to whom loans were made, if any, during the prescribed period. In *Nash* v. *Layton* the Court held that the party to be interrogated should not be compelled to disclose this information. The same grounds were raised. The material issue, in my opinion, is, can the defendant prove that the plaintiff was carrying on business as a money lender? It is material, therefore, to know the place, dates, terms and other circumstances of such transactions, if there be any, in order that the Court may decide whether that party has acted in such a manner as to carry on the trade of money lender, as defined in the Ordinance.

The names and addresses of the persons to whom such loans may have been made are not material to the issues being prepared for hearing, and the opposite party should not seek to obtain such information for the purposes of investigation of the witnesses. Such a course, if adopted, might leave openings, for grave irregularities.

Replies are given on oath, and the deponent is bound by the sanctions governing that oath. The opposite party must be content with that and the results he may obtain in judicious cross-examination at the hearing of the action. I doubt if I have added anything valuable to what has been better said in the Judgment delivered in *Nash* v. *Layton.* I adopt the same course as was taken in that action.

Solicitors: *W. I. Sousa; D. P. Debidin.*

CELESTINE GILLETTE, Plaintiff.

v.

HENRY STANLEY CARTHY, Defendant.

[1939. No. 182.—DEMERARA].

BEFORE LANGLEY J.

1940. FEBRUARY 20, 21; MARCH 11.

Trust—Trust property—Power of trustee to sell—Unless contrary intention in instrument creating trust—Power therein to trustee to offer trust property for sale—Evidence of contrary intention—Trustee Act, 1893—Civil law of British Guiana Ordinance, cap, 7, s. 13

A trustee is empowered to sell trust property unless an intention to the contrary is expressed in the trust instrument.

There is such a contrary intention where, in the trust instrument, a trustee is merely empowered to offer the trust property for sale.

Action by the plaintiff Celestine Gillette against the defendant Henry Stanley Carthy for an injunction restraining the defendant from transporting a parcel of land at Lodge Village on the ground that the defendant holds the lands as trustee for Edwin Theodore Wilson and herself. The facts appear from the judgment.

G. M. Farnum, for plaintiff.

J. L. Wills, for defendant.

Cur. adv. vult.

LANGLEY, J. in the course of his judgment said: Mr. Wills submitted that assuming the defendant was a trustee, which he denies, then as a constructive trustee in legal possession of the property he would be vested with power of sale by the Imperial Trustee Act, 1893 (56 & 57 Vict. c. 53) the provisions of which are applied to this Colony by section 13 of the Civil Law of British Guiana Ordinance, Chapter 7. That statutory power is created, however, subject to no contrary intention being expressed in the instrument creating the trust. In this case there was such a restriction as it was expressly stated that the defendant was "to offer for sale", not "to sell".

Judgment for plaintiff.

Solicitors: *H. C. B. Humphrys; A. Mc.L. Ogle.*

NORAN CHANDICA PERSAUD, Plaintiff,

v.

ISAAC JAMES and ERIC KHEDAROO, Defendants.

[1939. No. 34.—BERBICE.]

BEFORE FRETZ, J.

1940. FEBRUARY 29; MARCH 1, 4, 5, 6, 7; APRIL 1.

Will—Party propounding—Burden on—To satisfy conscience of Court—Instrument propounded is last will of a free and capable testator—Party taking benefit under will—Suspicion of Court generally excited by—Instrument not to be pronounced for unless suspicion removed.

The onus *probandi* lies on the party propounding a will, to satisfy the conscience of the Court that the instrument prepounded is the last will of a free and capable testator.

If a party propounding a will takes a benefit under it, that is a circumstance which ought generally to excite the suspicion of the Court, and calls on it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to propound, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased.

Action by the plaintiff Noran Chandica Persaud against the defendants Isaaac James and Eric Khedaroo claiming that a document alleged to be executed by Tapasiah Ramnarain, deceased, on July 3, 1939, was the last will and testament of the deceased, and asking that the Court pronounce against a will made by the deceased on June 24, 1939. The facts and arguments appear from the judgment.

Mungal Singh, for plaintiff.

E. V. Luckhoo, for defendants.

Cur. adv. vult.

FRETZ, J.: This is an action concerning two documents dated respectively the 23rd June, 1939, and the 3rd July, 1339, each purporting to be the last will and testament of Tapasiah Ramnarain, an East Indian woman of approximately 63 years of age and each of which has been tendered for probate.

The testatrix died on the 4th of July, 1939, and four days later, on the 8th July, Noran Chandica Persaud, the executor and one of the legatees in the later will of the 3rd July, 1939, lodged that document in the Supreme Court Registry at New Amsterdam, Berbice, for probate. On the 1st August, 1939, Isaac James and Eric Khedaroo both legatees named in the previous will of the 23rd June, 1939, entered a caveat to restrain the executor from obtaining probate of the later will. On the 28th of October, 1939, no further action having been taken by the caveators

Noran Chandica Persaud (plaintiff in this action) filed a claim to prove in solemn form the later will of the 3rd July, 1939, at the same time seeking an order from the Court to pronounce against the first will of the 23rd June, 1939, and for the caveators, (defendants in this action) to withdraw the caveat of the 1st August, 1939.

Before proceeding to review the facts and circumstances surrounding the two documents, it is necessary to examine the particulars of the defence which reveal the grounds on which the caveat was entered.

It is alleged by the defence that the deceased at the time of the execution of the last will did not know and approve of the contents thereof, never gave instructions, could not read nor write English, and was not in a state or condition to understand its contents. Paragraph 3 states: "The deceased at the time the said will purports to have been executed, was not of sound memory and understanding. At the time she purported to execute the said will she was of the age of 63. She was in a moribund condition and died the next day. She was unable to speak or answer questions and was in such a condition of mind and memory as to be unable to understand anything whatever. She was unconscious and in an exhausted condition. By paragraph 4 "the defendants say that they are the adopted sons of the said deceased, and on the 24th June, 1939, the said deceased duly executed a last will and testament appointing them sole devisees. The said last will and testament dated 23rd June, 1939, was executed in due conformity with all legal requirements and one Joseph Daniels was appointed sole executor and the defendants were named the devisees thereunder."

By way of counterclaim the defendants allege that the deceased made her true last will dated the 23rd June, 1939, thereby appointing Joseph Daniels the sole executor thereof, and it is prayed that the Court will pronounce against the will propounded by the plaintiff, and decree probate of the will of the deceased dated 23rd June, 1939.

It is an accepted presumption of law that if a will is rational on the face of it, and appears to be duly executed, it is presumed, in the absence of evidence to the contrary, to be valid. In the case before me, however, the plaintiff propounding the will of the 3rd July is put to the proof and that presumption becomes inapplicable; the principle is laid down by Lord Penzance in his judgment in *Clear & Foster* v. *Clear* (1869) L.R.I P & D p. 657, "I hold it to be clear" he states "that in all cases, whether through the medium of a presumption unrebutted, or of positive evidence to that end, the party who puts forward a document as the will of a testator must establish the fact that the testator was competent to make a will when he executed it. This competency forms part of the proposition that a will was made, for if there is

no competency—no testable capacity—there can be no will. I am of opinion that the testator's knowledge of the contents of his alleged will stands upon the like footing. That he knew and approved of the contents is a proposition implied in the assertion that a will was made by him. For if a man were to sign a paper of the contents of which he knew nothing it would be no will. That the testator did know and approve of the contents of the alleged will is therefore part of the burthen of proof assumed by everyone who propounds it as a will."

In the application of these principles to the case before me it is clear that the onus is on the plaintiff Chandica Persaud, who seeks to propound the later will of the 3rd July, to satisfy the Court that the testatrix was competent to make that will when she executed it, and was in a state of mind to understand her testamentary act, and that the document sought to be propounded expresses the true will of the deceased.

It becomes necessary at this point, in order to appreciate the weight of evidence adduced by both parties with reference to the later will which is sought to be propounded, to be cognizant of the established facts and circumstances concerning the first document. The first will dated the 23rd June, 1939, was prepared, at the request of the testatrix Tapasiah Ramnarain, on the 23rd of that month by Joseph Benjamin Leitch; it was written under the directions of the testatrix herself who though suffering from illness, was clearly of sound disposing mind at the time. The document, in accordance with her wishes, was executed on the following day, the 24th June, being witnessed by Doctor Loris Rohan Sharples, a Government Medical Officer, and Caroline James, a personal friend of the testatrix; Joseph Daniels, manager and agent of her estate, was named as executor. Under this will the two defendants become the devisees of the whole estate in equal shares. The will was witnessed and executed according to law, and the circumstances under which it was made, as disclosed by the evidence of Doctor Sharples, are important and should be carefully borne in mind when considering the later document. Doctor Sharples states "I have been her medical attendant since 1926. She had diabetes since 1935 and a major operation about that time. In June 1939 about the 20th I saw her. She had an enormous abscess involving her thigh and buttock. I operated on the 20th June. It had a great effect on the condition of the patient and certainly on the nervous system. Her general condition did not improve. On 24th June she asked me to witness her will, the document had been already written out. I asked her if she knew what the contents of the paper was, she answered "yes". I read it for her, she understood. I did this because they (the two boys, defendants) were not her relatives. She said she had brought them up that they were the only ones she really knew and she had determined to leave everything for them. I asked her

if she had any relations, she said that they were all scattered and died out and did not come to see her now. She was in a bad condition suffering from absorption from the abscess and the effects of the sugar in her blood, she showed no sign of coma but her condition pointed to that direction. I would be surprised to hear that she made a will on the 3rd July." On the 30th June, six days later and the day previous to her departure to the hospital, the plaintiff saw Dr. Sharples for the first time, and informed him that he was a relative of the testatrix. Mrs. Tapasiah Ramnarain left her home on the 1st July, 1939, for the Public Hospital. She was taken there by the plaintiff in his own car and admitted on that day.

It is of interest, and convenient at this point to follow the medical history of Mrs. Ramnarain as disclosed by the evidence of Dr. Joseph Glavina, Resident Surgeon of the New Amsterdam Hospital. Mrs. Ramnarain (testatrix) was admitted to the New Amsterdam Hospital at 12 10 p.m. on the 1st July and she died on the 4th July, 1939 at 4.05 p.m. Doctor Glavina states: "From the 1st to the 4th July she was under my care. I saw her every day during that period, twice a day or more. She suffered from diabetes in an advanced stage and she was semi-comatose as a result. She had an abscess on the buttock which gave rise to a temperature. She was very poor indeed, in a stuporous condition, semi-comatose. She did not improve at all from when she was admitted. She died on the 4th. She had a running temperature up and down, and she died in a high temperature of 105 degrees. About 10 o'clock on the 3rd July her temperature was 99 degrees, at 2 o'clock 101, at 6 o'clock 102 degrees. The temperature was rising all the time. That may or may not affect her mind, as she had a disorder of mind from diabetes the temperature would not improve her condition. She was not in a condition to answer any questions at any time that I saw her. I did not have any request from anyone to be allowed to make a will for her. I would have advised that she was not in a state to do so. That includes the complete time from when she came in to the time she died. She was very prostrate." In cross-examination the witness stated "I do say that a person in a coma could hav6 a lucid interval and could even recover altogether. In my opinion she could not appreciate what she was doing or saying; she was being treated with insulin. She had 20 units a day." In reply to a question from the Court and on the later document being shown to him, the witness stated "I do not think she was capable of understanding any process of thought such as disclosed in this will. I tried myself to ask her questions on the morning of the 3rd and on several occasions but had to give it up for she could not understand. I am definitely of opinion that she could not have understood or comprehended the nature of any testamentary act." In the light of this medical testimony the

second document with the evidence and facts supporting it may now be examined.

By a comparison of the two wills it is observed that by the first one the two defendants, the adopted sons of the testatrix, are legatees of the whole of the property in equal half shares; by the later will, however, after directions concerning certain religious rites and testamentary expenses and two minor bequests to female relatives, all her immovable property and the residue of her movable property is bequeathed by the testatrix to the plaintiff and the two defendants each in equal shares.

It was established by evidence that on the 30th June, 1939, the plaintiff informed Dr. Sharples that he was the adopted brother of the testatrix Mrs. Tapasiah Ramnarain, and on the next day, on medical advice and in company with Isaac James, he took her to the Public Hospital in New Amsterdam. The plaintiff next visited the hospital on the morning of the 3rd July, the day on which the later will was made, and according to his own evidence, learning then the testatrix desired to make a will proceeded to one Hannoman whom he instructed to obtain a lawyer. Mr. Frederick Emanuel Waldron, a barrister of 19 years' standing, was called by Hannoman and proceeded to the hospital. It is not necessary here to go into the details of the evidence which is conflicting as to minor circumstances, but it was effectually established that the nurse in charge of the testatrix was requested to inform the medical officer, in this instance Dr. Glavina, and seek his permission for the patient to make a will; this permission was not obtained, and the medical officer in charge was in fact not consulted. The nurse, however, does state that she spoke to the patient who was weak but sensible, and subsequently reported to the lawyer, who apparently believing that the doctor's permission had been obtained, then proceeded to the private ward where the testatrix lay. There were present at the making of the will, in and about the ward, twelve or more persons amongst whom were Mr. Waldron who wrote the document, Koran Chandica Persaud, (the plaintiff), Isaac James, first defendant, Joseph Daniels, Benjamin Khedaroo guardian of the second defendant, two women (minor legatees under this later will) and one Gurdat who, under the lawyer's instructions, repeated aloud the terms of the will at the bed-side of the testatrix. The evidence of Mr. Waldron, materially in conflict with the medical evidence to which reference has already been made, should here be examined in detail; he states: "I entered the room of the patient Tapasiah Ramnarain. I said 'Good morning Mrs. Ramnarain'; she said 'Good morning.' I said 'I am barrister Waldron and have come here according to request to make a will for you' she answered 'yes'. I said 'Is it true that a few weeks ago you made a will to which Dr. Sharples signed as a witness?' She said 'yes.' I then said 'will you tell

me please why you want a fresh one made to-day?' She said 'when I made that will I had been deceived, I had sent some people to call my adopted brother Chandica Persaud, they never went to him but they returned and told me he had refused to go.' The witness then further alleged that she gave him full instructions and spoke concerning the religious rites, funeral expenses, the disposition of certain gifts of jewellery and directions concerning the residue of her property. He states "I asked her who she wanted to be her executor and she said her adopted brother Chandica Persaud'; I said 'is he alone to be your executor or do you want someone else?' She said 'he alone to be my executor'. She said she was giving her adopted brother Chandica Persaud a share, she said 'all in equal shares'. I asked her if she could write her name, she said 'no'. I told her then to touch the pen and I would make her mark on the will. She took the pen, she touched the pen and I signed her mark. I then called the witnesses and they signed in turn in her presence. She recognised them." In cross-examination this witness stated "I only learnt at the hospital that the testatrix had made a will a few weeks before, that was before I saw the deceased." "It is not true to say that the deceased was in a stuporous conditions, she appeared to be ill. It is not true to say that deceased never spoke a word to me. She was not in an exhausted condition, nor did she appear to me to be in a feeble condition."

Joseph Daniels and Isaac James, both say that the testatrix was not able to speak at the time she is alleged to have made the later will, which statements, if true, would support the medical testimony; these allegations are however strenuously denied by the plaintiff and his witnesses. It will be observed therefore, from the foregoing, that the evidence is of a contradictory nature and it remains now for consideration as to whether, at the time of making the will of the 3rd July, 1939, the testatrix was capable of having such a knowledge and appreciation of facts and was indeed so far in control of her own intentions as would enable her to have a will of her own on the disposition of her property, and further as to whether there are circumstances existing to excite the suspicion of the Court as regards the document to be prepounded.

It is a rule of law laid down in many cases, *inter alia, Fulton* v. *Andrew* (1875) 32 L.T. N.S. 209, and *Barry* v. *Butlin* (1838) 2 Moore P.C. 482, that firstly the *onus probandi* lies on the party propounding a will, who must satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator. Secondly, that if a party propounding a will takes a benefit under it, that is a circumstance which ought generally to excite the suspicion of the Court, and calls on it to be vigilant and jealous in examining the evidence in support of

the instrument in favour of which it ought not to propound, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased.

In the case before me suspicion was raised not only by the conflict of evidence concerning the physical condition of the testatrix on the 3rd day of July, 1939, and her testamentary capacity but also by other circumstance. Then plaintiff only informed Dr. Sharples on the day before she was sent to hospital that he was the adopted brother of the testatrix. Dr. Sharples stated himself that her condition on that day "pointed to that direction," the direction of coma. The medical officer of the hospital stated quite definitely that in his opinion "she could not have understood nor comprehended the nature of a testamentary act." Further, the plaintiff was permitted at the close of the case to call medical evidence which showed that the effect of insulin was to allow the patient an interval of lucidity after a period of two hours approximately from the administration of the dose. In this instance the testatrix was injected with insulin at about 9 o'clock, the will was made about 11.15 and normally this evidence would have some weight but its cogency is reduced by the fact that neither of the two medical witnesses called ever saw the testatrix, the patient in question, who was suffering from other ailments besides diabetes; they could not in consequence possibly testify as to her condition. A further circumstance which, I consider, demands explanation may be found by an examination of the reason for the making of the second will as contained in the evidence of Frederick Emanuel Waldron, Barrister. That witness stated he asked the testatrix "will you tell me why you want a fresh one made today?" She said "When I made that will I had been deceived, I had sent some people to call my adopted brother Chandica Persaud, they never went to him but they returned and told me he had refused to go." The fact, however, the she possessed an adopted brother and had sent to call him was not divulged to Dr. Sharples at the time that the testatrix sent for the doctor to witness her first will. This appears to me to be open to adverse comment. The doctor, whose evidence I accept without hesitation, was a trusted friend and a medical adviser of many years' standing, the testatrix at that time was of sound disposing mind and in possession of all her faculties, and the doctor indeed questioned her closely concerning her relations and those to whom she wished to leave her property; she replied to the effect that, other than her two adopted sons, she had no relations, that they were all scattered and had ceased to visit her. It is therefore difficult to reconcile this reason given to Mr. Waldron at the hospital on the day before her death, as to why she wished to make her second will, and the remarkable omission of any mention to Dr. Sharples of

an adopted brother, or of such having been sent for and having refused to go to her.

The case presents a remarkable chain of circumstances and was ably argued by counsel on both sides. The peculiar sequence of facts; the reason for the second will as disclosed by the evidence of Mr. Waldron, when examined in the light of the evidence of Doctors Sharples and Glavina; the plaintiff's appearance as an adopted brother of the testatrix six days after the completion of the first will; the plaintiff himself as executor and legatee in the second will; the hurried action taken for the making and completion of the later will and the death of the testatrix within thirty-six hours after the completion of that document are circumstances however which have raised the suspicion of the Court. In arriving at my final decision I am guided by the principles aforementioned in this judgment as established in *Barry* v. *Butlin*, and *Fulton* v. *Andrews*, and also by *Brown* v. *Fisher* (1890) 63 L.T. 465, and *Baker* v. *Batt* (1838) 2 Moore P.C.C. p. 321. On the whole of the evidence I find that the doubts and suspicion with which I regard the plaintiff's case have not been removed; and it has not been established, as was the duty of the plaintiff to establish, that the deceased testatrix did in fact know and approve of the contents of the later will of the 3rd July, 1939, or that she intended to or did actually execute it.

I accordingly refuse probate of the will of the 3rd July, 1939, and grant probate in solemn form of the will of the 24th June, 1939, with costs as against the plaintiff.

Judgment for defendants.

Solicitors: *P. M. Burch-Smith; E. A. Luckhoo, O.B.E.*

S. M. LUTHER, Plaintiff,

v.

THE ARGOSY COMPANY, LIMITED, AND OTHERS, Defendants.

[1938. No. 145.—DEMERARA.]

BEFORE CAMACHO, C.J.

1940. MARCH 12, 13, 14; APRIL 22.

Libel—Publication—Of and concerning the plaintiff—Opinion of jury—Sensible readers knowing plaintiff—Opinion of—That article refers to plaintiff—Intention of defendant immaterial.

Libel—Words—Notoriously a bad character and a prison habitué—Meaning—Incorrigible criminal and a person who spends his life in and out of prison—Not a person whose last term of imprisonment was 10 years ago, and since then had been a good citizen.

Libel—Fair comment—Defence of—Failure of—Allegations of fact on which comment made—Not truly stated.

In an action for libel, it is immaterial whether the defendant intended to refer to the plaintiff, if those who knew him concluded that he was the person attacked. It is enough if the words designate the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary for everyone to know to whom the article refers. This would in many cases be an impossibility; but if, in the opinion of the jury, a substantial number of persons, reading the article, would believe it refers to him, an action for libel, assuming the language to be defamatory, can be maintained; and it makes no difference whether the writer of the article inserted the name and description unintentionally, by accident, or believing that no person existed corresponding with the name or answering the description. If upon the evidence the jury are of the opinion that ordinary sensible readers, knowing the plaintiff, would be of opinion that the article referred to him, the plaintiff's case is made out.

The defendants published of and concerning the plaintiff that he was notoriously a bad character and a prison habitué, and that the public as a consequence, should be relieved of such a grave scandal as having such a person for a rural constable in the city of Georgetown.

The plaintiff had served several terms of imprisonment, the last one having expired more than 10 years prior to the publication of the words complained of. Since his last imprisonment, he had lived the life of a good citizen.

The defendants pleaded (1) that the words were not capable of any defamatory meaning, (2) that they were not defamatory, and (3) fair comment.

Held, (1) that the words are defamatory of the plaintiff in their natural meaning. The words meant that the plaintiff is an incorrigible criminal and a person who spends his life in and out of prison, and the plaintiff cannot now be so described; and

(2) that the allegations of fact upon which the comment was made were not truly stated, and that the defence of fair comment therefore failed.

Action by the plaintiff Samuel Martin Luther, suing as a poor person against the Argosy Company Limited and others claiming damages for libel. The facts and arguments appear from the judgment.

S. I. Cyrus, for plaintiff.

J. A. Luckhoo, K.C., (*C. V. Wight* with him) for defendants.

Cur. adv. vult.

CAMACHO, C.J.: The plaintiff is a watchman employed by a firm of solicitors at Georgetown and alleges that at the time of the publication of the words hereinafter set forth he was a Rural Constable carrying out his duties at Georgetown.

The defendants, the Argosy Company, Limited, are proprietors of a Daily Newspaper published in this Colony known as "The Daily Argosy", the defendants Leonard Evelyn-Moe, Richard Sydney Ross are, respectively, the Editor and Printer of the newspaper.

In the issue of the Daily Argosy of the 6th January, 1938, the following letter appeared under the caption "Undesirable Town Constable"

> "Sir,
>
> I think your columns provide the only means by which the public could be relieved of such a grave scandal as having for a Rural Constable in this city a man who is notoriously a bad character and a prison habitué! Who is responsible? I shall continue to write you on the point until his appointment is cancelled and be no longer seen misusing, as one like him must, his powers.
>
> Yours, etc.,
> Vigilante."

Alleging that the words refer to, and are defamatory of, him as an individual and as the holder of the office of Rural Constable the plaintiff brings this action for damages.

The defendants while admitting the printing and publication of the words deny that—

(1) they refer to the plaintiff,
(2) they are capable of any defamatory meaning,
(3) they are defamatory of, or were understood to be defamatory of, the plaintiff,
(4) the plaintiff held the office of Rural Constable, or was performing the duties of that office at the time of the publication.

They plead fair comment.

It is serviceable to deal at once with the denial of the plaintiff's office. The evidence establishes to the satisfaction of the Court that the plaintiff was duly appointed a Rural Constable in accordance with law and was actually performing the duties of his office at Georgetown at the time when the letter appeared in the defendants' newspaper.

The primary question the Court is called upon to determine is whether the words referred to the plaintiff, that is to say whether they were printed and published of and concerning him. The defendants called no evidence and relied upon cross-examination of the plaintiff and his witnesses in order to show that he was not the person attacked. It is immaterial whether the defendants intended to refer to the plaintiff if those who know him concluded that he was the person attacked. It is enough if the words designate the plaintiff in such a way as to let these

who knew him understand that he was the person meant, "there is abundant authority to show that it is not necessary for every one to know to whom the article refers; this would in many cases be an impossibility; but if, in the opinion of the jury a substantial number of persons who knew the plaintiff, reading the article, would believe it refers to him, in my opinion an action, assuming the language to be defamatory, can be maintained; and it makes no difference whether the writer of the article inserted the name or description unintentionally, by accident, or believing that no person existed corresponding with the name or answering the description. If upon the evidence the jury are of opinion that ordinary sensible readers, knowing the plaintiff, would be of opinion that the article referred to him, the plaintiffs case is made out." *Per* Alverstone, C. J., in *Jones* v. *Hulton* (1909) 2 K.B. 454. What is the evidence on the point?

About ten years prior to the publication of the letter the plaintiff had served several terms of imprisonment and was on the day before the letter was published on duty at High and America Streets directing traffic on the instructions of the police authorities. On that occasion his authority was challenged by members of the public. The witness William Ernest McKenzie stated "the moment I read the article I connected it with the plaintiff. I connected it with him because the previous day he had been at the corner at High and America Streets regulating one way traffic and because his authority was rejected. I knew the plaintiff 14 years ago. To my knowledge the plaintiff had been in prison several times before this publication." It was attempted by cross-examination of this witness to show that he connected the plaintiff with the letter only by reason of an article referring to the plaintiff which appeared in a newspaper called the "Daily Chronicle" at or about this time. The witness is however definite that he connected the plaintiff with the letter by reason of the caption "Undesirable Town Constable," the reference to his prison record and his knowledge of the difficulties the plaintiff encountered in regulating traffic on the day before the letter appeared. Stanley Rose deposed that he connected the plaintiff with the letter on reading it in the Argosy and because he knew that the plaintiff had been regulating traffic on the previous day He also stated that since the publication of the letter the plaintiff to the knowledge of the witness has been described as an "Undesirable Town Constable" and as "an old time outlaw and vagabond." George Rodhouse Reid stated "I read this letter, I knew it referred to the plaintiff. Before I went to my office on that day I had read the letter and I knew to whom it referred. It was not in consequence of what I read in the Chronicle that I connected the plaintiff with the letter I read in the Argosy" This witness volunteered the statement that he knew the history of the plaintiff prior to reading the letter. In cross-examination Thomas Bedford Fraser said that, apart from the episode which he related

and which took place on the preceding day, he connected the plaintiff with the letter because he knew the plaintiff was a Rural Constable and had been to prison Finally, Joseph Edward de Freitas stated that the plaintiff showed him the letter and having read it he thought it referred to the plaintiff. "When I read the letter I knew that the plaintiff had been in prison several times." The defence however submits that these witnesses did not identify the plaintiff by the contents of the letter but by a Daily Chronicle article entitled "Fun with the Traffic Cop" and by the traffic episodes in which the plaintiff was concerned and which had occurred prior to the publication of the letter.

On the evidence the Court holds that the letter published in the Argosy of the 6th January, 1938, was published of and concerning the plaintiff and was understood to refer to him by a substantial number of persons who knew him irrespective of the aid which the Chronicle article may have afforded.

The Court further holds the words capable of a defamatory meaning and finds, apart from the defence of fair comment, that they are defamatory of the plaintiff in their natural meaning. The meaning which the Court considers must be attached, and which was in fact attached, to them is, that the plaintiff is an incorrigible criminal and a person who spends his life in and out of prison. Although the plaintiff had prior to 1930 served several terms of imprisonment his offences had been expiated and he cannot by reason of these offences and imprisonment be now described as a man who "is notoriously a bad character and a prison habitué." It is not right that a man who has served his punishment and who for the past ten years has led the life of a good citizen, as was proved, should have his past offences cast at him as though he were still a criminal and continuing in his evil courses. Inasmuch as he has endured his punishment he is not now in law or in fact a notoriously bad character or a prison habitué. As was said by Brett, L.J. in *Leyman* v. *Latimer* (1878) 3 Ex. D. p. 356, "it was considered to be proper that a person, who had endured the punishment for a felony, should not be liable to have reflections made upon him."

As to the plea of fair comment—to constitute the defence the allegations of fact upon which the comment is made must be truly stated. The allegations of fact in this letter are not truly stated. The plaintiff is not now of the character or of the habits described. The defence therefore fails.

Judgment must be entered against the defendants jointly and severally for $200 damages. The plaintiff shall have his costs, to be taxed.

I do not grant any certificate under Rule 16 of the Rules of the Supreme Court (Poor Persons) 1925.

The injunction prayed is granted.

Judgment for plaintiff.

Solicitors: *D. P. Deidin; E. A. W. Sampson.*

E. G. WOOLFORD *v.* O. W. BISHOP & OR.

E. G. WOOLFORD, Plaintiff,

v.

O. W. BISHOP and L. DEVEAUX, Defendants.

[1939. No. 197 and No. 193.—DEMERARA. CONSOLIDATED.]

BEFORE CAMACHO, C.J.

1940. MARCH 27, 28, 29; APRIL 1, 2, 3, 4, 8, 9, 10, 11, 22.

Libel—Publication—Printer—Delivery of printed matter—Purpose of dissemination—Knowledge thereof—Purpose effected—Liability of printer—For participation in publication.

Libel—Privilege—Legislative Council—Member of—Particular electoral district—Nature of communication—Why member should no longer represent that district—Voters in district—Person making communication not one—Publication not restricted to—Whether privilege exists.

Libel—Defence—Fair comment—Comment, fair, and comment on matter of public interest—Facts upon which comment made to be truly stated—Libellous statement of facts—Not comments.

Libel—Ingenious rather than honourable—Meaning—Possessed of ingenuity but devoid of honour—Clever but dishonest—Capable but dishonourable—Defamatory.

Libel—Printer—Innocent and without negligence—Whether liable for publication.

A defendant who prints defamatory matter and delivers or causes or permits it to be delivered to another for the purpose of dissemination, or with knowledge that that other intends to disseminate it, must be considered to have participated in the publication when that purpose or intention is effected.

A libellous communication relating to the reasons why a member of the Legislative Council should no longer represent the electoral district for which he has been elected is not privileged—

(a) if the person making the communication is not a voter for the electoral district; or

(b) if the communication was addressed to persons in general, and not merely to voters of the electoral district.

To establish a plea of fair comment in an action for libel, the words must be comment, fair, and comment on a matter of public interest. The defendant must show that the words, in so far as they consist of allegations of fact, are true, and that, in so far as they consist of expressions of opinion, they are fair comments on those facts made in good faith and without malice on a matter of public interest. If, however, the words complained of are not comments, but allegations of fact only, the plea is not made out because a libellous statement of facts is not comment or criticism on any thing.

The defendants published of and concerning the plaintiff the following:—

"Hon. E. G. Woolford, K.C.

"The sum total of Mr. Eustace Gordon Woolford's legislative activities may be said to be a career that makes many intelligent citizens regard him more in the light of an ingenious, than in that of an honourable man. Should his constituents desire a more progressive form of legislative representation, then it should be to their general interests to direct Mr. Woolford's attention to the following sign, erected along the road of least resistance: It is always better to go and let people wonder why, than to stay, and let them ask, why doesn't he go?"

The plaintiff alleged that the words were defamatory in their primary and ordinary sense, and they pleaded the following innuendo, namely, that the words mean, *inter alia*, that the plaintiff in his conduct and representation of his constituency and of the colony's interests in general has been dishonest,

dishonourable and corrupt in the discharge of his duties, and has degraded and prostituted his position as a member of the Legislature to secure his personal ends, and has thus forfeited and deserves to forfeit the respect, confidence and esteem of his constituency and of the electorate generally and is unfit any longer to occupy a seat in the Legislature of the Colony.

Fair comment was pleaded.

Held, (1) that the words in themselves are capable of a defamatory meaning;

(2) that the words are defamatory of the plaintiff in their natural meaning;

(3) that the innuendo is substantially the natural meaning;

(4) that the defence of fair comment fails, because (a) the personal sketch of the plaintiff is not comment at all, as it consists of an allegation of fact namely, that the plaintiff is ingenious but devoid of honour, followed by a recommendation to reject him at the next election, and (*b*) the sketch although alleging that the plaintiff is ingenious but dishonest or dishonourable does not state the facts on which the allegation of dishonesty or dishonour is made.

Quaere: Whether it is open to a defendant in action for libel to plea that he was an innocent printer and was not guilty of negligence in respect of the publication of the libel.

Action by the plaintiff Eustace Gordon Woolford claiming damages for libel against the defendant O. W. Bishop: this action was consolidated with another action by the same plaintiff claiming damages against the defendant L. A. De Veaux in respect of the publication of the same libel. The necessary facts and arguments appear from the judgment.

H. C. Humphrys K.C., (*C. Shankland* and *H. B. S. Bollers* with him), for plaintiff.

S. I. Cyrus, for defendant Bishop.

J. A. Luckhoo, K.C., (*J. L. Wills* with him), for defendant De Veaux.

Cur. adv. vult.

CAMACHO, C.J.: The plaintiff is an Executive Councillor, an elected Member of the Legislative Council, a Member of the Bar and of a number of Public Boards, of this Colony.

The defendant Bishop is an author and journalist.

The defendant De Veaux is the Registered Proprietor of a printery at Georgetown known as "The Demerara Standard Establishment" and undertakes job printing generally.

In June, 1939, a book entitled "The Legislative, Commercial and Municipal Mirrors of British Guiana" was printed and published at Georgetown. The defendant Bishop admits authorship of the work (in this judgment referred to as the Mirror) and that he caused to be printed therein, and published, certain words alleged to be defamatory of the plaintiff. The defendant De Veaux admits the printing but denies the publication of the said words.

In his preface to the Mirror the defendant Bishop states:—

> "Arising out of the conviction that the tone of the public life of the Colony is not very high, nor that it is necessarily low, I have set about these studies in general personalities"

The Mirror, the result of these studies, is a collection of character sketches of persons prominent in the Public, Commercial and Municipal life of the community. At page 60 of the publication there appears the following of and concerning the plaintiff:—

"Hon. E. G. Woolford, K.C.

The sum total of Mr. Eustace Gordon Woolford's legislative activities may be said to be a career that makes many intelligent citizens regard him more in the light of an ingenious than in that of an honourable man. Should his constituents desire a more progressive form of legislative representation, then it should be to their general interests to direct Mr. Woolford's attention to the following sign, erected along the road of least resistance:—

It is always better to go and let people wonder why, than to stay, and let them ask—why doesn't he go?"

The plaintiff complains that these words defame him and has brought actions for damages—one against the defendant Bishop as author and publisher, the other against the defendant De Veaux, as printer, of the said words.

On the hearing of the action against the defendant De Veaux the Court, on his application, ordered consolidation of the two suits. They were accordingly tried together.

It is the case for the plaintiff that the words printed and published mean, *inter alia,* that the plaintiff in his conduct and representation of his constituency and of the colony's interest in general has been dishonest, dishonourable and corrupt in the discharge of his duties and has degraded and prostituted his position as a member of the Legislature to secure his personal ends and has thus forfeited and deserved to forfeit the respect, confidence and esteem of his constituency and of the electorate generally and is unfit any longer to occupy a seat in the Legislature of the colony.

If this innuendo fails the plaintiff relies upon the words being defamatory in their primary and ordinary sense.

Both defendants deny the meaning assigned and in their pleadings and by their evidence maintain that the words are incapable of bearing any defamatory meaning. They urge on the Court the view that the character sketch of the plaintiff must be considered to be complimentary of him, and that the expressions "more ingenious" and "an honourable man", in their context, are in the nature of comparison, not however derogatory of the plaintiff. That the words mean and were intended to mean that although the plaintiff is, indubitably, an honourable man he is nevertheless a "more ingenious man". Alternatively stated, that although the plaintiff is wholly honourable his outstanding personal characteristic is ingenuity. Learned Counsel devoted much thought and time to a metaphysical and

flattering glossary of the words, and, in ingenuous efforts to show the words incapable of a defamatory meaning, strayed into strange grammatical pastures.

On this aspect of the case the simple duty which devolves on this Court in its dual role is to determine whether the words are capable of a defamatory meaning and, given such capability, whether the words are in fact libellous of the plaintiff. If the Court decides the first question in favour of the plaintiff the Court must then determine whether an ordinary, intelligent and unbiassed person reading the words would understand them as terms of disparagement and an allegation of dishonest or dishonourable conduct. The Court will not be astute to find subtle interpretations for plain words of obvious and invidious import. The Court has no hesitation in holding that the words in themselves are capable of a defamatory meaning and, with as little hesitation, considers them an imputation on the plaintiff's character, clearly conveyed to the ordinary reader. To allege of the plaintiff in relation to his activities as a legislator that many intelligent citizens regard him more in the light of an ingenious than in that of a honourable man does not admit, apart from justification, privilege or fair comment, of any excusatory explanation. The words mean, must be understood to mean, and were in fact understood to mean that the plaintiff, qua legislator, is regarded by his fellow men as possessed of ingenuity but devoid of honour, as clever but dishonest, as capable but dishonourable, These are the meanings, each gravely disparaging of the plaintiff, which, having regard to the words themselves and to the evidence, in the opinion of the Court, attach to the character sketch of the plaintiff. The expressions "ingenious" and "honourable" in their context undisguisedly introduce the idea of contrast and to contend otherwise is mere sophistry.

Mr. George Drysdale Bayley called for the plaintiff, stated:—"I describe the article on the plaintiff as scurrilous. "Ingenious", "honourable", conveyed the impression that the writer was picturing him as an unscrupulous person. I regard the first sentence of the article as alleging that the plaintiff is an unscrupulous person, in other words that he is a clever rogue. That was the impression left on my mind by reading the article. I cannot conceive of any meaning to this sentence other than the one I have given. I understand the sentence to mean that the plaintiff was more crafty than honourable". The Court is asked to conclude that Mr. Bayley could not, at the time he read the words, have been of the opinion expressed in his testimony or he would not have "chaffed" or "teased" the plaintiff. Although Mr. Bayley, by "chaffing" or "teasing" the plaintiff, may have assumed in the presence of the plaintiff an attitude of levity that attitude does not necessarily imply that he did not at the time entertain the opinion which he alleges he held. It

is said that there is no evidence that the witness read the words prior to the issue of the writ. In the view of this Court the evidence discloses that the witness did in fact read them prior to the institution of the suit. This opinion is founded on the admission of the defendant Bishop that before action brought he delivered a copy of the Mirror to the witness and on the statement of the witness that having read his own character sketch he turned over the pages of the publication and while doing so his attention was attracted to, and he read, the pen portrait of the plaintiff. The evidence further establishes that copies of the Mirror were in circulation for some time before the plaintiff brought his action, and that, in fact, the plaintiff remained in ignorance of publication of the defamatory matter until his attention was called to it either by this witness or by some other person.

At this trial it is contended that the action is brought by the plaintiff qua Member of the Legislative Council whereas the words do not relate to him in that capacity only but refer to him also in his professional capacity. The submission is then made that it is no disparagement to say of a member of the Bar that he is "a more ingenious" than an "honourable man." This disengenuous proposition is based on the caption to the sketch "Hon. E. G. Woolford, K.C." The text however puts beyond controversy the attack on the plaintiff in his legislative capacity. The distinction sought to be drawn is without point for if the words can be held to be an attack on the plaintiff in both capacities they do not thereby cease to be defamatory.

The Court passes to consideration of the defences put forward by the defendants respectively—

The defendant De Veaux.

This defendant denies publication. On this question the evidence, summarised is: The defendant Bishop arranged with this defendant's Manager and compositor for the printing of the Mirror. Although proofs were delivered to the defendant Bishop for his emendations and approval, printer's proof reading and the printing of the work were accomplished at the Demerara Standard Establishment by this defendant's servants. When the work was concluded this defendant delivered or caused or permitted to be delivered sixty copies of the Mirror to the defendant Bishop well knowing that Bishop took delivery of the copies for circulation among the general public. In the opinion of the Court a defendant who prints defamatory matter and delivers or causes or permits it to be delivered to another for the purpose of dissemination or with knowledge that that other intends to disseminate it must be considered to have participated in the publication when that purpose or intention is effected.

There is clear evidence that this defendant not only printed,

but his dealings, by himself and by his servants, with the defendant Bishop comprehended the publication by the latter of, the Mirror: *Johnson* v. *Hudson & Morgan* (1836) 7A. & E. 233. It is however pleaded that the defendant was an innocent printer and was not guilty of negligence inasmuch as he was ignorant of the injurious matter contained in the Mirror. It is nevertheless certain that shortly after the contract was made with the manager of the Demerara Standard Establishment, the defendant Bishop interviewed this defendant and obtained from him details of his career for inclusion in the Mirror. At that interview this defendant was informed of the title of the Mirror and that it contained character sketches of persons prominent in the community Moreover this defendant was for two hours daily at the printery during the time when the Mirror was in course of printing and when the work was completed saw the printed copies lying in his establishment. He did not however examine them. Assuming the defence "no negligence" available to this defendant the Court would find him guilty of negligence. He was put upon his enquiry by the information he received from the defendant Bishop. The very character of the work, containing as it did to his knowledge character sketches of public men, should have placed him on his guard and induced prudence. The Mirror is precisely the type of publication in which dangerous matter is apt to be found. He neglected every precaution and without any enquiry delivered the work for publication to his co-defendant.

The defendant Bishop—

In addition to the defences common to both defendants this defendant pleads qualified privilege and fair comment. If the plea of privilege is established the plaintiff would fail unless he were able to show express malice in the defendant—that is to say—that the defendant Bishop was actuated by indirect or improper motives. It is incumbent upon this defendant under the plea of privilege to prove that he lay under a public or private duty to make the disclosure, or had a legitimate common interest with the persons to whom the disclosure was made.

What public or private duty lay on this defendant? admittedly none.

What common interest had the defendant with the persons to whom he communicated the defamatory matter? In the opinion of the Court he had none. This defendant however asserts that, the plaintiff being a member of the Legislature, the disclosure was for the public good and that he the defendant, by virtue of his office of elector, had an interest in common with other electors. The initial difficulty this plea encounters lies in the omission to offer any evidence of possession by the defendant of a voter's qualification in any constituency. Moreover, the publication was not confined to the plaintiff's constituency. It was disseminated

to the world at large and it is no answer to the objection to point to the distribution of sixty copies only of the offending words. The evidence does not establish direct communication by the defendant to any of the electors in the plaintiff's constituency whereas it does establish widespread direct communication to other persons unconnected with his Electoral District. In disclosing information of the kind conveyed by the words complained of, a defendant should exercise every care to disclose it only to those persons who have a legitimate common interest in the subject matter. "A man ought not to be protected if he publishes what is in fact untrue of someone else when there is no occasion for his publishing it to the persons to whom he in fact publishes it." *Per* Earl Loreburn in *Adam* v. *Ward* (1917) A.C. 321. In the 2nd Edition of Mr. Gatley's work on Libel and Slander at page 275 Lord Denman is credited with the following observation in *Duncombe* v. *Daniell* "however large may be the privileges of electors, it would be extravagant to suppose that they can justify the publication to all the world of facts injurious to the character of any person who happens to stand in the situation of a candidate". It cannot be too strongly emphasised that there must be a corresponding interest in the person making and the person receiving the communication. What interest had this defendant in common with, for example, the witnesses Mr. Bayley and Mr. D'Aguiar to whom, among others, he communicated the character sketch? the first named may or may not be an elector for the Georgetown Electoral District, the other is a member of the Legislative Council and it is not shown, as already stated, that the defendant is a voter in any Electoral District. Assuming this defendant possesses the franchise for the Georgetown Electoral District the plaintiff is not the Member for Georgetown and the addressing of the defamatory matter to the electors of Georgetown and to the world at large would not, while inflicting hurt to the plaintiff's reputation, result in removing him from the Legislative Council. It is by the suffrages of his constituents that the plaintiff holds his seat and, if it was the defendant's intention to indicate the unfitness of the plaintiff, the communication should have been made to his electors. It is however, said that the plaintiff in the Legislative Council represents the whole colony and that therefore all persons in the community have a common interest in him and in his conduct. It is a fallacy to assert a colony representation by the plaintiff, he in fact represents one constituency only of the colony. The Court apprehends that the position of a member of the Local Legislature, elected for a particular constituency, is, for the purposes of this case, similar to that of a candidate for that constituency. To communicate to the world at large that a Member of Parliament is dishonest or dishonourable is not a privileged communication, the Court conceives. "Privilege" is not synonymous with "fair

comment." For these reasons the Court holds the plea of privilege fails.

The defence of fair comment pleaded by this defendant was peculiarly developed during the course of the trial. He dissociated himself from any imputation against the plaintiff. He made no attempt to establish the truth of the allegations which he said, in effect, cannot be regarded as included in the personal sketch of the plaintiff. That the words were entirely comment on facts, not stated, and a mere repetition of opinions expressed to him by others. In his own words "what I wrote was fair comment as reflected by public opinion." His counsel, on the other hand, while repudiating the meanings—dishonest, corrupt dishonourable, etc.—attached to the words by the plaintiff, cross-examined the plaintiff at length and adduced witnesses to establish that the plaintiff used, or abused, his position as a Member of the Legislature for his private gain. Four episodes were relied upon, cases in which the plaintiff was engaged in his professional capacity.

The Court proposes to touch on these matters as briefly as possible.

[The Court did so, and after finding that the evidence did not enable the Court to conclude that the plaintiff had acted in an improper manner or with improper motives as alleged or that his conduct was an abuse of his position, continued as follows:]

It is noteworthy that the defendant Bishop at the time he wrote the words, now pleaded as fair comment, had no knowledge of any of these transactions. He acquired his information from his solicitor and counsel at or immediately before the trial of his action.

To establish a plea of fair comment the words must be comment, fair, and comment on a matter of public interest. The defendant must show that the words, in so far as they consist of allegations of fact, are true and that in so far as they consist of expressions of opinion they are fair comments on those facts made in good faith and without malice on a matter of public interest. If however the words complained of are not comments but are allegations of fact only, the plea is not made out, for "a libelous statement of facts," as was said by Field, J. in *R.* v. *Flowers* (1880) 44 J. P. 377, 378, "is not comment or criticism on anything". "The distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact such as that disgraceful acts have been committed . . . . . It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct": *Davis & Sons* v. *Shopstone* (1886) 11 A.C. 190. This equally applies to imputations of corrupt or dishonourable motives (*Joynt* v. *Cycle Trade Publishing Co.* (1904) 2 K.B. 292).

In the opinion of the Court the personal sketch of the plaintiff is not comment at all. It consists of an allegation of fact namely, that he is ingenious but devoid of honour followed by a recommendation to reject him at the next election. It is to be noted that the sketch although alleging, as the Court finds, that the plaintiff is ingenious but dishonest or dishonourable does not state the facts on which the allegation of dishonesty or dishonour is made.

"If the defendant alleges that a public man has been guilty of disgraceful conduct or has been actuated by corrupt or dishonourable motives, and does not state what those disgraceful acts are, or assign any grounds from which such motives can reasonably be inferred, his allegations are allegations of fact, and not expressions of opinion, and he cannot therefore rely on the defence of fair comment" (Gatley, p. 375). The principle enunciated by Mr. Gatley is extracted from a series of English, Australian, Canadian and South African cases and is too well settled to be questioned. In *O'Brien* v. *Marquis of Salisbury* (1889) 54 J.P. 216, Field, J., remarked "if a statement in words of fact stands by itself naked, without reference, either expressed or understood, to other antecedent or surrounding circumstances notorious to the speaker and to those to whom the words are addressed there would be little, if any, room for the inference that it was understood otherwise than as a bare statement of fact, and then, if untrue, there would be no answer to the action." Where a comment appears in the guise of a fact and there is nothing to show on what it is based it must be treated as a statement of fact which is not protected by a plea of fair comment.

On the ground that the words are allegations of fact and not comment, and on the further ground, assuming the words could be regarded as comment, that the facts are not truly stated, the Court holds that the plea of fair comment fails.

The Court holds (1) the words to be defamatory of the plaintiff in their natural meaning, (2) the innuendo to be substantially the natural meaning, (3) the defendant Bishop wrote and published the said words, (4) the defendant DeVeaux printed and participated in the publication of the said words.

The defences having failed on every ground there must be judgment for the plaintiff against both defendants.

The defendant DeVeaux has pleaded verbal, and tender of a written, apology. There can be no doubt that the moment this defendant discovered the plaintiff taking exception to the printed matter he did all within his power, except tender of pecuniary compensation, to make amends to the plaintiff. He interviewed the plaintiff, expressed his regret and offered to sign and publish any dictated apology. The offer was refused. The Court has every sympathy with the defendant DeVeaux who, it is evident, was not actuated by any ill will towards the plaintiff. He is

nevertheless in law responsible with his co-defendant for the injury occasioned the plaintiff. If, however, it were within the competence of the Court to apportion damages and costs and thus temper the judgment to this repentant defendant, the Court would do so. In the state of our statute law there is, however, no discretion.

The Court awards $1,440 damages, jointly and severally against the defendants, and directs that they shall pay the plaintiff's costs.

The Court grants the injunction against each defendant as prayed in the respective statements of claim.

Judgment for plaintiff.

Solicitors: *H. C. B. Humphrys,* for plaintiff;
A. Vanier, for defendant Bishop;
A. McL. Ogle, for defendant De Veaux.

REPORTS OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1940

AND IN

THE WEST INDIAN COURT OF APPEAL

[1940.]

EDITED BY E. MORTIMER DUKE, LL.B., (Lond.),

Barrister-at-law, Middle Temple; Registrar of Deeds and Registrar of the Supreme Court, British Guiana.

GEORGETOWN, DEMERARA:
"THE ARGOSY" COMPANY, LIMITED, PRINTERS TO THE GOVERNMENT OF BRITISH GUIANA.
1941.

JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA DURING 1940.

MAURICE VIVIAN CAMACHO	...Chief Justice.
WILMOT THEODORE STUART FRETZ	...First Puisne Judge (from January 4) Acted as Chief Justice from October 3.
CARLETON GEORGE LANGLEY	...Second Puisne Judge (January 1 to October 29).
WILLIAM HEMMING STUART (*a*)	...Second Puisne Judge (from October 30).
STANLEY EUGENE GOMES	...Acting Puisne Judge (from October 7).

(a) Mr. Justice Stuart assumed duty **on** February **21, 1941.**

WEST INDIAN COURT OF APPEAL.

As, at present, no reports of decisions in the West Indian Court of Appeal are published separately, the decisions in that Court are included in the British Guiana Law Reports.

METHOD OF CITATION.

These Reports will be cited as (1940) L.R.B.G.

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